MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

DECEMBER 20, 1965 to APRIL 12, 1966

HIRAM C. BOND
STATE REPORTER

VOLUME 2

FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1968

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	Term Expires
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CHIEF JUDGE PRO TEM.

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ROBERT B. BURNS, Grand Rapids,	Dec. 31, 1970
JOHN H. GILLIS, Grosse Pointe,	Dec. 31, 1970
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SOLICITOR GENERAL: ROBERT A. DERENGOSKI, East Lansing.

[1] From April 1, 1966.
[2] Appointed September 16, 1965.

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[1] Retired March 31, 1967.
[2] Appointed March 9, 1967.

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[1] Elected November 2, 1965; term began January 1, 1966.

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---

[1] Died January 24, 1966.
[2] Died January 22, 1966.

MUNICIPAL JUDGES.

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VINCENT J. BRENNAN.[1]
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GERALD W. GROAT.
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PAUL E. KRAUSE.[2]
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TRAFFIC AND ORDINANCE DIVISION: JOHN R. KIRWAN.
RICHARD M. MAHER.
ANDREW C. WOOD.

[1] Resigned March 11, 1966.
[2] Died March 20, 1966.
[3] Retired March 1, 1966.

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Alcona	Harrisville	23
Alger	Munising	11
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Branch	Coldwater	15
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Dickinson	Iron Mountain	41
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Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	34*
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	24
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	28
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	19
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	35
Luce	Newberry	11
Mackinac	St. Ignace	33
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	19
Mecosta	Big Rapids	27
Menominee	Menominee	41
Midland	Midland	21*
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
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Oscoda	Mio	23
Otsego	Gaylord	34
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	15
Sanilac	Sandusky	24
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Shiawassee	Corunna	35
Tuscola	Caro	40
Van Buren	Paw Paw	36
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* Pursuant to PA 1965, No 284, amending PA 1961, No 236, §§ 522 and 535, and adding section 543, Gladwin county was detached from the thirty-fourth judicial circuit and attached to the twenty-first judicial circuit; and Midland county was detached from the twenty-first circuit and became the forty-second circuit. The amendatory act became effective July 22, 1965. See Stat Ann 1965 Cum Supp §§ 27A.522, 27A.535 and 27A.543.—REPORTER.

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DECEMBER SESSION, 1965.*

KERSHESKE *v.* TOWNSHIP OF THOMAS.

1. TOWNSHIPS—ZONING ORDINANCES—ESSENTIAL SERVICES—GARBAGE SERVICE.

   Essential services permitted as authorized and regulated by law and other ordinances of the township, as term is used in township zoning ordinance wherein it was declared to be the intention to except *essential services* from the provisions of the ordinance, is construed as an exemption of essential municipal services which the township might operate and does not except privately operated garbage collection and disposal service conducted by plaintiffs (Thomas Township Zoning Ordinance, § 6.13).

2. SAME—PRESUMPTIONS—BURDEN OF PROVING ARBITRARINESS.

   A township zoning ordinance is presumed to be valid, and the party attacking it has the burden of proving affirmatively that the ordinance is an arbitrary and unreasonable restriction upon his use of his property.

3. SAME—ZONING—AGRICULTURAL USES—SANITARY LANDFILL.

   Township ordinance zoning for agricultural uses area including land plaintiffs sought to use for sanitary landfill operation *held,* not an arbitrary or unreasonable zoning.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—TOWNSHIP ZONING ORDINANCE—VALIDITY OF ARREST.

   Whether appellant was entitled to damages, attorney fees, and costs for an illegal arrest is not determined in action he had brought to enjoin enforcement of township zoning ordinance

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* Continued from Volume 1, Mich App.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 66.
[2, 3] 58 Am Jur, Zoning § 68.
[4] 5 Am Jur 2d, Appeal and Error § 702 *et seq.*

under which complaint and warrant were issued and which action is still pending, since any action taken by the Court of Appeals in such matter would be premature.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted Division 3 October 5, 1965, at Grand Rapids. (Docket No. 309.) Decided December 20, 1965.

Complaint by Chester A. Kersheske and Wilson Garbage Co., Inc., a Michigan corporation, against Township of Thomas, a municipal corporation, Thomas W. McDonald, and Robert H. Schoen to enjoin enforcement of zoning ordinance and prosecution thereunder. Counterclaim to enjoin plaintiff from using premises for landfill operation. Judgment for defendants. Plaintiffs appeal. Affirmed.

Martin & Martin (*Walter Martin,* of counsel), for plaintiffs.

Bruce H. Mellinger, for defendants Township of Thomas and Robert H. Schoen.

O'Keefe, Braun, Kendrick & Finkbeiner (*James V. Finkbeiner,* of counsel), for defendant McDonald.

BURNS, P. J. Plaintiffs instituted suit to enjoin the defendant township from enforcing its zoning ordinance and preventing the plaintiffs from utilizing land for a sanitary landfill. Plaintiff Kersheske also seeks damages for illegal arrest, attorney fees, and costs.

Defendants filed counterclaims to enjoin plaintiffs from operating a landfill on the premises.

Kersheske has been operating a garbage collection and disposal business in Saginaw since May, 1946, when he purchased the Wilson Garbage Company.

Plaintiffs hauled the refuse to a private dumping site in James township, until informed by the owner that he could no longer accommodate them as his site was filling up and he needed the area for himself.

On August 20, 1963, plaintiff Wilson Garbage Company, Inc., through its president, C. A. Kersheske, entered into an agreement to purchase an undivided 1/2 interest to approximately 90 acres of land located in section 33, Thomas township, Saginaw county, Michigan.

The entire parcel and the surrounding area are zoned agricultural. The permitted uses of this land as set forth in the Thomas township rural zoning ordinance are as follows:

"Sec. 3.1. Uses. All land zoned as agricultural may be put to the following uses:

"A. Principal uses and buildings.

"1. Agricultural and gardening, including all types of farming, gardening and truck gardening. Roadside stands, portable, may be permitted for the retail sale of farm products of the owner or tenant.

"2. Dwellings.

"3. Churches and missions, schools, parochial schools, auditoriums, municipal uses, social uses, privately owned and operated parks, picnic groves, golf courses or similar facilities for outdoor recreation and exercise, railroads, and hospitals are permitted in agricultural districts."

On August 22, 1963, Kersheske inquired by letter of the township board if he could conduct a landfill operation at the site. He was informed by letter dated September 9, 1963, that a landfill operation was not a permitted use, and was prohibited.

On September 16, 1963, plaintiffs started to dispose of garbage at the site, in violation of the ordinance.

Criminal warrants were issued and Kersheske was arrested on September 17, 1963. He was arraigned and stood mute; pleas of not guilty were entered for both defendants, plaintiffs herein, and Kersheske was released on his own recognizance. Before the criminal case came to trial the plaintiffs instituted this suit to enjoin the defendants from enforcing the zoning ordinance.

The trial judge granted the defendants a permanent injunction enjoining the plaintiffs from conducting a sanitary landfill on the property.

It is the claim of the plaintiffs that the collection and disposal of refuse is an essential service and thereby excepted from the provisions of the ordinance. Section 6.13 of the ordinance provides:

"Essential services shall be permitted as authorized and regulated by law and other ordinances of the township, it being the intention hereof to except essential services from the provisions of this ordinance."

The appellants have not cited any cases in support of this position. A more reasonable construction of said section is advanced by the appellees, to the effect that said section was meant to exempt the township from being subject to its own zoning ordinance with respect to essential municipal services which it might operate.

Next, the appellants claim that they are deprived of their State and Federal constitutional rights through judicial construction of the township zoning ordinance. The Michigan Supreme Court stated in *Brae Burn, Inc.* v. *City of Bloomfield Hills* (1957), 350 Mich 425, 432:

"The ordinance comes to us clothed with every presumption of validity, *Hammond* v. *B. H. Building Inspector* (1951), 331 Mich 551, and it is the burden of the party attacking to prove affirmatively

that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property."

The land in question is in the country and zoned agricultural. The appellants did not convince the trial court, nor have they convinced this Court, that said zoning was arbitrary or unreasonable.

Finally, the appellant Kersheske claims that he is entitled to damages, attorney fees, and costs for an illegal arrest. The appellant was arrested on a complaint and warrant. Said action is still pending in the justice court of Thomas township. Any action taken by this Court at this time would be premature.

Judgment of the trial court is affirmed. Costs to appellees.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

SEABOARD FINANCE COMPANY *v.* BARNES.

SAME *v.* BLAIR.

1. FRAUD—BANKRUPTCY.
   The Court of Appeals does not interpret the bankruptcy act, or amendments thereto, in an action for fraud in obtaining funds from plaintiff through use of false financial statement (11 USC, § 1 *et seq.*, as amended).

2. SAME—BURDEN OF PROOF.
   The party who alleges fraud in action based upon fraud has the burden of proof.

REFERENCES FOR POINTS IN HEADNOTES

[1] 9 Am Jur 2d, Bankruptcy § 23.
[2] 24 Am Jur, Fraud and Deceit § 255.
[3, 4] 24 Am Jur, Fraud and Deceit §§ 217–220.

3. SAME—DAMAGES.

Plaintiff in action for fraud must prove that he has suffered a loss directly from, and as a clear consequence of, the fraud, and the damages to be recovered must always be the natural and proximate consequence of the act of which complaint is made.

4. SAME—FALSE FINANCIAL STATEMENTS.

Recovery in action for fraud through use of false financial statements is limited to amount of moneys advanced pursuant to use of such false statements and does not embrace entire debt of obligor including debt theretofore owed.

Appeal from Muskegon; Beers (Henry L.) and Piercey (John H.), JJ. Submitted Division 3 October 5, 1965, at Grand Rapids. (Docket Nos. 424, 425.) Decided December 20, 1965. Leave to appeal granted by Supreme Court February 24, 1966. See 377 Mich 703; 378 Mich 627.

Summons and bill of particulars in Muskegon Municipal Court by Seaboard Finance Company against Oscar R. Barnes for money obtained by a false financial statement. Similar action by Seaboard Finance Company against Robert Lee Blair. Partial judgment for plaintiff in both cases. Plaintiff appeals to Muskegon Circuit Court. Stipulation filed that both cases will be governed by opinion in Seaboard Finance Company *v.* Barnes. Partial judgment for plaintiff. Plaintiff appeals and cases consolidated in Court of Appeals. Affirmed.

Cochran & Grimm (*Jack M. Grimm,* of counsel), for plaintiff.

John S. White, for defendants.

BURNS, P. J. These two cases have been consolidated for trial and on appeal. Both cases have practically the same facts. The defendants-appellees borrowed money on promissory notes from the plaintiff-appellant. Each note was in the amount

of $500. While the original notes were still in effect and up to date, the defendants obtained additional sums of money from the plaintiff. Barnes obtained $85.52 and Blair obtained $120.59. The old notes were destroyed and new notes written for the amount of $500.

The defendants executed financial statements which were false in that they did not list all of the debts and obligations of the defendants.

Thereafter, defendants filed bankruptcy proceedings and received discharges therein.

The lower court awarded judgments for the plaintiff in the amounts advanced on the second transactions and not the $500 asked.

The appellant has appealed the judgments, claiming that the trial court misinterpreted the effects of the bankruptcy act and the amendments thereto.[1]

These are not cases where the plaintiff brought suits on promissory notes and the defendants pleaded bankruptcy as a defense, and this Court does not interpret the bankruptcy act or amendments thereto.

The plaintiff sued in pleas of trespass on the case for the balances due on loans obtained by false financial statements.[2]

In an action for fraud the burden of proof is upon the party who alleges fraud. It is incumbent upon the party to prove that he has suffered a loss directly from, and as a clear consequence of, the fraud. As stated in *Findlater* v. *Dorland* (1908), 152 Mich 301, 308: " ' "The damage to be recovered must always be the *natural and proximate consequence* of the act complained of." ' "

The trial judge correctly held that the damages to the plaintiff were the moneys advanced at the

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[1] See 11 USC, § 1 *et seq.*, as amended.—REPORTER.

[2] Summons, affidavits of accounts, and bills of particulars filed in the municipal court of Muskegon.

time the false financial statements were made by the defendants. Judgments affirmed. Costs to appellees.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

COCKERLINE *v.* CITY OF WARREN.

1. MUNICIPAL CORPORATIONS—ADOPTION OF CHARTER—CIVIL SERVICE—FIREMEN—POLICEMEN.

   The adoption of a charter creating a new municipality renders it subject to the civil service act for municipal firemen and policemen (CLS 1961, § 38.506).

2. SAME—CIVIL SERVICE — FIREMEN — POLICEMEN — EXAMINATION—CHARTERS—STATUTES.

   Charter provision of newly incorporated city, relative to civil service plan for policemen and volunteer firemen of village whose territory was included, which blanketed in the personnel in the city civil service without examination *held,* not contrary to statutory provisions implementing policy of continuity of service and protection insofar as personnel was qualified by 6 months of previous service (CLS 1961, § 38.506; City of Warren Charter, § 7.18[c]).

3. SAME—PENSION PLAN—POLICEMEN—FIREMEN—CHARTERS—STATUTES.

   Charter provision of newly incorporated city, relative to inclusion of prior service in pension plan of the city of policemen and part-time volunteer firemen who had so served the village, *held,* not contrary to statute, providing, at time of incorporation, that all service performed by members prior to the enactment of the act by any city or village should be computed to the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 15 Am Jur 2d, Civil Service §§ 1–5.
[2] 15 Am Jur 2d, Civil Service § 22.
[3] 40 Am Jur, Pensions §§ 18, 19, 26.
[4, 6] 5 Am Jur 2d, Appeal and Error § 974.
[5] 5 Am Jur 2d, Appeal and Error § 1009.

credit of the member so affected (CL 1948, § 38.554; City of Warren Charter, § 16.2).

4. APPEAL AND ERROR—REMAND—ADDITIONAL FINDING—FIREMEN—POLICEMEN—PRIOR SERVICE.

Record in suit for declaratory judgment as to rights of firemen and policemen under charter of newly created city with respect to civil service and pension provisions under pertinent statute and charter provisions, failing to show duration of their previous service essential to qualify them for participation, required remand of case for the making of such finding and the taking of additional testimony if necessary (CLS 1961, § 38.506; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2).

5. COSTS—PUBLIC QUESTION—POLICEMEN—FIREMEN—CIVIL SERVICE—PENSION PLAN.

No costs are allowed in suit for declaration of rights by policemen and firemen under charter of newly created city with respect to civil service and pension plan, a public question being involved (CLS 1961, § 38.506; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2).

ON APPLICATION FOR REHEARING.

6. DECLARATORY JUDGMENT—FIREMEN—PENSION PLAN OF NEWLY-ORGANIZED CITY.

Declaratory judgment that plaintiffs, former members of village volunteer fire department, were entitled to participate in pension fund established under charter of newly organized city is affirmed without remand, where it is now conceded plaintiffs qualified for participation in the fund by reason of sufficient previous service (CLS 1961, § 38.506; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2).

Appeal from Macomb; Beer (William J.), J., presiding. Submitted Division 2 October 6, 1965, at Lansing. (Docket No. 31.) Decided December 20, 1965. Rehearing denied February 9, 1966. Leave to appeal denied by Supreme Court April 26, 1966. See 377 Mich 708.

Bill of complaint by Clifford Cockerline and 13 others against the City of Warren, a municipal corporation, to declare rights to participate in a

pension fund established under the city charter. Judgment for plaintiffs. Defendant appeals. Affirmed.

Charles H. Earl, for plaintiffs.

Emil E. Cardamone, City Attorney, and *Robert F. Cella,* Assistant City Attorney, for defendant.

MCGREGOR, J. On January 1, 1957, the city of Warren was incorporated as home-rule city from the territory which was previously the charter township of Warren and the village of Warren. The charter township had a paid fire department which was organized on a civil service basis under CL 1948, § 38.501 *et seq.* (Stat Ann § 5.3351 *et seq.*) and under a retirement program, as provided in CL 1948, § 38.551 *et seq.* (Stat Ann § 5.3375[1] *et seq.*). The village of Warren volunteer fire department, however, had neither civil service nor retirement programs. The Warren city charter, adopted by the electorate on October 27, 1956, placed the city under both the civil service and retirement statutes cited above. In order to consolidate the charter township and village police and fire departments for the benefit of the new city, the charter contained these provisions:

"Full time policemen and volunteer firemen of the village of Warren on the effective date of this charter shall be deemed to have been covered by the civil service plan of the charter township of Warren as though they had been policemen and firemen of the township, and shall have seniority in service as though they had been policemen and firemen of the township, but shall not have seniority in rank; Provided, That to be so eligible for employment by the city, a volunteer fireman of the village shall declare his intention to become a full-time fireman of the city and shall qualify for and assume such position on or before July 1, 1957." Charter of the city of Warren, § 7.18(c).

"Within 60 days after the effective date of this charter, the policemen and firemen employees of the village of Warren, who become policemen and firemen of the city shall be included within the pension

plan of the city for policemen and firemen on the same basis as though they had been policemen and firemen of the charter township of Warren. The city shall assume and amortize the city's obligation for the prior service of such policemen and firemen. Each such policeman and fireman may pay into the pension plan the amount that he would have contributed, had he been employed by the charter township of Warren, instead of the village of Warren, and the retirement board shall provide a plan for doing so in monthly payments to be completed within 10 years after such employees are placed under the city's pension plan for policemen and firemen." Charter of the city of Warren, § 16.2.

The plaintiffs herein are all former members of the village volunteer fire department who commenced employment with the city of Warren fire department before July 1, 1957. In the village fire department, they were part-time and part-paid firefighters, who earned their livelihood by other means. The city civil service commission granted them one year of credit for every three years served with the village fire department towards eligibility for promotional examinations only, and denied them any other seniority rights for their prior service with the village. The city also refused to grant the plaintiffs any credit relative to pension rights for prior service with the village. The plaintiffs then brought this action in the circuit court for the county of Macomb to obtain a judgment declaring that they were entitled to all the rights which the city charter purported to give them. Upon an agreed statement of facts, the trial judge found for the plaintiffs and ruled that they were entitled to seniority rights granted by section 7.18(c) and pension rights provided in section 16.2 of the charter of the city of Warren. The defendant city and its civil service and pension commissions bring this appeal, contending that these charter provisions are in conflict with the acts of the legislature and are therefore void.

Does charter section 7.18(c) conflict with the fire and police civil service law, CL 1948 and CLS 1956,

§ 38.501 *et seq.* (see Stat Ann 1958 Rev § 5.3351 *et seq.*)? The answer to this question is contained in this statement of legislative policy:

"Sec. 6. For the benefit of the public service and to prevent delay, injury, or interruption therein by reason of the enactment of this act, all persons holding a position in the fire and/or police department, including the chief thereof, when this act takes effect, who shall have served in such position for a period of at least six months last past continuously, are hereby declared eligible for permanent appointment under civil service to the offices, places, positions or employments which they shall then hold, respectively, without examination or other act on their part, and not on probation; and every such person is hereby automatically adopted and inducted permanently into civil service, into such office, place, position or employment which such person then holds." CLS 1961, § 38.506 (Stat Ann 1958 Rev § 5.3356).

The adoption of the charter created a new municipality and made applicable to it this civil service act. To allow permanent positions to those who had been firemen within the territory covered by the new city for a period of six months prior to the adoption of the new charter would implement this policy of continuity of service and protection. This Court finds no conflict between charter section 7.18(c) as applied to those village firemen who served for six months immediately prior to the effective date of the charter and the civil service system. Accordingly, all of the plaintiffs who meet this six-month service requirement were entitled to be employed in the city fire department without civil service examination.

Is charter section 16.2 in violation of the fire and police retirement act? Defendants contend that the following statutory language:

"Sec. 4. All service performed by members prior to the enactment of this act by any city, village or township, including service performed for predecessor townships, shall be computed to the credit of each member so affected." CLS 1961, § 38.554 (Stat Ann 1963 Cum Supp § 5.3375[4]).

prohibits retirement credit for service to the village. Defendants contend that since the legislature specifically allowed credit for service to predecessor town-

ships, it must have been the legislative intent to exclude credit for service to predecessor villages. The fact of the matter is that this statutory provision was not in effect when the Warren city charter was adopted and the plaintiffs' rights accrued. Until amended, after the effective date of the Warren city charter, by PA 1957, No 52, the pertinent statutory section read as follows:

"Sec. 4. All service performed by members prior to the enactment of this act by any city or village shall be computed to the credit of each member so affected." CL 1948, § 38.554 (Stat Ann § 5.3375 [4]).

This Court finds no conflict between the statutory section as it was in effect January 1, 1957, and charter section 16.2.

Since the record below does not show whether the plaintiffs served in the village fire department continuously for the six-month period prior to the effective date of the city charter, this case is remanded for such finding with the power to take additional testimony if necessary. In other respects, the judgment of the trial court is affirmed. No costs are awarded because of the public nature of the questions involved.

QUINN, P. J., and WATTS, J., concurred.

ON APPLICATION FOR REHEARING.

PER CURIAM. Simultaneously with filing an application for rehearing, the defendant has conceded that each of the plaintiffs involved herein had served the 6-month period prior to the effective date of the charter. Such concession makes it unnecessary to remand the case for the further proceeding previously indicated. Judgment is, therefore, affirmed. Rehearing is denied.

QUINN, P. J., and McGREGOR and WATTS, JJ., concurred.

O'DELL *v.* DECKER.

AUTOMOBILES—MINOR PEDESTRIANS—NEGLIGENCE—QUESTION FOR JURY.

Evidence presented in actions for injuries sustained by 2-1/2 year old girl when she came into contact with the left side of defendant's southbound car after coming from behind a parked car on east side of street *held,* to present a question for jury as to whether defendant was negligent in failing to see the child in time to stop and avoid the accident, hence, directed verdict for defendant was error.

Appeal from Saginaw; Borchard (Fred J.), J. Submitted Division 3 October 6, 1965, at Grand Rapids. (Docket Nos. 134, 135.) Decided December 20, 1965. Leave to appeal denied by Supreme Court February 22, 1966. See 377 Mich 702.

Complaint by Marvin O'Dell, guardian of the estate of Cynthia O'Dell, a minor, against John Richard Decker for personal injuries sustained in automobile-pedestrian accident. Derivative suit for medical expense. Cases consolidated for trial and on appeal. Directed verdicts and judgments for defendant. Plaintiffs appeal. Reversed and remanded for new trial.

John P. Murphy, Jr. (*Henry G. Kubyn,* of counsel), for plaintiffs.

Stanton, Taylor, McGraw & Collison (*John W. McGraw,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic §§ 447-450.

BURNS, P. J. The plaintiffs appeal from directed verdicts of no cause of action and the trial court's denial of motions for a new trial.

Marvin O'Dell, guardian of the estate of Cynthia O'Dell, instituted suit against the defendant for injuries sustained by Cynthia O'Dell when she ran into the side of an automobile driven by the defendant. A derivative suit was instituted by her father Marvin O'Dell for medical expenses incurred.

Cynthia O'Dell was 2–1/2 years of age when she ran into the side of an automobile driven by the defendant. The facts indicate that the defendant approached the scene of the accident going south on a through street. Three school children were standing at or near the west curb. No other pedestrian traffic was nearby or in sight. The defendant slowed down, honked his horn, and pulled over toward the middle of the road to safely pass the children along the west curb, continuing south at a slow speed. He saw a northbound car approaching south of the intersection. There were several cars parked along the east curb, but none along the west curb. The testimony would indicate that the minor child, Cynthia O'Dell, toddled from a driveway on the east side of the road, which may have been obscured from defendant's vision by a parked car, into the side of the defendant's car, and struck somewhere between the rear of the left front wheel and the left front door of the car and bounced back onto the pavement.

There was a conflict of testimony in that an eyewitness estimated the distance between the rear of the parked car and the driveway to be 2 feet, but pictures introduced in evidence and taken by a police officer showed that there was sufficient room from the rear of the parked car to the driveway to accommodate a police motorcycle, with room to spare. The

testimony also indicated that the defendant's car was a distance of 8 feet from the parked car as he passed it.

Johnson v. *Hughes* (1960), 362 Mich 74, 78, states:

"Plaintiff walked 8 feet across the street in front of defendant, where he could have been seen by defendant, after emerging from the rear of the Stoddard car. * * * This gave rise to a jury question of fact as to whether defendant had maintained a reasonable and proper lookout and, if not, whether such negligence was a proximate cause of plaintiff's injuries."

There is no doubt that Cynthia was in the street to be seen. Whether the defendant should have seen the child in time to stop and avoid the accident was a question of fact for the jury to decide.

Reversed and remanded to the circuit court for a new trial. Costs to appellants.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

SMITH *v.* TOWNSHIP OF NORTON.

1. TOWNSHIPS—WATER AND SEWER SYSTEM—REVENUE BOND ACT OF 1933—CHARGES—NONUSERS.

   A charter township, acting under the authority of the revenue bond act of 1933 in establishing and maintaining a water and sewer system, is limited in making charges for services, facilities, and commodities furnished to *users* of the system and may not charge *nonusers* (CLS 1961, § 141.104).

2. SAME—WATER AND SEWER SYSTEM—NONUSERS—TAXATION.

   A charge to nonusers of a township water and sewer system for services made available but not used is, in legal effect, a tax and can be effected only by complying with statutory requirements and not by creation of a charge within the rate structure of the public service established under the revenue bond act of 1933 (CLS 1961, § 141.104 *et seq.*).

3. SAME—WATER AND SEWER SYSTEM—CHARGES TO NONUSERS—INJUNCTION—INTEREST.

   Nonusers of township water system *held,* entitled to injunction against enforcement of collection of so-called *ready to serve* and *debt service* charges defendant charter township sought to impose under ordinances for the establishment of a township water and sewer system, as authorized by the revenue bond act of 1933, and to recover payments made together with interest at 5% from date of payment (CL 1948 and CLS 1961, § 141.101 *et seq.*).

Appeal from Muskegon; Beers (Henry L.), J. Submitted Division 3 October 6, 1965, at Grand Rapids. (Docket No. 152.) Decided December 20, 1965.

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur, Waterworks and Water Companies § 24.
[2] 51 Am Jur, Taxation §§ 2, 3.
[3] 28 Am Jur, Injunctions § 186.

Bill by Robert H. Smith, as a class action, against Township of Norton for injunction restraining enforcement of ordinances charging nonusers in connection with the establishment of water and sewer system, and for refund of charges made and collected thereunder. Complaint dismissed. Plaintiff appeals. Reversed and remanded for entry of injunction and accounting to nonusers of services.

Charles A. Larned, Jr., for plaintiff.

James F. Schoener, for defendant.

HOLBROOK, J. This is a class action commenced November 22, 1961, by plaintiff, for himself and on behalf of others in the same position, against the defendant charter township for the return of charges paid and an injunction restraining enforcement of ordinance No 18 (1959) and ordinance No 30 (September 27, 1961), being amendments to ordinance No 1 (1944), establishing a township water and sewer system, and ordinance No 6 (1954), providing for extensive enlargement of said system including issuance of revenue bonds in the amount of $700,000 to cover the necessary costs. The ordinances were enacted under the authority granted by the revenue bond act, PA 1933, No 94 (CL 1948 and CLS 1961, § 141.101 *et seq.* [Stat Ann 1958 Rev and Stat Ann 1961 Cum Supp § 5.2731 *et seq.*]).

Defendant and appellee does not seek to enforce ordinance No 18 which provided minimum rates for water to be charged nonusers, but maintains it has a legal right to make charges for "ready to serve" and "debt service charges," to nonusers, as provided in ordinance No 30 which states in part as follows:

"The owner or occupant of any building used for residence or business purposes, located on lots or

parcels of land adjacent to water mains or sewers of the township, shall cause such building or buildings to be connected to such water mains or sewers. Any building or buildings not so connected shall be charged the readiness to serve charge and the debt currently in effect on the mains involved."

In appellee's brief it is stated in part:

"The prior ordinances of the township seeking to have a compulsory hookup to the water system was abandoned and the only ordinance at issue in this case is the question of 'readiness to serve' and 'debt service charges,' to be made quarterly upon the persons abutting the line. As stated in the stipulated facts, the same was requested by the bond holders in order to provide for the security of the bonds of the water system."

The case was submitted to the trial court upon stipulated facts and briefs. An opinion granting plaintiff relief was rendered October 24, 1963. The case of *Seltzer* v. *Sterling Township* (1963), 371 Mich 214, had just been handed down by our Supreme Court, and became available shortly thereafter. The learned trial judge, upon motion of the defendant, reopened the case, filed a written opinion deciding that "the *Sterling Case* is controlling of this case", determined the "readiness to serve" and "debt service charge" to nonusers was a legal charge under the revenue bond act of 1933, and ordered the dismissal of plaintiff's complaint. Judgment was filed April 24, 1964. From this judgment, plaintiff appeals.

Plaintiff is the owner of real property with a residence thereon located at 2963 Vulk street, within the boundaries of the area served by the water system of the defendant charter township. His property is not connected to the water system and he does not need or desire to use its services and ob-

jects to paying "ready to serve" and "debt service charges" for the payment of the revenue bonds.

It was stipulated that appraisers for defendant, if called to testify would testify "that the facility of municipal water being made available by lines abutting the property owners in the position of plaintiff or persons of like situation, adds to the value of said property and would provide a service to said property even though said property owners" had not hooked up to the municipal water supply. Further, "that the amounts of increase would vary with the size, location and circumstances of the lot owner and * * * with the availability of pure well water, but that material benefit is conferred by the fact of having such municipal supply available."

It was also stipulated that the ordinance in question (Ordinance No 30) was designed, authorized, and adopted to provide for adequate operation of the water and sewer facilities and to insure the security of the bonds issued and sold.

Prior to the enacting of ordinance No 6, the township supervisor sent out a notice to the residents stating in substance that Norton township was contemplating the extension of water and/or sewer services and set out certain contemplated charges and also "no assessment is made against persons not using the service, except one mill for fire hydrant protection."

Ordinance No 6 set up water rates to be charged and also provided a "readiness to serve charge" to be paid by all users for 30 years from July 1, 1954, or the date of their connection, whichever was later.

Ordinance No 6 in its schedule of rates and charges did not contain any charge to nonusers of water. The one mill for fire hydrant protection has been paid by the township and charged in the ad valorem tax assessments in the several fire protection dis-

tricts of the township. Plaintiff does not object to the payment of the one mill tax for fire protection, and asserts if the township needs more money to secure the proper operation of the water system and the repayment of the revenue bonds, any reasonable increase of this charge together with increases in the rates to *users* would be the proper method.

There is no claim before this Court that the non-user residents are required or need to use township water for the public health.

The following question has been raised and we believe it essential to be answered. "Does the revenue bond act, PA 1933, No 94, as amended, authorize the township of Norton to charge 'debt service charge' and/or 'ready to serve charge' to persons who abut upon the water lines of the township but are not hooked up to the lines, for the purpose of paying interest and overhead of the water system established by Norton township?"

The pertinent provisions of the revenue bond act, PA 1933, No 94, as amended by PA 1946 (1st Ex Sess), No 23 are as follows:

Title: "An act to authorize public corporations to purchase, acquire, construct, improve, enlarge, extend and/or repair public improvements within and/or without their corporate limits, and to own, operate and maintain the same; to authorize the condemnation of property for such public improvements; *to provide for the imposition and collection of charges, fees, rentals and/or rates for the services, facilities and commodities furnished by such public improvements;* to provide for the issuance of bonds and refunding bonds payable solely from the *revenues* of public improvements; to provide for the payment, retirement and security of such bonds."

"Sec. 2. This act shall be construed as cumulative authority for the exercise of the powers herein granted and shall not be construed to repeal any

existing laws with respect thereto, it being the purpose and intention of this act to create full and complete additional and alternate methods for the exercise of such powers."

"Sec. 3. Whenever used in this act, except when otherwise indicated by the context: * * * (e) The term 'rates' shall be construed to *mean* the charges, fees, rentals and rates which may be fixed and imposed for the *services, facilities and commodities furnished* by any public improvement."

"Sec. 4. Any public corporation is authorized to purchase, acquire, construct, improve, enlarge, extend and/or repair 1 or more public improvements and to own, operate and maintain the same, within and/or without its corporate limits, and *to furnish the services, facilities and commodities of any such public improvement to users within and/or without its corporate limits.*"

"Sec. 21. *Rates for services furnished by any such public improvement shall be fixed precedent to the issuance of the bonds.* * * * Such rates shall be fixed and revised from time to time by the governing body of the borrower so as to produce these amounts[1] and the borrower shall covenant and agree in the ordinance authorizing the issuance of such bonds and on the face of each bond to maintain at all times such rates for services furnished by such public improvement as shall be sufficient to provide for the foregoing." (Emphasis supplied.)[2]

The act has been amended by PA 1959, No 78, to include in its title:

"to provide for the imposition of special assessments against properties benefited by such public

[1] Administration, operation, and maintenance expenses, interest, reserves.—REPORTER.

[2] These sections of the act, with subsequent minor amendments are, currently, CL 1948 and CLS 1961, §§ 141.102, 141.103, 141.104, 141.121 (Stat Ann 1958 Rev §§ 5.2732, 5.2733, 5.2734, 5.2751).—REPORTER.

improvements, and for the issuing of special assessment bonds for the purpose of refunding outstanding revenue bonds."[3]

Said act has not been amended to provide for special assessments except against properties specially benefited to pay for "parking revenue bonds" under section 20c of said amended act (CLS 1961, § 141.120c [Stat Ann 1963 Cum Supp § 5.2750(3)]).

A charter township acting under the authority of the revenue bond act of 1933 establishing and maintaining a water system, as provided in section 4 of said act, is limited in making charges for services, facilities, and commodities furnished to the "users" of said system, there being no provision in said act for charging "nonusers."

Appellee cites the cases of *City of North Muskegon* v. *Bolema Construction Co., Inc.* (1953), 335 Mich 520; and *Seltzer* v. *Sterling Township, supra,* in substantiation of defendant's position that such charges are proper. These cases are distinguishable from the case at bar. In the *Bolema Case,* the Supreme Court ruled that a lateral consisting of sewer pipe and fittings running from a sewer main to the property line of the *user* is a necessary part of a sewage system and as such, is a service or facility within the meaning of the revenue bond act of 1933, for which a charge may be made by the municipality.

The *Seltzer Case* involved an ordinance enacted under the revenue bond act of 1933, without issuing bonds as provided in section 4 of said act. It required payment of a $150 per lot capital charge to defray the expense of the construction of the municipal water line. Plaintiffs paid the fee and sued to recover the same claiming the charge was unlawful. The plaintiffs were *users* for it is stated

[3] CLS 1961, ch 141, title (Stat Ann 1963 Cum Supp, title preceding § 5.2731).—REPORTER.

in the facts of the case that the payments of $150 privilege fee per lot were in addition to the water tap-in fees of $125 per lot and that in addition, plaintiffs *paid* the water rate established by the ordinance based upon the amount of water used, the same as other *users* of water.

We find in the text, The Law of Revenue Bonds, Chermak (1954), published by the National Institute of Municipal Law Officers, Washington, D. C., what we feel to be applicable law to the issue before this Court, at p 162, wherein is stated the following:

"Although the charges made for services rendered have been compared with special assessments levied on the property specially benefitted, *care should be taken that the charge made for the service is not in the nature of a special assessment which involves the power of taxation.* (Citing [*Hamilton's Appeal*] *In re the Petition of the City of Philadelphia* [1940], 340 Pa 17 [16 A2d 32].) *Such charge should rest on contract for use, unless statutory requirements covering special assessment procedure are fully met.* Where the charge is made solely for use, it is not a tax." (Emphasis supplied.)

Also, on p 200 of said text, it is stated:

"The rates, of course, must be based upon *use* and not special benefit or other similar criteria, unless special assessment proceedings are accepted." (Emphasis supplied.)

Anyone using the services of the township water system by implication contracts to pay the rates including charges, fees, and rentals. To charge nonusers for services made available by its presence without regard to whether any *use* is made of the service or facility is in legal effect a tax and can be effected only by complying with the statutory requirements and not by creation of a charge within the rate structure of the public service.

Other questions raised by appellant not being necessary to decision, will not be discussed.

Reversed and remanded to the trial court for entry of injunction restraining defendant township from collecting charges from nonusers of water under ordinance No 18 and ordinance No 30, consonant with this opinion, and an accounting to allow plaintiff and other nonusers to recover payments made under said ordinances, together with interest at 5% per annum from date of payment. Costs to appellant.

BURNS, P. J., and T. G. KAVANAGH, J., concurred.

GROWE v. GROWE.

1. JUDGMENT—FOREIGN COUNTRY—CONSTRUCTION OF STATUTES.
The term *another State*, as used in statute permitting enforcement of a decree for alimony by courts of this State, is not construed as including a foreign country (CL 1948, § 552.121).

2. STATUTES—CONSTRUCTION.
A statute will be construed in accordance with the affirmatively and clearly expressed wording contained therein, where the legislature has not provided otherwise.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 17A Am Jur, Divorce and Separation §§ 959, 978, 979.
[2] 50 Am Jur, Statutes §§ 217, 221–223, 238.
[3] 50 Am Jur, Statutes §§ 238, 343.
[5] 39 Am Jur, Parent and Child §§ 35, 38.
[6] 20 Am Jur 2d, Courts §§ 183, 186.
[7, 8] 30A Am Jur, Judgments § 233.
16 Am Jur 2d, Conflict of Laws §§ 4–6.
[9] 5 Am Jur 2d, Appeal and Error § 1009.

3. SAME—CONSTRUCTION—EQUITY.

The certain and definite language used in a statute must be construed as it may read, without reference to equitable considerations.

4. JUDGMENT—ENFORCEMENT OF JUDGMENT FOR ALIMONY—STATUTES—OTHER STATES—FOREIGN COUNTRY.

Recovery in this State may not be had on a judgment for alimony rendered by a court in the Province of Ontario, Canada, under statute of this State limiting actions for enforcement of alimony decrees to decrees of other States (CL 1948, § 552.121).

5. PARENT AND CHILD—SUPPORT OF CHILDREN.

The obligation of a mother to care for, support, nourish, and educate her child is as much of a moral obligation upon her as the father, hence, she will not be permitted to recover for doing so simply because the father omits his duty.

6. COURTS—PRECEDENTS—LEGISLATIVE INACTIVITY.

A rule of law relative to support of children that was established by the Supreme Court upwards of 75 years ago, reiterated by the Supreme Court upwards of 45 years ago, and not changed by the legislature will be recognized as controlling recovery, where applicable.

7. ACTION—ENFORCEMENT OF RIGHT OF ACTION—PUBLIC POLICY.

Refusal to enforce a right of action accruing under the laws of any other State or country must be based upon the fact that the right is against good morals or natural justice, or that it would be prejudicial to the general interest of the citizens of the State of the forum, the mere fact that a statute might differ from the law of the forum not necessarily making enforcement contrary to the public policy of the State.

8. JUDGMENT—FOREIGN COUNTRY—COMITY—DUE PROCESS.

The requirements for proper application of comity are satisfied with respect to the enforcement in this State of a judgment of a court of the Province of Ontario, Canada, where it appears that the basic rudiments of due process were followed in that the parties were present in court, a hearing on the merits was had, and judgment for alimony is not subject to modification of arrears or increase under Canadian law, and no cogent reason for nonenforcement of the decree is presented.

9. COSTS—PUBLIC QUESTION—ENFORCEMENT OF ONTARIO JUDGMENT FOR ALIMONY.

No costs are allowed in action presenting a novel question as to enforcement of a judgment for alimony of a court of the Province of Ontario, Canada, a public question being involved.

Appeal from Wayne; Montante (James) and Gilmore (Horace W.), JJ. Submitted Division 1 October 6, 1965, at Detroit. (Docket No. 292.) Decided December 20, 1965. Rehearing denied January 28, 1966. Leave to appeal denied by Supreme Court April 26, 1966. See 377 Mich 708.

Declaration by Helen Growe against Joseph Louis Growe to enforce a judgment for alimony entered by the supreme court of the Province of Ontario. Defendant's motion to dismiss granted, with leave for plaintiff to amend. Plaintiff amended complaint to seek reimbursement of moneys expended for supporting herself and her children. Partial judgment for plaintiff. Defendant appeals. Reversed and remanded for proceedings to enforce the foreign alimony judgment.

Matheny, Schureman & Frakes (*John C. Frakes, Jr.,* of counsel), for plaintiff.

Capizzi, Valenti & Kwetcher (*Roland L. Olzark,* of counsel), for defendant.

FITZGERALD, J. Helen Growe began an action for alimony in the supreme court of Ontario against her husband Joseph Growe in 1955, charging desertion. Ontario law provides actions for divorce, for annulment, and for alimony; and it was the latter action chosen by the plaintiff.

On November 30, 1955, a judgment for alimony, custody of minor children, and maintenance of minor children was rendered by the supreme court of Ontario in favor of Helen Growe. Provision of the judgment was that defendant pay to plaintiff $25 per week for the maintenance of the three minor children and to pay the plaintiff wife $20 a week alimony during the lifetime of the parties so long as they lived apart. It should be noted that this was not a

divorce, but a judgment for alimony under Ontario law (the judicature act, Revised Statutes of Ontario 1960, chap 197, § 2).

Subsequently, defendant left Canada, secured a Nevada divorce, and at the time of this action was a resident of Wayne county. Plaintiff remained in Ontario with the children.

The action before us was begun in 1961 in Wayne county circuit court, claiming that there was due the sum of $4,757.83 on the Canadian judgment, covering a period from 1955 to the institution of suit. Plaintiff's bill of particulars credited defendant with $7,752.17 received from him during the period, of the total amount of $12,510 claimed due during the period.

Defendant in his answer challenged the jurisdiction of the court and disputed the amount claimed.

In 1963, following trial, the Honorable James Montante entered findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

"Plaintiff, Helen Growe, seeks to recover accrued instalments allegedly due under an Ontario alimony order or judgment, providing payment of weekly instalments for the support of plaintiff and their minor children dated December 27, 1955."

CONCLUSIONS OF LAW.

"Judgment of dismissal be entered in said cause. Plaintiff is allowed 30 days to file an amended declaration."

The basis for denying recovery on the original complaint was the court's interpretation of CL 1948, § 552.121 (Stat Ann 1957 Rev § 25.141) which was the basis of the suit and which reads as follows:

"In all cases where a decree for alimony has been rendered in another State in a case where the party

against whom the decree was rendered was present in court or was personally served with process within the jurisdiction of the court, the alimony decree upon the final hearing may be recovered in an action at law in this State, regardless of whether the same is decreed to be paid in one payment or in instalments from time to time."

The substance of the decision was that prior to the enactment of this statute in 1911, it had been held by the Michigan Supreme Court in *Nixon* v. *Wright* (1906), 146 Mich 231 (10 Ann Cas 547) and *Mayer* v. *Mayer* (1908), 154 Mich 386 (19 LRA [NS] 245, 129 Am St Rep 472), that an action could not be founded upon an alimony judgment of another State because the judgment was not a final one, but was subject to modification in the State originally issuing it. Holding that "another State" in the foregoing statute meant only "sister State" and was not intended by the legislature to include foreign countries, the Court stated that recovery was not to be had under this provision of Michigan law.

Continuing, the Court stated that it did not believe that plaintiff was without a remedy and that the court could entertain a proceeding brought by a wife to obtain reimbursement from her husband for moneys advanced by her for the support of herself and her children, crediting the husband with any money she may have received from him.

Thirty days was given to plaintiff to amend her pleadings, seeking recovery, not on the statutory basis of the alimony judgment, but on the basis of seeking reimbursement for the support of herself and her children.

Plaintiff subsequently amended her complaint claiming a total of $32,062.44 expended over the years and covering such items as mortgage payments, utilities, food, medical and dental expenses,

clothing, transportation, and miscellaneous expenses.

Defendant filed a motion declaring the amended complaint failed to set forth a cause of action.

The matter, then heard before the Honorable Horace Gilmore, resulted in an opinion stating,

"The court feels that the plaintiff should be allowed to maintain her action, whether it be upon the theory of reimbursement for the expenditures made for the support of the children or under CL 1948, § 552.121 (Stat Ann 1957 Rev § 25.141)."

In October, 1964, after hearing, a partial summary judgment was entered by Judge Gilmore declaring defendant was liable for the support and maintenance of plaintiff and the minor children and that damages be determined at a later date following testimony.

Thereafter, defendant filed this appeal from the order.

We are met here with a matter of first impression in Michigan, and indeed of most of the jurisdictions of the United States. Before us also are the opinions of two eminent jurists of equal jurisdiction, those opinions themselves being at variance.

We are first asked to interpret the statute previously cited wherein the term, "another State" is used, to include "or foreign country". We are convinced that this statute does not handily lend itself to this construction.

The net effect of this statute, enacted as it admittedly was, to correct inequities arising from *Mayer, supra,* is to allow an action based on a judgment of alimony from another State, not foreign countries.

In *City of Lansing* v. *Township of Lansing* (1959), 356 Mich 641, the Court stated (p 650), "Nowhere in the statute under consideration did the legisla-

ture, by words or any other manner, provide for a different rule of construction or express an intention to apply any other ratio than the one affirmatively and clearly expressed in the wording of the statute." We think that this reasoning applies with no less force here.

In a case where the equitable considerations are no less appealing than the instant case, *Mercy Hospital* v. *Crippled Children Commission* (1954), 340 Mich 404, it is stated that (p 408) "The language used is certain and definite. It is the duty of the courts to construe it as it read, without reference to equitable considerations."

Accordingly, plaintiff may not recover under our interpretation of CL 1948, § 552.121 *et seq.* (Stat Ann 1957 Rev § 25.141 *et seq.*), which limits actions to decrees of "other States," in view of the original decree coming, as it did, from Ontario.

On plaintiff's second contention that an action may lie for moneys expended by plaintiff on behalf of the children and herself, we are led inexorably to the conclusion that no cause of action was stated by the amended complaint, under *Lapworth* v. *Leach* (1889), 79 Mich 16, and *In re Stephenson's Estate* (1921), 216 Mich 320.

So emphatic was *Stephenson* that in reiterating *Lapworth,* it was said (pp 322, 323), " 'The mother is as much morally bound to care for, support, nourish, and educate her child as the father, and the law will not allow her to recover for so doing simply because the father omits his duty.' * * * The law was settled for this State by the *Lapworth Case.* That case will not be overruled."

To such a mandate as this we must defer, recognizing that the legislature has had an opportunity to act on this subject every year since *Lapworth* was decided and has chosen not so to do.

One last avenue of assistance remains open to plaintiff: the principle of comity. Faced as we are here with a judgment from a court of competent jurisdiction which lies but the breadth of a river from the instant court, closer, indeed, than most of the remaining 49 States, and a court which draws its concepts of law from the same roots as ours, comity supplies a rational and well-founded reason for affording relief to this plaintiff. Any appellate court faced with the compelling elements this Court finds before it would be derelict if it did not examine minutely this burgeoning concept of jurisprudence. Comity, admittedly, is a field surrounded by a special mystique, and not readily amenable to definition.

The Supreme Court of Michigan has had little opportunity to deal with the gross concept of comity, though the interpretation and enforcement of foreign statutory law has come before it on occasion through the years. Nevertheless, though sometimes speaking *obiter dictum,* we believe that there is sufficient indicia before us to determine the attitudes of the Michigan appellate bench over the years.

In *Rick* v. *Saginaw Bay Towing Co.* (1903), 132 Mich 237, in holding that Canadian law governed the rights of an injured plaintiff, the Court said (p 240):

"The tendency of the modern decisions is to hold that, before the court of any State is justified in refusing to enforce a right of action accruing under the laws of any other State or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interest of the citizens of the State of the forum, and that it does not follow that, because the statute differs from the law of the forum, it is contrary to

the public policy of the State, within the meaning of this rule."

It was in the aforementioned case that an Ontario statute was examined. In *Kaiser* v. *North* (1939), 292 Mich 49, Ontario's guest passenger act which denied a right of action against a motorist for injuries sustained while riding as a guest passenger was held not to be class legislation and not to contravene the public policy of this State.

Quoting Justice Cardozo in *Loucks* v. *Standard Oil Company of New York* (1918), 224 NY 99 (120 NE 198), the Court in *Kaiser* said, " 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' "

It could be said that interpretation of a foreign statute versus enforcement of a foreign judgment are two different things, but we do not find this argument persuasive. True, the statute is before us for all to see, but the foreign judgment contains more. A review of the judgment will indicate whether or not the basic rudiments of due process were followed, whether the parties were present in court, whether a hearing on the merits was had.

These elements were present when the case of Helen Growe *v.* Joseph Louis Growe was heard in the Supreme Court of Ontario. The requirements for proper application of comity are satisfied.

A valid judgment from an Ontario court of competent jurisdiction presents to us a more compelling recognition of comity since the fact situation is settled, than does a statute which must be molded to a new set of facts arising in a Michigan court.

In applying comity, however, we are met with the argument that the principle of *Mayer* v. *Mayer, supra,* still applies, in that the judgment before us is

not "final" but is open "until this Court shall otherwise order," to quote the judgment before us.

One essential difference, however, sweeps away the objection that the Growe judgment is controlled by *Mayer*. Canadian law, it appears, does not permit discharge nor modification of arrears in alimony.

In *Knox* v. *Knox,* [1942] OWN 462, the Ontario High Court of Justice, in ruling on a motion by defendant for an order, *inter alia,* discharging arrears in alimony, said (pp 462–464):

"There can be no doubt that any judgment for alimony contemplates that it shall be subject to further order, and it would appear on a simple construction that the wording of the section (dealing with jurisdiction in alimony actions) is sufficiently broad to include an order modifying or even discharging arrears. * * *

"However, it is now drawn to my attention that the Court of Appeal has, early in the current month, in an unreported case of *Alabaster* v. *Alabaster,** decided otherwise. No doubt there is a great deal to be said in favour of the proposition that arrears of alimony which have accrued are in an entirely different position from installments still to accrue. Arrears may be said to have crystallized under the judgment."

In the case of *M* v. *M,* [1947] OWN 474 (3 DLR [1947] 74), wherein plaintiff sought to increase alimony and maintenance, the court commented on the *Knox Case,* stating (p 475), "It was decided in *Knox* v. *Knox,* that the Court has no jurisdiction to modify arrears of alimony, and if that is so, surely there can be no power to increase the amount

* *Alabaster* v. *Alabaster,* an appeal from an order of Rose C. J. H.C., was heard by a Court composed of Latchford C.J.A. and Riddell and Henderson JJ.A. on the 7th February 1936. The appeal was dismissed without written reasons.

of any payment which has accrued due but has not been paid."

A fair reading of these cases convinces us that the moneys now due under the alimony judgment in *Growe* v. *Growe* could not be altered in any way by the Ontario courts. Consequently, the entire rationale of *Mayer* is obviated and there is no cogent reason why the Growe judgment cannot be enforced in a Michigan court under the principle of comity. The money in question is now a sum certain that cannot be tampered with by the court issuing the judgment.

Accordingly, we hold that the instant judgment may be the proper object of an action in the courts of Michigan, with the *caveat,* however, that any such judgment must stand or fall upon a finding of the protection of the rights of the parties who were parties to the previous litigation producing that judgment. We are not flinging open the doors of Michigan's courtrooms to indiscriminate enforcement of any foreign judgment which may come their way, but rather, applying comity to the judgment before us which appears not to offend our laws, disadvantage our citizens, flout our public policy, nor indeed provide any cogent reason for nonenforcement in our courts.

Reversed. Remanded for proceedings to enforce the foreign alimony judgment. No costs, a public question being involved.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

HUIZENGA *v.* YELLOW TRANSIT FREIGHT LINES, INC.

1. PLEADING — AMENDMENT — STATUTE OF LIMITATIONS — SAME TRANSACTION.

   The amendment of a pleading is not barred by the statute of limitations whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, even though new facts, a new theory, or even a different cause of action be introduced (CLS 1961, § 600.5805; GCR 1963, 118.4).

2. SAME—AMENDMENT—DISCRETION OF COURT.

   Whether an amendment of a pleading should be allowed is within the discretion of the trial judge, but it is provided by court rule that leave to amend shall be freely given when justice so requires (GCR 1963, 118).

3. SAME—AMENDMENT—STATUTES.

   It is provided by statute that a trial court has power to amend before judgment a pleading either in form or substance for the furtherance of justice (CLS 1961, § 600.2301).

4. AUTOMOBILES — NEGLIGENCE — PLEADING — AMENDMENT — STATUTE OF LIMITATIONS.

   Amendment of complaint which averred the defendant's vehicle "was negligently driven into the plaintiff" and that "defendant was negligent in hiring its driver" who "was habitually negligent and was driving without a license, said license having been revoked" was not barred by the statute of limitations, where the claim sought to be asserted in the amendment arose out of the occurrence set forth, or attempted to be set forth,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 34 Am Jur, Limitation of Actions §§ 260–262, 266.
[2] 41 Am Jur, Pleading § 293.
[3] 41 Am Jur, Pleading §§ 293, 294, 296.
[6] 20 Am Jur 2d, Costs §§ 10, 14, 20.

in the original complaint (CLS 1961, § 600.2301; GCR 1963, 118).

5. PLEADING—AMENDMENT—AUTOMOBILES—STATUTE OF LIMITATIONS.
Denial of motion for leave to amend and grant of motion for summary judgment in action arising out of a motor vehicle accident in Ohio is reversed for reconsideration of such motions in the light of a recent interpretation by Supreme Court of pertinent court rule provisions in the application of test for granting amendments when the statute of limitations is involved (CLS 1961, § 600.5805; GCR 1963, 117, 118).

6. COSTS—REMAND FOR RECONSIDERATION.
Costs are ordered to abide determination of trial court on remand for reconsideration of denial of plaintiff's motion to amend complaint and grant of defendant's motion for summary judgment in the light of recent interpretation by the Supreme Court of pertinent court rule (CLS 1961, § 600.5805; GCR 1963, 117, 118).

Appeal from Kent; Hoffius (Stuart), J. Submitted Division 3 October 6, 1965, at Grand Rapids. (Docket No. 315.) Decided December 20, 1965.

Complaint by Albert Huizenga, with Michigan Mutual Liability Company, subrogee, later joining, against Yellow Transit Freight Lines, Inc., for personal injuries and property damage resulting from collision of motor vehicles. Summary judgment for defendant. Plaintiffs appeal. Remanded for reconsideration of plaintiffs' motion to amend complaint and defendant's motion for summary judgment.

Martin S. Packard, for plaintiff Huizenga.

Allaben & Massie (*Sam F. Massie, Jr.,* of counsel), for plaintiff Michigan Mutual Liability Company.

Luyendyk, Hainer, Hillman, Karr & Dutcher (*Robert N. Hammond,* of counsel), for defendant.

HOLBROOK, J. This is a negligence case involving a motor vehicle accident occurring March 2, 1961, in the city of Maumee, Ohio. Summons issued December 19, 1962, and plaintiffs filed a complaint February 11, 1963. On February 20, 1963, the defendant filed an answer. June 5, 1963, a pretrial conference was held with both parties expressing satisfaction with the pleadings, arranging for discovery and depositions, and stipulating ability to agree upon the pertinent Ohio laws and city of Maumee ordinances. On June 9, 1964, plaintiffs praeciped for trial, which was set for October 14, 1964. Depositions were filed August 31, 1964, of plaintiff and defendant drivers and defendant's safety director. On October 3, 1964, plaintiffs' attorney sent a letter to appellee's attorney setting out as stipulated at the pretrial the pertinent provisions of the Ohio laws and the city of Maumee ordinances, which had been delivered to defendant. On October 13, 1964, the day before jury trial, defendant filed a motion for summary judgment of no cause for action and dismissing the action in favor of the defendant upon the ground that plaintiffs had failed to state a claim upon which relief could be granted.[1] The following day the trial court heard the motion for summary judgment, at which time the plaintiffs moved to amend their complaint if the trial court found it was not specific enough to give the defendant reasonable notice of plaintiffs' claim. The pertinent portions of plaintiffs' complaint appear in the footnote.[2]

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1 GCR 1963, 111.1 and 117.

2 "(1) That on the 2d day of March, 1961, at the intersection of Ford road and US–25 in the city of Maumee, Ohio, the semitrailer vehicle owned by defendant and/or leased by the defendant and/or under the care, custody and control of the defendant, was negligently driven into the plaintiff, while said vehicle was being operated with defendant's express and/or implied consent or knowledge, by Richard Marra.

"(2) That defendant was negligent in hiring its driver, Richard Marra, and further defendant knew or should have known, that its

The learned trial judge after careful consideration rendered an opinion stating in part as follows:

"A careful analysis of the pleadings indicates that the only portion of the pleadings which would indicate a cause of action are the words in paragraph 1, 'was negligently driven into the plaintiff.'

"It should, however, be noted that GCR 1963, 111.1 reads as follows: 'Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim, or third-party claim, shall contain (1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend.' * * *

"I am of the opinion that this pleading which merely says 'negligently driven into the plaintiff' is not adequate.

"I have read the older case of *Schindler* v. *Milwaukee, L. S. & W. R. Co.,* 77 Mich 136 wherein it is stated at page 154, 'But a naked charge that a person negligently hurt another, with nothing more, cannot be sufficient.'

"I am also cognizant of the case of *Kuchcinski* v. *Curtis* in 251 Mich 210. * * *

"If the plaintiff has not stated a good cause of action in the beginning we may have a further problem in that how can he amend a no-cause-of-action case to a cause-of-action case? This matter was discussed in *Talbot* v. *Stoller,* 366 Mich 296 wherein the Supreme Court affirmed the denial of plaintiff's motion to amend the declaration."

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driver was habitually negligent and was driving without a license, said license having been revoked by the State of Michigan.

"(3) That as a result thereof, the cab of plaintiff's vehicle was sheared off and plaintiff was pinned in it, causing multiple fractures to his spinal column, injuries to his knee, concussion, and multiple lacerations, contusions and abrasions to his person, whereby he has suffered great pain of body and mind."

There can be no question but that the action of the learned trial judge in granting the summary judgment and denying the motion to amend was correct and proper under the court rules and judicature act operative at the time of this accident in 1961, as construed in *Talbot* v. *Stoller, supra,* and relied on by the trial judge in his opinion. The statute of limitations had run against the action March 2, 1964,[3] and therefore, an amendment which stated a new cause of action would be barred.[4]

The plaintiffs-appellants assert that the statute of limitations is not a bar to an amendment to their complaint under the circumstances in this case because of GCR 1963, 118.1 and 118.4, which are as follows:

".1 Amendments. A party may amend his pleading once as a matter of course at any time before or within 15 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, he may amend it at any time before or within 15 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party. *Leave shall be freely given when justice so requires.* All amendments shall be filed in writing, dated, and numbered consecutively. Unless otherwise indicated therein, an amended pleading shall supersede the former pleading."

".4 Relation Back of Amendments. Except for the purpose of demanding a trial by jury under sub-rule 508.2, the amendment relates back to the

[3] CLS 1956, § 609.13 (Stat Ann 1959 Cum Supp § 27.605). Currently, see CLS 1961, § 600.5805 (Stat Ann 1962 Rev § 27A.5805).—REPORTER.

[4] *Gorman* v. *Newaygo Circuit Judge,* 27 Mich 138, 140; *Michigan Central R. Co.* v. *Kalamazoo Circuit Judge,* 35 Mich 227; *Nugent* v. *Kent Circuit Judge,* 93 Mich 462, 463; *Wingert* v. *Wayne Circuit Judge,* 101 Mich 395, 397; *Bockoff* v. *Curtis,* 241 Mich 553, 558; *O'Rourke* v. *Deffenbaugh,* 280 Mich 407, 414, 415.

date of the original pleading *whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.*" (Emphasis supplied.)

At the time of the ruling by the trial court on the motion for summary judgment and motion for leave to amend, our Supreme Court had not spoken concerning the effect of GCR 1963, 118.1, 118.4, in relation to the statute of limitations. October, 1965, in the case of *LaBar* v. *Cooper,* 376 Mich 401, this question was raised and determined. Mr. Justice ADAMS on pp 404–409 stated as follows:

"Two weeks before the January, 1964, term was to begin, and some six months after Dr. Cooper was deposed, plaintiffs' attorneys moved to amend the declarations, primarily to charge Dr. Cooper with general acts of negligence in sending Mrs. LaBar to the hospital when he knew the standard of care employed by the nurses was faulty and that shots were administered by them in a dangerous place. The trial judge denied the motions and this Court granted leave to appeal.

"The trial judge stated:

" 'Prior to filing the motions the statute of limitations, both as to malpractice and ordinary negligence, had run. Prior to the effective date of GCR 1963, the motion would have been denied, because of the running of the statute.[5] * * *

"GCR 1963, 118 is an adoption of Federal Rule 15. The purpose of its adoption is stated by Honigman & Hawkins at 1 Michigan Court Rules Annotated, page 416:

" 'The relationship between the original pleading and a proposed amendment becomes important when the date of filing the amendment raises a question of limitations. The doctrine of "relation back"

[5] CLS 1961, § 600.5805, subd (3) (Stat Ann 1962 Rev § 27A.5805, subd [3]).

was devised by the courts to associate the amended matter with the date of the original pleading, so that it would not be barred by the statute of limitations. But some restrictions had to be placed upon the doctrine, or claims clearly barred could be resurrected by pleading them in an amendment to an unrelated claim which was not barred. Previous Michigan cases had set this restriction in terms of whether the amended matter involved a new cause of action.

" 'Subrule 118.4 is intended to introduce a more liberal and workable test, borrowed from the Federal rules. See committee comment (5), *supra*. The test is no longer conceptual, but rather functional. The amendment relates back to the date of the original pleading and, therefore, is not barred by limitations, whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *It is thus beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally.* The new test satisfies the basic policy of the statute of limitations, because the transactional base of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction.' (Emphasis supplied in quoted opinion.) * * *

"From the effective date of the new court rules,[6] the old rule cited in the cases immediately above was meant no longer to be followed. * * *

"If the amendments were not barred by the running of the statute of limitations, there remains the question of exercise of discretion by the trial judge. Defendants also opposed the motions on the ground that the cases had been pretried, placed on the calen-

[6] See GCR 1963, 14.

dar, and adjourned over one term at the request of the plaintiffs. * * *

"It should always be borne in mind that GCR 1963, 118 provides that leave to amend shall be freely given when justice so requires, and that RJA, § 2301 (CLS 1961, § 600.2301 [Stat Ann 1962 Rev § 27A-.2301]) *provides for amendment either in form or substance for the furtherance of justice.* * * *

"The cases are remanded to the trial judge for further disposition in the light of this opinion. In the event the motions are denied, such exercise of discretion should be supported by specific findings as to reasons for the same." (Emphasis supplied.)

By reason of the ruling in the *LaBar* v. *Cooper Case,* the amendment by plaintiffs in our case is not prevented by the statute of limitations because the claim to be asserted in the amendment arose out of the occurrence set forth or attempted to be set forth in the original complaint.

In the case at hand, we find that the defendant filed an answer to the complaint, participated in a pretrial conference as well as taking of depositions and discovery, and stipulated that the statutes of the State of Ohio and the ordinances of the city of Maumee could be introduced unless defendant gave notice requiring the same to be proved. At no time up to the day before trial date did the defendant raise the issue that the pleadings of plaintiff were fatally defective. Our Supreme Court has spoken under similar circumstances, in the case of *Manley, Bennett & Co.* v. *Woodhams* (1957), 349 Mich 586, wherein a motion for dismissal of plaintiffs' declaration made after plaintiffs' opening statement and after denial of plaintiffs' motion to amend declaration, was granted. Mr. Justice TALBOT SMITH stated on pp 593, 594 as follows:

"We are constrained, also, to observe that this matter was pending for many months, that discovery

depositions had been taken and filed, that pretrial conference had been held, and that nowhere during these lengthy proceedings, so far as this record discloses, had defendants even intimated that the declaration did not contain such information as to 'reasonably inform the defendant of the nature of the cause he is called upon to defend.' It was not until the jury had been empaneled and opening statement made that the alleged fatal deficiency was made the subject of motion to dismiss. We take this occasion to point out to the profession that it was the kind of debacle here experienced, resulting in delay of justice and unnecessary expense to all concerned, that the pretrial conference was, in part, intended to eliminate. If one of the parties to litigation is of the opinion that the pleadings are fatally defective it is his duty at this time (entirely independent of the doctrine of waiver by pleading over or going to trial without specifically raising the point) to raise the issue so that the matter may then and there be explored. We have passed the day when the art of pleading was a game of setting traps for the unwary and we do not intend to return to it.

"In the view we have taken of the case it is not necessary to pass upon the court's refusal to permit amendment, save to agree, with Honigman (Michigan Court Rules Annotated, p 243) that 'there has been a constant trend for increasing liberality in the matter of granting amendments.' "

It is true defendant may delay the bringing of a motion for summary judgment until the day of trial under GCR 1963, 117; however, under the same rules, 118, the trial judge may allow an amendment to cure a defect in the complaint and to the extent of pleading a new cause of action when justice requires and where defendant is not harmed *except by a delay in the trial to which he has materially contributed.*

The motion for summary judgment in favor of the defendant was granted, and leave to amend

denied to plaintiffs *on authority of the then known applicable law.* However, we now have the interpretation of GCR 1963, 118.1, 118.4, pertaining to granting of amendments and relation back of same as construed by *LaBar* v. *Cooper, supra.* Under these circumstances, fairness requires that we remand in order that the trial judge may reconsider the plaintiffs' motion to amend and the defendant's motion for summary judgment in the light of the *LaBar Case* and this opinion.

Remanded as indicated above. Costs will abide determination in the trial court.

BURNS, P. J., and T. G. KAVANAGH, J., concurred.

SCHMIDT *v.* ROBINET.

1. AUTOMOBILES—RIGHT SIDE OF ROAD—SKIDDING ACROSS ROAD.
   Failure of driver of motor vehicle to keep on the right side of the road as required by statute may be excused when, through no fault of his own, his car skids across road on slippery pavement but if skidding is result of his own negligence he is not absolved from consequence thereof (CLS 1961, § 257.634).

2. SAME — ICE-COVERED PAVEMENT — SKIDDING — NEGLIGENCE — QUESTION FOR JURY.
   Evidence adduced in action against defendant driver for injuries to plaintiff passenger arising out of injuries received when defendant lost control of his car on ice-covered pavement,

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REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur 2d, Automobiles and Highway Traffic § 689.
[2, 3] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 494, 511.
[4] 5 Am Jur 2d, Appeal and Error § 833.

skidded to wrong side of street, and collided with another car, *held,* to present question for jury as to whether defendant was guilty of negligence, and to support jury's verdict for defendant.

3. SAME—ICE-COVERED PAVEMENT—SKIDDING—WRONG SIDE OF STREET—DISPUTED TESTIMONY.

Jury's verdict for defendant driver in passenger's action against him for injuries received when his car skidded out of control on ice-covered pavement to wrong side of street where it collided with another car, *held,* not against the great weight of evidence, there being dispute in the testimony as to whether defendant had previously bumped the curb several times, had stopped at an intersection, or had slackened his speed before skidding.

4. APPEAL AND ERROR—COURT OF APPEALS—QUESTIONS OF FACT—PREPONDERANCE OF EVIDENCE.

The Court of Appeals does not substitute its judgment on questions of fact for that of a jury unless the facts clearly preponderate in the opposite direction.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted Division 3 October 6, 1965, at Grand Rapids. (Docket No. 348.) Decided December 20, 1965. Leave to appeal denied by Supreme Court February 24, 1966. See 377 Mich 703.

Complaint by Kenneth E. Schmidt against George V. Robinet for injuries sustained by plaintiff when an automobile driven by defendant, and in which plaintiff was a passenger, collided with another automobile. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

van Benschoten & van Benschoten (*Harvey E. van Benschoten,* of counsel), for plaintiff.

Stanton, Taylor, McGraw & Collison (*Ralph B. Taylor,* of counsel), for defendant.

BURNS, P. J. This is a suit for personal injuries by the plaintiff-passenger against the defendant-driver.

The accident occurred on December 24, 1959, in Saginaw county, when defendant's car went out of control, skidded onto the wrong side of an ice-covered road, collided with another car, and injured the plaintiff.

The facts show that the parties were employed at the same place of business, resided near each other, and shared rides to their place of employment, some 23 miles distant.

The plaintiff alleges two theories of liability: one, that plaintiff was a passenger for hire and the driver is liable for ordinary negligence; alternatively, if plaintiff was a guest, the driver is liable on the theory of gross negligence.

Defendant denies that plaintiff was a passenger for hire and also claims a sudden emergency as an affirmative defense, stating that he unexpectedly skidded on the slippery roadway which caused his vehicle to slue out of control and cross the center line.

At the close of defendant's proofs, plaintiff moved to strike the affirmative defense on the ground that by defendant's own testimony there was no showing of sudden emergency; that in fact all roads in the Saginaw area were ice-covered and slippery at the time of the accident. Plaintiff also moved the court to instruct the jury that the defendant was negligent as a matter of law. The court denied both motions.

The trial judge read to the jury the provisions of the statute relating to a guest passenger[1] and defined the distinction between gross negligence and negligence. He instructed the jury that the issue of the plaintiff being a guest passenger and the defendant's negligence or gross negligence was a factual question for the jury.

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[1] CLS 1961, § 257.401 (Stat Ann 1960 Rev § 9.2101).

The jury returned a verdict of no cause of action.

On appeal, plaintiff claims that the trial court erred by failing to grant the above motions.

The rule was well stated by Mr. Justice SHARPE in *Leonard* v. *Hey* (1934), 269 Mich 491, 494:

"It is fundamental law that the driver of a car must keep on the right side of a street or highway, but failure to keep to the right when, through no fault of the driver, an automobile skids on a slippery pavement and is thus thrown across the road, has been held to excuse failure to comply with the statute (CL 1929, § 4703;[2] *Chase* v. *Tingdale Bros.*, 127 Minn 401 [149 NW 654]), but if such skidding results from the negligent acts or commissions of a driver, he is not absolved from the consequences of breach of the rule although it is not deliberate or intentional. Berry on Automobiles (4th ed), § 865."

The roads in the Saginaw area at the time of the accident were generally slippery and ice-covered. On the day of the accident the sheriff's department answered 25 accident calls; the average is 5.

The plaintiff testified that the defendant skidded through the intersection at West Michigan avenue and Center street, hit the curb several times, and, despite this dangerous condition, did not slacken his speed but continued at the same speed.

The defendant denied that he skidded through the intersection or that he bumped any curb. He claimed that he stopped at the intersection, turned onto Center street, and proceeded 200 feet before he started to "fishtail" and thereafter skidded across the center line.

Considering all of the circumstances we are of the opinion that reasonable minds might differ as to whether the defendant driver was negligent. The question, therefore, was one of fact for the jury.

[2] See currently CLS 1961, § 257.634 (Stat Ann 1960 Rev § 9.2334). —REPORTER.

The jury saw the witnesses and heard the testimony. From the testimony presented in the record it certainly cannot be said that the jury verdict is against the great weight of evidence. We do not substitute our judgment on questions of fact unless they clearly preponderate in the opposite direction.

Judgment is affirmed. Costs to appellee.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

PARRISH v. MICHIGAN PROPERTIES CORPORATION.

1. VENDOR AND PURCHASER—FORFEITURE—WAIVER OF REDEMPTION.
Defendant corporate purchaser under land contract which had been given notice of forfeiture for default waived its right of redemption when it failed to pay amount due and the amount of costs awarded the party forfeiting the contract within 90-day period of redemption provided by statute (CLS 1961, § 600.5673).

2. SAME—ABANDONMENT OF INTEREST—EXPIRATION OF REDEMPTION.
The dismissal by the Supreme Court, pursuant to a stipulation, of an appeal from a judgment of restitution in the circuit court is not a determination of the appeal but rather an abandonment of the land contract purchaser's interest in the property permitting redemption period to expire 90 days after entry of the judgment of restitution in the circuit court (CLS 1961, § 600.5673).

REFERENCES FOR POINTS IN HEADNOTES

[1] 55 Am Jur, Vendor and Purchaser § 461.
[2] 55 Am Jur, Vendor and Purchaser §§ 437, 461, 509.
[3] 55 Am Jur, Vendor and Purchaser §§ 424, 759.
[4] 55 Am Jur, Vendor and Purchaser § 369.
[5] 55 Am Jur, Vendor and Purchaser § 363.

3. SAME—SUBPURCHASERS OF LAND CONTRACT VENDEE.

Purchasers of part of premises which defendant corporation had purchased under a land contract had the right to purchase the entire tract for their own benefit and protection when the defendant's rights in the property were extinguished.

4. SAME—IMPROVEMENTS—RESTITUTION—VALUE.

Improvements which were made on premises sold under land contract inured to the benefit of the vendor upon vendor's securing judgment of restitution, hence, parties who negotiated purchase of premises after such judgment would have to pay for the then value of the premises.

5. SAME—USE OF PREMISES—RENT—BREACH OF CONTRACT.

Plaintiff purchasers under a land contract of a part of the premises which defendant corporation had itself purchased under a land contract from vendor of entire premises, were not required to pay rent for use of premises when they sued defendant corporation for breach of its contract after it had lost its interest in the premises through forfeiture of the contract, since they had not contracted to pay rent but to purchase the premises, a contract which defendant breached by not acquiring title it had contracted to buy, since to award rental would be tantamount to approving defendant's conduct and compensating it for its refusal to honor its contractual obligations.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted Division 1 October 6, 1965, at Detroit. (Docket No. 650.) Decided December 20, 1965.

Complaint by Allen K. Parrish and Vivian K. Parrish against Michigan Properties Corporation, a Michigan corporation, William W. Schenck, Ben H. Schenck, Jr., and Lila C. Schenck for damages incurred when defendants, plaintiffs' vendors under a land contract, breached a land contract to purchase property from a third party. Plaintiffs' motion for summary judgment granted. Defendant Michigan Properties Corporation appeals. Affirmed.

Dykema, Wheat, Spencer, Goodnow & Trigg (*Curtis W. Poole, Jr.*, and *Richard E. Rabbideau*, of counsel), for plaintiffs.

Piggins, Balmer, Grigsby, Skillman & Erickson (*Carroll C. Grigsby,* of counsel), for defendants.

J. H. GILLIS, J. On June 4, 1956, the defendant Michigan Properties Corporation entered into a land contract for the purchase of approximately 86 acres of land from one Dr. Wilson. On November 2, 1956, plaintiffs Allen K. Parrish and Vivian K. Parrish entered into a land contract with the defendant corporation for the purchase of approximately one-half of the 86-acre tract.

On December 21, 1961, Frances H. Wark, assignee of the Dr. Wilson contract, served a notice of intention of forfeiture upon the defendant corporation contending it was in default on its land contract. The defendant corporation then advised plaintiffs of its receipt of such notice. No further payments were then made or accepted on the plaintiffs' contract with the defendant.

On October 11, 1962, the Honorable Timothy C. Quinn, formerly of the Lapeer county circuit court, entered a judgment of restitution in favor of Mrs. Wark and against the defendant corporation. This judgment was appealed to the Michigan Supreme Court but dismissed on April 24, 1964, by order of the Supreme Court pursuant to a stipulation of the parties thereto.

On June 20, 1964, plaintiffs purchased the entire 86-acre tract from Mrs. Wark including the portion thereof they had contracted to purchase from the defendant corporation.

On July 28, 1964, plaintiffs brought the present action for breach of contract, alleging damages of $6,182.26 made up of $5,301.01 paid defendant on their contract and $881.25 for the cost of certain improvements they had made on the premises.

Plaintiffs joined William W. Schenck, Ben H. Schenck, Jr., and Lila C. Schenck, officers of the

defendant corporation, as party defendants. The suit was dismissed as to these individual defendants on February 18, 1965.

On December 18, 1964, the circuit court granted plaintiffs' motion for summary judgment and entered judgment against the defendant corporation for $6,182.26.

The defendant corporation appeals this judgment contending that plaintiffs purchased the tract while their contract with defendant was still in effect and therefore such purchase was, as a matter of law, for the account of defendant.

Defendant relies on CLS 1961, § 600.5673 (Stat Ann 1962 Rev § 27A.5673), to fortify its contention that the contract was still in effect at the time plaintiff made the purchase from Mrs. Wark. This statute states:

"No writ of restitution shall be issued * * * until the expiration of 90 days after the entry of judgment of restitution; and in case of an appeal within that time, no writ of restitution shall issue until such appeal is determined in the circuit court, or if further appeal is taken to the Supreme Court, within 90 days after such appeal is determined in the Supreme Court."

Defendant argues that its appeal was "determined" in the Supreme Court on April 24, 1964, at the time the Supreme Court ordered the appeal dismissed pursuant to the stipulation of the parties. Further, defendant contends that by virtue of the statute, above quoted, it had an equity of redemption until July 23, 1964, and that since the plaintiffs purchased the tract on June 20, 1964, the purchase inures to the benefit of defendant.

The record does not indicate that during this 90-day period the defendant made any tender of the amount found due and owing on its contract to either the plaintiffs or Mrs. Wark.

The statute, above quoted, provides that "no writ of restitution shall issue if the defendant shall * * * within 90 days * * * pay the amount so found due and the amount of costs awarded to the said plaintiff." This the defendant failed to do and thereby waived its right of redemption. See *Kaiser* v. *Weber* (1942), 301 Mich 609.

And it appears that even if the defendant had made a proper tender prior to July 23, 1964, its rights in the tract had already been extinguished. The statute relied upon by defendant provides for a 90-day period within which redemption may be accomplished, beginning from a "determination" of the appeal by the Supreme Court.

An order dismissing the appeal pursuant to a stipulation entered into by the defendant is not a "determination" of the appeal within the meaning of the statute. Rather, it indicates an abandonment of the defendant's interest in the property and its satisfaction with the adjudication of the learned circuit judge. The redemption period herein expired 90 days after the judgment of restitution was entered in the circuit court.

When the defendant's rights in the property were extinguished, plaintiffs had the right to purchase the tract for their own benefit and protection.

Two further issues are presented in this appeal. Defendant contends that if the Court should find that plaintiffs are entitled to a judgment, it should not include the cost of the improvements made by the plaintiff. In this argument the defendant loses sight of the fact that when Mrs. Wark secured the judgment of restitution the improvements inured to her benefit. Plaintiffs in negotiating their purchase from Mrs. Wark had to pay for the then value of the land the same as any arm's length purchaser.

Defendant's final contention is that the plaintiffs, having had use of the land during the time they were

making payments to the defendant on the land contract, should be required to pay a reasonable rent. This argument is untenable. Plaintiffs did not enter into a contract to rent the premises. They contracted to purchase the property and the defendant corporation having breached the contract cannot now complain. To award rental value under these circumstances would be tantamount to approving defendant corporation's conduct and compensating it for its refusal to honor its contractual obligations.

Judgment affirmed. Costs to appellees.

LESINSKI, C. J., and FITZGERALD, J., concurred.

PEOPLE *v.* HENLEY.

1. CRIMINAL LAW—DEFENDANT'S MISCONDUCT AT TRIAL—PREJUDICE.
Defendant who so conducted himself during prosecution on charges of assault with intent to commit rape and an attempt to procure an act of gross indecency between male and female persons as to make it necessary for the trial court to have defendant be forcefully clothed and shackled to a chair, may not complain if such conduct prejudiced the jury, since he cannot claim the benefit of error he himself occasioned (CLS 1961, §§ 750.85, 750.338).

2. SAME—ASSISTANCE OF COUNSEL—WAIVER.
The Constitution of the United States, and the Constitution and statutes of this State do not oblige one charged with crime to have a lawyer, and, if the defendant knows what he is doing and chooses not to have an attorney, he may waive

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 240.
[2] 21 Am Jur 2d, Criminal Law §§ 310, 312, 316, 317.
[3] 21 Am Jur 2d, Criminal Law §§ 310, 321.
[4] 21 Am Jur 2d, Criminal Law §§ 309, 312, 316, 319, 321.

assistance of counsel (US Const, Am 6; Mich Const 1963, art 1, § 13; CL 1948, § 763.1; GCR 1963, 785).

3. SAME—DISCHARGE OF COUNSEL.

A defendant in a prosecution for crime has a right to discharge his attorney, whether the attorney be of his own choosing or an attorney appointed by the court to defend him, and proceed with the trial in person, hence, the trial court committed reversible error in refusing to permit defendant to discharge his attorney and proceed with the trial representing himself (US Const, Am 6; Mich Const 1963, art 1, § 13; CL 1948, § 763.1; GCR 1963, 785).

4. SAME—ASSIGNMENT OF COUNSEL—NEW TRIAL.

The obligation of the State to provide counsel for a defendant who is charged with felony has been satisfied by the appointment of 3 counsel who were discharged by defendant or allowed to withdraw for reasons attributed to him, hence, where new trial is ordered, no counsel need be assigned (GCR 1963, 785).

Appeal from Recorder's Court; O'Hara (John P.), J. Submitted Division 1 October 7, 1965, at Detroit. (Docket No. 110.) Decided December 20, 1965. Rehearing denied January 28, 1966. Leave to appeal granted by Supreme Court May 11, 1966. See 377 Mich 709.

G. T. Henley was convicted of assault with intent to rape and attempt to procure an act of gross indecency between male and female persons. Defendant appeals. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel D. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Rheo C. Marchand,* Assistant Prosecuting Attorney, for the people.

Jesse E. Williams, for defendant.

J. H. GILLIS, J. The defendant G. T. Henley was arraigned on a warrant June 20, 1963 containing two counts: (1) assault with intent to commit rape

(CLS 1961, § 750.85 [Stat Ann 1962 Rev § 28.280]), and (2) attempt to procure an act of gross indecency between male and female persons (CLS 1961, § 750-.338b [Stat Ann 1954 Rev § 28.570(2)]). An attorney was assigned by the court to represent the defendant and an examination was conducted in recorder's court on July 11, 1963. The examining magistrate, Judge Elvin L. Davenport, ordered the prosecuting attorney to file a petition for a sanity hearing pursuant to CLS 1961, § 767.27 (Stat Ann 1963 Cum Supp § 28.967). Three physicians examined the defendant and reported to the court on August 7, 1963 that he was not psychotic, was free from mental defect, able to understand the charges pending against him, and able to assist counsel in his defense. On October 24, 1963, defendant advised the court that he desired to engage his own counsel, did not want assigned counsel and the court permitted assigned counsel to withdraw from the case. Several adjournments of the case were granted in order that defendant might retain counsel.

On December 9, 1963 the defendant, not having hired counsel, was offered another assigned counsel by the then presiding judge of the recorder's court, but the defendant refused to sign the required affidavit and petition for appointment of counsel. Three days later Judge John P. Scallen assigned an attorney to represent the defendant. On the following day trial commenced. A mistrial was declared in the early stages of that trial, and the assigned counsel was permitted to withdraw from the case after defendant requested that he be discharged. Judge Scallen then appointed a new sanity commission consisting of three additional physicians who reported on January 8, 1964, the same findings reported by the prior sanity commission. On December 24, 1963 another attorney was retained by

the defendant, and this attorney remained with the defendant throughout the balance of the proceedings in this cause. This trial attorney, having received only a small retainer initially, was appointed and compensated as an assigned counsel.

A new trial was commenced on May 27, 1964 and on June 4, 1964 the jury returned a verdict of guilty on both counts set forth in the information. The lengthy transcript covering this trial is replete with attempts by the defendant to dominate the court proceedings. The record clearly shows that the defendant continually interrupted the trial judge, insisted on instructing his counsel in so loud a tone that it could be heard by members of the jury in the court, interrupted the testimony of various witnesses, conducted oratorical speeches directed to the jury protesting his innocence, and insisted that he was being deprived of his constitutional rights. At other times he would direct remarks to the spectators sitting in the rear of the courtroom contending that his rights were being violated and requested someone in the audience to send news reporters or representatives of various organizations to see him. After one court recess, the defendant while in a jail cell adjacent to the courtroom removed all of his clothing and refused to come out for further proceedings.

It was thereafter necessary for the court to order the defendant forcefully clothed and brought into the courtroom where he was shackled to a chair. This action by the trial court seemed only to intensify the contemptuous attitude displayed by the defendant. The trial judge, who displayed the patience of Job,[1] did everything possible throughout the trial to control the defendant's actions except to order the defendant gagged. See *People* v. *La-*

[1] James 5: 11.

Marr (1965), 1 Mich App 389, and citations contained therein for authority of the court to shackle a defendant.

The conduct of the defendant may well have prejudiced the jury but this defendant cannot complain inasmuch as he cannot claim the benefit of error that he himself occasioned.

After the trial was well under way, the defendant advised the court that he had "fired" his attorney and was going to represent himself. The court advised the defendant to sit down and instructed the defense counsel to continue with the trial. On many occasions thereafter the defendant advised the court that he desired to represent himself and did not want his attorney speaking in his behalf.

The defendant alleges many grounds of reversible error, but only one merits consideration. Was it reversible error for the trial court to refuse to permit the defendant to discharge his attorney and proceed with the trial representing himself?

The Constitution of the United States[2] does not force a lawyer upon the defendant. He may waive his constitutional rights to assistance of counsel if he knows what he is doing and his choice is made with open eyes. See *Johnson* v. *Zerbst* (1937), 304 US 458 (58 S Ct 1019, 82 L ed 1461).

The Michigan Constitution of 1963, art 1, § 13, provides:

"A suitor in any court of this State has the right to prosecute or defend his suit, either in his own proper person or by an attorney."

The statute which covers this issue is CL 1948, § 763.1 (Stat Ann 1954 Rev § 28.854):

"On the trial of every indictment or other criminal accusation, the party accused shall be allowed to

[2] US Const, Am 6.

be heard by counsel and *may defend himself.*" (Emphasis supplied.)

The record in the instant case fails to disclose any basis which would warrant the defendant to discharge his counsel and, in fact, defense counsel did an admirable job under trying circumstances. However, under our Constitution, statutes, and case law, defendant had the right to discharge his attorney and proceed with the trial in his own proper person.

Three counsel having already been assigned and having been discharged by defendant or allowed to withdraw for reasons attributed to defendant, we think the State has satisfied its obligation under GCR 1963, 785; no counsel need be assigned on retrial of this cause.

Judgment reversed. Remanded to the recorder's court of the city of Detroit for a new trial.

LESINSKI, C. J., and FITZGERALD, J., concurred.

PEOPLE *v.* KEARNS.

1. INDICTMENT AND INFORMATION—PURPOSE.
   The basic reason for an information is to apprise the defendant of the charges against him, and an information which fulfills such requirement is a good and proper information.

2. SAME—DESCRIPTION OF LESSER INCLUDED CRIME.
   An information which may be defective in its averments as to a higher crime but which contains a full description of a lesser included offense is a good and proper information as to the included offense.

3. SAME—AMENDMENT—INCLUDED OFFENSE.
   Information which charged defendant and an accomplice with crime of robbery armed and which information fully informed defendant of the included offense of assault with intent to rob being armed did not require that an amendment be made by the trial court in order to enable the court to accept a plea of guilty to the lesser included offense (CL 1948, § 750.89; CLS 1961, § 750.529).

4. CRIMINAL LAW—PLEA OF GUILTY—EXAMINATION BY TRIAL JUDGE.
   Contention that trial court committed error in failing to examine defendant as to whether undue influence had been exerted upon him in eliciting a plea of guilty *held*, untenable, where it is clear the trial judge satisfied himself that the plea was voluntary (CL 1948, § 768.35).

5. SAME—PLEA OF GUILTY—EXAMINATION BY TRIAL JUDGE.
   A trial judge must examine one accused of crime and who pleads guilty thereto as to whether the plea was made freely, that

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REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur, Indictments and Informations §§ 2, 4.
[2] 27 Am Jur, Indictments and Informations §§ 105, 194.
[3] 27 Am Jur, Indictments and Informations § 118.
[4] 21 Am Jur 2d, Criminal Law §§ 485, 486.
[5–7] 21 Am Jur 2d, Criminal Law § 486.
[8] 21 Am Jur 2d, Criminal Law § 504.
[9] 39 Am Jur, New Trial § 6.

it was made with full knowledge of the nature of the accusation, and that the plea was made without undue influence or promise of leniency (CL 1948, § 768.35; GCR 1963, 785.3[2]).

6. SAME—PLEA OF GUILTY—EXAMINATION BY TRIAL JUDGE.

The form and manner of the examination which a trial judge must make before accepting a plea of guilty has not been prescribed, but is left to his discretion, to be exercised by him in the manner best suited to the parties and the offense (CL 1948, § 768.35; GCR 1963, 785.3[2]).

7. SAME—PLEA OF GUILTY—VOLUNTARY CONFESSION—UNDUE INFLUENCE.

One who pleads guilty to a crime charged against him and admits that the confession he had made was of his own free will would be precluded from claiming the trial judge needed to question him specifically as to whether there was any undue influence, for a voluntary confession indicates there was no undue influence (CL 1948, § 768.35; GCR 1963, 785.3[2]).

8. SAME—WITHDRAWAL OF PLEA OF GUILTY AFTER SENTENCE—DISCRETION OF COURT.

The withdrawal of a plea of guilty on motion for new trial after sentence rests upon the sound discretion of the trial judge.

9. SAME—NEW TRIAL—DISCRETION OF COURT.

Record in prosecution for robbery armed in which defendant pleaded guilty to included offense of assault with intent to rob being armed, and that trial court ascertained plea had been made voluntarily and sentenced defendant to 8 to 10 years in prison *held,* not to show there was an abuse of discretion in denying subsequent motion for new trial (CL 1948, §§ 750.89, 768.35; CLS 1961, § 750.388; GCR 1963, 785.3[2]).

Appeal from Recorder's Court; Davenport (Elvin L.), J. Submitted Division 1 October 7, 1965, at Detroit. (Docket No. 207.) Decided December 20, 1965.

Charles A. Kearns was convicted of assault with intent to rob being armed. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel E. Olsen,*

Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Counsel, and *James E. Lacey,* Assistant Prosecuting Attorney, for the people.

Michael D. Silber, for defendant.

LESINSKI, C. J. On March 14, 1963, upon waiver of a preliminary examination, a criminal information was filed charging the defendant-appellant Charles A. Kearns and an accomplice, James Vista Burnett, with the crime of robbery armed. CLS 1961, § 750.529 (Stat Ann 1963 Cum Supp § 28.797). On April 4, 1963, the date set for trial, appointed counsel informed the court that the defendant desired to withdraw his plea of not guilty and enter a plea of guilty to the included offense of assault with intent to rob being armed. CL 1948, § 750.89 (Stat Ann 1962 Rev § 28.284). The court then examined the defendant and concluded the plea was given of his own free will. The court accepted defendant's plea, and he was subsequently sentenced to 8 to 10 years in prison.

After sentence on May 13, 1963, a motion for new trial was filed in recorder's court of the city of Detroit seeking to withdraw a plea of guilty alleging (1) that the defendant pleaded guilty for reasons other than his actual guilt, (2) that defendant was not guilty, and (3) that newly-discovered evidence proves that defendant was not guilty. In support of this motion counsel at the hearing in August of 1963 filed four affidavits, one each by the defendant and his three accomplices absolving defendant from any responsibility for the crime. On September 5, 1964, the court denied the motion for new trial. Appeal was taken from this order.

The questions before this Court for determination evolve from the taking of the plea by the trial judge

and his subsequent denial of the motion for new trial.

The first question raised by the appellant inquires into the necessity of amending the information when the judge takes a plea to a lesser included offense. The basic reason for an information is to apprise the defendant of the charges against him. If the information fulfills this requirement, then it is a good and proper information. As early as *People* v. *Calvin* (1886), 60 Mich 113, the Michigan Supreme Court laid down the guidelines as to what is necessary to inform the defendant. In the *Calvin Case* our Supreme Court said at page 122:

"If the information or indictment, although defective in its averments as to a higher crime, *contains a full description of a lesser offense of the same nature, the respondent cannot complain that he has not had full and sufficient notice of the crime for which he is tried and convicted.*" (Emphasis supplied.)

See, also, *In re Kovacivich* (1948), 323 Mich 310, 314, 315.

In the case at bar, the defendant was fully informed by the information of the included offense of assault with intent to rob being armed. CL 1948, § 750.89 (Stat Ann 1962 Rev § 28.284). We therefore find no merit to the contention that the trial court was required to amend the information, as it initially informed the defendant of the charge against him.

The next error alleged by the defense inquires into the necessity of extensive examination of the defendant by the trial court prior to accepting a plea of guilty. It is the defense's contention that CL 1948, § 768.35 (Stat Ann 1954 Rev § 28.1058) and GCR 1963, 785.3(2) requires the trial court to interrogate the defendant in three specifically de-

lineated areas, those being: that the plea was made freely, that the plea was made with full knowledge of the nature of the accusation, and that the plea was not contributed to by undue influence. Counsel then contends that the court failed to examine the defendant as to whether undue influence had been exerted upon him in eliciting the plea. The Court does not find merit in this contention. Upon close scrutiny of the examination held by the trial court prior to accepting the plea, it is clear that the trial judge satisfied himself as to its voluntariness. The law requires no more. As our Supreme Court said in its most recent affirmation of the doctrine in *People* v. *Bumpus* (1959), 355 Mich 374, 379, 380 that:

"Both our statutes and our court rules, quoted above, require that upon a plea of guilty to an information *the judge shall satisfy himself* that the plea was made freely, with knowledge of its consequences, and without undue influence or promise of leniency. The *form and manner of this examination by the judge has not been prescribed but is left to the discretion of the judge,* to be exercised by him in the manner best suited to the parties and the offense." (Emphasis supplied.)

See, also, *In re Elliott* (1946), 315 Mich 662, 667, and cases cited therein; *People* v. *Coates* (1953), 337 Mich 56, 72–75 and cases cited therein. It is clear from the above citations that the trial judge in accepting a plea of guilty to a given offense need only satisfy himself as to the freeness, voluntariness and lack of influence in the plea. Yet in this case the examination goes beyond the spirit of the law and does in fact satisfy the letter of the law. The judge herein was very careful to elicit from the defendant during the examination the facts surrounding the crime as well as its voluntariness. As the record shows in part:

"*Q*. Did you confess to the police your part in this?

"*A*. I did.

"*Q*. Of your own free will?

"*A*. Yes, sir, that's right.

"*Q*. Have you told me what you have told me this morning of your own free will?

"*A*. I did."

The fact that defendant answered that the confession was of his own free will would preclude him from now claiming that the judge need specifically question him as to whether there was any undue influence. It is this Court's view that once a person indicates his plea is given of his own free will, it indicates that there was no undue influence. Thus, the Court finds this contention of the defense without merit.

The defense alleges in its last complaint of error that on the motion for new trial which was made after sentence, the trial judge had the mistaken impression that under the law of Michigan a plea of guilty could not be retracted. After close scrutiny of the record, this Court finds no indication that the trial judge was under any misconception as to what the law is regarding withdrawal of a plea of guilty on a motion for new trial after sentence. That law as it stands today rests the right of withdrawal of a plea of guilty after sentence upon the sound discretion of the trial judge. See *People* v. *Vasquez* (1942), 303 Mich 340; *People* v. *Davis* (1964), 372 Mich 402; *People* v. *Zaleski* (1965), 375 Mich 71. It is this Court's determination that the trial judge did not abuse that discretion.

This Court finds no merit in the defense's other allegations of error.

Affirmed. Costs to the appellee.

FITZGERALD and J. H. GILLIS, JJ., concurred.

PEOPLE *v.* PATE.

1. CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAW — CRIMINAL LAW—PUNISHMENT.

   The prohibition against arbitrary deprivation of life, liberty, or property by a State and requirement of equal and impartial justice under the law, contained in the Constitution of the United States, does not limit the powers of a State to deal with crimes committed within its own borders or with the punishment (US Const, Am 14).

2. CRIMINAL LAW—PUNISHMENT—DISCRETION OF COURT—COURT OF APPEALS.

   The Court of Appeals does not have supervisory control over the punishment imposed by a trial court in the exercise of the wide discretion accorded it, when a sentence has been imposed within the maximum provided by statute (CL 1948, § 769.1).

3. SAME—SENTENCE.

   Sentence of 5 to 10 years imposed after defendant pleaded guilty to breaking and entering, a crime carrying a maximum penalty of 10 years, *held*, neither arbitrary nor in violation of defendant's rights, where it was his second felony and he was on probation at the time the second offense was committed, and trial court recommended the minimum (CL 1948, § 750.110).

Appeal from Ottawa; Smith (Raymond L.), J. Submitted Division 3 October 7, 1965, at Grand Rapids. (Docket No. 536.) Decided December 20, 1965.

Charles Pate was convicted for breaking and entering. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 577, 580–583.
[2] 21 Am Jur 2d, Criminal Law § 583 *et seq.*
[3] 21 Am Jur 2d, Criminal Law § 614.

R. Neal Stanton, for defendant.

BURNS, P. J. The defendant appeals a sentence of 5 to 10 years for breaking and entering.[1]

The defendant entered a plea of guilty to the charge of breaking and entering and was sentenced to the jurisdiction of the State prison of southern Michigan at Jackson for a period of not less than 5 nor more than 10 years. The court recommended the minimum.

According to the appellant's brief (the facts do not appear in the record and the prosecuting attorney did not file a brief), a codefendant was sentenced to a term of 2 to 10 years, although this offense was the appellant's second felony conviction while said offense was the codefendant's third felony conviction. The appellant neglected to mention that he was on probation at the time of this offense.

The defendant claims that he was denied equal protection of law guaranteed by both the State Constitution[2] and the Federal Constitution.[3]

The Fourteenth Amendment of the Constitution of the United States of America does prohibit a State from arbitrary deprivation of life, liberty, or property and requires equal and impartial justice under the law; but it does not limit the powers of a State to deal with crimes committed within its own borders or with the punishment. *In re Converse* (1890), 137 US 624 (11 S Ct 191, 34 L ed 796). Also, *Ughbanks* v. *Armstrong* (1908), 208 US 481 (28 S Ct 372, 52 L ed 582).

CL 1948, § 769.1 (Stat Ann 1954 Rev § 28.1072) states in part as follows: "Any of the several circuit judges in the respective circuits, * * * are hereby authorized and empowered to pronounce

1 CL 1948, § 750.110 (Stat Ann 1962 Rev § 28.306).—REPORTER.
2 Const 1963, art 1, § 2.
3 US Const, Am 14, § 1.

judgment against and pass sentence upon all persons heretofore convicted."

When a sentence is within the maximum provided by statute, the trial court has wide discretion and an appellate court does not have supervisory control over the punishment. See *Cummins* v. *People* (1879), 42 Mich 142; *People* v. *Kelly* (1894), 99 Mich 82; *People* v. *Guillett* (1955), 342 Mich 1.

The fact that this conviction was the defendant's second felony conviction and the codefendant's third felony conviction does not by itself inform us of the entire history of the record of the defendant and the codefendant. At the time of sentencing the trial judge made the following statement:

"Your record is such, Mr. Pate, it doesn't recommend you for any further consideration. I think that perhaps in your case we ought to be a little serious minded and try to impress you at this time that a life of crime just doesn't pay. Perhaps if we can accomplish that at this stage in your life it won't be necessary for you to appear before the court again with such frequency as you have in the past, perhaps never. That is what we hope."

The sentence was not arbitrary and did not violate the defendant's rights. Judgment affirmed.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

TEACHOUT *v.* MAIERS.

1. APPEAL AND ERROR—NONJURY CASES—FINDINGS OF FACT.

   The Court of Appeals will not set aside the findings of fact in a nonjury suit whereby plaintiffs sought specific performance of alleged agreement to procure a written lease from landlord of premises upon which restaurant business was conducted or, in the alternative, rescission of the agreement of sale of the business and return of all moneys paid by them to defendant, unless the findings are clearly erroneous (GCR 1963, 517.1).

2. CONTRACTS—CONSTRUCTION—INTENT.

   The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties, all other rules being subordinate thereto.

3. SAME—AMBIGUITY—PAROL EVIDENCE.

   Parol evidence may be admitted to show preliminary negotiations, not to vary or contradict the plain terms of an ambiguous instrument, but to aid the court in determining the intent with which the words were used.

4. SAME—ASSIGNMENT OF LEASE—PAROL EVIDENCE.

   Parol evidence was properly admitted in suit seeking the alternative relief of specific performance of an agreement to assign lease of premises on which restaurant business was being conducted or rescission and return of sums paid, in order to show true intent of the sales agreement was that the lease involved was an oral lease.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 839–845.
[2] 17 Am Jur 2d, Contracts §§ 1, 22, 240, 245.
[3, 4] 20 Am Jur, Evidence § 1142 *et seq.*

Appeal from Eaton; McDonald (Archie D.), J. Submitted Division 3 October 7, 1965, at Lansing. (Docket No. 665.) Decided December 20, 1965.

Complaint by Lyle W. Teachout and Irma Teachout against Robert H. Maiers, Sr., for specific performance of contract to assign written lease for restaurant, or in alternative, for rescission of sale and refund of money paid. Judgment for defendant. Plaintiffs appeal. Affirmed.

John H. Eliasohn, for plaintiffs.

Hudson E. Deming, for defendant.

MCGREGOR, J. The plaintiffs, Mr. and Mrs. Teachout, contracted to buy defendant Maiers' restaurant business, located in the basement of the Elks building in the city of Lansing, together with fixtures, merchandise and equipment. The purchase price was $32,500, with $14,366.31 as down payment, and the balance to be paid at $200 or more each month, with interest at 6% per annum. The agreement allocated the entire purchase price to trade fixtures and provided that title to all these fixtures would remain in the defendant seller until the entire price had been paid. The contract provisions here brought to issue are as follows:

"6. If there is default in payments or if there is a violation of any of the terms of this contract, seller may either (1) elect to sue for the entire amount unpaid thereby vesting title in buyers, or (2) take possession of said fixtures with or without legal process and thereafter hold them free from all claims and retain all payments made to date thereof."

"11. Seller agrees to assign his lease with the Elks to buyers who agree to assume the same and save the seller harmless therefrom. In the event seller is unable to secure an assignment of said lease to buyers, then this agreement shall be null and void and all moneys paid hereon shall be returned to buyers."

"18. This contract contains the entire agreement of the parties and there are no understandings, representations, or warranties, express or implied, by operation of law or otherwise, other than those made herein."

After the plaintiffs operated the restaurant business for more than three years they were evicted from the building by the Elks, who then had defendant resume operation of the restaurant. The plaintiffs had faithfully met all the required payments until their eviction. Plaintiffs filed a complaint in circuit court, demanding specific performance requiring defendant Maiers to procure a written lease from the Elks and to assign the same to the plaintiffs, or in the alternative, rescission of the contract and return of all the moneys paid by them to the defendant. The defendant contended that he fully performed the requirements of paragraph 11, *supra,* by oral assignment of his oral lease with the Elks. Defendant also counter-claimed for reformation of the contract to exclude paragraph 11 on the grounds that said paragraph was retained in the written agreement by mistake. He did not ask, however, for judgment awarding the contract balance.

The trial court, sitting without a jury, rendered judgment denying the plaintiffs any relief and barring defendant from recovering any of the purchase price. Plaintiffs bring this appeal on the grounds that the trial court erred in admitting parol evidence which tended to show that the plaintiffs were in-

formed of the lack of any written lease between the defendant Maiers and the Elks.

The trial court did not grant reformation of the contract, but found instead that paragraph 11 made no reference to, and did not require, a written lease to be obtained by the defendant and assigned to the plaintiffs. The trial court admitted testimony that the attorney who represented the plaintiffs at the contract closing informed them that defendant was operating his business on a month-to-month oral lease. The court also allowed defendant to introduce into evidence a memorandum, dated slightly prior to the signing of the sales contract, which was given by Mr. Walter Grabow, secretary-manager of the Elks, to plaintiff Mrs. Irma Teachout. This memorandum provided in part as follows:

"The following agreement between Lansing Lodge #196 and Mrs. Irma Teachout relative to operation of cafeteria in building is effective April 1, 1960.

"1. The entire basement, including stairway from Elks Lodge to cafeteria and Allegan entrance.

"2. The rent shall be $250 per month for the first six months, payable on the 1st day of the month. At the end of the six months period, the board of trustees and Mrs. Teachout will meet to evaluate and determine a rental figure."

Plaintiffs contend that, although paragraph 11 does not specifically refer to a written lease nor specify any term, the lease was to have been in writing and for a term sufficient to enable plaintiffs to complete their payments under the contract. At the rate of $200 per month, it would have taken about 10 years to pay the entire contract price. The trial court found, however, that the plaintiffs were aware of the lack of a written lease, and that they entered into the contract with full knowledge that their continuance in the building depended upon a

review by the Elks of the restaurant operation at the end of the first six months of the plaintiffs' operation of the business. The trial court concluded that defendant had not breached the contract by failing to obtain a written lease.

This Court will not set aside the findings of fact made by the trial court unless they are clearly erroneous. GCR 1963, 517.1.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of parties. To this rule all others are subordinate. * * *.

"If ambiguous terms are used, the preliminary negotiations may be considered, not to vary or contradict the plain terms of the instrument, but to aid the court in determining the intent with which such words were used." (Authorities cited.) *McIntosh* v. *Groomes* (1924), 227 Mich 215, 218, 219.

The trial court did not err in accepting evidence to show the true intent and meaning of paragraph 11 of the sales agreement.

The decision of the trial court is affirmed. Costs are awarded to defendant-appellee.

QUINN, P. J., and WATTS, J., concurred.

WEEREN *v.* EVENING NEWS ASSOCIATION.

1. LIBEL AND SLANDER—PRIVILEGE—PLEADINGS—ADMISSION.
   The question of privilege was properly determined by the trial court as a matter of law, where the circumstances giving rise to the occasion of televising the film which plaintiff claimed was defamatory of him are all admitted in the pleadings.

2. SAME—QUALIFIED PRIVILEGE—TELECASTER.
   Finding of trial court that defendant telecaster enjoyed a qualified privilege in televising documentary film "A Bell for Okinawa" *held*, amply supported by circumstances of the occasion.

3. SAME—QUALIFIED PRIVILEGE—MALICE—EXCESSIVE PUBLICATION.
   A qualified privilege may be lost by abuse, as with publication with actual malice or excessive publication.

4. SAME—QUALIFIED PRIVILEGE—MALICE—EVIDENCE.
   The showing of malice required for the forfeiture of a qualified privilege is not presumed but is a matter of proof by the plaintiff, it being necessary to show both the falsity of the statement and express malice.

5. SAME — SUMMARY JUDGMENT — TELECASTER — MALICE — EXCESSIVE PUBLICATION.
   Summary judgment was properly granted defendant telecaster who had telecast "A Bell for Okinawa" twice, where record shows trial court properly found no showing of material falsity or malice and excessive publication could not be claimed (GCR 1963, 117).

Appeal from Wayne; Canham (James N.), J. Submitted Division 1 November 2, 1965, at Detroit. (Docket No. 50.) Decided December 20, 1965. Leave to appeal granted by Supreme Court March 18, 1966. See 377 Mich 705, 379 Mich 475.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 33 Am Jur, Libel and Slander § 296.
[3] 33 Am Jur, Libel and Slander §§ 113, 187.
[4] 33 Am Jur, Libel and Slander § 297.
[5] 33 Am Jur, Libel and Slander § 292 *et seq.*

Declaration by Franz J. Weeren against Evening News Association, a Michigan corporation, Reader's Digest Association, a foreign corporation, and National Broadcasting Company, a foreign corporation, for damages sustained by the showing of an allegedly defamatory television film. Service of process quashed and case dismissed as to defendant Reader's Digest Association. Discontinued without prejudice as to defendant National Broadcasting Company. Summary judgment for defendant Evening News Association. Plaintiff appeals. Affirmed.

Kelman, Loria, Downing & Craig (*George L. Downing,* of counsel), for plaintiff.

Vandeveer, Haggerty, Doelle, Garzia, Tonkin & Kerr (*Buell Doelle,* of counsel), for defendant.

QUINN, J. Plaintiff filed this action on the theory that because of a telecast by defendant of a film entitled "A Bell for Okinawa", plaintiff was "defamed, cheapened, made notorious, subjected to contempt, ridicule, and inquisitive notice of the public, was singled out and identified to the public in a manner obnoxious to plaintiff, was subjected to contempt and ridicule and suffered deep humiliation and mental anguish in public and in private and in his employment both for himself and his family and plaintiff will in the future suffer humiliation and mental anguish and distress by reason of defendant's acts". Plaintiff further claimed that defendant made a second telecast of the same film after receipt of written notice from plaintiff's attorneys not to do so. Defendant admitted the telecasts, claimed its sole connection with "A Bell for Okinawa" was televising it, that it was a legitimate matter of news, and that the televising of it was justified and privileged. After several days of jury trial during which

the film in question was shown, but before the case was submitted to the jury, plaintiff's motion for mistrial was granted. Thereafter, defendant's motion for summary judgment was granted and this action was affirmed by the trial court on plaintiff's motion for new trial and for rehearing motion for summary judgment. Plaintiff appeals.

The 6 issues raised by plaintiff have been reviewed and this Court determines the basic issue is: Was the trial court correct in granting summary judgment under GCR 1963, 117, on the basis of the record then before it?

The pertinent facts are undisputed. Defendant is the proprietor of WWJ-TV, a Detroit area television station. It televised twice the film "A Bell for Okinawa", once after receiving a written warning from plaintiff's attorneys not to do so. The film was made by Bernard L. Schubert, Inc.; it was leased to defendant for two showings by Telestar Films, Inc., on defendant's Sunday program entitled "The Reader's Digest Hour". The film is a dramatic portrayal of the true story of how the head of a leper colony in Okinawa obtained a bell for the colony free of charge from Neukolln Iron Works in West Berlin. Plaintiff's father owned the iron works, but plaintiff pleaded he was general manager at the time involved (the summer of 1952) and dealt with the head of the leper colony regarding the bell. Bruce Bliven, Jr., wrote an article for "Christ Und Welt", a German Lutheran Church publication, relating the story of the bell. A condensation of this article by the author appeared in the August, 1955, issue of Reader's Digest. The film involved was based on the condensation. It was viewed twice by the trial judge; at the time of oral argument, this Court was requested by both counsel to view the film and did so. The Reader's Digest article was an exhibit in the trial court and is before this Court.

The circumstances giving rise to the occasion of televising the film are all admitted in the pleadings. This being true, the trial court properly held it was the trial court's duty to determine the question of privilege as a matter of law. *Lawrence* v. *Fox* (1959), 357 Mich 134.* The circumstances of the occasion amply support the trial court's finding that defendant enjoyed a qualified privilege in televising this documentary film.

Since the privilege is qualified, it may be lost by abuse, as with publication with actual malice or excessive publication. (See *Fox, supra.*) But as was said in *Fox* at p 146: "The showing of malice required for the forfeiture of the privilege is not presumed but is a matter of proof by the plaintiff." This rule has been approved by the United States Supreme Court in *New York Times Company* v. *Sullivan* (1964), 376 US 254 (84 S Ct 710, 11 L ed 2d 686, 95 ALR2d 1412). In the early case of *Edwards* v. *Chandler* (1866), 14 Mich 471 (90 Am Dec 249), the Supreme Court said (p 475):

"Where a communication is privileged, the plaintiff cannot recover without proving affirmatively not only the falsehood of its contents, but also that it was published with express malice. Unless he can prove both of these points he must fail."

With the pleadings, film and article on which the film was based before it, the trial court properly found no showing of material falsity or malice and granted summary judgment for defendant. There is no claim here, nor could there be on this record, of excessive publication.

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* Only 3 Justices adopt this language in *Fox*, but in 3 subsequent cases, a unanimous Court adopts it. See *Cochrane* v. *Wittbold* (1960), 359 Mich 402; *Polcdna* v. *Bendix Aviation Corp.* (1960), 360 Mich 129; *Nuyen* v. *Slater* (1964), 372 Mich 654. On this basis, it is the law and *Fox* is cited because of its full and lucid discussion of the question that is before us.

The trial court is affirmed, with costs to appellee.

LESINSKI, C. J., and WATTS, J., concurred.

VANNOY *v.* CITY OF WARREN.

JOHNSON & ANDERSON, INC., *v.* NELSON M. SHARROW EXCAVATING CO., INC.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—NEGLIGENCE—JOINT TORT-FEASOR.

   An employer, covered by the workmen's compensation act, may not be held to respond in damages as a joint tort-feasor for negligence in addition to his liability under the workmen's compensation act (CL 1948, § 411.1 *et seq.*, as amended).

2. DEATH—WORKMEN'S COMPENSATION—THIRD-PARTY COMPLAINT—NEGLIGENCE.

   Permission to amend third-party complaint by city and its engineers, defendants in action under the wrongful death act by the widow of third-party defendant's employee so as to charge such latter defendant with negligence *held,* properly denied, since the liability to an employee of an employer subject to the workmen's compensation act is confined to the liability thereunder (CL 1948, § 411.1 *et seq.*, as amended § 691.581 *et seq.*).

3. INDEMNITY—CONSTRUCTION OF CONTRACTS—INTENT.

   Indemnity contracts are to be so expounded as to effectuate the intentions of the parties, and in ascertaining such intentions the court must take into consideration not only the language of the contract, but the situation of the parties and the cir-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation § 66.
[3] 27 Am Jur, Indemnity § 13 *et seq.*
[4] 41 Am Jur, Pleadings § 340 *et seq.*
[5] 20 Am Jur 2d, Costs § 10 *et seq.*

cumstances surrounding them at the time the contract was made.

4. JUDGMENT—SUMMARY JUDGMENT—THIRD-PARTY DEFENDANT—INDEMNITY CONTRACT.

Trial court's denial of third-party defendant's motion for summary judgment in action under death act against defendant city and its engineers which had contracted with the third-party defendant to install a sewer, in which activity plaintiff's husband had been killed, *held*, proper, where construction of indemnity contract, forming the basis of the third-party complaint, was properly determinable at the trial (CL 1948, § 691.581 *et seq.*).

5. COSTS—THIRD-PARTY DEFENDANT—NEGLIGENCE—SUMMARY JUDGMENT.

Costs in action under death act wherein defendants impleaded her late husband's employer as a third-party defendant, are awarded to plaintiff on appeal of defendants from denial of their motion to add a count based on negligence of the third-party defendant and latter cross-appealed from denial of its motion for summary judgment, and both denials are affirmed, plaintiff alone having prevailed in full (CL 1948, § 691.581 *et seq.*).

Appeal from Macomb; Carroll (Howard R.), J. Submitted Division 2 November 2, 1965, at Lansing. (Docket Nos. 51, 52.) Decided December 20, 1965. Leave to appeal denied by Supreme Court February 24, 1966. See 377 Mich 703.

Declaration by Pollyana Vannoy, administratrix of the estate of John Carl Vannoy, deceased, against City of Warren and Johnson & Anderson, Inc., for the wrongful death of decedent, who when working in a manhole was overcome by gas and fell into 7 feet of water. Defendants' motion to add third-party defendant, Nelson M. Sharrow Excavating Company, Inc., granted. Defendants' motion to amend third-party complaint denied. Defendants appeal. Third-party defendant's motion for summary judgment denied. Third-party defendant appeals. Affirmed.

Ward, Plunkett, Cooney, Rutt & Peacock (*John D. Peacock* and *Charles T. McGorisk,* of counsel), for defendant Johnson & Anderson, Inc.

Nunneley, Nunneley & Hirt, for defendant City of Warren.

Alexander, Buchanan & Conklin (*John A. Kruse,* of counsel), for third-party defendant Nelson M. Sharrow Excavating Company, Inc.

T. G. KAVANAGH, J. Plaintiff's deceased husband was an employee of the Nelson M. Sharrow Excavating Co., Inc., which had contracted with the defendant city of Warren to do certain work in connection with the installation of a sewer. On February 21, 1961, the plaintiff's decedent in the course of his employment descended into a manhole, was allegedly overcome by gas, and fell into 7 to 10 feet of water where he died. The plaintiff sued the city of Warren and its engineers, Johnson & Anderson, Inc., under the wrongful death statute[1] alleging negligence on the part of each.

Pursuant to court order, the defendants filed third-party complaints against the Sharrow Excavating Co., on the basis of an indemnity agreement. Thereafter the defendants filed a motion to amend their third-party complaint to add a count for negligence against Sharrow. The trial court denied the motion and from this ruling this appeal is taken.

The issue raised was whether an employer covered by the workmen's compensation act[2] could be held to respond in damages as a joint tort-feasor for negligence in addition to his liability under the act.

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[1] See CL 1948, § 691.581 *et seq.* (Stat Ann 1959 Cum Supp § 27.711 *et seq.*).—REPORTER.

[2] See CL 1948, § 411.1 *et seq.*, as amended (Stat Ann 1960 Rev § 17.141 *et seq.*, as amended).—REPORTER.

At the time the briefs were submitted this was a question of first impression in Michigan. However, the Supreme Court has since resolved the issue in the case of *Husted* v. *Consumers Power Co.* (1965), 376 Mich 41.

In that case Husted was injured when the crane he was operating came in contact with power lines owned by defendant Consumers. Consumers filed a third-party complaint against Husted's employer Hertel-Dego charging negligence on the employer's part and demanding contribution. The Court stated at page 56 of the opinion:

"Thus if Husted could not sue his employer (Hertel-Dego), and we know he could not, Hertel-Dego and Consumers cannot be joint tort-feasors by law. Consumers therefore cannot sue Hertel-Dego for contribution should it be held to respond to plaintiff in damages."

Accordingly the trial judge here was correct in refusing to permit amendment of appellants' third-party complaint to include negligence.

The appellee has filed a cross appeal in this case. As third-party defendant the appellee filed a motion for summary judgment on the grounds that the indemnity agreement cannot be construed to indemnify third-party plaintiffs against their negligence. The trial judge denied the motion stating the indemnity agreement ought to be construed at the trial.

The law on this point is well settled in Michigan. The Supreme Court said in the case of *Title Guaranty & Surety Co.* v. *Roehm* (1921), 215 Mich 586, at p 592:

" 'Indemnity contracts like other contracts are to be so expounded as to effectuate the intentions of the parties. Thus in ascertaining the intention of the parties, the court must take into consideration not only the language of the contract but the situation

of the parties and the circumstances surrounding them at the time the contract was made.' 22 Cyc, p 84."

In his opinion on the motion for summary judgment the trial court said: "The court cannot at this preliminary juncture determine with finality that the terms are equivocal, ambiguous, and uncertain * * * construction thereof must await the trial."

Whatever facts defining the "situation of the parties and the circumstances surrounding them" may be properly established at the trial are appropriate for the court's consideration.

The trial court is therefore affirmed.

The plaintiff-appellee alone having prevailed in full, may tax her costs against the defendants city of Warren and Johnson & Anderson.

McGREGOR, P. J., and FITZGERALD, J., concurred.

LEE *v.* FIDELITY LIFE & INCOME MUTUAL INSURANCE COMPANY.

1. JUDGMENT—SUMMARY JUDGMENT—EASEMENTS—PARKING.

Defendant's motion for summary judgment was properly denied, where plaintiff's complaint stated a cause of action by alleging that her easement of passage over 50' x 75' strip of land had been converted into a parking lot for parking cars of defendant's employees (GCR 1963, 117).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 41 Am Jur, Pleading § 340 *et seq.*
17A Am Jur, Easements § 124.
[3] 17A Am Jur, Easements § 121 *et seq.*
[4] 17A Am Jur, Easements § 112 *et seq.*
[5] 17A Am Jur, Easements § 113.
[6] 20 Am Jur 2d, Costs § 14 *et seq.*

2. SAME—SUMMARY JUDGMENT—EASEMENTS.

Order granting owner of dominant tenement's motion for summary judgment in her action against fee owner of 50′ x 75′ strip of land in which plaintiff had an easement of passage *held*, error, where in effect the court ruled defendant could use the disputed piece of land only for the purposes of ingress and egress (GCR 1963, 117).

3. EASEMENTS—FEE OWNER'S RIGHTS.

Fee owner of 50′ x 75′ strip of land retains full dominion over his land subject merely to the right-of-way conveyed by deed granting perpetual easement of right to cross, and may make any use of his land which does not interfere with a reasonable use of the way.

4. SAME—DOMINANT OWNER'S RIGHTS.

The rights of the owner of an easement of passage are paramount to the extent of the grant.

5. SAME—USER—QUESTION OF FACT—SUMMARY JUDGMENT.

What may be a reasonable and proper use of a fee and what may be necessary to the beneficial use and enjoyment of the easement of passage over a 50′ x 75′ strip of land by the owner of the easement are questions of fact to be determined upon a trial, hence, it was error to grant plaintiff's motion for summary judgment (GCR 1963, 117).

6. COSTS—NEITHER PARTY PREVAILING IN FULL.

No costs are allowed on appeal where order denying defendant's motion for summary judgment is affirmed and order granting plaintiff's motion for summary judgment is reversed, since neither party has prevailed in full (GCR 1963, 117).

Appeal from Berrien; Hadsell (Philip A.), J. Submitted Division 3 November 2, 1965, at Grand Rapids. (Docket No. 133.) Decided December 20, 1965.

Complaint by Maryella Lee against Fidelity Life & Income Mutual Insurance Company, a Michigan corporation, to enjoin interference with her easement right. Summary judgment for plaintiff. Defendant appeals. Reversed and remanded for further proceedings.

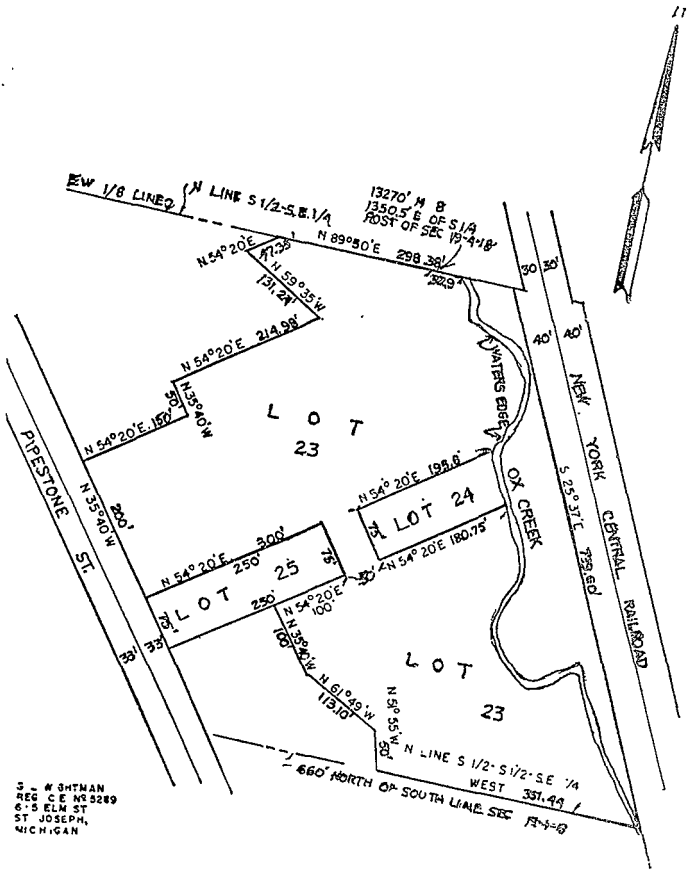
Ryan, McQuillan & Vander Ploeg (*John T. Ryan,* of counsel), for plaintiff.

Small & Shaffer (*Robert P. Small,* of counsel), for defendant.

J. H. GILLIS, J. Plaintiff-appellee Maryella Lee is the owner of lots 24 and 25 of Assessors Plat #31, city of Benton Harbor, Michigan. Defendant-appellant Fidelity Life & Income Mutual Insurance Company is the owner of lot 23 in the same plat. A map is attached to this opinion from which the size and shape of these lots, and their relationship to each other can be discerned.

Plaintiff in her deed was granted an easement over that part of defendant's lot 23 which lies between lots 24 and 25. This easement is in the following language:

"Grant to second parties the right to use said strip of land 50 feet in width between said two parcels (lots 24 and 25) for roadway purposes, and the right to cross the same as a means of ingress and egress to and from the parcel of land last above described (lot 24), and said rights and easements are perpetual and shall run with both of said parcels of land."



Plaintiff in her complaint alleged defendant had converted the strip between lots 24 and 25 into a parking lot for daily and continuous parking of automobiles. Defendant answered stating that its lot had been improved by construction of an office building on a portion thereof; that as a part of the improvement the strip between lots 24 and 25 had been blacktopped; and that a small portion of this strip is used for parking employees' cars. Defend-

ant further contended that the parking of these automobiles did not impair, obstruct, and interfere with the reasonable exercise of plaintiff's easement.

At a pretrial conference plaintiff's position was stated as follows:

"Plaintiff claims that the defendant's use of the right-of-way for any other purpose than ingress or egress to defendant's property is illegal and should be restrained."

The pretrial statement further noted that:

"Plaintiff will file a motion for summary judgment to raise the legal issue of whether defendant can make any use of the strip other than for ingress and egress."

Following the pretrial conference both parties filed motions for summary judgment.[1] Defendant's motion was properly denied.[2]

We are of the opinion that the learned trial court erred in granting the plaintiff's motion for summary judgment. In effect he ruled that the defendant could use the disputed piece of land only for the purposes of ingress and egress. As appellant's counsel, in speaking of appellee's theory of the case, so aptly put it:

"[Appellee's claim that appellant can use the property only for ingress and egress] makes Mrs. Lee the owner with the insurance company holding the easement for ingress and egress. Counsel has his parties mixed. It is appellant which is the owner and it is appellee who has the easement for ingress and egress."

The owner of the fee retains full dominion over his land subject merely to the right-of-way. He may

1 See GCR 1963, 117.—REPORTER.

2 Plaintiff's complaint clearly states a cause of action. Its claimed failure to do so was the only basis of the defendant's motion for summary judgment.

make any use of his land which does not interfere with a reasonable use of the way. 2 Thompson Real Property (1961 Rev), Easements, § 431, p 719. *Kirby* v. *Meyering Land Co.* (1932), 260 Mich 156. The rights of the owner of the easement are paramount to the extent of the grant, *Harvey* v. *Crane* (1891), 85 Mich 316 (12 LRA 601), but what may be a reasonable and proper use of the fee and what may be necessary to the beneficial use and enjoyment of the easement by its owner are questions of fact to be determined upon a trial. *Hasselbring* v. *Koepke* (1933), 263 Mich 466 (93 ALR 1170); *Harvey* v. *Crane, supra.*

It may be that upon a trial of this cause the plaintiff could establish that it was the contemplation of the parties at the time the easement was created that a reasonable use of the easement required free and unobstructed passage over the entire 50′ by 75′ strip of land. It may be that plaintiff can establish that the defendant has allowed cars to be parked on the strip in such a manner as to unreasonably interfere with the plaintiff's beneficial use of the easement, but these are all questions of fact which should be developed only after a full trial on the merits.

The order denying appellant's motion for summary judgment is affirmed. The order granting appellee's motion for summary judgment is reversed, and the cause is remanded for further proceedings. No costs, neither party having fully prevailed.

HOLBROOK, P. J., and BURNS, J., concurred.

DOUTRE *v.* NIEC.

1. NEGLIGENCE—BEAUTICIANS—STANDARD OF CARE—EVIDENCE.

Exclusion of testimony of defendant beauticians as to standard of care used by such operators in the county *held*, reversible error, requiring new trial, in action for head and facial injuries received by plaintiff from bleach and color treatment administered by defendants without a pretreatment patch test, where one of the defendants had been in the business for 24 years and the other for 14 years, had attended conventions of beauticians and observed their practices and said they were abreast of the practices of other beauticians in the county, since no one can be held to a higher standard of care than the average in the industry.

2. NEW TRIAL—BEAUTICIANS—LIABILITY—DAMAGES.

New trial, not limited to liability, is ordered in action for damages because of head and facial injuries received in bleach and color treatment by defendant beauticians without a pretreatment patch test having been made, where there was an error made in the exclusion of evidence touching upon the issue of liability, justice requiring that the jury which determines the liability or the lack of it should have the responsibility for measurng any damages, especially when they are unliquidated.

Appeal from Genesee; Parker (Donn D.), J. Submitted Division 2 November 2, 1965, at Lansing. (Docket No. 402.) Decided December 20, 1965. Rehearing denied January 26, 1966.

Complaint by Helen Doutre against Pauline Niec and Floyd Niec, doing business as Pauline's Beauty

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REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur 2d, Barbers and Cosmetologists § 19.
Liability of barber, beauty shop or specialist, barber college, or school of beauty culture, for injury to patron. 14 ALR2d 860.
[2] 39 Am Jur, New Trial § 24.

Shop, for head and facial injuries received when plaintiff received a bleach and color treatment from defendants. Verdict and judgment for plaintiff. Defendants' motion for new trial granted as to the issue of liability. Defendants appeal and plaintiff cross appeals. Reversed and remanded for new trial as to all issues.

Howard C. Fisher, for plaintiff.

Walter J. Barkey, for defendants.

T. G. KAVANAGH, J. Defendants operate a beauty shop in Flint. On April 19, 1962, plaintiff was given a bleach and color treatment by defendants without a pretreatment patch test. Plaintiff received head and facial injuries as a result of the treatment and sued for damages.

During the trial defendants were not allowed to testify as to the standard of care observed by beauty shops in the Flint area when administering such treatment. The jury awarded plaintiff $10,000. Defendants filed a motion for a new trial. Such motion was granted and a new trial ordered but limited to the question of liability.

Both parties appeal.

The plaintiff alleges error in granting the new trial as to liability on the theory that the court was correct in the first place when he ruled at the trial that the proffered testimony on the standard of care was not admissible. The defendants allege the court erred in limiting the new trial to the issue of liability on the theory that the questions of liability and damages are so closely intertwined that they should be tried together.

As to the plaintiff's claim we find little merit. His objection is based on the theory that the defendants

could know of the practices of the trade in Flint only by hearsay. This is not supported by the record.

The record shows that one of the defendants had been in the business for 24 years and the other for 14 years; they had attended conventions of beauticians and observed their practices and said they were abreast of the practices of other beauticians in Genesee county.

We agree with the trial court's last ruling that these witnesses should have been allowed to testify and that to exclude their testimony was error requiring a new trial. Such testimony is admissible because no one is held to a higher standard of care than the average in the industry. *Barton* v. *Myers* (1965), 1 Mich App 460.

The limitation of the trial to the issue of liability only poses a more difficult problem. It has long been recognized that the questions of liability and damages are so closely intertwined that they may not usually be separated. The only exception the Michigan Supreme Court has so far recognized is in the case wherein "liability is clear" a retrial of the issue of damage alone may be permitted. *Trapp* v. *King* (1965), 374 Mich 608.

In this case the court reiterated its position that despite the court rule authorizing it (GCR 1963, 527.1), limited new trials are not favored. No compelling reason moves us to extend the rule.

The trial judge's opinion states: "This ruling (on the evidentiary question) may have materially influenced the jury on the liability issue. It could not, however, by any stretch of the imagination have affected the issue of damages." This bespeaks an assurance we do not share.

In the case before us the damages are not liquidated and the liability was determined pursuant to a trial in which an admitted error touching on liability was committed. Under these circumstances

it seems to us that justice requires that the jury which determines the liability or lack of it should have the responsibility for measuring any damages.

The trial court's order for a new trial shall be extended to all of the issues. Costs are awarded defendants.

McGREGOR, P. J., and FITZGERALD, J., concurred.

PEOPLE *v.* DONALD D. WILLIAMS.

1. RAPE—EVIDENCE OF OTHER OFFENSES.

A qualified exception to the general rule that evidence of the commission of another offense by the defendant cannot be admitted for the purpose of showing that defendant was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense, is made in cases involving statutory rape to permit admission of specific acts of impropriety between the prosecutrix and the accused for the purpose of showing opportunity, disposition of the parties, and intimate relations tending to break down self-respect and modesty (CLS 1961, § 750.520).

2. CRIMINAL LAW—ASSISTANCE OF COUNSEL—INTERROGATION BY POLICE.

Interrogation of defendant by police which resulted in a statement by him that was later introduced in evidence on trial for statutory rape *held*, not to have deprived him of his constitutional rights, where he had previously consulted counsel and sought the interview, although his counsel was not present thereat (US Const, Am 6; Mich Const 1908, art 2, § 19; Mich Const 1963, art 1, § 20).

REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur, Evidence § 310 *et seq.*
[2] 21 Am Jur 2d, Criminal Law § 314.
[3] 21 Am Jur 2d, Criminal Law § 241 *et seq.*

3. RAPE—SPEEDY TRIAL.

Record on trial of defendant on charge of statutory rape of his daughter, a trial had some 7 months after arraignment and which resulted in conviction of included offense of assault with intent to rape *held*, not to show he was prejudiced, as a result of the delay and no request was made for a more speedy trial, notwithstanding the State had been dilatory in processing the previous charge of incest (CLS 1961, § 750.520).

Appeal from Montcalm; Bebeau (Leo B.), J. Submitted Division 3 November 2, 1965, at Grand Rapids. (Docket No. 580.) Decided December 20, 1965.

Donald D. Williams was convicted of assault with intent to commit rape. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *C. Homer Miel,* Prosecuting Attorney, for the people.

Robert D. Edsall, for defendant.

BURNS, J. Defendant Donald D. Williams, while serving a one-year sentence imposed on a charge not related to this case, was arraigned on a warrant charging the commission of the crime of incest brought on a complaint initiated by his daughter, Donna Williams. Defendant's daughter alleged the act of incest took place on or about February 17, 1963, but she did not complain to the authorities until shortly before the defendant's arraignment on July 17, 1963, explaining the delay was caused by her fear of her father.

The defendant requested an examination, which was held in the justice court on October 4, 1963. On December 10, 1963, at 1:30 p.m., the defendant was interrogated at the office of detective Earl R. DeBoer at the Michigan State police post at Rock-

ford. Defendant was then represented by counsel who was not present at the time of the interrogation.

On a petition of the prosecuting attorney, a *nolle prosequi* was entered by the court on January 20, 1964. Thereafter, on the same date, the defendant was arraigned on a new warrant charging the commission of the crime of statutory rape on complaint of his daughter Donna, a female child under the age of 16 years.[1] The rape charge contained the same averments as to venue and date as contained in the prior warrant charging the commission of incest. After a preliminary examination the defendant was arraigned on an information and was brought to trial by jury on February 11, 1964.

At the trial, Detective Earl R. DeBoer testified concerning the results of the interrogation of December 10, 1963, stating that the defendant had appeared voluntarily to answer questions concerning the then pending charge. Defendant denied the charge but made a statement admitting other immoral acts involving the same complainant. The jury returned a verdict of guilty to the lesser and included offense of assault with intent to commit rape.[2]

Defendant's counsel raises three relevant issues. Incorporated in this appeal are 19 other allegations of error set forth at the request and in the language of the defendant. An examination of this record discloses that the 19 errors proposed by the defendant are either completely refuted by the transcript or are not worthy of comment by this Court.

Counsel for the defendant contends that the court erred in allowing the detective to testify as to the defendant's admission, for the following reasons: (1) the admission related to a separate and distinct

1 CLS 1961, § 750.520 (Stat Ann 1954 Rev § 28.788).—REPORTER.
2 CLS 1961, § 750.85 (Stat Ann 1954 Rev § 28.280).—REPORTER.

offense not covered by the then pending charge; (2) the defendant's counsel not being present, the statement was inadmissible.[3]

It has long been the rule in Michigan that the evidence of the commission of another offense by the defendant cannot be admitted for the purpose of showing that the defendant was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense. But in cases involving statutory rape, a qualified exception to the general rule permits proof of specific acts of impropriety between the prosecutrix and the accused for the purpose of showing opportunity, disposition of the parties, and intimate relations tending to break down self-respect and modesty. *People* v. *Jennes* (1858), 5 Mich 305; *People* v. *Gengels* (1922), 218 Mich 632; *People* v. *Treil* (1926), 235 Mich 469.

As to the second basis for objection raised by the appellant's counsel, it should be emphasized that this is not a case where the defendant was questioned for several days and was refused the services of an attorney as in the case of *People* v. *Hamilton* (1960), 359 Mich 410, or where a defendant has requested his attorney be present before or during interrogation as in *Escobedo* v. *Illinois* (1964), 378 US 478 (84 S Ct 1758, 12 L ed 2d 977). The interrogation in the instant case occurred after defendant had conferred with his counsel. In fact, during oral arguments before this Court, it was indicated that it was the defendant himself who sought this interview.

While there are no Michigan cases on this exact proposition of law, it would appear that the present case falls within the principle of *Williams* v. *South*

[3] See US Const, Am 6; Mich Const 1908, art 2, § 19; Mich Const 1963, art 1, § 20.—REPORTER.

Carolina (ED SC), 237 F Supp 360. When a defendant has ample opportunity to confer with his attorney and does not demand to see him during the entire interrogation, the defendant's constitutional rights are not violated.

The third ground raised by counsel is that the appellant's constitutional rights to a speedy trial were denied. It would appear that the State was dilatory in processing the charge of incest. However, on the instant charge before this Court, that of statutory rape, the State did proceed with a timely trial. Under the circumstances of this particular case, the defendant having served a portion of another sentence from the date of arrest on the former charge up to the date of trial in the instant case, and no showing having been made on this record of any request for a more speedy trial and the record having failed to indicate any prejudice to the defendant as a result of the delay, it is apparent that he was not prejudiced in any manner.

Judgment of conviction affirmed.

HOLBROOK, P. J., and J. H. GILLIS, J., concurred.

PICARD *v.* GREISINGER.

1. SCHOOLS AND SCHOOL DISTRICTS—TORTS—GOVERNMENTAL IMMUNITY.

A school district, as an agency of the State, is clothed with the State's immunity from liability for ordinary torts committed in the course of its exercise of the governmental function entrusted to it.

2. SAME—TORTS—GOVERNMENTAL IMMUNITY.

No recovery of damages from either the school board or school district is permitted for injuries plaintiff minor sustained when basketball was thrown at him by defendant teacher while such plaintiff was watching a gym class at defendants' school, the defense of governmental immunity being available to such agencies as a bar to an action for tort.

Appeal from Wayne; Baum (Victor J.), J. Submitted Division 1 November 3, 1965, at Detroit. (Docket Nos. 24, 25.) Decided December 20, 1965.

Declaration by Donald Picard against Dale Greisinger for injuries sustained when defendant intentionally threw a basketball at plaintiff, striking plaintiff in the head and severely injuring his eye on June 4, 1958; and against Taylor Township School District, a school district of the State of Michigan, and Taylor Township Board of Education for the same injuries sustained when defendants retained an employee, who they knew or should have known had a violent temper. Derivative action by Mel Picard, plaintiff's father. Summary judgment for

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur, Schools § 56 *et seq.*

defendant school district and school board on the ground of governmental immunity from liability for torts. Plaintiffs appeal. Affirmed.

Sugar & Schwartz (*David M. Tyler* and *Lawrence Warren,* of counsel), for plaintiffs.

Harry F. Vellmure and *Victor T. Mitea,* for defendants school board and school district.

QUINN, J. Plaintiffs filed their actions to recover for injuries allegedly sustained by the minor plaintiff while watching a gym class at the school he attended. Defendant Greisinger was a teacher at that school and part of his duties was to conduct, instruct, and supervise gym classes. The school was in defendant school district and was governed by defendant board of education. Plaintiffs alleged the minor was injured as the result of being struck in the head by a basketball thrown at him intentionally and forcibly by Greisinger at a time when the latter knew, or should have known, the minor was unprepared to catch it. Plaintiffs further alleged that Greisinger refused to allow the minor to seek medical treatment and required him to remain in the gym class in spite of the injuries. Plaintiffs pleaded that Greisinger's negligence was imputed to the district and board; that they retained Greisinger in employment even though they knew, or should have known, he was of violent disposition and that he had and was likely to cause harm to students; and that the district and board were negligent in failing to provide adequate supervision for students. In their answers, the district and board pleaded affirmatively the defense of governmental immunity. By replies, plaintiffs pleaded this defense did not preclude the district and board from liability for their own tortious acts or those of their

agents, servants, and employees. The trial court granted the motion of the district and board for summary judgment on the authority of *Sayers* v. *School District No. 1, Fractional* (1962), 366 Mich 217. Plaintiffs appeal from this action by the trial court.

Plaintiffs raise two questions on this appeal, namely:

1. Are school districts and boards of education immune from liability for injuries sustained as a result of the tortious conduct of their employees acting within the course and scope of their employment?

2. Are school districts and boards of education immune from liability for injuries sustained as a result of their own tortious conduct?

The facts pertinent to decision have been recited from plaintiffs' pleadings earlier in this opinion.

Contrary to apparent expectations,* the doctrine of governmental immunity in tort actions arising from the performance of a governmental function is still with us. How virile it remains depends on whom you read and what case. See *McDowell* v. *State Highway Commissioner* (1961), 365 Mich 268; *Stevens* v. *City of St. Clair Shores* (1962), 366 Mich 341; *Lewis* v. *Genesee County* (1963), 370 Mich 110; *Myers* v. *Genesee County Auditor* (1965), 375 Mich 1. However, *Sayers, supra,* is subject to only one interpretation. A clear majority of the Supreme Court there said a school district is clothed with immunity by the doctrine while in the exercise of a governmental function. It does not except the tortious conduct of employees acting within the course and scope of their employment, nor does it

* "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan." EDWARDS, J. in *Williams* v. *City of Detroit* (1961), 364 Mich 231, 250; concurred in by three other justices.

except the tortious conduct of the district and board from the protection of the doctrine. *Sayers* has not been overruled and it is authority for the action of the lower court in this case.

Affirmed, with costs to appellees.

LESINSKI, C. J., and WATTS, J., concurred.

FOGEL *v.* SINAI HOSPITAL OF DETROIT.

1. HOSPITALS—PATIENTS—NEGLIGENCE—STANDARD OF CARE.
   The standard of care required of a defendant hospital in an action against it for injuries received by a patient therein alleged to be due to defendant's negligence is that of an ordinary, careful, and prudent person under the same circumstances, where the situation is one not requiring expert testimony.

2. SAME—PATIENTS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.
   Denial of defendant hospital's motions for directed verdict and for judgments notwithstanding verdicts in actions by husband and wife for fractured hip latter sustained while a patient en route to toilet with the assistance of only 1 nurse's aide *held,* not error, a jury question being presented as to whether defendant had been negligent.

3. SAME—PATIENTS—HIP INJURY—PERMANENT INJURY—EVIDENCE—REQUEST TO CHARGE.
   Requested charge that there was no evidence of permanent injury as result of fracture of hip by plaintiff, a 79-year-old woman,

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REFERENCES FOR POINTS IN HEADNOTES

[1; 2] 26 Am Jur, Hospitals and Asylums § 14.
[3, 4] 22 Am Jur 2d, Damages § 354.
[5] 22 Am Jur 2d, Damages § 316.
Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury. 50 ALR2d 419.
[6] 4 Am Jur 2d, Appeal and Error § 515 *et seq.*
22 Am Jur 2d, Damages §§ 104, 311.

who fell while en route to toilet while a patient in defendant hospital *held,* properly denied, where prior medical reports indicated demineralization, and, at time of trial some 3 years later, she still could not move the leg nor walk on it.

4. EVIDENCE—MORTALITY TABLES—PERMANENT INJURIES.
Claim of error in admission of mortality tables in action by 79-year-old patient in defendant hospital for injuries received from hip fracture *held,* eliminated by reason of holding that there was evidence the injury was permanent.

5. SAME—MORTALITY TABLES—PERMANENT INJURIES—HEALTH.
Mortality tables are admissible and to be used by jury if it determines the issue of reasonable health favorably to the one offering the tables, where there is evidence the injuries involved were permanent.

6. APPEAL AND ERROR—MEDICAL BILLS—RECORD.
Admission in evidence of certain medical bills without it having been established they were necessary and reasonable was error, but not reversible error, where the bills were not made a part of the record so that an appropriate reduction of the judgments could be made in actions by husband and wife for injuries latter sustained as a result of defendant hospital's alleged negligence.

Appeal from Wayne; Elliott (Phillip), J., retiree, presiding. Submitted Division 1 November 3, 1965, at Detroit. (Docket Nos. 343, 344.) Decided December 20, 1965. Rehearing denied January 28, 1966.

Case by Helen Fogel against Sinai Hospital of Detroit for personal injuries sustained in fall while a hospital patient. Derivative suit by David Fogel, husband. Cases consolidated on trial and appeal. Verdicts and judgments for plaintiffs. Defendant appeals. Affirmed.

Lipton, Papista & Garfinkle (*Donald Garfinkle,* of counsel), for plaintiffs.

Ward, Plunkett, Cooney, Rutt & Peacock (*John D. Peacock,* of counsel), for defendant.

QUINN, J. Plaintiffs brought these actions to recover damages allegedly arising from the negligence of defendant. Helen Fogel claimed damages for personal injuries, pain, suffering, and disability; her husband, David, claimed damages for hospital and medical expenses for Helen and for loss of consortium. Judgments entered on jury verdicts for plaintiffs, and the trial court denied defendant's motions for judgments *non obstante veredicto* or for new trial. Defendant appeals from denial of these motions.

Defendant claims the trial court erred in not granting its motion for directed verdict made on the basis plaintiffs had failed to establish a prima facie case; that the trial court erred in submitting the question of permanent injuries to the jury, in permitting the mortality tables in evidence, and in permitting certain medical bills in evidence.

October 15, 1961, Helen Fogel fell at home and was taken to defendant hospital for care and treatment. She was then 79 years of age. X-rays disclosed no fractures and her doctor ordered that she be encouraged to walk. By November 1, 1961, Helen Fogel was walking some and she continued to do so thereafter. Late in the evening of November 5, 1961, she signalled for a nurse to assist her to the bathroom. A nurse's aide appeared and assisted plaintiff as requested in spite of plaintiff's warning that one aide was not capable of doing so. On the way to the bathroom, plaintiff slipped, the aide could not hold her and plaintiff fell. Her hip was fractured in the fall, and these actions were to recover the damages arising therefrom.

Defendant's first allegation of error is based on its contention that since there was no evidence of the skills usually exercised by hospitals in the Detroit area in the care of patients, no standard of

care was established, and no breach of duty was shown. Defendant's position in this regard arises from the fact that plaintiffs pleaded that defendant owed a duty to treat Helen Fogel according to such a standard; it is not supported legally. As stated in 2 Harper and James, Law of Torts, at p 966:

"Except for malpractice cases (against a doctor, dentist, et cetera), there is no general rule or policy *requiring* expert testimony as to the standard of care, and this is true even in the increasingly broad area wherein expert opinion will be received."

In *Lince* v. *Monson* (1961), 363 Mich 135, 139, the Michigan Supreme Court succinctly stated the standard in the following language:

"In the ordinary negligence case a question is presented whether an ordinary, careful and prudent person would have done as defendant did under the circumstances."

The record here presented a jury question on defendant's negligence and it was not error to deny defendant's motions for directed verdict and for judgments *non obstante veredicto*.

Defendant next claims the trial court erred in failing to give defendant's requested charge that there was no evidence of permanent injury in the case. Defendant relies on *Kethledge* v. *City of Petoskey* (1914), 179 Mich 301, as authority for its position that permanency of injury is a medical question and there must be competent medical testimony of permanency before that question can be submitted to a jury. On the facts of *Kethledge*, it may be so read. It involved a 17-year-old and the claimed permanent injury involved damage to ligaments around the elbow. In reversing the trial court for submitting the question of permanent injury to the jury, the Supreme Court said (p 311):

"We are of the opinion that the above instructions were erroneous (these instructions dealt with the question of permanent injury), for the reason that there was *no evidence* in the case from which the jury should have been permitted to find that the plaintiff was permanently injured."

Here, Helen Fogel was 79 when she broke her hip, prior medical reports indicated demineralization, at the time of trial, three years later, she still could not move the leg involved nor walk on it. This is evidence of permanency and the requested charge was properly denied.

This holding eliminates from consideration defendant's first claim of error with respect to receiving the mortality tables in evidence, namely: their use is improper absent permanent injury. Defendant next claims it was error to admit the tables because Helen Fogel was not in reasonably good health at the time of the accident. It was disputed whether or not she was in reasonable health. In this situation, the tables are admissible and are to be used by the jury if it determines the issue of reasonable health favorably to the one offering the tables. *Norris* v. *Detroit United Railway* (1916), 193 Mich 578.

Defendant's final allegation of error is that certain medical bills were allowed in evidence without proper foundation being laid as to their necessity and reasonableness. There is no question that the law requires such a foundation, and that foundation was not laid here. This was error, but it is not reversible error. If the bills were before this Court, an appropriate reduction of the judgments could be made. The bills are not part of the record and this Court has no basis for correcting this error.

The trial court is affirmed, with costs to appellees.

LESINSKI, C. J., and WATTS, J., concurred.

PEOPLE *v.* DORIS WHITE.

1. CRIMINAL LAW—NONJURY CASES—WEIGHT OF EVIDENCE.

The trial judge is the trier of the facts in a nonjury trial of a prosecution for crime and may give such weight to the testimony as it is entitled to in his opinion.

2. APPEAL AND ERROR—NONJURY CASES—PREPONDERANCE OF EVIDENCE.

The Court of Appeals will not reverse the judgment of a trial court in a nonjury case on a finding of fact unless the evidence clearly preponderates in a direction opposite to the finding by the trial court.

3. CRIMINAL LAW—LARCENY—EVIDENCE—IDENTIFICATION OF DEFENDANT.

Evidence presented in prosecution of appellant and another for larceny by trick *held*, sufficient to support finding of guilt by trial court sitting without a jury, notwithstanding claim on part of appellant that 80-year-old complainant, having been ill, was unable to identify defendant (CLS 1961, § 750.356).

Appeal from Recorder's Court for the City of Detroit; Gillis (Joseph A.), J. Submitted Division 1 November 3, 1965, at Detroit. (Docket No. 616.) Decided December 20, 1965. Leave to appeal denied by Supreme Court April 19, 1966. See 377 Mich 708.

Doris White and another were convicted of larceny. Defendant White appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel D. Olsen,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur, Evidence § 1216.
[2] 5 Am Jur 2d, Appeal and Error § 835.
[3] 32 Am Jur, Larceny § 135 *et seq.*

Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Rheo C. Marchand,* Assistant Prosecuting Attorney, for the people.

Piggins, Balmer, Grigsby, Skillman & Erickson (*Robert H. Harkness,* of counsel), for defendant.

WATTS, J. Defendants, Doris White and Elizabeth Marshall, were convicted of larceny of $214 by trick in a nonjury trial in the recorder's court of Detroit, both defendants having signed written waivers of trial by jury. Defendant White was sentenced to serve 2–1/2 to 5 years in the Detroit house of correction, and appeals. Defendant Marshall did not appeal.

On July 15, 1964, a criminal complaint was filed by J. K. Winfrey, an 80-year-old woman, alleging defendants committed larceny of $214 by trick in violation of CLS 1961, § 750.356 (Stat Ann 1962 Rev § 28.588).

Complainant Winfrey testified that while shopping in a downtown Detroit store she became ill and was offered assistance by defendant White. At the suggestion of defendant White, they left the store and later were met by defendant Marshall. Defendant Marshall told defendant White and the complainant that she had found a purse which contained approximately $3,000. The complainant and the two defendants went to a nearby park to talk about the "found" money. Defendant Marshall left the conversation on the pretext of reporting the "find" to her "boss" and later returned with the report that the money would be divided between the two defendants and the complainant. After the complainant was persuaded by the defendants to withdraw funds from a savings account in a downtown bank, she delivered to defendants White and Marshall $214 in cash. The complainant was told by the defend-

ants to see a Mr. McBride for the return of the money. Mr. McBride was not located and the money was not returned.

It is the contention of defendant White that the complainant, being a person 80 years of age and having been ill, was unable to identify defendant and that during the trial the complainant had many failures of memory.

The issue in the instant case is whether or not the evidence presented by the prosecution is sufficient, if believed, to support a finding by the trier of the facts that the accused is guilty of the crime charged beyond a reasonable doubt.

In cases tried without a jury, the trial judge is the trier of the facts and he may give such weight to the testimony as in his opinion it is entitled. This Court will not reverse the judgment of the trial court unless evidence clearly preponderates in a direction opposite to the finding of fact by the trial court. *People* v. *Szymanski* (1948), 321 Mich 248; *People* v. *Geddes* (1942), 301 Mich 258; *People* v. *Chesbro* (1942), 300 Mich 720.

Affirmed.

LESINSKI, C. J., and QUINN, J., concurred.

BRABANT *v.* MICHIGAN CONSOLIDATED GAS COMPANY.

1. DAMAGES—MENTAL ANGUISH—BREACH OF CONTRACT—PLEADING.
No recovery for mental anguish as an element of damages for breach of contract is allowed, where plaintiff's complaint neither alleges a contract nor the breach of a contract.

2. SAME—MENTAL ANGUISH—FRAUD—PLEADING.
Complaint by elderly woman who conveyed an easement across her property for a gas line failed to state a cause of action for fraud entitling her to damages for mental anguish, where averments of fraud or mistake failed to set forth circumstances of any fraud or mistake with particularity (GCR 1963, 112.2).

Appeal from Genesee; Newblatt (Stewart A.), J. Submitted Division 2 November 3, 1965, at Lansing. (Docket No. 928.) Decided December 20, 1965.

Complaint by Armene L. Brabant against Michigan Consolidated Gas Company for cancellation of deed granting an easement and for damages because of mental torture. Summary judgment based on defendant's offer to return easement and pay costs only. Plaintiff appeals. Affirmed.

Joseph & Joseph (*Joseph R. Joseph,* of counsel), for plaintiff.

Dutchess, Mika, Miles, Meyers & Snow (*John C. Jones,* of counsel), for defendant.

FITZGERALD, J. Plaintiff, described in her brief as an elderly lady, granted an easement to defendant

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 22 Am Jur 2d, Damages §§ 195, 283.

gas company to construct a gas line across her property in return for the consideration of $1. She was told by defendant that the gas line would neither damage her property nor affect its value. Plaintiff later discovered that the easement she had signed contained the following clause:

"Grantor agrees that during the life of this easement no structure will be erected or placed on said premises."

Plaintiff brought suit seeking cancellation of the easement and damages for mental anguish, claiming that the easement was tantamount to a sale of her property for $1.

Defendant filed an offer of judgment providing for the return of the unrecorded easement and payment of plaintiff's costs and fees under GCR 1963, 519. The offer of judgment was not accepted by plaintiff.

At pretrial conference, the parties agreed that the only issue to be decided was plaintiff's right to recover for "mental anguish and emotional distress". Defendant moved for summary judgment on this question and the parties agreed that, in the event the motion was granted, judgment would enter in accord with the terms of defendant's previous offer of judgment.

The trial court granted plaintiff 15 days to "specify in detail what damages plaintiff seeks and to supply law in support of the plaintiff's right to recover." The requested specification was not forthcoming and judgment was entered ordering defendant to return the unrecorded easement and pay plaintiff costs of $32.75. Plaintiff brings this appeal.

Plaintiff states the question on appeal as follows:

"Is an elderly lady entitled to recover for mental suffering caused by the defendant representing to her that the signing of a certain easement would not affect her property in any way and then she

discovers that the easement contained the clause 'grantor agrees that no structure shall be placed on said premises'?"

Defendant is perhaps a bit more succinct in its statement of the question on appeal as: "Does plaintiff's complaint state a cause of action for 'mental torture' or mental anguish?"

Certainly these are not bifurcated statements of the issue before us and taken together set forth everything before this Court. The opinion herein can be said to encompass them both.

Recovery for mental anguish is no stranger to the law, though many inflexible guidelines have been drawn around it. The fact situation here suggests two possible applications of rules governing damages for mental anguish.

More specifically, in suits for breach of contract, mental anguish may be an element of damages. *Stewart* v. *Rudner* (1957), 349 Mich 459. Here, however, plaintiff's complaint furnishes us with no contract, express or implied, nor does it allege any breach of a contract.

The remedy of an action for fraud or misrepresentation with attendant mental anguish might have been open to plaintiff in this case, but once again, the complaint fails to state any specific misrepresentations by defendant. Though the prayer for relief asks that plaintiff "be awarded damages for the fraud and misrepresentation of the defendant," GCR 1963, 112.2 was not complied with in its direction that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

The record is devoid of any attempt on the part of plaintiff to amend, but rather, demonstrates unequivocally that plaintiff elected to stand on the footings of the pleadings as they were originally

filed. Those footings prove to be a shaky foundation for a fact situation such as presented here.

In the absence of an allegation of contract and its breach or fraud, misrepresentation, or some other actionable wrong, we must hold with the trial judge that no cause of action was stated, nor can any be implied.

Affirmed. Costs to appellees.

McGREGOR, P. J., and T. G. KAVANAGH, J., concurred.

HAZELTON *v.* HAZELTON.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.

   Trial court's finding that defendant husband had been guilty of extreme cruelty to plaintiff wife in suit for divorce by reason of his associations with other women *held,* amply supported by testimony in the record.

2. APPEAL AND ERROR—CHANCERY CASES—FINDINGS BY TRIAL COURT—EVIDENCE.

   Findings of the trial court in chancery matters are not disturbed on appeal, where supported by credible evidence and no credible evidence to the contrary is adduced.

3. SAME—CREDIBILITY OF WITNESSES.

   The credibility of a witness is better judged by the trier of the facts who has an opportunity to see and hear the witness testify than an appellate court which must depend entirely on the printed record.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation § 437.
[2] 5 Am Jur 2d, Appeal and Error § 839.
[3] 5 Am Jur 2d, Appeal and Error § 831.
[4] 17A Am Jur, Divorce and Separation § 924.

4. DIVORCE—DIVISION OF PROPERTY.

An award of something less than half of the property of the parties to plaintiff wife upon grant to her of divorce terminating 25-year marriage *held*, not to indicate an abuse of discretion lodged in the court in making division of the property (CL 1948, § 552.101).

Appeal from Ingham; Peterson (William R.), J., presiding. Submitted Division 2 November 3, 1965 at Lansing. (Docket No. 1,036.) Decided December 20, 1965.

Complaint by Maude Hazelton against Reuben C. Hazelton for divorce on ground of extreme and repeated cruelty, with cross complaint by defendant on ground of desertion. Judgment for plaintiff. Defendant appeals. Affirmed.

Jack W. Warren, for plaintiff.

Haskell L. Nichols, for defendant.

T. G. KAVANAGH, J. After 25 years of marriage plaintiff, Maude Hazelton, sued for divorce on the ground of extreme cruelty. The defendant, Reuben C. Hazelton, filed a cross claim alleging desertion.

After a trial the chancellor found that the plaintiff had established her case and the defendant had not. He granted the plaintiff a divorce and awarded her something less than half of the property of the parties.

The defendant's appeal asserts that the court erred in awarding the divorce to the plaintiff, claiming the divorce should have been granted him, and also that the property awarded plaintiff was excessive.

The parties were the only witnesses at the trial. In his opinion the chancellor stated without equivocation that he did not believe the testimony of the

defendant and found the facts to be as the plaintiff testified.

Finding as he did that the defendant was guilty of cruelty in associating with other women, upon the ample testimony to that effect in the record, we accept his determination, and likewise his rejection in full of defendant's testimony as to desertion.

While appeals in chancery matters are heard *de novo,* we have traditionally declined to upset the findings of a chancellor when the record contains evidence to support his conclusions and no credible evidence to the contrary is adduced. A reading of the record does not move us to vary the trial court's finding one iota. We have long recognized that the opportunity to see and hear the witness as he testifies makes the trier of the facts a better judge of the credibility of a witness than one who must depend entirely on the printed record for his belief. See *Chubb* v. *Chubb* (1941), 297 Mich 501.

The award of property in a divorce action is by statute squarely within the sound discretion of the court. CL 1948, § 552.101 (Stat Ann 1957 Rev § 25.131). Nothing has been asserted here which could seriously be regarded as indicating an abuse of his discretion. *Pinchuk* v. *Pinchuk* (1947), 317 Mich 523.

Affirmed, with costs to appellee.

McGREGOR, P. J., and FITZGERALD, J., concurred.

JORDAN *v.* C. A. ROBERTS COMPANY.

1. WORKMEN'S COMPENSATION—EXCLUSIVE REMEDY.
   The workmen's compensation act provides the exclusive remedy for recovery against the employer of a person injured or killed (CL 1948, § 411.4).

2. SAME—ADJUDICATION BY WORKMEN'S COMPENSATION APPEAL BOARD—RES JUDICATA.
   The decision of the workmen's compensation appeal board having jurisdiction to make an award of workmen's compensation, from which no appeal is taken, constitutes an adjudication that the person injured was an employee of the defendant employer to which the doctrine of *res judicata* is applicable as a bar to recovery from the employer in an action under the death act by the employee's widow (CL 1948, § 411.4; CLS 1961, § 600.2922).

3. SAME—ADJUDICATION BY WORKMEN'S COMPENSATION APPEAL BOARD—COLLATERAL ATTACK.
   Unappealed workmen's compensation redemption order, followed by acceptance and payment thereunder, estops the beneficiary, or others, from collateral attack on findings necessary to validity of the order (CL 1948, § 411.4).

Appeal from Wayne; Gilmore (Horace W.), J. Submitted Division 1 November 4, 1965, at Detroit. (Docket No. 174.) Decided December 20, 1965. Leave to appeal granted by Supreme Court March 15, 1966. See 377 Mich 704, 379 Mich 235.

Complaint by Thelma Leola Jordan, administratrix of the estate of John C. Jordan, against C. A.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 64 *et seq.*
[2] 58 Am Jur, Workmen's Compensation §§ 493, 496.
Res judicata as regards decisions or awards under workmen's compensation acts. 122 ALR 550.
[3] 58 Am Jur, Workmen's Compensation § 498.

Roberts Company, a foreign corporation, and others for damages under the death act (CLS 1961, § 600.2922 [Stat Ann 1962 Rev § 27A.2922]), for her husband's death. Accelerated judgment for defendant C. A. Roberts Company. Plaintiff appeals. Affirmed.

Albert Lopatin (*Norman L. Zemke,* of counsel), for plaintiff.

Alexander, Buchanan & Conklin (*Floyd Westcott,* of counsel), for defendant C. A. Roberts Company.

QUINN, J. Plaintiff's complaint of June 21, 1963, alleged that certain acts of negligence on the part of defendant C. A. Roberts Company caused the death of her husband, John C. Jordan, an independent contractor. Roberts' answer pleaded affirmatively that at the time of his death, Jordan was an employee of Roberts and the exclusive remedy was under workmen's compensation statutes; that plaintiff as widow voluntarily agreed to accept redemption of Roberts' liability as employer and February 24, 1961, a workmen's compensation department redemption order was entered based on this agreement. That payment under the redemption order was made and accepted. Roberts then moved for accelerated judgment. In granting the motion, the trial court held that the redemption order followed by acceptance of payment estops the beneficiary at this time from a collateral attack on the findings necessary to the validity of such order. Plaintiff appeals.

The issue is: Does a workmen's compensation redemption order, followed by acceptance and payment thereunder, from which no appeal has ever been taken estop the beneficiary, or others, from collateral attack on findings necessary to validity of said order?

At his death, John C. Jordan left surviving his widow, the plaintiff, and two children by a former marriage, both of whom were of full age. Plaintiff filed application for hearing and adjustment of claim for workmen's compensation benefits with the workmen's compensation department January 5, 1961, through her attorney. In February, 1961, she executed the agreement to redeem and she was represented by an attorney. February 24, 1961, the redemption order was made; its terms were complied with by Roberts and plaintiff accepted payment. No appeal was ever taken from the redemption order.

If John C. Jordan was an employee of defendant Roberts at the time of his death, workmen's compensation benefits are the exclusive remedy. CL 1948, § 411.4 (Stat Ann 1960 Rev § 17.144). Also *Moran* v. *Nafi Corp.* (1963), 370 Mich 536. In *Hughson* v. *City of Kalamazoo* (1935), 271 Mich 36, 41, the Supreme Court said:

"When the agreement for compensation made between plaintiff and defendant was presented to the department of labor and industry, and was approved by it, the department necessarily determined plaintiff was an employee of defendant entitled to compensation. It had jurisdiction so to do. Though its determination may have been erroneous according to the subsequent opinion of this Court, such order was never appealed from and stands as an adjudication by the department. The erroneous exercise of undoubted jurisdiction does not amount to a want of jurisdiction."

In *Ayers* v. *Genter* (1962), 367 Mich 675, the Supreme Court said:

"In behalf of plaintiff Ayers, argument is raised that the decision of the workmen's compensation appeal board concerning the defendant's status as an employee is not *res judicata* in a subsequent per-

sonal injury action between the parties. It is clear that in this jurisdiction the doctrine of *res judicata* is applicable to a decision rendered in workmen's compensation proceedings."

These authorities clearly support the action of the trial court and it is affirmed, with costs to appellee.

LESINSKI, C. J., and WATTS, J., concurred.

RITTER *v.* DERROW MOTOR SALES, INC.

AUTOMOBILES—OWNERSHIP—DEALERS—OHIO—CERTIFICATE OF TITLE.

Determination by trial court that defendant automobile dealer was owner of car under Ohio law at time it was involved in accident in this State *held,* proper, where the dealer had never given Ohio certificate of title to a previous purchaser of the vehicle, dealer had regained possession of it and sold it to driver but had not yet had the title transferred to such driver, hence, summary judgment for plaintiffs on issue of ownership in actions for damages by reason of personal injuries to plaintiff wife was proper (Page's Ohio Revised Code, § 4505.4).

Appeal from Monroe; Wiepert (William J., Jr.), J. Submitted Division 2 November 4, 1965, at Detroit. (Docket Nos. 295, 296.) Decided December 20, 1965. Rehearing denied January 28, 1966.

Complaint by Ted A. Ritter against Derrow Motor Sales, Inc., an Ohio corporation, Edwin Hasselworth,

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REFERENCES FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic §§ 30, 37.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interests. 18 ALR2d 813.

and Dana K. Reed for injuries sustained in an automobile accident. Summary judgment for plaintiff that defendant Derrow was owner of one of the automobiles at the time of the collision. Defendant Derrow appeals. Affirmed.

James J. Kelley, Jr., for plaintiff.

Ready & Braunlich (*William J. Braunlich, Jr.,* of counsel), for defendant.

QUINN, J. These cases were filed to recover for personal injuries suffered by Ted A. Ritter in a collision of motor vehicles and for incidental loss of consortium suffered by his wife, Marilyn J. Ritter. Plaintiffs and defendant Derrow Motor Sales, Inc., an Ohio corporation, moved for partial summary judgment on the issue of Derrow's ownership of the vehicle involved at the time of the collision. The trial court granted plaintiff's motion and denied Derrow's ruling that the latter was the owner under Ohio and Michigan law at the time of collision. Derrow appeals.

The issue presented by the appeal is precise. Was the trial court correct in its ruling?

The following facts pertinent to decision were agreed to by counsel: August 29, 1958, Derrow sold the vehicle here involved to Reed, who paid nothing down but who executed a promissory note and conditional sales contract for the price of the vehicle. Reed never received certificate of title. He returned the vehicle to Derrow by October 15, 1958, stating he could not pay for it. September 9, 1958, a certificate of title was issued to Reed but Derrow retained it. This certificate was lost or misfiled by Derrow. From October 15, 1958 through October 31, 1958, the vehicle was on Derrow's sales lot.

Derrow's salesman showed it to defendant Hasselworth who drove it and then executed a sales order for it November 1, 1958. Between that date and November 5, 1958, certain repairs were made to the vehicle by Derrow for Hasselworth, and on November 5, 1958, the vehicle was invoiced to Hasselworth, his license plates were attached to it and he was given possession of it. The accident involved in these cases occurred November 6, 1958, while Hasselworth was driving the vehicle in Monroe county, Michigan. November 13, 1958, Derrow made application for and obtained a duplicate certificate of title in Reed's name. The next day Derrow transferred this certificate of title to Derrow. In the application for this transfer, Derrow stated it was the lawful owner having "acquired said motor vehicle by repossession from Reed". November 17, 1958, Derrow caused the certificate of title to be issued to Hasselworth.

To sustain its position that it is not an owner under Ohio law, Derrow relies on Ohio certificate of title act, Page's Ohio Revised Code, § 4505.04, which is as follows:

"No person acquiring a motor vehicle from the owner thereof, whether such owner is a manufacturer, importer, dealer, or otherwise, shall acquire any right, title, claim or interest in or to said motor vehicle until such person has had issued to him a certificate of title to said motor vehicle. * * * No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless evidenced:

(A) By a certificate of title or a manufacturer's or importer's certificate issued in accordance with §§ 4505.01 to 4505.19, inclusive, of the Revised Code;

(B) By admission in the pleadings or stipulation of the parties."

and Ohio adjudications construing the act. Derrow contends this statute, as construed by Ohio courts, makes the issuance or nonissuance of a certificate of title solely determinative of the question of ownership.

If this proposition is accepted as correct, its application here imposes liability on Reed as an owner, even though all concerned admit Reed had nothing to do with the vehicle for more than three weeks before the accident. The trial court refused to reach such an absurd result, and in our opinion, he did so properly. After finding the purpose of the Ohio statute was to prevent the sale of stolen or other unregistered vehicles, the trial court recognized the binding force of Ohio decisions under principles of conflict of laws, but he found that the precise question before him had not been decided by the Ohio courts and stated his opinion as follows:

"This is not quite the situation of any of those cases that have been litigated in Ohio, and the court feels justified in interpreting the controlling law to be that where possession has been retaken, title has, in effect, by operation of law been vested as here in Derrow Motor Sales by taking repossession, and by acting as full and complete owner of the vehicle, the resting place of the paper title is unimportant. The court accordingly grants the plaintiffs' motion for a summary judgment in each case to the extent of finding that Derrow Motor Sales, Inc., was the owner under the Ohio law of the motor vehicle in question at the time of the accident."

As we read the Ohio decisions, the trial court was correct in this statement and his conclusion is supported by *United States Fidelity & Guaranty Company* v. *Trussell* (DC WD Va), 208 F Supp 154, which interpreted a similar statute of Virginia on similar facts exactly as the trial court here interpreted the Ohio statutes.

The trial court is affirmed on its determination that Derrow was an owner under Ohio law at the time of the accident, and we hold summary judgment for plaintiffs was proper on this issue. Having reached this conclusion, it is unnecessary to decide whether Derrow was an owner under Michigan law, and we decline to decide that question. Appellees may recover costs.

LESINSKI, C. J., and WATTS, J., concurred.

KING *v.* DALY.

1. WITNESSES—CROSS-EXAMINATION—BIAS—DISCRETION OF COURT.
The scope and duration permitted in the cross-examination of witnesses to show bias or interest rests in the sound discretion of the trial court, and the exercise thereof will not be reversed absent a clear showing of abuse.

2. SAME—CROSS-EXAMINATION.
Record in actions for personal injuries to plaintiff wife, a pedestrian, *held*, not to reveal that plaintiff was unduly or prejudicially restricted in the cross-examination of a witness for defendant motorist, where it appears he had identified himself as a retired nursery farmer but plaintiff elicited from him that he had retired after over 40 years' service as an attorney for different kinds of insurance companies and cross-examination was not stopped until plaintiff made the argumentative charge that he gave his talents to the defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Witnesses § 716.
Cross-examination for purpose of showing bias or hostility, on part of witness. 74 ALR 1157.
[3, 5] 5 Am Jur 2d, Appeal and Error § 894.
[4, 6] 5 Am Jur 2d, Appeal and Error §§ 891–894.
[7, 8] 8 Am Jur 2d, Automobiles and Highway Traffic § 1018 *et seq.*

3. APPEAL AND ERROR—INSTRUCTIONS.
An appellate court views a trial court's instructions as a whole in determining their adequacy.

4. SAME—INSTRUCTIONS—TEST OF ADEQUACY.
The test applied by an appellate court in determining adequacy of instructions in a civil case is whether they inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case.

5. SAME—INSTRUCTIONS—INDIVIDUAL OBJECTIONABLE SENTENCES.
The fact that individual sentences in instructions, when considered independent of the context, are objectionable, does not constitute reversible error, where the charge, taken as a whole, correctly states the law applicable to the particular case.

6. SAME—INSTRUCTIONS—PROLIXITY.
Prolixity in instructions in a case does not necessarily equate with error.

7. AUTOMOBILES—PEDESTRIANS—INSTRUCTIONS—OBJECTIONS.
Instructions given in actions arising from injuries pedestrian woman received when struck by defendant's car at a street intersection in downtown section of a city *held,* to have outlined adequately the relative positions of both plaintiff and defendant, in view of all instructions given on the subjects of negligence, contributory negligence, and proximate cause and in view of failure to object to instructions of which complaint is now made.

8. SAME—PEDESTRIANS—INSTRUCTIONS—NEGLIGENCE—EVIDENCE.
Instructions in actions against motorist for injuries inflicted upon plaintiff wife while crossing a street at an intersection that the "mere fact that an accident has happened" is not evidence of negligence *held,* not prejudicial in view of detailed instructions which followed.

Appeal from Genesee; Baker (John W.), J. Submitted Division 2 November 4, 1965, at Lansing. (Docket Nos. 427, 428.) Decided December 20, 1965. Leave to appeal denied by Supreme Court February 22, 1966. See 377 Mich 702.

Complaint by Irene King against Howard A. Daly for injuries allegedly sustained when struck by an

automobile, driven by defendant, while crossing a street. Derivative action by Harvey King. Verdict and judgment for defendant. Plaintiffs appeal. Affirmed.

Cicinelli, Mossner, Majoros & Harrigan (*Peter F. Cicinelli* and *Eugene D. Mossner,* of counsel), for plaintiffs.

Milliken & Magee (*Herbert A. Milliken,* of counsel), for defendant.

FITZGERALD, J. Plaintiff Irene King brings this appeal from a verdict of no cause of action rendered by the jury in a suit to recover for her personal injuries as a result of being struck by defendant's car. Her husband appeals from a similar verdict in his companion suit.

The facts, other than that plaintiff was struck while crossing the street at an intersection in downtown Flint, are not essential to deciding this appeal, since the questions revolve primarily around the conduct of the trial.

Plaintiffs claim they did not receive a fair and impartial trial by jury due to erroneous and repetitious jury instructions and because the trial judge terminated cross-examination of a defense witness.

On the latter count, appellants' contention would infer that the trial judge foreclosed cross-examination of a prime defense witness, Edward L. Young, when the thrust of the matter is that plaintiff did manage to bring out what plaintiff considered to be that witness's bias or prejudice. The witness had identified himself as a retired nursery farmer and when cross-examined by counsel for plaintiff, the colloquy complained of went as follows:

"*Q.* Now, tell me, did you have another profession other than the operation of a farm?

"*A.* Yes. I was admitted to the bar in 1907, practiced law for 31-1/2 years.

"*Q.* And was that a particular type of law that you practiced?

"*A.* It was a specialty, yes.

"*Q.* What kind of a specialty was it?

"*A.* I represented several insurance companies for different kinds of claims; life insurance, casualty insurance, fire insurance.

"*Q.* Was this trial work or office work?

"*A.* It began with mostly with trial work, and continued partially with trial work, but it developed more into managerial duties of a large claim office.

"*Q.* You were salaried, full time employed?

"*A.* I was.

"*Q.* For an automobile and other type of casualty —

"*A.* No casualty claims.

"*Q.* — insurance companies?

"*A.* Liability claims.

"*Q.* You were working as an investigator then, or were you working as an office man?

"*A.* I was working as an attorney.

"*Q.* And, as a matter of fact, your views are — were represented — you gave your talents to the defendant?

"*Mr. Milliken.* If the Court please, I resent that on behalf of this witness, dragged here by a subpoena some several years after he's retired and to have this kind of inference put on the record. I think it should be stricken. The question should be stricken.

"*Mr. Shanahan.* If the Court please, I believe that what I am trying to show is possibly bias or prejudice of 42 years of experience in a particular field, 42 years of working for the defendant to get off liability. And I think this is proper for the jury to weigh. There's no implications that I make —

"*Mr. Milliken.* If the Court please, —

"*Mr. Shanahan.* — except to bring this up to the jury.

"*Mr. Milliken.* If the Court please, again in inference to bring this up to the jury that a man like this who practiced law for 40 some years, who devoted all of his efforts to get out of liability, and then after he's retired is still doing that I resent because as everyone knows the job he was in he was there to pay just claims and resist the others.

"*Mr. Shanahan.* Your Honor, I'm not making any implication.

"*Mr. Milliken.* He certainly is.

"*Mr. Shanahan.* Any implications made has been stated by —

"*Mr. Milliken.* I'd like to know —

"*Mr. Shanahan.* — defense counsel.

"*Mr. Milliken.* I would like to know what else the purpose is.

"*A.* You want me to answer that question?

"*Mr. Milliken.* If the Court please, —

"*Mr. Shanahan.* I don't recall the question.

"*Mr. Milliken.* We have all gone far enough with it.

"*The Court.* I will sustain the objection. Further examination is immaterial."

Thus did the court terminate the cross-examination.

Appellants assert that completely unlimited cross-examination is the right of any litigant and that the court's ruling destroyed the effectiveness of what counsel had uncovered concerning the witness's background. Appellants pick the jury's mind by such contentions as that the court "in reality instructed the jury that it was *to disregard* this man's background in assessing his testimony." They say further that "The jury also may well have believed that the trial court placed its approval or blessing on the testimony of witness Young, since plaintiff's counsel was forbidden by the court from proceeding any further with this line of cross-examination."

To such speculation we cannot subscribe and further, cannot say that the trial judge improperly limited cross-examination. It cannot be said that the alleged biases were not brought before the jury by the previously-quoted portion of the record. The cross-examination was permitted freely and fully so long as it remained within proper bounds and was terminated only when the argumentative charge was made to the witness that, "you gave your talents to the defendant."

The scope and duration permitted in the cross-examination of witnesses to show bias or interest rests in the sound discretion of the trial court, the exercise of which will not be reversed absent a clear showing of abuse. *Merkel* v. *Consumers Power Co.* (1922), 220 Mich 128; *Malicke* v. *Milan* (1948), 320 Mich 65. While the allowance of considerable latitude to the cross-examiner is to be preferred, the record here does not reveal that the plaintiff was unduly or prejudicially restricted. This being true, no abuse of discretion is to be found.

Appellants further contend that there was error in the trial court's charge to the jury, specifically in what they claim is undue emphasis on the subject of contributory negligence and in unduly emphasizing that plaintiffs had the burden of proof and must prove their case by a preponderance of the evidence.

We must first point out that appellant acknowledges that the record does not disclose whether or not any objections were ever taken to the complained-of instructions.

In his opinion denying a motion for a new trial, the trial judge sheds some light on this matter in his statement,

"Trial counsel was well aware of all the instructions which the court would give, but failed to object and on the other hand, seemed well satisfied that the ones given were fair to both sides.

"Counsel has diligently added up the references to instructions which contain the words contributory negligence and preponderance, but has conveniently ignored those instructions which describe in detail the obligations of the defendant driver. It has been repeatedly held by our courts that the instructions should be read as a whole and in view of the type of case involved. This same proposition holds true as to isolating parts of the charge which define words or phrases where clarification is made at a later time."

The rule that appellate courts view a trial court's instructions as a whole in determining their adequacy is a basic concept. *Huffman* v. *First Baptist Church of Flushing* (1959), 355 Mich 437.

A passage from that decision bears repeating. Mr. Justice VOELKER, writing for a unanimous court, stated (p 446):

"We are so often compelled to repeat this elementary proposition that we are moved to observe this it is probable that few trial judges, however experienced or learned, if given more time for meditation and research, would again give precisely the same jury instructions that they actually gave. Upon further reflection their instructions would doubtless be less halting and redundant, infinitely clearer and more cogent and more on target—much like the compelling jury arguments most lawyers make to their bedroom ceilings the night after the trial is over. It follows that the job of an appellate court in appraising jury instructions (usually given by the busy trial judge immediately following the tug and heat of the trial) is not to determine whether we would select his instructions as models of literary excellence and pearls of legal wisdom were we editing a form book on the subject; rather our role is mercifully more limited and our test less severe, namely: Did the instructions as given adequately inform the jury on the applicable law reflecting

and reflected by the various evidentiary claims in the particular case? In other words, in the idiom of the day, we simply ask ourselves: Were the instructions understandable and did they give both sides a 'fair shake'?"

This test, which seems to us to be the only reasonable test which can be applied, validates the instructions before us. For every complained-of passage, another portion of the instructions, read with it, clears the point in issue.

In *Wilson* v. *Modern Mobile Homes* (1965), 376 Mich 342, Mr. Chief Justice KAVANAGH states (p 354):

"In *Bouma* v. *Dubois,* 169 Mich 422, 434, quoted with approval in *Gilson* v. *Bronkhorst,* 353 Mich 148, 160, this Court held:

"'"Where the charge of the court, taken as a whole, correctly states the law as applicable to the particular case, and clearly defines the issue, the fact that sentences are objectionable, were considered independent of the context, does not constitute reversible error."'"

The allegations of repetition, while not what any judge would prefer if he had unlimited time to prepare instructions, do not constitute error. Prolixity does not necessarily equate with error.

One final quotation from *Huffman, supra,* will define our view toward instructions such as those before us (p 446):

"Trial judges are constantly required to instruct juries, often in complicated cases, with scarcely more pause to meditate than to sip a glass of water—much (dark thought) as though the members of this Court were obliged, say, to dictate in final form their opinions from the bench immediately following oral argument. Their task is unenviable and manifestly neither counsel nor we should impose on the instructions thus given any severer requirements

than we ourselves would fairly expect under similar circumstances. Given the adverse and distracting conditions under which most jury instructions must be delivered, the marvel is not that the average jury instructions are as bad as they are but rather that they are as good."

The remaining two contentions of error likewise deal with instructions, charging specifically that their content was erroneous.

"1. Did the trial court err in instructing the jury that if plaintiff was guilty of 'any negligence' which contributed to the accident or 'some degree' of negligence that she could not recover damages against defendant?

"2. Did the trial court err in giving an instruction to the effect that the 'mere fact that an accident has happened' is not evidence of negligence?"

In the matter of the first contention, plaintiffs say that the instructions "suggested" that if the plaintiff was negligent in the slightest degree, she could not recover. The cases relied upon by plaintiff condemn the actual use of the term "slight negligence". *Mack* v. *Precast Industries, Inc.* (1963), 369 Mich 439; *Frederick* v. *City of Detroit* (1963), 370 Mich 425.

In *Iwrey* v. *Fowler* (1962), 367 Mich 311, the trial judge instructed the jury that if the plaintiff was 1-10th of 1% guilty of negligence she could not recover. This instruction was held to be erroneous.

In the case before us, the court did not speak in any way of percentages, nor did it refer to the "slightest degree" of negligence. One of the final instructions to the jury before it returned its verdict was as follows:

"Contributory negligence does not mean negligence so slight as to be immaterial or remote lack of care. But it means negligence proximately materially contributing to the accident."

No sooner had this instruction been given than plaintiffs' trial counsel requested a further instruction which was given:

"I might give you this further portion of instructions. Mrs. King as a pedestrian is not required to be free from every manner and degree of fault to allow plaintiff recovery. It is enough for recovery if you find that Mrs. King once in the crosswalk did everything that she could be reasonably expected to do to avoid injury, and the defendant Daly had an opportunity to avoid the accident failed to do so in exercise of that degree of care required and expected of the average driver. In other words, if you find that Mrs. King was negligent this would not preclude a verdict for coplaintiffs if you find that Mr. Daly by using reasonable care and prudence might have avoided the accident notwithstanding Mrs. King's negligence."

A fair reading of the instructions demonstrates their adequacy in outlining the relative positions of both plaintiff and defendant.

A review of the cases cited by plaintiff in support of his second contention satisfies us that an accident, standing alone, gives no right of recovery until all the elements of a cause of action have been proven. If there was any misapprehension in the minds of the jurors stemming from the instruction that the "mere fact that an accident has happened" is not in itself evidence of negligence, it was corrected by the detailed instructions which followed. No prejudicial error is to be found.

On the basis of the errors assigned, we find no ground for reversal of the jury's verdict of no cause of action.

Affirmed. Costs to appellee.

McGREGOR, P. J., and T. G. KAVANAGH, J., concurred.

KRAUS *v.* ARTHUR MURRAY STUDIOS OF MICHIGAN, INC.

1. FRAUD—REMEDY.
   One of the remedies for fraud is a suit for damages caused by the fraud.

2. SAME—QUESTION OF FACT.
   Fraud is a question of fact to be deduced from all the circumstances.

3. SAME—EVIDENCE—PREPAYMENTS FOR DANCING LESSONS.
   Evidence adduced in student's nonjury action against dance studio to recover prepayments for dancing lessons she did not receive because of ill health, *held,* to sustain trial court's finding of fraud.

4. SAME—FINDING OF TRIAL COURT—PREPONDERANCE OF EVIDENCE.
   Trial court's finding of fraud in student's nonjury action against dance studio to recover prepayments for dancing lessons she did not receive because of ill health must be sustained, where it cannot be said to be against the clear preponderance of the evidence.

5. SAME—FINDING OF TRIAL COURT—PREPONDERANCE OF EVIDENCE—PREPAID DANCING LESSONS.
   Trial court's finding that plaintiff was prevented from completing her lessons at defendant's dance studio by reason of her physical condition is sustained in her nonjury action to recover prepayments made for such lessons, where it cannot be said to be against the preponderance of the evidence in action for fraud.

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Fraud and Deceit § 198 *et seq.*
[2] 24 Am Jur, Fraud and Deceit § 291 *et seq.*
[3–5] 24 Am Jur, Fraud and Deceit § 278 *et seq.*
[6] 24 Am Jur, Fraud and Deceit § 217.
[7] 24 Am Jur, Fraud and Deceit § 238.

6. SAME—DAMAGES—PREPAID DANCING LESSONS.
The proper measure of damages in action of fraud for recovery of prepayments for dancing lessons not received is the amount paid for such lessons.

7. INTEREST—PREPAID DANCING LESSONS—DEMAND.
Interest at 5% is payable on amount to which plaintiff is entitled to recover for prepayments made for dancing lessons, which were not received because of her physical condition, from date of demand, here the date when suit was commenced, until entry of amended judgment in the trial court.

Appeal from Common Pleas Court of Detroit; Kent (George D.), J. Submitted Division 1 November 4, 1965, at Detroit. (Docket No. 485.) Decided December 20, 1965.

Complaint by Mayme Kraus against Arthur Murray Studios of Michigan, Inc., a Michigan corporation, for money fraudulently retained from plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed, as amended.

Daniels & Weiner (*James M. Weiner,* of counsel), for plaintiff.

Darden, Neef & Heitsch (*Allen Neef,* of counsel), for defendant.

QUINN, J. Plaintiff filed this action in the common pleas court for the city of Detroit to recover money prepaid to defendant for dancing lessons she did not receive because of her ill health. She claims she was induced to prepay defendant by the representations of defendant's agents that unused prepayments would be refunded in the event plaintiff's health prevented her from taking lessons even though the written contracts clearly stated refunds would not be made. Plaintiff further claimed the representations were false and were known by de-

fendant's agents to be false. Defendant denied the alleged representations and claimed it owed plaintiff nothing under the terms of the contract. The trial court sitting without a jury found for plaintiff and defendant appeals.

In spite of six questions posed by defendant in its brief and a counterstatement of question involved by plaintiff, this Court believes there are only three issues presented, namely:

1. Does the record establish a case of actionable fraud?

2. Does the record establish that plaintiff was physically unable to complete the dancing lessons?

3. Are the damages properly computed?

July 22, 1953, at age 57, plaintiff commenced her dancing career with defendant. From that date to November 12, 1959, she signed 12 separate agreements for dancing lessons from defendant. These agreements entitled her to 435 hours of lessons, and she paid $3,858.75 to defendant. Defendant's records show plaintiff has paid for 62 hours of lessons she has not used. If plaintiff had completed all of her lessons, she would have been entitled to 20 hours of bonus lessons. The uncontradicted and unobjected to testimony of plaintiff establishes that she continued to sign agreements for more lessons on the continued assurances of defendant's agents that in the event of her illness, defendant would refund the unused portion of prepayments in spite of the provisions in the agreements to the contrary. The only evidence to establish plaintiff's physical inability to complete the lessons was her testimony.

One of the remedies for fraud is a suit for damages caused by the fraud. *Kordis* v. *Auto-Owners Insurance Co.* (1945), 311 Mich 247. This is the remedy plaintiff selected. Fraud is a question of fact to be deduced from all the circumstances. *Cort-*

land Manufacturing Company v. *Platt* (1890), 83 Mich 419. There is evidence in the record to sustain the trial court's finding of fraud, and it cannot be said such finding is against the clear preponderance of the evidence. The finding of fraud must be sustained. *Shaw* v. *Wiegartz* (1965), 1 Mich App 271. The same authority requires us to sustain the finding of the trial court that plaintiff's physical condition prevented her from completing the lessons.

With respect to damages, it is our opinion that the proper measure thereof is the amount plaintiff paid for lessons not received. This is readily computed. It includes 25 hours contracted for November 12, 1959, at a price of $337.50; 30 hours contracted for September 26, 1959, at a price of $403.50; and 7 of the 20 hours contracted for April 5, 1958, at the rate of $13.45 per hour, or $94.15. This totals $835.15. Plaintiff is entitled to interest at 5% on this sum; the problem is from when? The transcript does not establish the date of plaintiff's demand for refund. The only positive date on which to commence the computation of interest is the date on which suit was filed, namely: September 26, 1963.

The trial court is affirmed except as to amount of judgment, and the cause is remanded for entry of judgment for plaintiff in the amount of $835.15 plus interest on that sum at 5% per annum from September 26, 1963, to date of entry of the amended judgment in the lower court. Appellee may recover costs.

LESINSKI, C. J., and WATTS, J., concurred.

DIONNE *v.* PIERSON CONTRACTING COMPANY.
GARAVAGLIA *v.* SAME.

1. JUDGMENT—SUMMARY JUDGMENT—PLEADINGS—AFFIDAVITS.
   A motion for summary judgment should be granted forthwith if the pleadings show that a party is entitled to a judgment as a matter of law or if the affidavits or other proof show there is no genuine issue of fact (GCR 1963, 117.3).

2. CORPORATIONS—REDEMPTION OF STOCK—SUMMARY JUDGMENT—AFFIDAVITS.
   Holders of stock certificates in defendant corporation, which were not redeemed at times provided therein and in the articles of incorporation for their redemption, were properly granted summary judgments, where defendant's affidavit was either conclusionary, in that he stated his answer raised material questions of fact, or upon information and belief that surplus was insufficient, since the affidavits were not made on personal knowledge nor did they set forth such facts with particularity as would be admissible as evidence to deny the grounds stated in the motion (GCR 1963, 116.4, 117.3).

3. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVITS.
   An affidavit opposing a motion for summary judgment must be made on personal knowledge and set forth with particularity such facts as would be admissible as evidence to deny the grounds stated in the motion (GCR 1963, 116.4, 117.3).

4. SAME—SUMMARY JUDGMENT—AFFIDAVITS—CONCLUSION.
   An affidavit by defendant which is cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence fails to comply with court rule requirements pertaining to testing a plaintiff's motion for summary judgment (GCR 1963, 116.4, 117.3).

REFERENCES FOR POINTS IN HEADNOTES

[1–6] 41 Am Jur, Pleading §§ 340–343.

5. SAME—SUMMARY JUDGMENT—AFFIDAVITS—REDEMPTION OF CORPORATE STOCK.

Assertion in affidavit for defendant corporation that its creditors might be prejudiced if plaintiffs' stock were redeemed as provided for therein and in the articles of incorporation was a conclusion and insufficient to prevent the grant of plaintiffs' motions for summary judgments (GCR 1963, 116.5, 117.3).

6. SAME—SUMMARY JUDGMENT—AFFIDAVIT—CONCLUSION—REDEMPTION OF CORPORATE STOCK.

Assertion that the actual value of defendant corporation's property *might* have been considerably less than that shown on the corporate books, is a conclusionary utterance that is insufficient to prevent entry of summary judgment for plaintiff stockholders whose stock was not redeemed at times provided for in the stock certificates and in the articles of incorporation (GCR 1963, 116.4, 117.3).

Appeal from Saginaw; O'Neill (James E.), J. Submitted Division 3 November 4, 1965, at Lansing. (Docket Nos. 953, 954.) Decided December 20, 1965.

Complaint by Bridget Garavaglia Dionne, administratrix of the estate of Jule C. Garavaglia, against Pierson Contracting Company, a Michigan corporation, for redemption of preferred stocks. Similar action by Michael J. Garavaglia, Louis A. Garavaglia, Audrey Garavaglia, and the National Bank of Detroit, guardian of the estate of Marietta L. Garavaglia, a minor. Cases consolidated in lower court and on appeal. Summary judgments for plaintiffs. Defendant appeals. Affirmed.

Darin, Darin & McMillan (*Malcolm McMillan,* of counsel), for plaintiff Dionne.

Brucker & Brucker (*Wilber M. Brucker, Jr.,* of counsel), for plaintiffs Michael Garavaglia and others.

O'Keefe, Braun, Kendrick & Finkbeiner (*Larry C. Carl,* of counsel), for defendant.

FITZGERALD, J. Plaintiffs are the owners of shares of class D and class E preferred stock issued by defendant corporation. Defendant's articles of incorporation and stock certificates provide for final redemption of class D stock by June 1, 1962, and of class E stock by June 1, 1963. The certificates state in part that "Classes of preferred stock shall be redeemed *only out of surplus to the extent that the same are legally capable of being redeemed* in whole or in part, at those final maturity dates." (Emphasis supplied.)

Neither class of stock had been redeemed as of July 20, 1964, and plaintiffs brought suits for the stated redemption prices, dividends which they alleged were due and unpaid, and interest subsequently accrued at the legal rate, relying on balance sheets and financial statements issued by defendant containing figures which plaintiffs alleged indicated sufficient retained earnings and net income for these purposes.

Defendant denied that there was an adequate surplus to require or permit redemption or that any dividends were due. They submitted a financial statement stating that retained earnings as of the fiscal year ending April 30, 1962, were $104,892.36 as opposed to the $392,751.11 figure which appeared in an earlier statement relied on by plaintiffs. The total amount prayed for by plaintiffs was $57,960 plus accrued interest and costs.

Plaintiffs' motions for summary judgments based on the allegation that there were no genuine issues as to any material fact were granted by the trial court following a hearing and the submission of briefs. Summary judgments entered for plaintiffs totaling $52,440, representing the redemption of the

stock plus 4% dividends. The defendant appeals these judgments, the cases being consolidated for this purpose.

This appeal revolves solely around the propriety of the summary judgments granted plaintiffs in these two cases. It asks the question: Did the pleadings and affidavits set forth any material facts entitling defendant-appellant to a trial on the merits?

These cases, with judgments totaling $52,440 for plaintiffs, point up the incisive quality of a motion for summary judgment and the burden it places upon the challenged party.

Indeed, we could say that this case is decided merely by citing *Durant* v. *Stahlin* (*Appeal in re Van Dusen, Elliott, Romney*) (1965), 375 Mich 628, were it not that a brief examination of the posture of the pleadings is in order.

In *Durant,* Mr. Justice ADAMS set forth what we consider to be the essence of summary judgment proceedings, in stating (p 640):

"Once a party is challenged as to the existence of the facts upon which he purports to build his case, the sum and substance of the summary judgment proceeding is that general allegations and notice pleading are not enough. Matters upon information and belief and alleged common knowledge are not enough. That party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted. In the language of GCR 1963, 117.3, *'Judgment shall be rendered forthwith* if the pleadings show that any party is entitled to judgment as a matter of law or *if the affidavits or other proof show that there is no genuine issue of fact'.*" (Emphasis supplied.)

A brief review of the case at bar will illustrate why it falls four-square within the above-quoted admonition.

Defendant's affidavit opposing plaintiffs' motion for summary judgment stated, "that deponent * * * is satisfied that the answer of the defendant raises material questions of fact to be decided by the court only after hearing testimony from numberous (*sic*) witnesses, including accountants and other experts familiar with corporate matters of this nature"; and further, "upon information and belief states that there was not a surplus on June 1, 1962, or on June 1, 1963, which legally permitted the redemption of preferred stock issued by the defendant corporation."

Such responses cannot be said to fall within GCR 1963, 116.4, governing the content of affidavits and its requirement that "Supporting and opposing affidavits shall be made on personal knowledge and *shall set forth with particularity* such facts as would be admissible as evidence to establish or deny the grounds stated in the pleading or motion." (Emphasis supplied.)

Defendant's affidavit is deficient in the very things that the court rule and *Durant* require. In that case, where the situation was reversed, with defendant filing summary judgment motion, Mr. Justice SOURIS, concurring in affirmance, stated (p 657):

"Instead, however, plaintiff chose to file affidavits * * * which were not responsive to the defendant's affidavits, which were in part based upon information and belief instead of personal knowledge of the affiant, and which were cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence."

Defendant urges that interrogatories answered by the president of the corporation suggest that de-

fendant's creditors would be prejudiced if the shares had been redeemed. Here again, a conclusion is asserted, as is done throughout defendant's pleadings and brief, *e.g.* "In addition, the actual value of the property and equipment *might* have been considerably less than that shown on the corporate books."

We agree with the trial court opinion where it states:

"On consideration of the arguments and briefs, this court is of the opinion that the motions for summary judgments must be granted because all defendant says is that plaintiffs should not rely on its financial statements."

Conjecture cannot substitute for fact nor conclusion for admissible evidence. A review of defendant's contentions indicates that the summary judgments in the consolidated cases should be affirmed.

Affirmed. Costs to appellees.

McGREGOR, P. J., and T. G. KAVANAGH, J., concurred.

In re LANE.

1. PARDON—HEARING ON VIOLATION OF PAROLE.
   Failure to hold a fair and impartial hearing before 2 members of the parole board on charge of parole violation within 30 days after obtaining jurisdiction over and custody of the prisoner does not bar further action upon such alleged violation (CLS 1961, § 791.240).

2. STATUTES—STATUTE OF LIMITATIONS.
   The language of a statute must expressly state that it constitutes a statute of limitations in order to be so construed.

3. PARDON—HEARING ON VIOLATION OF PAROLE.
   Statutory provision according one accused of violation of parole a hearing before 2 members of the parole board within 30 days of such accusation is designed to assure an alleged parole violator a speedy hearing on the charge of the parole violation (CLS 1961, § 791.240).

4. SAME—FAILURE OF PAROLE BOARD—REMEDY.
   Failure of the parole board to comply with statutory requirement according one accused of parole violation a hearing within 30 days of accusation gives the accused a basis for a remedy by way of mandamus, not habeas corpus (CLS 1961, § 791.240).

5. SAME—HEARING ON VIOLATION OF PAROLE—RULES AND REGULATIONS.
   A fair and impartial hearing of one accused of a parole violation requires that the accused be apprised of the rules and regulations governing such a hearing in advance thereof either by submitting to the accused a copy of rules adopted by the parole

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3–5] 39 Am Jur, Pardon, Reprieve, and Amnesty § 95.
Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074.
[2] 34 Am Jur, Limitation of Actions § 37 *et seq.*
[6] 5 Am Jur 2d, Appeal and Error § 1009.

board or through publication in usual method for publication of administrative rules.

6. COSTS—HABEAS CORPUS—PAROLE VIOLATION.

No costs are allowed in habeas corpus proceeding by person charged with parole violation who had not been accorded a hearing by members of the parole board, a public question being involved (CLS 1961, § 791.240).

Edgar Elton Lane presented a complaint for habeas corpus against the Michigan department of corrections. Order to show cause issued. Submitted Division 1 November 4, 1965, at Detroit. (Docket No. 1,302.) Writ denied November 4, 1965. Opinion filed December 20, 1965. Leave to appeal denied by Supreme Court December 20, 1965, and February 11, 1966. Habeas corpus granted by Supreme Court January 11, 1966. See 377 Mich 693, 695, 700.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Charles C. Conklin,* Assistant Attorney General, for the Michigan Department of Corrections.

Albert Best, for Edgar Elton Lane.

LESINSKI, C. J. On reading and filing of plaintiff's complaint for a writ of habeas corpus, an order was issued requiring the Michigan department of corrections, bureau of pardons and paroles, to show cause on November 4, 1965 why a writ should not issue. Oral arguments were presented.

The detained party for whose benefit the said writ was sought is Edgar Elton Lane. Lane was arrested on a Federal charge on May 12, 1965 and was imprisoned in the Wayne county jail. On May 13, 1965, the Michigan department of corrections filed a detainer with the Wayne county authorities charging Lane with a parole violation. He had been on parole from the State Prison of Southern Michi-

gan since August, 1963. On September 17, 1965 Lane posted a $1,000 bond and was released from custody of the Federal court. However, he was immediately returned to Wayne county jail by the Michigan department of corrections on the charge of parole violation. On the same day a writ of habeas corpus was issued in the circuit court for the county of Wayne. A hearing was had on the writ on September 20, 1965 and Lane was discharged on the grounds that the Michigan department of corrections had not acted pursuant to CLS 1961, § 791.240 (Stat Ann 1954 Rev § 28.2310).

On September 21, 1965, Lane's attorney and an assistant attorney general were called in by the trial judge who had ordered Lane's release and a rehearing was held without the prisoner being present. At this time the writ was ordered dismissed and Lane was remanded to custody. Lane was removed by the Michigan department of corrections to the State Prison of Southern Michigan on September 22, 1965, and has been incarcerated there since that date. An appeal from the circuit court order was filed with this Court on September 24, 1965, and is presently pending.

At the hearing to show cause why a writ of habeas corpus should not be issued, it was determined from presentations by counsel for Lane and by the assistant attorney general that more than 30 days had elapsed since the Michigan department of corrections filed a detainer with the Wayne county authorities accusing Lane of a violation of his parole, and also more than 30 days had elapsed since Lane was returned to prison and no formal parole violation hearing has been held. It was not argued that the warrant for commitment was defective. The assistant attorney general advised the court and the attorney for Lane did not dispute that within

20 days after confinement at the prison Lane was allowed to plead to the charge of parole violation at which time he pled not guilty and a formal hearing was set for November 17, 1965.

No testimony in this cause was ordered taken as the court did not feel that any of the matters asserted would affect the final decision of the question before this Court.

Counsel for Lane argued that the effect of CLS 1961, § 791.240 (Stat Ann 1954 Rev § 28.2310) constitutes a statute of limitations, and that failure to hold said hearing within 30 days of either filing of the detainer by the Michigan department of corrections, or within 30 days after having been remanded to the custody of the Michigan department of corrections, effectively bars the authorities from taking further action upon the alleged parole violation. The statute reads in part as follows:

"Whenever a paroled prisoner is accused of a violation of his parole * * * he shall be entitled to a fair and impartial hearing of such charges within 30 days before two members of the parole board."

A careful study of the section and attending law does not lead this Court to complainant's conclusion. We hold that the failure to hold a parole violation hearing within 30 days after obtaining jurisdiction over or custody of the prisoner does not constitute a bar to continued proceedings under CLS 1961, § 791.240 (Stat Ann 1954 Rev § 28.2310). To constitute a statute of limitations, the language of the statute must be express. See *MacQueen* v. *City Commission of Port Huron* (1916), 194 Mich 328, 342; *Jones* v. *Grand Ledge Public Schools* (1957), 349 Mich 1, 10.

This Court deems that the provisions of the statute are designed to assure an alleged parole violator

a speedy hearing on the charge of parole violation, and the board is therefore required to hold a fair and impartial hearing within 30 days of the accusation of a parole violation. Failure of the board to comply with the statute does give the detained party a remedy, this being by petition to the court for a writ of mandamus. (See *Hazel Park Racing Association, Inc.*, v. *Racing Commissioner* [1953], 336 Mich 508, 518, and cases cited therein.) Habeas corpus is not a proper remedy here.

The Court takes note of the statement of the assistant attorney general that the Michigan department of corrections has not published its rules and regulations governing parole violation hearings. The requirements of a fair and impartial hearing under CLS 1961, § 791.240 (Stat Ann 1954 Rev § 28.2310) require that the accused be properly apprised of the rules and regulations governing such a hearing in advance thereof either by submitting to the accused a copy of the rules and regulations adopted by the parole board for such hearings, or through publication of same in the usual manner for publishing rules of administrative bodies.*

It is hereby ordered that the petition for a writ of habeas corpus is denied. No costs, public question involved.

QUINN and WATTS, JJ., concurred.

* See CL 1948, § 24.71 *et seq.*, as amended (Stat Ann 1961 Rev § 3.560[7] *et seq.*, as amended).—REPORTER.

JANUARY SESSION, 1966.

WALBER *v.* WAYNE CIRCUIT JUDGE.

1. CONSTITUTIONAL LAW—CONSTRUCTION.

   A provision of the Constitution could not mean one thing at the time of its adoption, and another thing at a subsequent time; and, hence, it is to be construed with reference to the state of the law or custom at the time of its adoption.

2. SAME—APPEAL IN CRIMINAL CASES.

   The term *appeal*, as used in provision of the Constitution according one accused of crime an appeal as a matter of right, as applied to a conviction of person charged with violation of a city ordinance in the recorder's court of Detroit, a court of record, means an appeal to the Court of Appeals and not to the circuit court of Wayne county (Const 1963, art 1, § 20; PA 1961, No 236, § 308, as added by PA 1964, No 281; GCR 1963, 806.1).

3. SAME—EQUAL PROTECTION OF LAWS—LOCAL REGULATIONS NOT COVERED BY STATE STATUTE.

   Local conditions and interests demand different regulations than are required for statewide observance and violations thereof relating to acts and omissions not embraced in the general criminal legislation of the State may be treated differently than violations of the general laws without offending the equal protection of laws provisions of the Federal and State Constitutions (US Const, Am 14; Mich Const 1908, art 1, § 2).

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—NUISANCE—APPEAL FROM RECORDER'S COURT OF DETROIT—COURT OF APPEALS.

   Whether or not violation of city ordinance, prohibiting maintenance of a nuisance and authorizing the commissioner of health

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 16 Am Jur 2d, Constitutional Law § 58 *et seq.*
[3] 16 Am Jur 2d, Constitutional Law § 540.
[4] 4 Am Jur 2d, Appeal and Error § 17 *et seq.*
[5] 20 Am Jur 2d, Costs § 35.

to abate the same, is a crime *held,* unnecessary to determination of issue presented in proceeding designed to compel circuit court to review *de novo* the conviction of plaintiff herein, of violation of such ordinances, since there is statutory and court rule provision for appeals from all final judgments from the recorder's court to the Court of Appeals (PA 1961, No 236, § 308, as added by PA 1964, No 281; GCR 1963, 806.1; Detroit Ordinances 39–1–40, 39–1–42).

5. COSTS—PUBLIC QUESTION—CONVICTION OF VIOLATION OF ORDINANCES—DE NOVO REVIEW.

No costs are awarded in mandamus proceeding to compel circuit court to review *de novo* plaintiff's conviction of violation of city ordinance, a public question being involved (Detroit Ordinances 39–1–40, 39–1–42).

Original mandamus proceeding in the Court of Appeals by Pauline Walber to compel Edward S. Piggins, Wayne Circuit Judge, to grant a trial *de novo* in circuit court of her conviction, in recorder's court for the city of Detroit—traffic and ordinance division, for violation of an ordinance of the city of Detroit. Submitted Division 1 December 10, 1965, at Flint. (Docket No. 992.) Writ denied January 3, 1966. Leave to appeal granted by Supreme Court March 23, 1966. See 377 Mich 705.

Norman E. Conn (*E. Donald Goodman,* of counsel), for plaintiff.

Robert Reese, Corporation Counsel, and *Robert D. McClear,* Assistant Corporation Counsel, for defendant.

QUINN, P. J. This is an original proceeding in mandamus[1] to require defendant to grant plaintiff a trial *de novo* of her conviction for violating a city of Detroit ordinance. The complaint also requests this Court to declare that the commission of an ordinance

[1] See GCR 1963, 816.2, 373 Mich lx and GCR 1963, 711.4(1), 373 Mich cvii.

violation is a crime and that the 1963 Michigan Constitution guarantees a right of appeal which is not discretionary with the judges of the circuit court.

There are three issues presented, namely: is there an appeal as of right to the circuit court of Wayne county and a trial *de novo* therein for a person convicted, in recorder's court of Detroit—traffic and ordinance division, for violation of a city ordinance? If not, is this a denial of equal protection of the law? Is the commission of an ordinance violation a crime?

Plaintiff was convicted of violating sections 39–1–40 and 39–1–42 of municipal code of Detroit (1964) and was sentenced to a fine or jail term. Section 39–1–40 prohibits maintenance of a nuisance and section 39–1–42 authorizes the commissioner of health to abate the same. The manner in which plaintiff kept a number of dogs in and about a private residence was the nuisance of which complaint was made. Following conviction, plaintiff attempted a general appeal to the Wayne circuit court but was prevented from perfecting it because the recorder's court clerk refused to accept the appeal fee and certify the case on appeal. Plaintiff then filed complaint in Wayne circuit court for superintending control in the nature of mandamus[2] to require the clerk of the recorder's court to perform these acts. This relief was denied by the present defendant, and this mandamus action followed.

Plaintiff contends that violation of an ordinance is a crime and Const 1963, art 1, § 20, provides she has an appeal as a matter of right. Claiming that GCR 1963, 785.1(1) makes GCR 1963, 701.1[3] and 701.10 applicable to such appeal, she argues the appeal is a trial *de novo* in circuit court. If this is not true, she says she is denied equal protection of the laws

[2] GCR 1963, 711.3.
[3] See 373 Mich civ.

(Const 1963, art 1, § 2, and US Const, Am 14, § 1) because a person convicted of a similar offense in Wayne county but outside Detroit does have an appeal to circuit court of Wayne county in the form of a trial *de novo*. Appeals from recorder's court—traffic and ordinance division for violation of city ordinances have been by certiorari (now superintending control).[4] See *City of Detroit* v. *Wayne Circuit Judge* (1925), 233 Mich 356.

The first question to be answered is, what does "appeal" in Const 1963, art 1, § 20, mean? The term is ambiguous in the sense that on appeal from justice of the peace court to circuit court, a misdemeanor conviction is tried *de novo,* but an appeal from circuit court for the same conviction is heard on the record. The reason is that no record is made in justice court. This is the reason for the provision in GCR 1963, 701.10 that "review in the circuit court is to be a retrial of issues upon evidence to be introduced in the reviewing court." It is not clear from the statement of delegates what the framers of the new Constitution intended "appeal" to mean. See 1 Official Record Constitutional Convention 1961, pp 562–568. In *Pfeiffer* v. *Board of Education of Detroit* (1898), 118 Mich 560 (42 LRA 536), the Supreme Court said with respect to constitutional interpretation (p 564):

"In determining this question, we should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change. (Citing authorities.) It is therefore essential that we determine

[4] See GCR 1963, 711.3.

the intent of this provision by reference to the state of the law or custom previously existing, and by the contemporaneous construction, rather than attempt to test its meaning by the so-called advanced or liberal views obtaining among a large class of the community at the present day."

This test was adopted by a unanimous court in *Holland* v. *Clerk of Garden City* (1941), 299 Mich 465, 470; and by a majority of the participating justices of the court in *Burdick* v. *Secretary of State* (1964), 373 Mich 578, 584. Applying it here, at the time the Constitution of 1963 was adopted, appeal from city ordinance conviction in traffic and ordinance division of recorder's court meant certiorari (now superintending control) to circuit court. See *City of Detroit* v. *Wayne Circuit Judge, supra.* From this we conclude "appeal" in Const 1963, art 1, § 20, does not have the meaning contended for by plaintiff, and in the case before us "appeal" means appeal to the Court of Appeals. This result conforms with the statutory jurisdiction of the Court of Appeals. See PA 1961, No 236, § 308, as added by PA 1964, No 281, CL 1948, § 600.308, subd (1) (Stat Ann 1965 Cum Supp § 27A.308, subd [1]). It also conforms with the rule promulgated by the Supreme Court covering appeals to the Court of Appeals. See GCR 1963, 806.1, 373 Mich xxxvii.

In resolving plaintiff's contention that this interpretation denies her equal protection of the law, it must be borne in mind of what she was convicted. It was for violation of an ordinance regarding nuisances. Michigan has long recognized that local conditions and interests demand different regulations and that violation of such regulations which relate to acts and omissions that are not embraced in the general criminal legislation of the State may be treated differently than are violations of the gen-

eral laws. *In re Cox* (1902), 129 Mich 635, 636. *Cox* involves right to trial by jury which, if not more fundamental than right of appeal, is certainly of longer standing in this State. There is no showing on this record that the offense plaintiff is charged with is covered by general legislation, and this Court has not found any State statute on the subject. That differentiation of this sort does not violate US Const, Am 14, § 1, see *Missouri* v. *Lewis* (1879), 101 US 22 (25 L ed 989) and *Bailey* v. *United States* (1938), 69 DC App 25 (98 F2d 306). If it does not violate US Const, Am 14, § 1, this Court can see no reason for holding that it violates Const 1963, art 1, § 2.

This opinion deals only with the problem before this Court on this appeal. It does not involve the conviction under city of Detroit ordinance covering an offense also covered by general criminal legislation of the State. The answer to this problem may be found in 3 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 1973. *In re Cox, supra;* and the language of the United States Supreme Court in *Missouri, supra,* referring to US Const, Am 14, § 1, where it said (p 30), "it contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made."

We find it unnecessary to determine whether violation of an ordinance is a crime. That some ordinance violations may not be crimes see *In re Cox, supra,* and cases cited therein on page 637.

In view of what has already been said, we further find that it is not necessary to say anything more about the meaning of right of appeal in Const 1963, art 1, § 20. However, since the statute, PA 1961, No 236, § 308, as added by PA 1964, No 281, CL

1948, § 600.308, subd (1) (Stat Ann 1965 Cum Supp § 27A.308, subd [1]) grants the Court of Appeals jurisdiction on appeals from *all* final judgments from the recorder's court and GCR 1963, 806.1, *supra,* includes appeals from *all* final judgments from recorder's court, we conclude that appeal from final judgment of recorder's court is to Court of Appeals, regardless of the division of recorder's court from which the appeal is taken. Such an appeal is on the record and it is incumbent on recorder's court to make provision for a record in *all* cases disposed of by it on final judgment.

For the reasons herein stated the writ of mandamus is denied. A public question being involved, no costs are awarded.

J. H. GILLIS and WATTS, JJ., concurred.

LACROIX *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. RAILROADS—TRESPASS—STATUTES—INSTRUCTION.

Instructions to jury relative to railroad right-of-way trespass statute and its application to the facts in action by truck driver who, after drinking intoxicating liquor, had driven his truck some 45' west on railroad's right-of-way and then returned to crossing at 3:55 a.m. before being hit by defendant's diesel engine *held,* when viewed in its entirety, to be clear, fair, proper, and amply supported by the record (CL 1948, § 469.421).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 539 *et seq.*
[2] 53 Am Jur, Trial § 512.
[3] 38 Am Jur, Negligence §§ 362, 366.

2. SAME—REQUEST TO CHARGE—EVIDENCE—WILFUL AND WANTON MISCONDUCT.

Plaintiff's request to charge relative to wilful and wanton misconduct by defendant railroad was properly denied, where there was no evidence that conduct of railroad employees was either wilful or wanton, it being the function of the jury to determine the issues in a case on the basis of the facts found to be established by the proofs.

3. SAME—INSTRUCTIONS—SUBSEQUENT NEGLIGENCE.

Instructions relative to subsequent negligence in action against railroad company for injuries plaintiff sustained *held,* properly given and supported by the record.

Appeal from St. Clair; Streeter (Halford I.), J. Submitted Division 2 October 6, 1965, at Lansing. (Docket No. 32.) Decided January 11, 1966. Leave to appeal granted by Supreme Court March 23, 1966. See 377 Mich 706, 379 Mich 417.

Declaration by Walter H. LaCroix against Grand Trunk Western Railroad Company, a Michigan corporation, for injuries sustained when plaintiff's car was struck by defendant's train. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Peter E. Bradt, for plaintiff.

Earl C. Opperthauser, for defendant.

WATTS, J. This is a civil suit brought by plaintiff, Walter H. LaCroix, against the Grand Trunk Western Railroad Company, a corporation, for damages arising from personal injury when his automobile was struck by a diesel railroad engine. Judgment was entered for the defendant, and plaintiff appeals. The case was transferred to the Court of Appeals by order of the Supreme Court on October 14, 1964.

Andrew Gray was the engineer and Carl Harmon was the fireman on a Grand Trunk Western Railroad Company 8-car train which was involved in an acci-

dent at 3:55 a.m. on April 25, 1958, in the vicinity of Bartlett road crossing and the Grand Trunk railroad tracks in Kimball township, St. Clair county, in which plaintiff LaCroix was seriously injured. Gray and Harmon testified in the instant case. Plaintiff LaCroix's memory was erased by trauma, and he had no knowledge of how his injuries occurred or how his automobile came upon the railroad tracks.

When the train was approximately 1–1/2 to 2 miles from Bartlett road crossing, engineer Gray observed 2 lights, which appeared to be classification lights on a westbound train with headlights out, standing at a railroad siding, waiting for the eastbound train to pass. Approximately 680 feet west of Bartlett road crossing, Gray and Harmon determined there was a vehicle on the eastbound main line tracks with headlights on, at which time the brakes on the train were put in emergency operation and the train came to a stop within 2,000–2,800 feet. The engine collided with the automobile and after the accident, he (Gray) saw plaintiff's motor vehicle in a ditch approximately 50 feet east of Bartlett road crossing and 8 feet north of the north rail of the main line eastbound tracks. He further observed the members of the crew administering artificial respiration to an injured person.

Carl Harmon, the fireman on defendant train, observed lights ahead and mentioned to the engineer, "They must be running an extra tonight, there is one in the hole waiting for the single track." At approximately 700 feet from Bartlett road crossing, he (Harmon) observed that the lights were from a motor vehicle and the brakes on the train were applied. Just before the collision of the train with the motor vehicle, he observed a person standing at the crossing just north of the north rail of the eastbound main

line. After the accident, he observed the automobile approximately 45 feet east of Bartlett road crossing and a person in the water just north of the automobile, completely submerged with the exception of his nose and mouth. The person was later identified as plaintiff, Walter H. LaCroix, who was given artificial respiration and taken by ambulance to a hospital. The motor vehicle was a 1955 Chevrolet 2-door sedan identified as belonging to LaCroix. A broken flashlight was found in the vicinity of the intersection of the railroad tracks and Bartlett road crossing.

There is competent testimony that after LaCroix had been drinking intoxicants, he drove a motor vehicle on defendant's railroad tracks for approximately 45 feet west of the public crossing. The vehicle became stuck on the tracks and LaCroix removed himself from the automobile to a position at the crossing approximately 45 feet in front of the stalled vehicle.

Plaintiff's counsel contends that LaCroix's 1955 Chevrolet automobile became stuck straddling the north rail of defendant's eastbound main line approximately 45 feet west of Bartlett road crossing in St. Clair county. The car had its lights on and was pointed down the track toward the west so that the lights were visible to the engine crew of defendant's eastbound train. The engine crew failed to keep a proper lookout ahead and did not discover the car on the tracks until it was too late to avoid an accident, resulting in injuries to LaCroix and damage to his automobile.

Defense counsel contends that LaCroix drove his automobile from Bartlett road crossing west on the Grand Trunk main line tracks for a distance of approximately 45 feet and that the plaintiff had plenty

of time to remove himself from an obvious position of danger to a place of safety.

Defense counsel further contends that engineer Gray and fireman Harmon had reason to believe the white lights which they observed for the first time approximately 1–1/2 to 2 miles from Bartlett road crossing were classification lights on a train waiting on the other track. The brakes on the train were immediately applied when the engineer and the brakeman determined that the lights were from a motor vehicle. Further, the engine crew was not negligent and had no reason to anticipate the negligent conduct of LaCroix.

Defense counsel further contends that under all circumstances the plaintiff knew more about the perilous position of himself and his car than the trainmen. Applying the same standard of care to each, there can be no negligence found on the part of the trainmen without there also being equal or greater negligence on the part of the plaintiff, which would bar all recovery in the instant case.

Plaintiff's counsel stated in his brief that this appeal would be limited to the court's instructions on subsequent negligence, wilful and wanton misconduct, and trespass. The transcript was limited to the testimony of defendant's claim agent, engine crew, a portion of the testimony of one of its brakemen, the instructions given to the jury and plaintiff's objections thereto. At the request of defendant, the testimony of plaintiff's wife's uncle was also included.

Plaintiff's counsel stated the issues in the instant case as follows:

"Was it reversible error for the court to instruct the jury that a 'violation' of the so-called trespass statute (CL 1948, § 469.421 [Stat Ann § 22.1231]) was negligence?

"Was it reversible error for the court to refuse to instruct the jury on wilful and wanton misconduct?"

The court instructed the jury on the trespass statute as follows:

"A Michigan statute states no person shall have authority to go upon or across railroad tracks or right-of-way at any place other than a public or private crossing provided that the provisions of this act shall not apply to any person going upon such right-of-way or tracks to save human life or to protect property. A violation of a statute is negligence. If you find that Mr. LaCroix violated this statute and that his negligence in so doing was a proximate cause of his injuries, there can be no recovery in this case. If you find that Mr. LaCroix violated this statute but that such violation was not a proximate cause of his injuries, his violation of the statute would not prevent his recovery of damages in this case if you find the defendant to have been negligent and that defendant's negligence was a proximate cause of plaintiff's injuries.

"A person may go upon or cross railroad tracks or right-of-way at a public or private crossing* and may go upon such right-of-way or tracks to save human life or to protect property."

The court's instructions to the jury relative to the trespass statute and its application to the facts in the instant case when viewed in their entirety are clear, fair, proper, and amply supported by the record. *Kaminski* v. *Grand Trunk W. R. Co.* (1956), 347 Mich 417; *Cree Coach Co.* v. *Wolverine Insurance Co.* (1962), 366 Mich 449; *Huffman* v. *First Baptist Church of Flushing* (1959), 355 Mich 437.

* In 1917, PA 1917, No 245, was enacted to prevent trespassing on the rights-of-way and tracks of railroad companies operating lines within the confines of any city or village of this State, or to go upon or cross such tracks or right-of-way at any place other than a public or private crossing. CL 1948, § 469.421 (Stat Ann § 22.1231).

At the conclusion of the testimony, the court proceeded to charge the jury on the various theories of the parties to the litigation. Counsel for plaintiff-appellant requested the court to instruct the jury on wilful and wanton misconduct. The court refused to give the instruction requested by counsel.

It was the function of the jury to evaluate the testimony and determine issues in the case on the basis of the facts found to be established by the proofs. There is no evidence before the jury that would permit them to find as a fact that defendant-railroad employees' conduct was either wilful or wanton.

One of the court's concluding instructions to the jury dealt with subsequent negligence; the instruction was properly given and supported by the record.

We find no reversible error in the instant case. Judgment for defendant affirmed. Costs to defendant-appellee.

Quinn, P. J., and McGregor, J., concurred.

HUGENER *v.* MICHLAP.

1. Damages—Hospital and Medical Expenses—Rear-End Collision.

Jury's verdict of $15,000 for plaintiff wife in action arising from a rear-end automobile collision *held,* not reversible error, where it appears she spent 12 days in the hospital and was under a physician's care for more than 3 years.

References for Points in Headnotes

[1, 2] 22 Am Jur 2d, Damages § 363 *et seq.*

[3] 39 Am Jur, New Trial § 24.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded. 29 ALR2d 1199.

2. SAME—INADEQUATE VERDICT—EVIDENCE.

Plaintiff husband whose wife was injured when defendant's car collided with the rear end of their car which she was driving *held,* to have conclusively and irrefutably established a portion of his alleged damages in an amount grossly in excess of jury's verdict of $1.05, liability having been admitted by defendant.

3. NEW TRIAL—LIMITED NEW TRIAL—INADEQUATE VERDICT.

New trial limited to damages only is ordered in action by plaintiff husband, where his action and that of his wife had been consolidated for trial and appeal, liability in both cases was admitted by defendant, a verdict of $15,000 was awarded wife, and a grossly inadequate verdict of $1.05 awarded husband.

Appeal from Wayne; Elliott (Phillip), J., presiding. Submitted Division 1 October 6, 1965, at Detroit. (Docket Nos. 322, 339.) Decided January 11, 1966.

Declaration by Alice M. Hugener against Marion F. Michlap for injuries arising out of an automobile accident. Derivative action by William A. Hugener. Cases consolidated for trial and appeal. Verdict and judgment for plaintiffs. Defendant Michlap appeals in case by Alice M. Hugener, claiming excessive damages. Plaintiff William A. Hugener appeals claiming inadequate damages. Affirmed as to plaintiff Alice M. Hugener. Reversed and remanded for new trial as to damages for plaintiff William A. Hugener.

Jack W. Hutson, for plaintiffs.

Rouse, Selby, Webber, Dickinson & Daoust (*James R. Daoust,* of counsel), for defendant.

J. H. GILLIS, J. On December 25, 1960, plaintiff Alice Hugener was a passenger in an automobile driven by her husband, plaintiff William Hugener, when it was struck from the rear by an automobile operated by defendant Marion Michlap.

Plaintiff Alice Hugener sued the defendant to recover for her personal injuries, and her husband sued to recover for hospital, medical and other associated expenses and for the loss of consortium. The cases were consolidated for trial. The defendant admitted liability in both cases but contested injury and damages, contending much of the expense was unrelated to this accident or unnecessary. The jury returned verdicts for plaintiff Alice Hugener in amount of $15,000 and for plaintiff William Hugener in amount of $1.05. Plaintiff William Hugener appeals contending the verdict is inadequate in his case, and the defendant appeals the verdict rendered in favor of Alice Hugener contending it is excessive. The appeals are consolidated in this Court.

Testimony in the wife's case showed that she spent some 12 days in the hospital and was under a physician's care for more than 3 years. The jury was the trier of the facts and we cannot say from this record that they erred in awarding $15,000 to the plaintiff-wife. See *Teeter* v. *Pugsley* (1947), 319 Mich 508, 511.

There was ample testimony, which was not controverted, to support a claim by the husband for out of pocket expenses, such as the $100 deductible collision expense. There is no question but that the jury erred by bringing in an inadequate award for the plaintiff-husband. In his argument to the jury at the conclusion of the case defense counsel stated, in part, in relation to the plaintiff-husband:

"It sure as blazes takes a lot of nerve and a lot of gall to come in here and ask the people to award him a sum of money for what the law calls loss of consortium, which is loss of the companionship and comfort and the congenial relationship, the intimate relationship of marriage and so on and so forth, when a little over a year after this accident happened, he abandons the ship of matrimony. Boy that

takes gall, and I don't think I have—I have never heard of anything like that before in my life."

Defense counsel wound up his argument by requesting the jury to return a verdict for the plaintiff-husband in the amount of $1.10 and the jury more than accommodated by returning a verdict of $1.05.

Defendant contends that the two verdicts are clearly irreconcilable and inconsistent and new trials should be granted in each case. Defendant relies on *Bias* v. *Ausbury* (1963), 369 Mich 378, and other cases that consider irreconcilable and inconsistent verdicts in companion cases. However, an examination of the *Bias Case, supra,* reveals a substantial difference in that the question of liability was an issue for the jury. Here, liability having been admitted in both cases, the sole question is the adequacy of the damages. Plaintiff-husband, having conclusively and irrefutably established a portion of his alleged damages in an amount grossly in excess of the jury verdict, must be granted a new trial limited to a determination of damages only.

Accordingly the judgment in the plaintiff-husband's case is set aside and pursuant to GCR 1963, 527.1(4), a new trial is ordered on the question of damages only. See *Brown* v. *Wyman* (1923), 224 Mich 360, and *Trapp* v. *King* (1965), 374 Mich 608.

Judgment in plaintiff Alice Hugener's case is affirmed. Costs to plaintiff in both cases.

LESINSKI, C. J., and FITZGERALD, J., concurred.

MILLMAN BROTHERS, INC., *v.* CITY OF DETROIT.

1. COURTS—JURISDICTION—COMMON PLEAS COURT OF DETROIT.

   Jurisdiction of the common pleas court of Detroit is delineated by statute, hence, any case heard before that court must be within its enumerated powers and rights to hear (CLS 1961, § 728.1).

2. SAME—COMMON PLEAS COURT OF DETROIT—JURISDICTION—MUNICIPAL CORPORATIONS.

   The common pleas court of Detroit has concurrent jurisdiction with the circuit court in civil actions, wherein the debt or damages do not exceed $3,000 including actions against municipal public utilities operated as if privately owned but excepting other actions against municipal corporations (CLS 1961, § 728.1).

3. SAME—COMMON PLEAS COURT OF DETROIT—JURISDICTION—DEPARTMENT OF PUBLIC WORKS—SNOW REMOVAL.

   The department of public works, including its snow and ice removal activities, is an integral part of the city structure and is not run as if privately owned, hence, the common pleas court would not have jurisdiction over an action against such department by virtue of jurisdiction conferred by statute (CLS 1961, § 728.1).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4, 5] 20 Am Jur 2d, Courts §§ 30, 91.
[3] 20 Am Jur 2d, Courts §§ 30, 91.
37 Am Jur, Municipal Corporations § 44.
[6] 20 Am Jur 2d, Courts § 97.
[7, 9] 20 Am Jur 2d, Courts § 95.
[8] 20 Am Jur 2d, Courts § 139.
[10] 20 Am Jur 2d, Courts §§ 30, 91, 97, 105.
[11] 20 Am Jur 2d, Costs § 19.
5 Am Jur 2d, Appeal and Error § 1009.

4. SAME—MUNICIPAL COURTS—JURISDICTION—STATUTES.

Municipal courts of this State are not courts of general jurisdiction, but derive their power only from enumeration within the statutes.

5. SAME—COMMON PLEAS COURT OF DETROIT—JURISDICTION.

The common pleas court of Detroit may not expand or contract, enlarge or diminish, the jurisdiction conferred upon it by statute, by rule or otherwise (CLS 1961, § 728.1).

6. SAME—JURISDICTION—DISMISSAL OF ACTION.

Any action, except to dismiss, a court may take with respect to subject matter before it of which it does not have jurisdiction is absolutely void.

7. SAME—JURISDICTION—WAIVER—CONSENT.

A general appearance, answer, demand for jury trial, or participation in the trial itself, where the action is absolutely void by reason of lack of jurisdiction of the court over the subject matter, can never constitute a waiver, or consent to jurisdiction by either party.

8. SAME—JURISDICTION OF SUBJECT MATTER.

Jurisdiction of the subject matter of a suit cannot be conferred upon a court by conduct of litigants.

9. SAME—QUESTION AS TO JURISDICTION.

Question of jurisdiction of the subject matter can be raised on appeal, or in any proceedings wherein the enforcement of the action may be sought.

10. MUNICIPAL CORPORATIONS—SNOW REMOVAL—COMMON PLEAS COURT OF DETROIT—JURISDICTION.

Action by plaintiff in common pleas court of Detroit against city's department of public works for damages to store front and merchandise by reason of snow removal activities is ordered dismissed, since such court has no jurisdiction over the subject matter of the action (CLS 1961, § 728.1).

11. COSTS—PUBLIC QUESTION—COMMON PLEAS COURT OF DETROIT—JURISDICTION.

No costs are allowed on city's appeal in action against it in common pleas court of Detroit, where that court has no jurisdiction over the subject matter of the action, a public question being involved (CLS 1961, § 728.1).

Appeal from Common Pleas Court; Vokes (David C.), J. Submitted Division 1 October 7, 1965, at Detroit. (Docket No. 596.) Decided January 11, 1966.

Declaration by Millman Brothers, Inc., a Michigan corporation, against the City of Detroit, department of public works and John Doe, whose name is unknown, but whose person is well known. Defendants' motion to dismiss for lack of jurisdiction denied. Judgment for plaintiff. Defendant City of Detroit appeals. Reversed and remanded with instructions to dismiss for lack of jurisdiction.

Pevos & Pevos (*Daniel N. Pevos,* of counsel), for plaintiff.

Johnson & Campbell (*Reginald S. Johnson,* of counsel), for defendant.

LESINSKI, C. J. This case is an appeal from a determination in common pleas court for the city of Detroit in favor of the plaintiff-appellee in the sum of $800. The appellant, the city of Detroit, is claiming the lower court lacked jurisdiction over the subject matter of this action and therefore their determination is void.

This action arose from alleged damages caused by a public works snow removal truck clearing Woodward avenue in Detroit of ice in March of 1964. The ice chunks being removed by defendant's truck hit plaintiff's store front plate glass window and shattered three window lights, caused carpet damage, and ruined merchandise in the window. On this cause plaintiff instituted suit in common pleas court.

On January 18, 1965, after the case had been partially tried and adjourned, the defendant filed a motion to dismiss because of lack of jurisdiction in

common pleas court to try this action against a municipal corporation. Upon denial of this motion, the trial was resumed and it resulted in a verdict for plaintiff in the sum of $800.

It was stipulated by the parties to this appeal that the jurisdictional issue would be the only ground of appeal.

The jurisdiction of the common pleas court of Detroit is delineated by statute, and it acquires its powers and rights only from that source. Thus any case heard before the common pleas court must be within those enumerated by the statute.

In the case at bar, the relevant sections of the statute, CLS 1961, § 728.1 (Stat Ann 1962 Rev § 27-.3651), read as follows:

"And exercise concurrent jurisdiction with the circuit court of the county in which said common pleas court is located in all civil actions now cognizable in said circuit court wherein the debt or damages do not exceed $3,000, *except actions against municipal corporations.*" (Emphasis supplied.)

The statute continues in part:

"The common pleas court of such city shall have and exercise jurisdiction in all suits and proceedings against * * * municipal corporations, where by their charter, it is provided that in the operation of a public utility same shall be operated as if privately owned, wherein the debt or damages do not exceed $3,000."

To deal with the latter section of the statute first, it is clear that the department of public works is an integral part of the city structure and this department is not run as if privately owned. See City of Detroit, charter, title 4, chap 8, § 1 *et seq.** Therefore, the common pleas court cannot obtain jurisdiction over the city under this portion of the statute.

* See Municipal Code, City of Detroit (1964), Charter section, pp 78–83.

Thus the Court must turn its attention to the exclusionary section of CLS 1961, § 728.1 (Stat Ann 1962 Rev § 27.3651) and address itself to the question of whether this language so denies the common pleas court jurisdiction over the subject matter of the action as to make any action by the court void, or is it a restriction on the parties' jurisdiction which can be waived by appearance of the parties?

The municipal courts of Michigan are not courts of general jurisdiction, but derive their power only from enumeration within the statutes. The case of *Mooney* v. *Unemployment Compensation Commission* (1953), 336 Mich 344, dwells on just this point. Though that case was appealed to the Supreme Court from a determination of the superior court of Grand Rapids, that court like the common pleas court of Detroit was a statutory court and lacked general jurisdiction. In the *Mooney Case* the plaintiff claimed that the circuit court having general jurisdiction would have a right to hear an appeal from the unemployment compensation commission. Therefore, since the superior court had concurrent jurisdiction, it obtained the same power by implication. The Supreme Court rejected this thesis speaking through Justice CARR. The Court said at page 355, 356:

"In view of the nature of the superior court, however, the purposes for which it was created, and the enumerated powers conferred on it, we do not think that such inference or implication is permissible. The compensation act created new rights to a specific method to be followed in obtaining and protecting those rights. Had the legislature intended to grant the superior court the authority and jurisdiction now claimed for it, we think that, in keeping with the specific nature of other provisions of the act, such intent would have been stated."

The Court goes on to remand the case to have the judgment set aside.

The facts of the case at bar present an even stronger case for dismissal. Here the statute on its face, CLS 1961, § 728.1 (Stat Ann 1962 Rev § 27-.3651), excludes that group of cases from consideration by the common pleas court brought against municipal corporations. The statute explicitly denies the common pleas court any jurisdiction. Therefore, the court neither had the power nor the right to exercise jurisdiction as the subject matter of this suit was explicitly excluded, by statute, from consideration by the common pleas court. As the Supreme Court said in *Ray Jewelry Co.* v. *Darling* (1930), 251 Mich 157, at page 160, in referring to the common pleas court of Detroit:

"It may not expand or contract, enlarge or diminish, the jurisdiction conferred upon it by rule or otherwise."

It is clear in the case at bar the court was seeking to expand its jurisdiction and go beyond its statutory power.

Thus, it is the judgment of this Court that the decision of the common pleas court to proceed with the trial was erroneous. As the Supreme Court recently stated in *Fox* v. *Board of Regents* (1965), 375 Mich 238, at page 242:

"When a court is without jurisdiction of the subject matter, any action with respect to such cause, other than to dismiss it, is *absolutely void.*" (Emphasis supplied.)

Thus by answering the first of the two queries in this case, the second issue has also been determined. A general appearance, answer, demand for jury trial, or participation in the trial itself where the action is absolutely void, can never constitute a

waiver, or consent to jurisdiction by either party. This doctrine was affirmed in *Orloff* v. *Morehead Manfg. Co.* (1935), 273 Mich 62, where the Michigan Supreme Court said at pages 65, 66:

"Jurisdiction of the subject-matter of a suit cannot be conferred upon a court by conduct of litigants. *Hoffman* v. *Security Trust Co. of Detroit,* 256 Mich 383; *Exo* v. *Automobile Inter-Ins. Exchange,* 259 Mich 578."

Among other decisions recognizing a rule, identical in content and similar in form are: *Strandt* v. *Strandt* (1936), 278 Mich 354; *Berry* v. *Bruce* (1947), 317 Mich 490; *Shane* v. *Hackney* (1954), 341 Mich 91.

In the *Orloff Case,* the Court continues at page 66:

"The question of the jurisdiction of the subject-matter can be raised on this appeal, or in any proceedings wherein enforcement of the decree may be sought. *General Motors Acceptance Corp.* v. *Ellar,* 243 Mich 603."

See, also, *Lehman* v. *Lehman* (1945), 312 Mich 102; *In re Cody's Estate* (1940), 293 Mich 697.

It is therefore the conclusion of this Court that jurisdiction of the *subject-matter* may be raised at any stage of the proceedings and that such jurisdiction can never be conferred by the actions of the parties.

The case is remanded with directions to set aside the judgment entered and to dismiss the proceeding.

No costs. Public question involved.

FITZGERALD and J. H. GILLIS, JJ., concurred.

PEOPLE *v.* FLOYD.

1. CRIMINAL LAW—LARCENY IN A BUILDING—EVIDENCE.

Verdict of guilty in prosecution for larceny in a building *held*, supported by ample proof as to elements of the alleged crime and identity of the alleged defendant and sufficient to permit jury to find defendant guilty beyond a reasonable doubt of the crime charged (CL 1948, § 750.360).

2. SAME—MISSTATEMENT IN CLOSING ARGUMENT—CORRECTION OF ERRORS.

Inadvertent misstatement of prosecutor as to whether defendant had a mustache, made in his closing argument in prosecution for larceny in a building *held*, corrected when objected to by defense counsel and not to have resulted in prejudicial error in view of the subsequent statement (CL 1948, § 750.360).

Appeal from Recorder's Court; O'Hara (John P.), J. Submitted Division 1 November 2, 1965, at Detroit. (Docket No. 100.) Decided January 11, 1966.

James Frederick Floyd was convicted of larceny in a building. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Angelo A. Pentolino, Jr.,* for the people.

REFERENCES FOR POINTS IN HEADNOTES

[1] 32 Am Jur, Larceny §§ 10, 119, 120, 135.
[2] 32 Am Jur, Larceny § 152.
53 Am Jur, Trial § 505.

Gerald Brock, for defendant.

WATTS, J. James Frederick Floyd was found guilty by jury in the recorder's court, Detroit, and sentenced to Jackson for not less than 2 nor more than 4 years for the crime of larceny, in violation of CL 1948, § 750.360 (Stat Ann 1954 Rev § 28.592). Defendant's motion for new trial was denied, and he appeals. The case was transferred to the Court of Appeals by the Supreme Court on October 14, 1964.

At approximately 3:10 in the afternoon of November 19, 1963, the complainant, Edward Trout, was a customer at the White Tower restaurant. He placed a white envelope containing fifty $1 bills, two rolls of quarters, and a money order for $10.71 (a total value of $80.71) on the counter. While he was drinking his coffee, it is alleged that the defendant entered the restaurant, took the white envelope and contents from the counter, and ran out of the restaurant by way of the front door into an alley where he got into a 1955 green Mercury automobile, Michigan vehicle plate FX 6114.

Witness Alphonso King testified that he was working on a truck parked in an alley in the vicinity of the restaurant at the time the alleged violation occurred, when a car containing two men was driven into the alley. After the car was parked, one of the men left the automobile while the other, James Frederick Floyd, remained in the car. Later, the man who had left the car ran back to the car with a white envelope in his hand and jumped into the automobile which was driven away at a high rate of speed. He (King) took the license number of the automobile, which was a 1955 green Mercury bearing Michigan vehicle plate FX 6114.

Detroit police officer John Chaperon testified that on November 19, 1963, at 8:10 p.m., he observed an

automobile with Michigan vehicle plate FX 6114 in a parking lot in the vicinity of 2670 Gladstone in the city of Detroit and that he saw the two defendants walk from that address across the street and get into the car. The defendants were placed under arrest.

Defense counsel contends: The conviction of the defendant was contrary to the great weight of evidence; and the assistant prosecutor committed error in his argument to the jury.

The competent, conflicting testimony in the instant case presents clear questions of fact for the jury relating to the elements of the alleged crime and the identity of the alleged defendant. The jury verdict is supported by ample proof. This Court will not disturb the verdict unless evidence fails to support the finding of fact by the jury. *People* v. *Loudenslager* (1950), 327 Mich 718; *People* v. *Petrosky* (1938), 286 Mich 397; *People* v. *Schram* (1965), 1 Mich App 279.

One of the other questions is whether or not the assistant prosecuting attorney committed error in his closing argument which would justify the granting of a new trial. Counsel refers to the following argument by the assistant prosecuting attorney:

"*Prosecutor:* Here you have this car with this license number in this vicinity. You have a witness standing right there, sees the car pull up in front of him, sees the man get out of that car, walk by him, goes on down the alley. In the meantime, he watches the man inside the car and that man inside of the car sits around this way and is looking back. Now he can't describe his clothes naturally because the car is closed and he is looking over his shoulder and all he can see is his face and he has a mustache; and the man that walked passed him had a mustache—

"*Defense counsel:* May it please the court, I'm going to object to the remark just made by the prosecutor because nowhere in the evidence did any witness state they had a mustache, rather the witness King stated that neither of the defendants had a mustache."

The assistant prosecuting attorney inadvertently made a misstatement to the jury that witness King testified that he (Floyd) had a mustache. The prosecutor forthwith corrected his error when he made the following statement to the court and the jury:

"*Prosecutor:* As I stated, if Your Honor please, if I am misquoting facts, the jurors will remember who said what. I may be wrong and I may be right. My recollection is that he identified these two boys as being those boys in the car. * * * We will leave that to the jury. That is their prerogative, to try to remember what testimony each respective witness gave."

We have examined those matters which defense counsel has raised and conclude that no prejudicial error occurred, that defendant received a fair trial, and that there is ample evidence from which the jury could find the defendant guilty beyond a reasonable doubt of the crime charged.

The order denying defendant's motion for a new trial is affirmed.

LESINSKI, C. J., and QUINN, J., concurred.

BEARDSLEY *v.* R. J. MANNING COMPANY.

1. JUDGMENT—SUMMARY JUDGMENT—MATERIAL ISSUES OF FACT.
   Existence of a material issue of fact raised by the pleadings bars entry of a summary judgment (GCR 1963, 117).

2. SAME—SUMMARY JUDGMENT—NEGLIGENCE.
   Summary judgment is inappropriate in a negligence case where the qualitative issue of whether defendants exercised reasonable care is in dispute, a question for the jury (GCR 1963, 117).

3. SAME—SUMMARY JUDGMENT—NEGLIGENCE—DIRECTED VERDICT.
   Summary judgment may properly be granted in a negligence case where on the undisputed physical facts the trial judge would say that a directed verdict would be required (GCR 1963, 117).

4. SAME—SUMMARY JUDGMENT—INFERENCES—COUNTER AFFIDAVITS.
   Inferences to be drawn from the underlying facts pleaded or contained in the counter affidavit to motion for summary judgment must be viewed in the light most favorable to the party opposing the motion (GCR 1963, 117).

5. SAME—SUMMARY JUDGMENT—QUESTIONS OF FACT.
   Summary judgment procedure cannot impinge upon a party's right to trial of disputed factual issues by a jury or usual court procedure (GCR 1963, 117).

6. NEGLIGENCE—QUESTION FOR JURY—STORE ENTRANCE-EXITWAY.
   Whether design of entrance-exitway of defendants' store is proper *held*, a question for consideration by jury, where it appears one walkway was 106″ long with a continuous rise of 9″ from sidewalk to door and other had a terrazzo floor for some 59″ with a slope of 6″ down to a 6″ step at window line and then slope continued to sidewalk for another 44″, hence, summary judgment for defendants in action by customer who fell at the step was error (GCR 1963, 117).

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 41 Am Jur, Pleading §§ 340–343.
[6] 38 Am Jur, Negligence § 344.

Appeal from Saginaw; O'Neill (James E.), J. Submitted Division 3 November 2, 1965, at Lansing. (Docket No. 130.) Decided January 11, 1966.

Complaint by Lillie E. Beardsley against R. J. Manning Company and Chesaning Hardware & Implement Company, Michigan corporations, for injuries allegedly sustained on stairs in defendants' store on March 16, 1963. Summary judgment for defendants. Plaintiff appeals. Reversed and remanded.

Albert A. Smith and *Robert L. Richardson,* for plaintiff.

Smith, Brooker, Harvey & Cook (*A. T. Lippert, Jr.,* of counsel), for defendants.

MCGREGOR, P. J. This is an appeal by plaintiff from summary judgment granted to defendants, dismissing plaintiff's action for personal injury damages.

Defendants own and operate the Manning Variety Store in which are maintained two passageways, or entrance doorways, which are the means of ingress and egress for customers. The northernmost passageway consists of a continuous ramp walkway which slopes down from the door to the sidewalk for a distance of approximately 106 inches, with a height variation of approximately 9 inches between the sidewalk merger point and the said door. The southernmost walkway consists of an inner terrazzo or slope, running down from the door between the showcase windows for an approximate distance of 59 inches with a height variation, or sloping slant, of 5–1/2 to 6 inches. The terrazzo ends at the front window line of the premises with a perpendicular step of approximately 6 inches. The walkway then continues to slope or slant for a further distance of

approximately 44 inches to a point where it merges with the public sidewalk.

Plaintiff's complaint alleged that she entered the defendants' store on the ramp entry and was leaving through the other doorway when she slipped and fell off the six-inch step. She also alleged that defendants thus created an inherently dangerous condition constituting negligence by constructing and maintaining a six-inch step at one door, contrasting with a ramp at the other door, and by failing to give warning of the step or to equip the step with a handrail or other safety device, because the step was extremely difficult to perceive due to the continuation of the slope or ramp beyond the window line for some distance before merging with the common sidewalk. Plaintiff further alleged that the six-inch step at one doorway, in contrast to the ramp walkway at the other doorway, constituted a nuisance created and maintained by defendants, which resulted in plaintiff's injuries. Defendants' answer admitted the physical facts with respect to the entrance and exitways as stated in plaintiff's complaint but denied that they were negligent or that they maintained a nuisance by the maintenance of the premises in said condition. They further alleged that the plaintiff was contributorily negligent in that she failed to have a proper regard for her own safety. Defendants filed a motion for a summary judgment which was granted.

If appellant's complaint raises material issues of fact to be litigated, they should be resolved only by a jury. It is necessary that there be material issues of fact presented in order to bar entry of a summary judgment.

In the discussion under GCR 1963, 117, 1 Honigman and Hawkins, Michigan Court Rules Annotated, p 360, is found the following:

"In negligence cases, even though there may be no dispute as to the quantitative or physical facts, summary judgment will almost always be inappropriate because the qualitative issue of whether defendant exercised reasonable care will be in dispute and must be left for the jury, unless on the undisputed physical facts the judge would say that a directed verdict would be required—which is to say that there really is no negligence issue for the jury. In such cases summary judgment has been allowed in negligence cases and should be."

It is, of course, axiomatic that a summary judgment or decree will not be upheld where there are material issues of fact raised on the pleadings. *Kaminski* v. *Standard Industrial Finance Co.* (1949), 325 Mich 364. Any inferences to be drawn from the underlying facts pleaded or contained in the counter affidavit must be viewed in the light most favorable to the party opposing the motion.

"There is considerable language in the cases emphasizing that the court should be slow to grant summary judgment and that the rules governing the procedure are to be construed strictly. Such language must be understood in the context in which it was uttered—that is, in deciding whether a particular case situation was right for summary judgment. Unfortunately, summary judgment has been requested too often where there was a genuine issue of fact, but an impatient party or busy trial judge wanted to try it by affidavits. Any such inclination must be repudiated, for summary judgment procedure cannot impinge upon a party's right to trial of disputed factual issues by a jury or usual court procedure." 1 Honigman and Hawkins, Michigan Court Rules Annotated, p 358, quoted with approval in *Durant* v. *Stahlin* (*Appeal in re King, Bashara, Merrell, and Waldron*) (1964), 374 Mich 82, 89.

Defendants rely primarily on the cases which held that, as a matter of law, a person could not recover

for injuries sustained in a fall off the step connecting the two portions of a split level floor. See *Boyle* v. *Preketes* (1933), 262 Mich 629; *Garrett* v. *W. S. Butterfield Theaters, Inc.* (1932), 261 Mich 262. In granting the motion for summary judgment the trial judge apparently concluded that there can be no differing in the minds of reasonable men, that there is no negligence to be found on the part of the defendants, and further, there is nothing to establish the creation and maintenance of a nuisance, and in effect, that in the location where this accident occurred, the design and construction of the entrance-exitway is proper.

Applying the "favorable to plaintiff" rule to the facts pleaded in plaintiff's complaint and making the inferences to be drawn from the underlying facts, this Court finds that the minds of reasonable men might differ. The test used is whether from the facts, in the light most favorable to the plaintiff, reasonable men could honestly reach a different conclusion. If the answer is "yes", the question is for the jury. *Killen* v. *Benton* (1965), 1 Mich App 294; *Sparks* v. *Luplow* (1963), 372 Mich 198; *Anderson* v. *Gene Deming Motor Sales, Inc.* (1963), 371 Mich 223; *Tacie* v. *White Motor Co.* (1962), 368 Mich 521.

A jury question was presented. Accordingly, the order of dismissal entered by the trial court is reversed and this case is remanded to the lower court for further proceedings. Costs are awarded to appellant.

FITZGERALD and T. G. KAVANAGH, JJ., concurred.

SEELYE *v.* BROAD.

1. CONTRACTS—MATERIAL DEPARTURE FROM OFFER—ACCEPTANCE.
   Any material departure from the terms of an offer invalidates the offer as made and results in a counter proposition which, unless accepted, cannot be enforced.

2. SAME—OFFER AND ACCEPTANCE.
   A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.

3. SAME—IRREVOCABILITY—CONSIDERATION.
   A written offer purporting on its face to be irrevocable for 1 day is terminable at any time, where there is not shown to be any consideration for the irrevocability of the unilateral contract.

4. SAME—REVOCATION OF OFFER—EVIDENCE.
   Finding of trial judge that defendant property owners had, in good faith, effected a revocation of their offer to sell their property by selling it to another party, before plaintiff had effected an acceptance of their offer to sell and had communicated such fact to defendants *held*, sustained under record presented in broker's action for commission.

5. BROKERS—COMMISSIONS—REVOCATION.
   A broker is not entitled to a commission for the sale of land until he has done the thing he has agreed to do before a revocation or withdrawal of the offer, but the owner may not defeat the broker's right to a commission by terminating the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur 2d, Contracts § 62.
Difference between offer and acceptance as regards place of payment or of delivery as variance preventing consummation of contract. 3 ALR2d 256.
[3, 4] 17 Am Jur 2d, Contracts § 36.
[5] 12 Am Jur 2d, Brokers § 222.
Broker's right to commission on sales consummated after termination of employment. 27 ALR2d 1348.

agency after the broker has procured a purchaser ready, willing, and able to buy the property on the terms suggested by the owner and has communicated that fact to the owner.

Appeal from Oakland; Ziem (Frederick C.), J. Submitted Division 2 November 2, 1965, at Lansing. (Docket No. 319.) Decided January 11, 1966. Leave to appeal granted by Supreme Court March 17, 1966. See 377 Mich 704, 379 Mich 289.

Complaint by Warren O. Seelye, Jr., doing business as Warren Seelye Realty Company, against Eli Broad and Edythe Broad for damages arising from breach of a contract to employ plaintiff in the sale of real estate. Judgment for defendants. Plaintiff appeals. Affirmed.

Frank C. Glabach and *Robert Steen,* for plaintiff.

Bodman, Longley, Bogle, Armstrong & Dahling (*Michael B. Lewiston,* of counsel), for defendants.

MCGREGOR, P. J. Warren O. Seelye, Jr., the plaintiff herein, had obtained an exclusive listing agreement from the defendants, Mr. and Mrs. Eli Broad, for the sale of certain real estate owned by the defendants. After expiration of the agreement on May 8, 1962, the plaintiff continued his efforts to find a purchaser for the property. On the morning of May 10, 1962, plaintiff submitted the written offer of Jack Peltz to purchase the property for $65,000. This offer was rejected by defendants. Later the same day, defendant Eli Broad prepared an offer to sell for $70,000 on a standard offer-to-purchase form, signed the same in the place marked for seller's acceptance, and inserted the provision that the offer would be open for one day. Plaintiff took this instrument and returned it the same afternoon, signed by the prospective purchaser Peltz, but with the

sales price changed to $69,000 and a provision inserted requiring the defendants to pay the cost of connecting the sewer to the house. Defendants took the offer under advisement and informed plaintiff that they would let him know by 5 p.m.

When plaintiff went to defendants' office, about 10 a.m. on May 11, 1962, they told him they had sold the property to another party. Plaintiff then secured acceptance of defendant's original offer. At about 10:30 a.m., on May 11th (within the one-day period for which the defendants' offer to sell was to remain open), plaintiff presented the defendants with the instrument of offer signed by Jack Peltz, stating the price at $70,000 and omitting the provision requiring the defendants to pay for the sewer connection. Defendants sold the property to a party unknown to plaintiff for the sum of $66,000.

The trial court, hearing the case without a jury, supplemented the above stipulated facts with the finding that the defendants acted in good faith in revoking the plaintiff's authority to obtain a purchaser by informing him of the sale to another party. From the judgment of no cause of action, entered accordingly for the defendants, the plaintiff brings this appeal, contending first, that the defendants did not show that they revoked plaintiff's authority in good faith, and also, that the offer to sell of May 10, 1962, could not be legally revoked within the one-day period.

The written offer to sell signed by Eli Broad on May 10, 1962, was actually an offer to make two contracts. The first was an offer directed to Jack Peltz of a bilateral contract for the sale of real estate. The second was an offer of a unilateral contract to the plaintiff broker, since the instrument contained a provision offering a commission of 6% to the plaintiff broker for services. The counter-offer made by

Jack Peltz constituted a rejection and termination of defendants' written offer to sell for $70,000.

"Any material departure from the terms of an offer invalidates the offer as made and results in a counter proposition, which, unless accepted, cannot be enforced." (Authorities cited.) *Carrollton Acceptance Co.* v. *Ruggles Motor Truck Co.* (1931), 253 Mich 1, 5.

" 'There must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.' " *Thomas* v. *Ledger* (1935), 274 Mich 16, 21.

Both are cited with approval in *Harper Building Company* v. *Kaplan* (1952), 332 Mich 651, 655, 656. Whether or not the termination of the offer as to Peltz terminated the plaintiff's authority to continue negotiations need not be decided here.

In spite of the fact that the written offer purported on its face to be irrevocable for one day, defendants retained the power to terminate at any time the offer of unilateral contract to the plaintiff, since the record fails to show any consideration for irrevocability. The principle stated in *Night Commander Lighting Company* v. *Brown* (1921), 213 Mich 214, 216, applies here, even though that case was concerned with the contract for the sale of goods:

"It is elemental that an order such as this, though it contained the words 'not subject to countermand,' may be countermanded at any time before acceptance. Until so accepted, it is simply an offer to purchase and in no way creates a binding agreement." (Authorities cited.)

The trial judge found that the defendants, acting in good faith, legally revoked their offer to sell by

informing the plaintiff of the sale to the other party. The agreed statement of facts sustains this conclusion. The actual purchaser was not obtained by the plaintiff. This is not a case in which the seller revoked the broker's listing in order to avoid the payment of commissions and then sold to a purchaser obtained by the efforts of the broker. A revocation in such circumstances is not effective to deprive broker of his commission. *Schostak* v. *First Liquidating Corporation* (1948), 320 Mich 406.

"The right of a broker to commission is fixed at the time of his discharge in good faith. It depends on whether he has done the thing he undertook to do before his authority was terminated. * * * As applied to the ordinary contract of employment to sell property, for which there is no consideration other than the commission to be paid the broker and which may be considered as a mere offer that does not become an enforceable contract until it is performed by the broker, the rule means that where the owner in good faith revokes the agency or authority or withdraws the offer before the broker procures a purchaser ready, willing and able to purchase on the owner's terms, the broker is not entitled to compensation for procuring the purchaser thereafter or to a commission on a subsequent sale by the owner.

"Conversely, the owner cannot defeat the right of the broker to a commission or other compensation by terminating the agency after the broker has procured a purchaser ready, willing, and able to buy the property on the terms suggested by the owner and has communicated that fact to the owner." 12 CJS, Brokers, § 66, p 150, quoted with approval in *Schostak* v. *First Liquidating Corp.* (1948), 320 Mich 406, 415.

Since the plaintiff failed to obtain a ready purchaser before his authority to sell the property was revoked, he is not entitled to a commission.

The judgment of the trial court is affirmed, and costs are awarded to appellees.

FITZGERALD and T. G. KAVANAGH, JJ., concurred.

PEOPLE *v.* JOHNSON.

1. CRIMINAL LAW—SENTENCE—PLEA OF GUILTY—RECORD.
   All of the proceedings involved in the sentencing of a defendant who has pleaded guilty to crime should be recorded, whether in court or in conference in chambers and thereby enable appellate courts to examine a record on which they can judge compliance with pertinent court rule requiring the trial court to inform the accused of the nature of the accusation and consequences of his plea (GCR 1963, 785.3[2]).

2. SAME—PLEA OF GUILTY—EXAMINATION BY JUDGE—RECORD.
   Record on application for delayed appeal, which shows trial court had failed to inform defendant of the nature of the charges of forgery and uttering and publishing a forged instrument before accepting plea of guilty and the effect of such plea at second arraignment where defendant then had no counsel, justified peremptory order setting aside plea of guilty and vacating sentence, the mandatory provisions of the pertinent court rule not being supplied by defense counsel's waiver of the reading of the information at the first arraignment (CL 1948, §§ 750.248, 750.249; GCR 1963, 785.3[2], 806.7).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*
Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted Division 2 November 2, 1965, at Lansing. (Docket No. 1,290.) Decided January 11, 1966.

Michael Duane Johnson was convicted, on his plea of guilty, of forgery and uttering and publishing a forged instrument. On application for delayed appeal, conviction set aside and remanded for further proceedings.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald L. Reisig,* Prosecuting Attorney, and *James R. Ramsey,* Assistant Prosecuting Attorney, for the people.

Larry D. Fowler, for defendant.

MCGREGOR, J. The defendant Johnson was convicted in the Ingham county circuit court of the crimes of forgery[1] and uttering and publishing[2] upon his plea of guilty. He was sentenced to concurrent 2-1/2 to 14-year terms on each count. The record shows that when defendant was first brought before the circuit court for arraignment, on November 13, 1964, he was represented by counsel. His counsel waived reading of the information and stated that the defendant understood the charge and desired to stand mute. Accordingly, the court entered a plea of not guilty for the defendant. On December 28, 1964, defendant was again brought before the circuit bench. The attorney had withdrawn from the case but defendant, after being informed of his right to appointed counsel, told the court he did not want a lawyer.

The record shows that at the second arraignment the trial judge fully informed the defendant about his rights to counsel and to a trial by jury or before

[1] CL 1948, § 750.248 (Stat Ann 1962 Rev § 28.445).—REPORTER.
[2] CL 1948, § 750.249 (Stat Ann 1962 Rev § 28.446).—REPORTER.

the court without a jury, and gave him an opportunity to ask for counsel and trial. Defendant declined both. This Court has no reason to doubt that the trial judge advised defendant of the consequences of his plea, but the record is inadequate in this regard. Such advice is not recorded and was apparently given at the unrecorded conference in chambers. To avoid such inadequacies, trial courts should record all of the proceedings, whether in court or in conference in chambers. Such practice would furnish appellate courts with a record on which they can judge compliance with GCR 1963, 785.

The case comes before this Court on defendant's application for delayed appeal from his conviction in the circuit court. Defendant contends that his plea of guilty was not understandingly made because he was not informed of the charges against him during the arraignment at which his plea of guilty was accepted. The rules require the following procedure:

"Imposing sentence. If the accused pleads guilty, after such plea and before sentence, the court shall inform the accused of the nature of the accusation * * * and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly, and voluntarily made." GCR 1963, 785.3(2).

Careful examination of the record shows that the trial court failed to inform the defendant of the nature of the charges against him at the second arraignment before accepting the plea of guilty. There is not a hint that the charges against the defendant were even mentioned. The appellee contends that the defense counsel's waiver of the reading of the information at the first arraignment supplies for this defect. Consideration of the language and purpose of Rule 785 refutes this con-

tention. The court rules clearly state that the court must inform the defendant of the nature of the accusation. There are no exceptions to this requirement. The trial judge is bound to make whatever examination is necessary to determine that the defendant's plea is understandingly made, whether or not he is represented by counsel. A plea cannot be understandingly made if the defendant is not told what he is pleading guilty to. This failure of the court to comply with the mandatory provisions of the court rule requires that relief be granted in this Court.

In lieu of granting the application for delayed appeal, this Court, under GCR 1963, 806.7, peremptorily sets aside the plea of guilty, vacates sentence, and remands to the circuit court for such further proceedings as may be required.

QUINN, P. J., and T. G. KAVANAGH, J., concurred.

PEOPLE *v.* WOLSCHON.

1. CRIMINAL LAW—WITHDRAWAL OF PLEA OF GUILTY—DISCRETION OF COURT.

   The withdrawal of a plea of guilty after sentence rests upon the sound discretion of the trial judge.

2. APPEAL AND ERROR—DISCRETION OF COURT.

   An abuse of discretion by a court involves far more than a difference in judicial opinion between the trial and appellate courts, where the exercise of discretion turns upon a factual determination made by the trier of the facts, since the term *discretion* involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.

3. SAME—ABUSE OF DISCRETION.

   An abuse of discretion by a trial court in making a determination of fact, requires the reviewing court to find that the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

4. CRIMINAL LAW—MANSLAUGHTER—WITHDRAWAL OF PLEA OF GUILTY—DISCRETION OF COURT.

   Trial court in prosecution for murder wherein defendant pleaded guilty to manslaughter in the presence of counsel, defendant was exhaustively examined by court before acceptance of the plea and court properly apprised himself that the plea had been made freely, voluntarily, and without undue influence, then sentenced defendant to 7-1/2 to 15 years *held*, not to have abused his discretion in denying motion to withdraw plea of guilty after sentence (CL 1948, §§ 750.316, 750.321, 768.35; GCR 1963, 785.3[2]).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 21 Am Jur 2d, Criminal Law § 504.
Right to withdraw plea of guilty. 20 ALR 1445, 66 ALR 628.
Withdrawal of plea of guilty and substitution of plea of not guilty after conviction. 146 ALR 1430.
[2, 3] 5 Am Jur 2d, Appeal and Error § 774.

Appeal from Recorder's Court; Davenport (Elvin L.), J. Submitted Division 1 November 4, 1965, at Detroit. (Docket No. 894.) Decided January 11, 1966.

Julius Wolschon pleaded guilty to manslaughter. After sentence, defendant moved to withdraw guilty plea. Motion denied. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *James E. Lacey,* Assistant Prosecuting Attorney, for the people.

Michael A. Guest, for defendant.

LESINSKI, C. J. After preliminary examination in the recorder's court of the city of Detroit, an information was filed charging the defendant, Julius Wolschon, with murder with malice aforethought. CL 1948, § 750.316 (Stat Ann 1954 Rev § 28.548). A tentative date for trial was set for October 28, 1964, and on September 4, 1964 a defense motion to reduce the charge from murder in the first degree to manslaughter was heard and denied in the recorder's court. The case was then reset for trial on November 25, 1964, but for reasons not clearly indicated in the record, the defendant was brought before the court on November 17, 1964. At that time, in the presence of defense counsel, a plea of guilty was accepted by the court to the lesser included offense of manslaughter. CL 1948, § 750.321 (Stat Ann 1954 Rev § 28.553). On December 1, 1964, the defendant was sentenced to 7–1/2 to 15 years imprisonment.

A motion to withdraw a plea of guilty was filed by defense counsel subsequent to sentence, and from

a denial of this motion by the trial court the defense takes this appeal. Defense assigns as error the trial court's denial of the defendant's motion to withdraw his plea of guilty after sentence.

A review of the record indicates that the trial court gave the defendant an exhaustive examination prior to accepting his plea of guilty. This Court feels that the trial judge properly apprised himself as to the freeness, voluntariness, and lack of undue influence with which the plea was given, and that the judge fully satisfied the requirements of CL 1948, § 768.35 (Stat Ann 1954 Rev § 28.1058) and GCR 1963, 785.3(2).

The law as it stands today rests the withdrawal of a plea of guilty after sentence upon the sound discretion of the trial judge. See *People* v. *Vasquez* (1942), 303 Mich 340; *People* v. *Davis* (1964), 372 Mich 402; *People* v. *Zaleski* (1965), 375 Mich 71. This Court turns to the language in *Spalding* v. *Spalding* (1959), 355 Mich 382, in determining whether the trial judge abused his discretion in denying the defendant's motion to withdraw a plea of guilty. As our Supreme Court said in *Spalding, supra* at pp 384, 385:

"Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of our exercise of will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias."

Tested under these guidelines, it is this Court's determination that the trial court did not abuse that discretion.

The trial court is affirmed. Costs to the appellee.

QUINN and WATTS, JJ., concurred.

SOLNER INVESTMENT COMPANY *v.* THOMS.

1. APPEAL AND ERROR—COMMON PLEAS COURT—INTERLOCUTORY ORDER —JURISDICTION OF COURT OF APPEALS.

   An order of the common pleas court of the city of Detroit setting aside a default judgment is interlocutory and not a matter of which the Court of Appeals has jurisdiction to hear an appeal (GCR 1963, 801.3).

2. COSTS—BRIEFS—DISMISSAL OF APPEAL.

   No costs are allowed appellee upon dismissal of appeal, where appellee had failed to file a brief.

Appeal from Common Pleas Court of Detroit; Vokes (David C.), J. Submitted Division 1 December 7, 1965, at Detroit. (Docket No. 831.) Decided January 11, 1966.

Summons and affidavit of account by Solner Investment Company, a Michigan corporation, against

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REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 127.
5 Am Jur 2d, Appeal and Error § 856.
Order setting aside, or refusing to set aside, default judgment as a final judgment or order for purposes of appeal. 108 ALR 225.

[2] 5 Am Jur 2d, Appeal and Error §§ 686, 1010, 1013.

Frederick W. Thoms and Erin L. Thoms for the unpaid balance on moneys owed on the purchase of goods. Default judgment for plaintiff. Defendants' motion to set aside default granted. Plaintiff appeals. Appeal dismissed.

Balfour D. Peisner, for plaintiff.

J. H. GILLIS, J. This is an appeal from an order of the common pleas court of the city of Detroit setting aside a default judgment. The order is interlocutory and under GCR 1963, 801.3 this Court has no jurisdiction to hear this appeal.

Dismissed. No costs, appellees having failed to file a brief.

WATTS, P. J., and BURNS, J., concurred.

SEARS, ROEBUCK & COMPANY *v.* HOLMES.

1. APPEAL AND ERROR—COMMON PLEAS COURT—INTERLOCUTORY ORDER —JURISDICTION OF COURT OF APPEALS.

An order of the common pleas court of the city of Detroit setting aside a default judgment is interlocutory and not a matter of which the Court of Appeals has jurisdiction to hear an appeal (GCR 1963, 801.3).

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 127.
5 Am Jur 2d, Appeal and Error § 856.
Order setting aside, or refusing to set aside, default judgment as a final judgment or order for purposes of appeal. 108 ALR 225.

[2] 4 Am Jur 2d, Appeal and Error § 47 *et seq.*

[3] 5 Am Jur 2d, Appeal and Error §§ 686, 1010. 1013.

2. SAME—INTERLOCUTORY ORDERS—COMMON PLEAS COURT—CIRCUIT COURT.

Interlocutory orders of the common pleas court of Detroit are appealable to the circuit court by leave of that court (GCR 1963, 806.1).

3. COSTS—BRIEFS—DISMISSAL OF APPEAL.

No costs are allowed appellee upon dismissal of appeal, where appellee had failed to file a brief.

Appeal from Common Pleas Court of Detroit; Vokes (David C.), J. Submitted Division 1 December 7, 1965, at Detroit. (Docket No. 963.) Decided January 11, 1966. Amended opinion filed February 9, 1966.

Summons and affidavit of account by Sears, Roebuck & Company, a New York corporation, against Alfred Holmes and Pennie J. Thomas for the unpaid balance of moneys owed on the purchase of goods. Default judgment for plaintiff. Defendants' motion to set aside default granted. Plaintiff appeals. Appeal dismissed.

Balfour D. Peisner, for plaintiff.

J. H. GILLIS, J. This is an appeal from an order of the common pleas court of the city of Detroit setting aside a default judgment. The order is interlocutory and under GCR 1963, 801.3 this Court has no jurisdiction to hear this appeal. Appeals from interlocutory orders of the common pleas court are appealed by leave to the circuit court. GCR 1963, 806.1. See 3 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), pp 448, 449, for discussion of this question.

Dismissed. No costs, appellees having failed to file a brief.

WATTS, P. J., and BURNS, J., concurred.

MICHIGAN CENTRAL PARK ASSOCIATION *v.*
ROSCOMMON COUNTY ROAD COMMISSION.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—RECORD.
   A chancery case is heard by the Court of Appeals *de novo* on the record.

2. SAME—CHANCERY CASES—FINDINGS OF FACT.
   Great weight is given by the Court of Appeals to the findings of fact by the trial judge in a chancery case, and reversal is not made unless convinced from a reading of the entire record that the Court of Appeals would have reached a different conclusion.

3. HIGHWAYS AND STREETS—DEDICATION—LAKE SHORE BOULEVARD—RIPARIAN RIGHTS OF ABUTTING OWNERS.
   Finding of fact in class action by voluntary association of owners of lots abutting a boulevard, dedicated to public use, along an inland lake shore, whereby an injunction was sought restraining public authorities from turning the boulevard into a public beach, that each plaintiff abutting lot owner had riparian rights to the shore and lake opposite his lot except where there was privately owned land between his property and the beach is affirmed under record presented.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CLASS ACTION—SUBDIVISION LOT OWNERS.
   Adjudication of separate rights, if any, of owners of lots of the subdivision not abutting lake shore boulevard, other than as they are members of the general public, is not made on appeal in class action by plaintiff, a voluntary association of owners

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 703, 967.
[2, 3] 5 Am Jur 2d, Appeal and Error § 822.
[4] 4 Am Jur 2d, Appeal and Error § 291; 6 Am Jur 2d, Associations and Clubs § 55.
[5] 30A Am Jur, Judgments § 909 *et seq.*
[6] 5 Am Jur 2d, Appeal and Error § 1009.

of lots abutting the boulevard to enjoin defendant board of county road commissioners and township board from converting lakeside area in front of plaintiffs' lots into a public bathing beach.

5. HIGHWAYS AND STREETS — LAKE SHORE BOULEVARD — RIPARIAN RIGHTS — POLICING.

Part of judgment of trial court ordering township board to assume the policing of a boulevard along an inland lake shore dedicated to public use, wherein plaintiffs have riparian rights is ordered vacated, where there is no record showing of legislative authority for enforcement of such an order.

6. COSTS — PUBLIC QUESTION — INLAND LAKE — SHORE BOULEVARD — PUBLIC BEACH.

No costs are allowed in class action by owners of lots abutting a boulevard along a shore of an inland lake to restrain defendant public authorities from converting the premises into a public beach, a public question being involved.

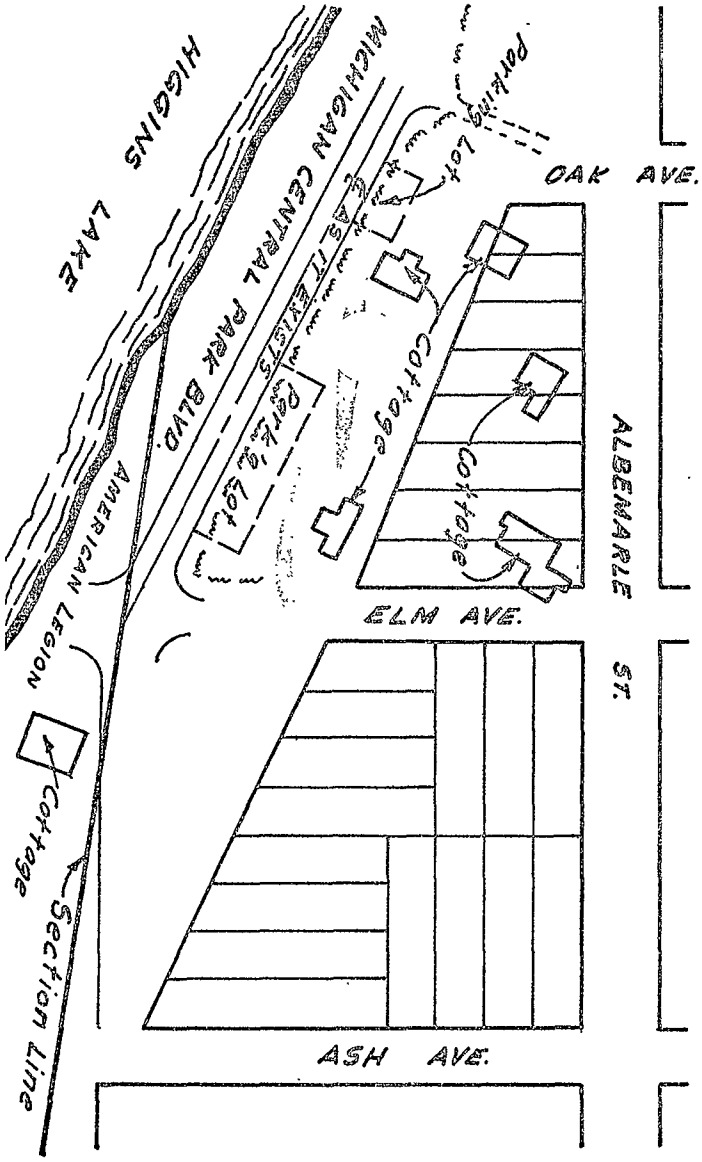
Appeal from Roscommon; O'Keefe (Dennis J.), J. Submitted Division 3 October 5, 1965, at Lansing. (Docket No. 70.) Decided January 25, 1966.

Bill for injunction by Michigan Central Park Association of Higgins Lake, a voluntary association, against Roscommon County Road Commission, a statutory corporation, and others to enjoin the conversion of a public road into a public beach. Injunction granted. Defendants appeal. Modified and affirmed.

Fortino, Plaxton & Deatrick (*Albert J. Fortino,* of counsel), for plaintiff.

Charles H. Miltner, for defendants.

WATTS, J. The seeds for the action here being appealed were sown back at the turn of the century when the land involved, lying along Higgins lake, was platted. At that time, the plattor laid out lots


HIGGINS LAKE
MICHIGAN CENTRAL PARK BLVD.
AMERICAN LEGION
Section Line
Cottage
Cottage
Cottage
Parking Lot
Parking Lot
OAK AVE.
ALBEMARLE ST.
ELM AVE.
ASH AVE.

and streets in the Michigan Central Park subdivisions and along the shore of the lake showed an irregular strip of shoreline as "Michigan Central Park Boulevard". The plats designated that all streets and alleys in the subdivisions concerned were dedicated to public use.

Down through the years, until the 1950's, there was no development made by the Roscommon county road commission of Michigan Central Park Boulevard. In some places, the area was wooded down to the lake. In 1953, the defendant Roscommon county road commission came in and cleared land on Michigan Central Park boulevard between Oak and Elm streets, two streets which ran to the lake. This was not graded or graveled, but apparently there was some vehicular traffic. There is evidence in the record that protest was made at that time of the traffic. There is also evidence in the record that other parts of Michigan Central Park boulevard, in the same subdivision, have been developed by the abutting owners as lawns down to the water's edge. Furthermore, in the area between Oak and Elm streets, and within the boulevard as surveyed and platted, there have been cottages built. This has also occurred in other areas.

Referring to the 1953 clearing by the road commission, the testimony shows that the public generally started coming down into the area after the clearing.

In 1957, a chancery action was started which preceded and ties in with this case. In it, the plaintiffs sought a temporary and permanent injunction against defendant Roscommon county road commission on the theory that the dedication of the boulevard to public use had been abandoned.

In July, 1958, a decree was filed by the Roscommon county circuit court which dismissed the bill of com-

plaint. Appeal was made but not perfected; and on December 31, 1959, parties stipulated that the unperfected appeal be dismissed.

During the course of this first case, sometime between 1957 and 1959, the Roscommon county road commission graded and graveled the roadway between Oak and Elm streets. It should be understood that this was a roadway under 30 feet wide, running for one block through Michigan Central Park boulevard, and that the boulevard as platted varies in width from under 50 feet to 200 feet.

The court in the first case found that Michigan Central Park boulevard was a public street under the jurisdiction and control of the Roscommon county board of county road commissioners.

In August, 1960, the present action was begun in chancery. In it, the plaintiff, Michigan Central Park Association of Higgins lake, a voluntary association, sought a temporary injunction restraining the defendants from turning the boulevard into a public beach; sought to have the lower court hear the case and enter an order and decree permanently enjoining defendants from so doing; and directing it to maintain the roadway and post signs indicating that the roadway was not a public beach.

The plaintiff association, composed of members from two of the Michigan Central Park subdivisions who owned lots abutting the boulevard, brought the action as a class action for all other abutting owners.

The plaintiff's theory was basically that if Michigan Central Park boulevard were a roadway, as claimed by the defendants and as found in the first case, it should be maintained as a roadway and not as a public beach; to maintain it as a public beach is contrary to the use of a public road and, furthermore, deprives them of a property interest, namely, riparian rights, without due process.

Defendants argue that since the property is platted to public use and dedicated to public use, the riparian rights are shared by the abutting owners with other lot owners in the same plat and the general public.

The basic issue then is whether or not members of plaintiff association have riparian rights in Higgins lake as owners of lots abutting Michigan Central Park boulevard.

We do not think it would serve any purpose to go into an extensive exposition of the involved arguments and various authority set forth by counsel in their excellent briefs. This Court has thoroughly and repeatedly reviewed the entire record in the case.

The lower court found that Michigan Central Park boulevard, running parallel with Higgins lake, was a public highway as contemplated by the McNitt act,* as amended, CLS 1961, § 247.669 (Stat Ann 1958 Rev § 9.1097[19]) and that the public authorities had assumed jurisdiction thereof as a county road.

That court further found that the plaintiff Michigan Central Park Association of Higgins lake and all other abutting property owners have riparian rights along the shore of Higgins lake, each lot owner having riparian rights in the shore and lake opposite his lot. This finding of the court below is squarely supported by *Croucher* v. *Wooster* (1935), 271 Mich 337, and the New York case of *Johnson* v. *Grenell* (1907), 188 NY 407 (81 NE 161, 13 LRA [NS] 551) cited therein. (In both of those cases, the lots involved were part of a plat: the road in the Michigan case had been established by user, while that in the New York case had been dedicated by the

* The McNitt-Holbeck-Smith act (CL 1948, § 247.1–247.13 [Stat Ann §§ 9.141–9.153]), was repealed and replaced by PA 1951, No 51 (CLS 1961, §§ 247.651–247.673 [Stat Ann 1958 Rev §§ 9.1097(1)–9.1097(23)]).—REPORTER.

plat.) The only exception to the above general proposition found by the lower court is where there is land in private ownership lying between Michigan Central Park boulevard and the lake, riparian rights belong to the owners of such lands and not to the owners of lands on the opposite side of the boulevard.

This was a chancery proceeding, having been begun in 1960. On appeal, it was transferred to this Court by the Supreme Court. A chancery appeal or, since the change of rules in 1963, an appeal which formerly would have been in chancery is heard *de novo* on the record. However, in such cases, great weight is given by this Court to the findings of fact of the trial judge. We do not reverse in such cases unless we find from a reading of the entire record we would have reached a different conclusion. *Kren* v. *Rubin* (1953), 338 Mich 288; *Resh* v. *Fox* (1961), 365 Mich 288; *Stacey* v. *Mikolowski* (1962), 367 Mich 550; *Haas* v. *Klapatch* (1963), 370 Mich 499. We have thoroughly reviewed the entire record, and we will not reverse the fact findings of the lower court in this case.

The separate rights, if any, of owners of lots of the subdivisions not abutting Michigan Central Park boulevard are not adjudicated in this case, except as they are members of the general public.

This Court vacates that part of the judgment of the lower court which orders the Lyon township board to assume the policing of Michigan Central Park boulevard since there is no showing in the record of legislative authority for enforcing such an order.

The Court affirms the remainder of the judgment. No costs, a public issue being involved.

QUINN, P. J., and MCGREGOR, J., concurred.

PEOPLE *v.* ATKINS.

1. CRIMINAL LAW—FORGERY—OPPORTUNITY TO HAVE ADVICE OF COUNSEL—PLEADING.

   Trial court committed reversible error in prosecution of 16-year-old minor for uttering and publishing a forged check and forgery, where defendant was told he might hire counsel or have one furnished to him and, without having an opportunity to request counsel, was asked to plead, especially where record shows a lack of comprehension of the proceedings on the part of the immature defendant (CL 1948, §§ 750.248, 750.249; GCR 1963, 785).

2. SAME—FORGERY—UTTERING AND PUBLISHING—CONSEQUENCES OF PLEA OF GUILTY.

   Court's statement to 16-year-old defendant in prosecution for uttering and publishing a forged check and for forgery that he would be dealt with according to law in such kind of a case *held*, insufficient compliance with requirement of court rule that trial court inform the defendant of the consequences of plea of guilty, it being requisite that the defendant be informed of the elements of the crime and the possible minimum and maximum sentences for the crimes charged (CL 1948, §§ 750.248, 750.249; GCR 1963, 785.3).

Appeal from Ingham; Coash (Louis E.), J. Submitted Division 2 October 6, 1965, at Lansing. (Docket No. 508.) Decided January 25, 1966. Rehearing denied April 1, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 309 *et seq.*

[2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

Calvin Atkins was convicted of uttering and publishing a forged check and of forgery. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald L. Reisig,* Prosecuting Attorney, and *Julius I. Hanslovsky,* Assistant Prosecuting Attorney, for the people.

Warner, Hart, Warner & Timmer (*Ronald G. Morgan,* of counsel), for defendant.

MCGREGOR, J. The defendant appeals from his conviction in the Ingham county circuit court on a plea of guilty on two felony charges: first, uttering and publishing a forged check,[1] and second, forgery.[2] Defendant, then only 16 years old, was sentenced to concurrent terms of 2–1/2 to 14 years on each count. Jurisdiction was waived in the probate court for Ingham county, defendant being represented by a court-appointed attorney. Subsequently, the defendant appeared without counsel in the municipal court and waived examination.

The relevant portion of the circuit court arraignment at which defendant appeared without counsel, is as follows:

"*Court.* In other words, in count 1 of the information you are charged with forging this check in the name of Michael Goss on the reverse side of this check. Is that right?

"*Defendant. No, I didn't forge it.* (Emphasis supplied.)

"*Court.* And count 2 is the passing or cashing of the check. Now, under the laws of Michigan you can have a trial on this if you want to, a trial before

[1] CL 1948, § 750.249 (Stat Ann 1962 Rev § 28.446).—REPORTER.
[2] CL 1948, § 750.248 (Stat Ann 1962 Rev § 28.445).—REPORTER.

myself as circuit judge, or a trial before a jury, whichever you decide upon. Further, you have the right to be represented by a lawyer. That would be any lawyer that you might care to hire, or if you did not have sufficient money to hire your own attorney, Ingham county would furnish you a lawyer. Do you understand that?

"*Defendant.* Yes.

"*Court.* With that in mind, how are you going to plead?

"*Defendant.* Guilty.

"*Court.* Guilty. Now, has anyone made any threats or promises to you to get you to plead guilty?

"*Defendant.* No.

"*Court.* Do you understand that you will be dealt with according to the laws of Michigan pertaining to this kind of a case?

"*Defendant.* Yes.

"*Court.* Just be seated and I will talk with you."

(Conferring in chambers.)

"*Court.* In the case of the People of the State of Michigan *v.* Calvin Atkins, let the record show that I have talked with Mr. Atkins in my office and he admits to offenses charged in the information. He admits taking this check while employed as a messenger from the city controller's office. Isn't that right?

"*Defendant.* Purchasing.

"*Court.* Purchasing department. And that you and some other boy, a fellow named Johnson, cashed the check and signed it. The other boy cashed it and you got half the money, isn't that right?

"*Defendant.* Yes."

Did the defendant understandingly waive his right to counsel and plead guilty to each of the two charges? The court rules require the trial courts to follow the following procedure:

"If the accused is not represented by counsel upon arraignment, before he is required to plead, the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him." GCR 1963, 785.3(1).

The circuit judge informed the defendant of his rights but failed to ascertain whether the boy wanted counsel. Proper concern for the rights of a minor defendant requires that the court grant an opportunity to request counsel. Here, the defendant was asked to plead before such an opportunity was given. Judge Desmond, writing for a unanimous court in *People* v. *Marincic* (1957), 2 NY2d 181, 184 (139 NE 2d 529, 158 NYS 2d 569, 571) held that:

"Telling a defendant, probably ignorant of court procedures, that she is entitled to counsel, trial by jury, adjournment, bail, et cetera, and then immediately, without waiting for any reply from the defendant, asking her how she pleads and taking her guilty plea is not a compliance with either the spirit or the language of that section (of the statute). * * * [A] defendant is entitled not only to be informed of his right to counsel but to be given a real opportunity to get counsel and to take his advice and aid."

The facts in *Marincic* were functionally the same as in the instant case. The New York court of appeals reversed a conviction of petty larceny on a plea of guilty made by a 16-year-old girl. Although the language of the New York statute governing proceedings and arraignment is substantially different from GCR 1963, 785.3, yet the meaning and purpose are identical. This Court holds that the trial court should have inquired of the defendant whether or not he wished counsel, and, if so, have

given him an opportunity to obtain the advice of such counsel.

The record herein shows the failure of the trial court to properly protect the rights of an immature defendant who may not have completely understood the nature of the charges against him. That portion of the record at arraignment which indicates that the defendant first denied forging of the instrument and then tendered a plea of guilty seems to show a lack of comprehension of the proceedings on his part. Did defendant plead guilty to both charges or only to the charge of uttering and publishing? If there is any cause for doubt that the defendant understands the nature of the accusations, the trial court must explain to him the elements of the crimes charged. *People* v. *Hunn* (1965), 1 Mich App 580.

GCR 1963, 785 also requires the court to inform the defendant of the consequences of his plea before sentencing. The court informed the young defendant that he would be dealt with according to the laws of the State pertaining to his kind of case. This Court does not believe that in the case of a 16-year-old boy such a statement in itself is sufficient compliance with the court rule. The circuit judge should have informed him of the possible minimum and maximum sentences for the crimes charged.

The judgment is reversed and the case is remanded for further proceedings.

QUINN, P. J., and WATTS, J., concurred.

BRIGGS *v.* CAMPBELL, WYANT & CANNON FOUNDRY COMPANY.

HABETLER *v.* SAME.

HARRIS *v.* SAME.

WRIGHT *v.* SAME.

HARRINGTON *v.* GALE MANUFACTURING COMPANY.

1. STATUTES—PROSPECTIVE OPERATION—EXCEPTIONS.
   Statutes are prospective in ther operation excepting in such cases as the contrary is expressed by clear and positive command, or is to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment admits of no reasonable doubt, but precludes all question of such intention.

2. SAME—VESTED RIGHTS.
   Vested rights may not be impaired by legislative action.

3. SAME—INTENT—RETROSPECTIVE ACTION.
   Interpretation of a statute imputes an intention against retrospective action unless the terms clearly indicate an intention in favor of it.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 8] 50 Am Jur, Statutes § 475.
[2, 5] 16 Am Jur 2d, Constitutional Law § 444.
[4, 9, 10, 12, 13] 58 Am Jur, Workmen's Compensation § 342.
[6] 16 Am Jur 2d, Constitutional Law § 177.
Workmen's compensation: termination of employment before occurrence of disability or disease attributable to employment as affecting right to compensation. 104 ALR 1210.
[7] 16 Am Jur 2d, Constitutional Law § 179.
[11] 50 Am Jur, Statutes § 35; 19 Am Jur 2d, Estoppel and Waiver §§ 59, 60.

4. WORKMEN'S COMPENSATION — SILICOSIS — APPORTIONMENT OF AWARD.

Amendatory statute which supplied the necessary ingredients to satisfy constitutional requirements of notice and right of a former employer to contest a claim by an employee for an award of workmen's compensation for silicosis or other dust disease in the first instance *held*, inapplicable so as to permit apportionment of award in proceedings which related to disability or injury which took place prior to the effective date of the amendatory act (CL 1948, § 417.3, as amended by PA 1962, No 189).

5. STATUTES—CONTRIBUTION—VESTED RIGHTS.

The right to hold a party liable for the payment of contribution toward the retirement of a statutory obligation, and the right to defend against any such liability where the liability to contribute did not exist when the party seeking contribution was compelled to pay, alike are vested and substantive rights.

6. SAME—UNCONSTITUTIONALITY.

Generally, an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void and ineffective for any purpose where it denies due process, since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it; an unconstitutional law, in legal contemplation, being as inoperative as if it had never been passed.

7. SAME—AMENDMENT—UNCONSTITUTIONAL LAW—PROSPECTIVE OPERATION OF VALIDITY.

An unconstitutional statute may be rendered valid by removing the objectionable features or by supplying essential features by amendment, but validity would be prospective only.

8. SAME—PRESUMPTIONS—INTENT—PROSPECTIVE EFFECT.

The presumption that the legislature intended that a statute should have prospective effect only is especially true when giving it retroactive operation will create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed.

9. WORKMEN'S COMPENSATION—SILICOSIS—APPORTIONMENT—AMENDMENT.

Recovery of workmen's compensation may be had from only the last of successive employers by claimant for total disability due to silicosis or other dust disease, and, prior to 1962 amendment no right of apportionment having existed, no apportion-

ment may be recovered by the last employer on award for plaintiffs who became disabled and entitled to compensation prior to such amendment (CL 1948, § 417.9, as amended by PA 1962, No 189).

10. SAME—SILICOSIS—APPORTIONMENT OF AWARD—CONSTRUCTION OF STATUTES—PROSPECTIVE OPERATION.

Neither the general public nor any employee in particular will be in any way adversely affected by holding that amendment of the workmen's compensation act providing a valid apportionment of an award to an employee for silicosis or other dust disease operated prospectively only (CL 1948, § 417.9, as amended by PA 1962, No 189).

11. STATUTES—ESTOPPEL—CONSTITUTIONAL LAW—MANDATORY DUTY.

The general rule that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens does not apply where the statute requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive, since the element of voluntary action essential to waiver or estoppel is absent.

12. WORKMEN'S COMPENSATION—SILICOSIS—APPORTIONMENT OF AWARD—CONSTITUTIONAL LAW—ESTOPPEL.

Employers of plaintiffs were not estopped from raising question as to constitutionality of provision of workmen's compensation act apportioning awards for silicosis, where the act had been made compulsory as to them by the same statute as gave the employees compensation for silicosis acquired in a foundry (CL 1948, §§ 417.1, 417.4, 417.9).

13. SAME—SILICOSIS—APPORTIONMENT OF AWARD—CONSTITUTIONAL LAW—NOTICE.

Statute apportioning liability for award for silicosis among all employers in whose employ claimant against last employer had served was unconstitutional so far as former employers were concerned, where it did not provide for notice to them nor afford them opportunity to defend in the first instance against the asserted liability (CL 1948, §§ 417.1, 417.4, 417.9).

Appeals from Workmen's Compensation Appeal Board. Submitted Division 3 October 7, 1965, at Grand Rapids. (Docket Nos. 90–93, 563.) Decided January 25, 1966. Leave to appeal granted by Supreme Court in all 5 cases April 7, 1966. See 377 Mich 706, 707; 379 Mich 160.

Case No. 90.

Buffen Briggs presented a claim against Campbell, Wyant & Cannon Foundry Company, Division of Textron American, Inc., and Liberty Mutual Insurance Company, its insurer, for injuries for silicosis and other dust diseases. Award to plaintiff. On appeal to Workmen's Compensation Appeal Board, defendants moved to add Campbell, Wyant & Cannon Foundry Company, Inc., and Michigan Mutual Liability Insurance Company, a prior employer and its insurer, as defendants and to apportion award as to all defendants. Motion as to apportionment denied and case dismissed as to added defendants. Original defendants appeal. Affirmed.

Case No. 91.

Charles Habetler presented a claim against Campbell, Wyant & Cannon Foundry Company, Division of Textron American, Inc., and Liberty Mutual Insurance Company, its insurer, for injuries from silicosis and other dust diseases. Defendants' motion to add Campbell, Wyant & Cannon Foundry Company and Michigan Mutual Liability Insurance Company, a prior employer and its insurer, granted. Award to plaintiff apportioned as to all defendants. On appeal to Workmen's Compensation Appeal Board, award amended to dismiss added defendants. Original defendants appeal. Affirmed.

Case No. 92.

Albert Harris presented a claim against Campbell, Wyant & Cannon Foundry Company, Division of Textron American, Inc., and Liberty Mutual Insurance Company, its insurer, for injuries from silicosis and other dust diseases. Defendants' motion to add Campbell, Wyant & Cannon Foundry Company, Inc., and Michigan Mutual Insurance Company, a prior

employer and its insurer, as defendants granted. Award to plaintiff apportioned among the several defendants. Added defendants appealed to Workmen's Compensation Appeal Board. Award amended to dismiss added defendants. Original defendants appeal. Affirmed.

Case No. 93.

Melvin Wright presented a claim against Campbell, Wyant & Cannon Foundry Company, Division of Textron American, Inc., and Liberty Mutual Insurance Company, its insurer, for injuries from silicosis and other dust diseases. Campbell, Wyant & Cannon Foundry Company, Inc., and Michigan Mutual Insurance Company, a prior employer and its insurer, entered an appearance. Award to plaintiff, not apportioned as to prior employer and its insurer. On appeal to Workmen's Compensation Appeal Board, Campbell, Wyant & Cannon Foundry Company, Inc., and Michigan Mutual Insurance Company added as defendants. Award affirmed and cause dismissed as to added defendants. Original defendants appeal. Affirmed.

Cholette, Perkins & Buchanan (*Edward D. Wells,* of counsel), for defendant Campbell, Wyant & Cannon Foundry Company, Division of Textron American, Inc., and Liberty Mutual Insurance Company.

Charles H. King, for added defendants Campbell, Wyant & Cannon Foundry Company, Inc., and Michigan Mutual Liability Insurance Company.

Case No. 563.

Robert W. Harrington presented a claim against Gale Manufacturing Company, Corporate Service, Inc., Albion Malleable Iron Company, and Brooks

Foundry Company, and Michigan State Accident Fund, its insurer, for injuries arising from pneumoconiosis. Award to plaintiff as to all defendants except Albion Malleable Iron Company. On appeal to Workmen's Compensation Appeal Board, award amended to dismiss as to Brooks Foundry Company and Michigan State Accident Fund. Defendant Gale Manufacturing Company appeals. Affirmed.

Edward J. Ryan, for plaintiff.

Lacey & Jones (*F. L. Sylvester,* of counsel), for defendant Gale Manufacturing Company.

Herbert H. Sulzbach, for defendant Albion Malleable Iron Company.

Stanley F. Dodge and *Peter B. Munroe,* for defendant Michigan State Accident Fund.

Cases consolidated for appeal and one opinion entered in all five cases. All cases affirmed.

HOLBROOK, J. These cases are appeals from the workmen's compensation appeal board and involve the construction of CL 1948, § 417.9, as amended by PA 1962, No 189 (Stat Ann 1963 Cum Supp § 17.228) providing in part for apportionment of liability between employers in occupational disease disability awards. The first 4 cases were consolidated by order of the Supreme Court in granting leave to appeal, and subsequently, on October 14, 1964, assigned to this Court; the fifth case, leave to appeal was granted in an order of February 17, 1965, solely on the right, if any, of appellant, Gale Manufacturing Company, to apportion its liability, and to be presented to the Court of Appeals for consideration

with Wright *v.* Campbell, Wyant & Cannon Foundry Company.

These appeals all come from the workmen's compensation appeal board's rulings dated April 23, 1964, as to the first four cases, and May 22, 1964, as to the last case.

All five plaintiffs in these cases were found by the hearing referee to have suffered an occupational injury, that of silicosis or related diseases on different dates: Robert W. Harrington, March 2, 1960; Melvin Wright, February 17, 1961; Buffen Briggs, April 5, 1961; Albert Harris, December 19, 1961; and, Charles Habetler, February 28, 1962. All of the hearings were held before the hearing referee on or before February 19, 1963, and awards granted by the hearing referee were all completed before March 28, 1963, excepting as to Albert Harris, which was made April 24, 1963. In the cases of Buffen Briggs and Melvin Wright, petitions to add prior employers were made before the workmen's compensation appeal board: Buffen Briggs, February 8, 1963; and, Melvin Wright, February 18, 1963. In both cases, the workmen's compensation appeal board granted the motions. In the case of Robert W. Harrington, the prior employer Brooks Foundry Company was made a party-defendant in an amended application for hearing of claim filed June 7, 1961. The hearing referees in the Habetler, Harris, and Harrington cases made orders for proportionate payment by prior employers.

As to the first 4 cases, the facts are that plaintiffs were employees of Campbell, Wyant & Cannon Foundry Company, hereinafter referred to as CWC, for a number of years prior to April 20, 1956, and worked in conditions conducive to silicosis. CWC's insurer, under the workmen's compensation act, was the Michigan Mutual Liability Company, hereinafter

referred to as Michigan Mutual. In April, 1956, Textron, Inc., a Rhode Island corporation, purchased CWC from its owners and continued the business under the name of CWC, Division of Textron American. Michigan Mutual continued to insure the liability of Textron American until January 1, 1961, at which time Liberty Mutual Insurance Company became the insurer for Textron. The four plaintiffs were found to be eligible for workmen's compensation under the occupational disease section, subsequent to January 1, 1961, thereby making Liberty Mutual Insurance Company liable as insurer of Textron, "the employer who last employed the employee in the employment, to the nature of which the disease was due and in which it was contracted."

In the Harrington Case, Gale Manufacturing Company, Corporate Service, was found to be the last employer March 2, 1960, and therefore, liable for the compensation by reason of its being self-insured. The hearing referee found Brooks Foundry Company employed the plaintiff for 24 out of the 170 months of exposure, and apportioned 14% of the payments to be recovered by Gale Manufacturing Company from Brooks Foundry Company, and State Accident Fund, its insurer.

The workmen's compensation act was amended by PA 1937, No 61, effective October 29th, and amended by PA 1937, No 3 (Ex Sess) effective November 10, 1937, providing for apportionment of compensation liability, which was applied in the cases before the workmen's compensation department until December of 1961, when the Supreme Court in *Trellsite Foundry & Stamping Company* v. *Enterprise Foundry,* 365 Mich 209, declared the apportionment provision of the occupational disease statute (CL 1948, § 417.9 [Stat Ann 1960 Rev § 17.228]), unconstitutional. The provision had allowed the last employer who

was liable for the entire compensation to the employee to seek apportionment or contributions from prior employers who had contributed to the development of the disease. This provision did not require notice to the prior employers of the original hearing on liability nor the right to contest the original award in favor of the employee and against the last employer, and for that reason was declared unconstitutional.

The legislature in 1962 amended CL 1948, § 417.9, by PA 1962, No 189, effective March 28, 1963, to read as follows:

"The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If any dispute or controversy arises as to the payment of compensation or as to liability therefor, the employee shall give notice to and make claim upon the last employer only and apply for a hearing against the last employer only. If the employee was employed by prior employers in an employment to the nature of which the disease was due and in which it was contracted, then the workmen's compensation department on motion made in writing by the last employer shall join any or all prior employers, mentioned in said motion, as parties-defendant. Any prior employer so joined as a party-defendant may move, in writing, to join other employers as parties-defendant, and the department shall join said employers as parties-defendant. The workmen's compensation department, within 5 days of the entry of its order joining any prior employer as a party-defendant, shall give such party written notice thereof by first-class mail, which notice shall in no case be mailed less than 30 days before the date of hearing, and shall include the name of the employee, the name of the last employer, the name of the moving party, and the names of all other em-

ployers joined as parties-defendant. *The workmen's compensation department shall give not less than 30 days' notice in writing by first class mail to all parties of the time and place of the hearing between the employee and the last employer at which liability shall be determined.* Any prior employer named as a defendant by the department pursuant to motion shall have 10 days from the date of the mailing of notice of joinder to file objections to his being named as a party-defendant. On the day of the hearing at which the liability of the parties shall be determined, the hearing referee shall first hear arguments and take evidence concerning the joinder, as parties-defendant, of employers who have filed timely objections, and if the arguments and evidence warrant, the hearing referee shall grant a motion to dismiss any prior employer as a party-defendant. At the said hearing all employers named as defendants may appear, *cross-examine witnesses, give evidence and defend both on the issue of the liability of the last employer to the employee and on the issue of their liability to the last employer.* The workmen's compensation department shall enter an order determining liability for compensation as between the employee and the last employer. The department shall apportion liability for compensation among the several employers in proportion to the time that the employee was employed in the service of each employer in the employment to the nature of which the disease was due and in which it was contracted and shall enter a separate order in favor of the last employer and against prior employers for their proportionate share of liability, which order may be enforced in the same manner as an award for compensation. Any order so entered may be appealed by any party to the proceeding before the department and shall be reviewed in accordance with the procedure provided in part 3 of this act." (Emphasis supplied.)

Under this amended act, prior employers of an employee sought to be charged with a portion of the compensation award made under the occupational disease section,[1] were granted the procedural right to have notice of the original proceedings before the workmen's compensation department, and the substantive right to defend against the claim of the plaintiff in the first instance as well as to be heard on the apportionment issue.

This amended act was not given immediate effect, and therefore, became effective March 28, 1963, upon expiration of 90 days after adjournment of the legislature. Const 1908, art 5, § 21.

The workmen's compensation appeal board in each case determined that the amended act was prospective and not retroactive in effect, and illustrative of the holding for all cases, stated in the Wright Case: "On February 17, 1961, there were no provisions in the compensation act for apportioning liability. We hold that the provisions of PA 1962, No 189, are not applicable." From these rulings, defendants and appellants appeal.

The essential question to be answered in all of these cases appears to be: "Is the amendment to the workmen's compensation act, PA 1962, No 189, which provides for apportionment of compensation benefits, paid to an employee because of disability due to industrial disease, among employers who employed the employee in employments, which by their nature were a cause of the disease, retroactive in effect?" Defendants-appellants contend the answer should be "yes," whereas, defendants-appellees maintain that the amendment above quoted was prospective in nature in accord with the decision of the workmen's compensation appeal board.

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[1] CLS 1961, § 417.4 (Stat Ann 1960 Rev § 17.223).

In *Trellsite Foundry & Stamping Co.* v. *Enterprise Foundry, supra,* Mr. Chief Justice DETHMERS, on p 217, stated as follows:

"We think these quotations properly state the law. Either the apportionment provision of the statute is or is not constitutional. We hold that it is not because it provides for imposition of liability on prior employers without notice or *opportunity for them to resist the claim at the original hearing where, subject to rights of appeal, validity of the claim is conclusively determined.* The right, if it exists under the statute, of prior employers to quibble with the last employer at the hearing on apportionment as to their relative shares of the liability, if any, is not a complete or satisfactory substitute *for the right to contest claimant's claim in the first instance.*" (Emphasis supplied.)

The general law as to statutes being prospective or retrospective in nature is found in the case of *In re Davis' Estate* (1951), 330 Mich 647, wherein Mr. Justice BOYLES states on pp 651–653, in part as follows:

" 'We think it is settled as a general rule in this State, as well as in other jurisdictions, *that all statutes are prospective in their operation excepting in such cases as the contrary clearly appears from the context of the statute itself.*

" ' "Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force *is expressed by clear and positive command, or to be inferred by necessary, unequivocal . and . unavoidable . implication . from . the words of the statute taken by themselves and in connection with the subject matter, and the occasion of*

the enactment, admitting of no reasonable doubt, but precluding all question as to such intention." Endlich, Interpretation of Statutes, § 271.' *Detroit Trust Co.* v. *City of Detroit,* 269 Mich 81.

"To the same effect, see *Ramey* v. *Michigan Public Service Commission,* 296 Mich 449; *In re Dissolution of Ever Krisp Food Products Co.,* 307 Mich 182, 213; *Michigan Bell Telephone Co.* v. *Michigan Public Service Commission,* 315 Mich 533, 547 (66 PUR NS 287). * * *

"'*It is conceded that vested rights may not be impaired by legislative action.*' *Ramey* v. *Michigan Public Service Commission, supra.*

"Appellee indicates reliance on the reference in section 34a[2] to grants 'paid during the lifetime of the deceased.' Naturally, a claim for reimbursement from an estate would be for grants paid to the beneficiary during her lifetime. But that language does not show clearly a legislative intent that section 34a should be given retroactive effect, or that vested rights should be disturbed. Such a legislative intent must clearly appear from the context of the statute itself. *Detroit Trust Co.* v. *City of Detroit, supra.*

"'It is true the language is general, but it is still subject to the rule of interpretation which imputes an intention *against* retrospective action unless the terms clearly indicate an intention *in favor* of it.' *Finn* v. *Haynes,* 37 Mich 63." (Emphasis and footnote supplied.)

Also, see *Melcher* v. *Employment Security Commission* (1952), 335 Mich 122; and, *Bullinger* v. *Gremore* (1955), 343 Mich 516.

In applying this general principle to these cases, we go to the context of the 1962 apportionment statute in search of an indication, of an intention on the part of the legisature that the statute should have retroactive effect, and find nothing as a result of our search.

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[2] The Court was interpreting CL 1948, § 400.34a (Stat Ann 1960 Rev § 16.434[1]).

PA 1962, No 189, supplied the necessary ingredients to satisfy the constitutional requirements, *i.e.*, provision for notice and the right to contest the claimant's case in the first instance. Appellants would have us now apply these requirements retroactively to all cases wherein the disability or injury took place at a time prior to the effective date of said statute. *Smith* v. *Lawrence Baking Co.*, (May of 1963, subsequent to effective date of the amended statute), 370 Mich 169, was a decision which awarded compensation against the last employer and excluded the prior employer who was also a party-defendant, even though the prior employer had employed the plaintiff for a much longer time in the occupation which caused his "injury." Mr. Justice T. M. KAVANAGH stated on p 175 as follows:

"The act specifically defines a much different basis for the determination of employer liability.

"The first sentence of part 7, § 9, of the workmen's compensation act provides:

" 'The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted.' (CL 1948, § 417.9 [Stat Ann 1960 Rev § 17.228].)*

"In construing this portion of part 7, § 9, consideration must be given to other pertinent provisions of the statute.

"Part 2, § 1, of the act establishes the time and date of injury as follows:

" 'The term "time of injury" or "date of injury" as used in this act shall in the case of a disease or in the case of an injury not attributable to a single event to the last day of work in the employment in which the employee was last subjected to the condi-

* "The apportionment provisions of this section were held unconstitutional in *Trellsite Foundry* v. *Enterprise Foundry*, 365 Mich 209. The subsequent amendment to part 7, § 9, namely PA 1962, No 189, did not change the language of the quoted sentence."

tions resulting in disability or death.' (CLS 1956, § 412.1 [Stat Ann 1960 Rev § 17.151].)" (Footnote in quoted opinion.)

We find other obstacles to declaring the amended act as being retroactive, for to hold that a statute is retrospectively operative by the device of calling it procedural rather than substantive, when it of necessity is a combination of both, is risky business. Such holding would automatically bring a constitutional question to the foreground.

The right to hold a party *liable* for the payment of money, here for contribution toward retirement of a statutory obligation, and the right to defend against any such *liability* where the *liability* to contribute did not exist when the plaintiff (last employer) was compelled to pay, alike are *vested* and *substantive* rights.

In 16 Am Jur 2d, Constitutional Law, § 177, pp 402, 403, it is stated as follows:

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed."

And in section 179, on pp 406, 407, it is stated:

"While it has been broadly stated that an unconstitutional act cannot be validated by the legislature, it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the constitution. The true rule seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the constitution to enact the law, it is not possible for

that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing against it, *then the statute may be rendered valid by amendment, so far as its future operation may extend.*"[3] (Emphasis supplied.)

We conclude that *Trellsite, supra,* destroyed CL 1948, § 417.9 (Stat Ann 1960 Rev § 17.228), *ab initio* and that no right of contribution (apportionment under the 1962 act) accrued in favor of Textron and Liberty Mutual nor Gale Manufacturing Company, Corporate Service.

Appellants in substantiation of their position that the amended act of 1962 should be construed as retroactive, cite two cases: *Rookledge* v. *Garwood* (1954), 340 Mich 444, and *Lahti* v. *Fosterling* (1959), 357 Mich 578, wherein two amendments to the compensation act were held to be remedial only, and hence, not subject to the general rule that statutes should be given prospective interpretation.

The nature and rule concerning "remedial" statutes was described by the Supreme Court in *Hansen-Snyder Company* v. *General Motors Corporation* (1963), 371 Mich 480, wherein Mr. Justice DETHMERS stated on pp 484, 485 as follows:

"Absent a clearly expressed legislative intent to the contrary it is to be presumed that the legislature intended an enactment to have prospective effect only * * * this is * * * especially true when giving a statute retroactive operation will * * * create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed. * * * 'Remedial statutes, or statutes related to remedies or modes of procedure,

[3] *People* v. *DeBlaay,* 137 Mich 402; *Seneca Mining Company* v. *Secretary of State,* 82 Mich 573.

which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing, do not come within the legal conception of retrospective law, or the general rule against retrospective operation of statutes.'" (Emphasis supplied.)

Prior to March 28, 1963, when the new apportionment statute became effective, there was no right of apportionment in occupational disease cases. During that earlier period the only valid law respecting the liability of successive employers was that: "The total compensation due shall be recoverable from the employer who last employed the employee." (CL 1948, § 417.9 [Stat Ann 1960 Rev § 17.228]), and it was during this period of time that the plaintiffs became disabled and entitled to compensation.

In both the *Rookledge Case* and the *Lahti Case,* the Court emphasized the public aspect of holding the amendments involved to be retroactive. In *Rookledge,* the Court recognized (p 454) "remedying a situation which had become detrimental to the public interest," and in *Lahti,* the Court said that the amendment was (p 587) "intended to remedy an existing injustice."

In the matters at hand, neither the general public nor any employee in particular will be in any way adversely affected by holding the new apportionment statute prospective.

Appellants also claim that the appellees are estopped to assert unconstitutionality of the apportionment statute and rely upon the rule stated in 11 Am Jur, Constitutional Law, § 123, pp 767, 768:

"The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. * * * For instance, an employer who *elects* to accept the ben-

efits of a workmen's compensation act is estopped to attempt to escape its burdens by asserting that it is unconstitutional." (Emphasis supplied.)

The exceptions to the general rule appear in the same authority, 11 Am Jur, Constitutional Law, § 124, p 771:

"The most important and frequent class of exceptions to the general doctrine of waiver or estoppel to assert the validity of a law is that where a statute requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive. In such cases *the element of voluntary action essential to waiver or estoppel is absent.* For example, where the provisions of a statute are incorporated in a contract between a contractor and a municipal corporation in accordance with its mandates, the parties are not estopped or bound by such provisions in the event that the statute itself is unconstitutional." (Emphasis supplied.)

Silicosis acquired in a foundry first became compensable in 1943, PA 1943, No 245 (CL 1948, § 417.1 [Stat Ann 1960 Rev § 17.220]). By the very same statute, the workmen's compensation act was made compulsory as to employers having eight or more employees. Both prior employers in our cases became subject to the workmen's compensation act by statutory mandate.

Arguendo, it would also appear evident that appellees, no doubt, have suffered equally as much as they have benefitted from the operation of the former unconstitutional apportionment statute.

These matters have received the careful review that the question presented requires, and it is the opinion of this Court that the appellees are not estopped from asserting the unconstitutionality of the former apportionment statute and it is definite that at the time of the hearing to determine liability, the

statute did not contain essential provisions for notice to prior employers and for granting former employers the opportunity to defend against the asserted liability. Thus the controlling statute was defective and constituted a denial of the constitutional guarantee of due process to such prior employers. These cases are thus governed directly by *Trellsite, supra,* which denied the imposition of an apportioned liability since the person sought to be charged therewith was denied the opportunity to defend against it.

Judgments affirmed, costs to appellees.

BURNS, P. J., and T. G. KAVANAGH, J., concurred.

PEOPLE *v.* CARR.

1. CRIMINAL LAW—ASSAULT—INDECENT LIBERTIES—EXPLANATION OF RESPONSIVE ANSWERS.

   Refusal to strike claimed unresponsive answers of mother of allegedly assaulted 10-year-old girl as mother testified in trial of defendant on charge of assaulting and attempting to take indecent and improper liberties with a child under the age of 16 years *held,* proper, where the obviously responsive parts of the answers were followed by explanation not connecting the defendant more than the direct evidence (CLS 1961, § 750-.336).

2. SAME—MISCARRIAGE OF JUSTICE.

   A judgment or verdict in a criminal case may not be set aside or reversed or new trial granted on the ground of misdirection

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 20 Am Jur, Evidence §§ 245, 246, 251.
[2] 39 Am Jur, New Trial § 139.
[4] 53 Am Jur, Trial § 509.
[5, 8] 53 Am Jur, Trial § 842.
[6, 7] 6 Am Jur 2d, Assault and Battery §§ 24, 25.

of the jury, improper admission or rejection of evidence, or error as to any matter of procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice (CL 1948, § 769.26).

3. SAME—ASSAULT—INDECENT LIBERTIES—EXPLANATION OF ANSWERS BY WITNESS.

Explanatory portions of answers of mother of allegedly assaulted 10-year-old girl involved in prosecution of defendant on charge of assaulting and attempting to take indecent and improper liberties with a child under the age of 16 years, even if irrelevant and unresponsive, *held*, not reversibly prejudicial, when considered with all the evidence in the case (CLS 1961, § 750.336; CL 1948, §769.26).

4. TRIAL—PURPOSE OF INSTRUCTIONS.

The purpose of court's instructions to the jury is to assist the jury in deliberating upon the facts in order to better understand the entire case.

5. CRIMINAL LAW—INSTRUCTIONS.

Jury instructions in a criminal case must be read in their entirety in order to determine whether prejudicial error is present.

6. SAME—INDECENT LIBERTIES—ASSAULT.

An assault or assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under 16 years of age (CLS 1961, § 750.336).

7. SAME—ATTEMPT TO TAKE INDECENT LIBERTIES—ASSAULT.

An assault is a necessary element in the crime of attempting to take indecent and improper liberties with a female child under 16 years of age (CLS 1961, § 750.336).

8. SAME—INSTRUCTIONS—ASSAULT—INDECENT LIBERTIES—MISCARRIAGE OF JUSTICE.

Supplemental instructions to jury requesting an explanation of the difference between "assault and simple assault" in prosecution for assaulting and attempting to take indecent liberties with a 10-year-old girl *held*, not to contain prejudicial error or to result in a miscarriage of justice, when the instructions to the jury are considered in their entirety (CLS 1961, § 750.336; CL 1948, § 769.26).

Appeal from Superior Court of Grand Rapids; Vander Ploeg (Claude), J. Submitted Division 3 November 2, 1965, at Grand Rapids. (Docket No. 745.) Decided January 25, 1966.

Willie Carr was convicted of assault with intent to take indecent and improper liberties. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Norman K. Kravitz,* Assistant Prosecuting Attorney, for the people.

Godfrey Vander Werff, for defendant.

HOLBROOK, P. J. The defendant-appellant was tried and convicted September 29, 1964, in the superior court for Grand Rapids, before a jury, of the offense that he did "unlawfully and feloniously assault a child under the age of 16 years, to-wit: [A][1] of the age of 10 years, and did attempt to take indecent and improper liberties with the person of said child."[2] On the afternoon of June 27, 1964, the defendant's daughter, [B],[1] of about 10 years of age, and a friend of A's asked A to stay at B's home that night. A's parents were consulted, and they gave their consent. After playing in the evening, the two girls went to bed about 11:30 p.m. in a bed on the porch. Sometime thereafter, about 12:45 that same night, defendant took a blanket to put over the two children. At the time, B was asleep, but A was awake, and the alleged acts took place. A, disturbed and crying, awakened B and asked her to unlock the door and A immediately went home without getting her clothes, and made complaint to her parents of what had occurred.

[1] Identity not disclosed.

[2] CLS 1961, § 750.336 (Stat Ann 1954 Rev § 28.568).

After conviction and sentence, the defendant made a motion for a new trial claiming therein and on this appeal from the denial of said motion (1) Mrs. M, mother of A, was guilty of misconduct in testifying in the case by giving claimed prejudicial unresponsive answers to questions asked of her on cross-examination, particularly as follows:

"*Q.* So the only two occasions she talked about it was the night she returned to your house when it was dark, and when she talked to Mrs. Visser the following week?

"*A.* No, because she talked to that detective on Saturday or Monday, I can't remember.

"*Q.* At any other time, did she discuss that with you?

"*A.* No, we was very definite about not talking about it because then it come out about [B], and [B] was so upset, and [B], more or less, upset [A] * * *

"*Q.* [Mrs. M], it was only on two occasions that you discussed this with your daughter, is that true?

"*A.* I don't believe you can knock it down to two times. A child is going to, all the sudden, say something to you, and you will make, maybe, one sentence, remark, or, if you feel she wants to say a little more, you might sit down and try to explain something to her, like out of a clear sky, she might say to you, 'Why, that must be why he took us swimming for a week to try to get on our good side.' I have got to have an answer for her."

and, (2) claimed error of the trial judge in giving supplementary instructions to the jury at their request after they had commenced deliberation. Their request appears in the record as follows:

"Your Honor, one or two of the jurors have asked questions what is the difference — they haven't got it clear in their mind is the difference between assault and simple assault."

Defendant claims error in that the trial judge in answering the question of the jury stated that "within every offense of indecent liberties there has to be an assault" and then stated "that in this case, it is claimed that there was an attempt to take indecent liberties" and then gave instructions on the main charge as well as the lesser offense of simple assault.

We will first consider defendant's claims of prejudicial error by reason of the trial judge failing upon request to strike the claimed irrelevant answers of Mrs. M. The witness was asked questions concerning discussions with the daughter of the occurrence and then asked "at any other time did she discuss it with you?" The answer was "no," (which was responsive), and then in explanation, the witness said, "We was very definite about not talking about it because then it come out about [B], and [B] was so upset, and [B], more or less, upset [A]." To find whether this was prejudicial, we need to consider the facts as claimed by the people and testified to by A, *i.e.,* she was at her little friend's home staying all night, that she was in bed with B, and that something unusual happened and that she was crying, and awakened B from a sound sleep and asked her to unlock the door so she could go home. This would be ample justification for B to be upset and to ask questions concerning the occurrence. There is nothing else in the evidence or record that would indicate any other conclusion. This does not, more than the direct evidence, connect the defendant with the alleged offense.

As to the other claimed prejudicial unresponsive answer of Mrs. M's:

"*A.* I don't believe you can knock it down to two times. A child is going to, all the sudden say something to you, and you will make, maybe, one sentence, remark, or, if you feel she wants to say a little more, you might sit down and try to explain something to

her, like out of a clear sky, she might say to you, 'Why, that must be why he took us swimming for a week to try to get on our good side.' I have got to have an answer for her."

The first part of the answer was responsive and the last part was in explanation. It had already been testified that the defendant had taken the children swimming on several occasions the week prior to the claimed offense. Although it was hearsay, it did not increase the damage to the defendant, considering all the evidence including the testimony of A.

CL 1948, § 769.26 (Stat Ann 1954 Rev § 28.1096) provides as follows:

"No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this State in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

It does not appear to this Court that these two irrelevant unresponsive answers in explanation prejudiced the defendant when considered with all the evidence in the case.

As to the claimed error of the supplemental instructions, the Court finds that the jury in requesting an explanation of the difference between "assault and simple assault" had reference to the offenses they were considering: that is, assault and attempt to take indecent and improper liberties with a female child under the age of 16 years, and the lesser included offense of simple assault. No other interpretation would justify the question. The purpose of instructions to the jury is to assist them in deliberating upon the facts in order to better under-

stand the entire case. *People* v. *Knoll* (1932), 258 Mich 89.

Defining the offense charged as well as the lesser included offense of simple assault in the supplemental instructions was necessary in order to give proper aid to the jurors so that they might understand fully the entire case.

Jury instructions in a criminal case must be read in their entirety in order to determine whether prejudicial error is present. *People* v. *Dye* (1959), 356 Mich 271 (certiorari denied, 361 US 935 [80 S Ct 367, 4 L ed 2d 355]).

The instructions together with the supplemental charge fully and adequately defined the charged offense and the lesser included offense of simple assault and did not place undue emphasis upon the greater crime.

An assault or assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under 16 years. *People* v. *Sanford* (1907), 149 Mich 266; *People* v. *Dupree* (1913), 175 Mich 632; and, *People* v. *Place* (1924), 226 Mich 212. By the same token, an assault is a necessary element in the crime of attempting to take indecent and improper liberties with a female child. We find no error in the supplemental instructions.

We reiterate what Chief Justice STARR stated in the case of *People* v. *Pizzino* (1945), 313 Mich 97, 103:[3]

" 'We have no right to reverse a conviction unless we are satisfied that there was such error committed on the trial as deprived the defendant of substantial rights or resulted in a miscarriage of justice.' "

We have carefully examined the record and are convinced that the errors complained of did not

[3] Quoting *People* v. *Kasem* (1925), 230 Mich 278, 290.

result in a miscarriage of justice. CL 1948, § 769.26 (Stat Ann 1954 Rev § 28.1096).

The trial court did not err in denying defendant's motion for a new trial. Defendant's conviction affirmed.

BURNS and J. H. GILLIS, JJ., concurred.

PEOPLE *v.* DOLPHUS.

1. LARCENY—EVIDENCE.

Testimony, showing defendant was encountered with complainant's portable television set in hand soon after complainant's apartment had been broken into, *held,* sufficient to permit trial judge, as trier of fact, to find that defendant's guilt of larceny from a building was established beyond a reasonable doubt (CL 1948, § 750.360).

2. CRIMINAL LAW—NONJURY TRIAL—CREDIBILITY OF WITNESSES—EVIDENCE—APPEAL—REASONABLE DOUBT.

The credibility of witnesses is a matter for the trial judge when sitting without a jury and the finding of guilty by the trial judge in a criminal case will not be disturbed upon appeal unless the Court of Appeals is satisfied that the guilt of the accused was not established beyond a reasonable doubt.

Appeal from Recorder's Court; Gillis (Joseph A.), J. Submitted Division 1 November 3, 1965, at Detroit. (Docket No. 445.) Decided January 25, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1] 32 Am Jur, Larceny §§ 140–143.
[2] 53 Am Jur, Trial § 1123.

Eddie Dolphus was convicted of larceny in a building. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Rheo C. Marchand,* Assistant Prosecuting Attorney, for the people.

Dominick Carnovale, for defendant.

LESINSKI, C. J. On July 21, 1964, defendant-appellant Eddie Dolphus, upon waiver of a jury trial, was tried in Detroit recorder's court and found guilty of larceny in a building. CL 1948, § 750.360 (Stat Ann 1954 Rev § 28.592). This cause arose when the complainant, Henry Brown, came upon the defendant coming out of the entrance to complainant's apartment dwelling with complainant's portable television in hand.

Brown at the trial testified that Eddie Dolphus told him that some unknown young fellow had taken the television from the complainant's apartment, who when met by the defendant dropped the television. Brown said the defendant claimed he was in the process of returning it to the complainant and not stealing the television.

At the trial Eddie Troy was also called by the people to testify. Both Brown and Troy in their testimony spoke of the possession of the television by the defendant, and of the fact that the complainant's apartment had been broken into. Upon completion of the people's case, both the prosecution and defense rested their cases. The judge sitting as trier of fact found the defendant guilty as charged, and then sentenced him to 2–1/2 to 4 years in prison.

A motion for new trial was filed by the defense

on September 16, 1964. Upon denial of this motion on January 14, 1965, appeal was taken.

The issues facing this Court turn on the weight of the evidence as admitted at trial. It is the defense's contention that there was no competent evidence upon which to convict the defendant of larceny from a building, CL 1948, § 750.360 (Stat Ann 1954 Rev § 28.592), and that it was not proved beyond a reasonable doubt that the defendant had the requisite intent necessary to sustain a charge of larceny.

On close scrutiny of the evidence, it is this Court's view that the record contains proof upon which the trier of fact could convict the defendant. The testimony shows that the defendant was encountered with the complainant's television set in hand, soon after the complainant's apartment had been broken into. Thus, if the the testimony was believed, the trier of fact could find that the defendant's guilt was established beyond a reasonable doubt.

As the Michigan Supreme Court stated in *People* v. *Geddes* (1942), 301 Mich 258, 261:

"The credibility of the witness is a matter for the trial judge when sitting without a jury and the finding of guilt by the trial judge in a criminal case will not be disturbed upon appeal unless this court is satisfied that the guilt of the accused was not established beyond a reasonable doubt. See *People* v. *Sartori,* 168 Mich 308."

This Court is satisfied that the guilt of the accused was established beyond a reasonable doubt, and will not substitute its judgment for that of the trial court as the trial court had an opportunity to hear the testimony of the witnesses and observe their conduct. See *People* v. *Martino* (1944), 308 Mich 381, 391.

Judgment affirmed. Costs to the appellee.

QUINN and WATTS, JJ., concurred.

PEOPLE *v.* CURTIS LEE WILLIAMS.

CRIMINAL LAW—BREAKING AND ENTERING—PLEA OF GUILTY—ADVICE OF COUNSEL—CONSEQUENCES OF PLEA.

It was reversible error for trial court to accept plea of guilty from 16-year-old defendant, charged with breaking and entering in the nighttime, where court advised him of his right to counsel but gave defendant no opportunity to request counsel and failed to inform defendant of the consequences of his plea of guilty (CL 1948, § 750.110; GCR 1963, 785.3).

Appeal from Ingham; Coash (Louis E.), J. Submitted Division 2 November 3, 1965, at Lansing. (Docket No. 768.) Decided January 25, 1966. Rehearing denied March 30, 1966.

Curtis Lee Williams was convicted of breaking and entering in the nighttime. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald L. Reisig,* Prosecuting Attorney, and *James R. Ramsey,* Assistant Prosecuting Attorney, for the people.

Thomas P. Mitchell, for defendant.

MCGREGOR, P. J. The defendant appeals from his conviction in the circuit court for Ingham county on a plea of guilty to the felony of breaking and entering

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REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 486 *et seq.*

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof, 97 ALR 2d 549.

in the nighttime.[1] Defendant, then only 16 years old, was sentenced to 3 to 5 years. The trial court journal shows the sentence to be 3 to 15 years. Upon defendant's appearance without counsel in circuit court for arraignment, the information was read to him. The proceedings then continued as follows:

"*Court.* Now, do you understand the charge against you?

"*Defendant.* Yes.

"*Court.* In other words, you are charged with breaking and entering in the nighttime with intent to commit a larceny there in Gregg's Grocery at 1320 West Kalamazoo street in the city of Lansing on the 22d day of April, 1964. Do you understand that?

"*Defendant.* Yes, sir.

"*Court.* Under the laws of Michigan you can have a trial on this charge if you want to, a trial before myself as circuit judge, or a trial before a jury, whichever you decide upon. Further you have the right to be represented by a lawyer. That would be any lawyer that you might care to hire; or if you did not have sufficient money to hire your own attorney, Ingham county would furnish you a lawyer. Do you understand that?

"*Defendant.* Yes.

"*Court.* How are you going to plead?

"*Defendant.* Guilty.

"*Court.* Guilty?

"*Defendant.* Yes.

"*Court.* Has anyone made any threats or promises to you to get you to plead guilty?

"*Defendant.* No.

"*Court.* Is it your own free act and deed?

"*Defendant.* Yes.

"*Court.* Do you understand you will be dealt with according to the laws of Michigan pertaining to this kind of case?

"*Defendant.* Yes.

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[1] CL 1948, § 750.110 (Stat Ann 1962 Rev § 28.305).—REPORTER.

"*Court.* All right. Just be seated and I will talk with you.

(Conferring in chambers.)

"*Court.* In the case of the people of the State of Michigan v. Curtis Lee Williams, let the record show that I have talked to Mr. Williams in my office. He admits the offense charged in the information. He admits breaking into the grocery store described in the information about 12:30 in the morning, and he got some cigarettes and wine and some other things, didn't you?

"*Defendant.* Yes, sir.

"*Court.* And the court finds that his plea of guilty is voluntary and will be accepted, and remanded to the county jail to await sentence."

The plea of guilty was not properly accepted. The defendant was not given an opportunity to request counsel. The court failed to inform him of the consequences of his plea.[2] These issues are fully discussed in *People* v. *Atkins* (1966), 2 Mich App 199 and the resolution therein applies fully to the instant case.

Judgment is reversed and the case is remanded.

FITZGERALD and T. G. KAVANAGH, JJ., concurred.

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[2] See GCR 1963, 785.—REPORTER.

CITY OF MUSKEGON *v.* SLATER.

1. EMINENT DOMAIN—ATTORNEY FEES—STATUTES.
   Attorney fees in condemnation proceeding for urban renewal project are allowable only when permitted, and in amount limited, by statute (CL 1948, § 213.21 *et seq.*).

2. SAME—ATTORNEY FEES.
   Attorney fee of $1,250, allowed by trial judge in condemnation proceeding for urban renewal project *held*, not proper, where statute set maximum limit for attorney fee in the amount of $25 (CL 1948, § 213.37).

3. CONSTITUTIONAL LAW—EMINENT DOMAIN—JUST COMPENSATION—ATTORNEY FEE.
   Attorney fees are not embraced within *just compensation* for land taken by eminent domain (US Const, Ams 5, 14; Mich Const 1908, art 13, § 1; Const 1963, art 10, § 2).

4. COSTS—CONDEMNATION PROCEEDING—ATTORNEY FEE.
   No costs are allowed on appeal to Court of Appeals in condemnation proceeding for urban renewal project from order allowing $1,250 attorney fee, where pertinent statute limited such fee to $25 (CL 1948, § 213.37).

Appeal from Muskegon; Beers (Henry L.), J. Submitted. Division 3 November 4, 1965, at Grand Rapids. (Docket No. 404.) Decided January 25, 1966. Leave to appeal granted by Supreme Court April 7, 1966. See 377 Mich 707; 379 Mich 466.

Condemnation petition by city of Muskegon, a municipal corporation, against Henry S. Slater, John D. Shamel, Esther H. Shamel, and others to acquire

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 18 Am Jur, Eminent Domain § 379.
[4] 5 Am Jur 2d, Appeal and Error § 1009 *et seq.*

land for an urban renewal project. Award confirmed and order entered assessing attorney fee for defendants and against plaintiff city. Plaintiff appeals. Reversed and remanded.

Parmenter, Forsythe & Steendam, for plaintiff.

James F. Schoener, for defendants.

J. H. GILLIS, J. In order to implement its urban renewal plan, the plaintiff-appellant city of Muskegon filed a petition for condemnation pursuant to CL 1948, § 213.21 *et seq.* (Stat Ann 1958 Rev § 8.11 *et seq.*) The defendants-appellees John D. Shamel and Esther H. Shamel were owners of a lot ultimately condemned in these proceedings.

The circuit judge entered an order permitting the defendants to tax $1,250 for attorney fees against the plaintiff. The parties stipulated that this sum is reasonable in amount.

This case has been submitted upon a stipulated statement of facts and the sole issues are whether CL 1948, § 213.37 (Stat Ann 1958 Rev § 8.27) is an unlawful interference with the power of a court to assess reasonable costs and whether this statute violates the right of a defendant to receive just compensation for the taking of his property.

The statute in question states:

"Officers, jurors and witnesses in any proceeding under this act shall be entitled to receive from the petitioner the same fees and compensation as are provided by law for similar services in an ordinary action at law in the circuit courts, and it shall be lawful for the judge in any case to order the payment by the petitioner to any respondent of such reasonable attorney fee as he may deem just, not exceeding 25 dollars, which may be taxed with the costs."

Plaintiff contends that the statutory limit of $25 for attorney fees is not unlawful and that the circuit judge exceeded his authority in allowing an attorney fee of $1,250.

Plaintiff contends that a court does not have an inherent power to award costs or attorney fees, and that the right of a prevailing party to recover either is a creature solely of statute.

Decision in this case is controlled by *Detroit Edison Company* v. *Janosz* (1957), 350 Mich 606, wherein the following appears at page 611:

" 'The condemnation statutes of the State of Michigan may be divided into 3 general groups on the question involved in this appeal: those which make no provision for awarding attorney fees, those which provide for attorney fees but specifically limit their amount, and 1 statute which provides for a reasonable attorney fee to be fixed and determined by the court.' "

The Court also stated, at page 610:

"That expert witness and attorney fees are allowable only when and in the amount provided by statute."

The condemnation statute here involved falls into the second category which provides for attorney fees but limits the amount that can be awarded. The circuit judge exceeded his authority in awarding an attorney fee in excess of $25. *Gundersen* v. *Village of Bingham Farms* (1965), 1 Mich App 647.

Defendants' contention that the $25 limitation on attorney fees violates his constitutional rights* to receive just compensation for the taking of his property has been considered by the United States Supreme Court in *Dohany* v. *Rogers* (1930), 281 US

* See US Const, Ams 5, 14; Mich Const 1908, art 13, § 1, Const 1963, art 10, § 2.—REPORTER.

362 (50 S Ct 299, 74 L ed 904, 68 ALR 434), a case involving a Michigan condemnation statute. The court held, at page 368:

"Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

Since no statutory authority exists for the taxation of the $1,250 attorney fee, the order of the circuit judge is reversed and the cause remanded for the entry of an order taxing $25 for the attorney fee. No costs.

HOLBROOK, P. J., and BURNS, J., concurred.

PEOPLE *v.* DEMERS.

CRIMINAL LAW—ARRAIGNMENT—PLEA OF GUILTY—TRIAL BY JURY.

It was reversible error for trial court to accept plea of guilty to charge of breaking and entering with intent to commit a felony from defendant not represented by counsel at arraignment, where, trial court stated defendant was entitled to a trial but failed to indicate he was entitled to a trial by *jury* as required by court rule (CL 1948, § 750.110; GCR 1963, 785.3).

Appeal from Berrien; Hadsell (Phillip A.), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 628.) Decided January 25, 1966.

REFERENCES FOR POINTS IN HEADNOTE

31 Am Jur, Jury §§ 8, 53.

Right of defendant to waiver right of trial by jury where he is not represented by counsel. 143 ALR 445.

Charles Demers was convicted of breaking and entering with intent to commit a felony. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *John T. Hammond,* Prosecuting Attorney, and *Harry J. Creagar,* for the people.

Thomas H. Adams, Jr., for defendant.

FITZGERALD, P. J. Defendant, Charles Demers, was arrested and charged with breaking and entering with intent to commit a felony or larceny pursuant to CL 1948, § 750.110 (Stat Ann 1962 Rev § 28.305). The crime took place November 26, 1964, in the city of Benton Harbor.

Upon arraignment, December 4, 1964, to answer an information charging him with the offense, defendant, unrepresented by counsel, pleaded guilty and later was sentenced to 3 to 10 years in prison.

Defendant appeals on various grounds, all of which are directed toward statutory and constitutional issues arising from arraignment.

To go to the heart of defendant's appeal, we set forth the relevant part of GCR 1963, 785.3(1), supplying emphasis where it bears on this appeal:

"Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead, *the court shall advise the accused that he is entitled to a trial by jury* and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him."

Following is the relevant portion of the record on arraignment:

"*Court.* It carries a maximum penalty of 10 years in the penitentiary. *You are entitled to a trial* to determine whether or not you are guilty of this charge. You are entitled to counsel to defend you; of your own choosing if you have sufficient funds to employ counsel, and, if not, then appointed by the court at the expense of the people. You also have a right to plead to it if you wish. What is your desire?

"*Defendant.* Plead guilty."

Defendant has assigned as error the fact that he was not apprised of his right to jury trial on arraignment—and indeed he was not, a fact conceded by the prosecution.

Defendant submits a number of subjective reasons why he was prejudiced by this failure to inform him of his right to jury trial: that the court and prosecutor were not clearly divorced in his mind, that the judge in the instant case failed in conveying the idea of impartiality to him, that all those present were interested in his sentencing and that he consequently pleaded guilty.

The people, as appellees, conversely use subjective arguments to say that this was not prejudicial error, specifically by the statement from their brief: "Query: Does the average person, uninformed as to the law, associate a trial with a jury? Submitted that he definitely does so. In fact, appellee respectfully submits that appellant also understood that his right to a trial meant a trial by jury, and challenges him to show otherwise."

The problem, it seems to us, is not what was in the mind of the defendant, the prosecutor, or the judge, but whether the court rule was complied with.

Problems arising from GCR 1963, 785.3, have come to this court in its brief existence with increasing frequency. See *People* v. *Hunn* (1965), 1 Mich App

580; *People* v. *Atkins* (1966), 2 Mich App 199; *People* v. *Curtis Lee Williams* (1966), 2 Mich App 232.

It is not necessary to assume the role of a martinet to state that GCR 1963, 785.3(1), was not complied with here, specifically in that defendant was not told of his right to a jury trial.

A trial court need not be avuncular in its compliance with GCR 1963, 785.3(1), but all its mandates must be observed. Five minutes invested in a thorough compliance with the rule could yield untold benefits for all concerned with a criminal prosecution.

Reversed and remanded.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

KNIBBE *v.* CITY OF WARREN.

1. JUDGMENT—RES JUDICATA.

Judgment of court of competent jurisdiction upon a point is, as a plea, a bar, or as evidence conclusive, between the same parties, or their privies, upon the same matter directly in question in another court, and no matter once litigated and determined, by proper authority, shall a second time be brought in controversy between the same parties or their privies.

2. SAME—RES JUDICATA—DIFFERENT SUBJECT MATTER.

Judgment in first suit or proceeding by court of competent jurisdiction upon a particular matter, fact, or point is conclusive between the same parties or their privies in second suit

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REFERENCES FOR POINTS IN HEADNOTES

[1] 30A Am Jur, Judgments §§ 324, 325.
[2] 30A Am Jur, Judgments §§ 363, 365–368, 463.
[3] 30A Am Jur, Judgments §§ 324, 325, 363, 365–368, 463.
38 Am Jur, Municipal Corporations § 728.

even though the object and subject matter of the second suit may be different from the first suit.

3. MUNICIPAL CORPORATIONS—SEWER-TAP FEES—TRAILER COACH PARK.

Judgment that plaintiff trailer coach park was not covered by ordinance concerning sewer-tap permits fixed rights of parties respecting such subject matter, hence, subsequent resolution by city to raise such fees for trailer parks was invalid and unenforceable against plaintiff notwithstanding charge to plaintiff would be smaller than others to whom applicable.

Appeal from Macomb; Kane (Edward T.), J., presiding. Submitted Division 2 December 7, 1965, at Lansing. (Docket No. 688.) Decided January 25, 1966. Rehearing denied March 4, 1966. Leave to appeal denied by Supreme Court June 13, 1966. See 378 Mich 719.

Mandamus by Klaas Knibbe against the City of Warren, a municipal corporation, to compel issuance of utility permits and to enjoin enforcement of zoning ordinances in respect to trailer coach parks as they apply to his property. Writ granted. Defendant appeals. Affirmed. See *Knibbe* v. *City of Warren* (1961), 363 Mich 283. Defendant ordered plaintiff to cease work on improving the land until the increased permit fees were paid. Plaintiff sought a show cause order as to why the defendant should not be held in contempt. Circuit court enjoined defendant from attempting to collect the utility fee. Defendant appeals. Affirmed.

Johnston & Wendt (*William V. Wendt,* of counsel), for plaintiff.

Emil C. Cardomone, City Attorney, and *Robert F. Cella,* Assistant City Attorney, for defendant.

QUINN, J. Defendant appeals from an order of the circuit court for the county of Macomb dated March 11, 1965. This order enjoined defendant from

enforcing, with respect to plaintiff, its resolution requiring payment of certain sewer-tap fees before property owners may connect to city of Warren's sewer system. The resolution involved was passed by defendant's council January 13, 1959.

In its brief, defendant states two questions involved on this appeal, but it is the opinion of this Court that they can be combined into one question, namely: is plaintiff entitled to sewer-tap permits on payment of the fees required therefor by defendant on December 18, 1958?

This is a controversy of long standing. A short summary of its development is required. In 1941, plaintiff was the owner of a trailer park in Warren township, now defendant. By 1949, he acquired additional land contiguous to the trailer park. In 1951, while developing the additional land for trailer park purposes, he applied for meter, inspection, and sewer permits for the additional property and paid the required fees. The permits were issued and defendant began a sewer installation to the property. Defendant terminated this work before completion, and on August 22, 1956, defendant revoked the permits and returned the fees. Further applications for permits were refused, and plaintiff finally petitioned Macomb county circuit court for a writ of mandamus to require the issuance of permits. After hearing on the merits, the writ of mandamus issued December 18, 1958. Defendant appealed and the trial court was affirmed. *Knibbe* v. *City of Warren* (1961), 363 Mich 283. Thereafter defendant issued plaintiff the permits at the rates existing prior to January 13, 1959, the date defendant passed the resolution on sewer tap fees. This resolution raised the fees to $200 per unit for trailer parks. December 7, 1964, defendant ordered plaintiff to cease work on the additional land until the increased permit fees were

paid. Plaintiff petitioned Macomb county circuit court for an order to show cause why defendant should not be held in contempt for violation of the judgment of December 8, 1958. This matter was heard March 1, 1965 and resulted in the order here appealed from.

The controlling principle of law was clearly set forth in *Wales* v. *Lyon* (1851), 2 Mich 276, 281:

"It is a well settled general principle, that the judgment of a court of competent jurisdiction directly upon the point, is, as *a plea, a bar,* or as *evidence* conclusive, between the same parties, or their privies, upon the same matter directly in question in another court, and that no matter once litigated and determined, by proper authority, shall a second time be brought in controversy between the same parties or their privies. [Citing cases.] Such has ever been the rule, and although the object and the subject matter of the two suits or proceedings be different, yet the judgment of a Court of competent jurisdiction upon a particular *matter, fact* or *point,* once litigated and determined, is conclusive between the parties, or their privies."

This is still the law of Michigan. See *Smith* v. *Heppner* (1936), 276 Mich 463, 469. Applying this rule to the facts before us, defendant's argument that the equal protection clause of the Constitution will be violated if plaintiff is charged a smaller sewer-tap fee than others (see *Beauty Built Construction Corporation* v. *City of Warren* [1965], 375 Mich 229) is of no force. The rights and obligations of the parties were fixed by the judgment of December 18, 1958, several weeks before the sewer-tap ordinance of January 13, 1959.

The trial court order of March 11, 1965, is affirmed, with costs to appellee.

LESINSKI, C. J., and MCGREGOR, J., concurred.

PEOPLE *v.* DAVIS.

CRIMINAL LAW—ESCAPES—CONSECUTIVE SENTENCE—STATUTES.

Sentence for unlawfully driving away an automobile to commence after expiration of life sentence for first-degree murder *held*, valid, where statute permitted commencement of sentence for crime committed by escapee to start after expiration of sentence being served at time of escape (CL 1948, § 750.413; CLS 1961, § 768.7a).

Appeal from Jackson; Dalton (John C.), J. Submitted Division 2 December 8, 1965, at Lansing. (Docket No. 451.) Decided January 25, 1966. Leave to appeal denied by Supreme Court May 17, 1966. See 377 Mich 710.

Orcean Davis was convicted of unlawfully driving away an automobile. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James G. Fleming,* Prosecuting Attorney, and *Thomas G. Fleming,* Assistant Prosecuting Attorney, for the people.

William F. Goler, for defendant.

QUINN, J. While serving a life sentence for first-degree murder, defendant was convicted by his plea of guilty of unlawfully driving away an automobile. CL 1948, § 750.413 (Stat Ann 1954 Rev § 28.645). He was sentenced to State prison for a term of 1-1/2 to 5 years, sentence to commence at the expiration of the life sentence defendant was then serving. De-

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REFERENCES FOR POINTS IN HEADNOTE

[1] 21 Am Jur 2d, Criminal Law §§ 545, 547–549,

fendant appeals on the basis that the sentence was null and void because it was uncertain and indefinite.

Defendant clearly states the issue presented as:

"May an inmate of a penal institution who, while serving a term of imprisonment for his natural life, shall commit a criminal offense, upon a conviction therefor, be sentenced to a term of imprisonment to begin at the expiration of the term then being served?"

In support of his position, defendant relies on *In re Bloom* (1884), 53 Mich 597, and *In re Lamphere* (1886), 61 Mich 105. Each of the cases relied on held that a sentence similar to the one here appealed from was void because the time of commencement was indefinite and uncertain, but in each case the Supreme Court specifically held that this was true because there was no statute on the subject. There was such a statute when defendant here was sentenced. CLS 1961, § 768.7a (Stat Ann 1954 Rev § 28.1030[1]) provides:

"Any person who is now or hereafter incarcerated in any penal or reformatory institution in this State, or who escapes from such institution, and commits a crime punishable by imprisonment in any penal or reformatory institution in this State shall, upon conviction thereof, be subject to sentence therefor in the manner provided by law for such crimes. The term of sentence imposed for such crime may, at the discretion of the court pronouncing judgment in such case, commence forthwith or at the expiration of the term or terms of sentence which such person is serving or has theretofore become liable to serve in any penal or reformatory institution in this State.

"The powers conferred upon the court by this section shall be deemed to be supplementary to any other power conferred by law."

This clearly authorizes the sentence imposed in this case.

The trial court is affirmed.

LESINSKI, C. J., and MCGREGOR, J., concurred.

PEOPLE v. HALL.

CRIMINAL LAW—ESCAPES—CONSECUTIVE SENTENCES.

Sentence for escape from prison to commence after expiration of life sentence for first-degree murder *held*, valid, where statute authorized imposition of sentence to run consecutively (CLS 1961, § 750.193).

Appeal from Jackson; Dalton (John C.), J. Submitted Division 2 December 8, 1965, at Lansing. (Docket No. 659.) Decided January 25, 1966.

Theodore Hall was convicted of escape from prison. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James G. Fleming,* Prosecuting Attorney, and *Thomas G. Fleming,* Assistant Prosecuting Attorney, for the people.

William F. Goler, for defendant.

QUINN, J. This appeal raises the same issue presented in *People* v. *Davis* (1966), 2 Mich App

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REFERENCES FOR POINTS IN HEADNOTE

[1] 21 Am Jur 2d, Criminal Law §§ 545, 547–549.

245. The only factual difference is that this defendant was convicted of escape from prison. CLS 1961, § 750.193 (Stat Ann 1962 Rev § 28.390). This is no reason for differentiation. *Davis* controls.

Affirmed.

LESINSKI, C. J., and MCGREGOR, J., concurred.

FEBRUARY SESSION, 1966.

PENDELL *v.* NORTHWESTERN LEATHER COMPANY.

1. WORKMEN'S COMPENSATION—CONTINUING JURISDICTION OF DEPARTMENT—ALTERATION OF AWARD.

   The workmen's compensation department has continuing jurisdiction to alter awarded compensation upon proof of changed facts.

2. SAME—ENDING COMPENSATION.

   The statutory method of ending workmen's compensation as specially fixed by the statute is exclusive (CLS 1961, § 412.9).

3. SAME—ENDING COMPENSATION.

   Neither the administrative agency charged with the administration of the workmen's compensation act nor a court reviewing its action has the power to terminate or reduce an award of workmen's compensation in a situation not provided for by statute (CLS 1961, § 412.9).

4. SAME—REDUCTION OF COMPENSATION—AGE OF DEPENDENTS—SUPPORT OF CHILDREN.

   Reduction of award of workmen's compensation to employee whose 3 grandchildren were dependent upon her at time of injury may not be made merely because they cease to receive more than half of their support from the injured employee, where statute does not provide for termination of compensation in

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 498.
Res judicata as regards decisions or awards under workmen's compensation acts. 122 ALR 550.
Workmen's compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement. 165 ALR 9.
[2, 3] 58 Am Jur, Workmen's Compensation § 499 *et seq.*
[4, 5] 58 Am Jur, Workmen's Compensation § 501.
[6] 5 Am Jur 2d, Appeal and Error § 1009.

such a situation until the lapse of 6 months after children reach age of 16 and cease to receive more than half of their support from the injured employee (CLS 1961, § 412.9).

5. SAME—DEPENDENTS—CHANGE OF CIRCUMSTANCES.

Determination of workmen's compensation appeal board that injured employee's married daughter who was a dependent at the time of the injury was no longer a dependent *held*, supported by record, due to change of circumstances in that she was divorced and remarried (CLS 1961, § 412.9).

6. COSTS—PUBLIC QUESTION—REDUCTION OF WORKMEN'S COMPENSATION.

No costs are allowed on appeal in proceeding to reduce workmen's compensation awarded to claimant with dependents consisting of a married daughter and the daughter's 3 minor children upon the daughter's divorce and remarriage and reduction in proportion of the employee's proportion of support to less than 50% for the children, a public question being involved (CLS 1961, § 412.9).

Appeal from Workmen's Compensation Appeal Board. Submitted Division 3 October 7, 1965, at Grand Rapids. (Docket No. 98.) Decided February 9, 1966.

Martha Pendell presented a claim for compensation against Northwestern Leather Company and Liberty Mutual Insurance Company, for an injury suffered April 1, 1957. On May 1, 1961, defendants petitioned for a reduction of compensation. Referee ordered compensation reduced. Workmen's Compensation Appeal Board modified referee's order. Defendants appeal. Affirmed.

Goodman, Crockett, Eden, Robb & Philo (*Morton A. Eden* and *William Goodman,* of counsel), for plaintiff.

Burney C. Veum, for defendants.

T. G. KAVANAGH, J. This appeal from the decision of the workmen's compensation appeal board presents two issues for determination.

1. How may compensation benefits be reduced when dependency ceases?

2. Does dependency of a child over 16 at the time of injury terminate when such child ceases to receive more than one-half of his support from the injured employee?

The claimant, Martha Pendell, received compensation for an injury suffered on April 1, 1957. As of that date she had four dependents, a married daughter and the daughter's three minor children.

On May 1, 1961, defendants petitioned for a reduction of compensation on the grounds that (1) the claimant's daughter had received aid to dependent children, and (2) the claimant's daughter was divorced and remarried and neither the daughter nor the children were receiving more than 50% of their support from the claimant.

When the claimant's answer to the petition admitted these facts the referee ordered the compensation reduced by elimination of the award for these four dependents.

The appeal board modified the decision of the referee and eliminated only the claimant's married daughter as a dependent.

The appellants argue that the department has continuing jurisdiction to alter awarded compensation upon proof of changed facts. They cite many cases in support of their proposition. *Allen* v. *National Twist Drill & Tool Company* (1949), 324 Mich 660; *Winn* v. *Adjustable Table Co.* (1916), 193 Mich 127; *Letourneau* v. *Davidson* (1922), 218 Mich 334; *Szczucki* v. *Cadillac Motor Car Co.* (1940), 294 Mich 271; *Millaley* v. *City of Grand Rapids* (1925), 231 Mich 10; and *Grycan* v. *Ford Motor Company*

(1939), 291 Mich 241. But this is not disputed. The appellee admits that the department has jurisdiction to alter the award, but insists that the circumstances of such alteration are spelled out in the statute and must control its action.

We agree.

CLS 1961, § 412.9 (Stat Ann 1960 Rev § 17.159) being section 9 of part 2 of the workmen's compensation law provides in pertinent part:

"(d) Weekly payments to any injured employee shall be reduced by the additional amount provided for any dependent child or husband or wife or other dependent when such child either reaches the age of 21 years or after becoming 16 ceases for a period of 6 months to receive more than one-half of his support from such injured employee, if at such time he or she is neither physically nor mentally incapacitated from earning, or when such husband or wife shall be divorced by final decree from his or her injured spouse, or when such child, husband or wife or other dependent shall be deceased."

This provides that in exercising its continuing jurisdiction to alter awards, the department shall reduce the payment to an injured employee:

1. When a dependent spouse shall be divorced or die,
2. When a dependent child (not mentally or physically incapacitated from earning),
(a) reaches the age of 21
(b) reaches the age of 16 and thereafter for a period of 6 months ceases to receive more than one-half of his support from the injured employee
(c) dies; and
3. When any other dependent dies.

In the case at bar, the grandchildren are "other dependents". Whether the statute should provide for the reduction of compensation when an "other dependent" ceases to receive more than one-half his

support from the injured employee is for the determination of the legislature. As the act stands it does not so provide.

The principles stated by the Supreme Court in *Grycan, supra,* and *Winn, supra,* control us here:

"When the method by which compensation may be ended is specially fixed by the statute, such statutory method of ending compensation is exclusive." *Grycan, supra,* p 248.

"It was an attempt to meet a situation not provided for by statute and neither the industrial accident board* nor this Court has any power to do that." *Winn, supra,* p 132.

The second issue is the effect on a compensation award when a dependent child who is over 16 at the time of the injury ceases to receive more than one-half of his support from the injured employee for a period of 6 months.

As we read the provisions of subdivision (d) above, the compensation is to be reduced when a dependent child who is over 16 ceases to receive more than one-half of his support from the injured employee for a period of 6 months. For the purposes of this provision it does not matter what the dependent child's age was at the time of the injury.

The receipt of over one-half his support is a factual determination and not here disputed. Thus the appeal board's determination that the injured employee's daughter is no longer a dependent is supported by the record.

Affirmed. No costs awarded, a question of public interest being involved.

BURNS, P. J., and HOLBROOK, J., concurred.

* The administration of the workmen's compensation act is presently vested in the workmen's compensation department and the workmen's compensation appeal board. See CLS 1961, §§ 408.2, 408.10 (Stat Ann 1960 Rev §§ 17.6[8], 17.6[16]).—REPORTER.

WEST MICHIGAN PARK ASSOCIATION *v.* DEPARTMENT OF CONSERVATION.

1. DEDICATION—REVOCATION—ESTOPPEL—VACATION.

A dedication by the owner-plattor of land to public use becomes irrevocable upon the sale of lots by reference to the plat, estops him to vacate it, except through court proceedings as provided by statute, and binds the grantees of the dedicators (CLS 1961, § 560.62).

2. SAME—CONVEYANCE OF LAND FOR PUBLIC USES IN TRUST.

Original plat of land, made in 1886, *held*, a sufficient conveyance to vest in the county wherein the land was located the fee of such parcels of land as were therein expressed to be for public

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REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur 2d, Dedication §§ 25, 60, 61.
Revocation or withdrawal of dedication by grantees or successors in interest of dedicator. 86 ALR2d 860.
[2] 23 Am Jur 2d, Dedication § 22.
[3, 6] 23 Am Jur 2d, Dedication § 58.
[4] 23 Am Jur 2d, Dedication § 66.
[5] 23 Am Jur 2d, Dedication § 75.
[7] 23 Am Jur 2d, Dedication § 42.
Necessity of acceptance of dedicated street to relieve it from taxation. 5 ALR 1537.
[8] 23 Am Jur 2d, Dedication §§ 43, 44.
Validity and construction of regulations as to subdivision maps or plats. 11 ALR2d 524.
[9, 11, 12] 23 Am Jur 2d, Dedication §§ 43, 44.
[10, 14] 23 Am Jur 2d, Dedication § 49.
Dedication: time for acceptance. 66 ALR 321.
[13] 23 Am Jur 2d, Dedication §§ 41, 60.
[15] 5 Am Jur 2d, Appeal and Error § 820.
[16] 23 Am Jur 2d, Dedication § 23.
[17] 23 Am Jur 2d, Dedication § 4.
[18] 23 Am Jur 2d, Dedication § 41.
[19] 23 Am Jur 2d, Dedication § 24.
[20] 23 Am Jur 2d, Dedication § 44.
[21] 23 Am Jur 2d, Dedication § 65.
[22] 23 Am Jur 2d, Dedication § 69.
[23] 5 Am Jur 2d, Appeal and Error § 1009.

uses, in trust to and for the uses and purposes therein expressed, and for no other use or purposes whatever, where statute then in force provided that the due making, acknowledgment, and recording of a plat should be deemed a sufficient conveyance to vest in the county in which the land lies the fee of parcels of land expressed for public uses, in trust (PA 1839, No 91; § 2, as last amended by PA 1885, No 111).

3. SAME—PLAT AS CONVEYANCE—BASE FEE.

The term *base fee*, as used with reference to description of estate in land dedicated to public uses conveyed to the county by plat, was used in the sense of a fee which has a qualification annexed to it (PA 1839, No 91, § 2, as last amended by PA 1885, No 111).

4. SAME—PARK AREAS—ABANDONMENT.

Plaintiff association, whose members are lot owners of subdivision used for summer resort purposes, and who have used the areas dedicated to public use and designated as park areas may not be said to have abandoned the areas so dedicated, where the use of them has been continuous.

5. SAME—ABANDONMENT—BURDEN OF PROOF.

The burden of proving abandonment of land dedicated by owner-plattor to public uses is upon the party asserting abandonment.

6. SAME—PARK—BASE FEE IN COUNTY.

The dedication by the owner-plattor of lands in a subdivision for park purposes effected a transfer from the dedicator to the county in which the land was situated a base fee title, the qualifications attaching to the dedication being for park purposes (PA 1839, No 91, § 2, as last amended by PA 1885, No 111).

7. SAME—ACCEPTANCE—TAXATION—MAINTENANCE—REPAIR.

Acceptance of an offer to dedicate land to public use is ordinarily essential to a complete dedication, and to work an exemption of the dedicated property from taxation, especially where the public body is to be charged with the duty to maintain and repair the facility offered to the public, and subjected to liability for nonperformance of such duty.

8. SAME—PLATS—OFFER TO DEDICATE—ACCEPTANCE.

A plat of land is generally taken as a mere offer to dedicate the areas indicated for public use which must be accepted before the dedication is complete.

9. SAME—OFFER TO DEDICATE—ACCEPTANCE.
An offer to dedicate land as contained in a plat may be accepted either by public authorities or by the public.

10. SAME—OFFER TO DEDICATE—ACCEPTANCE.
The right to accept land offered in a plat to public use will ordinarily continue until the wants and convenience of the public require the use of the land, or until the offer is withdrawn or revoked.

11. SAME—ACCEPTANCE.
A dedication of land for the public use, being merely an appropriation of land for such purpose, may be accepted by a formal acceptance for such use by or in behalf of the public.

12. SAME—ACCEPTANCE BY PUBLIC.
Determination by trial judge that land within a plat dedicated to public use for park purposes had been used by the public for such purpose for upwards of 65 years qualified as an acceptance by the public of the dedication.

13. SAME—ACCEPTANCE BY GRANTEES OF THE DEDICATOR.
An acceptance of a dedication of park areas by the grantees of the dedicators made the original dedication irrevocable.

14. SAME—DURATION OF OFFER—STATUTE OF LIMITATIONS.
An unaccepted offer of land for public uses, unless there are facts equivalent to a continuous renewal of the offer, cannot be considered open after the lapse of time enough to bar all actions for the recovery of lands under the statute of limitations.

15. APPEAL AND ERROR—QUESTIONS FOR TRIER OF FACTS—PREPONDERANCE OF EVIDENCE.
The Court of Appeals does not substitute its judgment on questions of fact for that of the trial court in a nonjury case, unless the evidence presented clearly preponderates in the opposite direction.

16. DEDICATION—ACCEPTANCE—PUBLIC IN GENERAL.
Rights based upon dedication and acceptance of a plat are ascertable, if at all, as a right or use to which public in general is entitled.

17. SAME—PUBLIC RIGHTS.
The essence of a dedication to public uses is that it shall be for the use of the public at large and while there may be a dedication of lands for special uses, it must be for the benefit of the public and not for any particular part of it.

18. SAME—ACCEPTANCE—PARK AREA.

Finding of trial judge that area adjacent to State park which area was within summer resort subdivision and had been dedicated to public use for park purposes was owned by county in trust for the public *held,* not error under record presented in action to enjoin State and county officers from using such park area and to declare that plaintiff lot owners have exclusive right to use thereof, since there had been acceptance of the dedication through user thereof (PA 1839, No 91, § 2, as last amended by PA 1885, No 111).

19. ACKNOWLEDGMENT—PLATS—CURING OF TECHNICAL DEFICIENCY.

Holding by trial court that technical deficiency in acknowledgment of plat had been cured by statutory provision validating recorded plats that had not been acknowledged in accordance with statute and that plat was valid *held,* not error, where dedicator and its grantees had asserted the legality of the plat from time to time in the past (CL 1948, § 560.69).

20. OFFICERS—AUDITOR GENERAL—DEPUTY—ABSENCE—APPROVAL OF PLAT.

A plat which was recorded in 1886 is not declared invalid nearly 80 years later merely because the deputy auditor general, rather than the auditor general himself, approved the plat, since the acceptance by the deputy may well have been done in the absence of the auditor general himself (How Stat, § 283).

21. DEDICATION—PARK PURPOSES—LEASE BY COUNTY TO STATE.

Defendant county in which summer resort subdivision was located and in which plat dedicating certain areas for public use for park purposes had effected a base fee title in county was empowered to lease such dedicated area to the State department of conservation for purposes within the dedication so limited (CL 1948, § 318.7).

22. SAME—PUBLIC AND LOT OWNERS IN SUMMER RESORT SUBDIVISION—JURISDICTION.

Retention of jurisdiction in circuit court *held,* ample to preserve and protect rights of lot owners of summer resort subdivision and the general public in portions of plat dedicated by owner-plattor for park purposes and thereafter leased by county to to State department of conservation.

23. COSTS—DEDICATION—PARKS.

No costs are allowed in action to enjoin defendant county and State officers from using and possessing certain areas in summer resort subdivision which had been dedicated to the public for park purposes, a public question being involved.

Appeal from Ottawa; Smith (Raymond L.), J. Submitted Division 3 October 7, 1965, at Grand Rapids. (Docket No. 261.) Decided February 9, 1966. Leave to appeal denied by Supreme Court May 11, 1966. See 377 Mich 709.

Bill by West Michigan Park Association of Ottawa Beach, Michigan, a Michigan corporation, and others against the Department of Conservation, State of Michigan; the County of Ottawa; and the Ottawa County Road Commission to enjoin defendants from using, controlling, and possessing certain park land in area known as Plat of West Michigan Park, and to declare that plaintiffs have exclusive right to possession and use of the park land. Judgment for defendants. Plaintiffs appeal. Affirmed.

McShane, Bowie & Anderson (*T. Gerald McShane,* of counsel), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Nicholas V. Olds* and *Warren R. Snyder,* Assistant Attorneys General, for defendants.

Amicus Curiae:

Edward D. Wells, in propria persona.

HOLBROOK, J. Plaintiffs-appellants, members of West Michigan Park Association of Ottawa Beach, Michigan, and lot owners in what is known as Plat of West Michigan Park, brought suit on March 31, 1958, against the defendants-appellees, the department of conservation of the State of Michigan, county of Ottawa, and Ottawa county road commission, for an injunction restraining them from using, controlling, and possessing so-called "park" land in

said plat, and for decree that plaintiffs have exclusive rights to possession and enjoyment of said "park" areas to the exclusion of the general public.

The able trial judge, after hearing the cause, determined that the county of Ottawa held title in fee to the "park" areas and open areas designated in said plat subject to the perpetual right of the lot owners to use, occupy, and enjoy the same with the general public. Judgment was entered in accord therewith. Plaintiffs appeal.

The pertinent facts appear in the opinion of the trial judge as follows:

"On September 21, 1886, the West Michigan Park Association, incorporated as a summer resort association under PA 1869, No 151,[1] recorded in the office of the register of deeds for Ottawa county its plat of West Michigan Park. This plat was marked 'Map of West Michigan Park' and contained a number of areas designated as 'park, walks, roads' as well as open areas. Eventually a large number of lots were sold to the public by reference to this plat.

"The legal standing of this plat has been before the Michigan Supreme Court on three occasions: *West Michigan Park Association* v. *Pere Marquette R. Co.,* 172 Mich 179; *Westveer* v. *Ainsworth,* 279 Mich 580; *Kirchen* v. *Remenga,* 291 Mich 94.

"In *Kirchen* the Supreme Court held that the lot owners had the legal right under the plat to maintain the areas designated 'park' as such. In the matter before this court the issue is whether or not the designated 'park' areas and other open areas treated by all parties concerned as park areas are public to the extent that the general public may not be excluded from their use.

"For many years there was a large resort hotel located on a 'park' area and the general public was invited to use the facilities of the resort and to make

[1] See repealer and saving clause in CL 1948, § 455.22 (Stat Ann 1963 Rev § 21.681).

use of the 'park' and open areas for recreational purposes. From 1954 to 1958 the public was excluded from using these lands by the erection of fences and the posting of signs. In 1958 the fences were removed by public authorities.

"Defendant maintains a public park called Holland State Park, comprising 43 acres of land on Lake Michigan and located south and west of West Michigan Park and contiguous to it. Holland State Park draws in excess of 1,000,000 attendance each year.

"In 1958 defendant conservation department and Ottawa county entered into a lease wherein the county leased certain areas originally designated 'park' areas or open areas in the West Michigan Park plat above referred to and now known as park areas 3, 7, 8, and 12 of Nieuwsma's Supervisor's Resubdivision of West Michigan Park. In this lease Ottawa county was designated as the owner of the fee. The lease contained limitations as to use so as to secure the rights of all concerned within the purposes of the original West Michigan Park plat. * * *

"The record sustains a finding that the public have for many years, from 1886 to 1954, used the beach and park areas, especially the beach areas between West Michigan Park and Lake Michigan and the area to the north of Holland State Park, now referred to as the Thompson property, and Mt. Pisgah Park for recreational purposes. Be that as it may this court finds a statutory dedication present. The record likewise sustains a finding that there were public moneys spent to maintain walks and fire lanes in the plat.

"The above mentioned lease was entered into pursuant to PA 1919, No 218, § 7, as amended. This act authorized a municipality to transfer the care and control of open spaces to the conservation department. The lease contains ample provision to insure that the rights of the lot owners are maintained and the original purposes of the dedication are carried out."

We have two questions raised that must be resolved in this appeal: (1) Did the plat of 1886 of West Michigan Park effect a dedication to the public of the areas on the plat marked "park"? (2) Did Ottawa county own or control the areas on the plat map marked "park" and the "Thompson area" so as to render PA 1919, No 218, § 7 (CL 1948, § 318.7 [Stat Ann 1958 Rev § 13.1015]) applicable and thereby allow the transfer of said areas to the department of conservation?

In *Westveer* v. *Ainsworth, supra,* Mr. Chief Justice FEAD on pp 583, 584 stated as follows:

"It is the great weight of authority that dedication by the owner-plattor becomes irrevocable upon sale of lots by reference to the plat and he is estopped to vacate it. 18 CJ Dedication, p 119; 8 RCL, p 914; Ann Cas 1917A, 1109, note. *And the grantees of the dedicators are bound by the dedication.* 18 CJ Dedication, p 115. * * *

"We need not attempt to define precisely the sort of title the lot purchaser has in the public grounds nor discuss the matter of vacation at common law, because when the instant plat of 1886 was recorded, as now, the statutes provided for change therein by the court unless there be 'reasonable objection to making such alteration or vacation.' How Stat, § 1478 *et seq.;* CL 1929, § 13259.[2] While such proceedings may constitute an attempt at revocation of the dedication, 18 CJ Dedication, p 123, grantees of the original plattor are not estopped to take them. *In re Oakes,* 249 Mich 494. And the statutes themselves name the persons who may make application.* The plat must be deemed to have been recorded subject to the statutory conditions and plaintiffs are not estopped from pursuing the procedure. *The estoppel*

[2] See, currently, CLS 1961, § 560.62 (Stat Ann 1963 Cum Supp § 26.492).

runs only to their denying the dedication as against the lot purchasers." (Emphasis supplied.)

"* See CL 1929, § 13256 *et seq.*"

The dedication by the owner-plattor as to this plat became irrevocable subject only to be changed by the Court as provided by statute.

In *Kirchen* v. *Remenga, supra,* plaintiff's herein or their predecessors in title brought action against defendants therein who claimed rights to dedicated public lands in said plat to the exclusion of plaintiffs and the general public. Mr. Justice POTTER stated on pp 111–113 as follows:

"The territorial act of March 12, 1821, governing town plats, provided that when made, acknowledged, and recorded in accordance with the statute, they 'shall be deemed a sufficient conveyance, to *vest the fee* of such parcels of land as are therein expressed, named, or intended to be for public uses, in the county in which such town lies, *in trust* to and for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.' 1 Terr Laws, p 816. The same language was continued in section 2 of the act of April 12, 1827 (2 Terr Laws, p 577). This language was continued in PA 1839, No 91, § 2, as originally enacted and as amended by PA 1859, No 35, and PA 1885, No 111. By PA 1887, No 309, amending such section, it was provided:

" 'The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever.'

"This rule was continued by CL 1929, § 13247 (Stat Ann § 26.480).[3]

"The original plat here involved was made and filed while PA 1885, No 111, was in force, and must be deemed as sufficient conveyance to vest the fee of such parcels of land as were therein expressed, named, or intended to be for public uses, in the county of Ottawa, in trust to and for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever.

" 'The statute in question provides in express terms that the plat shall have the effect to convey the fee of land dedicated to public uses to the county. A plat conforming to the statute, then, operates as a conveyance of a fee, though *probably* it is a base fee;' and there were 'sufficient reasons for a statute which should give to a formal offer of dedication of public ground by a plat the effect of *a conveyance by way of grant to uses, and providing a grantee.' Patrick* v. *Young Men's Christian Ass'n of Kalamazoo,* 120 Mich 185.

"The term 'base fee,' which the court in the case last cited said was probably meant by the statute, was used in the sense of a fee which has a qualification annexed to it. 1 Bouvier's Law Dictionary (Rawle's 3d Rev), p 329. This is apparent from the later language above quoted. * * *

"Defendants contend plaintiffs have abandoned whatever rights they may have had in the premises dedicated for park purposes, and that defendants have acquired rights therein by adverse possession. It does not appear plaintiffs and their grantors ever ceased to use the park lands for the purposes for which they were dedicated. *Plaintiffs do not claim exclusive rights to the use and possession of the park lands, but only claim they are entitled to use them in common with others in the same manner in which parks are generally used.* Such use by plaintiffs and by their grantors has been continu-

[3] See, currently, CL 1948, § 560.50 (Stat Ann 1953 Rev § 26.480).

ous, and it cannot be said that abandonment has taken place. The burden of proving abandonment is upon the party asserting it, and abandonment occurs only when the use for which the property is dedicated wholly fails. *Delaware, L. & W. R. Co.* v. *City of Syracuse* (ND NY), 157 F 700; *Sipe* v. *Alley,* 117 Va 819 (86 SE 122); *Horey* v. *Village of Haverstraw,* 124 NY 273 (26 NE 532); 18 CJ Dedication, p 123; *Sinclair* v. *Comstock,* Harr Ch (Mich) 404. Plaintiffs contend, and we hold, such use of the park lands as has been made does not amount to an abandonment." (Emphasis supplied in part.)

It is apparent from the ruling in the *Kirchen Case,* plaintiffs therein, who are now plaintiffs in this case or their predecessors in title, did not claim exclusive rights in the said "park" lands of said plat, but only the right to use the same with the general public.

It appears settled law that the 1886 plat effected a transfer of the fee from the dedicator to the county of Ottawa which was a "base" fee. The qualifications attaching to the dedication of the lands in question was for "park" purposes. The question arises as to acceptance of the dedication.

In 23 Am Jur 2d, Dedication, §§ 42, 43, 45, 49, and 50, pp 38–40 and 43–45, it is stated in part:

"Unless otherwise provided by statute, acceptance of an offer to dedicate land to public use is ordinarily essential to a complete dedication and to work an exemption of the dedicated property from taxation, especially where the public body is to be charged with the duty to maintain and repair the facility offered to the public, and subjected to liability for nonperformance of such duty. * * *

"In the case of dedication by plat the matter of acceptance is peculiarly apt to be overlooked by reason of the ready implication of acceptance, and sometimes acceptance almost seems to be implied as a

matter of course. * * * Generally, however, the plat is taken as a mere offer to dedicate, which must be accepted before the dedication is complete. * * * Although the owner, by platting land and conveying lots with reference to the plat, is, as a general rule, estopped to deny the dedication of the parts of the tract marked on the plat as streets, alleys, parks, or other public places, as against his grantees, or may even be estopped to revoke or deny such dedication as against the public, it does not necessarily follow that the dedication is accepted by the municipality. * * *

"In the absence of statute, an offer to dedicate land to public use is not required to be accepted by public authorities; *it may be accepted by the general public.* * * *

"Unless a statute provides to the contrary, the right to accept land offered to public use as a street will ordinarily continue until the wants and convenience of the public require the use of the street or, as is said in some cases, until the offer is withdrawn or revoked. * * *

"Formal acceptance may consist of a formal ratification by the proper official board of the municipality, a formal resolution or order by any other proper official body, the adoption of a municipal ordinance, the vote of a town council, *the signing of a written instrument by the proper authorities,* the execution of an official map by a city showing the street offered to be dedicated as such, or an act of the legislature incorporating a town, or adopting a map showing its limits." (Emphasis supplied.)

The case of *Clark* v. *City of Grand Rapids* (1952), 334 Mich 646, casts light upon the manner in which a dedication of public property may be accepted. Mr. Justice BUTZEL on pp 656, 657, stated as follows:

"A dedication is merely an appropriation of land to some public use, accepted for such use by or in behalf of the public. *Hayes* v. *Livingston,* 34 Mich

384 (22 Am Rep 533); *Alton* v. *Meeuwenberg,* 108 Mich 629."

The trial judge in his finding of facts determined that the park lands in question had been used by the public for many years from 1886 to 1954. This would qualify as an acceptance *by* the public and permissible under *Clark* v. *City of Grand Rapids, supra.*

The dedication of the "park" areas had already been accepted by the grantees of the dedicator, as evidenced by the decision in the *Westveer Case,* thus making the original dedication irrevocable. The early case of *County of Wayne* v. *Miller* (1875), 31 Mich 447, enunciates the general rule concerning acceptance of a dedication by a municipal authority. It is stated by Mr. Justice COOLEY on p 450 as follows:

"After what length of time such an offer must be regarded as withdrawn, circumstances may perhaps determine, but unless there were facts equivalent to a continuous renewal of the offer, it cannot be considered open after the lapse of a period of time sufficient to bar all actions for the recovery of lands under the statute of limitations."

See, also, *Shewchuck* v. *City of Cheboygan* (1963), 372 Mich 110.

Our case is distinguishable from both *Shewchuck* and *Miller.* In our case we have lot owners or grantees from the dedicator asserting rights in and to the "park" areas and also acceptance of the "parks" by the general public by user for a period of more than 65 years. These facts have been determined in the previous cases involving this plat and from the fact findings, made by the able trial judge, in our case. This Court does not substitute its judgment on questions of fact in a nonjury case,

unless the evidence presented clearly preponderates in the opposite direction.

The question arises: Do plaintiffs have exclusive right to possession and enjoyment of the "park" areas as delineated in the 1886 plat? As authority for the principle that there cannot be a dedication for private purposes or enjoyment, we turn to *Krausharr* v. *Bunny Run Realty Co.* (1941), 298 Mich 233, wherein Mr. Justice NORTH stated on pp 241, 242 as follows:

"'"Solely as individuals, these plaintiffs cannot assert any rights based upon the dedication and acceptance of the plat; but, instead, rights of that character *must be asserted, if at all, as a right or use to which the public in general is entitled.*

" 'There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. In fact, the essence of a dedication to public uses is that it shall be for the use of the public at large. There may be a dedication of lands for special uses, but it must be for the benefit of the public, and not for any particular part of it; and if from the nature of the user it must be confined to a few individuals, * * * the idea of dedication is negatived.' 16 Am Jur, p 359." (Emphasis supplied.)

We conclude that the dedication of the "park" areas in the 1886 plat under the statute effected a grant of the fee to the county of Ottawa in trust for the public. That this offer remained open under the circumstances of this case; *i.e.*, by reason of the acceptance of the dedication by the grantees of the dedicator, and their use of the lands thereunder together with acceptance by the general public through user. We find no error in the trial judge's ruling that the so-called "Thompson property" was a part of the park areas as dedicated.

Plaintiffs claimed that the original West Michigan Park plat was ineffectual because of certain technical deficiencies, claiming the acknowledgment was made in Kent county instead of Ottawa county and that the plat was accepted by the deputy auditor general instead of the auditor general. The trial judge ruled that the claimed acknowledgment deficiency was cured by CL 1948, § 560.69 (Stat Ann 1953 Rev § 26.499) and that the acceptance by the deputy auditor may well have been done in the absence of the auditor general[4] under the *facts* of this case. We agree and further add that the legality of the plat has been asserted by the dedicator and its grantees from time to time in the past. The trial judge did not err in ruling the plat valid.

A similar lease from a municipal authority to the department of conservation of the State of Michigan has already been approved as proper under CL 1948, § 318.7 (Stat Ann 1958 Rev § 13.1015). *Clark* v. *City of Grand Rapids, supra.*

The judgment of the circuit court amply provided for protection of plaintiffs' rights in and to said public lands by retaining jurisdiction of the matter to preserve and protect the rights of plaintiffs and the general public in said lands.

Judgment affirmed, no costs, a public question being involved.

BURNS, P. J., and T. G. KAVANAGH, J., concurred.

[4] See How Stat, § 283 (CL 1948, § 13.26 [Stat Ann 1961 Rev § 3.130]).

BERGER v. TRAVELERS INSURANCE COMPANY.

1. INSURANCE—ACCIDENTAL DEATH—CONSTRUCTION OF POLICY.
   Construction of an accidental death insurance policy must be as fair and as reasonable as the limiting language will permit in order to have such contracts of value to the insured.

2. SAME—ACCIDENTAL DEATH.
   An accidental injury must stand out as the prominent factor in the production of death of the insured in order to recover under an accidental death insurance policy.

3. SAME—ACCIDENTAL DEATH—PROXIMATE CAUSE.
   Parties to an accidental death insurance policy are deemed to have intended that the active, efficient, proximate cause of death be the ultimate test of liability.

4. APPEAL AND ERROR—COURT OF APPEALS—NONJURY CASES—PREPONDERANCE OF EVIDENCE.
   The function of the Court of Appeals upon review of a nonjury action at law is to determine whether the judgment was against the preponderance of the evidence.

5. TRIAL—CHANGING THEORY OF CASE ON REBUTTAL.
   Plaintiff who has finished proof and rested case on one theory cannot, under claim of rebuttal, put in a new and different case as a ground of recovery.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur, Insurance §§ 258, 261.
[2, 3] 29A Am Jur, Insurance § 1162.
[4] 5 Am Jur 2d, Appeal and Error §§ 783, 841.
[5] 5 Am Jur 2d, Appeal and Error §§ 546, 591.
[6] 29A Am Jur, Insurance § 1212.
Arteriosclerosis as affecting right to recovery under accident policy or accident provision of life policy. 82 ALR2d 611.
[7] 29A Am Jur, Insurance § 1956.
[8] 4 Am Jur 2d, Appeal and Error §§ 11, 17.

6. INSURANCE—ACCIDENTAL DEATH—DISEASE—FINDING OF FACT.
Finding of trial judge in nonjury action under accidental death insurance policies that primary cause of death of insured was severe arteriosclerotic heart disease, not the automobile accident in which insured had been involved 2 weeks before his death, *held*, supported by competent evidence.

7. SAME—ACCIDENTAL DEATH—PROXIMATE CAUSE—EVIDENCE.
It is a question for the trier of the facts to determine what the active, efficient, and precipitating cause of death may be when conflicting evidence of relations between alleged causes and effects are presented in action under accidental death insurance policies.

8. APPEAL AND ERROR—NONJURY CASES—PREPONDERANCE OF EVIDENCE—WITNESSES.
The Court of Appeals does not substitute its judgment on questions of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction, since the trial judge has the benefit of observing and hearing the witnesses.

Appeal from Muskegon; Piercey (John H.), J. Submitted Division 3 November 3, 1965, at Grand Rapids. (Docket No. 341.) Decided February 9, 1966. Leave to appeal granted by Supreme Court April 19, 1966. See 377 Mich 708, 379 Mich 51.

Declaration by Margie S. Berger against Travelers Insurance Company for death benefits under two insurance policies issued on the life of her husband who died following an automobile accident. Judgment for defendant. Plaintiff appeals. Affirmed.

Marcus, McCroskey, Libner, Reamon, Williams & Dilley (*Vernon D. Kortering,* of counsel), for plaintiff.

Hathaway, Latimer, Clink & Robb (*H. Winston Hathaway,* of counsel), for defendant.

HOLBROOK, P. J. Plaintiff, beneficiary on two health and accident policies issued by defendant

company to her husband LuVerne C. Berger, brought action for the payment of death benefits thereunder, claiming her husband died as a result of injuries received in an automobile accident September 29, 1960.

The pertinent terms of the policies are as follows:

Policy No. R (1)—145762—$5000.

" * * * against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this policy and effected solely through accidental means, subject to the provisions, conditions and limitations herein contained, * * *

"A. The insurance under this policy shall not cover * * * death * * * caused directly or indirectly, wholly or partly, * * * or (2) by any other kind of disease."

Policy GA 9500—$10,000.

"If bodily injury not hereinafter excepted, effected directly and independently of all other causes, through accidental means, shall be sustained by a member employee, while insured under this part and shall result, within 90 days of the date of accident, in any one of the losses enumerated below, the company will pay the sum set opposite such loss, but only one of the amounts so specified, the largest, will be paid for all injuries resulting from any one accident. * * *

"Exclusions:—The insurance under this part shall not cover

"(1) accident, injury, death or other loss caused directly or indirectly, wholly or partly, by disease."

The trial judge, sitting without a jury, found for the defendant and plaintiff has appealed.

The facts appear to be undisputed except as to cause of death. LuVerne C. Berger, age 54, was driving in Saginaw on September 29, 1960, and had an accident whereby his vehicle hit an immovable

object and he was thrown forward causing the steering wheel to bend, and he suffered fractures of the third, fourth, fifth, sixth, seventh, and eighth left ribs, and the seventh and eighth right ribs at the interior axillary line without displacement, several broken teeth, lacerations and hematoma of the chin, lacerations of the left knee and of the inside of the lip. He was given medical attention at Saginaw and then was returned to his home at Muskegon. He saw Dr. Warren White October 1st; Monday, October 3d; Tuesday or Wednesday of same week; and again on Monday, October 10, 1960. Dr. White gave Mr. Berger medical attention and in testifying related that Mr. Berger complained of severe pain in his chest on both sides and that he appeared to be markedly depressed and tense—and he did look ill during all this time, depressed, anxious, and even agitated. Mr. Berger returned to some of his duties with his company Tuesday, October 11, 1960, but with discomfort and difficulty, and on Wednesday, October 12, 1960, left for Bay City with a junior salesman of the company and was found dead in his hotel room in the early hours of October 13, 1960.

In 1948, Mr. Berger suffered a heart attack and was hospitalized, treated for the same, and was required to refrain from working for a period of time. After about four months, he resumed his work and appeared to have recovered from the heart attack as far as being able to carry on his vocation. EKG's were periodically given and the results indicated good progress. Blood tests in the early part of 1960 showed high cholesterol content of 400.

Dr. Henry DeLeeuw, pathologist, on October 14, 1960, performed an autopsy to determine the cause of death. He found the fractured ribs and other evidence of the accident. He examined the coronary

arteries and found them to be markedly thickened, and that Mr. Berger suffered severe arteriosclerosis, and found evidence of the old area of occlusion in the right coronary artery. The lungs and the liver were abnormally heavy. Dr. DeLeeuw testified that the prime cause of death was "severe arteriosclerotic heart disease" and that he found no evidence of any current or recent infarction or occlusion. He also made 14 slides composing exhibit 3 showing two coronary arteries and myocardial sections. These were used together with the report of the pathologist by the other medical physicians testifying in the case.

Plaintiff's theory on the trial was that Mr. Berger suffered a cardiac contusion in his automobile accident of September 29, 1960, which caused his death. The two physicians testifying for plaintiff were Dr. Ray W. Kissane and Dr. Jack F. Sanders, and though disagreeing in certain aspects of the case did agree that plaintiff's decedent suffered a cardiac contusion in the accident and that it caused the heart failure which resulted in his death.

The three testifying physicians for defendant stated that in their opinion, plaintiff's decedent did not suffer a cardiac contusion. Their pertinent testimony most favorable to plaintiff appears in the record as follows:

Dr. DeLeeuw, the posting pathologist testified:

"*Q.* (*By Mr. Hathaway for defendant*). This man was in an automobile accident approximately 13 days before he died, Doctor, wherein he sustained the rib fractures which you mentioned. In your opinion, did this accident or the injury to the ribs have anything to do with this man's death as a causal factor?

"*A.* (*Dr. DeLeeuw*). Well, I think this man's primary difficulty was his severe arteriosclerotic heart disease. *Now, he had an accident about two weeks before, and of course an accident doesn't do anybody any good.* I think it is fair to say that if

this man were 23 years old, *he would have recovered without incident.*

"*Q.* Or, assuming that he did not have the heart disease, what is your opinion as to whether or not the accident would have caused death?

"*A.* Well, that is what I mean. I think he would probably have recovered.

"*Q.* So, you say the prime cause of death was what?

"*A.* Severe arteriosclerotic heart disease." (Emphasis supplied.)

Dr. Lange, consulting pathologist, testified:

"*A.* Then, he had this accident. He was getting along fairly well, he was taking good care of himself. He was working hard. He obeyed the rules that was set down for him, and he had this accident. *Well, after the accident he just forgot to obey those rules. He could not eat properly. He could not sleep. He could not rest properly. And I think that was the big factor in the old sickness coming up again. He didn't have the cardiac reserve to go through this. And, he allowed out the trauma that he had, and, therefore, the coronary arteriosclerosis again manifested itself and found himself dead in bed. That is my interpretation of the case.*

"*Q.* (*By Mr. Hathaway*). Then too, what would you say were the one or two factors or conditions which developed, which caused this man's death?

"*A.* Well, number one, the coronary arteriosclerosis and previous heart attack. Number two, the accident and the more or less indirect effects of it in changing his life, and in precipitating his myocardial failure." (Emphasis supplied.)

Dr. White, the treating physician for Mr. Berger for more than 10 years, testified:

"My answer is that I feel that the underlying heart condition had caused his death was arteriosclerotic heart disease, *but I feel that the stress he endured in the auto accident, and, had a great deal*

to do with his demise. It seems too fortuitous, more than fortuitous, that he expired within two weeks from the time that he had this automobile accident." (Emphasis supplied.)

After trial of the case and before decision, the Supreme Court handed down its opinion in the case of *Nickola* v. *United Commercial Travellers of America* (1964), 372 Mich 600, which followed the ruling in the case of *Kangas* v. *New York Life Insurance Co.* (1923), 223 Mich 238. The *Nickola Case* was drawn to the attention of the trial judge by plaintiff before decision and given consideration in his opinion.

In the *Kangas Case*, the terms of the policy appear on pp 239, 240 as follows:

"'New York Life Insurance Company agrees to pay to Jemina Kangas, mother of the insured, beneficiary, $3,000 (the face of this policy) upon receipt of due proof of the death of John E. Kangas, the insured, or double the face of this policy upon the receipt of due proof that the death of the insured resulted *directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within 60 days after sustaining such injury. This double indemnity benefit will not apply if the insured's death resulted from self-destruction,* whether sane or insane; from any violation of law by the insured; from military or naval service in time of war; from a state of war or insurrection; from engaging in submarine or aeronautic operations; from physical or mental infirmity; *or directly or indirectly from illness or disease of any kind.*'" (Emphasis supplied.)

The facts in the *Kangas Case* appear to be that plaintiff, after her son's death, made claim for double indemnity under terms of policy because of an accidental injury to her son's left knee causing sep-

ticemia, resulting in death. The defendant claimed that plaintiff's decedent was treated for a carbuncle on the thigh of the left leg, shortly before his death, and that if the insured suffered any injury to his knee, death did not result solely from the injury, but was caused in whole or in part from infection resulting from the carbuncle. Mr. Justice MCDONALD stated on pp 243–245 as follows:

"In most cases a policy of this character would be of little or no value to the insured if the limiting language be literally interpreted as claimed by the defendant. Death from an external injury, unless instantaneous, is usually the result of various concurring causes. The injury sets in motion other agencies and awakens dormant internal ailments which contribute to death. These are conditions rather than causes. If such insurance contracts are to be of any value to the man who pays for the risk assumed, a construction as fair and reasonable as the limiting language will permit should be placed upon them.

" 'We think the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the predominant factor in the production of the result, and not that it must have been so virulent in character as necessarily and inevitably to have produced that result, regardless of all other conditions and circumstances. People differ so widely in health, vitality and ability to resist disease and injury, that what may mean death to one man would be comparatively harmless to another, and therefore the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions; and if, under the peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears as the active, efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause

of death.' *Driskell* v. *Insurance Co.,* 117 Mo App 362 (93 SW 880).

"There are two lines of decisions dealing with the interpretation of these insurance clauses. Both will be found cited in *Abbott* v. *Travelers Insurance Co.,* 208 Mich 654. They diverge on the application of the doctrine of proximate cause. I am of the opinion that the qualifying language of the contract may properly be interpreted to mean that the parties intended *efficient, proximate cause to be the ultimate test of liability.* This interpretation renders the contract of some substantial value to the man who pays the premium as well as to the party who carries the risk.

"Applying this test to the facts in the instant case, the question is whether *pre-existing disease or an accidental external injury was the efficient, dominant, proximate cause of the death of the insured.* The testimony of the defendant tended to show that there was no external injury, but that death resulted from general infection originating from a carbuncle with which the insured was afflicted a short time prior to the alleged injury. The testimony of the plaintiff was to the effect that the infection was produced by the injury to the knee, and that the injury was the sole cause of death. Each of these conflicting claims was supported by some competent evidence. It was therefore a question for the jury to determine the cause of death, *and if both causes concurred, to say which was the efficient, dominant, proximate cause."* (Emphasis supplied.)

In the *Nickola Case, supra,* Mr. Justice O'HARA related the findings of fact of the trial judge on pp 601, 602 as follows:

" 'From the evidence, this court finds that the insured experienced an accident while attempting to push his stalled automobile and that the accident brought about a gross hematuria of a pre-existing, undiscovered cancerous condition of the bladder,

which in turn, was followed by complications and developments (coronary thrombosis, et cetera) which led to his death.' "

And, on pp 603–605, stated as follows:

"It is quite apparent from a reading of the record that just as persuasive an inference of nonaccident related death could be made as the one reached by the trier of the facts. Which of the 2 theories to us is the more convincing is of course not to the point. The point, and only point, is whether there was competent testimony from which the court could draw reasonable inferences to support his factual finding. On this point the following questions and answers are of record:

" '(Cross-examination)

" 'Q. So, in other words, this hematuria from the fall was not a cause of this man's death according to your statement on one of those death certificates.

" 'A. The death, as far as I am concerned, is a combination of these unfortunate situations that occurred as a result of the initial bout with hematuria. * * *

" 'Q. In other words, the fall may have precipitated the hematuria but the hematuria never killed him? * * *

" 'A. True, sir.

(Redirect examination)

" 'Q. Now I think just before our recess you said that hematuria didn't kill him. I think you said something along that line. Did it have a connection with his death?

" 'A. I think in my opinion that the hematuria set up a succession of events that eventually led to the man's demise.'

"It was apparently the trial court's conclusion that the coronary thrombosis was one of those 'events' which the fall set in motion. We cannot say that such conclusion was beyond reasonable inference from the medical testimony. While such a thrombosis might well have resulted from surgery done at

any time and such surgery would have to have taken place once the carcinoma was discovered—such possibility does not vitiate the medical expert's testimony that the thread of causality ran directly from the fall to the necessity of surgery at the time it was in fact performed. So construed, the 'fall' and synonymously the accident was the cause of death 'independent of all other causes' in that the *then* necessitated surgery was the cause of the occlusion."

Mr. Justice SOURIS in a concurring opinion stated on p 606 as follows:

"Our only remaining function upon review of this nonjury law case is to determine whether the judgment was against the preponderance of the evidence. Court Rule No 64 (1945). Defendant claims it was, relying upon the testimony of a Dr. Murphy. However, from Dr. Murphy's own testimony, the trial judge could have found, as he in effect did, that insured's fall precipitated hematuria which, in turn, 'set up a succession of events that eventually led to the man's demise.' That Dr. Murphy also testified that insured might have died anyway within 5 years from a tumor is entirely beside the point. There was no other evidence in the case to refute the competent evidence that insured's death was proximately caused by his accidental fall. Defendant having failed to persuade that the judgment was against the preponderance of the evidence, the judgment must be affirmed, with costs."

In the case at hand, plaintiff's theory throughout the trial was that plaintiff's decedent suffered a myocardial contusion which was the sole cause of death. Now, it is true that plaintiff brought to the attention of the court, prior to its decision, the ruling in the *Nickola Case*. However, the *Nickola Case* did not change the law but rather followed the rule stated in the *Kangas Case*.

Plaintiff states that the trial judge committed error in ruling that plaintiff was required to prove

that the deceased died of a myocardial contusion before she could collect the death benefits under the policies. This claim is based upon the following quote from the trial judge's opinion:

"A careful study and review of all of the medical testimony given by the five physicians in this case leads me to the conclusion that to say that the plaintiff has sustained the burden placed upon her of proving that the deceased died of a coronary contusion would be against the great weight of evidence."

Plaintiff, having selected her theory upon which she based her right to recovery and the case having been submitted the same could only have been reopened upon proper cause shown and by order of the court. See *Hartley* v. *A. I. Rodd Lumber Co.*, (1937), 282 Mich 652, p 658, wherein it is stated:

"But the rule is that when plaintiffs have finished their proof and rested their case on one theory, they cannot, under claim of rebuttal, put in a new and different case as a ground for recovery. *Carney* v. *Hotchkiss,* 48 Mich 276."

The trial judge made this further statement in his opinion:

"It is not easy to write an opinion which effectively deprives a widow of insurance benefits and I have no quarrel with the rule of construction reiterated by Mr. Justice SOURIS, on p 605 of the *Nickola Case,* in which a liberal construction of the terms of the policy were required in construing cases of this nature. However, I am not free to change facts or to manufacture nonexistent facts, and I must, of necessity, after a careful review of all of the medical testimony adduced at the hearing and contained in the depositions, reach the conclusion that the preponderance of evidence was against the plaintiff and in favor of the defendant on the cause of death. * * *

"I therefore make the following conclusion of fact: That LuVerne C. Berger died on October 13, 1960, and that the primary cause of death was severe arteriosclerotic heart disease.

"I make the following conclusion of law: That plaintiff is not entitled to recovery under insurance policy R (1) - 145762, or policy GA 9500, for the reason that both policies contain restrictions on payment where death is occasioned 'by any other kind of disease.' Severe arteriosclerotic heart disease is such a disease within the meaning of the contracts."

Although the theory of plaintiff in the trial of the case was more confined than it needed to have been under the pleadings; *i.e.,* that the injuries received from the accident caused the death of plaintiff's decedent, the statement in the opinion of the trial judge could not alter the result for the controlling question presented to the trial court for determination still remained; *viz.,* what was the efficient, dominant, and proximate cause of death of the insured? The trial judge answered saying that the primary cause of death was severe arteriosclerotic heart disease.

In 56 ALR 2d 800, 807, under "Heart attack following exertion or exercise as within terms of accident provision of insurance policy," § 2[e], appears the following:

"An insurance policy providing for the payment of stipulated sums for accidental injury or death resulting from violent and accidental means alone, directly, independently, and exclusively of all other causes, means that recovery may be had when the accident is the active, efficient, and precipitating cause which sets in motion the agencies which result in the injury or death, without the intervention of any other independent force, even though an existing infirmity of the insured may be a necessary condition to the result. *When the cause of death involves*

the determination upon conflicting evidence of the relations between alleged causes and effects, it becomes a question of fact for a jury." (Emphasis supplied.)

In 82 ALR 2d 611, 625, 626, § 2, under title of Arteriosclerosis as affecting right to recovery under accident policy or accident provision of life policy, it is stated:

"In an action to recover double indemnity under a policy providing such benefits if death resulted directly and independently of all other causes from bodily injury effected solely through external, violent, and accidental means, and providing that double indemnity would not be payable if the insured's death resulted directly or indirectly from infirmity of mind or body from illness or disease, where medical expert testimony was conflicting as to whether the insured died from a pulmonary embolism resulting from an accident, gangrene, and amputation, or from a coronary thrombosis caused by arteriosclerosis resulting from age, or from paralysis, the Court in *McKenna* v. *New York Life Ins. Co.* (1946), 314 Mich 304, affirming a judgment for the plaintiff, held the evidence sufficient to establish that the accident, with the sequel of gangrene, amputation, and pulmonary embolism, was sufficient to cause the death, and that bodily infirmity or disease was not a contributing cause of death. The Court said that the precise question *was whether the insured's death resulted directly and independently of all other causes from bodily injury effected solely through external and accidental means, or, on the contrary, whether the insured's death resulted directly or indirectly from infirmity of mind or body, and this last question was answered by the trial court, sitting without a jury, in the negative.*" (Emphasis supplied.)

The issue herein is the same as presented in *McKenna* v. *New York Life Ins. Co., supra.* Under

the proofs in the case at hand, there was a definite conflict as to the cause of death—the pre-existing heart disease or the external injuries sustained in the automobile accident. That question of fact was presented under the evidence and determined by the trier of the facts. The trial judge had the benefit of observing and hearing the witnesses. This Court does not substitute its judgment on questions of fact in a *nonjury* case unless the evidence clearly preponderates in the opposite direction. *Northwest Auto Company* v. *Mulligan Lincoln-Mercury, Inc.* (1957), 348 Mich 279.

Judgment affirmed, costs to appellee.

BURNS and J. H. GILLIS, JJ., concurred.

PEOPLE *v.* HOLMES.

1. TRIAL—ATTORNEY'S ARGUMENT TO JURY.
   An attorney does not have the right to read law to the jury but does have the right to argue his theory of the law.

2. SAME—ARGUMENT TO JURY—ALCOHOL CONTENT OF BLOOD.
   It was not reversible error for prosecuting attorney to argue to the jury in prosecution for manslaughter by defendant motorist that if there was more than .15% alcohol in defendant's blood at time of the accident in which another motorist was killed, defendant was presumed to be under the influence of intoxicat-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 494.
Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury. 67 ALR2d 245.
[2] 53 Am Jur, Trial §§ 460, 463; 20 Am Jur, Evidence §§ 12, 876, 1203.
[3] 53 Am Jur, Trial §§ 579, 580.
[4] 20 Am Jur, Evidence § 532 *et seq.*

ing liquor, where there was testimony by State health department chemist that sample of blood taken from defendant about 4 hours after the accident showed .12% and opinion testimony that as of time of accident defendant's blood would have contained .18% alcohol (CL 1948, § 750.321; CLS 1961, § 257.625a).

3. CRIMINAL LAW—MANSLAUGHTER—ALCOHOL CONTENT OF BLOOD.
Instructions to jury in prosecution of motorist for manslaughter, relative to presumptions arising from blood alcohol test which were limited to alcohol content of .05% or less and to content of .05% to .15% did not contain reversible error, so far as defendant is concerned, where the testimony on the subject was from a State health department chemist who stated that sample taken from defendant about 4 hours after accident in which another motorist was killed contained .12% and that in chemist's opinion defendant's blood would have contained .18% at time of accident, where statute relative to such test provided that if test showed alcohol content of between .05% and .15% the jury could consider such fact along with other competent evidence in determining guilt or innocence of accused (CL 1948, § 750.321; CLS 1961, § 257.625a).

4. SAME—CONFESSION—VOLUNTARINESS—EVIDENCE.
Determination as to voluntariness of confession is not a ground for remanding prosecution for manslaughter, where the confession was not admitted in evidence.

Appeal from Superior Court of Grand Rapids; Vander Ploeg (Claude), J. Submitted Division 3 November 3, 1965, at Grand Rapids. (Docket No. 368.) Decided February 9, 1966.

J.C. Holmes was convicted of manslaughter. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Norman K. Kravitz,* Assistant Prosecuting Attorney, for the people.

Warner, Norcross & Judd (*Wallson G. Knack,* of counsel), for defendant.

BURNS, J. The defendant, J. C. Holmes, was convicted of manslaughter[1] resulting from an automobile collision in which two persons were killed.

The defendant was driving in a residential section of Grand Rapids at approximately 10 p.m., on March 29, 1964, when a police cruiser, noting the excessive speed and the lack of any lights on defendant's automobile, started to pursue him. The defendant, while attempting to elude the police, ran through a red traffic control signal, accelerated to speeds in excess of 70 miles per hour, ran through a second red traffic control signal, and collided with an automobile driven by Christine Cooper, killing her instantly.

The defendant fled the scene of the accident on foot, but was later apprehended at his home. A blood test to which the defendant consented was taken 4 hours after the accident and indicated an alcoholic content of 0.12%.[2]

At the trial, Mr. John R. Matthews, an employee of the Michigan department of health, a chemist, testified the defendant's blood contained 0.12% alcohol at the time the test was made. Over the objection

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[1] CL 1948, § 750.321 (Stat Ann 1954 Rev § 28.553).—REPORTER.

[2] The pertinent statute in effect at the time of the accident, PA 1960, No 148 (CLS 1961, § 257.625a (Stat Ann 1963 Cum Supp § 9.2325[1])) states:

"The amount of alcohol in such person's blood * * * shall be admissible and shall give rise to the following presumptions, * * *

"(a) If there was at that time 0.05% or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

"(b) If there was at that time in excess of 0.05% but less than 0.15% by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

"(c) If there was at that time 0.15% or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor; however, such presumption shall be subject to rebuttal."

See, currently, CLS 1961, § 257.625a, as amended by PA 1964, No 104 (Stat Ann 1965 Cum Supp, § 9.2325[1]).

of defendant's attorney, he was asked to give his opinion as to what the alcoholic content of defendant's blood would have been at the time of the accident, 4 hours prior to the test. The witness stated that in his opinion the defendant's blood would have contained 0.18% alcohol at the time of the accident.

A police officer testified to a certain conversation with the defendant which was reduced to writing and signed by the defendant. At the time of the trial the confession was identified by the officer and offered in evidence. The defense attorney objected to its admission and the jury was excused while counsel argued the point. The court sustained the objection by the defense attorney and the confession was not admitted.

The defendant appeals, claiming the trial court erred: (1) in permitting the prosecuting attorney to argue that the defendant was presumed to be under the influence of intoxicating liquor at the time of the accident; (2) in instructing the jury concerning all presumptions under the statute when the blood test showed the weight of alcohol in defendant's blood was 0.12%. Lastly, defendant claims that because of the testimony of the police officer before the jury concerning his conversation with the defendant, the case should be remanded to the circuit court to determine the voluntariness of the signed statement in the light of the case of *People* v. *Walker* (1965), 374 Mich 331.

The prosecutor did argue to the jury that if there was more than 0.15% alcohol in the defendant's blood at the time of the accident, he was presumed to be under the influence of intoxicating beverages. This argument was based on the testimony of the employee of the State health department.

An attorney does not have the right to read law to the jury, *but he does have the right to argue his theory of the law.* See *Fosdick* v. *VanArsdale*

(1889), 74 Mich 302; *Pallas* v. *Crowley-Milner Co.* (1952), 334 Mich 282.

Considering the second contention advanced by the defendant, a complete reading of the record indicates that the trial judge did *not* instruct the jury concerning all of the presumptions under the statute as claimed by the defendant. The judge gave only the instructions under 1(a) and 1(b). Therefore, this claim of error is unwarranted.

Regarding the defendant's third contention, the statement was not admitted in evidence and the *Walker Case* does not apply.

The judgment of conviction is affirmed.

HOLBROOK, P. J., and J. H. GILLIS, J., concurred.

OPPENHUIZEN *v.* WENNERSTEN.

1. FRAUD—PRIVITY OF CONTRACT.

One who, by fraudulent representation, induces another to act to his damage is liable for the damages suffered, and it is not essential that there should have been privity of contract.

2. SAME—REPRESENTATIONS TO INTERMEDIARY.

False representations need not be made directly to plaintiff claiming to have relied upon them, where made by a defendant to another party with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving the third party and such third party becomes the plaintiff.

3. SAME—INTENT.

False representations must have been intended to influence the complaining party directly or indirectly, in order that recovery may be based thereon.

4. SAME—INTENT—PARTIES.

The fact that representations were intended to deceive the person to whom they were made as well as a third person will not affect the right of the latter.

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur, Fraud and Deceit § 187.
[2, 5] 23 Am Jur, Fraud and Deceit § 118.
[3] 23 Am Jur, Fraud and Deceit § 116.
[4] 23 Am Jur, Fraud and Deceit §§ 116, 117.
[6] 24 Am Jur, Fraud and Deceit § 278; 5 Am Jur 2d, Appeal and Error § 882.
[7, 8] 24 Am Jur, Fraud and Deceit § 222; 22 Am Jur 2d, Damages § 249.
[9] 24 Am Jur, Fraud and Deceit § 222; 22 Am Jur 2d, Damages § 250.
[10] 24 Am Jur, Fraud and Deceit § 222; 22 Am Jur 2d, Damages §§ 254, 263, 264.
[11] 22 Am Jur 2d, Damages §§ 263, 264.
[12] 22 Am Jur 2d, Damages §§ 162, 165.
[13] 22 Am Jur 2d, Damages §§ 263, 264; 24 Am Jur, Fraud and Deceit § 222.

5. AUTOMOBILES—SALE OF STOLEN CAR—FORGED TITLE—INTENT TO DEFRAUD—PARTIES.

Sale of stolen car by junkyard dealer to repairer, together with forged title thereto, who used it and parts of another car and resold the stolen vehicle to plaintiff was properly held to have intended that repairer represent to a prospective purchaser that the title was valid, and thereby supply the connection necessary to hold the dealer responsible to the ultimate purchaser.

6. APPEAL AND ERROR—FRAUD—GREAT WEIGHT OF EVIDENCE—WITNESSES.

Claim of appellant in action for fraud that judgment against him was against the great and overwhelming weight of the evidence *held,* not sustained in view of the conflict in the facts and that, in weighing the evidence, the trial judge had the advantage of hearing and observing the witnesses.

7. DAMAGES—EXEMPLARY DAMAGES—INTENT.

Exemplary damages are recoverable in actions based upon tortious acts which involve intentional or wanton and reckless disregard of plaintiff's rights.

8. SAME—PURPOSE OF EXEMPLARY DAMAGES—PUNISHMENT—COMPENSATION.

Exemplary damages are recoverable, where the act or trespass complained of arises from wilful and malicious conduct, such damages not being awarded as a punishment to the wrongdoer but to compensate the injured party.

9. FRAUD—FORGED TITLE OF CAR—EXEMPLARY DAMAGES.

Act of junkyard dealer as representing as valid a forged title of an automobile and making the sale, understanding that resale would take place in the near future, must have been done with design and from wilful motives that infer malice, entitling the person to whom resale was made to collect exemplary damages resulting from the wilful wrong.

10. SAME—EXEMPLARY DAMAGES—EMBARRASSMENT.

Embarrassment in being questioned about the purchase of a stolen vehicle and the necessity for incurring liability for the costs of collecting damages justified award of $500 exemplary damages.

11. DAMAGES—EXEMPLARY DAMAGES—COMPENSATION.

Exemplary damages must not be so oppressive as to shock the sense of fair minded men nor beyond an amount fairly compensating a party entitled thereto.

12. TORTS—DAMAGES—COMPENSATION.

A person who through the tort of another has been required to act in the protection of his interest by bringing an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees, and other expenses incurred.

13. FRAUD—EXEMPLARY DAMAGES—EMBARRASSMENT—INJURY TO REPUTATION.

Embarrassment from innocent involvement by automobile repairer with the purchase and sale of a stolen automobile, damage to reputation, questioning by the authorities, and being required to defend his rights in action by person to whom he had resold the car, justified an award to repairer of $250 exemplary damages.

Appeal from Ottawa; Smith (Raymond L.) J. Submitted Division 3 November 3, 1965, at Grand Rapids. (Docket No. 406.) Decided February 9, 1966.

Complaint by Harry Oppenhuizen against Carl Wennersten and Howard M. Veneklasen for damages arising from the sale of a stolen automobile. Cross complaint by Carl Wennersten against Howard M. Veneklasen for damages arising from the sale of the same stolen automobile. Judgment for plaintiff against both defendants. Judgment for cross-plaintiff against defendant Veneklasen. Defendant Veneklasen appeals. Affirmed.

Ten Cate, Townsend & Cunningham (*Gordon H. Cunningham,* of counsel), for plaintiff.

George A. Lievense, for defendant Wennersten.

Shivel, Phelps, Linsey & Strain (*Leland D. Phelps,* of counsel), for defendant Veneklasen.

HOLBROOK, P. J. Harry Oppenhuizen, plaintiff-appellee, brought an action against Carl Wenner-

sten, defendant-appellee, and Howard M. Veneklasen, defendant-appellant. Trial before the circuit judge without a jury resulted in a judgment in favor of the plaintiff against defendant Wennersten for actual damages because of failure of consideration and against Veneklasen based on fraud for $1,768 actual damages and $500 exemplary damages. Judgment for exemplary damages of $250 was also awarded in favor of defendant-appellee Wennersten upon his cross complaint based on fraud against defendant Veneklasen.

Defendant-appellant made a motion for new trial and upon its denial, appealed to this Court.

The transactions concerning 2 so-called "Monza" automobiles make up the background for the action.

The first "Monza" was blue in color and purchased by defendant Veneklasen June 18, 1963, from Weller Auto Parts of Grand Rapids and described in the purchase receipt as a "1963 Corvair, 4-door, #8258." This car, after being taken to defendant-appellant's junk yard, was dismantled and considered nonrepairable by one of Veneklasen's employees and placed in the yard on top of another Chevrolet vehicle. The second was a "red, 2-door 1963 Monza" stolen from Chicago, Illinois, May 7, 1963.

Defendant Wennersten was in the salvage business and the business of buying repairable automobiles for resale.

Wennersten purchased from defendant Veneklasen a 1963 Chevrolet 2-door automobile on June 27, 1963, for $1,300, and after making necessary repairs, resold it to plaintiff Oppenhuizen July 9, 1963, for $1,700. Shortly thereafter, the Federal Bureau of Investigation identified the car as the stolen "red, 2-door Monza" and repossessed it for the true owner.

Defendant Veneklasen testified that he did not sell any red Monza to Wennersten; however, the state-

ment of the motor vehicle sale of June 27, 1963, described a "1963 Chevrolet, 2-door vehicle, #30927-W195053," which appeared also on the title Veneklasen gave to Wennersten, and in turn on the title Wennersten gave to plaintiff Oppenhuizen.

The number tab on the "red Monza vehicle" was for the blue Corvair purchased by Veneklasen from Weller Auto Parts. It had been removed from that vehicle and glued onto the 2-door red Monza. Plaintiff Oppenhuizen and defendant Wennersten charged defendant Veneklasen with forging the title to the "red, 2-door Monza" knowing the same had been stolen and by representing the false title as valid invited not only Wennersten to rely thereon, but also any purchaser from Wennersten.

It was further claimed that Veneklasen knew that, but for the probability of a resale, Wennersten would not have purchased the "red, 2-door Monza." Veneklasen was convicted in Federal court in 1964 on a charge in connection with being a member of a car theft ring.

The learned trial judge made these pertinent findings of fact: That plaintiff purchased from Wennersten in July of 1963, a "red Monza automobile" and received a purported title for the same. Wennersten had previously purchased this red Monza from defendant Veneklasen. The red Monza was a stolen automobile, that Veneklasen knew it, but sold it to Wennersten without revealing this fact.

The blue Monza purchased by Veneklasen from Weller Auto Parts was not repairable. The identification tab on the blue Monza put on by the manufacturer was found on the "red Monza" by the authorities.

Veneklasen set the whole sequence of events in operation knowing that Wennersten was in the business of repairing and selling cars having dealt

with him on that basis for nine months. It was foreseeable that someone beyond Wennersten would be hurt if the true facts were discovered concerning the "red Monza." The true facts were discovered and plaintiff suffered damages to the extent of the purchase price of the car together with the embarrassment that he endured by the fact that he was in a deal, although innocently, with a convicted member of a car theft ring, and resulting liability for costs of collecting his damages. Wennersten had no knowledge that the "red Monza" was a stolen car and that Veneklasen had no legal title to it. Wennersten was likewise damaged by Veneklasen's fraud.

Defendant-appellant raises several issues on this appeal: (1) that judgment should not have been rendered in favor of plaintiff-appellee against him because there was no privity of contract between them; (2) that the decision for plaintiff Oppenhuizen and defendant Wennersten against defendant Veneklasen was against the great and overwhelming weight of the evidence; (3) the court erred in awarding exemplary damages to plaintiff-appellee; and (4) the court erred in awarding exemplary damages to Wennersten.

Appellant in support of his position that there must be privity of contract between the parties in an action based on fraud in order for recovery, cites 12 Michigan Law and Practice, Fraud, § 10, pp 408, 410:

"In order to authorize an action for fraud, the plaintiff must be the one who has suffered injury from the fraud, and the defendant must have induced the plaintiff's act. * * *

"A person cannot be held liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him or in some way participated therein."

In the same authority under the same title and section on p 409 appears the following:

"One who, by fraudulent representation, induces another to act to his damage is liable for the damages suffered, and *it is not essential that there should have been privity of contract or other personal dealings.* A declaration from which it appears that the fraudulent representations of defendant were made for the purpose of inducing plaintiff to make a contract, and did induce him, indicate a sufficient connection on defendant's part with plaintiff's loss to make him liable, though he took no part in making the contract."

The general rule on the subject appears in 23 Am Jur, Fraud and Deceit, § 118, pp 903, 904, which reads in part:

"While some connection, direct or indirect, between a party charged with making false representations and a party relying thereon must be shown, it is not essential, in support of a cause of action for damages resulting from false representations, that the false representations be shown to have been *made directly to the party claiming to have relied upon them.* It has been repeatedly held that where a party makes false representations to another with the *intent or knowledge* that they be *exhibited or repeated* to a third party for the purpose of deceiving him, the third party, if so deceived to his injury, can maintain an action in tort against the party making the false statements for the damages resulting from the fraud. Such holdings conform to the principle that the rule that representations must have been intended to influence the complaining party is equally applicable whether they are made to him directly or indirectly. Stating the proposition in concrete form, in order to recover for representations made to a third person, it must have been intended that they be communicated to and acted upon by the complaining party, since

otherwise he has no right to rely on them and does so at his own risk. Similarly, if representations are made to one person with the intention that a third person alone shall act upon them, the person to whom they are made cannot maintain an action for deceit against the person making them, although he acts upon them and suffers damage; but the fact that representations were intended to deceive the person to whom they were made as well as a third person will not affect the rights of the latter." (Emphasis supplied.)

From the finding of facts by the learned trial judge, defendant Veneklasen knew that the forged title would be used by Wennersten in making a resale of the "stolen Monza" and that his sale was based mainly upon such an event happening. With such knowledge, could it have been possible that Veneklasen did not intend for Wennersten to represent to a prospective purchaser, in fact to the plaintiff herein, that the title was valid? We think not.

Such a conclusion validates the connection or relationship between the parties necessary to hold defendant responsible to plaintiff for his damages suffered by reason of the fraud. See 37 CJS, Fraud, § 61, p 346; American Law Institute, 3 Restatement of Torts, § 533.

The claim of appellant Veneklasen that the judgment for plaintiff Oppenhuizen and defendant Wennersten against him, was against the great and overwhelming weight of the evidence, appears to be based mainly upon the representation or hope that his testimony would be accepted as true. Appellant challenges the credibility of Wennersten's testimony and relates testimony of Thomas Reimink, Jr., owner of a service garage, concerning a conversation about the "red Monza" at the time it was brought in for repairs, wherein Wennersten is claimed to have said that he made one out of two cars. This

conversation was clarified when Wennersten returned to obtain the automobile after it had been repaired and Reimink questioned Wennersten concerning the previous condition of the car and Wennersten replied "it was wrecked on the right front only," and then Reimink testified that he said, "then we could see where it had been repaired, the hood and fender."

Other parts of the testimony are cited by defendant Veneklasen in an effort to cast doubt upon the testimony of Wennersten. However, the trial judge chose to believe Wennersten in his explanation of what had occurred. The facts were in conflict and in weighing the evidence, the trial judge had the advantage of observing and hearing the witnesses. One inescapable conclusion; *i.e.,* that the *title* for the "blue Monza" bought by defendant Veneklasen from the Weller Auto Parts and junked by defendant, was utilized by Veneklasen in making the sale of the stolen "red Monza" to defendant Wennersten and by Wennersten in turn to plaintiff Oppenhuizen, prevents any serious consideration of defendant's contention that the judgment is against the great and overwhelming weight of evidence.

Defendant Veneklasen asserts that there was no basis for the awarding of $500 exemplary damages in favor of plaintiff-appellee.

To determine whether exemplary damages are appropriate in a case such as the one at hand, we turn to 15 Am Jur, Damages, § 274, p 710, wherein it is stated:

"As a general rule, exemplary damages are recoverable in all actions for damages based upon tortious acts, which involve ingredients of malice, fraud or insult, or wanton and reckless disregard of the plaintiff's rights."

And, in the same authority, section 280, p 718, it is stated:

"Malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations."

In harmony with the stated rule, our Supreme Court has spoken on the subject in the case of *Ten Hopen* v. *Walker* (1893), 96 Mich 236, wherein Mr. Justice LONG states on p 240 as follows:

"Usually, where an act is done with design, and from wilful and malicious motives, the law compels full compensation, and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blameable act; but, where the act or trespass complained of arises from wilful and malicious conduct, exemplary damages are recoverable. These damages are not awarded as a punishment to the wrongdoer, but to compensate the injured party. *Wetherbee* v. *Green,* 22 Mich 311 (7 Am Rep 653).

"All redress in damages partakes to some extent of a punitory character, and the line between 'actual' and what are called 'exemplary' damages cannot be drawn with much nicety. They are properly based upon all the circumstances of the aggravation attending it. The real purpose is to compensate the plaintiff for the injuries he has suffered. *Stilson* v. *Gibbs,* 53 Mich 280; *Wilson* v. *Bowen,* 64 Mich 133. It was said by Chief Justice COOLEY, in *Stilson* v. *Gibbs, supra:*

" 'In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause

him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous."

The act of the defendant in representing as valid a forged title to an automobile in making its sale, understanding that a resale of the same would take place in the near future, must have been done with design and from wilful motives that infer malice. This qualifies plaintiff to collect exemplary damages resulting from the wilful wrong committed.

Plaintiff-appellee testified that he had been subjected to much embarrassment in being questioned about the purchase of the stolen vehicle and the trial judge in his finding of facts properly stated, that it was necessary for plaintiff to incur liability for the costs of collecting damages. The question arises, *were there elements of damage to justify the award of $500 exemplary damages?*

The rule in Michigan for the measure of exemplary damages appears in the case of *Stuyvesant* v. *Wilcox* (1892), 92 Mich 233, on p 242, stated by Mr. Justice LONG as follows:

"No rule can be laid down properly measuring or limiting the damages allowable in cases where exemplary damages may be recovered, except, as has been said, 'they must not be oppressive, or such as shock the sense of fairminded men;' but the jury must understand in all cases that they are not justified in going beyond an amount that shall fairly compensate the party entitled to them."

In 72 ALR 2d 943, 947, there appears under the title of "Measure of damages recoverable for fraud as to the credit or financial condition of a third person," the following:

"In actions for falsely representing the financial condition or credit status of a third person, certain specific items or elements of damage have been allowed under the particular circumstances of the cases.

"For example, in *Seaboard Surety Co.* v. *Permacrete Constr. Corp.* (CA 3, 1955), 221 F2d 366, an action by a surety company against a third person for fraudulently inducing the plaintiff to write a surety bond for a contractor that defaulted, the court held that it was not error for the trial court to allow the jury to consider the surety company's counsel fees in the suit against it on the performance bond as an item of damage, citing as a court-approved authority section 914, Restatement, Torts, reading as follows: 'A person who through the tort of another has been required to act in the protection of his interest by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.' "

We find under the facts of this case, the $500 exemplary damages awarded to plaintiff were reasonable and justified and cannot under any circumstances be deemed oppressive or such as to shock the minds of fairminded men.

In dealing with the last issue raised by defendant-appellant, *viz.*, the trial court erred in awarding exemplary damages to Wennersten, we believe that Wennersten by being connected with purchasing and selling a stolen automobile, even though he was innocently involved, suffered embarrassment and damage to his reputation. He was also questioned

concerning his relationship with the stolen vehicle by the authorities and required to defend his rights in a suit at law. We apply the same reasoning and rules of law, stated herein applicable to plaintiff, to the exemplary damages of $250 awarded Wennersten, and find that the same were reasonable and justified.

We find no basis in law or in fact to disturb the trial judge's findings. The order denying a new trial is affirmed, costs to Oppenhuizen, plaintiff-appellee, and Wennersten, defendant-appellee.

BURNS and J. H. GILLIS, JJ., concurred.

DOMESTIC FINANCE COMPANY *v.* PURSER.

1. CERTIORARI—WRIT OF SUPERINTENDING CONTROL.
   The writ of certiorari has been superseded by the writ of superintending control (GCR 1963, 711).

2. APPEAL AND ERROR—MUNICIPAL COURTS—SPECIAL APPEAL—LEAVE TO APPEAL.
   Special appeals from municipal courts to the circuit courts are now provided for by a court rule wherein leave to appeal is required (GCR 1963, 702).

3. SAME—MUNICIPAL COURTS—CLAIM OF APPEAL.
   An appeal from a municipal court to a circuit court is limited to the reasons and grounds for appeal stated in the claim of appeal (GCR 1963, 701).

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur 2d, Certiorari § 1 *et seq.*
[2] 4 Am Jur 2d, Appeal and Error § 309 *et seq.*
[3, 4, 5] 5 Am Jur 2d, Appeal and Error § 648 *et seq.*

4. JUDGMENT—ACCELERATED JUDGMENT—JURISDICTION—CLAIM OF APPEAL.

Failure to specify claimed jurisdictional objection to judgment of municipal court in the statement of reasons and grounds for appeal precluded using such unstated grounds as a basis for motion for accelerated judgment in the circuit court (GCR 1963, 116.1, 701, 702, 711).

5. SAME—MUNICIPAL COURT—CIRCUIT COURT—ACCELERATED JUDGMENT—JURISDICTION—CLAIM OF APPEAL.

Denial of defendant's motion for accelerated judgment for lack of jurisdiction of municipal court to enter judgment after expiration of 10 days from date case is alleged to have been submitted to it for determination, *held,* proper, where such ground for lack of jurisdiction had not been specified in claim of appeal from the municipal court to the circuit court (GCR 1963, 116.1, 701, 702, 711).

Appeal from Berrien; Hadsell (Philip A.), J. Submitted Division 3 November 3, 1965, at Grand Rapids. (Docket No. 857.) Decided February 9, 1966.

Complaint in the city of St. Joseph municipal court by Domestic Finance Company against Billy Lee Purser and Wanda Purser for damages incurred by the nonpayment of a loan procured by fraud. Judgment for plaintiff. Defendants filed claim of appeal in the Berrien county circuit court. Defendants' motion for accelerated judgment denied. Defendants appeal. Affirmed.

John V. Russell, for plaintiff.

Phillip A. Brown, for defendants.

HOLBROOK, P. J. This is an appeal by leave of this Court from a denial by the circuit court of a motion by defendants-appellants for accelerated judgment based on GCR 1963, 116.1, which provides for a judgment dismissing the action when:

"(1) the court lacks *jurisdiction* of the person or property." (Emphasis supplied.)

The facts appear to be as follows: Plaintiff-appellee brought the action in municipal court for the city of St. Joseph against defendants for damages because of the nonpayment of a loan claimed to have been procured by fraud. The return day was June 25, 1964. After proper adjournments, trial was held August 6, 1964, and at its conclusion the municipal judge adjourned the matter for filing of briefs. Defendants' attorney was present and did not object nor did he file a brief. Appellee's attorney duly filed a brief, and on September 24, 1964, the municipal judge rendered judgment in favor of plaintiff and against defendants.

October 9, 1964, defendants filed claim of appeal and stated therein as reasons and grounds for appeal: "(1) that the judgment was contrary to the law and contrary to the great weight of evidence; (2) that the defendants have a meritorious defense to plaintiff's claim."

In the motion for accelerated judgment, defendants stated as reason for relief the following: "1. That the lower court failed to render a judgment and enter the same within 10 days after the cause had been submitted to him for his final decision as required by revised judicature act, section 7115;* to-wit: Cause submitted for final decision on August 6, 1964; judgment rendered in favor of plaintiff in the sum of $1,000 damages and $20 costs on September 24, 1964."

The circuit judge ruled that the matter was submitted for final decision to the municipal judge on September 24, 1964, and denied the motion for accelerated judgment.

* CLS 1961, § 600.7115 (Stat Ann 1962 Rev § 27A.7115).

The fundamental question presented is, did defendants' claim of appeal *save* the *jurisdictional question* raised on motion for accelerated judgment for dismissal? Prior to GCR 1963 and under the former judicature act, a review of claimed jurisdictional defects occurring in justice or municipal courts was had by two methods: (1) certiorari, CL 1948, § 678.22 (Stat Ann § 27.3502), Court Rule No 43, § 2 (1945). *McOmber* v. *Chapman* (1879), 42 Mich 117; *Harbour* v. *Eldred* (1895), 107 Mich 95; or, (2) special appeal, CL 1948, § 678.1 (Stat Ann § 27.3481), repealed by the revised judicature act, PA 1961, No 236, § 9901 (CLS 1961, § 600.9901 [Stat Ann 1962 Rev § 27A.9901]), effective January 1, 1963 (CLS 1961, § 600.9911 [Stat Ann 1962 Rev § 27A.9911]).

The writ of certiorari has now been superseded by the writ of superintending control as provided in GCR 1963, 711. Special appeals from municipal courts to the circuit court are provided for in GCR 1963, 702, which require leave or consent by order of the circuit court.

The present appeal is governed by GCR 1963, 701, and particularly 701.5(2):

"Contents. The claim of appeal shall designate the order, determination, decision, sentence, action, judgment, or decree appealed from, together with a plain concise statement of the reasons and grounds for appeal, *to which the appeal shall be limited.*" (Emphasis supplied.)

In 3 Honigman and Hawkins, Michigan Court Rules Annotated, p 545, appears the following comment:

"The first basic function of a special appeal was to require, in effect, a specification of error or a statement of reasons and grounds for appeal as to those matters which could not be remedied by a

retrial on the merits in the circuit court. Thus, if jurisdictional objections were not specified in the affidavit on appeal, it was said to be a general appeal which constituted a waiver of jurisdictional defects. *Miller* v. *Sutro Bros. & Co.* (1934), 267 Mich 335. The same function is now served by subrule 701.5 (2), *which limits the appeal to issues stated in the reasons and grounds for appeal.* If jurisdictional defects or other special objections not related to the merits are not specified in the statement of reasons and grounds, *such objections are lost,* not because the appeal is 'general,' thereby resulting in some fictitious 'waiver,' but simply *because the issues were not raised as required by the rules.* If jurisdictional objections and like special matters are specifically stated in the reasons and grounds for appeal, the appellant is entitled to have them passed upon. And if his jurisdictional objections are overruled, the appellate court may proceed to a retrial of any factual issues also raised in the statement of reasons and grounds for appeal, just as the circuit courts formerly went to a trial *de novo* upon overruling the issues raised by a special appeal. See *Fowler* v. *Hyland* (1882), 48 Mich 179; *Benjamin* v. *Dodge* (1883), 50 Mich 41; *cf. Lymburner* v. *Jenkinson* (1883), 50 Mich 488." (Emphasis supplied.)

Inasmuch as defendants failed to specify the claimed jurisdictional objection in the statement of reasons and grounds for appeal, such objection was lost and could not be the subject of the motion for accelerated judgment.

The circuit judge did not err in denying the motion. Other questions raised need not be considered in view of our decision.

Order denying accelerated judgment affirmed, costs to appellee.

BURNS and J. H. GILLIS, JJ., concurred.

BAITH *v.* KNAPP-STILES, INC.

1. CONTRACTS—BREACH OF CONTRACT—SUBCONTRACTORS.
   Record in subcontractors' nonjury action against contractor for construction of low-rent housing project *held*, to support trial court's finding that defendant refused to allow plaintiffs to continue on the job after they had failed to meet a payroll which defendant paid, such refusal constituting the alleged breach of contract relied upon by plaintiff as constituting basis for recovery.

2. SAME—FAILURE OF PERFORMANCE.
   He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform.

3. SAME—BREACH OF CONTRACT—FAILURE OF PERFORMANCE.
   Determination of whether recovery for failure of performance of a contract by a defendant is to be denied plaintiff by reason of a substantial prior breach by plaintiff is tested by factors of (a) the extent to which defendant will obtain the substantial benefit which he could have reasonably anticipated, (b) the extent to which defendant may be adequately compensated in damages for lack of complete performance by plaintiff, (c) the extent to which plaintiff has already partly performed or made preparations for performance, (d) the greater or lesser hardship on the plaintiff in terminating the contract, (e) the wilful, negligent, or innocent behavior of the plaintiff, and (f) the greater or lesser uncertainty that plaintiff will perform the remainder of the contract.

4. SAME—SUBCONTRACTORS' SUBSTANTIAL BREACH OF CONTRACT.
   Plaintiff subcontractors' breach of their contract to supply carpentry labor for construction of low-rent housing project to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 13 Am Jur 2d, Building and Construction Contracts § 101 *et seq.*

[2, 3] 17 Am Jur 2d, Contracts §§ 365, 425 *et seq.*

defendant contractor *held,* so substantial as to preclude recovery from defendant, where plaintiffs' failure to meet their payroll was met by defendant's payment thereof and removal of plaintiffs from project, where it is found that defendant would obtain no substantial benefit until the work is completed, the only adequate compensation for defendant is completion of the work, plaintiffs had been fully paid for the duration of their performance, there was less hardship on them by reason of such payment, the cost of completion was more than they had coming, their behavior was wilful, and there was less certainty of performance of the remainder because of their questionable financial position.

Appeal from Saginaw; Borchard (Fred J.), J. Submitted Division 3 December 8, 1965, at Lansing. (Docket No. 188.) Decided February 9, 1966. Leave to appeal granted by Supreme Court April 20, 1966. See 377 Mich 708.

Declaration by P. Charles Baith and Allen P. Hensley, doing business as Baith & Hensley Construction Company, against Knapp-Stiles, Inc., for damages resulting for a breach of contract involving construction subcontracting. Judgment for plaintiffs. Defendant appeals. Reversed and judgment of no cause for action ordered entered in the Court of Appeals.

James M. Collins, for plaintiffs.

Warner, Norcross & Judd (*Paul K. Gaston,* of counsel), for defendant.

QUINN, J. Plaintiffs brought this action for breach of contract claiming they were removed from the construction project involved without just cause and that they were entitled to recover the amount they would have received if permitted to complete the contract. Defendant claimed a prior breach by plaintiffs justified their removal. Plaintiffs recov-

ered substantial damages. Defendant appeals and raises six questions for decision.

The first question raised requires a determination of whether or not the record justifies the application of the rule that a party who first breaches a contract is precluded from an action against the other party for nonperformance. The remaining five questions all deal with findings and accounting procedures of the trial judge in reaching decision and need not be more specifically stated.

November 9, 1959, defendant entered into a contract with the city of Saginaw through its housing commission for construction of the low-rent housing project. The contract provided no subcontractor should be allowed to work on the project without prior written approval of the commission. In the spring of 1960, plaintiffs and defendant entered into an agreement under which plaintiffs, as independent contractors, agreed to furnish all labor, power tools, and equipment to complete the carpentry labor as specified in the specifications for the project. For this defendant agreed to pay the plaintiffs $136,170 plus $4.70 per hour for extra jobs. Other pertinent provisions of this agreement were:

"Terms: Net less 10% holdback for all billings received by the first of the month.

"7. * * * Any waiver of strict compliance with the terms hereof by Knapp-Stiles, Inc., shall not constitute a waiver of its right to insist upon strict compliance with the terms of this order thereafter * * *.

"10. On all subcontracts, payment shall be made for work done and material furnished at such intervals as may be agreed in writing between Knapp-Stiles, Inc., and the subcontractor; provided, however, that 10% of the amount of such labor and material payments to be made shall be retained by Knapp-Stiles, Inc., and shall be paid to the subcon-

tractor at such time as the operations covered by this order are completed and accepted by the owner and Knapp-Stiles, Inc."

Plaintiffs were not immediately approved by the commission as a subcontractor, and their employees were placed on defendant's payroll when work commenced under a separate letter agreement between plaintiffs and defendant which provided as follows:

"At such time as approval is received of your operating as a subcontractor, we will then deduct from the total amount of your contract the amount paid out by us to your men. This will include the base rate plus health and welfare benefits, social security, unemployment insurance, and insurance. Tools and equipment will still be furnished by you during this period."

From April 11, 1960, through the pay period of August 15, 1960, defendant carried plaintiffs' employees on its payroll and paid them wages in the amount of $102,377.08. On August 15, 1960, the parties hereto agreed that plaintiffs should pay their employees. They further agreed that because defendant had overpaid plaintiffs on the contract, on the basis of work completion schedule less the 10% retention, defendant's payments to plaintiffs under the contract would be limited to the amount of plaintiffs' payroll until plaintiffs' completed work called for larger payments. The payments under this arrangement were to be kept in a separate account by plaintiffs and were to be used solely for payroll purposes. This arrangement was followed until October 13, 1960, and under it defendant paid a further sum of $27,192.13. In October, 1960, an overpayment by defendant to plaintiffs under this arrangement in excess of $1,800 was discovered. Plaintiffs had used the overpayment for obligations other than labor. Defendant refused to advance

more than plaintiffs' net payroll less the overpayment and plaintiffs were unable to meet their October 14, 1960, payroll. Plaintiffs were granted time to raise the required funds elsewhere, and when this failed, defendant paid plaintiffs' October 14th payroll in the amount of $1,576.90, and the events occurred which resulted in this lawsuit. While there is some dispute in the testimony whether plaintiffs left the job or were not permitted to continue, the record supports the finding of the trial court that defendant refused to allow plaintiffs to continue on the job after October 14, 1960. This is the breach relied on by plaintiffs. Defendant relies on the fact that plaintiffs' inability to meet their payroll of October 14, 1960, was a failure of performance constituting a prior breach of contract which prevents plaintiffs from recovering in this lawsuit.

The rule relied on by defendant is found in *Ehlinger* v. *Bodi Lake Lumber Company* (1949), 324 Mich 77, and is thus stated (p 89): "He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." The facts in *Ehlinger* are similar to those in the case at bar with respect to prior breach by plaintiffs, events leading up to the same and what occurred thereafter. That the rule is generally recognized, see 6 Williston on Contracts (3d ed), § 871, and 2 Restatement of the Law of Contracts, § 397. The question becomes whether plaintiffs' failure to meet payroll on October 14th was a substantial breach. 1 Restatement of the Law of Contracts, § 275, sets forth the standards to apply in answering this question:

"(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

"(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

"(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

"(d) The greater or less hardship on the party failing to perform in terminating the contract;

"(e) The wilful, negligent, or innocent behavior of the party failing to perform;

"(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

Before applying these standards to the case before us, it should be noted that plaintiffs had no money due them from defendant on October 14, 1960. The trial court so found when it determined a further advance from defendant to plaintiffs on October 14, 1960, would have to be from the 10% retention that plaintiffs were not entitled to until their work was completed. Applying the above standards with this fact in mind, we find:

(a) Defendant obtains no substantial benefit until the work has been completed.

(b) The only adequate compensation for defendant is completion of the work.

(c) Plaintiffs have been fully paid for performance to October 14, 1960.

(d) There is less hardship on plaintiffs because they have been fully paid for work to date. They were required to leave the project and the cost of completion of the contract was more than they had coming under it.

(e) The behavior of plaintiffs was wilful.

(f) It is less certain plaintiffs will perform the remainder of the contract because of their questionable financial position.

From this we conclude plaintiffs' breach in not meeting its payroll October 14, 1960 was a substantial breach.

In view of provision number 7 of the contract quoted at the beginning of this opinion, plaintiffs are in no position to say defendant has waived performance by plaintiffs of their obligation to meet the payroll.

The trial court is reversed and a judgment of no cause for action may enter in this court. This result obviates the need to discuss the other five questions raised by defendant. Defendant may recover its costs.

LESINSKI, C. J., and MCGREGOR, J., concurred.

BEITZEL *v.* DEPARTMENT OF REVENUE.

TAXATION—SALES TAX—LOCAL ACTIVITY—OUT-OF-STATE SUPPLIER.

Conduct of plaintiffs in this State in selling advertising specialties and novelties to customers in this State by taking orders for such goods in this State and ordering such materials imprinted with the customers' identification from suppliers outside the State, who ship them directly to the customers who are billed by plaintiffs *held*, a sufficient local activity for the imposition of the State sales tax (CL 1948, § 205.51 *et seq.*, as amended).

Appeal from Court of Claims, Beers (Henry L.), J., presiding. Submitted Division 2, December 8, 1965, at Lansing. (Docket No. 969.) Decided February 9, 1966. Rehearing denied March 14, 1966.

Complaint by Floyd M. Beitzel and Floyd M. Beitzel Calendar Company, a Michigan corporation,

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REFERENCES FOR POINTS IN HEADNOTE

47 Am Jur, Sales and Use Taxes § 10.

against the State of Michigan and the Department of Revenue to recover sales taxes paid under protest. Judgment for defendants. Plaintiffs appeal. Affirmed.

Lucking, Van Auken & Miller (*Howell Van Auken,* of counsel), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *T. Carl Holbrook, Richard R. Roesch,* and *William D. Dexter,* Assistant Attorneys General, for the defendants.

MCGREGOR, J. The plaintiffs herein are engaged at a Detroit location in the business of selling advertising specialties and novelties to merchants and industrial concerns located in the State of Michigan. The plaintiffs take orders for these goods in Michigan and then, in turn, order these advertising materials imprinted with the customers' identification from suppliers outside the State of Michigan. The finished goods are sent directly from the out-of-State suppliers to the plaintiffs' Michigan customers, without passing through the plaintiffs' hands. The plaintiffs bill the Michigan purchasers and they pay the out-of-State suppliers.

In June, 1963, the defendant department of revenue issued to plaintiff a sales tax deficiency notice for these transactions. After an adverse ruling by the State board of tax appeals, the plaintiffs paid the assessment under protest. Plaintiffs then brought this action in the court of claims to recover $1,160, contending that the imposition of the State sales tax on these transactions violates the interstate commerce clause of the Federal Constitution.[1] Plaintiffs bring this appeal from the trial court's

[1] US Const, Art 1, § 8.—REPORTER.

dismissal of this action upon the defendants' motion for summary judgment.

The plaintiffs base their argument primarily on *Montgomery Ward & Co.* v. *Fry* (1936), 277 Mich 260, and *McLeod* v. *J. E. Dilworth Co.* (1944), 322 US 327 (64 S Ct 1023, 88 L ed 1304). *Montgomery Ward & Co.* v. *Fry* held that a sales tax imposed upon goods shipped from Illinois to customers who ordered such merchandise at Montgomery Ward retail stores in Michigan was in violation of the commerce clause. *McLeod* v. *J. E. Dilworth Co.* held that the State of Arkansas could not impose a sales tax upon goods sold to Arkansas residents by a Tennessee seller, since the title to the goods passed when they were given to the carrier in Tennessee for delivery to the Arkansas customers.

The law in this area has undergone significant development since these cases were decided. The last word on the matter from the Supreme Court of the United States is *Scripto, Inc.*, v. *Carson* (1960), 362 US 207 (80 S Ct 619, 4 L ed 2d 660), which held that the State of Florida could require a corporation located in Georgia to collect a use tax from Florida customers. Scripto, Inc., did not maintain any office or warehouse in Florida or have any regular employee or agent there. Its orders were solicited by advertising specialty brokers, also called wholesalers or jobbers, who are Florida residents. The *Scripto Case* ignored such technicalities as the passing of title and considered the decisive factor to be a link, or minimum connection, between a State and the person, property, or transaction it sought to tax. The court, in *Scripto,* found that the Florida use tax law, which placed the burden of the tax on the ultimate consumers for the use and enjoyment of property which had been purchased by Florida residents and which had entered into and become a part of the mass of

property in that State, did not violate the commerce clause.

There is one case which is substantially identical in its essential facts to the instant case. In *McGoldrick* v. *A. H. DuGrenier, Inc.* (1940), 309 US 70 (60 S Ct 404, 84 L ed 584) the Supreme Court upheld a New York city sales tax as it applied to the sale of office machines which were shipped directly from the Massachusetts manufacturer to customers within the city of New York. The orders were taken within the city of New York by an independent sales agent who transmitted these orders to the out-of-State manufacturer.

In *Ashton Power Wrecker Equipment Company* v. *Department of Revenue* (1952), 332 Mich 432, 438, in upholding the application of the sales tax to the plaintiff, the Court held that:

"The fact that a sale was negotiated through the channels of interstate commerce is immaterial; * * * a State sales tax is lawfully imposed if it is conditioned upon a sufficient local activity."

This Court finds that the conduct of plaintiffs' business within the State of Michigan is a sufficient local activity for the imposition of the Michigan sales tax to the transactions in question.[2]

Judgment affirmed. Costs to appellees.

LESINSKI, C. J., and QUINN, J., concurred.

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[2] See CL 1948, § 205.51 *et seq.*, as amended (Stat Ann 1960 Rev § 7.521 *et seq.*, as amended).—REPORTER.

MANIE *v.* MATSON OLDSMOBILE-CADILLAC COMPANY.

1. NEGLIGENCE — AUTOMOBILE DEALER — STOLEN DEALER LICENSE PLATES—CUSTOMER'S ARREST.

   Plaintiff, who was driving recently purchased automobile, on which dealer had placed stolen dealer license plates, and who was arrested for driving an automobile with stolen registration plates, *held*, entitled to recover for dealer's negligence, since dealer plates were in the sole control of the defendant, as slight precautionary methods, at dealer's place of business, could have been taken to insure plates, placed on plaintiff's automobile, were not stolen.

2. SAME—QUESTION FOR TRIER OF FACTS.

   Negligence is a question of fact and not of law.

3. PLEADING SUFFICIENCY—FACTS.

   Facts presented to court, no matter how extraordinary, are the basis for judging sufficiency of pleadings.

4. APPEAL AND ERROR—NONJURY CASES—FINDINGS OF FACT—PREPONDERANCE OF EVIDENCE.

   Court of appeals is bound by trial judge's findings of fact, in nonjury case, absent a showing that the facts are contrary to a clear preponderance of the evidence.

5. SAME—DAMAGES—EMOTIONAL HARM—EVIDENCE.

   Claim of plaintiff, in action for negligence without an accompanying physical injury, whose proof of emotional harm was by her husband, friend, and sister that she was nervous, and no

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REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 92, 131.
[2] 38 Am Jur, Negligence § 344 *et seq.*
[3] 41 Am Jur, Pleadings § 2 *et seq.*
[4] 5 Am Jur 2d, Appeal and Error § 839 *et seq.*
[5, 6] 22 Am Jur 2d, Damages § 195.
[7] 22 Am Jur 2d, Damages § 196.
[8] 5 Am Jur 2d, Appeal and Error §§ 1014, 1015.

testimony of physician, as to effects of defendant's negligence on plaintiff's nervous system, was introduced *held*, so remote and proof thereof so inadequate that an award of damages could not be sustained under negligence theory.

6. NEGLIGENCE—DAMAGES—EMOTIONAL HARM.

Damages will not be awarded for an emotional or mental disturbance, without accompanying physical injury, caused by defendant's negligence because there is no duty to exercise care to avoid causing mental or emotional harm.

7. SAME—PROBABILITY OF EMOTIONAL HARM.

Mere fact that an act involves an undue probability of mental or emotional harm, and does in fact result therein, is not regarded as a sufficient basis for the maintenance of an action.

8. COSTS — NEITHER PARTY PREVAILING — NEGLIGENCE — EMOTIONAL DAMAGES.

No costs are allowed on appeal in nonjury action for negligence, where judgment of $500 is reduced to disallow recovery of so-called emotional damages, since neither party has prevailed.

Appeal from Muskegon; Piercey (John H.), J. Submitted Division 3 December 8, 1965, at Grand Rapids. (Docket No. 1,057.) Decided February 9, 1966. Leave to appeal granted by Supreme Court April 19, 1966. See 377 Mich 707; 378 Mich 650.

Complaint by Florence Manie against Matson Oldsmobile-Cadillac Company, a Michigan corporation, for damages arising from plaintiff's arrest while driving an automobile which carried stolen dealer license plates, placed thereon by defendant. Judgment for plaintiff. Defendant appeals. Affirmed in part, and reversed in part.

Marcus, McCroskey, Libner, Reamon, Williams & Dilley (*Vernon D. Kortering*, of counsel), for plaintiff.

Poppen, Street, & Sorensen (*Harold M. Street*, of counsel), for defendant.

FITZGERALD, P. J. The unusual train of events which brings about this case and the attendant appeal produces questions for decision by this Court which are no less fascinating than the facts themselves. Broadly stated, the issue before us is whether the plaintiff properly stated a cause of action based on the misadventures which befell her in December, 1963, all stemming from the purchase of a car.

A brief resume produces this intriguing fact situation: On December 6, 1963, Ernest Manie, the husband of the plaintiff, entered into an agreement with the Matson Oldsmobile-Cadillac Company in Muskegon to purchase a 1960 Cadillac automobile with a 1961 Comet to be traded in on it. The 1961 Comet had a trailer hitch attached, which was to be removed by the Grand Rapids firm which originally installed it, prior to the contemplated exchange. At that time, license plates remained with the same owner* and had it not been for the removal of the trailer hitch, the plates would have been switched from the Comet to the Cadillac. However, as an accommodation to Mr. Manie, a salesman for defendant company attached a "dealer plate" to the Cadillac to be used until the trailer hitch could be removed in Grand Rapids and the Comet returned.

The Manies, driving the two cars, went to Grand Rapids, accompanied by Mrs. Manie's sister. After the trailer hitch was removed, Mr. Manie drove the Comet back to Muskegon and Mrs. Manie, driving the Cadillac, decided to do some Christmas shopping. At about 9:30 p.m., a Wyoming police department cruiser required her to pull over to the side of the road and she was requested to follow the cruiser to police headquarters. After Mr. Manie arrived home about 10:30, he received a telephone

* CLS 1961, § 257.233 (Stat Ann 1960 Rev § 9.1933).—REPORTER.

call that Mrs. Manie was being held in the Wyoming police station for driving a car with "stolen plates". Mr. Manie called the defendant company's salesman who offered to take another dealer plate to the police station for use in returning the Cadillac to Muskegon, but Mr. Manie declined the offer, picked up the plate himself and took it to the Wyoming police station. By the time Mrs. Manie was able to leave, it was approximately 2 a.m. the following day.

Mrs. Manie received a ticket for illegal use of dealer plates. The salesman for defendant company called the Wyoming police station and was informed that the dealer plate he had placed on the Cadillac was registered in the name of the operator of a used car lot and automobile auction in the Grand Rapids area. The following day, Mrs. Manie went to defendant's place of business and discussed the ticket with the salesman who offered to take care of the ticket by way of explaining the matter to the proper officials. Mrs. Manie declined the offer and retained an attorney to represent her on the ticket. Ultimately, the matter was explained to the authorities regarding how she happened to have the plate and this was accepted by the court and the charge dropped.

Suit against defendant automobile dealer was started by Mrs. Manie in August, 1964, containing three counts; one of negligence; one for breach of contract for failure to furnish a valid plate; and one of misrepresentation based on the innocent, though mistaken, statement to the effect that the Cadillac was in proper condition to be driven on the highway.

An answer denying the charges was filed and the case tried before the court without a jury on June 18, 1965, resulting in a judgment of $500 in favor

of Mrs. Manie for her expenses and also for humiliation, embarrassment, and nervousness brought on by the previous events and by the harrassment and teasing she was subjected to by her co-employees because of the ticket and subsequent legal proceedings.

The trial court, in a lengthy decision, based the award in part on the fact that the negligence count was proven because of the sole control of the license plates being in the hands of the defendant and that a proper handling of these plates would have precluded the incidents which took place. To illustrate the rationale of the trial court, we quote a portion of the opinion filed in this case:

"I am of the opinion that a cause of action has been stated on a negligence theory and we will proceed to set forth the theory upon which I recite this. I might hasten to add that it is pretty clear that also under a misrepresentation theory, the plaintiff is entitled to recover. As to negligence, I am of the opinion that the sole control of this license plate was in the hands of the defendant. I am further convinced also that with very slight precautionary measures and techniques including the posting of a sign at a proper place near the places of sale, where the salesmen work, they could take the license plate, quickly glance at a chart and ascertain whether or not the plate they are about to place on a car, is a plate that could be lawfully placed there. I am also of the opinion that it is foreseeable that a plate which is not in the lawful possession of the defendant, either through mistake or otherwise, can very easily cause the exact results that were caused in the case at bar. That a person driving a motor vehicle would be pulled over if the plate is not a proper one and would be at least, temporarily detained or arrested. I think this is a natural consequence of an improper plate being placed upon a car. Now perhaps the court is a little closer to a

knowledge of the fact that police officials do make a surveillance of missing plates, but I don't think it unreasonable to say that persons who deal in the sale of automobiles are aware of the fact that there is a surveillance and a look-out for either stolen plates, missing plates, misplaced plates, and that the officer certainly when he has, when he sees a plate that is so listed, has every reason to stop the driver and to pull them over. So I think the [sic], and so find that the plaintiff's agent, or the defendant's agent rather, was negligent in his dealing with this plate, even though it may have been in the ordinary course of business. If this is the ordinary course of business, I submit that it is negligent handling and should be corrected. The facts that it is generally engaged in by others does not remove it from what I consider to be obviously negligent handling of the plates."

We subscribe to the trial court's decision that plaintiff pleaded and proved a cause of action for negligence. It has long been recognized that, as a general rule, negligence is a question of fact and not of law. *Miller* v. *Miller* (1964), 373 Mich 519. The facts presented to a court, no matter how extraordinary they may be, are the basis on which the sufficiency of the pleadings must be judged. Admittedly, the fact situation before us is bizarre. Nevertheless, it did occur.

No argument is presented that the trial judge was incorrect in any of his findings, and absent a showing that the facts as found by the trial judge are contrary to a clear preponderance of the evidence, this Court is bound by them. *Shaw* v. *Wiegartz* (1965), 1 Mich App 271.

That the plaintiff also sued in counts of contract and misrepresentation and that such counts will not support recovery are other grounds urged by defendant on appeal. With this contention we agree,

but the fact that a valid cause of action has been pleaded and proven in negligence obviates the need for disposing of the issues of the validity of contract and misrepresentation counts.

The remaining issue before us is the question of damages, wherein defendant contends that plaintiff's recovery may not be sustained upon any legal theory or by the evidence in the case.

Defendant, however, concedes in its brief as follows:

"The only monetary expenses or loss testified to by the plaintiff was the $75 paid to Attorney Reamon; the loss of 7 hours regular work at $1.96 per hour and 1 hour of overtime at time and a half, or a total in lost wages of $16.66, and two trips to Grand Rapids, which if taken at 80 miles per round trip, or a total of 160 miles at 10¢ per mile, which comes to $16.00, a total of $107.66."

Defendant asserts that any award over this sum is a reward for nervousness, humiliation, and mental anguish and consequently not sustainable. It is true that the record contains no physician's testimony as to the effect of the events on plaintiff's nervous system. There is no proof beyond testimony of plaintiff, her husband, her sister and a friend as to her alleged "nervousness". There is no claim of actual physical injury.

Under these conditions, we agree with defendant that plaintiff's "emotional damages" are so remote and the proof thereof so inadequate that an award on this ground could not be sustained under a negligence theory, or *arguendo,* the contract and misrepresentation theories which plaintiff also pleaded.

That plaintiff should not have recovered for emotional damages under these circumstances, no matter the quantum of proof, is stated in 52 Am Jur, Torts, § 48, p 392:

"The rule denying the right to maintain an action for a mental or emotional disturbance is most frequently applied, or stated to be applicable, in cases of negligence. In this respect, it has been declared that there is no duty to exercise care to avoid causing a mental or emotional disturbance, and the mere fact that an act involves an undue probability of a mental or emotional disturbance, and does in fact result therein, is not regarded as sufficient to make it a basis for the maintenance of an action."

Since this case turns on the question of negligence, we rule that plaintiff did not properly prevail in that portion of the award which reflects emotional distress but that she may be awarded the sums as specified, *supra,* indicating actual dollars-and-cents loss, and the costs as taxed in the trial court.

The trial court is affirmed in that portion of its decision holding that plaintiff stated a cause of action in negligence and reversed as to the portion of the award beyond the sums herein set forth.

No costs, neither party having prevailed.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

KELLER *v.* CITY OF SOUTHFIELD.

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SIDEWALKS—DISCRETION OF OFFICERS.

   Record in proceeding to compel city to construct sidewalks in residential area adjacent to public school *held,* not to show city officials abused their discretion in relation to the proposed public improvement upon which relief may be granted; hence, summary judgment was properly granted (GCR 1963 117.2).

2. COSTS — PUBLIC QUESTIONS — MUNICIPAL CORPORATIONS — SIDEWALKS.

   No costs are allowed on appeal in proceeding to compel city to install sidewalks on streets adjacent to public school, a public question being involved.

Appeal from Oakland; Beer (William John), J. Submitted Division 2 October 7, 1965, at Lansing. (Docket No. 340.) Decided February 22, 1966.

Complaint by Rudolph Keller and others against the city of Southfield to force the city to construct sidewalks in residential area adjacent to public school and to compel the formation of a special assessment district for the financing of the public improvements. Potentially affected property owners Bertha B. Becker and others intervened as

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REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Municipal Corporations § 559 *et seq.* 25 Am Jur, Highways § 68.

[2] 5 Am Jur 2d, Appeal and Error § 1009.

defendants. Summary judgment for defendants. Plaintiffs appeal. Affirmed.

Mayer Morganroth, for plaintiffs.

James M. Ginn, for defendant city.

WATTS, J. This is an appeal from a summary judgment in the lower court. The judgment was based on that court's finding that the plaintiffs had failed to state a cause of action for which relief could be granted. GCR 1963, 117.2 (1).

Plaintiffs seek to have the summary judgment set aside and the cause remanded for trial on the issues. The case was transferred to the Court of Appeals by the Supreme Court on January 7, 1965.

The plaintiff group consists of property owners in the subdivisions of Southfield Village Estates and Kentfield Manor Estates, city of Southfield, who favor the construction of sidewalks on a 16–1/2-foot public right-of-way on those streets which are access streets to the Glenn Schoenhals elementary school.

The defendant group consists of persons who own private real property on the access streets to the school. They have extended their front lawns to include the 16–1/2-foot right-of-way for sidewalks, some have planted shrubs, while others have placed large boulders in the right-of-way. They are opposed to the construction of sidewalks.

This dispute came into prominence when the new school opened its doors to the public in January, 1964. The plaintiff group, incensed by the hazardous condition created by the lack of sidewalks, called upon the city attorney for advice and later filed a petition with the city officials requesting the construction of sidewalks. The Southfield police de-

partment and the members of the district school board were also concerned about the safety of the children attending the school and made their opinions known to the city officials and the public. The city council on its own initiative adopted a resolution to install sidewalks on certain streets in the subdivisions of Southfield Village Estates and Kentfield Manor Estates. The resolution reads in part as follows:

"The matter of making said public improvement is hereby referred to the city administrator, who shall prepare a report concerning the same which shall include necessary preliminary plans, and estimates of cost and estimate of the life of the improvement, a description of the special assessment district and such other pertinent information as will permit the council to decide the cost, the extent and necessity of the proposed public improvement and what part thereof should be paid by special assessment upon the property benefited and what part, if any, should be paid by the city at large."

Before the administrator for the city of Southfield filed a report as requested in the resolution, the defendant group filed a counter petition opposing the construction of sidewalks. The city officials later denied the plaintiffs' request for sidewalks.

Plaintiffs alleged that they and affected homeowners contributed several thousands of dollars and were advised by the city administrator to hire a contractor and to take out the permit for the construction of sidewalks. They further allege that they and other contributors followed the instructions of the city administrator and the city council. Plaintiffs' complaint states that the city council again withdrew its support to the sidewalk proposal when the defendant group objected to the project.

The plaintiffs filed suit in the Oakland county circuit court requesting the following relief:

That it be ordered and adjudged that the city of Southfield and the city council have the power and authority to make a special benefit assessment district which encompasses all users of the proposed improvement for access to the Glenn Schoenhals school;

That it be ordered and adjudged that the homes with sidewalks are benefited by sidewalks being installed for access to a school within their district and where their children can go to school;

That the city of Southfield and the city council be ordered to continue and proceed on its resolution #1 and designate the special benefit assessment district * * * and to designate said special assessment district to include all those homes that would use said improvements by virtue of their children going to or coming from the Glenn Schoenhals elementary school;

That the city of Southfield be ordered to remove all obstructions, shrubs, boulders, in the right-of-way for pedestrian traffic along the way to and from Glenn Schoenhals elementary school;

That the city of Southfield and the city council be ordered and adjudged to erect, construct, and install sidewalks along the right-of-way and easements and public right-of-way to and from Glenn Schoenhals elementary school and to pay for same out of its general tax revenue or general tax funds;

That the city of Southfield and the city council be ordered to make the public improvement of the right-of-way for pedestrian travel to and from Glenn Schoenhals elementary school to promote the health, safety, and welfare of the community;

That the court order such other and further relief as is in keeping with equity and good conscience.

On November 9, 1964, the Honorable William John Beer, Oakland county circuit court judge, rendered the following summary judgment:

"This matter having come on for hearing on defendant's motion for summary judgment, the attor-

neys for the plaintiffs, defendant, and intervening defendants having appeared and presented arguments to the court, and the court having determined that the *plaintiffs have failed to state a claim upon which relief can be granted,* and the Court being fully advised in the premises,

"Now, therefore, it is hereby ordered and adjudged, that the motion for summary judgment is hereby granted and plaintiffs' complaint is dismissed with prejudice, provided, however, that plaintiffs shall have 20 days in which to file an amended complaint." (Emphasis supplied.)

The court also rendered a written opinion which reads as follows:

"Because of article 3, § 2 of the Michigan Constitution of 1963, I am granting the motion to dismiss. I have read the complaint, and certainly the major part of this complaint is addressed to the court through its judicial power to exercise a legislative function. Therefore, I have no jurisdiction. As to the remaining part about obstructions in the public way, the complaint is not sufficiently detailed to say the best for it.

"No sensible person can long defend the situation factually that the absence of sidewalks in a traveled way is good. Southfield has become a city and should have sidewalks where needed. I think the legislative body has to exercise its discretion in that regard.

"As I have already said, I am granting the motion to dismiss for the reason given. I am allowing counsel for the plaintiff, if he wishes, 20 days in which to file any amended bill of complaint."

The plaintiffs contend that the trial court committed reversible error in granting motion for summary judgment made by the defendants.

The plaintiffs further contend that they are not requesting the court to legislate but are asking the court to review the procedures for local public im-

provement and to determine whether the officials of the said city have abused their discretion and have failed to properly perform their functions to provide health, safety, and welfare for the community.

It is the contention of defendant city of Southfield that the complaint does not set forth sufficient facts which, if true, would entitle the plaintiffs to a judgment ordering the defendant city of Southfield to install sidewalks in front of homes not belonging to plaintiffs and to finance the cost of such installation by special assessment against the abutting homeowners and the plaintiffs or out of general tax revenue.

We are cognizant of the Southfield city charter, § 9.26, as amended, and section 6 of ordinance 147, dealing with the owners of private real property objecting to proposed improvements.

Invariably, when a district is created to determine whether or not a proposed improvement shall be made, many may differ as to the boundaries of the district and its inclusion or noninclusion of specific property. The members of the city council in the instant case considered only the persons who were owners of private real property on which the proposed improvement was to be made in determining if more than 60% of the number of owners of privately owned real estate to be assessed for improvement had objected in writing to the original determination of necessity.

The question relating to the validity of the summary judgment depends upon whether or not the pleadings present a question of fact, namely: *Did the Southfield city officials abuse their discretion in determining whether or not the proposed improvement should be made?*

While the pleadings indicate a strong difference of opinion, they do not indicate that the city officials

abused their discretion. No statement of fact is presented relating to the proposed improvement upon which relief may be granted. *Hughes* v. *City of Detroit* (1953), 336 Mich 457; *Robertson* v. *New York Life Insurance Co.* (1945), 312 Mich 92; *Veldman* v. *City of Grand Rapids* (1936), 275 Mich 100.

The summary judgment of the trial court is affirmed. No costs, a public question being involved.

QUINN, P. J., and MCGREGOR, J., concurred.

SWINDLEHURST *v.* AMERICAN FIDELITY FIRE INSURANCE COMPANY.

1. JUDGMENT—RES JUDICATA.
   A party who fails to make a full presentation of his case, whereby judgment passes against him, cannot be permitted to make a better showing in a new suit.

2. SAME—RES JUDICATA—OPPORTUNITY TO PRESENT ISSUES.
   Res judicata applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits.

3. SAME—RES JUDICATA—PRIVIES.
   Res judicata rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them are concerned.

4. ACTION—BREACH OF INSURANCE CONTRACT—CONVERSION.
   Plaintiff insured, whose tractor and trailer equipment were damaged in an accident and thereafter taken by the defendant insurer to defendant garagekeepers for repairs, had alterna-

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 30A Am Jur, Judgments § 324 *et seq.*
[4, 6, 7] 53 Am Jur, Trover and Conversion § 159.
[5] 30A Am Jur, Judgments §§ 347, 348.
[8] 33 Am Jur, Liens § 30; 53 Am Jur, Trover and Conversion § 193.

tive remedies for alleged failure to make acceptable repairs and subsequent sale of vehicles, by suit on the contracts of insurance for breach or suit in tort for conversion, but only 1 cause of action.

5. JUDGMENT—BASED ON PROCEDURAL RULES—DETERMINATION ON MERITS.

A judgment for defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law, but if the judgment determines that the plaintiff has no cause of action, it is on the merits.

6. SAME—BREACH OF CONTRACT—CONVERSION—RES JUDICATA—JURISDICTION.

Consequences of adverse judgment in action for breach of contract of insurance policies, from which plaintiff did not appeal may not be avoided by bringing a new action for conversion but based on the same cause of action, where the justiciable controversy was determined by a court of competent jurisdiction.

7. SAME—CONVERSION—BREACH OF CONTRACT—RES JUDICATA.

Directed verdict for defendant insurer was erroneously denied in action for conversion of tractor and trailer equipment belonging to plaintiff and which had been damaged in an accident, where a judgment had previously been rendered for defendant in action plaintiff had brought for breach of insurance policies and no appeal taken, the doctrine of *res judicata* being applicable.

8. TROVER AND CONVERSION—GARAGE-KEEPER'S LIEN—EVIDENCE.

Defendant garagekeeper was entitled to directed verdict in action for alleged conversion of plaintiff's damaged trailer defendant insurer had left for repairs and which was sold for charges, where plaintiff failed to introduce material evidence that the garage-keeper had not complied with the garage-keeper's lien law, since plaintiff failed to establish a prima facie case of conversion (CL 1948, § 570.301 *et seq.*).

Appeal from Ingham; Hughes (Sam Street), J. Submitted Division 2 November 2, 1965, at Lansing. (Docket No. 304.) Decided February 22, 1966. Rehearing denied April 29, 1966. Leave to appeal denied by Supreme Court July 11, 1966. Certiorari denied by Supreme Court of the United States May 15, 1967. See 378 Mich 722.

Declaration by E. G. Swindlehurst against American Fidelity Fire Insurance Company, a foreign corporation; Henry Sales, doing business as Sales Welding; and C. C. Creed, Inc., a Michigan corporation, for conversion of tractor and trailer. Cause dismissed as to defendant C. C. Creed, Inc. Verdicts and judgments for plaintiff. On defendants' motion, new trial granted unless plaintiff filed remittiturs. Plaintiff appeals. Defendants cross-appeal. Reversed and judgment of no cause of action ordered entered.

H. Donald Bruce, for plaintiff.

Allaben & Massie (*Keith A. Vander Weyden,* of counsel), for defendant American Fidelity Fire Insurance Company.

Stephen T. Roumell, for defendant Sales.

MCGREGOR, P. J. This is a suit for the alleged conversion of plaintiff's 1950 Ford tractor and trailer. In September, 1950, plaintiff E. G. Swindlehurst was the owner of a tractor and steel hauling trailer which were damaged in an accident. The equipment was insured with defendant American Fidelity Fire Insurance Company (hereinafter referred to as AFFI Co.) under separate policies of $250 deductible collision insurance. Both policies gave the AFFI Co. the option of repair. AFFI Co. took possession of the damaged equipment, placing the trailer with defendant Henry Sales and the tractor with C. C. Creed, Inc. (hereinafter referred to as Creed) for the necessary repairs. Swindlehurst considered the repair work done by Sales and Creed to be unsatisfactory and refused to pay the $250 deductible due each for their work under the

terms of the insurance policies or to retake possession of the equipment. Negotiations between the parties did not lead to any solution and a long record of litigation precedes the instant case.

In July, 1951, Swindlehurst brought a suit for breach of contract against AFFI Co. in Ingham county circuit court (No. 15,922). At the conclusion of Swindlehurst's proofs, AFFI Co.'s motion for a directed verdict of no cause of action on the merits was granted by the court, based on a failure to present proof as to damages. Swindlehurst's motion for a new trial was denied and no appeal was taken.

Separate suits were brought by Sales (Berrien county No. 9,754) and Creed (Berrien county No. 9,935) for the cost of repairs and storage charges, naming Swindlehurst and the AFFI Co. as defendants. A settlement was reached between Creed and the AFFI Co., and that suit was dismissed. The suit brought by Sales resulted in judgment on January 14, 1955, against AFFI Co. with the court finding that Sales "completed those repairs in a good, workmanlike manner", and further finding no cause of action as to Swindlehurst, based on the absence of privity of contract. On that day the plaintiff and the defendant Sales entered into an agreement that plaintiff would remove the trailer in 2 or 3 days without charge for storage, and that if plaintiff did not do so, there would be a charge for storage at the rate of $2 per day. Plaintiff Swindlehurst continued to refuse to take possession of the trailer and, about 9 months later, on October 19, 1955 (this being more than 5 years after defendant Sales received the trailer), defendant Sales, pursuant to the provisions of the garage-keeper's lien statute (CL 1948, § 570.301 *et seq.* [Stat Ann 1960 Rev § 9.1711 *et seq.*]), sold the trailer. The Ford tractor had been sold by Creed on April 12, 1954, pursuant to

the provisions of the garage-keeper's lien statute, *supra.*

In April, 1956, Swindlehurst brought suit against AFFI Co. in Ingham county (circuit court No. 18,020) demanding damages of $65,000 for breach of contract and loss of profits. After hearing part of the proofs the trial court ordered that a judgment of no cause of action be entered in favor of AFFI Co., holding that the issues had been previously adjudicated in the first suit tried before the Ingham county court and in an opinion, filed May 3, 1957, denying plaintiff's motion for a new trial, said:

"The first case (Ingham county No. 15,922) was based on what amounts to a conversion. The instant case is the same. If the plaintiff is right in the instant case, he should have appealed from the judgment entered in the former case.

"Motion for a new trial is denied."

The instant action for conversion was brought by Swindlehurst in September, 1957, naming AFFI Co., Sales, and Creed as defendants. An order was entered in 1958, dismissing Creed as a party defendant. Defendant Sales entered a plea of general denial; defendant AFFI Co. pleaded affirmative defenses of *res judicata,* split cause of action, election of remedies, and statute of limitations, and a plea of general denial. AFFI Co.'s motion to dismiss based on *res judicata* and the statute of limitations was denied by the Ingham county circuit court. The defendants' application for leave to appeal that decision was denied by the Supreme Court.

This case came to trial in November, 1962, and resulted in a jury verdict for Swindlehurst against AFFI Co. and Sales in the amount of $14,000 on the trailer, and for Swindlehurst against AFFI Co. alone in the amount of $42,000 on the tractor. Motions for a new trial were filed by both AFFI Co.

and Sales on December 19, 1962, with subsequent motions to amend the original motions filed, authorized, and accepted by the trial court.

On August 31, 1964, twenty-one months after the motion for new trial was filed,* the trial court filed its opinion on the motions for a new trial, holding that the verdicts were excessive and that a new trial would be granted unless Swindlehurst filed a remittitur of $38,000 of the verdict against AFFI Co. on the tractor, leaving a judgment of $4,000; and a remittitur of $10,000 of the verdict against AFFI Co. and Sales on the trailer, leaving a judgment of $4,000. Swindlehurst thereafter filed his claim of appeal and AFFI Co. and Sales filed claims of cross-appeal.

The first question we consider is whether or not the trial court erred in denying a motion made by defendant AFFI Co. for dismissal on the grounds of *res judicata.*

"It is not intended that a controversy shall be tried over and over, but rather that one suit, in which issues are tried and disposed of on the merits, must conclude the litigation. If a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit." *Banks* v. *Billups* (1958), 351 Mich 628, 635.

In *Strech* v. *Blissfield Schools* (1959), 357 Mich 620, 623, the Supreme Court said:

"*Res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Porth* v. *Cadillac Motor Car Co.*, 209 Mich 89; *Thompson* v. *Doore,* 269 Mich 466; *McDaniel* v. *Black,* 270 Mich 305; *Boyich* v. *J. A. Utley Co.,* 306 Mich 625."

* GCR 1963, 527.1(4).

In *Machen* v. *Budd Wheel Co.*, (1933), 265 Mich 530, 535, it is stated:

"The doctrine of *res judicata* rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them are concerned."

Also:

"Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." Restatement, Judgments, § 48, p 191.

Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach or he could pursue the tort remedy of conversion. (See *Newman* v. *Olney,* 118 Mich 545.) Ingham county case No. 18,020, filed April 20, 1956, by the plaintiff against AFFI Co., in which a judgment for the defendant for no cause of action was entered, is *res judicata* as to the defendant AFFI Co. in the instant matter. In Restatement, Judgments, § 49, p 193, it is stated:

"A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment determines that the plaintiff has no cause of action, it is on the merits."

Plaintiff having failed to make use of any remedy available to him after the adverse judgments in previous cases, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same cause of action. The issue between the plaintiff and defendant AFFI Co. herein decided adversely to the plaintiff (Ingham county circuit court No. 18,020)

are the same issues involved in the instant suit. The justiciable controversy in this case has heretofore been determined by a court of competent jurisdiction. The trial court in this matter erred in not granting defendant AFFI Co.'s motion to dismiss on the grounds of *res judicata*.

At the conclusion of the plaintiff's evidence, defendant Sales' counsel moved the court to direct a verdict of no cause of action. The record shows that plaintiff failed to introduce material evidence that the defendant Sales did not comply with the garagekeeper's lien law. Plaintiff therefore did not establish a prima facie case of conversion. Defendant Sales' motion for a directed verdict of no cause of action should have been granted. *Thoma* v. *Tracy Motor Sales* (1960), 360 Mich 434. In view of the decision herein, the other issues raised by the parties are irrelevant.

As to both defendants, the American Fidelity Fire Insurance Company and Henry Sales, the judgment of the trial court is reversed and a judgment of no cause of action shall be entered, with costs to appellees.

FITZGERALD and T. G. KAVANAGH, JJ., concurred.

PEOPLE v. GARDINEER.

1. WITNESSES—CREDIBILITY—IMPEACHMENT—ASSAULT WITH INTENT TO RAPE.

   Defense counsel's attempt to impeach credibility of mother of girl upon whom her defendant stepfather was charged with assault with intent to rape *held*, proper, where girl had testified it was possible her mother had told her what to say, hence, it was reversible error for trial court to sustain prosecutor's objection to defense counsel's inquiry of mother whether she had told her daughter what to say and admonish mother that if she changed her testimony she would be guilty of perjury under record failing to show that if the mother had been permitted to testify that she had told her daughter what to say, she would thereby be changing her testimony under oath (CLS 1961, § 750.85).

2. SAME—CROSS-EXAMINATION.

   Cross-examination of a witness, devised for the discovery of truth, is a security for the correctness and completeness of testimony.

3. SAME—CONSISTENT STATEMENTS.

   Proof of consistent statements to those given by a witness on direct examination, without any impeachment, is unnecessary and valueless and would ordinarily be considered irrelevant and cumbersome.

4. SAME—UNIMPEACHED WITNESS—CONSISTENT STATEMENTS.

   Admission of testimony of policeman regarding prior statement of defendant's stepdaughter, made in the presence of defendant after bias, interest, or corruption was shown to have existed, was error, where her testimony at stepfather's trial on charge of assault with intent to commit rape upon her had not been impeached.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Witnesses § 674 *et seq.*
[2] 58 Am Jur, Witnesses § 610.
[3] 58 Am Jur, Witnesses §§ 817–820.
Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony. 75 ALR 2d 909.

Appeal from Kent; Vander Wal (John D.), J. Submitted Division 3 November 4, 1965, at Grand Rapids. (Docket No. 560.) Decided February 22, 1966.

John Abraham Gardineer was convicted of assault with intent to commit rape. Defendant appeals. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Norman K. Kravitz,* Assistant Prosecuting Attorney, for the people.

C. Blair Mohney, for defendant.

J. H. GILLIS, J. On November 18, 1964 defendant was found guilty by a jury of assault with intent to rape* and thereafter sentenced to a term of 2–1/2 to 10 years in the State prison. The alleged victim of the assault was the 13-year-old stepdaughter of the defendant.

Defendant appeals from the judgment and sentence of the court, alleging reversible error occurred during the course of the trial.

The offense allegedly occurred on April 3, 1964. The record indicates that the first complaint to the police concerning this act was August 6, 1964, some four months later. The police were called to the defendant's home on August 6, 1964, at the urgent solicitation of the defendant's wife who first complained that her husband was beating her. After the officers informed the wife that they could not arrest the defendant because they had not witnessed the act, the wife, being at the time in a highly emotional state, informed the officers of the occurrence for which the defendant presently stands convicted.

* CLS 1961, § 750.85 (Stat Ann 1962 Rev § 28.280).

At trial, the stepdaughter testified concerning acts done by the defendant from which testimony the jury could properly determine the guilt of the defendant.

On cross-examination of the stepdaughter by defense counsel, insinuations were developed to the effect that the girl testified as she did only because her mother had told her what to say in an effort to get the defendant out of the home. The defendant's attorney, in attempting to impeach the credibility of the stepdaughter, asked her on cross-examination whether or not her mother had told her what to say and to "lay it on good." The stepdaughter suggested it was possible. During the cross-examination of defendant's wife, defense counsel asked whether she had told her daughter what to say. The prosecutor objected and was sustained by the court. At this point the court admonished the wife that if she changed her testimony, she would be guilty of perjury.

The record does not indicate that if the mother had been permitted to testify that she had told her daughter what to say, she would thereby be changing her testimony under oath.

The credibility of the stepdaughter was certainly a material issue, and the attempt of defense counsel to impeach her credibility was proper.

Cross-examination was a distinctive feature of the English trial system, and the one which most contributed to the prestige of the institution of jury trial. It is a security for the correctness and completeness of testimony. Cross-examination is the most efficacious test which the law has devised for the discovery of truth.

It was reversible error for the trial court to restrict counsel's cross-examination of the mother concerning whether or not she had told her daughter

what to say. See *Geary* v. *People* (1871), 22 Mich 220.

Defendant further contends that the trial court committed reversible error in permitting a police officer to relate the substance of a statement he had taken from the stepdaughter in the presence of the defendant on September 1, 1964. This testimony was objected to by defendant.

The statement as related by the police officer was consistent with the testimony of the stepdaughter given at trial. The people contend the purpose of this testimony was to corroborate the testimony which the stepdaughter had given earlier during the trial.

Professor Wigmore, in his exhaustive treatise on the law of evidence, considers this method of rehabilitating or supporting a witness' testimony by proof of a prior consistent statement.

"When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be both irrelevant and cumbersome to the trial; and is rejected in all courts." 4 Wigmore on Evidence (3d ed), § 1124, p 194.

There are exceptions to this rule. The one applicable to the instant case reads:

"A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The

former statements are therefore admissible." 4 Wigmore on Evidence (3d ed), § 1128, p 203.

In the case at bar, the officer was permitted to testify to a statement made to him by the stepdaughter on September 1, 1964. The bias, interest, or corruption alleged by the defendant as the motive for the stepdaughter's testimony existed at least as early as August 6, 1964. Thus, it is apparent that the statement was uttered *after* the alleged bias, interest, or corruption was in existence. This testimony does not fall within that class of cases which are recognized as exceptions to the rule excluding proof of prior consistent statements and should have been rejected.

This rule of evidence is well covered in the opinion of Justice COOLEY in *People* v. *Stewart* (1871), 23 Mich 63 (9 Am Rep 78). See, also, those cases cited in 140 ALR 21.

This cause is remanded for a new trial in accordance with the provisions of this opinion.

HOLBROOK, P. J., and BURNS, J., concurred.

PEOPLE *v.* WOOD.

1. CRIMINAL LAW—CONTINUANCE OF PROBATION.
   The granting of probation to one convicted is a matter of grace and confers no vested right to its continuance (CL 1948, § 771.4).

2. SAME—PROBATION—REVOCATION PROCEDURE.
   Written copy of the charges against probationer for violation of his probation must be served upon him and at least a summary informal hearing accorded to him before revocation of the probation (CL 1948, § 771.4).

3. SAME—REVOCATION OF PROBATION—RIGHT TO COUNSEL.
   There is presently no guarantee of right to counsel at a hearing on the revocation of probation (CL 1948, § 771.4).

4. SAME—REVOCATION OF PROBATION—WRITTEN COPY OF CHARGES.
   Statutory requirement that probationer be furnished a written copy of the charges for revocation of his probation is not met by a reading of the charges to him when he is standing before the court during a hearing or at some other time (CL 1948, § 771.4).

5. SAME—REVOCATION OF PROBATION—HEARING—WITNESSES.
   Hearing contemplated by statute to be accorded a probationer includes affording him the opportunity to produce witnesses in his behalf and it was reversible error not to afford such opportunity that had not been waived (CL 1948, § 771.4).

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 563, 564.
[2] 21 Am Jur 2d, Criminal Law § 568.
Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074.
[3] 21 Am Jur 2d, Criminal Law §§ 564, 567, 568.
[4, 5] 21 Am Jur 2d, Criminal Law §§ 567, 568.
[6] 21 Am Jur 2d, Criminal Law §§ 566–568.

6. SAME—REVOCATION OF PROBATION—REMAND.

Order revoking probation that is set aside for failure to accord probationer a proper hearing before issuing such order and remand of petitioner to custody of trial court is without prejudice on the part of the trial court after probationer is served a written copy of the probation charges he is required to meet and a proper hearing had thereon (CL 1948, § 771.4).

Appeal from Ingham; Salmon (Marvin J.), J. Submitted Division 2 November 4, 1965, at Lansing (Docket No. 863.) Decided February 22, 1966.

Tommie M. Wood pled guilty to a charge of carrying a concealed weapon and was placed on probation for a period of 5 years. Probation was revoked, and defendant sentenced to a term of 2 to 5 years imprisonment. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald L. Reisig,* Prosecuting Attorney, and *James R. Ramsey,* Assistant Prosecuting Attorney, for the people.

Dunnings & Gibson (*Stuart J. Dunnings, Jr.,* of counsel) for defendant.

FITZGERALD, J. In June of 1964, defendant Wood entered a plea of guilty in Ingham county circuit court to a charge of carrying a concealed weapon* and was placed on probation for a period of 5 years.

In January of 1965, defendant was brought before the same court pursuant to a bench warrant charging him with violation of his probation. A probation violation hearing was held and after listening to the testimony of the defendant, the court adjourned the hearing and requested the chief probation officer to

* CL 1948, § 750.227 (Stat Ann 1962 Rev § 28.424).—REPORTER.

produce witnesses at a subsequently scheduled hearing.

At the conclusion of the later hearing, the defendant was held to have violated his probation, probation was revoked, and he was sentenced to a term of 2 to 5 years imprisonment. The defendant was not represented by counsel at these hearings.

In March of 1965, defendant's attorney filed a motion asking the court to set aside its order revoking probation. The reasons given were that defendant was not furnished with a written copy of the charges constituting the claim that he had violated probation nor was he advised of his right to have counsel represent him at the hearings and to produce witnesses in his own behalf.

A hearing was held on this motion and the testimony of a probation officer was taken to the effect that the defendant either had possession of, or was familiar with, the contents of a written copy of the charges constituting the claim of probation violation.

Defendant's attorney stated that he had been contacted by the defendant and that one of the reasons the attorney was not present at the hearings was a misunderstanding as to the nature of the proceedings. The motion to set aside the order revoking probation was denied.

After the order entered denying defendant's motion, a document was filed with the court and served on defendant's attorney certifying that defendant was served with an "exact copy of petition and warrant which sets forth the charges against this person relative to his probation violation on December 22, 1964." The document is dated March 26, 1965, three days after the order entered denying defendant's motion, and is signed "B. Joe Southwell, Sgt." Defendant's attorney states in his brief that no petition or warrant setting forth any charges was at-

tached to the instrument served on him. This is also true of the original document as filed with the court.

Defendant alleges two grounds for reversal in this appeal. First, that the revocation was invalid because he was not properly served with a warrant and a copy of the charges against him. Second, that he was denied due process of law in that he was not informed of his right to be represented by counsel at the hearings or to present witnesses in his own behalf.

In order to determine these questions it is necessary to examine the statute under which probation is given and revoked, namely chapter 11 of the code of criminal procedure PA 1927, No 175, as amended; CL 1948 and CLS 1961, § 771.1 *et seq.* (Stat Ann 1954 Rev and Stat Ann 1963 Cum Supp § 28.1131 *et seq.*). Section 4 of this chapter is important in the determination of this case. This section is as follows:

"It is the intent of the legislature that the granting of probation to one convicted shall be a matter of grace conferring no vested right to its continuance, if, during the period of probation it shall appear to the satisfaction of the sentencing court that the probationer is likely again to engage in an offensive or criminal course of conduct, or that the public good requires revocation or termination of probation previously granted. All probation orders, therefore, shall be revocable or terminable in any manner which the court which imposed probation shall deem applicable, either for any violation, or attempted violation of any condition of probation, or for any other type of antisocial conduct or action on the part of the probationer which shall satisfy such court that revocation is proper in the public interest. Hearings on such revocation shall be summary and informal and not subject to the rules of

evidence or of pleadings applicable in criminal trials. The court may, in its probation order or by general rule, provide for the apprehension, detention and confinement of any probationer accused of violation of any of the conditions of probation or of conduct inconsistent with the public good. The method of hearing and presentation of charges accorded shall lie entirely within the discretion of the court which granted probation: Provided, however, That the probationer shall be entitled to a written copy of the charges against him which constitute the claim that he violated his probation, and shall be entitled to a hearing thereon. Said court is hereby empowered to make such investigation and such disposition of probationer thereafter as such court may determine shall best serve the interests of the public. In case such probation order is terminated or revoked the court may proceed to sentence such probationer in the same manner and to the same penalty as it might have done if such probation order had never been made." (CL 1948, § 771.4 [Stat Ann 1954 Rev § 28.1134].)

It is noted that the legislature set forth with some particularity what it intended by the enactment of this statute, namely that the granting of probation is a matter of grace and that hearings on revocation are summary and informal. Further, they state, hearings are not subject to the rules of evidence or pleadings applicable in criminal trials and also that the method of hearing and presentation of charges shall be within the discretion of the court.

In response to the question as to whether a defendant has a right to counsel at a hearing on probation revocation, we believe that under present interpretations of appellate courts the answer is that there is no guarantee of right to counsel at such hearings. In *People* v. *Dudley* (1912), 173 Mich 389, it was held that because revocation of proba-

tion is not a criminal prosecution, the constitutional guarantee of right to counsel is not applicable. A recent holding by the seventh circuit court of appeals in the case of *Brown* v. *Warden, U. S. Penitentiary* (CA 7, 1965), 351 F2d 564, decided October 7, 1965, reiterated that Federal probationers do not have a right to court-appointed counsel in revocation proceedings. The court there stated:

"Recent decisions concerning the rights of parolees on revocation proceedings serve to emphasize the distinction between penological devices under legislative mandate, such as probation or parole where the guilt and liability to punishment of the offender are no longer in issue, and the initial criminal prosecution where these matters were determined. [Citing cases.] It appears clearly from these decisions that the Federal constitutional rights of an accused in a criminal prosecution and the rights of an offender in proceedings on revocation of conditional liberty under parole or probation are not coextensive."

The Michigan Supreme Court in *People* v. *Marks* (1954), 340 Mich 495, 500, held specifically: "The Michigan act in its terms is similar to the Federal probation act (Chap 521, 43 Stat 1259. Revised in 1948, 62 Stat 842 [18 USCA, §§ 3651–3656])." This, we believe, answers on point the defendant's contention concerning right to appointed counsel and adequately demonstrates that, as yet, no such guaranteed right exists.

Defendant's remaining contentions require examination of two mandates found in the statute previously quoted, *supra*. The words "provided, however, that the probationer shall be entitled to a written copy of the charges against him which constitute the claim that he violated his probation and shall be entitled to a hearing thereon," make it clear that while the legislature granted wide latitude to

the trial court in the conduct of these proceedings, it also set minimum requirements demanding strict compliance. If a probation revocation is to be valid, the record must demonstrate that the probationer was furnished with a written copy of the charges against him and that a hearing was had on these charges which satisfies the requirements of the legal meaning imparted to the word "hearing".

The record in this case does not satisfy us that the requirement of furnishing a written copy of the charges was met. Rough approximation in the face of such a statutory requirement will not suffice. The requirement is not met by a reading of the charges to the probationer when he is standing before the court during a hearing or at some other time. *In re Rudnik* (1952), 333 Mich 216, and *In re McLeod* (1957), 348 Mich 434, are illustrative of the particularity with which the Supreme Court has dealt with the matter of service of a statement of the charges.

The explanation of the trial court's rejection of the defendant's motion to set aside the revocation based on failure to furnish the required written copy of the charges is illustrated by the following quotation:

"I think that Mr. Wood was sufficiently advised of the charges here that would be tantamount to having been served with these charges if he was not. There is some indication that he was served. I think he was fully advised of these charges sufficient to comply with the requirements of notice. That is the reason for service of notice."

Nor is the defect cured by the filing of the document previously described at a time three days after the hearing in which an order was entered denying defendant's motion to set aside the order revoking his probation. At no time during the proceedings was this "proof of service" on file, hence, at no time

during the proceedings was there an opportunity to challenge its accuracy or validity.

Defendant's remaining contention, which goes to the sufficiency of the revocation hearing, should also be noted. The "hearing" contemplated by the statute includes affording the probationer the opportunity to produce witnesses in his behalf. *In re Bobowski* (1946), 313 Mich 521.

In the instant case, the record yields examples of the defendant having material to present at the hearing, but not being afforded the opportunity to present it. When asked why he was found near his ex-wife's home with a shotgun in the car, he explained that he had intended to take his son rabbit hunting but had been arrested and the gun found, professing not to know that the gun was in the car. The following statement shows that a material witness for the defendant might have been produced had the opportunity been afforded him:

"*The Witness:* During deer season last year my son used my car and shotgun, took it deer hunting, and evidently loaded it; I don't know. We were supposed to be going rabbit hunting that morning. I parked about a block away where I could see when the lights came on. The first thing I know the State Police pulled up, had me out of the car, had me put my hands on the roof and said that they had a report that I had a pistol. I told them to go ahead and search me. That's when they found the shotgun.

"*The Court:* You didn't know it was there?

"*The Witness:* I didn't know. My boy said he would come down to explain to the probation officer. I don't know if he did or not."

On the record before us it cannot be said that defendant was offered the opportunity to produce any witnesses that he might have had in his behalf, nor can it be said that he waived the right to a hearing granted to him by the statute.

The order revoking the probation is set aside, the sentence vacated, and petitioner is remanded to the custody of the court without prejudice on the part of the trial court where a proper hearing is ordered after defendant is given a written copy of the probation violation charges that he is required to meet.

McGREGOR, P. J., and T. G. KAVANAGH, J., concurred.

MICHIGAN MUTUAL LIABILITY COMPANY *v.* MESNER.

1. INSURANCE—CONSTRUCTION OF POLICY.
   The construction of insurance contracts should be in accordance with the standard of the understanding of the ordinary person.

2. SAME—CONSTRUCTION OF POLICY—UNINSURED MOTORISTS.
   Clause of automobile insurance policy insuring against injury by uninsured motorists is construed as imposing liability on the insurer to amount of insured's loss less sum received from workmen's compensation carrier with a maximum of $10,000 rather than $10,000 maximum less amount of recovery of workmen's compensation.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted Division 1 December 8, 1965, at Detroit. (Docket No. 812.) Decided February 22, 1966.

Complaint by Michigan Mutual Liability Company against Patrick Mesner to construe and declare

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REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur, Insurance § 245.
[2] 7 Am Jur 2d, Automobile Insurance §§ 2, 135.

rights in a policy of automobile insurance. Judgment for defendant. Plaintiff appeals. Affirmed.

Johnson & Campbell (*Reginald Johnson,* of counsel), for plaintiff.

Emerson H. Schink, for defendant.

BURNS, J. Plaintiff-appellant filed a motion for a declaratory judgment to determine its liability under an uninsured motorists section of an insurance policy.

Defendant-appellee carried a policy of automobile insurance with the appellant which contained a provision protecting the appellee from an uninsured motorist. He was injured in an accident with an uninsured motorist, has received $4,791 from a workmen's compensation carrier as a result of the same accident, and the matter is pending in an arbitration hearing under the policy.

The appellant contends the amount payable to appellee, if liability is found, would be the policy limit of $10,000, less $4,791. The appellee contends the amount payable, if liability is found, is the value of his injuries, less $4,791, and in no event to exceed $10,000.

The pertinent parts of the policy provide:

"PART IV—PROTECTION AGAINST UNINSURED MOTORISTS

"Coverage H—Uninsured Motorists (Damages for Bodily Injury)

"To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the in-

sured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration. * * *

"Limits of Liability

"(a) The limit of liability for uninsured motorists coverage stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to 'each accident' is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

"(b) If claim is made under this part and claim is also made against any person insured under part 1 because of bodily injury sustained in an accident by a person who is an insured under this part:

"(1) any payment made under this part to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person insured under coverage A; and

"(2) any payment made under coverage A to or for any such person shall be applied in reduction of any amount which he may be entitled to recover under this part.

"(c) Any loss payable under the terms of this part to or for any person *shall be reduced by the amount paid and the present value of all amounts payable to him under any workmen's compensation law,* exclusive of non-occupational disability benefits." (Emphasis supplied.)

The trial court held that the appellant was liable for the amount of the entire injury, less the $4,791 paid by the workmen's compensation carrier, but limited to $10,000.

The only authority cited to this Court is a case from the California court of appeals, *Jarrett* v. *Allstate Insurance Company* (1962), 209 Cal App 2d 804 (26 Cal Rptr 231). The California court affirmed the lower court, which interpreted an insurance policy with almost the identical language as in the present case, and held that the loss referred to in clause C, obviously referred to the liability fixed by clause A, and therefore that the payments made by the workmen's compensation carrier should be deducted from the limitation on the policy of $10,000.

However, we cannot agree with the interpretation placed on this contract by the California court, and we are not bound by their interpretation. In construing insurance contracts, the standard to be used is the understanding of the ordinary person. As Justice EDWARDS stated in *Wadsworth* v. *New York Life Insurance Co.* (1957), 349 Mich 240, on page 257, quoting from Judge Learned Hand:*

"'An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially.'"

When the structure of the policy and the arrangement of the clauses involved are viewed, it should be noted the protection against uninsured motorists is a separate part of the policy, part 4. The first heading under the part is coverage H, whereby the company promises "To pay *all sums*." (Emphasis supplied.) Under coverage H is listed definitions,

* *Gaunt* v. *John Hancock Mutual Life Insurance Co.* (CA 2), 160 F2d 599, 601.

exclusions, limits of liability, other insurance, arbitration, and trust agreements. We are involved in the section headed "Limits of Liability" which is broken down to (a), (b), and (c), and (b) is broken down further to (1) and (2).

Subsection (a) limits the liability for uninsured motorists coverage as stated on the front of the policy to $10,000. Subsection (c), which stands on equal footing with (a), and is not subordinate, as in the case of (1) and (2) under subsection (b), reduces any loss payable by the amount of the workmen's compensation paid or payable.

Therefore, it is our opinion that (c) modifies H and does not modify (a), and would so be interpreted by any ordinary person; that the liability of the company is to be computed on the value of the insured's loss, less the $4,791 received from the workmen's compensation carrier, and in no event to exceed $10,000.

Judgment of the lower court is affirmed. Costs to appellee.

WATTS, P. J., and J. H. GILLIS, J., concurred.

BEDNARSH *v.* WINSHALL.

1. ACCOUNTING—JOINT ADVENTURES.
   Record in suit for accounting *held,* to sustain trial court's finding that parties were engaged in a joint venture for the acquisition, development, and sale of real estate.

2. SAME—APPEAL.
   Facts are reviewed *de novo* on appeal in suit for accounting.

3. SAME—BURDEN OF PROOF.
   Plaintiff has the burden of proof insofar as a right to be credited with any controverted item involved in a suit for accounting.

4. APPEAL AND ERROR—ACCOUNTING—JOINT ADVENTURES—BURDEN OF PROOF—EVIDENCE.
   Finding of trial judge in suit for accounting for alleged profits in joint venture for acquisition, development, and sale of real estate that plaintiffs had failed to sustain their burden of proof *held,* sustained under record presented.

5. SAME—QUESTION FOR TRIER OF FACTS—EVIDENCE—CREDIBILITY OF WITNESS.
   The Court of Appeals does not reverse a decree in suit for accounting based on a determination of fact, where the evidence taken in open court is conflicting and apparently evenly balanced, since the trial court has had the opportunity to weigh the testimony in the light of the appearance, manner, and deportment of the witnesses.

6. SAME—QUESTIONS REVIEWABLE—ACCOUNTING—BURDEN OF PROOF—LACHES.
   Issue of laches is not discussed on appeal, where determination of trial court was that plaintiffs had failed to sustain their

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REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur 2d, Accounts and Accounting § 62.
[2] 1 Am Jur 2d, Accounts and Accounting § 64.
[3] 1 Am Jur 2d, Accounts and Accounting §§ 19, 62.
[4, 6] 1 Am Jur 2d, Accounts and Accounting §§ 62, 63.
[5] 1 Am Jur 2d, Accounts and Accounting §§ 62, 63; 5 Am Jur 2d, Appeal and Error §§ 831, 882.

burden of proof in suit for accounting for alleged profits in a joint venture in real estate.

Appeal from Oakland; Moore (Arthur E.), J. Submitted Division 2 January 4, 1966, at Detroit. (Docket No. 298.) Decided February 22, 1966. Rehearing denied March 24, 1966. Leave to appeal denied by Supreme Court May 26, 1966. See 377 Mich 712.

Bill by Charles Bednarsh and Jennie Bednarsh, his wife, against Jack W. Winshall and Phyllis Winshall, his wife, for an accounting with respect to joint venture in real-estate development. Bill dismissed. Plaintiffs appeal. Affirmed.

Sugar & Schwartz, for plaintiffs.

Cooper & Baskin, for defendants.

QUINN, J. Plaintiffs filed this action for an accounting on the theory that plaintiffs and defendants had entered into a joint venture in 1953 for the purpose of buying, developing, and selling a parcel of land in St. Clair Shores, Michigan. Plaintiffs contended that the venture resulted in a substantial profit and that they never received anything from the deal. Defendants claimed repayment of the original investment plus something in excess thereof and that there was no profit in the venture. Trial without a jury resulted in a judgment of no cause for action. Plaintiffs appealed from this judgment and from denial of their motion for rehearing.

Both sides agree that the appeal presents two issues. A condensed restatement thereof is: have plaintiffs met their burden of proof and are plaintiffs barred from recovery by laches?

For several years prior to 1953, the parties hereto had been friends and defendants had borrowed money from plaintiffs on occasion. No notes were given on these loans nor were written records kept so far as the record discloses. Some time in 1953, plaintiffs advanced cash to defendants to be applied by them on the down payment for real estate in St. Clair Shores, Michigan. Plaintiffs say this sum was $10,000; defendants say it was $6,000. No receipt was given for it, but the down payment was made and a land contract was executed to the parties hereto as vendees. Defendants were to develop and sell the real estate and any profits were to be divided equally between the parties. The land was developed and sold. Charles Bednarsh testified he signed deeds and contracts in the beginning of 1954 and that in the late fall of 1955 or the beginning of 1956, Jack Winshall told him all the money had been collected and there was a profit of $19,000 which was tied up in a different deal. The only testimony offered by plaintiffs was that of Jack Winshall and themselves. The only records produced were those of Winshall. His testimony and his records tended to show repayment and a loss on the project. The trial court found that the parties were engaged in a joint venture for the acquisition, development, and sale of this real estate. The record sustains this finding. At the close of plaintiffs' case, the trial court granted defense motion for directed verdict (properly for dismissal, see GCR 1963, 504.2) on the basis plaintiffs had failed with their burden of proof and were also barred by laches.

Recognizing that the facts are reviewed *de novo* on the record on this appeal, *Cullum* v. *Topps-Stillman's, Inc.* (1965), 1 Mich App 92, the burden of proof is plaintiffs insofar as they assert a right to be credited with any controverted item involved in

the accounting. *Barar* v. *Phillips* (1950), 328 Mich 267. In granting defense motion for dismissal, the trial court observed, "but unfortunately this does not overcome the fact that the case is almost completely devoid of credible testimony because of the paucity of normal evidence usually available in a case of this sort." A review of the record amply supports this observation. Controlling authority is aptly stated in *Green* v. *Langdon* (1873), 28 Mich 221 (syllabus): "Where on a chancery appeal involving only questions of fact, the evidence is conflicting and apparently nearly equally balanced, and the testimony has been taken in open court, so that the court below had an opportunity to weigh the testimony in the light of the appearance, manner, and deportment of the witnesses when upon the stand, the decree below will not be reversed."

This conclusion obviates discussion of the laches issue.

Affirmed, with costs to defendant.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

PEOPLE v. MALLORY.

1. JURY—SELECTION—DISQUALIFICATION—EQUAL PROTECTION—CRIMINAL RECORDS.

   Jury selection, in which prospective jurors may be disqualified by board of jury commissioners when prospective jurors have a criminal record or are related, in their immediate family, to those who have criminal records, *held,* not to be violation of equal protection of the law, when record indicates that selection of jury was in compliance with statutory requirements, and not a systematic exclusion of a class as claimed (US Const, Am 14; Const 1963, art 1, § 1; CL 1948, §§ 725.108–725.110, 725.115).

2. SAME—SELECTION—CURRENT LIST OF ELECTORS.

   Jury selection for January, 1965, trial from 1962 list of electors *held,* not to have resulted in improper jury, notwithstanding statutory requirement that lists of jurors should be made biennially or more often if necessary, where current list was not available because of apportionment problems (CL 1948, § 725.103).

3. CRIMINAL LAW—NARCOTICS—POSSESSION AND INTENT.

   Proof of possession of narcotics without a license therefor is sufficient to sustain conviction under the uniform narcotic drug act, it being unnecessary to show accused possessed the narcotics with intent to place them in commerce and traffic (CLS 1961, § 335.153).

4. SAME—UNLAWFUL POSSESSION OF NARCOTICS—SUFFICIENCY OF EVIDENCE—LACK OF LICENSE.

   Defendant's claim that the record did not show clearly that defendant did not have license to possess narcotics *held,* refuted

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REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Jury § 164.
[2] 31 Am Jur, Jury § 89.
[3, 4] 17A Am Jur, Drugs and Druggists § 34.
[5] 20 Am Jur, Evidence § 396.
[6] 5 Am Jur 2d, Appeal and Error § 623.

by record containing ample evidence for jury to find defendant was not licensed (CLS 1961, § 335.153).

5. SEARCHES AND SEIZURES—EVIDENCE—POLICE OFFICER'S SENSES.
Defendant's claim that narcotics seized by police officer should be suppressed as evidence *held,* not valid, where police officer discovered evidence by the use of his sense of sight while defendant was stopped for a traffic light, and not while officer was engaged in a searching operation (CLS 1961, § 335.153).

6. APPEAL AND ERROR—FAILURE TO GIVE INSTRUCTIONS—OBJECTION AT TRIAL.
Defendant is precluded from claiming error on appeal based on trial judge's failure to give an instruction when defendant was afforded an opportunity to object to charge given before jury retired and made no objection (GCR 1963, 516.2).

Appeal from Recorder's Court; Krause (Paul E.), J. Submitted Division 1 January 4, 1966, at Detroit. (Docket No. 435.) Decided February 22, 1966. Leave to appeal granted by Supreme Court May 23, 1966. See 377 Mich 710.

Sanders Mallory, Jr., was convicted of possession of narcotics without a license. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Rheo C. Marchand,* Assistant Prosecuting Attorney, for the people.

Milton E. Henry, Lawrence W. Massey, and *Edward F. Bell,* for defendant.

QUINN, J. Defendant appeals from his conviction and sentence for possession of narcotics (CLS 1961, § 335.153 [Stat Ann 1957 Rev § 18.1123]) in recorder's court of Detroit. He contends that the jury which convicted him was improperly drawn, and that the record does not sustain a conviction for violation of the above statute because mere possession is shown

and it is not shown that defendant did not possess a license. Defendant further contends that the trial court improperly denied his motion to suppress evidence on the basis of alleged unlawful search and seizure, and that the trial court erred in not giving one of defendant's requests to charge. These contentions frame the issues for decision.

May 8, 1964, four police officers were proceeding north on Twelfth street in Detroit in a police cruiser. As they passed the intersection of Twelfth and Buena Vista, a brown Cadillac convertible was observed on Buena Vista. It was stopped facing west on the east side of Twelfth. The driver of the cruiser continued to observe the brown Cadillac in his rear view mirror and saw it cross Twelfth and stop with its front end approximately at the crosswalk and its rear extending into Twelfth street. Immediately returning to the intersection of Twelfth and Buena Vista, the officers saw the brown Cadillac improperly back into Twelfth street and start north. The police car pursued the Cadillac and came along side it when the Cadillac stopped for a red light at Davison. At this point, one of the officers observed defendant, a passenger in the Cadillac, reach in his pocket and withdraw a tinfoil package about eight inches long and three or four inches wide. Thereupon, the officer called out "narcotics", jumped from the car, and while running to the Cadillac, saw defendant open the package. The officer saw white powder drip from the package. The driver of the Cadillac and defendant left it and started to run. The officer retrieved the package from the front seat, where defendant had dropped it. The package was still dripping white powder, and the officer closed it and placed it in his pocket. Defendant and the driver were arrested. Chemical analysis of the contents of the tinfoil package and white powder scraped from

the front seat of the Cadillac disclosed both were a mixture of cocaine, procaine, and lactose. Defendant was charged, tried, and convicted of violating CLS 1961, § 335.153 (Stat Ann 1957 Rev § 18.1123) which reads so far as pertinent:

"Any person not having a license as required under the provisions of Act No. 343 of the Public Acts of 1937, as amended, being sections 335.51 to 355.78, inclusive, of the Compiled Laws of 1948,[1] who shall possess or have under his or her control any narcotic drug shall be deemed guilty of a felony."

Selection of jurors to serve in recorder's court of Detroit is accomplished under municipal court jury code, CL 1948, § 725.101 *et seq.* (Stat Ann 1962 Rev § 27.3971 *et seq.*). The code requires that electors of good character, approved integrity, sound judgment; who are well informed, conversant with the English language, possessed of their natural faculties, judicious and discreet, not infirm or decrepit, who have not applied to be placed on a jury list, and who have not served on any jury during the preceding 3 years, shall be selected as jurors. CL 1948, § 725.115 (Stat Ann 1962 Rev § 27.3985). To determine these qualifications, a questionnaire is first used. CL 1948, § 725.108 (Stat Ann 1962 Rev § 27.3978). Prospective jurors may be disqualified by their answers to the questionnaire. CL 1948, § 725.109 (Stat Ann 1962 Rev § 27.3979). Those surviving the questionnaire are called in for oral examination under oath concerning their qualifications. CL 1948, § 725.110 (Stat Ann 1962 Rev § 27.3980). Prospective jurors are questioned as to their criminal records and the criminal records of their immediate family, and disclosure of a criminal record on the part of the juror

[1] Uniform narcotic drug act, CL 1948 and CLS 1961, § 335.51 *et seq.* (Stat Ann 1957 Rev and 1963 Cum Supp § 18.1071 *et seq.*)—REPORTER.

or some member of his immediate family may result in disqualification. Defendant contends this practice results in a systematic exclusion of a class from jury service and is a denial of equal protection of the law[2] as demonstrated by *Hernandez* v. *State of Texas* (1953), 347 US 475 (74 S Ct 667, 98 L ed 866). The record here demonstrates compliance with statutory requirements for jury selection rather than systematic exclusion as contended for by defendant.

Under the municipal court jury code, the source of prospective jurors is the list of electors. CL 1948, § 725.103 (Stat Ann 1962 Rev § 27.3973). Pertinent language thereof for present discussion is:

"On or before the last day of December, 1931, and biennially thereafter, or oftener if deemed necessary by the board, said board shall secure from the city officers having custody of the registration books or cards, a list containing the names and addresses of all electors of the city shown on such registration books or cards."

Defendant contends the 1963 list of electors should have been used to provide jurors for the panel in his case rather than the 1962 list which was used.[3] He cites no authority to establish that such a fact results in an improper jury and this Court has found none. While a reasonable application of the language above quoted to this case would indicate the 1963 list should have been used, the record indicates that prevailing apportionment problems delayed the compilation of the 1963 list and it was not available when the panel of jurors here involved was selected.

It is defendant's position that the statute under which he was convicted requires a showing that he possessed the narcotics with intent to place them in commerce and traffic, and since the record shows

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2 US Const, Am 14; Const 1963, art 1, § 1.—REPORTER.
3 Defendant was tried January 14, 1965.

mere possession, it does not support the conviction. The language of the statute precludes acceptance of this argument. Possession is sufficient to sustain conviction.

Defendant's claim that the record does not show clearly that he was not licensed is refuted by the record. It contains ample evidence from which a jury could find he was not licensed.

There is nothing in this record to support defendant's claim of illegal search and seizure. The evidence defendant sought to suppress was located not by search but by the officer's senses. He saw it before arrest and while defendant's vehicle was stopped for a red light. Actually, this case is even stronger than *People* v. *Kuntze* (1963), 371 Mich 419, and *Kuntze* refutes defendant on this point just discussed.

It is not necessary to discuss defendant's claimed error dealing with his requested charge that was not given. He was afforded an opportunity to object to the charge given before the jury retired, and he made no objection. He is now precluded from claiming error on this point. GCR 1963, 516.2.

Affirmed.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

LEE *v.* DESENBERG.

1. BROKERS—COMMISSIONS—COMPLETION OF DEAL.
   An owner becomes liable to a broker for a commission when the latter produces an enforceable contract and the owner then neglects or refuses to complete the deal, sells to another, or takes such action as may prevent the completion of the transaction.

2. CONTRACTS—PERFORMANCE AT HAPPENING OF FUTURE EVENT.
   There is an implied agreement that the promisor will place no obstacle in the way of the happening of a future event upon the occurrence of which the contract is performable, particularly where it is dependent in whole or in part on the promisor's own act.

3. BROKERS—COMMISSIONS—PREVENTION OF COMPLETION BY OWNER.
   The failure of the completion of transaction by reason of owner's settlement of his suit for specific performance of contract for sale of premises which plaintiff broker had negotiated did not relieve the owner of liability for *any* of the *entire* commission plaintiff had earned under agreement permitting broker only half the commission in the event the purchaser forfeited the deposit, since the owner himself has prevented completion of the transaction.

Appeal from Common Pleas Court of Detroit; Pernick (Joseph J.), J. Submitted Division 1 January 4, 1966, at Detroit. (Docket No. 778.) Decided February 22, 1966.

Declaration by Thomas F. Lee against Harold B. Desenberg and Rose P. Desenberg for commis-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur 2d, Brokers § 160.
[2] 17 Am Jur 2d, Contracts §§ 400, 442.
[3] 12 Am Jur 2d, Brokers § 199.

sions under a contract to act as a real-estate broker. Judgment for plaintiff. Defendants appeal. Affirmed.

A. L. Bauman, for plaintiff.

Moll, Desenberg, Purdy, Glover & Bayer (*Jon P. Desenberg,* of counsel), for defendants.

J. H. GILLIS, J. This is a real-estate broker's suit for commission. Plaintiff Thomas F. Lee, a licensed real-estate broker, located a prospective purchaser for a vacant lot owned by the defendants Harold B. Desenberg and Rose P. Desenberg. The defendants entered into an oral agreement to sell and the purchaser agreed to buy a vacant lot for $16,000. The agreement was reduced to writing and signed by the defendants, the vendee and the broker on the standard Detroit real-estate board agreement of sale form, the pertinent provision of which provided as follows:

"The foregoing offer is hereby accepted and the seller agrees to sell said premises upon the terms stated. Receipt of the deposit money is acknowledged and said money is hereby delivered to the broker to be held in accordance with the terms hereof and under the regulations of the Michigan corporation & securities commission.

"The seller hereby agrees to pay the broker for services rendered and for value received a commission of $1,050 (10/5% percent of the sale price), which shall be due and payable at the time set in said offer for the consummation of the sale or, if unconsummated, at the time of seller's election to refund the deposit, or of seller's or purchaser's failure, inability or refusal to perform the conditions of this offer; provided, however, that if the deposit is forfeited under the terms of said offer, the seller agrees that one-half of such deposit (but not in excess of the amount of the full commission) shall be paid to or

retained by the broker in full payment for services rendered."

The purchaser, one Nassar, deposited a check for $1,000 with the broker. The broker could not get the check certified. The defendants ascertained that the $1,000 check was not collectible, elected to enforce the agreement of sale, and commenced proceedings in the Wayne county circuit court against Nassar for specific performance.

After circuit court pleadings were complete and discovery taken, the Desenbergs' motion for summary judgment of specific performance was granted. Attached to the motion for summary judgment was an affidavit executed by the broker. Thereafter, pending the hearing on a motion to settle and enter the judgment for specific performance, the Desenbergs settled their circuit court claim by accepting the sum of $2,750 and retention of their property. The plaintiff thereafter commenced a suit in the common pleas court for the city of Detroit against the defendants for his commission. The defendants by answer denied plaintiff was entitled to a real-estate commission. After trial without a jury, the learned trial judge determined that a commission was due the plaintiff and entered a judgment for same with costs against the defendants.

This Court must decide the following: Is the owner of real estate liable to his broker for the commission agreed upon between them when such owner, although not required to do so, sues for specific performance of the contract of sale, prevails on a motion for summary judgment, but settles his claim before entry of the judgment?

Defendants contend that the $2,750 which they collected in the Wayne county circuit court suit was a recovery of a forfeiture and pursuant to the pertinent paragraph in the agreement of sale, the real-

estate broker is only entitled to one-half of the deposit and that, therefore, the plaintiff-broker, while entitled to $500, is entitled to nothing else. Appellants however did not attempt to forfeit the deposit but made an election to sue for specific performance relying therefor upon the agreement procured by the plaintiff herein. In the circuit court action the Desenbergs argued successfully that there was a completed valid contract between the parties for the sale of the vacant lot and in their motion for summary judgment attached an affidavit of the broker in support thereof. The Desenbergs' decision to thereafter settle their lawsuit after prevailing on their motion for summary judgment was of their own choosing. The broker was not a party to that lawsuit or settlement.

In Michigan the owner becomes liable to the broker for a commission when the broker produces an enforceable contract and the owner then neglects or refuses to complete the deal, sells to another, or takes such action as may prevent the completion of the transaction. In *Greenberg* v. *Sakwinski* (1920), 211 Mich 498, the owner sold to another after having accepted the deal produced by the broker. He was held liable for the commission. In *Hayes* v. *Beyer* (1938), 284 Mich 60, the land owner entered into a valid, enforceable land contract with the vendee and agreed to pay the broker out of the monthly payments. After a few payments the land owner bought the land back from the purchaser and declined to pay the broker the balance of the commission. The Court held the defendant liable for the commission because he had prevented consummation of the sale. In *Advance Realty Company* v. *Spanos* (1957), 348 Mich 464, the Court held that the broker was entitled to a commission pursuant to an exclusive listing after the owner refused to accept a written offer to pur-

chase on terms and conditions outlined in the listing agreement.

In 17A CJS, Contracts, § 468, p 645, the rule is well stated:

"Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents, hinders, or renders impossible, the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition, he cannot rely on such condition to defeat his liability."

Whether the owner of the property refuses to complete the sale, sells to another, or settles his rights after prevailing, as in the instant case, on a motion for summary judgment, is a distinction without a difference. In each of these instances the property owner has prevented the completion of the transaction.

Judgment affirmed. Costs to appellee.

LESINSKI, C. J., and QUINN, J., concurred.

CLEMENTS *v.* CLEMENTS.

1. PARTNERSHIP—DISSOLUTION—ASSETS—WEEK-TO-WEEK TENANCY.
   A week-to-week tenancy at the whim and caprice of the parents of defendant and his deceased brother whose widow sought an accounting of assets of parking lot operation the brothers had conducted as a partnership on land leased from their parents *held,* not an asset of the partnership for which the surviving brother who continued the business must account under the uniform partnership act, where evidence showed parents had declined to rent the premises to others than the sons for a substantially higher rent at about the time the brothers took over the operation of the lot (CL 1948, § 449.42).

2. SAME—DISSOLUTION—SPECULATION AS TO ASSETS.
   The determination of a court that the leassee's interest in a parking lot, owned by parents of the men who formed a partnership to operate it, constituted a partnership asset of value when partnership was dissolved by death of one of the brothers, cannot rest upon mere conjecture or speculation (CL 1948, § 449.42).

3. SAME—DISSOLUTION—ACCOUNTING—WEEK-TO-WEEK TENANCY.
   Accounting for partnership assets of parking lot operation which had been conducted by 2 brothers as a partnership until death of 1 of them is limited to determination of the value of a time clock, the sole tangible asset, where the lease of the premises was on a week-to-week basis from the parents of the brothers (CL 1948, § 449.42).

Appeal from Wayne; Bohn (Theodore R.), J. Submitted Division 1 January 5, 1966, at Detroit. (Docket No. 282.) Decided February 22, 1966. Rehearing denied April 1, 1966. Leave to appeal denied by Supreme Court June 21, 1966. See 378 Mich 720.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 40 Am Jur, Partnership §§ 108, 233 *et seq.*

Bill by Maxine Clements, administratrix of the estate of Charles Edward Clements, against Edward Horsman Clements seeking an accounting of the assets in a partnership. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Douglas Leo Patterson, for plaintiff.

Travis, Warren & Nayer (*Harry M. Nayer,* of counsel), for defendant.

J. H. GILLIS, J. In 1957 the defendant and his brother Charles Edward Clements formed a partnership to operate a parking lot on property owned by their parents in the city of Detroit. The brothers had no lease with their parents but rented the parking lot on a week-to-week basis at a weekly rent of $395.[1] No capital investment, improvements to the property, or real-estate taxes were paid by the brothers, and the sole tangible asset of the partnership consisted of a time clock, valued at less than $100. Charles Clements died July 15, 1960, survived by his wife Maxine Clements, plaintiff herein, and two children. Defendant accounted to plaintiff for her deceased husband's share of the profits up to the date of his death.

Plaintiff commenced suit in the Wayne county circuit court seeking an accounting of partnership assets. At trial, an expert witness testified on behalf of the plaintiff that in his opinion the value of the business at the time of Charles Clements' death would be the same as the net income of the parking lot operation for the year immediately preceding the partner's death. The parties hereto stipulated that this net income was $12,500. Plaintiff further con-

[1] The transcript established that a weekly rent of $395 was paid. However, the statement of facts in both plaintiff's and defendant's briefs sets the figure at $385 per week.

tended since no accounting had ever been made, the estate was entitled to one-half of the net income derived from the parking operation from the death of Charles Clements up to the date of trial.

Defendant contends that since the partnership did not have a lease on the land and since the business was operated on a week-to-week tenancy at the will of the parents and there were no partnership assets other than the time clock, there was no need for an accounting. At trial, an expert witness testified on behalf of the defendant that in his opinion, on the date of Charles Clements' death, the business had no salable value or, at most, only a nominal value.

The trial court found in favor of the plaintiff and granted a decree winding up and dissolving the partnership and awarding plaintiff $15,392.95, which sum represented $6,250 for the value of Charles Clements' interest in the partnership at the date of his death, $8,744.95 representing one-half of the net profits of the business from the date of Charles Clements' death until March 29, 1962, and $398 interest.

The trial court based its decision on section 42 of the uniform partnership act, which states:

"When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the

dissolved partnership." CL 1948, § 449.42 (Stat Ann 1964 Rev § 20.42.)

The court relied upon the testimony of plaintiff's expert in arriving at his decision concerning the value of the deceased partner's interest in the partnership at the time of death. The expert witness, in response to a question as to how he arrived at his formula for valuing the interest, testified:

"*A.* I think in this instance, where you only have a weekly tenancy, and there is no long lease involved, it would be restricted to only capitalizing the one year's earnings, because of the risk involved, not knowing whether a prospective purchaser had any assurance that this relationship would continue. I think, however, in the particular instance of this lot that I have been asked to appraise it would be reasonable to assume that there would be a market value of a one-half interest, particularly where the other partner was the son of the owners of the property. I mean it would be reasonable to assume that the family relationship that existed there would indicate to a buyer that there is a friendly and would be a continued relationship."

Testimony at the trial disclosed that the tenancy between the parents and the sons was based primarily upon their love and affection for their children and their desire to provide occupations for them. The record further disclosed that the parents could have obtained approximately $3,500 a year more rent for the property in question from a third party.

This Court must determine whether the surviving partner complied with section 42 of the uniform partnership act, *supra.*

The week-to-week tenancy at the whim and caprice of the parents of the Clements brothers does not constitute a partnership asset which is subject to the provisions of section 42 of the uniform partnership act, *supra.* The partnership having been dis-

solved on the death of Charles Clements, the administratrix, plaintiff herein, was entitled to nothing other than one-half of the undistributed profits then accrued and one-half of the value of the time clock. The record discloses that plaintiff received one-half of the accrued profits.

Plaintiff's expert testimony, upon which the trial court relied to formulate his opinion on the value of the partnership assets, was based upon a false premise. He testified:

"The family relationship that existed there would indicate to a buyer that there is a friendly and would be a continued relationship."

The record fails to support this proposition. In fact the record establishes the contrary to be true. The mother of the Clements brothers testified that she would not rent it to anyone else and a witness testified that he had offered to lease the property at a substantially higher rent at about the time the brothers took over the operation of the lot and the parents declined to let him lease the property. Any buyer, knowing the factual situation in the instant case and possessing the knowledge that the parents had heretofore refused a higher annual rental rate from a third party than that accepted from their own flesh and blood, would hardly pay anything to buy into a partnership based on such an uncertain foundation. The trial court's decision cannot rest upon mere conjecture or speculation. See *Michigan Aero Club* v. *Shelley* (1938), 283 Mich 401, 412.

Judgment reversed. This cause is remanded to the circuit court for a determination of the value of the time clock and the entry of judgment for plaintiff for one-half of the value thereof. Costs to appellant.

LESINSKI, C. J., and QUINN, J., concurred.

IRWIN *v.* VIA.

1. TRIAL—MOTION TO DISMISS AT CLOSE OF PLAINTIFF'S CASE.
   A motion to dismiss is defendant's proper motion when plaintiff has completed the presentation of his evidence to the court in a nonjury trial, since such a motion may be made without waiving his right to offer evidence in case the motion is denied (GCR 1963, 504.2).

2. SAME—MOTION TO DISMISS—MOTION FOR DIRECTED VERDICT.
   A motion to dismiss, made in a nonjury trial after plaintiff has rested has a different effect than a motion for a directed verdict at such time in a jury trial (GCR 1963, 504.2, 515).

3. SAME—DISMISSAL OF ACTION—RES JUDICATA.
   An order dismissing plaintiff's action at the close of plaintiff's proofs operates as an adjudication on the merits unless the dismissal is for lack of jurisdiction or the court otherwise specifies (GCR 1963, 504.2).

4. SAME—DISMISSAL WITHOUT PREJUDICE.
   An order dismissing plaintiff's cause of action without prejudice would allow plaintiff to recommence his action.

Appeal from Common Pleas Court of Detroit; Vokes (David C.), J. Submitted Division 1 January 5, 1966, at Detroit. (Docket No. 464.) Decided February 22, 1966.

Declaration by Donald L. Irwin and Shirley E. Irwin against Arlo Via, Jr., and Margaret E. Via for damages resulting from the failure to pay a

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 310, 311, 315, 336 *et seq.*
[2] 53 Am Jur, Trial §§ 310, 311, 315, 1126.
[3] 53 Am Jur, Trial §§ 310, 311, 315, 353; 30A Am Jur, Judgments § 352.

promissory note and two obligations of plaintiffs that defendants had assumed. Counterclaim by defendants for plaintiffs' failure to purchase Federal tax stamps. Cause dismissed without prejudice as to plaintiffs and voluntarily dismissed as to defendants without prejudice. Defendants appeal. Affirmed.

Ben W. Boutell, for plaintiffs.

Craig & Heidt (*Douglas Craig,* of counsel), for defendants.

J. H. GILLIS, J. Plaintiffs brought an assumpsit action in the common pleas court for the city of Detroit alleging money due from the defendants on an alleged contract and promissory note. Plaintiffs, on or about June 25, 1962, sold the equity in their home to the defendants. At the same time the parties executed an agreement under which defendants agreed to assume and pay an obligation owed by plaintiffs to the Manufacturers National Bank of Detroit in the amount of $712.46 and another obligation of the plaintiffs owed to the National Bank of Detroit in the amount of $945.57, and in addition thereto the defendants executed a promissory note for $100 payable to the order of the plaintiffs, said note payable on or before September 25, 1962.

The record discloses that the indebtedness to the Manufacturers National Bank of Detroit was originally incurred to cover landscaping, but is silent as to the circumstances surrounding the execution of the promissory note to the National Bank of Detroit.

Plaintiffs commenced suit alleging breach of the contract to pay the two bank indebtednesses and the failure to pay the promissory note. Defendants answered admitting the promissory note was due and payable, admitting they had failed to make the payments to the two banks, but contending the agree-

ment to pay the banks was obtained by fraud and was without consideration. Defendants filed a counterclaim alleging that plaintiffs had failed to pay the required Federal documentary tax in the amount of $14.85.

Trial commenced before the court without a jury and at the conclusion of plaintiffs' proofs and after the plaintiffs had rested, defense counsel moved for a directed verdict contending that there was no evidence of consideration shown for the alleged contracts covering the Manufacturers National Bank and National Bank of Detroit indebtednesses. After making a finding that consideration for the execution of the agreement to pay the obligations due to the banks was not proven, the court dismissed plaintiffs' case *without prejudice*. Defense counsel then stated:

"We will let our case go too, Your Honor. We have a cross-claim but we will let it go without prejudice too, Your Honor."

The court then dismissed the counterclaim without prejudice. Defendants commenced this appeal alleging, as the sole ground of reversible error, that the court should have dismissed the case with prejudice.

The procedure followed in the trial is puzzling to this Court.

First, the proper motion to be made by the defendants at the close of the plaintiffs' case was a motion to dismiss pursuant to GCR 1963, 504.2, and not a motion for a directed verdict which is applicable in jury trials and has a different effect. See GCR 1963, 515.*

Second, plaintiffs made no motion to reopen proofs in order to establish, if possible, the element

* While the language of GCR 1963, 11, does not specifically provide that the rules apply to the common pleas court for the city of Detroit, however, Rule No 39 of the common pleas court provides that the Michigan court rules govern in all matters not otherwise provided for in their own rules or expressly prohibited by statute.

of consideration. In view of the court's ultimate ruling dismissing the case without prejudice, and expressly indicating the plaintiffs could start their case anew, undoubtedly a motion by plaintiff to reopen would have been granted. See *Bonner* v. *Ames* (1959), 356 Mich 537.

Third, the defendants' counsel did not object to the court's ruling and suggested the additional ruling by the court dismissing defendants' counterclaim without prejudice.

It would appear that the better practice would have been for the court and counsel to proceed with the trial and obtain an adjudication on the merits so that the litigation would come to a speedy conclusion. Perhaps there were reasons dehors the record that necessitated the procedure utilized.

In any event, GCR 1963, 504.2, provides:

"*Unless the court in its order for dismissal otherwise specifies,* a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits." (Emphasis supplied.)

The noted lecturer and author, Judge Horace W. Gilmore, in his book, 1 Michigan Civil Procedure Before Trial, p 528, states:

"Special attention is also called to the fact that unless the court orders otherwise, a dismissal under GCR 1963, 504.2 acts as an adjudication upon the merits, unless the dismissal is one for lack of jurisdiction. The court may, if it dismisses for failure to comply with rules or otherwise, make the dismissal not a dismissal upon the merits, but rather a dismissal without prejudice, so as to allow the plaintiff to recommence his action."

Defendants rely on two Michigan cases in support of their theory, *Mt. Ida School for Girls* v. *Rood*

(1931), 253 Mich 482, and *Bettendorf* v. *F. W. Woolworth Co.* (1951), 329 Mich 409, neither of which support their proposition. In the *Mt. Ida Case* the issue presented in the instant case was not discussed. In the *Bettendorf Case* the factual situation was substantially different.

Since the trial court expressly specified a dismissal without prejudice, the judgment is affirmed. Costs to appellees.

LESINSKI, C. J., and QUINN, J., concurred.

SCHWARTZ v. TRIFF.

1. WITNESSES—CROSS-EXAMINATION—INSTRUCTIONS.

Cross-examination of plaintiff woman who claimed she had sustained personal injuries in a rear-end collision was not error, where although the information defendants' counsel obtained for his questions came from medical reports, the content of his questions was not evidence and jury was clearly instructed to decide the case from sworn testimony, received exhibits, and depositions read to jury.

2. SAME—CROSS-EXAMINATION—CREDIBILITY.

The party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify, or explain

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 609 *et seq.*
[2] 58 Am Jur, Witnesses §§ 623–630.
[3, 4] 58 Am Jur, Witnesses §§ 630–632.
[5] 58 Am Jur, Witnesses § 771.

the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness.

3. SAME—CROSS-EXAMINATION—CREDIBILITY—DISCRETION OF COURT.
Cross-examination of plaintiff woman who had put her health in issue on direct examination in action for alleged personal injuries, which questioning tended to contradict and weaken her direct testimony as to injuries sustained in rear-end collision *held*, proper and not an abuse of discretion, where the trial judge expressed his distrust of the witness in the absence of the jury.

4. SAME—CROSS-EXAMINATION—CREDIBILITY—DISCRETION OF COURT.
Cross-examination of a witness is a matter of right when it relates either to facts at issue or relevant facts, but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge and, unless abused, the exercise of such discretion is not the subject of review.

5. EVIDENCE—IMPEACHMENT.
Unverified, but duly authenticated, copy of pleading in a case commenced by plaintiff in Canada but settled before trial, which contained a statement of her claim tending to controvert her testimony as to nature of injury sustained in the Canadian case *held*, properly received on cross-examination for purpose of impeaching plaintiff in her action for personal injuries arising from rear-end collision (CLS 1961, § 600.2104).

Appeal from Wayne, Gilmore (Horace W.), J. Submitted Division 1 January 6, 1966, at Detroit. (Docket Nos. 409, 410.) Decided February 22, 1966. Rehearing denied April 11, 1966. Leave to appeal denied by Supreme Court June 17, 1966. See 378 Mich 720.

Declaration by Nettie Schwartz against Betty Z. Triff and Thomas Triff, administrator of the estate of George Andra, for injuries arising out of an automobile accident June 4, 1960. Derivative action by Louis Schwartz, her husband. Verdict and judgment for defendants. Plaintiffs appeal. Affirmed.

Sugar & Schwartz (*David M. Tyler,* of counsel) for plaintiffs.

Ward, Plunkett, Cooney, Rutt, & Peacock (*John D. Hayes* and *Thomas A. Neenan,* of counsel) for defendants.

QUINN, J. Plaintiffs, husband and wife, appeal from a jury verdict of no cause for action and judgment entered thereon in Wayne county circuit court and from denial of their motion for new trial. They claim the trial court committed reversible error in permitting improper cross-examination of plaintiff Nettie Schwartz and by holding admissible an unsworn, unverified pleading from a separate and unrelated proceeding in another jurisdiction. These claims frame the issues for decision. A more detailed development of them appears later in the opinion.

Plaintiffs' action is founded on the alleged negligence of defendant Betty Triff. The other defendant is the personal representative of the owner of the automobile driven by Betty Triff at the time of the accident. In the middle of the afternoon of June 4, 1960, plaintiffs' automobile stopped on Park avenue in Detroit at the intersection of Washington boulevard before entering the latter. Defendant driver approached from the rear of plaintiffs' vehicle and struck it. Nettie Schwartz claimed her neck, back, and hip were injured in this collision. Louis Schwartz asserted the usual derivative claims but made no claim for property damage to his vehicle. Defendants admitted liability but denied that Nettie Schwartz was injured in the collision which occurred at a time when defendants' vehicle was "barely crawling", going approximately three miles per hour. Defendant driver testified there was no damage to either vehicle, that no dust or dirt was knocked from

either vehicle and that at the accident scene, Louis Schwartz admitted there was no damage to his vehicle and so informed the police officer called to the scene. Louis Schwartz testified on direct examination that his vehicle was damaged as follows: broken tail pipe, bumper bent, and trunk bent. On cross-examination when asked if his car was damaged in the accident, Louis Schwartz replied, "It wasn't much at all. Just the taillight."

In her direct examination, Nettie Schwartz testified at length as to her health prior to this collision. During her cross-examination, she was examined extensively and closely as to her knowledge of information contained in medical reports by doctors who had examined and treated her or had merely examined her. In each instance she recalled seeing the doctor involved and the fact that she was examined, but with respect to what the doctor said he found to be wrong with her, Mrs. Schwartz either indicated the doctor might have said it or she did not recall if he said it. Defense counsel obtained the information for his questions from copies of the medical reports. Plaintiffs objected to this type of cross-examination and contend here that permitting it was reversible error. The basis for the contention is that by this method of cross-examination, defendants were able to get into evidence the content of the medical reports, which were inadmissible because they were hearsay. The contention is not well founded. The content of questions is not evidence. The trial court clearly instructed the jury what it was to consider in deciding these cases. The charge in this regard stated:

"In deciding this case, you must decide it solely and completely from the sworn testimony that has come to you from this witness stand, and the sworn testimony you have received from depositions read

to you, and from such exhibits as the court has received into evidence.

"These things—the sworn testimony from the witness stand, sworn testimony read to you in deposition, and the exhibits received into evidence—are the only things you may consider in deciding the case. Argument of counsel, colloquy between court and counsel, all of these things are important in pointing up the issues and in emphasizing issues, but when the decision of the case is made, you must make it upon the sworn testimony and such exhibits as the court has received into evidence."

In *Malicke* v. *Milan* (1948), 320 Mich 65, the Supreme Court reiterated two rules which fully support the trial judge in permitting the cross-examination here complained of. At page 70 the following rule appears:

"One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify, or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness."

The controlling issue in the case at bar was whether Mrs. Schwartz was injured in this accident. She placed her health in issue on direct examination. The questioning here complained of tended to contradict and weaken her direct testimony. It was proper.

At page 71 of *Malicke,* the following rule appears:

"So far as the cross-examination of a witness relates either to facts at issue or relevant facts, it is a matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion

of the trial judge and, unless abused, its exercise is not the subject of review."

A reading of this record raises a suspicion of the credibility and even the veracity of Mrs. Schwartz. The trial judge saw and heard her. He was more than suspicious in this regard. In the absence of the jury, he made the following statement on the record:

"If there has ever been a case in the history of this court in which I felt I should comment on the evidence, this is it. I am very much disturbed by the testimony, and I am saying this on the record, but out of the hearing of the jury, so you gentlemen know; it will have no influence on the jury, because I haven't said it in their presence.

"I am very much disturbed by the testimony of Mr. and Mrs. Schwartz. I thought they wilfully, intentionally, and deliberately lied to the court and jury, and I am also deeply disturbed by the testimony of the maid. I thought she wilfully lied. I can't prove it, so I can take no action."

There was no abuse of discretion in permitting the cross-examination complained of.

In August of 1958, these plaintiffs were involved in another accident in Canada causing injury to both. Suit was filed in Canada on their claims. This suit was settled prior to trial. On cross-examination in the present case, Nettie Schwartz denied she received any back injury in the Canadian accident that resembled her back injury in this case. Her statement of claim in the Canadian case tended to controvert this. She did not sign the Canadian pleading; it was not verified; it was authenticated in conformity with CLS 1961, § 600.2104 (Stat Ann 1962 Rev § 27A.2104). It was received in evidence over plaintiffs' objection for the purpose of impeaching Nettie Schwartz. It is the opinion of this Court

that this was proper under the above statute and under the case of *Cady* v. *Doxtator* (1916), 193 Mich 170.

Trial court affirmed, with costs to appellee.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

SEARS, ROEBUCK & COMPANY *v.* JONES.

1. CONTRACTS—REVOLVING CHARGE ACCOUNT—AUTHORITY—RATIFICATION—EVIDENCE.
   Authorization or ratification of wife's action in signing a revolving charge account agreement *held*, not shown in record in action against husband for balance alleged to be due under the agreement.

2. APPEAL AND ERROR—REQUESTS TO CHARGE—EVIDENCE.
   It was not error for trial judge to refuse to give plaintiff's request to charge that defendant had ratified his wife's action in making revolving charge account agreement, where there is no proof that he had ratified it.

3. CONTRACTS—AUTHORITY—EVIDENCE.
   Trial court's limitation of jury decision to question of authorization of the revolving charge account contract by defendant *held*, not error, where there is no proof of authorization or proof from which authorization might be inferred.

4. APPEAL AND ERROR—THEORY OF CASE—CONTRACTS—NECESSARIES.
   Submission of case to jury on theory that merchandise purchased from plaintiff was necessaries *held*, not permissible, where plaintiff chose to stand on its declaration on a specific contract.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 26 Am Jur, Husband and Wife § 392.
[2] 4 Am Jur 2d, Appeal and Error §§ 537, 538.
[4] 5 Am Jur 2d, Appeal and Error § 811.
[5, 6] 5 Am Jur 2d, Appeal and Error § 880 *et seq.*

5. SAME—SUPPRESSION OF EVIDENCE—RECORD.

Record in action to recover alleged balance due from defendant husband under revolving charge account agreement *held*, to support trial court's finding that defendant had not suppressed evidence material to plaintiff's case.

6. SAME—QUESTIONS REVIEWABLE—UNSUBSTANTIATED CLAIMS OF ERROR.

Claims of error dealing with rulings of the trial court on evidentiary matters which are unsubstantial or unsubstantiated on the record presented are not discussed.

Appeal from Common Pleas Court for the City of Detroit; Vokes (David C.), J. Submitted Division 1 January 6, 1966, at Detroit. (Docket No. 773.) Decided February 22, 1966.

Assumpsit by Sears, Roebuck & Company, a New York corporation, against Rance A. Jones and Doris Jones, jointly and severally, on a revolving charge account. Service was had on defendant Rance A. Jones. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Balfour D. Peisner, for plaintiff.

Harris, Stein & Hooberman, for defendant.

QUINN, J. Plaintiff sued defendants in common pleas court of Detroit. Defendant Rance A. Jones appeared and defended. Jury trial resulted in a verdict of no cause for action from which plaintiff has appealed.

Suit was filed on a contract attached to plaintiff's declaration. The contract is designated "Sears revolving charge account agreement". It is signed Mrs. Rance Jones, conceded to be the wife of Rance A. Jones, and it obligated Mrs. Rance Jones to pay for merchandise purchased on the revolving charge account. The account showed a balance due at time

of trial of $661.12. Rance A. Jones denied he was obligated on the contract and denied making any payments on it. It is undisputed on the record that Rance A. Jones made no purchases from plaintiff and that when plaintiff first saw him about the account some four months after the last purchase, he questioned his responsibility for the account. The record does not show that Rance A. Jones made any of the payments credited to the account.

The controlling issues before this court are whether Rance A. Jones authorized the contract or purchases or whether he ratified the contract. The record is devoid of proof of these issues, and we are compelled to hold that plaintiff has proved none of them. *Winchell* v. *Mixter* (1946), 316 Mich 151. This fact also disposes of plaintiff's alleged error on the part of the trial judge in refusing to give plaintiff's request to charge on ratification.

Plaintiff contends the trial court erred in limiting jury decision to the question of authorization of the contract by Rance A. Jones. Since the record contains no proof of authorization or proof from which authorization might be inferred, this was not error. In fact, defendant's motion for directed verdict at the close of plaintiff's proofs should have been granted. *Marshall & Ilsley Bank* v. *Mooney* (1919), 205 Mich 518.

Plaintiff further contends the trial court erred in not submitting to the jury the issue of defendant's liability on the theory that the merchandise purchased was necessaries and in failing to give plaintiff's request to charge on this theory. Plaintiff's declaration precluded submission of the necessaries theory to the jury, and a charge to the jury on that theory would have been error. *Iler* v. *Baker* (1890), 82 Mich 226. Plaintiff chose to stand on its declaration on a specific contract. Even though alerted by

argument of counsel and rulings of the court on defendant's motion for directed verdict that the pleadings and proof then before the court limited the issue to the contract, plaintiff made no move to amend.

Plaintiff also claims the trial court erred in determining there was nothing in the record to sustain a finding that Rance A. Jones suppressed evidence material to plaintiff's case. The trial court was correct in this respect.

Plaintiff's remaining claims of error dealing with rulings of the trial court on evidentiary matters are so unsubstantial and unsubstantiated they do not merit discussion.

Affirmed, with costs to appellee.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

MARCH SESSION, 1966.

SUN OIL COMPANY *v.* TRENT AUTO WASH, INC.

1. MONOPOLIES—RESTRAINT OF TRADE—RULE OF REASON.
   Restraint of trade is prohibited only when it is unreasonable.

2. SAME—RESTRAINT OF TRADE—RESTRICTIVE COVENANT—GASOLINE SALES.
   Restrictive covenant reserved by common grantor on defendant's 4 lots, adjacent to plaintiff's 2 lots used in connection with gasoline station, which prohibited storage and sale of gasoline and petroleum products on defendant's premises *held*, not an unreasonable restraint of trade.

3. COVENANTS—CONSTRUCTION.
   Construction of a covenant by examination of only the words used is proper when their meaning is clear and unambiguous.

4. SAME—CONSTRUCTION—INTENT OF PARTIES—AMBIGUITY.
   Covenant will be construed in light of circumstances surrounding its execution, the relation of the parties, the nature of the subject matter, and the apparent purpose in making the agreement only when the language is ambiguous, but these considerations will not be applied when the language of the agreement leaves no doubt as to the meaning of the covenant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 36 Am Jur, Monopolies, Combinations and Restraints of Trade §§ 5, 8.
[2] 36 Am Jur, Monopolies, Combinations and Restraints of Trade §§ 50, 52, 53; 20 Am Jur 2d, Covenants, Conditions and Restrictions §§ 182, 207.
[3] 36 Am Jur, Monopolies, Combinations and Restraints of Trade § 57; 20 Am Jur 2d, Covenants, Conditions and Restrictions § 185.
[4] 20 Am Jur 2d, Covenants, Conditions and Restrictions §§ 185, 186.
[5] 20 Am Jur 2d, Covenants, Conditions and Restrictions § 186.
[6] 20 Am Jur 2d, Covenants, Conditions and Restrictions §§ 180, 185, 186.

5. SAME—RUNNING WITH LAND—INTENT.
Covenant will be determined as personal or to run with land in light of the intent of the parties.

6. SAME—INTENT—GASOLINE.
Covenant restricting property to prohibit sale and storage of gasoline and petroleum products *held,* not ambiguous and meant to bind subsequent grantees even though words, "heirs and assigns," are not used.

Appeal from Macomb; Noe (Alton H.), J. Submitted Division 2 April 6, 1965, at Detroit. (Docket No. 199.) Decided March 9, 1966. Leave to appeal granted by Supreme Court May 17, 1966. See 377 Mich 710, 379 Mich 182.

Sun Oil Company, a New Jersey corporation, presented a complaint for injunction against Trent Auto Wash, Inc., a Michigan corporation, to restrain defendant from erecting gasoline storage and dispensing equipment in derogation of an alleged restrictive covenant on defendant's property. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert E. Childs, for plaintiff.

Colombo, Colombo, Colombo & Vermeulen (*Anthony A. Vermeulen,* of counsel), for defendant.

T. G. KAVANAGH, P. J. The facts in this case were not disputed.

On September 28, 1962, Clara Williams conveyed lots 4 and 5 of Assessor's Plat No 9 in the city of St. Clair Shores to the plaintiff Sun Oil Company. Sun Oil had previously acquired lots 1, 2, and 3 of such plat on which was erected a gasoline station.

The deed contained the following language:

"Grantor agrees that property now owned by grantor lying north of and adjacent to the within described premises shall not be used for or in connection with the operation of a gasoline service sta-

tion or filling station for the sale of gasoline motor fuel, petroleum products, automotive accessories or automotive services generally."

She subsequently sold lots 6–9 in the same subdivision to the defendant Trent Auto Wash, Inc., on land contract. It is agreed that these lots are the property referred to in the quoted language above as "property now owned by grantor lying north of and adjacent to the within described premises" and that Trent knew of the language in the Sun deed.

When Trent proposed to install gasoline storage and dispensing equipment on this land for the sale of gasoline in conjunction with its auto wash business, Sun's petition for an injunction restraining Trent was granted by the chancellor on his judgment that the quoted language amounted to a valid restrictive covenant running with the land.

Trent asserts error maintaining:

1. To construe this covenant as intending to bind the covenantor's grantees or to prohibit the proposed use is to extend the restriction beyond the express words of the covenant in contravention of established legal practice.

2. To give effect to this covenant is to enforce an agreement which is an illegal restraint of trade.

The second issue poses a relatively simple question and for convenience we treat it first.

Defendant asserts that restraint of trade contemplated by the covenant is prohibited by statute

The cases of *Staebler-Kempf Oil Company* v. *Mac's Auto Mart, Inc.* (1951), 329 Mich 351; *Watrous* v. *Allen* (1885), 57 Mich 362; and *Hubbard* v. *Miller* (1873), 27 Mich 15, establish the rule that only an unreasonable restraint of trade is to be prohibited.

We cannot say that limiting three lots is so extensive or forbidding the sale of petroleum products or automotive accessories or services is so intensive

a restriction on trade as to be unreasonable. We find this assertion of error without merit.

The first issue, however, is complex and difficult and requires more detailed analysis.

The thrust of Trent's argument is that considered alone the words of the covenant (1) bind only the covenantor because no words unequivocally indicating an intent to bind subsequent assignees were used and (2) do not spell out unequivocally a prohibition of the proposed use.

Trent asserts that we can look only to the words used. To do otherwise, he contends, is to extend by construction a restrictive covenant in violation of the principles laid down in *Sampson* v. *Kaufman* (1956), 345 Mich 48; *Stoia* v. *Miskinis* (1941), 298 Mich 105; *In re Nordwood Estates Subdivision* (1939), 291 Mich 563; *Moore* v. *Kimball* (1939), 291 Mich 455; *Bastendorf* v. *Arndt* (1939), 290 Mich 423 (124 ALR 445); and *Austin* v. *Kirby* (1927), 240 Mich 56.

We do not so read those cases.

We look only to the words used when their meaning is clear and unambiguous.

"Where the language of an agreement is susceptible to more than one meaning, it is construed in the light of circumstances surrounding its execution, the relation of the parties, the nature of the subject matter, and the apparent purpose in making the agreement; *but these considerations do not apply when the language of the agreement leaves no doubt as to its meaning.*" (Emphasis added.) *Moore* v. *Kimball, supra,* p 461.

In the case before us there are two areas of challenge by the appellant. We find the language ambiguous in the first—who was intended to be bound?

"Grantor agrees that property * * * shall not be used" might be read as as undertaking on the

part of the covenantor that the property would *never* be used or it might be read as an undertaking that it would not be used so long as the grantor had title.

The intention of the parties in this regard must be determined by reference to the "circumstances surrounding its execution, the relation of the parties, the nature of the subject matter, and the apparent purpose in making the agreement." (*Moore* v. *Kimball, supra,* p 461.)

Whether this covenant is to be regarded as a personal covenant or one running with the land will ultimately depend on the intention of the parties. See 20 Am Jur 2d, Covenants, Conditions, and Restrictions, § 31 and 21 CJS, Covenants, §§ 20, 54, and 60.

Both sides agree that there is no magic in the words "heirs and assigns." Trent argues that the fact that the words were not used is some indication that it was not intended to bind "heirs and assigns," but the covenantor only.

Sun argues that the language which was used is a better indication of what was intended than language that was not used and claims "that property * * * shall not be used" shows the intention to bind the land without regard to the person holding title.

To our mind the overriding consideration is "the nature of the subject matter, and the apparent purpose in making the agreement" (*Moore* v. *Kimball, supra,* p 461) which patently is the limitation of competition on this land. The intention to effect this end, we believe is more consistent with the construction that the covenant was meant to bind "heirs and assigns" even though the words were not used.

In the other area of challenge—do the words "gasoline service station or filling station for the

sale of gasoline motor fuel," et cetera, include the proposed use by Trent? ——— we see no ambiguity.

A "filling station for the sale of gasoline motor fuel," expresses a concept broader than a "gasoline service station." It includes any "station" or place offering gasoline for sale to the general public, through the method of "filling" tanks or other containers brought to the "station". It includes gasoline pumps at an auto wash.

Accordingly we find no reversible error in the chancellor's decision, so it is affirmed.

We acknowledge that our decision is not in accord with the case of *Lowe* v. *Wilson* (1952), 194 Tenn 267 (250 SW2d 366) or the authorities cited therein for we are not persuaded that blind adherence to such a technical rule is required by or desirable (in our view) for the jurisprudence of Michigan.

We observe that appellant is correct in the statement in his reply brief that "although plaintiff contends that the lack of words 'heirs or assigns' or words of similar import are unimportant, strangely enough, every case pertaining to convenants binding on subsequent parties which plaintiff has cited contains such words."

Plaintiff, however, could have cited the following cases which are authority for the position we adopt: *Kellogg* v. *Robinson* (1834), 6 Vt 276; *Sexauer* v. *Wilson* (1907), 136 Iowa 357 (113 NW 941); or *Metropolitan Investment Company* v. *Sine* (1962), 14 Utah 2d 36 (376 P2d 940).

Finally we mention that our view is not in accord with that expressed in 5 Restatement of Property, § 537. We do not share the concern there expressed in the comment (f) on that section (p 3221) anent the social harm involved.

Affirmed. Appellee may tax its costs.

HOLBROOK and MCGREGOR, JJ., concurred.

PEOPLE v. DANIELS.

1. CRIMINAL LAW—ASSISTANCE OF COUNSEL—CONFESSION.
   Confession of defendant to crime of robbery armed, obtained from him without his court-appointed counsel being present although the assistant prosecuting attorney knew defendant had counsel, *held*, not illegal and involuntary, where defendant solicited the statement and did not request that his attorney be present (CLS 1961, § 750.529).

2. SAME—VOLUNTARY CONFESSION—PLEA OF GUILTY.
   Claim that plea of guilty was based upon an illegal and involuntary confession to crime of robbery armed failed, where trial court's finding on remand to determine voluntariness of confession that it had been made voluntarily is supported by the record (CLS 1961, § 750.529).

3. SAME—PLEA OF GUILTY—NEW TRIAL—NERVOUSNESS.
   Sentence of 10 to 25 years for armed robbery may not be vacated, plea of guilty withdrawn, and new trial granted merely because defendant, at the time he pleaded guilty, was nervous and tense (CLS 1961, § 750.529).

4. SAME—PLEA OF GUILTY—INTERROGATION OF DEFENDANT.
   Interrogation of defendant under oath after he had indicated he would plead guilty, required by court rule to ascertain

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REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur, Evidence § 503.
Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel. 90 ALR2d 732.
[2] 20 Am Jur, Evidence §§ 482, 537; 21 Am Jur 2d, Criminal Law §§ 485, 486.
[3] 21 Am Jur 2d, Criminal Law §§ 569, 571.
[4] 21 Am Jur 2d, Criminal Law §§ 485–487.
[5] 21 Am Jur 2d, Criminal Law §§ 569, 571.
[6] 5 Am Jur 2d, Appeal and Error § 976; 21 Am Jur 2d, Criminal Law §§ 533, 572.

whether such plea was being made freely, understandingly, voluntarily, and without undue influence, compulsion, duress, or promise of leniency *held,* not to have effected a violation of the constitutional prohibition against compelling a person charged with crime to be a witness against himself (Const 1963, art 1, § 17; GCR 1963, 785.382).

5. SAME—SENTENCE.

Fact that defendant-appellant who pleaded guilty to armed robbery received sentence of 10 to 25 years, whereas another defendant charged with the same crime in the same county received a sentence of 2 to 10 years would not entitle appellant to have sentence set aside, where the sentence imposed upon him is within maximum term provided by statute (CLS 1961, § 750.529).

6. SAME—SENTENCE—COURT OF APPEALS.

The Court of Appeals does not have supervisory control over punishment imposed by trial court within statute.

Appeal from Berrien; Zick (Karl F.), J. Submitted Division 3 October 5, 1965, at Grand Rapids. (Docket No. 587.) Decided March 9, 1966. Leave to appeal denied by Supreme Court June 30, 1966. See 378 Mich 721.

J. B. Daniels was convicted, on his plea of guilty, of armed robbery. Defendant appeals. Remanded October 14, 1965, to determine if defendant's confession was voluntary. Confession found voluntary and cause returned to Court of Appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *John T. Hammond,* Prosecuting Attorney, and *Harry J. Creagar,* Assistant Prosecuting Attorney, for the people.

White, Klute & White (*Donald P. Stone,* of counsel), for defendant.

HOLBROOK, J. This is an appeal from a denial by the trial court of a motion for leave to file motion

to vacate sentence, withdraw plea, and for a new trial.

Defendant-appellant was convicted upon a plea of guilty of armed robbery,[1] with court-appointed counsel present, in the circuit court for Berrien county, September 14, 1964. He was sentenced October 16, 1964, to 10 to 25 years.

Appellant asserts in his brief on appeal that his plea of guilty was not voluntary. One of the reasons for such claim appears in his motion presented to the circuit court, *i.e.,* that he signed a confession without his attorney being present and without being advised of his rights or the consequences of such action, and that in the course of interrogation, he had been told that if he pleaded guilty, he would receive a lighter sentence. This, in effect, constituted a claim that his plea of guilty was based upon a confession illegally obtained.

Confronted with an issue upon which there was no evidence or record to review, this Court ordered a *Walker* hearing (*People* v. *Walker* [1965], 374 Mich 331) October 14, 1965, and remanded the matter to the trial court to take testimony "of the facts and circumstances under which the confession was obtained and the plea of guilty made." The order contained proper provisions for the protection of the rights of defendant in the event he testified.

A transcript of the hearing has been received by this Court, and indicates that the defendant and witnesses for the people testified concerning the interrogation and circumstances surrounding the confession. The defendant's testimony is in direct conflict with the people's witnesses as to the facts of the matter.

[1] See CLS 1961, § 750.529 (Stat Ann 1963 Cum Supp § 28.797).

The trial judge in his decision on the hearing rejected the claims of defendant and ruled on the basis of the record that the alleged confession was voluntary and the plea of guilty was freely, voluntarily, and understandingly made.

The following is a part of the trial judge's determination:

"There is one aspect of the case that the court does not like, and that is the fact that the record shows that a statement or confession of Daniels was taken with his attorney not being present and the assistant prosecuting attorney knowing that he had an attorney. However, the evidence is overwhelming to the effect that Mr. Daniels solicited this statement."

It also appears that the confession or statement was taken some weeks subsequent to the time when defendant's counsel was appointed and after defendant had conferred with his counsel. The record does not indicate any request by defendant for his attorney to be present at the time in question.

A similar question was presented in the case of *People* v. *Donald D. Williams* (1965), 2 Mich App 91, 94, wherein we stated:

"As to the second basis for objection raised by the appellant's counsel, it should be emphasized that this is not a case where the defendant was questioned for several days and was refused the services of an attorney as in the case of *People* v. *Hamilton* (1960), 359 Mich 410, or where a defendant has requested his attorney be present before or during interrogation as in *Escobedo* v. *Illinois* (1964), 378 US 478 (84 S Ct 1758, 12 L ed 2d 977). The interrogation in the instant case occurred after defendant had conferred with his counsel. In fact, during oral arguments before this Court, it was indicated that it was the defendant himself who sought this interview."

The claim of appellant that the plea of guilty was based upon an illegal and involuntary confession must fail by reason of the ruling of the trial judge and justified by the record.

Appellant further asserts that he entered his plea of guilty because he was upset, tense, mentally and physically disturbed, and that he did not fully comprehend the effect of his plea of guilty, and refers this Court to two of his answers as appear in the transcript of the arraignment. We relate herein such record with the answers referred to by appellant in italics as follows:

(Examination by the court)

"*Q.* Mr. Daniels, you have indicated to the court that you want to plead guilty to this charge of armed robbery.

"*A.* Yes, sir, I do.

"*Q.* For which there is a maximum penalty of life imprisonment, and you understand that?

"*A.* Yes, sir, I do.

"*Q.* I want to ask you a few questions. The information charges you committed this offense on July 20, 1964, at the township of Sodus.

"*A.* Yes, sir.

"*Q.* And it charges that with force and arms you did upon one Henry Krause make an assault and $244.62 in money of the property of Rex Shingledecker from the person of said Henry Krause and against the will of the said Henry Krause then and there feloniously and by force and violence did rob, steal, take and carry away, he the said J. B. Daniels at the time of committing the said assault and robbery aforesaid being then and there armed with a dangerous weapon, to-wit, a revolver. That is what you're charged with.

"*A. I don't understand that assault.*

"*Q.* That means any offer of violence. If I said, 'I'll hit you' that would be an assault. If I just

raised my hand and said I would hit you, that would be.

"*A. No, sir, I didn't do that.*

"*Q.* Did you have a gun?

"*A.* No, sir, I didn't. There was a gun like I stated, but I didn't have a gun.

"*Q.* Were you with some others?

"*A.* Yes, sir.

"*Q.* Did you know what was going on?

"*A.* Yes, sir, I did.

"*Q.* What was your part in the offense?

"*A.* I was there.

"*Q.* Were you driving the car?

"*A.* It was my car, yes, sir.

"*Q.* Were you driving?

"*A.* Yes, sir, I was.

"*Q.* Was this thing planned?

"*A.* Yes, sir.

"*Q.* But you didn't get out of the car?

"*A.* I was in the station, yes, sir.

"*Q.* Was this a gasoline station?

"*A.* Yes, sir.

"*Q.* All of you went in?

"*A.* Two.

"*Q.* You and another fellow?

"*A.* Yes, sir.

"*Q.* You knew that the other fellow had the gun?

"*A.* Yes, sir.

"*Q.* And he pulled the gun?

"*A.* I was driving. He got out and walked in and stated, 'It's a hold up.'

"*Q.* But the point is that you knew when the car was stopped at the gasoline station—and you said you were driving—you knew that the plan was to rob the place?

"*A.* Yes, sir.

"*Q.* And you even walked in with him?

"*A.* Yes, sir.

"*Q.* Did he get the money or did you get some of the money?

"*A.* I didn't get any of the money.

"*Q.* He took the money?

"*A.* Yes, sir.

"*Q.* But he did pull the gun.

"*A.* We went in there, but I didn't see when he pulled the gun; but he must have shown it for the guy to give him the money.

"*Q.* Anyway, you knew he had a gun.

"*A.* Yes, sir, I knew that.

"*Q.* But you didn't actually see him pull the gun.

"*A.* I didn't actually see him pull the gun.

"*Q.* Isn't it a fair statement—in that event anyone that aids abets or participates or procures, or anybody that is involved in an offense with another person, if he knew what was going on, they would be as guilty as the other person. Do you get that point?[2]

"*A.* Yes, sir, I do.

"*Q.* That is the basis you want to plead guilty?

"*A.* Yes, sir, I do.

"*Q.* And you have gone over this with your lawyer?

"*A.* Yes, sir, I have."

This questioning of defendant by the court took place after the plea of guilty had been offered and in reviewing the record but one conclusion comes to mind; *viz.,* that defendant was cognizant of the effect of his plea of guilty and that his claim of being upset and tense, mentally and physically disturbed, was not reflected in his reasonable and common sense answers. That he may have been nervous and tense under the circumstances can be accepted without challenge, however, we know of no precedent or authority for such a condition to be used by a defendant in a criminal case for the purpose of withdrawing his plea of guilty, having his sentence vacated, and being granted a new trial.

Defendant-appellant further claims that his constitutional rights were violated by the trial judge's

[2] For abolition of distinction between accessory and principal, see CL 1948, § 767.39 (Stat Ann 1954 Rev § 28.979).

failure to inform him of his constitutional right to remain silent during the arraignment and cites Const 1963, art 1, § 17:

"No person shall be compelled in any criminal case to be a witness against himself"

and, United States Const, Am 5. The questioning that defendant refers to in the arraignment was after he had stated to the court that he desired to plead guilty. Defendant was thereupon sworn without objection by himself or his attorney and answered the questions of the court. The procedure after an offering of a plea of guilty in the criminal courts of our State is set forth in the court rules. GCR 1963, 785.3(2):

"Imposing sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequences of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty, and imposing sentence *shall* ascertain that the plea was freely, understandingly, and voluntarily made, without undue influence, compulsion, or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted." (Emphasis supplied.)

The fact that defendant had already offered to plead guilty when the questioning took place precludes any application of the constitutional prohibition against the defendant being compelled to testify against himself. The issue of guilt as to the questioning was eliminated by defendant when he offered his plea of guilty. The questioning took place as required by law to assure that the plea was freely, understandingly, and voluntarily made. This pro-

cedure was necessary in order to comply with the requirements of due process. If the plea was rejected the issue of guilt would then have to be tried and the accused could not be compelled to be a witness against himself on that issue. See CL 1948, § 768.35 (Stat Ann 1954 Rev § 28.1058). *People* v. *Coates* (1953), 337 Mich 56, certiorari denied, 346 US 840 (74 S Ct 64, 98 L ed 361).

Finally, defendant-appellant asserts that the trial court should have granted his motion because he received a sentence of 10 to 25 years whereas another defendant charged with the same crime in the same county, but from another judge, received a sentence of 2 to 10 years. Appellant cites *People* v. *Rucker* (1931), 254 Mich 342, wherein the Supreme Court allowed the defendant therein to withdraw his plea of guilty after sentence and to change his plea to not guilty and ordered a new trial. However, the facts in that case are not analogous to the case at hand. Defendant therein sought to withdraw his plea of guilty before sentence and was refused by the trial court. Further, it appeared from the trial of defendant's companions who were all acquitted, that defendant was probably not guilty. The two cases are easily distinguished.

In *People* v. *Pate* (1965), 2 Mich App 66, on p 68, we stated:

"When a sentence is within the maximum provided by statute, the trial court has wide discretion and an appellate court does not have supervisory control over the punishment. See *Cummins* v. *People* (1879), 42 Mich 142; *People* v. *Kelly* (1894), 99 Mich 82; *People* v. *Guillett* (1955), 342 Mich 1."

The trial judge did not abuse his discretion in refusing to set aside the sentence for this reason.

Other claimed errors do not merit discussion.

The order denying defendant-appellant's motion by the trial court is affirmed.

BURNS, P. J., and T. G. KAVANAGH, J., concurred.

THOMPSON *v.* ENZ.

1. WATERS AND WATER COURSES—RIPARIAN RIGHTS.
   Riparian rights cannot be created in nonriparian land, but a single parcel of land abutting a lake is all riparian.

2. SAME—SUBDIVISION OF RIPARIAN PARCEL—RESERVATION OF RIPARIAN RIGHTS.
   Riparian rights in back lots of subdivision of parcel of land abutting a lake must be reserved when the riparian parcel is subdivided thereby preserving the right which the land has at the time of subdividing.

3. SAME—SUBDIVISION OF RIPARIAN PARCEL—CANALS.
   The owner of a large parcel of land abutting an inland lake may properly dig canals for access to the lake from lots within the parcel and grant riparian rights to purchasers thereof by proper conveyance.

Appeal from Barry; McDonald (Archie D.), J. Submitted Division 3 October 6, 1965, at Grand Rapids. (Docket No. 470.) Decided March 9, 1966. Rehearing denied April 19, 1966. Leave to appeal granted by Supreme Court July 21, 1966. See 378 Mich 723, 379 Mich 667.

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur, Waters §§ 273–275, 277.
[2] 56 Am Jur, Waters § 288.
[3] 56 Am Jur, Waters §§ 285, 288.

Complaint by Louis B. Thompson and others against Edward R. Enz and others to declare rights in lands bordering on a lake, which defendants desire to subdivide. Judgment for plaintiffs. Defendants appeal. Reversed and remanded for the entry of judgment for defendants.

Law, Fallon, Weathers & Richardson (*Robert W. Richardson,* of counsel), for plaintiffs.

Richard M. Brewer, for defendants.

Amici Curiae:

N. A. Cobb.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Nicholas V. Olds* and *Jerome Maslowski,* Assistant Attorneys General.

T. G. KAVANAGH, J. The plaintiffs are owners of lots on Gun lake in Allegan and Barry counties in beautiful western Michigan.

The defendants are land contract purchasers of a large parcel of land abutting Gun lake which they propose to subdivide into 144 to 153 lots. According to the proposed plat there will be approximately 16 lots in the new subdivision which will border Gun lake and the remaining lots will have access to the lake by means of canals which will be dug by the subdividers.

The plaintiffs filed suit claiming that defendants' proposed development would constitute an illegal invasion of their property rights as riparian owners abutting Gun lake.

When both parties moved for summary judgment, the trial court granted it to plaintiffs. From that judgment the defendants appeal.

The trial court determined that the back lots would be nonriparian and therefore could not be given riparian rights by dredging canals to them.

We agree with the lower court's conclusion that riparian rights cannot be created in nonriparian land. However, the case at bar does not involve that proposition and accordingly the cases cited in support of his holding, *Ruggles* v. *Dandison* (1938), 284 Mich 338; *Richardson* v. *Prentiss* (1882), 48 Mich 88; *Bauman* v. *Barendregt* (1930), 251 Mich 67; *Hilt* v. *Weber* (1930), 252 Mich 198 (71 ALR 1238); *Kerley* v. *Wolfe* (1957), 349 Mich 350, are not in point. This is not a case involving nonriparian land. The defendants' land is one parcel abutting Gun lake and as such there is no question of its riparian nature. Therefore, the issue presented in this case is whether or not riparian rights can be reserved in back lots when a riparian parcel is subdivided.

The question presented is one of first impression in Michigan but we find two States which have considered it and we agree with the reasoning explaining their decision.

The California supreme court has decided that riparian rights can be reserved in back lots where the original parcel was riparian. However, it is to be noted that if the riparian rights are not reserved, they will be lost. *Anaheim Union Water Company* v. *Fuller* (1907), 150 Cal 327 (88 P 978, 11 LRA NS 1062).

In the case of *Strong* v. *Baldwin* (1908), 154 Cal 150 (97 P 178, 129 Am St Rep 149) we find language appropriate to decision in the case at bar. The California court there stated (154 Cal 156 [97 P 181]):

"As we have seen, the land of some of these parties does not border upon the stream, but it does not

necessarily follow that such land is without such riparian rights. When a tract of land abuts on a stream and a portion thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed in the stream may also be conveyed with the land, as is fully recognized in the case cited by learned counsel for appellants (*Anaheim Union Water Company* v. *Fuller,* 150 Cal 331 [88 P 978]), and, when so conveyed, is still a riparian right with all the attributes of such right, and is in strict technical language 'parcel of the land' conveyed. The same is necessarily true where a tract of land abutting on a stream is partitioned in court proceedings among the owners thereof, and appropriate provision for riparian rights is made in the decree as to the portions allotted by the decree which do not abut on the stream. See *Rose* v. *Mesmer,* 142 Cal 322 (75 P 905); *Verdugo Cañon Water Company* v. *Verdugo,* 152 Cal 655 (93 P 1021). This is not a case, as suggested by appellants, of attempting to make riparian lands, which are not in fact riparian, but is simply the preservation of the right which the land has at the time of the conveyance or decree."

Also in accord are the cases of *Miller & Lux, Inc.,* v. *J. G. James Company* (1919), 179 Cal 689 (178 P 716); *Frazee* v. *Railroad Commission of California* (1921), 185 Cal 690 (201 P 921).

The Minnesota supreme court resolved the question in a similar manner in *St. Anthony Falls Water-Power Company* v. *City of Minneapolis* (1889), 41 Minn 270 (43 NW 56).

In the conveyance of each lot fronting on the proposed canals, the defendants here propose to grant the riparian right to use the lake for the same purposes as other riparian owners, and the right to use the canals for access to the lake. They may do so by proper conveyance.

In its opinion the trial court cited *City of Battle Creek* v. *Goguac Resort Association, Ltd.* (1914), 181 Mich 241; *Monroe Carp Pond Co.* v. *River Raisin Paper Co.* (1927), 240 Mich 279; *Beach* v. *Hayner* (1919), 207 Mich 93 (5 ALR 1052); *Tobias* v. *Tobias* (1956), 345 Mich 263; *Hoover* v. *Crane* (1960), 362 Mich 36; *Schurtz* v. *Wescott* (1938), 286 Mich 691, all of which are concerned with whether the use of riparian rights was reasonable.

The pleadings here did not frame that issue.

In a proper case, a use which adversely affects the rights of other riparian owners will be enjoined. If the pleadings raise the issue that a proposed use will, for example—adversely affect the level of the lake or will contaminate the waters, spoil the view or hurt the fishing or otherwise improperly impair the rightful use of riparian owners, such proposed use may be enjoined upon proof of the fact.

Since that is not the case before us the judgment is reversed with instruction to enter a summary judgment for defendants. Defendants may have their costs.

BURNS, P. J., and HOLBROOK, J., concurred.

PEOPLE *v.* VIDA.

1. FALSE PRETENSES—EVIDENCE—OTHER ACTS.

   Record in prosecution for obtaining property of a value of more than $100 by false pretenses *held*, to clearly indicate defendant falsely represented himself under another name, that he was in the real-estate business, that a $2,660 car was being purchased for his wife, that the complainant believed and relied on the defendant's false pretenses and was induced to give up possession of the car, and that like false representations were made by defendant to other persons the day before and on the same day as false representations were made to complainant (CLS 1961, § 750.218).

2. SAME—FUTURE EVENTS—POSTDATED CHECK—INSTRUCTIONS.

   It was not error for trial court to deny motion to strike paragraphs of information relative to what might occur in the future from information in prosecution for obtaining property by false pretenses by use of postdated check and in instructing jury that the false pretense may consist of issuing such check knowing there would be no money in the bank when it was presented, since such check was relevant and material as to defendant's motive, intent, scheme, plan, or system in doing the act (CLS 1961, § 750.218; CL 1948, § 768.27).

3. SAME—INSTRUCTIONS—NONDISCLOSURE OF OTHER PURCHASES—ACTIONS RATHER THAN WORDS.

   It was not error for trial court to instruct jury in prosecution for obtaining property by false pretenses that they might consider the nondisclosure of the purchase of other automobiles as a false pretense, since it is not essential that the pretenses

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REFERENCES FOR POINTS IN HEADNOTES

[1] 22 Am Jur, False Pretenses §§ 101, 103.
[2] 22 Am Jur, False Pretenses §§ 59, 70, 96.
[3] 22 Am Jur, False Pretenses §§ 109, 111.
[4] 22 Am Jur, False Pretenses §§ 59, 70.
[5] 22 Am Jur, False Pretenses §§ 105, 109.

by which a fraud is accomplished be expressed in words, falsehood deliberately acted being the same as spoken word (CLS 1961, § 750.218; CL 1948, § 768.27).

4. SAME—POSTDATED CHECK—EXISTING FACTS—OTHER ACTS—INTENT.

Rule that postdated check does not constitute grounds for a charge of false pretenses is not applicable to case where false pretenses and false representations were made by the defendant to complainant relative to present existing facts, past facts, and supported by testimony of like or similar acts of defendant tending to show his motive, intent, scheme, plan, or system in doing the act (CLS 1961, § 750.218; CL 1948, § 768.27).

5. SAME—NONDISCLOSURE OF OTHER ACTS—EVIDENCE.

Defendant in prosecution for obtaining property by false pretenses was not under an obligation to disclose to the complainant that he had purchased 2 automobiles for his wife just prior to negotiations with complainant, but testimony relating to such purchases was admissible as proof of intent (CLS 1961, § 750.218; CL 1948, § 768.27).

Appeal from Recorder's Court; Ricca (John A.), J. Submitted Division 1 November 3, 1965, at Detroit. (Docket No. 57.) Decided March 9, 1966. Leave to appeal granted by Supreme Court May 11, 1966. See 377 Mich 709.

Ernest J. Vida was convicted of obtaining property, valued at more than $100, by false pretenses. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Ivan E. Barris, for defendant.

WATTS, J. Ernest J. Vida was convicted in the recorder's court of Detroit of obtaining property of a value of more than $100 by false pretenses in violation of CLS 1961, § 750.218 (Stat Ann 1962 Rev

§ 28.415) and was sentenced to prison for a period of not less than 7–1/2 nor more than 10 years. Defendant appealed to the Supreme Court. The case was transferred to the Court of Appeals on October 14, 1964.

Testimony was introduced tending to show that on January 24, 1963, defendant Vida representing himself as George Annis made a small rental deposit on a vacant store in the city of Pontiac, Michigan, under the name of Annis Real Estate and Tax Office. There is no record of a George Annis being licensed as a real-estate broker or real-estate salesman in the State of Michigan. On that same day, the defendant represented himself as George Annis to an employee of the Oakland county clerk's office and filed a certificate of doing business under the name of Annis Real Estate and Tax Service.

On January 26, 1963, the defendant representing himself as George Annis opened a checking account at a local bank with a deposit of $50.

Complainant Melbourne P. King testified that on February 3, 1963, his advertisement for the sale of an automobile appeared in a Detroit newspaper and on that day the defendant answered the advertisement.

Defendant, representing himself as George Annis of the Annis Real Estate and Tax Service, negotiated with the complainant for the purchase of an Oldsmobile automobile for defendant's wife. Defendant represented to the complainant that defendant was in the real-estate business; he gave a postdated company check bearing the name, address and telephone number of the Annis Real Estate and Tax Service in the amount of $2,660. The defendant took possession of the automobile, which has not been located to the present time. On February 4, 1963, the complainant attempted to cash the postdated check,

which was returned with the notation "insufficient funds."

The record clearly indicates that defendant Vida falsely represented himself as George Annis, that he was in the real-estate business,[1] and that the automobile was being purchased for his wife.

The record also indicates that the complainant believed and relied on the defendant's false pretenses and was induced to give up possession of his automobile.

The record further indicates like and similar false representations were made by the defendant to other persons the day before and on the same day that the false representations were made to the complainant.

The people contend that the defendant may be found guilty of false pretenses based upon a promise to act in the future coupled with a misrepresentation of past and existing facts made as inducements for the delivery of personal property.

The people further contend that the defendant's silence on the purchase of two cars for his wife on February 2 and 3, 1963, just prior to his negotiations with the complainant, is evidence of false pretense.

Was sufficient and competent testimony presented to make an issue of fact for the jury as to defendant's guilt and to support the jury's verdict of guilty?

Was it reversible error for the court to instruct the jury that they may consider nondisclosure of the purchase of two other automobiles on the same

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[1] CL 1948, § 451.201 (Stat Ann 1964 Rev § 19.791). "It shall be unlawful for any person, firm, partnership, association, co-partnership or corporation, whether operating under an assumed name or otherwise, from and after January first, 1920, to engage in the business or capacity, either directly or indirectly, of a real estate broker or real estate salesman within this State without first obtaining a license under the provisions of this act."

day by the defendant for his wife as evidence of false pretense?

Defense counsel contends that a false pretense must relate to an existing fact and cannot consist of a promise concerning what might occur in the future; that silence does not constitute a false pretense; and that the court committed several errors in the trial of the instant case.

As a result of these contentions, defense counsel requested and the trial court properly denied motions to strike subparagraph 8 of count one of the information:

"There would be sufficient funds in the Pontiac State Bank to cover the check of $2,660 drawn on that bank, and delivered by the said Ernest John Vida, alias George Annis, to the said Melbourne P. King at the time of the presentment of the said check;"

and subparagraph 5 of count one of the information:

"He failed to disclose to the said Melbourne P. King the fact that he was in the process of purchasing other automobiles at the time he was purchasing the said 1962 Oldsmobile, two-door coach, motor number 622M33439."

Both of the said allegations are material as to the defendant's motive, intent, scheme, plan, or system in doing an act. CL 1948, § 768.27 (Stat Ann 1954 Rev § 28.1050):

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior

or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

The court did not err in instructing the jury that false pretense may consist of giving a postdated check if the defendant knew at the time of issuing the same that there would be no money in the bank at the time the check was presented. The said check is relevant and material as to defendant's motive, intent, scheme, plan, or system in doing the act. CL 1948, § 768.27, *supra.*

The court did not err in instructing the jury that they might consider the nondisclosure of the purchase of other automobiles as a false pretense. *People* v. *Clark* (1862), 10 Mich 310, holds that it is not essential that the pretenses by which a fraud is accomplished be expressed in words. Falsehood when deliberately acted is the same as spoken word.

The court adequately instructed the jury on the elements necessary in the proof of the offense charged.

We are cognizant of the well-established rule of law that a postdated check, being merely a promise to pay an obligation in the future, does not constitute grounds for a charge of false pretense. However, the rule of law is not applicable to the facts in the instant case where false pretenses and false representations were made by the defendant to the complainant relative to present existing facts, past facts, and supported by testimony of like or similar acts of the defendant which tend to show his motive, intent, scheme, plan, or system in doing the act.

We find sufficient and competent testimony for the jury to find that the defendant deliberately undertook by means of false pretenses to cheat and

defraud the complainant out of an automobile valued at $2,660.

We find that the defendant did not owe a duty to disclose to the complainant that he, the defendant, had purchased two automobiles for his wife just prior to negotiations with the complainant, but testimony relating to the purchases was admissible as proof of intent. CL 1948, § 768.27, *supra.*

See, also, *People* v. *Wakely* (1886), 62 Mich 297; *People* v. *Etzler* (1940), 292 Mich 489; *People* v. *Bagwell* (1940), 295 Mich 412; *People* v. *Larco* (1951), 331 Mich 420.

We have examined all the assignments of error made by the defendant and find that no reversible error was committed by the court.

Affirmed.

LESINSKI, C. J., and QUINN, J., concurred.

BEACON PLAZA SHOPPING CENTER, INC., *v.* TRI-CITIES CONSTRUCTION & SUPPLY COMPANY.

1. CONTRACTS—BUILDING CONSTRUCTION—STEEL STRUCTURE—FOUNDATION—PILING.

   Finding of trial court that shopping center owner had contracted to do the foundation work upon which defendant was to erect steel structure and that the inadequacy of the piling was due to derelictions of plaintiff, not defendant *held,* amply supported by the evidence.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5, 6] 13 Am Jur 2d, Building and Construction Contracts § 26 *et seq.*
[2, 3, 4] 17 Am Jur 2d, Contracts § 264 *et seq.*
[7] 13 Am Jur 2d, Building and Construction Contracts § 19.
[8] 17 Am Jur 2d, Contractor's Bond § 1 *et seq.*
[9] 5 Am Jur 2d, Appeal and Error §§ 839–845.

2. SAME—CONSTRUCTION OF DOCUMENTS SIMULTANEOUSLY EXECUTED.
Instruments executed at the same time by the same parties, for the same purpose, and in the course of the same transaction, will be read and interpreted together as one instrument.

3. SAME—CONSTRUCTION OF DOCUMENTS SIMULTANEOUSLY EXECUTED.
Contracts whereby defendant was to erect a steel building and to act as a contractor for plaintiff and a subcontract between defendant and a lumber company wholly owned by the same person who owned plaintiff, which were executed simultaneously evidenced an intent to impose responsibility for the construction of the shopping center upon plaintiff with the exception of the furnishing and erection of the steel building.

4. SAME—PRACTICAL INTERPRETATION.
Evidence may be admitted on the practical interpretation given simultaneously executed documents, where the proper interpretation of them as to the responsibility of the parties thereunder is in dispute and the terms are not clear.

5. SAME—BUILDING—INADEQUACY OF PILING.
Inadequacy of piling by reason of insufficient number, placement, and length to reach solid ground or bearing to support steel structure defendant had contracted to supply and erect was properly found to be a dereliction of plaintiff, not defendant, where latter duly reported to plaintiff owner when pile drivers discovered their 20-foot lengths were not reaching supporting subsoil and installation was completed pursuant to directions of plaintiff's construction supervisor without benefit of architect and civil engineer as to on-the-job inspection, hence defendant may not be held responsible for ensuing settlement of building.

6. SAME—DEFECTIVE WORKMANSHIP—SUBCONTRACT.
Plaintiff owner may not hold a defendant contractor under a building contract liable for defective workmanship which was the responsibility of owner's sole stockholder by reason of a subcontract imposed on the contractor as a condition of granting the contract.

7. SET-OFF AND COUNTERCLAIM—BUILDING CONSTRUCTION—EXTRAS—PREPONDERANCE OF EVIDENCE.
Trial court's allowance of defendant contractor's contested counterclaim for extras is not disturbed, where the conflicting evidence presented a fact question and record does not disclose allowance made was against the clear preponderance of the evidence.

8. SAME — BUILDING CONSTRUCTION — BONDS — CONSIDERATION FOR NOTE.

Counterclaim for amount due on note given by plaintiff to defendant to get it to function as general contractor which could furnish a performance bond that had to be obtained in order for plaintiff to finance construction of shopping center *held*, to have been properly allowed, even though defendant is not held liable on the general contract, where obtaining performance bond necessitated that members of defendant firm and their wives execute mortgages to the bonding company and the bond was a material benefit to the plaintiff, there being consideration for the note.

9. APPEAL AND ERROR—NONJURY CASES—QUESTION FOR TRIER OF FACTS—CLEAR PREPONDERANCE OF EVIDENCE.

The Court of Appeals does not substitute its judgment on questions of fact in a nonjury case, where the trial court's findings are based on credible evidence and the evidence does not clearly preponderate in the opposite direction.

Appeal from Ottawa; Smith (Raymond L.), J. Submitted Division 3 November 4, 1965, at Grand Rapids. (Docket No. 186.) Decided March 9, 1966.

Complaint by Beacon Plaza Shopping Center, Inc., a Michigan Corporation, against Tri-Cities Construction & Supply Co., a Michigan corporation, and Hartford Accident & Indemnity Company, a Connecticut corporation, for damages arising out of contracts to construct a shopping center. Counterclaim by defendant Tri-Cities Construction & Supply Co. for moneys owed under the contracts. Complaint dismissed and judgment entered for defendant on the counterclaim. Plaintiff appeals. Affirmed.

McShane, Bowie & Anderson (*Jack M. Bowie,* of counsel), for plaintiff.

Warner, Norcross & Judd (*Harold S. Sawyer* and *Paul K. Gaston,* of counsel), for defendants.

HOLBROOK, P. J. This is an appeal by Beacon Plaza Shopping Center, Inc., plaintiff-appellant, from a judgment dismissing its complaint, and from judgment for defendant-appellee Tri-Cities Construction & Supply Company on its counterclaim against plaintiff for $31,580.93. The facts of the case are somewhat complicated for they involve three written contracts, a previous oral agreement, and conflicting testimony as to the facts of the matter as well as a dispute as to the duties assumed by the parties under the agreements.

In 1957, James H. VanZylen, of Grand Haven, became interested in building a shopping center on his property in Grand Haven. He was at the time the sole owner of VanZylen Lumber Company which was engaged in the retail building supply and construction business. In the same year he organized plaintiff Beacon Plaza Shopping Center, Inc., and was the only shareholder and its president. James T. Leymon, construction supervisor and office manager of VanZylen Lumber Company, was chosen by VanZylen as its secretary and treasurer.

In 1958, VanZylen retained a Mr. Colton and his firm as architects to draw up plans for the shopping center designed for conventional construction. Mr. Hornbach of the firm was assigned this duty by Mr. Colton.

In late 1959, VanZylen asked defendant Tri-Cities Construction & Supply Company of Spring Lake (hereinafter referred to as "Tri-Cities"), the franchised dealer for Stran-Steel Buildings to quote on a steel building which would be the structural frame and roof of the shopping center.

In August, 1960, VanZylen asked Tri-Cities to give another quote for the same type but a larger steel building. Tri-Cities submitted a bid in the same month covering the furnishing and erecting of such a Stran-Steel building.

In December, 1960, at VanZylen's request, Tri-Cities gave a break-down of the items covered by its proposal showing total costs for furnishing and erecting the steel building to be $116,537.95.

Financing by first mortgage was arranged by VanZylen from a large insurance company. This mortgage was estimated by him to be about $50,000 less than needed and a second mortgage was required to be obtained. VanZylen planned through VanZylen Lumber Company to perform work on the center estimated at $120,734, including preparation of the site, layout, foundation footings, floors, et cetera, while Tri-Cities was to furnish and erect the steel building for $116,537.95. The remaining work, electrical, heating, and air conditioning, store fronts, doors and glazings, ceilings, and blacktop was to be contracted out to others.

Plaintiff, in order to obtain the construction money, needed performance bonds from all the various contractors. A question arose as to the ability of VanZylen to obtain a performance bond required to cover the work that he was to perform and as a result requested Tri-Cities to act as general contractor as to their work and his, and furnish bond in the amount of $237,000 and to subcontract back to him (VanZylen) all of the work excepting Tri-Cities furnishing and erecting the Stran-Steel building. Reluctantly, Tri-Cities agreed to the arrangement for a bonus of $10,000 to be paid by plaintiff by plaintiff's note payable $2,000 per year.

On January 3, 1961, the following documents were executed between the parties:

(1) Tri-Cities bid of August 29, 1960, to erect a steel building was accepted by James VanZylen on behalf of Beacon Plaza, with cost stated as $116,537.95;

(2) Beacon Plaza and Tri-Cities entered into a contract, whereby Tri-Cities agreed to act as con-

tractor for a portion of the center for $237,272, which provided in part:

"Article 1. Scope of Work—The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications entitled architectural trades, including all construction and parking lot, except electrical, plumbing, heating, and air-conditioning, store fronts, doors and glazing, blacktop and ceilings which will be covered by separate contracts. Prepared by Colton and Hornbach acting as and in these contract documents entitled the architect; and shall do everything required by this agreement, the general conditions of the contract, the specifications and the drawings."

(3) A subcontract agreement was executed between Tri-Cities and VanZylen Lumber Company whereby the latter agreed to perform for $120,734, all of the work shown in the drawings, except:

"The furnishing and erection of the Stran-Steel structure as furnished by the Stran-Steel Corporation job #60–5395, and supporting members and insulation of the Stran-Steel structure as outlined in the proposal dated August 29, 1960, and presented to the Beacon Plaza Shopping Center, Inc., and excepting that part of the construction not a part of the general contractor's contract with Beacon Plaza Shopping Center, Inc., dated 3d January, 1961."

In effect these agreements gave to VanZylen all of the responsibility of the general contractor except for Tri-Cities fulfilling its duties under offer of August 29, 1960, to furnish and erect the Stran-Steel building.

In May of 1960, VanZylen and his architect Hornbach met with William Wipperfurth, Jr., (an officer of Tri-Cities) and a Stran-Steel engineer, to

discuss the substitution of a Stran-Steel building for conventional construction of the center at which time it was made known that a footing for the Stran-Steel structure required a soil bearing pressure of 4,000 pounds per square foot and VanZylen and his architect were furnished a set of Stran-Steel drawings in detail.

Hornbach started his drawings based upon the assumption that at the location there was normal or average soil conditions affording a bearing pressure of 4,000 pounds per square foot.

VanZylen hired a Robert H. Gove, a consulting engineer, to take soil boring tests of the site. These were performed to the depth of 15 or 16 feet and on July 20, 1960, Mr. Gove mailed VanZylen a report together with two copies of his findings which stated in part as follows:

"From observing this material, it would appear that * * * a load bearing pressure of around 1000 lbs. per square foot should be used for design purposes.

"If your architect has any further questions, please feel free to have him call me."

This report was shown to Hornbach by VanZylen while the plans were still in progress and it was suggested that rather than change specifications for the footings, that piling might be used under the piers supporting the Stran-Steel building. The final plans of the architect incorporated into the contract of January 3, 1961, did not require or specify pilings, with one exception.

VanZylen had entered into a special arrangement with his architect for a reduced charge of 3% whereby the architect was relieved of the duty to give on-the-job inspection.

In December, 1960, before the written contracts were signed, VanZylen was out at the site preparing

the land surface for construction. Having been advised that pilings were needed, he arranged with Tri-Cities for driving piles at a cost of $1 per foot for driving and an additional $1 per foot should Tri-Cities furnish the piles. It was indicated that Mr. Gove suggested piles of 20- to 25-foot in length and the arrangements were made on that basis.

Mr. Leymon, for VanZylen, laid out the location of the outside footings by stakes, and the employees of Tri-Cities drove the pilings within the designated areas. It appears from the evidence that a contractor doing pile driving ordinarily is working under the supervision of a civil engineer specializing in soil conditions in relation to load bearing pressures.

The lack of such supervision by an expert and the lack of on-the-job inspection by the architect brought into operation a tragedy of errors and this resulting law suit. The plaintiff, who was in fact VanZylen (he being the sole owner), obviously desired to reduce his costs and did so by electing to do without such services.

The parties to the action in December, 1960, when discussing the piling job, did not realize that the footings for the inside walls also needed pilings. However, VanZylen was put on guard when his employees objected to the manner of doing the work. VanZylen, prior to the January 3, 1961, contracts, hired a trucking firm with a bulldozer to level the site and bring in some fill dirt. This operation was under the supervision of Leymon. One of the men, Morris Johnson, objected to pushing the fill dirt over the soft mud saying that fill should never be over soft mud, but was ordered by Leymon to go ahead and do it anyway. Also, a mason, hired by VanZylen, to do some of the work at the center, strenuously objected to the use of heavy cement blocks, stating that lighter blocks could and

should be used. He also objected to the shallow depth of the footings for the dividing walls and to pouring cement for the floors over the soft condition of the soil. He stated that the sand that was there should be compacted before pouring the cement floors. In spite of all these objections, Leymon ordered the mason to proceed as he instructed. These orders can be assumed to be in harmony with VanZylen's wishes for Leymon was VanZylen's supervisor in charge of construction. A pertinent fact appears from the billings that the piling performed by Tri-Cities was allocated to VanZylen's subcontract by Tri-Cities and agreed to by VanZylen.

Within a year from completion of the shopping center, considerable settlement of floors inside partition footings and walls and some settlement of outside piers was experienced. The most serious damage was caused by settlement in the W. T. Grant and Rexall stores with W. T. Grant canceling their lease.

Plaintiff, at great expense to itself, had the settled portions of the center repaired, which necessitated the driving of cement piles to a depth of 60 or more feet and tying the support for the footings of the damaged inside walls and floors to these pilings. This was in accord with recommendations of several engineering firms specializing in the business.

Plaintiff thereupon sued defendant Tri-Cities and defendant Hartford Accident & Indemnity Company named in the performance bond of Tri-Cities for the claimed damages. Defendant Tri-Cities filed a counterclaim. The trial court found that the plaintiff was not entitled to recover for its claimed loss and further found that Tri-Cities was entitled to recover on its counterclaim in the sum of $31,580.93, as follows: $7,206.73, balance due on contract;

$1,892.27, bond premium; $4,000 due on $10,000 note; and, extras in the amount of $18,481.93.

Plaintiff-appellant raises 4 questions on its appeal. We will deal with them in the order presented.

(1) Was it the responsibility of appellant to determine where and how much piling should be driven and to supervise the installation of same, whereas appellee was merely to mechanically install said piling? Pertinent findings of fact by the learned trial judge appear in his opinion as follows:

"It is obvious that VanZylen intended to act as his own general contractor in the construction of the shopping center. However, in December, 1960, VanZylen discovered that he was without sufficient financial ability to secure the requisite performance bond. VanZylen secured the promise of defendant to act as general contractor for the agreed figure of $10,000 upon the stipulation that defendant would subcontract back to VanZylen all the work not covered by the Stran-Steel construction agreement. * * *

"VanZylen entered into an oral arrangement in December, 1960, with defendant to drive the piling on this project, the agreement providing that payment would be at the rate of $1 per lineal foot for driving and $1 per lineal foot for providing the piling.

"VanZylen had in his employ at the VanZylen Lumber Company, one James Leymon. Leymon had some training and experience in the building of small homes and filling stations. Leymon also was secretary of plaintiff corporation. Leymon was VanZylen's representative on the job. * * *

"It is not disputed that defendant drove piles where Leymon instructed its employees to do so and according to the number Leymon requested.

"When the masons began putting up the cement block wall it was discovered that the footings were settling. With this information VanZylen and

Leymon went to defendant, and its foreman suggested splicing the piles to secure a solid bearing. This was done and the work progressed. * * *

"Plaintiff claims that the above paragraph (general contract) requires defendant to provide the necessary piling and install them to meet the needs of the structure to be erected. The testimony indicates that VanZylen had already undertaken to handle the piling by contracting with defendant prior to January 3, 1961, to drive the piling on a footage basis, by providing some of the piling himself, and by supervising defendant's employees on the job. * * *

"We are told by the testimony that soil conditions are a matter for a civil engineer and that architects and contractors depend upon the knowledge and findings of the civil engineer. Defendant knew that the architect had the findings of Gove before him when he drew up the drawings and indicated where the piling should be driven. In retrospect it now appears that many more piling were needed for the job and that piling on the interior walls were necessary.

"The court finds that plaintiff relied upon the skill and knowledge of the architect and upon the knowledge of VanZylen and Leymon, its president and secretary, in determining the adequacy of the piling. There is nothing in the oral agreement of December, 1960, between these parties to indicate that defendant undertook to determine where the piling should be driven and in what numbers. As between these parties there is nothing in the general contract to indicate that plaintiff abdicated its role as supervisor of the piling work and that defendant was required to assume it. The conduct of the parties remained the same after January 3, 1961, insofar as their relations with each other was concerned. Plaintiff should not now be allowed to complain of the results of its own derelictions. * * *

"The court finds that the contractual agreements between these parties and between VanZylen and

defendant, provide only that defendant drive piling where VanZylen wanted them to, and to erect a Stran-Steel structure on a foundation provided by VanZylen. This they did. Plaintiff should not be allowed to recover for any defects in the foundation resulting in damage to the structure."

These findings of fact are amply supported by the evidence.

In 12 Am Jur, Contracts, § 246, p 782, we find:

"The general rule is that in the absence of anything to indicate a contrary interpretation, instruments executed at the same time by the same parties, for the same purpose and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument."

As between these parties, the three instruments of January 3, 1961, may be combined and in so doing, we find the effect is to place on plaintiff, owner (solely owned by VanZylen) and VanZylen Lumber Company, subcontractor, (solely owned by VanZylen) the responsibility for the construction of the shopping center excepting the duty of Tri-Cities to furnish and erect the Stran-Steel building. Applying this rule to the case at hand we review the conduct of the parties as evidenced by the following facts: (a) VanZylen hired a consulting engineer to take borings of the site six months before the date of the contracts; (b) he hired defendant Tri-Cities to drive the pilings on a per foot basis a few weeks before the date of the contracts, and in accord with a report from the civil engineer; (c) VanZylen exercised control through Leymon, his supervisor of construction, of the pile driving both before and after the date of the contracts; (d) VanZylen controlled all of the work on the project excepting Tri-Cities erecting of the Stran-Steel building; (e)

VanZylen's refusal through Leymon to heed advice from bulldozer operator and a mason hired by him, that the footings for the inside columns were improperly placed as to depth and that the subsoil for the floor was improperly prepared; (f) VanZylen's employing an architect and civil engineer to assure a proper building being constructed and then proceeding with construction without their presence and on-the-job inspection; (g) and VanZylen assuming the work of a general contractor by reason of requiring Tri-Cities to subcontract back to him all the work excepting the furnishing and erecting of the steel building and at a figure set by VanZylen.

Where the proper interpretation of a contract as to the responsibility of the parties thereunder is in dispute and the terms are not clear, evidence may be admitted on the practical interpretation given it by the parties to aid in determining the meaning to be given legal effect. *Davis* v. *Kramer Bros. Freight Lines, Inc.* (1960), 361 Mich 371.

We conclude that on the facts and the law as between these parties the trial court properly held against the plaintiff on the first question of error raised by appellant.

For convenience, we join the second and third questions raised by plaintiff-appellant in its brief. (2) Was appellant fully informed by defendant-appellee Tri-Cities of the inadequacy of the ultimate piling? (3) If appellee did report the inadequacy of the piling to the appellant, did the appellee thereby fulfill its full responsibility to appellants?

Applicable findings of fact of the trial judge as to these questions appear in his opinion as follows:

"In the course of driving the piles, defendant's employees discovered that they were not reaching solid ground or bearing with their 20-foot lengths. This information was given Leymon. The only

resulting change in driving the piles was to drive two piles along side each other to provide so-called friction piling. * * *

"The court is of the opinion that VanZylen was fully informed by defendant as to the inadequacy of the piling. Certainly, VanZylen was aware of the failure of the footings to support the wall and the necessity of splicing the piles and of driving them to a supporting depth. VanZylen even now does not claim that defendant did not install piling where the drawings indicated, he admits that they did. However, plaintiff claims that the general contractor should have insisted on further soil borings and exploration of the subsoil to insure adequate bearing strength. * * *

"The court is of the opinion that the root of the trouble was plaintiff's desire to cut corners in the cost of construction, and that the work suffered for want of a competent project engineer, or architect, with on-the-job inspection duties. These duties were assumed by Leymon. It can only be suspected that he was carrying out the orders of VanZylen in matters of construction policy. It is the further opinion of the court that defendant carried its full responsibility when it reported the inadequacy of the piling to plaintiff."

We find that these findings of fact have adequate support in the record. The notice of inadequacy of piling given by Tri-Cities to plaintiff being sufficient as found by the trial judge, we face the question, did appellee thereby fulfill its full responsibility to the appellant? Having previously ruled that construing the three contracts together permitted the conclusion that plaintiff VanZylen assumed the responsibilities of general contractor and he having by choice dispensed with his architect and civil engineer as to on-the-job inspection and having taken over their duties controlling the construction through his supervisor, Leymon, we are precluded

from saying that Tri-Cities failed to fulfill its full responsibility to appellant.

Appellant cites 17A CJS, Contracts, § 515(e), p 857, as authority for the rule that the builder is responsible for defects caused by defects in the soil and refers this Court to the supporting cases of *Rubin* v. *Coles* (1931), 142 Misc 139 (253 NYS 808), and *Dearstine* v. *Dunckel* (1926), 130 Misc 281 (223 NYS 234).

We cannot quarrel with the rule contained in those cases as applied to the facts related therein. However, the facts in our case at hand are easily distinguished and therefore, the cases cited are not analogous.

To allow plaintiff owner to hold defendant contractor under a building contract liable for defective workmanship when in fact, the claimed defective workmanship was the responsibility of plaintiff's sole stockholder by reason of a subcontract imposed on the contractor as a condition of granting the contract, would in effect award plaintiff for its own breach and failure to perform properly and cannot be sanctioned under any known principle of the law.

The appellant refers the court to other authorities to substantiate its position. These need not be considered because they are inapplicable to the peculiar facts presented in the case at hand.

The last question raised by appellant on appeal, is appellee, Tri-Cities, entitled to counterclaim damages in the amount of $31,580.93? The balance due on the contract of $7,206.73 and the bond premium of $1,982.27 was not contested. The extras in the amount of $18,481.93 were in most part contested, as was the $4,000 due on the $10,000 note given as a bonus. The extras that the trial court found appellee entitled from appellant was based upon conflicting evidence which presented a fact question. We cannot say it is against the clear preponderance

of the evidence. The $4,000 awarded as due on the $10,000 note presents a more difficult problem. It is true that the defendant Tri-Cities was held not liable as between these parties on the contract, and therefore, Hartford Accident & Indemnity Company, a Connecticut corporation, not responsible on the bond. However, the performance bond under the general contract had to be obtained in order for plaintiff to draw the money from the finance institution to pay for the construction, and no doubt, to authorize the original loan. In order to obtain the performance bond, defendant Tri-Cities was required to execute mortgages, from the individual members of the firm and their wives, to the bonding company. The obtaining of this bond was of material benefit to plaintiff and therefore, the $10,000 note given by plaintiff to defendants was with consideration.

In summing up, we conclude that the trial court's findings of fact are based upon credible evidence and we cannot say that the evidence clearly preponderates in the opposite direction. We, therefore, do not disturb it. *Straith* v. *Straith* (1959), 355 Mich 267; *Insurance Company of North America* v. *Schuneman* (1964), 373 Mich 394; *Osius* v. *Dingell* (1965), 375 Mich 605.

The judgment dismissing plaintiff's complaint is affirmed. Judgment for defendant and against plaintiff for $31,580.93 is also affirmed. Costs to appellees.

BURNS and J. H. GILLIS, JJ., concurred.

DePRIEST *v.* KOOIMAN.

1. AUTOMOBILES—INSTRUCTIONS—NEGLIGENCE OF PLAINTIFF'S DRIVER —PROXIMATE CAUSE.

   It was not error to instruct jury that if they found plaintiff's southbound driver on stop road was the sole, proximate cause of accident with defendant's westbound car on through highway at intersection protected by red flashing light in plaintiff's direction and yellow flashing light in defendant's direction, plaintiff could not recover (CLS 1961, § 257.614).

2. SAME—THROUGH HIGHWAY—POSTED SIGNS.

   A driver on a through highway may properly assume and act on the assumption that others using the highways will comply with the rules of the road and properly posted signs as to right-of-way but he must remain alert to the hazards surrounding him and with which he is confronting others (CLS 1961, § 257.614).

3. SAME—FLASHING LIGHTS—YIELDING RIGHT-OF-WAY.

   Plaintiff's driver who stopped before entering intersection with through highway protected by a red flashing light had the duty thereafter not to proceed into the through highway in front of defendant's vehicle which was then and there so close as to constitute an immediate hazard (CLS 1961, § 257-.614).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 8 Am Jur 2d, Automobiles and Highway Traffic § 741 *et seq.*
Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging stop signal or sign. 3 ALR3d 180.

[2] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 748, 749.
Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging caution, slow, danger, or like sign or signal. 3 ALR3d 507.

[3] 8 Am Jur 2d, Automobiles and Highway Traffic § 751.
Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging stop signal or sign. 3 ALR3d 180.

4. SAME—INTERSECTION—INSTRUCTIONS—FLASHING LIGHTS.
Instructions relative to right-of-way of plaintiff's driver on stop road and defendant motorist on through highway at intersection protected by red and yellow flashing lights *held,* proper (CLS 1961, §§ 257.614, 257.627).

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted Division 3 December 7, 1965, at Lansing. (Docket No. 239.) Decided March 9, 1966. Leave to appeal granted by Supreme Court May 24, 1966. See 377 Mich 711, 379 Mich 44.

Declaration by Ruth F. DePriest against Dirk F. Kooiman for injuries arising out of a collision of two automobiles on April 20, 1958. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

van Benschoten & van Benschoten (*Duane S. van Benschoten,* of counsel), for plaintiff.

Smith, Brooker, Harvey & Cook (*Webster Cook,* of counsel), for defendant.

MCGREGOR, J. The plaintiff, Ruth Fay DePriest, was traveling south on M-83 in an automobile driven by her husband toward the intersection of this highway with M-46. Plaintiff's driver gradually brought his vehicle to a stop at the highway intersection, in obedience to the stop sign accompanied by a flashing red light. At the same time, defendant Dirk Kooiman was driving his automobile west on M-46 at the speed of approximately 50 miles per hour. About 100 yards east of the M-83 intersection, with a yellow flasher facing in his direction, the defendant slowed his speed slightly and continued into the intersection at a speed somewhere between 35 and 45 miles per hour. Plaintiff's driver then drove his automobile into the intersection from the stopped position at a speed of between 7 to 10 miles per hour, where it col-

lided with the defendant's vehicle, causing serious injuries to the plaintiff.

Both highways were paved, two-lane roads, 22 feet in width. The testimony was conflicting as to whether or not the pavement was wet or dry. It is undisputed that the intersection was open, without obstructions to the view of either vehicle on approaching the intersection. The posted speed limit on M-46 was 65 miles per hour.

Plaintiff brought this action against the defendant to recover damages for the injuries suffered in the collision, contending that the defendant was negligent in failing to reduce his speed when approaching the caution-light intersection, so as to have his car under control at all times, and in failing to take diversionary action or stop his vehicle to avoid striking the automobile in which plaintiff was riding. Defendant contended that the negligence of the plaintiff's driver was the sole proximate cause of the collision. The jury returned a verdict of no cause for action upon which the court entered a judgment for the defendant. The sole basis for plaintiff's appeal is alleged errors in the charge to the jury, the relevant portions of which are set forth as follows:

"Now, I believe it is necessary that I read to you from some of the laws which I believe may be applicable in this particular case * * * .

"and so, I shall read now from CLS 1961, § 257.614 (Stat Ann 1960 Rev § 9.2314), as follows:

" 'Whenever flashing red or yellow signals are used, they shall require obedience by vehicular traffic as follows:

" '1. Flashing red (stop signals). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked and the right to proceed shall be

subject to the rules applicable after making a stop at a stop sign.

" '2. Flashing yellow (caution signal). When a yellow lens is illuminated with rapid, intermittent flashes, drivers of vehicles may proceed * * * through the intersection or past such signals only with caution.' * * *

"CLS 1961, § 257.627 (Stat Ann 1960 Rev § 9-.2327), is as follows :

" 'A. Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing and no person shall drive any vehicle upon any highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead.'

"Now, members of the jury, I will say that if a person violates a statute of this State, such as one of the statutes which I have just read to you, the mere violation of the statute is negligence in and of itself.

"However, such violation of a statute must be the proximate cause of an injury in order to create liability on the part of the person who violates it.

"I charge you that the evidence shows that the highway upon which the defendant Dirk Kooiman was traveling was a State trunkline highway and plaintiff's driver was required by statute and by the flashing stop sign which then and there existed to stop before entering the highway and to yield the right-of-way to defendant Dirk Kooiman's vehicle, which was then and there so close as to constitute an immediate hazard.

"I charge you that the driver of plaintiff's vehicle had a duty to yield the right-of-way to defendant Kooiman and to continue to yield the right-of-way until the highway was clear, and before attempting to cross.

"I charge you further as a matter of law that the driver of the vehicle in which plaintiff was a passenger was guilty of negligence in pulling out in front of the vehicle driven by Dirk Kooiman in failing to yield the right-of-way to the vehicle driven by Dirk Kooiman then and there on a State trunkline highway.

"I charge you that defendant Dirk Kooiman as he approached the intersection where the accident occurred had a right to assume that plaintiff's driver would obey the law and would come to a complete stop and would yield the right-of-way to defendant Dirk Kooiman's vehicle. (Emphasis supplied.)

"However, the defendant Kooiman had a duty to exercise due care to make observations which a reasonably prudent man would make, and to exercise caution under the existing circumstances while proceeding through the intersection.

"I charge you that if you find that the defendant Kooiman was driving his car within the maximum speed limit as posted on the highway but yet was driving at a speed greater than was reasonable and proper, having due regard for the traffic, surface, and width of the highway, and the many other conditions established by the testimony in this case, then it would be your duty as jurors to find the defendant negligent for driving too fast, and in violation of the speed law which I have just read to you.

"In this regard, I instruct you that the flashing yellow traffic control device which was admittedly in operation for traffic travelling on M-46, as Mr. Kooiman was doing, would be one of the conditions which you must consider in determining whether or not Mr. Kooiman violated this basic speed law which I have just read to you.

"I charge you that if you find that the defendant Dirk Kooiman failed to proceed only with caution into this intersection, such failure on his part would be a violation of the law.

"It would be your duty then as jurors to find the defendant Kooiman negligent as a matter of fact and law in this case.

"If you find that the defendant Dirk Kooiman was guilty of any negligence which was a proximate cause or which contributed to the accident, and the plaintiff's injuries, then your verdict will be for the plaintiff for such damages as you find that she sustained as a direct result of the accident.

"I charge you that there may be more than one proximate cause of an accident. Causation is not determined by finding which of two possible wrongdoers is most at fault. If either one is negligent to any degree, and such negligence was the proximate cause of the accident, then the negligence of both is considered a legal cause or proximate cause of the accident, although one may be guilty of greater fault or negligence than the other.

"I charge you that you are not to put any blame or fault upon Mrs. DePriest for any negligent act which her husband as one of the drivers may have committed in this case. * * *

"I charge you that if you find that the sole, proximate cause of the accident was the negligence of plaintiff's husband, Lloyd DePriest, then the plaintiff may not recover in this accident, and you must return a verdict of no cause of action." (Emphasis supplied.)

Although the plaintiff objects only to the sole-cause instruction in the last paragraph quoted above because she admitted her driver's negligence, and to the charge that the defendant could proceed through the intersection on the yellow flasher under the assumption that the plaintiff's driver would obey the law, it is necessary to quote all of the above, in order to fairly present the substance of the trial court's charge.

Plaintiff's contention that the trial court injected a false issue by instructing the jury to find for the

defendant if the negligence of plaintiff's driver was the sole cause of the accident can easily be answered. The jury had to be informed that it was possible under the facts for them to find that the negligence of the plaintiff's driver was the only proximate cause of the collision. Such a statement is merely another way of stating that the jurors could find the defendant's actions were not legally causative of the plaintiff's injuries. Although this issue was not raised in *Stewart* v. *Ames* (1960), 362 Mich 31, 34, the Supreme Court held in that case a charge containing a sole-cause instruction to be a fair one.

The plaintiff's objection to the court's right-of-way instructions to the jury is answered by the following:

"Lacking notice otherwise, he [the driver] may assume that others using the highways will comply with the rules of the road and properly posted signs and he is not guilty of * * * negligence in acting upon such assumption. It should not, however, be assumed from the foregoing that he may proceed blindly upon the arterial [highway], secure in the supposition that he could do no wrong. He must remain alert to the hazards surrounding him and with which he is confronting others." *Krause* v. *Ryan* (1955), 344 Mich 428, 432. Quoted in part with approval in *Hicks* v. *Gillespie* (1956), 346 Mich 593, 599.

Although the *Krause Case* was concerned with the relative rights of a driver on an arterial highway as opposed to those of a driver on a subordinate road, this Court holds that the principle of the *Krause Case* applies to the instant case because the road on which the plaintiff was traveling was governed by a stop sign and flashing red light, while defendant's roadway was not. The charge was proper, in view of the fact that the trial court clearly and correctly charged the jury on the duty of the

defendant to respond to the flashing yellow caution light.

Taken as a whole, this Court is satisfied that the charge to the jury was a satisfactory presentation of the law as it pertained to the rights of both parties.

The judgment of the trial court is affirmed, and costs are awarded to the appellee.

LESINSKI, C. J., and QUINN, J., concurred.

WECHSLER *v.* ZEN.

1. STIPULATIONS—SETTING ASIDE—DISCRETION OF COURT.

   Stipulation of attorneys relating to conduct of pending cause may be set aside, within the discretion of the court, where the *enforcement of stipulation would result in injury to one of* the parties and the other party would not be materially prejudiced if the stipulation were set aside.

2. SAME—EXCHANGE OF NAMES OF WITNESSES—SETTING ASIDE—DISCRETION OF COURT.

   Stipulation that neither party to an action concerning rights in joint bank deposit, would call witnesses without giving the other party 48-hour notice *held,* properly set aside by trial judge when he felt that he could not do justice to the cause and, hence, it was not an abuse of discretion.

3. BANKS AND BANKING—JOINT ACCOUNT—STATUTORY PRESUMPTION —REBUTTAL PROOF.

   Clear and persuasive proof is needed to rebut statutory presumption that joint deposit became the property of survivor of the joint depositors (CL 1948, § 487.703).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 50 Am Jur 2d, Stipulations §§ 11, 12, 14, 16.
[3] 10 Am Jur 2d, Banks § 372.
[4] 5 Am Jur 2d, Appeal and Error § 834.

4. APPEAL AND ERROR — CREDIBILITY OF WITNESSES — CONFLICTING STATEMENTS OF WITNESSES — JUDGMENT OF TRIAL COURT.

Court of Appeals will not substitute its judgment for trial judge who saw and heard the witnesses, and formed an opinion that their conflicting testimony was sufficient to cast doubts on their credibility.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted Division 1 December 7, 1965, at Detroit. (Docket No. 310.) Decided March 9, 1966.

Bill of complaint by Louis Wechsler, special administrator of the estate of Secondo Troietto, deceased, against Agostino Zen to obtain funds held in a joint bank account by deceased and defendant. Judgment for defendant. Plaintiff appeals. Affirmed.

I. R. Starr, for plaintiff.

Dorothy E. Broeder, for defendant.

BURNS, J. Secondo Troietto died and left a joint bank account with the right of survivorship, in the National Bank of Detroit.[1]

Savings account No. 20761 was opened at the National Bank of Detroit, Gratiot and Riopelle branch, on March 21, 1949, in the names of Secondo Troietto and Agostino Zen, payable to either, or the survivor of them. At the time of the death of Secondo Troietto, the balance in the account was $10,453.67.

Troietto had lived at the Zen household from 1944 until his death in 1961. The parties were not related

1 CL 1948, § 487.703 (Stat Ann 1957 Rev § 23.303).

"The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

and it was admitted that Troietto had always paid for his room and board; Zen had not contributed to the account.

The appellant claims said account should pass to the estate to be distributed to Troietto's heirs-at-law.

The issue involved is: Did the plaintiff present sufficient testimony to rebut the presumption under the statute?

At the pretrial conference, the attorneys entered into a stipulation that neither side would call any witness whose name had not already been exchanged, unless the opposite side was given notice at least 48 hours in advance that such witness would be called to testify, giving his name and address.

After one complete trial, and a partial second trial, the trial judge stated:

"I am going to throw out the pretrial, and we will start all over again. I am going to get at the truth of this. Come in a week from today. You bring in all you have, and you bring in all you have. We will see where the truth lies. I am a little tired of this thing. You are coming in with about five cents worth of testimony and expecting to prove a lawsuit. I don't know how you can do it."

Actually, the hearing was not resumed for over 3 months, the above statement being made on December 16, 1963, and the balance of the hearings being resumed on March 31, 1964.

The appellee called 6 witnesses for rebuttal, but did not notify the appellant of said witnesses.

The appellant has appealed 3 issues, claiming that the trial court erred in:

1. Setting aside the pretrial stipulation;
2. Finding the appellant had not rebutted the statutory presumption; and
3. Ruling that the appellant's witness could be impeached on immaterial and irrelevant matters.

After reading the transcript of the testimony in this cause, we can understand the trial judge's action. While attorneys may enter into binding stipulations on facts and the court will treat such stipulations as sacrosanct, the same treatment is not accorded procedural stipulations. As a general rule it is within the discretion of the court to set aside stipulations of attorneys relating to the conduct of a pending cause, where the enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by their being set aside. *Borgman* v. *Bultema* (1920), 212 Mich 70. In the present case, the trial judge did not feel he could do justice unless such stipulation was set aside, and he did not abuse his discretion.

Clear and persuasive proof is needed to rebut the statutory presumption that deposits of the character here involved become the property of the survivor of the joint depositors. *Lau* v. *Lau* (1943), 304 Mich 218. The trial judge heard the testimony of the plaintiff's witnesses. He was not impressed, and stated:

"These discrepancies, in the opinion of this court, cast serious doubt on the creditability of plaintiff's witnesses. The plaintiff did not recall either of their witnesses, or any other witness, to rebut or explain the serious attack on the creditability of plaintiff's witnesses. It is apparent to this court that plaintiff's counsel did not attempt to verify the testimony of their two witnesses and the source of verification readily available to them.

"In viewing all the testimony in this case, the court is of the opinion that there is no competent contrary evidence which would overcome presumption of the intent of the decedent to establish a joint account with rights of survivorship in the defendant."

The trial court saw and heard the witnesses and formed an opinion that the conflicting statements of the plaintiff's witnesses were sufficient to cast doubts on the credibility of said witnesses. We do not substitute our judgment for the trial judge in such cases. *Barnes* v. *Beck* (1957), 348 Mich 286.

Judgment is affirmed. Costs to appellees.

WATTS, P. J., and J. H. GILLIS, J., concurred.

CATALDO *v.* WINSHALL.

1. APPEAL AND ERROR—NONJURY CASES—FINDING OF TRIAL COURT—PREPONDERANCE OF EVIDENCE.

   Findings of trial judge in broker's nonjury action for commissions and advances are not disturbed, where record does not clearly preponderate against such findings that are made after listening to the witnesses of the respective parties, since the trial court has seen and heard the witnesses and evaluated their testimony (GCR 1963, 517.1).

2. BROKERS—COMMISSIONS—ADVANCES—EVIDENCE.

   Admission of check in evidence against 1 of 4 defendants in broker's action for commissions and advances should not have been considered by trial court in rendering judgment against appellant, one of the other defendants, hence judgment against such appellant is reduced by amount of improperly allowed credit.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 839–845; 53 Am Jur, Trial § 123.
[2] 20 Am Jur, Evidence § 263.
[3] 53 Am Jur, Trial § 123.
[4] 39 Am Jur, New Trial § 13.
[5] 5 Am Jur 2d, Appeal and Error § 851.
[6] 5 Am Jur 2d, Appeal and Error § 1009 *et seq.*

3. TRIAL—MOTION TO REOPEN PROOFS—DISCRETION OF COURT.
   A motion to reopen proof is addressed to the sound discretion of the trial court and a reversal of a ruling thereon by an appellate court required a showing of abuse of discretion on the part of the trial court.

4. NEW TRIAL—DISCRETION OF COURT.
   A motion for a new trial is addressed to the sound discretion of the trial court and a showing of abuse of discretion is required before an appellate court will reverse the trial court's ruling.

5. APPEAL AND ERROR—REOPENING CASE—NEW TRIAL—DISCRETION OF COURT.
   Denial of defendant's motion to reopen case for introduction of supplemental proofs and denial of his motion for new trial *held,* not an abuse of discretion under record presented.

6. COSTS—NEITHER PARTY PREVAILING.
   No costs are allowed, where plaintiff's $12,666.34 judgment against 1 of 4 defendants in broker's nonjury action for commissions and advances is ordered reduced by $3,000, since neither party has prevailed.

Appeal from Macomb; Spier (James E.), J. Submitted Division 2 December 7, 1965, at Lansing. (Docket No. 369.) Decided March 9, 1966. Rehearing denied April 15, 1966. Leave to appeal denied July 12, 1966. See 378 Mich 722.

Declaration by Peter Cataldo against Jack I. Winshall, Phyllis Winshall, Charles Bednarsh, and Jennie Bednarsh to recover advances and commissions. Judgment for plaintiff against defendant Jack I. Winshall. Cause dismissed as to defendants Phyllis Winshall, Charles Bednarsh, and Jennie Bednarsh. Defendant Jack I. Winshall appeals. Judgment modified and affirmed.

Sugar & Schwartz (*A. Albert Schwartz,* of counsel), for plaintiff.

Starkey & Gentz (*William A. Gentz,* of counsel), for defendant.

QUINN, J. Plaintiff brought this action to recover commissions and advances he claimed were due him from defendants. The nonjury trial resulted in a judgment for plaintiff and against Jack I. Winshall for $12,666.34 and a judgment of no cause for action as to defendants Bednarsh and Phyllis Winshall. Jack I. Winshall appeals.

Defendant states the issues presented as follows:

1. "Was the verdict and judgment of the court against the clear weight of the evidence as to the finding in favor of plaintiff on his complaint as to the following exhibits and claims, to-wit: * * * [Defendant then lists five items that the trial court credited to plaintiff erroneously according to defendant.]?

2. "Did the trial court err in denying appellant's motion to reopen the case for the introduction of supplemental proofs and in denying his motion for new trial?"

Plaintiff's action was filed February 24, 1959. Plaintiff is a real-estate broker and over a period of years he acted as broker and agent for defendant in the sale and development of real estate. Defendant dealt in and developed real estate. The transactions involved in the instant case occurred in 1953 and 1954. In its written opinion, the trial court found, "the defendant has produced no books or records and those produced by the plaintiff are the improvised variety with frequent obvious changes, and from entries money cannot be traced except by parol evidence."

The forum for the relief defendant seeks by this appeal is the trial court; the manner of obtaining it is the production of records which substantiate his contentions. With one exception, there is evidence in the record to support the findings of the trial judge, and the record does not clearly prepon-

derate against such findings. Some of the findings resulted from the trial court giving more credence to plaintiff and his witnesses than it did to defendant and his witnesses. This is the province of the trial court; it sees and hears the witnesses, and its findings based on the weight it gives testimony will not be disturbed unless clearly erroneous. GCR 1963, 517.1. The record here indicates no reason for disturbing the findings of the trial court.

The exception above noted involves exhibit 25, a check issued by plaintiff to defendant Charles Bednarsh on October 16, 1953 in the amount of $3,000. At trial, this was admitted only as to Bednarsh. It should not have been considered by the trial court as to Winshall. The credit allowed plaintiff by the trial court in the amount of $3,000 on the basis of exhibit 25 was improper.

With respect to the second issue, motions to reopen for further proof and for new trial are addressed to the sound discretion of the trial court. A showing of abuse of discretion is required before an appellate court reverses a trial court's ruling on such motions. *People, for the use and benefit of E. P. Brady & Co.,* v. *Gilliland* (1958), 354 Mich 247; *Sabo* v. *New York C. R. Co.* (1961), 365 Mich 231. The record here does not show an abuse of discretion.

The judgment of the trial court is reduced by $3,000 and affirmed. Neither party having prevailed, no costs are allowed.

LESINSKI, C. J., and MCGREGOR, J., concurred.

MOORMAN *v.* STATE HEALTH COMMISSIONER.

1. HEALTH—TRAILER COACH—TAXATION—REGULATION.

   Statute providing for taxation of occupied trailer coaches located outside of licensed trailer parks was intended to apply to less than 3 trailers on a lot or tract of land not regulated by the "trailer coach park act of 1959," which latter act specifically required an annual license by the owner of land under the control of any person upon which 3 or more occupied trailer coaches are harbored (PA 1958, No 172; PA 1959, No 243, as amended by PA 1963, No 161).

2. SAME—TRAILER COACH PARK—REGULATION—STATUTES.

   The purpose of the trailer coach park act of 1959 is to take over the entire field of regulation and supervision of trailer coach parks in the State (PA 1959, No 243, as amended by PA 1963, No 161).

3. SAME—TRAILER COACH PARK—CONTROL.

   Control, as the term is used in the trailer coach park act of 1959, has no legal or technical meaning distinct from that given in its popular acceptation such as to manage, to keep under check, to govern, or to restrain (PA 1959, No 243, § 2, as amended by PA 1963, No 161).

4. SAME—HOUSE TRAILERS—CONTROL OF PREMISES.

   Owners of land who leased 19 sites on their tract for occupancy by house trailers under written leases terminable upon 10 days' notice did not thereby relinquish *control* of such areas, as the term is used in the trailer coach park act of 1959, since they

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REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur, Taxation § 416 (supp).
Taxation, as real estate, of trailers or mobile homes. 86 ALR2d 277.
[2, 5, 7, 8] 37 Am Jur, Municipal Corporations § 309.
[3, 5, 8] 50 Am Jur, Statutes § 235.
[4] 32 Am Jur, Landlord and Tenant § 195.
[6] 16 Am Jur 2d, Constitutional Law § 274.
[9] 5 Am Jur 2d, Appeal and Error § 1009.

limited the use for which the premises could be occupied, had control of the means of ingress and egress, and had reserved the right to terminate the lease, hence, were subject to licensure under the act (PA 1959, No 243, § 2, as amended by PA 1963, No 161).

5. SAME—TRAILER COACH PARK—ADJOINING TOWNSHIPS.

Fact that plaintiffs' tract of land was in 2 different adjoining townships would not relieve them from being subject to trailer coach park act of 1959 in each township, where all of the land is contiguous and used by them to carry on their lakeside resort business (PA 1959, No 243, as amended by PA 1963, No 161).

6. CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF BUSINESS AFFECTED WITH PUBLIC INTEREST.

The State has power, under the police power, to regulate businesses affected with a public interest, where the regulation may reasonably promote the public welfare.

7. HEALTH—REGULATION OF TRAILER COACH PARK.

The occupation of operating a trailer coach park is an enterprise peculiarly affecting the public interest, since there is a direct relation between such businesses and the public health, safety, or morals (PA 1959, No 243, as amended by PA 1963, No 161).

8. SAME—TRAILER COACH PARK.

Owners of land who used it to park 19 occupied trailer coaches *held*, subject to trailer coach park act of 1959, as amended (PA 1959, No 243, as amended by PA 1963, No 161).

9. COSTS—CONSTRUCTION OF STATUTES—DECLARATORY JUDGMENT—TRAILER COACH PARK.

No costs are allowed in action for declaratory judgment by owners of land who used it to park 19 occupied trailer coaches, where construction of statutes is involved (PA 1958, No 172; PA 1959, No 243, as amended by PA 1963, No 161).

Appeal from Mecosta; Van Domelen (Harold), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 523.) Decided March 9, 1966.

Complaint by George Moorman and Virginia Moorman against the State Health Commissioner of the State of Michigan for a judgment declaring

that land of plaintiff, used as a trailer site by their renters, comes under PA 1958, No 172 and not under PA 1959, No 243. Judgment entered declaring that PA 1959, No 243 is applicable to plaintiffs' property. Plaintiffs appeal. Affirmed.

Robert L. Miles, for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Nicholas V. Olds* and *Curtis G. Beck,* Assistant Attorneys General, for defendant.

HOLBROOK, J. Plaintiffs, owners of land used for trailer sites by their renters, brought action for a declaratory judgment,[1] protecting plaintiffs from threatened prosecution under the "trailer coach park act of 1959,"[2] and declaratory that plaintiffs have fully complied with the statute applicable to them, *viz.,* PA 1958, No 172.[3] From declaratory judgment contrary to their contentions, plaintiffs-appellants appeal.

The facts in the case were stipulated by the parties to be contained in the pleadings and exhibits attached thereto. They appear to be as follows:

Plaintiffs are purchasers by land contract of property on Tubbs lake, Mecosta county, Michigan, comprising the land involved in this action, and in their complaint state "which said property is resort property and *owned, occupied and operated as such by the plaintiffs.*" (Emphasis supplied.)

Plaintiffs, in writing, rented to other parties 19 plots of their land for the purpose of parking house

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[1] GCR 1963, 521.

[2] PA 1959, No 243, as last amended by PA 1963, No 161 (see CLS 1961, § 125.1001 *et seq.* [Stat Ann 1961 Rev and Stat Ann 1963 Cum Supp § 5.278 (31) *et seq.*]).

[3] CLS 1961, § 125.741 *et seq.* (Stat Ann 1961 Rev § 5.278 [21] *et seq.*).

trailers thereon. They provided no facilities such as water, sewer, or common facilities such as bathhouse or washing areas. The lease rental agreements each covered a small plot of land described therein "to be used by second party for the purpose of parking one trailer and one boat thereon for the period of —— months."

Restrictions were placed therein concerning the manner of use of the said property and a requirement that the renter comply with PA 1958, No 172, and do no act that might cause the public authorities to determine that a trailer camp is established on the described and adjacent premises. The lease provided that the use and occupancy of the described plot may be terminated upon 10 days' oral or written notice by plaintiffs.

Appellants claim that the use of their property in the foregoing manner does not constitute a "trailer coach park" as defined in the "trailer coach park act of 1959," but is subject to PA 1958, No 172 (CLS 1961, § 125.741 *et seq.* [Stat Ann 1961 Rev § 5.278(21) *et seq.*]).

Three questions are presented for review on this appeal:

(1) Is the land owned by plaintiffs and used for parking of 19 trailer coaches on individual lots defined for that purpose subject to the superintending powers and licensing authority of the State health commissioner as provided by PA 1959, No 243?

(2) Does PA 1958, No 172, provide appellants with an option as to whether they need comply with the "trailer coach park act of 1959"?

(3) Does the execution of "lease or rental agreements" by appellants for the parking of individual trailer coaches on their land, relieve appellants of their responsibility of complying with the "trailer coach park act of 1959"?

The pertinent provisions of the "trailer coach park act of 1959"[4] are as follows:

TITLE: "An act to define, license and regulate trailer coach parks; to prescribe the powers and duties of the State health commissioner and other State and local officers; to provide for the levy and collection of specific taxes on occupied trailers in trailer coach parks and the disposition of the revenues therefrom; to provide remedies and penalties for the violation of this act; and to repeal certain acts and parts of acts. * * *

"Sec. 2. As used in this act: * * *

"(d) 'Trailer coach park' or 'park' means any parcel or tract of land under the control of any person, upon which 3 or more occupied trailer coaches are harbored, or which is offered to the public for that purpose, regardless of whether a charge is made therefor, together with any building, structure, enclosure, street, equipment or facility used or intended for use incident to the harboring or occupancy of trailer coaches; except as provided by section 91 of this act. * * *

"(g) 'Site' means the portion of the trailer coach park set aside and clearly marked and designated for occupancy by an individual trailer coach. * * *

"Sec. 21. No person shall maintain, conduct or operate a trailer coach park within this State without an annual license therefor from the commissioner. If an operator of a trailer coach park has made a proper application for a renewal of his license not less than 15 days prior to the expiration date of an existing license, it shall continue until a new license has been issued or the application therefor shall have been denied, according to provisions of section 34 of this act. * * *

"Sec. 23. * * * If any applicant for a trailer coach park license desires to operate the trailer coach park only during the months from May 1

[4] PA 1959, No 243, as last amended by PA 1963, No 161 (see CLS 1961, § 125.1001 *et seq.* [Stat Ann 1961 Rev and 1963 Cum Supp § 5.278 (31) *et seq*]).

to October 1, he shall pay only 1/2 the annual license fee, but shall pay the monthly license fees for these months of operation as provided in section 41 of this act."

The pertinent provisions of the statute plaintiffs claim to be an alternative to the "trailer coach park act of 1959" and which they elect to come under PA 1958, No 172 (CLS 1961, § 125.741 *et seq.* [Stat Ann 1961 Rev § 5.278(21) *et seq.*]), are as follows:

TITLE: "An act to provide for the payment, collection and disposition of yearly taxes on occupied trailer coaches located outside of licensed trailer parks; and to provide for permits and sanitary regulations of trailers harbored outside of licensed trailer parks."

"Sec. 1. No person shall use or permit the use of any trailer coach as a residence on any site, lot, field or tract of land not specifically licensed as a trailer coach park for more than 15 days except by written permit as hereinafter provided."

This act is applicable only to trailer coaches not located in licensed parks, and was intended to apply to less than three trailers on a lot or tract of land not regulated by the "trailer coach park act of 1959."

A person owning land used for parking of trailer coaches and subject to the "trailer coach park act of 1959" is specifically excluded from the operation of PA 1958, No 172. This is true because the "trailer coach park act of 1959" by its terms repealed[5] and took the place of the "trailer coach park act" of 1939,[6] and the Supreme Court construed the purpose of that act in the case of *Richards* v. *City of Pontiac* (1943), 305 Mich 666, wherein Mr. Justice SHARPE stated on pp 671, 672 as follows:

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[5] See CLS 1961, § 125.1097 (Stat Ann 1961 Rev § 5.278[127]).

[6] PA 1939, No 143, as amended (CL 1948 and CLS 1956, § 125.751 *et seq.* [Stat Ann 1957 Cum Supp § 5.278(1) *et seq.*]).

"The purpose of this act as amended was the regulation of house trailer camps in all parts of Michigan. * * *

"Its intent and purpose is to take over the entire field of regulation and supervision of trailer parks in the State."

We adopt this language as applicable to the intent and purpose of the "trailer coach park act of 1959." In determining whether plaintiffs are subject to the "trailer coach park act of 1959," we must apply the tests of the act as contained in the definition of a "trailer coach park;" *i.e.*, "any parcel or tract of land under the control of any person, upon which 3 or more occupied trailer coaches are harbored."[7] Obviously, 19 trailer coaches are sufficient in number, and the land used for this purpose is a single tract as represented in plaintiffs' complaint. The only remaining test to apply is that of *control.*

In 13 CJ, Control, p 837, we find therein stated:

"Control. As a noun, the word has no legal or technical meaning distinct from that given in its popular acceptation."

We find this term defined by our Supreme Court in the case of *In re Petition of Hendricks to Vacate Street* (1930), 251 Mich 336, at pp 343, 344 as follows:

"There are a number of cases cited in Words and Phrases (First Series) in which the word 'control' is defined. 'The words "control" and "manage" are synonymous.' 'To keep under check, to govern, to restrain.' 'To exercise a directing, restraining, or governing influence over.' "

It is difficult to visualize how any owner of a trailer coach park could operate such a business

[7] PA 1959, No 243, § 2 (CLS 1961, § 125.1002), as amended by PA 1963, No 161 (Stat Ann 1963 Cum Supp § 5.278[32]).—REPORTER.

without rental arrangements either oral or written, with those who use his land for this purpose. Plaintiffs claim they have leased the land and therefore, have relinquished control of the same. This is not tenable as they control the use of the land in the agreement for the purpose of housing a single trailer on a single tract, and further, they control the streets (ways of ingress and egress) and the lake front privileges used in connection therewith. They also reserve the right in their rental agreements to terminate the use and occupancy rights of the renters.

The plaintiffs have not, under the facts in this case, completely relinquished their power or authority over the land used by the renters and have retained all control over the accompanying facilities.

We rule that plaintiffs retained control of said property under the lease arrangements present in this case.

Plaintiffs' land is situated in two townships. The land being used for purposes of parking trailer coaches, the subject of this action, lies next to land that plaintiffs propose to build a "trailer coach park" under the "trailer coach park act of 1959." They proceeded, without a permit, to build a facility affording central bath, washroom and also sanitary accommodations. This facility was placed in close proximity to the area used presently by the trailer coaches. Plaintiffs' position in this regard is that they may proceed with their plans because their proposed "trailer coach park" lies in another township, and their present setup is not subject to the "trailer coach park act of 1959."

This is not tenable because plaintiffs' land is one tract or parcel notwithstanding the fact that it lies in two townships. All of said land is contiguous and all used by the plaintiffs to carry on their resort business.

Plaintiffs' final claim is that to apply the "trailer coach park act of 1959" to the land of plaintiffs used by the 19 house trailers would in effect transgress constitutionally protected property rights created in the lessees under the rental and lease agreements.

In 22 ALR2d 774, Maintenance or regulation by public authorities of tourist or trailer camps, motor courts, or motels, § 4, pp 780, 781, we find stated the general rule concerning constitutionality of statutes regulating trailer courts and parks as follows:

"It is a universally accepted principle that the State has the power to regulate businesses affected with a public interest. Such power of regulation is generally referred to as the police power, and in earliest times was attributed to the theory that persons engaged in such businesses were in the exercise of public franchises or special privileges not given to others not so employed, and that this imposed a trust and public duty which the government could protect from abuse. In the development of the doctrine to its present concept, it appears that the requirement that the business must have a monopolistic character to justify regulation is no longer adhered to, but that a business may be found affected with a public interest when its regulation, for adequate reason, promotes the public welfare.

"In the application of this principle to governmental regulations imposed upon the operation of *tourist or trailer camps,* motor courts or motels, there has been universal recognition that persons engaged in the above occupations are engaged in enterprises *which peculiarly affect the public interest, since there is a direct relation between such businesses and the public health, safety, or morals.*" (Emphasis supplied.)

A Michigan case is cited as authority for this rule, *Cady* v. *City of Detroit* (1939), 289 Mich 499 (appeal dismissed 309 US 620 [60 S Ct 470, 84 L ed 984]).

We conclude that the "trailer coach park act of

1959" is constitutional and that the plaintiffs use of their land to park 19 trailer coaches is subject to said act.

Declaratory judgment affirmed. No costs, the construction of statutes being involved.

FITZGERALD, P. J., and T. G. KAVANAGH, J., concurred.

BILL *v.* BROWN.

1. APPEAL AND ERROR—NONJURY CASE—FINDING OF FACT—PREPONDERANCE OF EVIDENCE.

   The finding of fact in a nonjury case will not be reversed on appeal unless the evidence clearly preponderates against the finding by the trial court.

2. VENDOR AND PURCHASER—NONTRANSFER OF LIQUOR LICENSE—REFUND.

   Finding for plaintiff by trial court in nonjury action by would-be purchaser of a liquor license to recover amount paid under memorandum agreement stipulating for refund thereof if through no default or misrepresentation in the terms and conditions by the parties, the State liquor control commission failed or refused to transfer the license to the purchaser *held,* not against the clear preponderance of the evidence.

Appeal from Wayne; Bowles (George E.), J. Submitted Division 1 December 7, 1965, at Detroit. (Docket No. 681.) Decided March 9, 1966. Leave to appeal denied by Supreme Court May 23, 1966. See 377 Mich 710.

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 76.
[2] 30 Am Jur, Intoxicating Liquors § 167 *et seq.*

Declaration, in common pleas court for the city of Detroit, by Peter Bill, Sr., against Roy H. Brown, doing business as Roy H. Brown & Company, Earl Taylor, and Ruth Taylor for return of down payment made on purchase of business owned by defendants. Judgment for plaintiff. Prior to inauguration of Court of Appeals, defendants appealed to circuit court. Affirmed. Defendants appeal. Affirmed.

John R. Jones, for plaintiff.

Bernard J. Fieger, for defendants.

WATTS, P. J. Plaintiff Peter Bill, Sr., sued in common pleas court for the city of Detroit for $2,500. This was the amount paid to defendants Brown and Taylor on or about December 15, 1962, as down payment on a bar plaintiff wanted to purchase from defendants. On January 28, 1963, a memorandum agreement was executed between the parties, the important provisions of which, for the purposes of this appeal, are as follows:

"If through no default or misrepresentation in the terms and conditions hereof, by the parties hereto, the Michigan liquor control commission fails or refuses to transfer the license to the purchaser * * * all of the money paid under this agreement shall be refunded forthwith to the purchaser."

The Michigan liquor control commission did not grant the transfer of the license. The defendants refused to return the down payment, holding it as liquidated damages under the agreement and claiming that the plaintiff had defaulted and made misrepresentations to the liquor control commission.

The common pleas court found for the plaintiff, saying:

"The court finds as a matter of fact that there was no default or misrepresentation in the terms and conditions by the plaintiff, and the court cannot find that the Michigan liquor control commission refused to approve the sale because of any default or misrepresentation on the part of the plaintiff. Accordingly, the court will enter a judgment for the plaintiff in the sum of $2,500."

On appeal, the circuit court affirmed the judgment of the common pleas court.

In *Port Huron Township Park Commission* v. *Bluska* (1965), 1 Mich App 599, this Court said:

"The trial court heard the case without a jury. Unless the evidence clearly preponderates against the finding by the trial court, it must be affirmed. *Lynes* v. *J. R. Heineman and Sons, Inc.* (1961), 363 Mich 276. The evidence does not so preponderate here; in fact the record contains substantial evidence to support the finding of the trial court."

Directly on point and in accord with the above statement of the law by this Court are three excellent opinions from our Supreme Court, all of which appear in volume 348 of the Michigan Reports. They are as follows: *Schneider* v. *Pomerville* (1957), 348 Mich 49; *Northwest Auto Company* v. *Mulligan Lincoln-Mercury, Inc.* (1957), 348 Mich 279; and *Barnes* v. *Beck* (1957), 348 Mich 286.

The instant case was tried in common pleas court for the city of Detroit, reviewed in Wayne circuit court before the inception of the Court of Appeals on January 1, 1965, and reviewed again by this Court. We have thoroughly gone through the record and fail to find that the evidence clearly preponderates against the findings.

Judgment for plaintiff affirmed. Costs to plaintiff.

BURNS and J. H. GILLIS, JJ., concurred.

PEOPLE *v.* LIKELY.

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE.
   All of the testimony or evidence in a prosecution for crime need not be supplied at the preliminary examination.

2. ROBBERY—UNARMED ROBBERY—EVIDENCE.
   Finding of guilty beyond a reasonable doubt held, supported by record in nonjury prosecution for unarmed robbery (CL 1948, § 750.530).

3. SAME—UNARMED ROBBERY—ALIBI—EVIDENCE.
   Claim of alibi in prosecution for unarmed robbery *held,* insufficient to create a reasonable doubt as a matter of law, where the trial court, hearing the case without a jury could believe the complaining witness and reject the testimony of defendants and their supporting alibi witnesses or conclude that they were mistaken as to the element of time (CL 1948, § 750.530).

4. WITNESSES—SEQUESTRATION—DISCRETION OF COURT.
   Sequestration of witnesses during the nonjury trial of a person charged with crime is discretionary with the court.

5. SAME—SEQUESTRATION—DISCRETION OF COURT—REBUTTAL.
   A witness is not disqualified from testifying for the prosecution on rebuttal in a nonjury criminal case, by reason of his having remained in the courtroom after order excluding all witnesses from the courtroom was followed by statement of trial court after first witness had testified that thereafter a witness who had testified might remain in the courtroom, the matter of sequestration of witnesses being discretionary with the trial court.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 442.
[2] 46 Am Jur, Robbery § 50; 20 Am Jur, Evidence § 1216 *et seq.*
[3] 21 Am Jur 2d, Criminal Law § 136.
[4, 5] 53 Am Jur, Trial § 31.
Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate State's witnesses in criminal case. 32 ALR2d 358.

Appeal from Kent; Vander Ploeg (Claude), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket Nos. 706, 707.) Decided March 9, 1966. Leave to appeal denied by Supreme Court August 9, 1966. See 378 Mich 726. Reconsideration denied November 14, 1967. See 379 Mich 788.

George Likely and John Likely were convicted of unarmed robbery. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Joseph B. White,* Chief Assistant Prosecuting Attorney, for the people.

Ryan, Boerema & Kail (*Raymond R. Kail,* of counsel), for defendants.

HOLBROOK, J. The defendants, George Likely and John Likely, were convicted of the crime of unarmed robbery[1] March 4, 1964, by the superior court for Grand Rapids without a jury. Defendants expressly waived trial by jury in writing.

Defendants made a motion in the trial court to set aside the convictions and for a new trial. From the denial of said motion, defendants appeal.

Defendants raise two questions viz.: (1) Was the finding on the issue tried without a jury clearly erroneous? (2) Should the witness Richard Keil be permitted to testify on rebuttal when he did not remain out of the courtroom during the testimony?

Defendants claim as to the first question that the complaining witness in her testimony at the trial made inconsistent statements and also that her testimony on the trial when compared with that given at the preliminary examination showed inconsistencies. The complaining witness identified a picture shown to her several months before the trial as resembling

[1] CL 1948, § 750.530 (Stat Ann 1954 Rev § 28.798).

one of her assailants. This led to the positive identification of both of defendants at police headquarters when she was able to see them personally and hear their voices. In her testimony at the trial she identified a picture of John Likely, saying that it was George Likely. The complaining witness had not known either of the defendants personally and certainly did not know their names. This error of identifying a picture of one of the defendants or mistaking it as the other defendant could be of slight importance. The complaining witness in her testimony at the trial supplied additional detail of the acts and sayings of the defendants occurring at the time of the offense. All of the testimony or evidence need not be supplied at the preliminary examination and in any event, additional details of the event may be added at the trial even though they may not have been brought to mind and given at the time of the preliminary examination.

The record contains sufficient evidence which, if believed, supports a finding of guilty beyond a reasonable doubt. *People* v. *Stevens* (1965), 1 Mich App 673; *People* v. *Geddes* (1942), 301 Mich 258; *People* v. *Hallman* (1941), 299 Mich 657.

The testimony introduced in support of defendants' claim of alibi was not sufficient to create a reasonable doubt as a matter of law. The trier of the facts could believe the complaining witness and reject the testimony of the defendants and their supporting alibi witnesses or conclude that they were mistaken as to the element of time. *People* v. *Loudenslager* (1950), 327 Mich 718.

In considering the second question of defendants, we find that the trial judge granted the motion of defendants to exclude all witnesses from the courtroom during the trial. However, after the first witness testified, the trial judge stated:

"All right, the witness may step down. I may say that any witness, that is, for both the people or the defense, after they have testified, they may then stay in the courtroom."

The matter of sequestering of witnesses is discretionary with the court. *People* v. *Burns* (1887), 67 Mich 537; *People* v. *Martin* (1920), 210 Mich 139. Under similar circumstances where the witness had remained in the courtroom *without* permission of the court but allowed to testify on rebuttal, it was held not an abuse of discretion. *People* v. *Piper* (1897), 112 Mich 644.

The order denying motion to set aside convictions and grant a new trial was correct. Judgments of conviction affirmed.

FITZGERALD, P. J., and T. G. KAVANAGH, J., concurred.

PEOPLE v. HICKS.

1. CRIMINAL LAW—OBJECTION AFTER CONVICTION.
   Generally, counsel may not sit idly by during the trial and then, for the first time, interpose objections after the accused has been convicted of a felony.

2. SAME—STATUTORY RAPE—RECORD.
   Record in prosecution for statutory rape is examined in a search for error reflecting clear injustice, notwithstanding no objection was made at the trial (CLS 1961, § 750.520).

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 562 *et seq.*; 21 Am Jur 2d Criminal Law §§ 222, 223.
[2] 5 Am Jur 2d, Appeal and Error § 558 *et seq.*
[3] 5 Am Jur 2d, Appeal and Error § 809.
[4] 44 Am Jur, Rape § 113.

3. SAME—CROSS-EXAMINATION—ARGUMENT.

Cross-examination of defendant and prosecutor's argument to jury in prosecution for statutory rape *held,* not to contain any prejudicial attack on defendant's rights (CLS 1961, § 750.520).

4. RAPE—STATUTORY RAPE—EXAMINATION OF COMPLAINANT—LEADING QUESTIONS—DISCRETION OF COURT.

Examination of complainant, a 15-year-old girl, in prosecution for statutory rape *held,* not violative of defendant's rights, since it was within discretion of the trial court to allow considerable latitude in asking leading questions of young girls in such prosecution in order to elicit specific details of the event (CLS 1961, § 750.520).

Appeal from Recorder's Court; Groat (Gerald W.), J. Submitted Division 1 January 4, 1966, at Grand Rapids. (Docket No. 636.) Decided March 9, 1966.

Grady Hicks was convicted of statutory rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Rheo D. Marchand,* Assistant Prosecuting Attorney, for the people.

Ben Rosenthal, for defendant.

FITZGERALD, J. This appeal presents issues for consideration by this Court which are novel, but like an embryo, not completely formed.

In the first instance we are met with what has been called a form of "appellate insulation" by the fact that no objections to the alleged errors were made by defense counsel during the course of the trial and consequently the matters before us are first raised on appeal. It is, of course, the general rule in this State that counsel may not sit idly by

during the trial and then for the first time interpose objections after the accused has been convicted. *People* v. *Martin* (1965), 1 Mich App 265; *People* v. *Borowski* (1951), 330 Mich 120; *People* v. *Elliott* (1948), 322 Mich 313.

However, exercising the prerogative of searching for error which reflects clear injustice, although no objection was made at the trial, we will proceed to examine the matters before us.

The defendant, Grady Hicks, was prosecuted under CLS 1961, § 750.520 (Stat Ann 1954 Rev § 28.788), charging him with carnal knowledge of a female minor and was tried on January 13, 1965, represented by counsel and before a jury. Since both appellant and appellee agree upon the statement of questions involved, we set them forth herewith:

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial prosecutor invade defendant's constitutional right to confront and cross-examine witnesses by asserting personal knowledge of alleged facts prejudicial to defendant?

A. By asserting such facts when cross-examining defendant.

B. By asserting such facts in his rebuttal argument.

C. By putting words into the mouth of complainant in asking her leading questions.

The lower court in effect answered "No".

Appellant contends the answer should be "Yes".

2. Should attorney's failure at the trial to make objections to errors prejudicial to defendant preclude consideration thereof by appellate court to insure against injustice?

This question arises after trial.

Appellant contends the answer should be "No".

Specifically, appellant objects to the following quoted so-called "testimony" of the trial prosecutor:

"*Q.* Then you turned off the expressway at Belleville road? You know, to up like this and down? (Apparently motioning with his hands.)

"*A.* No, I didn't.

"*Q.* How did you get off it?

"*A.* They got accesses off there where you can go across there. They're building the roads.

"After a few more questions and answers, the trial prosecutor told defendant he did not want to confuse him. The trial prosecutor then testified as follows:

"'*I'm a resident of this town (Belleville) and I'm acquainted with it.*'

"Soon the cross-examination came back to the same matter.

"*Q.* Now I ask you once again, sir, if you are traveling west on the expressway going toward Ann Arbor, how do you get off the expressway to go to her (Mrs. Gimmick's) house? Do you turn off left?

"*A.* Turn left.

"*Q.* Left. Now, in turning left off the expressway do you come off on the exit and then turn and go over the expressway?

"*A.* No.

"*Q.* You mean you just cut across the expressway left?

"*A.* Right.

"These above set forth questions and answers paved the way for the trial prosecutor to again testify. In his rebuttal arguments to the jury he reflects on defendant's claim that he cut across the expressway to the left. He then testifies:

"'*I've driven it many times; I know something about the exits. I don't know about this one.*'"

It is difficult from these excerpts to say that there was any prejudicial attack on defendant's rights. Indeed, it appears that this does not go beyond a routine cross-examination of the defendant.

Likewise, defendant states that the prosecutor, in his argument, again violated the defendant's constitutional rights by the following remarks:

"Then he says, 'From 9:20 maybe a little later because it took me some time to get out there, I was at Mrs. Gimmick's out there fishing.' But that time's not even accounted for.

"If Mrs. Gimmick said, 'Yes, he came out there about 11 o'clock and stayed till 4:30,' then he wouldn't even be available for the first act of intercourse at 2 p.m., would he? But no Mrs. Gimmick.

"He goes out the expressway, busy expressway, and just turns left, goes to Mrs. Gimmick's but he doesn't know her address. I'm sure some of you drive the expressway; I've driven it many times; I know something about the exits. I don't know about this one. He couldn't help us too much.

"And then what happens? I go into the details and everybody can tell us everything that he did on these two days in question but not much about what happened the day before this stuff began. I asked him how could he remember these things so well and not the other day: 'Well, because these are days I'm suppose to have done it.' These are the days he's suppose to have done it. But his memory can't tell us what he did the day before."

Here again we find nothing to suggest that the prosecutor made any observation which he did not have a right to make, or which was prejudicial to the defendant in any way.

Finally, appellant charges that "words were put into the mouth" of complainant by asking her leading questions.

There has probably never been a prosecution under the instant statute in which the complainant was not somewhat reluctant to describe in detail the entire transaction, including relevant portions of her anatomy and that of the defendant. Couple this

with the fact that complainant was 15 years of age and it is difficult to see how any prosecutor could properly lay the elements of the crime charged before a jury without requesting the complainant to delineate in some detail the circumstances that led to the prosecution. While specific details of the event were elicited, we find that the questions which produced them should not be classified as leading questions, tortuous though they may be.

It is within the discretion of the trial court to allow considerable latitude in asking leading questions of young girls who are witnesses for the State. *People* v. *Kratz* (1925), 230 Mich 334. The examination of complainant as conducted by the prosecutor did not violate the rights of defendant.

In retrospect, we are constrained to say that had objection been raised timely during the trial, as it was not, this holding would not have been changed one iota. The jury heard the witnesses, evaluated their credibility based on the testimony offered, and the verdict should not be disturbed.

Affirmed.

WATTS, P. J., and HOLBROOK, J., concurred.

MUSIC *v.* NEW YORK CENTRAL RAILROAD COMPANY.

1. APPEAL AND ERROR—MOTION FOR DIRECTED VERDICT—EVIDENCE.
   The Court of Appeals views the evidence and draws reasonable inferences therefrom in the light most favorable to the opposite party on motion for a directed verdict or judgment, hence, facts testified to by the plaintiff are accepted as true.

2. RAILROADS — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE—EVIDENCE.
   Plaintiff motorist was properly found guilty of contributory negligence as a matter of law proximately causing his injuries when he ran into the side of the 92d car of defendant's freight train on a dark, clear, cold night, where the pavement was dry after skidding some 164 feet and bending over a standard for railroad crossbuck sign, since there was reckless driving and a failure so to drive as to be able to stop within the assured clear distance ahead (CLS 1961, §§ 257.626, 257.627).

3. SAME—SIDES OF FREIGHT CARS—LIGHTS—REFLECTORS—LUMINOUS PAINT MARKINGS.
   A railroad had no duty imposed by common law, or administrative regulation to equip the side of its freight cars with lights, reflectors, or luminous paint markings in 1962.

4. SAME—CONTRIBUTORY NEGLIGENCE—IRRELEVANT AND IMMATERIAL EVIDENCE.
   Testimony relating to pictures of railroad engines, cars, train control signals, and signs showing reflective materials, the cost thereof for use on sides of freight cars, evidence of certified copies of ICC reports as to grade crossing accidents in prior years, and of net profits of the railroad, were all immaterial and irrelevant, where trial court found plaintiff motorist's contributory negligence was the proximate cause of his injuries received in grade crossing accident.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 839, 849.
[2, 4] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 361, 369; 8 Am Jur 2d, Automobiles and Highway Traffic §§ 689, 958, 1006.
Liability for motor vehicle accident where vision of driver is obscured by smoke, dust, atmospheric condition, or unclean windshield. 42 ALR2d 13.
[3] 44 Am Jur, Railroads § 519.

Appeal from Calhoun; Ryan (Ronald M.), J. Submitted Division 3 January 4, 1966, at Grand Rapids. (Docket No. 914.) Decided March 9, 1966. Leave to appeal denied by Supreme Court May 11, 1966. See 377 Mich 710.

Declaration by Franklin D. Music against New York Central Railroad Company, a Delaware corporation, for damages for injuries allegedly occurring when an automobile driven by plaintiff struck defendant's train on May 4, 1962. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Kelly, Kelly & Kelly (*Phillip C. Kelly,* of counsel), for plaintiff.

Patrick E. Hackett, for defendant.

WATTS, P. J. This is a civil suit brought by plaintiff Franklin D. Music against the New York Central Railroad Company, a Delaware corporation, for damages arising out of personal injuries when the automobile plaintiff was driving struck a moving freight car. The court granted defendant's motion for directed verdict. Judgment was entered for the defendant, and plaintiff appeals. On May 26, 1965, a claim of appeal was filed in the Court of Appeals.

Plaintiff Music testified that he was familiar with the New York Central–18 1/2 Mile road crossing in Clarendon township, Calhoun county, and that he was cognizant of the existing conditions: a dark, clear night, cold weather, and dry pavement. Plaintiff testified that he was operating his automobile at a speed of 40–45 miles per hour with low beam lights. He did not see the defendant's freight cars until the car he was driving was approximately 100 feet from the train. He tried to stop the automobile and

turned the wheels of the car to the right. The car left the road and hit a railroad crossbuck sign and one of the defendant's freight cars. Plaintiff was seriously injured, and his automobile was damaged.

There is competent testimony that the train consisted of 3 engines, 126 freight cars, and a caboose; that the automobile driven by plaintiff hit the 92d freight car as it passed over the crossing at 18 1/2 Mile road; and that the 92d and 93d freight cars became separated in the accident.

A railroad warning sign was located approximately 300 feet south of the railroad crossing. This sign was a round, yellow disc with a cross and bearing the letters "R.R." The crossbuck sign struck by plaintiff's car was located 22 feet south of the track.

Frank Pettit, deputy sheriff of Calhoun county, testified that he observed skid marks 164 feet in length leading to the place of impact. The deputy sheriff also testified that when he arrived at the scene of the accident he observed that a piece of railroad track used as a standard for the crossbuck sign was bent to the ground.

Plaintiff Music alleges that in addition to the statutory and regulatory safety requirements for railroad companies, they have a common-law duty to equip the sides of railroad freight cars with lights, reflectors, or luminous paint markings which can be seen readily in the darkness.

It is the contention of the defendant that it has complied with all statutory and regulatory requirements, and that the railroad has used ordinary care and caution to maintain safeguards for the safety of the public.

The court ruled that the plaintiff was guilty of negligence as a matter of law and that his negligence was the proximate cause of the accident, resulting in his injuries. The court granted the defendant's

motion for a directed verdict of no cause for action and entered a judgment for the defendant.

The plaintiff requested the court to set aside the judgment for the defendant and to grant a new trial for the following reasons:

1. Rulings of the court sustaining objections of defendant to the following evidence offered by plaintiff and excluding such evidence:

(a) Pictures of railroad engines, cars, train control signals, and signs, showing the use of reflective materials thereon.

(b) Evidence of plaintiff's witness Vanderhill as to the cost to railroads of reflective products for use at the sides of freight cars, and evidence of this witness taken on a separate record.

(c) Certified copies of interstate commerce commission reports of numbers injured and numbers killed in rail-highway grade-crossing accidents in the years 1960 and 1961.

(d) Evidence on cross examination of the witness Kimbrough taken on a separate record.

(e) Evidence of net profits of defendant for the year 1964.

2. Ruling that plaintiff was guilty of negligence, which negligence was a proximate cause of plaintiff's injuries, as a matter of law.

3. Ruling that defendant was not guilty of willful and wanton misconduct and gross negligence, as a matter of law.

4. Ruling that defendant was not guilty of any negligence which was a proximate cause of plaintiff's injuries, as a matter of law.

5. Ruling that the evidence viewed in the light most favorable to plaintiff presented no question of fact as to negligence, contributory negligence, or willful or wanton misconduct, for the determination of the jury.

6. Directing the jury to return a verdict for defendant.

7. Entering judgment for defendant.

The issues in the main are:

Did the court err in ruling that the plaintiff was guilty of negligence as a matter of law and that the plaintiff's negligence was the proximate cause of the accident, resulting in his injuries?

Did the court err in granting defendant's motion for a directed verdict of no cause for action?

The record is clear and the citations extensive. The issues are well presented by counsel.

On motion for directed verdict or judgment, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the opposite party. *Fitzpatrick* v. *Ritzenheim* (1962), 367 Mich 326. Accordingly, the facts testified to by the plaintiff are accepted as true.

The record clearly indicates that plaintiff Music was operating his automobile without due circumspection, without due care and caution, and that he failed to use the same degree of care and caution an ordinarily prudent person would use under like or similar circumstances, and failed to stop the motor vehicle within the assured clear distance ahead.

It is our opinion that reasonable men would come to the same conclusion from the plaintiff's undisputed testimony. The trial court was correct in holding that the plaintiff was negligent as a matter of law and that his negligence was the proximate cause of the accident, resulting in his injuries; *i.e.,* reckless driving, CLS 1961, § 257.626 (Stat Ann 1960 Rev § 9.2326); failing to stop in assured clear distance ahead, CLS 1961, § 257.627 (Stat Ann 1960 Rev § 9.2327). See, also, *Baldinger* v. *Ann Arbor R. Co.* (1964), 372 Mich 685.

The facts in the instant case are distinguishable from the facts in the many cases cited by plaintiff. The crossing here is a clear view, open country crossing with 18 1/2 Mile road running straight

north and south and the New York Central Railroad tracks running east and west.

The plaintiff does not claim that the crossing is unusually dangerous, but does claim that the railroad breached its common-law duty in failing to equip the sides of its freight cars with lights, reflectors, or luminous paint markings. We have searched for one reported case holding that a railroad company has a common-law duty to so equip its freight cars. We have been unable to find that case.

The ICC and the subcommittee of the United States Congress have studied the advisability of recommending the installation of lights, reflectors, or luminous paint markings on freight cars without making recommendation as to proposed changes in the regulations or the existing laws. Docket #33440 (322 ICC 1, 70), entitled: Prevention of rail-highway grade-crossing accidents involving railway trains and motor vehicles.

There is no testimony to support plaintiff's contention that the railroad companies owe a common-law duty to install lights, reflectors, or luminous paint markings on the sides of freight cars.

It is our opinion that there is no such common-law duty. Furthermore, the testimony relating to pictures, testimony of witness Vanderhill, salesman of reflectors, certified copies of the ICC report entered in evidence, and evidence of net profits of defendant railroad are all immaterial and irrelevant.

Plaintiff has raised a moot question which has not been settled by judicial decisions and seeks to determine an abstract question which does not arise from the existing facts or rights. *Adams* v. *Union R. Co.*, 21 RI 134 (42 A 515, 44 LRA 273); *Smith* v. *Smith*, 209 Wis 605 (245 NW 644).

The Court has considered all plaintiff's allegations of error and find them to be without merit.

Judgment for the defendant affirmed. Costs to the defendant.

FITZGERALD and HOLBROOK, JJ., concurred.

MURPHY v. CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—NOTICE—SUNDAY.

   The statute permitting one sustaining damages by reason of injuries to person or property because of a defect in a sidewalk in a city street requires that written notice be served upon the city within 60 days from time of happening of the injury, and Sunday is not precluded from being counted as the last of the 60 days (CL 1948, § 242.8).

2. SAME—PERSONAL INJURIES—NOTICE OF CLAIM—STATUTES—LIBERAL CONSTRUCTION.

   Statutes requiring notice to municipal corporations of claims for personal injuries are liberally construed, and relief is not denied when, by any reasonable interpretation, the notice can be said to be in substantial compliance with the statute, or the defect in the notice has been effectively waived by the council (CL 1948, § 242.8).

3. SAME—DEFECTIVE SIDEWALK—NOTICE OF CLAIM—WAIVER BY ORDINANCE.

   The statutory requirement that notice of claim for personal injury alleged to have been due to defect in a city sidewalk may be waived by an ordinance adopted before the happening of the injury (CL 1948, § 242.8).

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 25 Am Jur, Highways § 437 *et seq.*; 38 Am Jur, Municipal Corporations § 593.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body. 65 ALR2d 1278.

[6] 5 Am Jur 2d, Appeal and Error § 1009.

4. SAME—DEFECTIVE SIDEWALK—STATUTORY NOTICE OF CLAIM—COMPUTATION OF TIME—WAIVER—ORDINANCE.

Statutory notice of claim for personal injury, alleged to be due to defective sidewalk and required to be served upon city within 60 days, *held,* to have been received timely, where last of 60-day period fell on Sunday, city ordinance excluded such day from computation, and notice was received on the next day, strict compliance with the statute having been waived by proper municipal authority, and there being no pertinent statutory computation of time (CL 1948, § 242.8, Detroit Municipal Code, pt 2, chap 1, § 1–1–2).

5. SAME—DEFECTIVE SIDEWALK—NOTICE OF CLAIM—LIMITED NEW TRIAL.

New trial, limited to determination of damages, is ordered in action against city for injuries alleged to have been sustained by reason of long-standing defect in city sidewalk, where trial judge had determined that the sidewalk was defective, that plaintiff was not guilty of contributory negligence, and that the defect was the proximate cause of plaintiff's injuries, but that plaintiff's failure to give notice within 60-day period as provided by statute barred recovery, and Court of Appeals determines that strict compliance with statute had been so waived by city ordinance that where 60-day period ended on Sunday receipt of notice on following day was timely (CL 1948, § 242.8; Detroit Municipal Code, pt 2, chap 1, § 1–1–2).

6. COSTS—PUBLIC QUESTION—WAIVER OF NOTICE.

No costs are allowed in action to recover damages from city for personal injuries sustained by reason of defective sidewalk in defendant city, a public question being involved in determining whether statutory requirement that notice of claim be served within 60-day period that ended on a Sunday was waived by city ordinance adopted prior to happening of injury (CL 1948, § 242.8; Detroit Municipal Code, pt 2, chap 1, § 1–1–2).

Appeal from Wayne; Stephens (Rupert B.), J., presiding. Submitted Division 1 January 5, 1966, at Detroit. (Docket No. 413.) Decided March 9, 1966. Rehearing denied April 15, 1966.

Declaration by Frank Murphy against City of Detroit, a municipal corporation, for injuries allegedly arising from a fall on a public sidewalk.

Judgment for defendant. Plaintiff appeals. Reversed and remanded for limited new trial.

Goodman, Crockett, Eden, Robb & Philo (*George W. Crockett, Jr.,* of counsel), for plaintiff.

Robert Reese, Corporation Counsel, and *Alfred Sawaya* and *Andrew F. Valenti,* Assistants Corporation Counsel, for defendant.

LESINSKI, C. J. This cause comes on appeal from a judgment of no cause of action granted in favor of the defendant in the circuit court for the county of Wayne. The plaintiff Frank Murphy sought recovery for alleged personal injuries suffered because of a fall on a defective sidewalk at 3163 Arndt in Detroit, Michigan, on May 18, 1960. It is plaintiff's contention that his injuries were the proximate result of the defendant's failure to inspect, construct, repair, and maintain said sidewalk in a manner reasonably safe and fit for public use and free from such hazards. To these allegations, the defendant answered and additionally raised an affirmative defense of noncompliance with the statutory notice requirement, CL 1948, § 242.8 (Stat Ann 1958 Rev § 9.598),[1] which requires that the city receive written notice of the accident within 60 days of its occurrence. Though plaintiff sent notice by registered mail on July 15, 1960, the 58th day, the notice was not received by the city until July 18, 1960, the 61st day. The two intervening days were Saturday and Sunday and the city clerk's office was closed. The trial court ruled in favor of the defendant that notice had not been timely filed and granted a no

[1] This statute has been repealed by PA 1964, No 170 (CL 1948, § 691.1401 *et seq.* [Stat Ann 1965 Cum Supp § 3.966(101) *et seq.*]), but this would have no bearing on the outcome of this cause of action as the effective date of PA 1964, No 170 was July 1, 1965 (CL 1948, § 691.1415 [Stat Ann 1965 Cum Supp § 3.996(115)]).

cause for action. From this ruling plaintiff takes appeal.

The question before this Court revolves around the terminal day of the 60-day notice period of the statute. When this terminal day falls on a Sunday, is notice delivered the following Monday sufficient and valid notice?

The statute, effective whenever municipalities have enacted notice ordinances such as the city of Detroit has, reads in its relevant parts as follows:

"In the event damages are sustained by any person, either by bodily injuries or to his property, because of the defective condition of any highway, street, bridge, *sidewalk,* crosswalk or culvert in any city or incorporated village of this State where written notice of such inquiry [injury] and defect is now required by law to be served upon such village or city before recovery can be had, it *will be necessary to show that such person did serve written notice upon said city or village within 60 days from the time of the happening of such injury.*" (Emphasis supplied.)

On its face, this statute clearly requires actual notice to be served on the municipality to be charged within 60 days. There was no computation of time provision included within the statute that would preclude the counting of the 60th day even if it fell on a Sunday. Nor has the legislature enacted a general computation of time statute that would exclude Sunday from the computation schedule.

Thus, unless the defendant has waived its right to enforce this notice requirement, plaintiff's notice will have to be construed as untimely.

In *Ridgeway* v. *City of Escanaba* (1908), 154 Mich 68, the Court says at page 70:

"We have been inclined to favor a liberal construction of statutes requiring notice of claims, and

have not denied relief which by any reasonable interpretation the notice could be in substantial compliance with the statute, or *where the defect had been waived by council.*" (Emphasis supplied.)

See, also, *Foster* v. *Village of Bellaire* (1901), 127 Mich 13, 14, and cases cited therein; *Lindley* v. *City of Detroit* (1902), 131 Mich 8, 9, and cases cited therein; *Swanson* v. *City of Marquette* (1959), 357 Mich 424, 431, and cases cited therein.

The cases cited deal with subsequent waiver by actions taken by city councils. This Court sees no distinction between subsequent waiver of notice in an action, or waiver in the form of an ordinance of the city enacted prior to the arising of this cause of action.

The city of Detroit, Municipal Code, part 2, chap 1, § 1–1–2, contains a computation of time section which reads as follows:

"Unless otherwise specified the time within which an act is required by law to be done shall be computed by excluding the first day and including the last, *except that the last shall be excluded if it be Sunday or a legal holiday.*" (Emphasis supplied.)

This section of the municipal code enacted by the city's common council the Court deems to be an effective waiver of strict compliance with the statute in those claims in which notice is received on the 61st day wherein the 60th day falls on a Sunday.

The waiver, as in this case, to be effective must be authorized by the proper authority of the municipality involved and cannot be effected by the mere action or inaction of any of its agents. See *Holtham* v. *City of Detroit* (1904), 136 Mich 17, 20; *Rottschafer* v. *East Grand Rapids* (1955), 342 Mich 43, 52; *Boike* v. *City of Flint* (1965), 374 Mich 462, 464.

Judgment of the trial court is reversed and this cause is remanded to the circuit court for the county of Wayne for trial, limited to the determination of damages, the trial judge having found a long-standing defect in the sidewalk, that the plaintiff was not guilty of contributory negligence, and that this defect was the proximate cause of the plaintiff's injuries. No costs, public question.

J. H. GILLIS and QUINN, JJ., concurred.

In re ARNSON ESTATE.

BRIDGERS *v.* ARNSON.

1. WITNESSES—ATTORNEY AND CLIENT—WAIVER OF PRIVILEGE OF SECRECY.

   The privilege of secrecy which attaches to what passes between attorney and client is the privilege of the client, and he may waive it if he so chooses.

2. SAME—ATTORNEY AND CLIENT—WAIVER OF PRIVILEGE—READOPTION.

   The privilege of secrecy which attaches to a communication between an attorney and client, once waived, is waived for all time and may not later be readopted as the advantage of the client dictates.

3. EVIDENCE—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATION—WAIVER.

   Testimony of 2 attorneys as to what they had told client, adduced on *de novo* trial in circuit court of proceeding to probate a

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 58 Am Jur, Witnesses §§ 519, 522 *et seq.*
Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 ALR2d 521.
[4–8] 57 Am Jur, Wills §§ 866, 867.
[9, 10] 5 Am Jur 2d, Appeal and Error § 622.

will was properly admitted, where client had previously testified in probate court that both attorneys knew of the will and gave her incorrect advice regarding it, since she thereby waived any privilege which she possessed.

4. WILLS—EXECUTION—ATTESTATION CLAUSE—PRESUMPTION.

A presumption arises that a will was executed in accordance with the recitation contained in a complete attestation clause, where such a clause is present.

5. SAME—ATTESTATION CLAUSE—PRESUMPTIONS—EVIDENCE.

A complete attestation clause in a will raises a presumption that the will was executed in accordance with the recitation therein that is not overcome by testimony of 1 of the attesting witnesses that he did not see the testator sign his name, did not see the testator's name, and that testator did not expressly say to them that he had signed it, especially where there is presented contradictory testimony in support of the due execution (CL 1948, § 702.5).

6. SAME—ATTESTATION CLAUSE—PRESUMPTION OF VALIDITY—REBUTTAL.

The general rule that discrepancies in the testimony of attesting witnesses to a will such as the day of the week when the will was executed or that a particular pen was used, would not, standing alone, defeat the presumption of validity, but when such testimony is coupled with the testimony of attorneys casting grave doubt on the validity and very existence of the attestation, the presumption could be successfully rebutted.

7. SAME—ATTESTATION CLAUSE—PRESUMPTION OF VALIDITY—REBUTTAL.

The presumption of validity arising from the presence of a complete attestation clause in a will is rebuttable.

8. SAME—ATTESTATION CLAUSE—FINDING OF PROBATE AND CIRCUIT COURTS.

Finding of probate and circuit courts that second instrument presented by proponent as the last will of deceased did not meet the statutory requirements is not disturbed under record presented that contains evidence casting grave doubts as to validity or existence of the attestation clause (CL 1948, § 702.5).

9. TRIAL—REMARKS OF TRIAL JUDGE.

Unsolicited remarks or expressions of ill humor by the trial court are best judged in the light of the circumstances under which they are made.

10. TRIAL—WILL CONTEST—REMARKS OF TRIAL COURT.

Trial court's remarks that actions of divorced wife of decedent, proponent of at least 2 instruments for probate "are reprehensible and she should be penalized and in any event not allowed to profit by such tactics" *held,* not to constitute reversible error, where he reached the proper decision and used valid legal reasoning.

Appeal from Antrim; Brown (Charles L.), J. Submitted Division 3 January 5, 1966, at Grand Rapids. (Docket No. 1,177.) Decided March 9, 1966.

In the matter of the estate of Aaron George Arnson, deceased. Ben Louise Bridgers, divorced wife of deceased, presented a second will for probate. Will denied probate. Proponent appealed to circuit court. Affirmed. Proponent appeals. Affirmed.

Roger Watson, for proponent.

Harry T. Cook, for heirs-at-law.

FITZGERALD, P. J. This statement, taken from the circuit court decision in the instant case,

"In the opinion of this court she has attempted to perpetrate a fraud on this court and the probate court"

stands out like a rubric and piques the legal and intellectual curiosity of the reader.

This quotation from the trial court's opinion refers to the appellant, Ben Louise Bridgers, proponent of the will at issue.

Involved is the estate of Aaron George Arnson, a prolific writer of wills. More specifically, this appeal concerns three "last wills and testaments" of the deceased, and the attempts of the Antrim county

probate and circuit courts to find which, if any, is valid.

Mr. Arnson died on May 6, 1960. On May 10th, a petition praying for appointment of an administrator was filed by his brother, G. David Arnson. The following day, Ben Louise Bridgers, the divorced wife of the deceased, filed an instrument purporting to be his last will and testament in which she was named executrix and sole devisee and legatee. This will was dated April 20, 1934, and was admitted to probate, G. David Arnson's petition for appointment of an administrator being dismissed.

Following this action by the probate court, the heirs-at-law of the decedent appealed to circuit court. The appeal terminated in a stipulation between the parties that Mr. Arnson's heirs-at-law and Mrs. Bridgers would each take one-half of the estate and that Mrs. Bridgers be appointed administratrix.

Mrs. Bridgers subsequently failed to qualify as administratrix and on March 26, 1962, appeared once again in probate court with a new attorney and filed a second document asking that this be admitted to probate as the last will and testament of the decedent. It is the admission of this "second will" to probate which concerns us here.

The second will is dated April 17, 1955, is holographic, and, *inter alia,* bequeaths property to a brother and sister in Sweden, a brother in Minnesota, leaving two-thirds of the residue to Ben Louise Bridgers and the remaining one-third to her daughter. The witnesses on this will were Mrs. Bridgers' husband, Alden L. Bridgers, and Mrs. Bridgers' maid, Daisy Orr Jones.

At the probate court hearing on the admission of the second will to probate, depositions taken in Florida from Mrs. Bridgers' husband and from her maid were admitted into evidence. In addition, Mrs.

Bridgers testified in person, as did two of her former attorneys, James R. Zerafa and Walter O'Hair.

During the hearing, a third instrument having the form of a last will and testament of Aaron George Arnson was introduced into evidence. This instrument was holographic, but lacked the signature of witnesses, and has not been urged for admission to probate.

At the conclusion of the hearing, the probate judge stated that, on the basis of all the evidence, it was the opinion of the court that the instrument identified as the second will was not, in fact, the last will and testament of Aaron George Arnson and therefore should not be admitted to probate.

The findings of the probate judge include, *inter alia,* the observation that Mrs. Bridgers had the second will in her possession at the time she offered the first will for admission to probate. She did not produce the purported second will until some two years after admission of the first will and after entering into the stipulation giving one-half the estate to herself and one-half to the heirs.

The reason for the delay in offering the second will, according to Mrs. Bridgers, was the alleged advice of her former attorneys, Mr. Zerafa and Mr. O'Hair. The alleged advice being that the second will was "not notarized and therefore invalid." The testimony of the attorneys did not confirm this allegation.

The probate court further found that both of the subscribing witnesses to the second will were certain that they could not have witnessed the will on a Sunday, although the date of the will falls on a Sunday. The court also noted that while both subscribing witnesses testified that they signed the will with the same pen used by the decedent in making his signature, it appeared that the signature of the

testator had been made with an ink pen while those of the witnesses were made with a ball point pen.

The denial of admission to probate was appealed to the circuit court for the county of Antrim. On proceedings there, the only person appearing on behalf of appellant was her present attorney who placed the second will in evidence, together with the depositions of the two subscribing witnesses, and then rested.

The opponents of the second will produced a handwriting expert who testified that the signature of the testator and the signature of the witnesses were not made with the same pen. Attorney Zerafa testified, stating that he had never seen the second will prior to the probate hearing and that he had never advised Mrs. Bridgers that any will was invalid because it was not "notarized". Attorney O'Hair testified that he had seen the second will in Altamonte Springs, Florida, in 1961, but at that time it had not been witnessed. He denied that he had ever advised Mrs. Bridgers that the second will was invalid because it was not "notarized".

No rebuttal testimony was offered on behalf of Mrs. Bridgers.

The circuit judge filed an opinion affirming the decision of the probate court denying admission to probate of the second will. He further held that the earlier order of the circuit court made in pursuance of the stipulation that proponent and heirs share equally in the estate was to be of no further force and effect, and that admission to probate be denied on the first will, it having been revoked by the divorce of the Arnsons.

From these proceedings, it can be readily ascertained that Mrs. Bridgers and her daughter take nothing from the estate, both wills being denied admission to probate.

Mrs. Bridgers appeals, contending that the second will was executed in the manner required by statute and that the testimony of the subscribing witnesses was such as would require admittance of that will to probate.

She also contends that the circuit court should have disallowed the testimony of her former attorneys in the trial *de novo* in circuit court and that comments on the conduct of Mrs. Bridgers by the circuit judge in his opinion, while not relevant, were weighed in determination of the admissibility of the second will to probate.

Our task is to cut through the confusion and conjecture and determine whether Aaron George Arnson left any *valid* last will and testament.

Since the entire matter hinges upon the proper attestation of the second will, we turn first to appellant's contention that Attorneys Zerafa and O'Hair should not have been allowed to testify in the trial *de novo* in circuit court and to present their uncontradicted testimony that the second will was not witnessed when seen by Attorney O'Hair, and that Attorney Zerafa had not seen the will until it was presented to him previously in probate court.

The question comes down to a consideration of whether Mrs. Bridgers, by testifying in probate court as to what was told her by her former attorneys, has forever waived any privilege which might have existed between them, or whether that privilege re-attaches in a trial *de novo* in circuit court, effectively sealing the lips of the two attorneys there.

In resolving this question, we must first acknowledge that the attorney-client privilege existed on these facts.

That the privilege may be waived, however, was commented upon early in Michigan jurisprudence in the case of *Passmore* v. *Passmore's Estate* (1883), 50 Mich 626, wherein Justice COOLEY stated the gen-

eral rule that (p 627): "There is a privilege of secrecy as to what passes between attorney and client, but is the privilege of the client and he may waive if it he so chooses."

Did Mrs. Bridgers waive any claim to the privilege in circuit court by her previous testimony in probate court?

The matter appears to be one of first impression, and, in our view, to be susceptible to only one conclusion: that in these circumstances the privilege between attorney and client, once waived, is waived for all time and may not later be readopted as the advantage of the client dictates. Mrs. Bridgers, by testifying in probate court that both attorneys knew of the will and gave her incorrect advice regarding "notarization" of a will, waived any privilege which she possessed. This being true, testimony of the attorneys was properly admitted in the later circuit court hearings.

In *Green* v. *Crapo* (1902), 181 Mass 55 (62 NE 956), it was held that where a party in a probate court proceeding waives his objection to the admission of certain privileged communications, such objection cannot later be invoked in a trial on appeal to a higher court.

The logic of Holmes, C. J., in *Green,* applies with equal vigor here (p 62): "The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain under such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice."

Having determined that the testimony of the two attorneys was properly admitted in the *de novo* circuit court hearing, we come to the heart of the question of the validity of the will. Specifically, was the will in question properly executed?

In *In re Dalton Estate* (1956), 346 Mich 613, 624, the general rule is stated, "It is well established that where there is a complete attestation clause a presumption arises that the will was executed in accordance with the recitation therein."

In *Utley* v. *First Congregational Church* (1962), 368 Mich 90, it was held:

"A complete attestation clause in a will raises a presumption that the will was executed with the recitation therein and is not overcome by testimony by 1 of the attesting witnesses that he did not see the testator sign his name, did not see the testator's name and that testator did not expressly say to them that he had signed it, especially where there is presented contradictory testimony in support of the due execution." (Syllabus 5.)

Under the general rule, the alleged discrepancies in the testimony of the attesting witnesses (as to the day of the week on which the will was executed and the pen used to affix the signatures of the testator and his witnesses) would not, standing alone, defeat the presumption of validity. Coupled, however, with the testimony by Attorneys Zerafa and O'Hair casting grave doubt on the validity, or even the very existence of the attestation, we see why the trial court could handily reach the conclusion expressed in its opinion, and perhaps why it felt constrained to comment in the harsh terms set forth in the first paragraph of this opinion.

It cannot be seriously contended that the presumption of validity which exists in Michigan may not be rebutted.

The statutory requirements for a valid will in Michigan, as found in CL 1948, § 702.5 (Stat Ann 1962 Rev § 27.3178 [75]) are explicit:

"No will made within this State, . . . shall be effectual to pass any estate, whether real or per-

sonal, nor to charge or in any way affect the same, unless it be in writing and signed by the testator or by some person in his presence, and at his express direction and attested and subscribed in the presence of the testator by 2 more competent witnesses."

The finding of the probate and circuit courts that the second will did not meet these requirements will not be disturbed.

Appellant's final contention that the trial judge colored his decision by judgment of Mrs. Bridgers' conduct we do not deem to be well taken. It is true that the trial court's opinion contains this statement, "Her actions in this case are reprehensible and *she should be penalized and in any event not allowed to profit by such tactics*". (Emphasis supplied.) While this observation certainly was not necessary to the proper decision of the case, it does not alter the fact that the trial court reached the proper decision using valid legal reasoning. Unsolicited remarks or expressions of ill-humor are best judged in the light of the circumstances under which they are made. *Patrick* v. *Carrier-Stevens Company* (1959), 358 Mich 94.

After exhaustively reviewing the record before us, we find it difficult not to make an observation ourselves. As ably stated by Thoreau: "Some circumstantial evidence is very strong as when you find a trout in the milk."[1]

Affirmed.

J. H. GILLIS and HOLBROOK, JJ., concurred.

[1] 8 Writings of Henry David Thoreau, Journal, November 11, 1850 (Torrey Ed.) p 94.

GREEN *v.* LUNDQUIST AGENCY, INC.

1. JUDGMENT—SUMMARY JUDGMENT—ISSUES OF FACT.
   Court rule provision that judgment be rendered forthwith if pleadings show a party entitled to judgment as a matter of law or if affidavits or other proof show there is no genuine issue of fact does not permit the balancing of defendants' sworn allegations of fact against unsworn allegations of plaintiff's complaint (GCR 1963, 117.2[3], 117.3).

2. SAME—SUMMARY JUDGMENT—AFFIDAVITS—OTHER MATTERS.
   The trial judge to whom a defendant's motion for summary judgment is addressed is not limited to a consideration of the affidavits supporting and opposing the motion, but may also consider pleadings, depositions, admissions, and documentary evidence then filed (GCR 1963, 117).

3. MASTER AND SERVANT—INTERFERENCE WITH RELATION—SUMMARY JUDGMENT—ISSUE OF FACT.
   Summary judgment for defendant insurance agency and its officer who wrote letter to plaintiff truck driver's employer complaining about plaintiff's carelessness and suggesting cancellation of the employer's insurance *held*, proper, in action for interference with employment relation, where defendants' uncontroverted affidavits disclosed an adequate basis for plaintiff's discharge and explicitly negate any factual basis for a claim of an unlawful interference by the defendants (GCR 1963, 117).

Appeal from Wayne; Rashid (Joseph G.), J. Submitted Division 1 January 6, 1966, at Detroit. (Docket No. 999.) Decided March 9, 1966.

Complaint by Phillip Green against Lundquist Agency, Inc., a Michigan corporation, and L. H. Lundquist for damages arising from plaintiff's dis-

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 41 Am Jur, Pleading § 340 *et seq.*

charge upon his employer's receipt of a letter written by defendants. Summary judgment for defendants. Plaintiff appeals. Affirmed.

Norman P. Silverstein, for plaintiff.

Alexander, Buchanan & Conklin (*Floyd Westcott,* of counsel), for defendants.

J. H. GILLIS, J. Plaintiff had been employed for some 12 years by the Dinverno Sons Trucking Company as a truck driver and during said employment period had been convicted of many traffic violations and had been involved in several traffic accidents.

On April 23, 1963 defendants sent the following letter to plaintiff's employer:

"April 23, 1963

"Dinverno Sons Trucking
24830 Ryan Road
Warren, Michigan
"Att: Guido Dinverno
"*Dear Guido:*

"The purpose of a safety engineering program is, of course, accident prevention, which, in turn creates insurability and sound premium structure.

"Over the years, insurance companies have found that persons who develop poor driving records with tickets and accidents continue to be lax in their driving habits.

"I have forwarded Philip Green's record to you for your attention. We cannot continue your program if we have to guarantee financial security for carelessness of this nature.

"Please reply by May 3d, so I can relay your action to our safety director.

"Yours truly,
LUNDQUIST AGENCY, INC.
L. H. LUNDQUIST
Executive Vice-President

"LHL/cl"

Shortly after the defendants' letter was received by plaintiff's employer, the plaintiff was discharged. Plaintiff then commenced suit in the Wayne county circuit court contending that the sending of the letter by the defendants was an unlawful interference with his employment contract because it threatened to cancel the employer's insurance coverage. In their answer defendants admitted sending the letter, but denied that it "was calculated to do other than help correct the plaintiff's bad driving habits," and further denied that their conduct caused the discharge of the plaintiff. Subsequently defendants filed a motion for summary judgment which was supported by affidavits of the individual defendant and of the plaintiff's employer. The affidavits alleged that the loss ratio, or number of at-fault accidents, was an important factor considered by the insurance company in determining whether or not the company would continue to insure the given risk, which in this instance was the Dinverno Sons Trucking Company; that plaintiff was involved in numerous at-fault accidents; and that there was no wilful or wanton maliciousness on the part of the defendants in sending the letter in question to the trucking company, but that they were merely following the usual and customary procedure utilized by insurance companies.

The affidavit of Mr. Dinverno stated that plaintiff:

"On many different occasions, was involved in accidents with company trucks, due to his negligent and careless handling in operation of the trucks, and at one time, suffered a black-out while driving one of the company trucks."

The affidavit continued:

"That the dismissal of Philip Green was without any willful and wanton maliciousness on the part of Dinverno & Sons Trucking Company, but merely to

protect not only the good will of Dinverno & Sons Trucking Company and customer relationships, but also the contractual relationship with Lundquist Agency, Inc., and L. H. Lundquist."

The only affidavit filed on behalf of the plaintiff in opposition to the motion for summary judgment was that of his attorney. This affidavit did not controvert any of the factual allegations of the defendants' affidavits, but merely averred that defendants' affidavits "merely sets [*sic*] forth facts or evidence in opposition to or in defense against plaintiff's claim and, as such, raise issues of fact for consideration by the trier of the facts."*

Consistent with the position he took in the lower court, plaintiff states as one of the questions involved on appeal:

"Do the *pleadings* raise a genuine factual issue?" (Emphasis supplied.)

Plaintiff wants us to balance the defendants' sworn allegations of fact against the unsworn allegations of the plaintiff's complaint and thus determine whether there is a factual issue to be tried. We do not read the applicable court rules as sanctioning such a procedure. GCR 1963, 117.3 provides in part that:

"Judgment shall be rendered forthwith if the pleadings show that any party is entitled to judgment as a matter of law *or if the affidavits or other proof* show that there is no genuine issue of fact." (Emphasis supplied.)

If we were to give Rule 117 the narrow construction contended for by the plaintiff, summary judgments for a defendant would be allowed only when the plaintiff's complaint considered by itself failed

* Plaintiff's affidavit likewise complained of the alleged conclusionary nature of the defendants' affidavits. We deem this contention is without merit.

to state a cause of action. Such a construction would strip Rule 117.2(3) of any meaning.

We do not mean to imply that the trial judge should dispose of a motion for summary judgment by referring only to the affidavits in support of and in opposition to the motion. The rule specifically directs that the affidavit shall be considered "together with the pleadings, depositions, admissions and documentary evidence then filed." But what the court shall consider are the affidavits, the pleadings and other matters referred to in the rule being merely the background in which the affidavits must be considered. If, as here, the affidavits in support of the motion for summary judgment stand on the record uncontroverted by any opposing affidavits, depositions, or exhibits, then the allegations in the opponent's unsworn pleadings should not deprive the party of his right to summary judgment.

We also note that at no time prior to judgment or later in his motion for rehearing did plaintiff ever suggest that he be allowed to take depositions under GCR 1963, 117.3.

Since the uncontroverted affidavits of the defendants disclose an adequate basis for the plaintiff's discharge and the affidavits likewise explicitly negate any factual basis for a claim of an unlawful interference by the defendants, we affirm the judgment of the lower court, with costs to appellees.

LESINSKI, C. J., and QUINN, J., concurred.

In re ALBERT L. WHITE.

1. EXTRADITION—COMMITMENT WITHOUT WARRANT OF GOVERNOR—NUMBER OF COMMITMENTS.

   Commitment of accused, arrested without warrant of governor as a fugitive from another State, may, in the event bail is not posted, be to the custody of the county sheriff for a period of 30 days and, then, for *one* additional period which is not to exceed 60 days (CL 1948, § 780.16).

2. SAME—THREE COMMITMENTS OF ACCUSED.

   Accused, who was committed 3 different times, to the custody of the county sheriff, for a period of 30 days each *held*, unlawfully detained as the statute provides for a maximum of 2 commitments (CL 1948, §§ 780.14, 780.16).

3. HABEAS CORPUS—UNLAWFUL COMMITMENT UNDER EXTRADITION STATUTE.

   Habeas corpus will lie to discharge an accused who was unlawfully committed, as a fugitive from another State, to the custody of the county sheriff under the extradition statute (CL 1948, §§ 780.14, 780.16).

Albert L. White presented a complaint for habeas corpus against the sheriff of St. Clair county after Streeter (Halford I.), J., had committed him to jail for a third time to await extradition to Missouri. On motion to show cause, writ issued. Submitted Division 2 February 9, 1966, at Detroit. (Docket No. 1,762.) Defendant ordered discharged February 9, 1966. Opinion filed March 9, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 22 Am Jur, Extradition § 51.

[3] 22 Am Jur, Extradition §§ 54, 55; 25 Am Jur Habeas Corpus § 67 *et seq.*

Determination, in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged. 40 ALR2d 1151.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *J. T. Corden,* Prosecuting Attorney, and *John G. Cummings,* Assistant Prosecuting Attorney, for the people.

James M. Kelly, for Albert L. White.

J. H. GILLIS, P. J. On December 3, 1965, pursuant to a telephone call from the State of Missouri, the Memphis, Michigan, police department arrested defendant herein as a fugitive from the State of Missouri.

On Monday, December 6, 1965, the defendant was arraigned on a fugitive warrant before a justice of the peace in Port Huron township. The defendant waived examination and was bound over to the St. Clair county circuit court. Later that same day defendant appeared before the circuit judge and pursuant to CL 1948, § 780.14 (Stat Ann 1954 Rev § 28.1285[14]) defendant was committed to the county jail for 30 days, the defendant having been unable to post a $2,000 bond set by the court.

On January 4, 1966, defendant's counsel appeared before the St. Clair county circuit court and requested his release. The court denied the motion and recommitted defendant for an additional 30 days pursuant to CL 1948, § 780.16 (Stat Ann 1954 Rev § 28.1285[16]), which provides:

"If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section 15, but within a period not to exceed 60 days after the date of such new bond."

On February 3, 1966, defendant's attorney again appeared before the circuit court and requested the release of defendant. The court denied the motion and recommitted the defendant for a third 30-day period, defendant again being unable to post the required bond. Defendant's counsel contended that CL 1948, § 780.16 (Stat Ann 1954 Rev § 28.1285[16]) did not authorize the third commitment and argued that while the court could have committed defendant to jail for a period of 60 days on his second appearance before the circuit judge, section 16 did not authorize two 30-day jail sentences.

Defendant then secured a writ of habeas corpus in this Court directing the sheriff of St. Clair county to make return at a hearing conducted by this Court. The St. Clair county prosecuting attorney's office appeared representing the sheriff of said county and, in answer, contended that the circuit court had the authority under section 16 to recommit the defendant inasmuch as the total commitment period did not exceed 90 days. The prosecutor further contended that the court has no limitation on the number of commitments it may issue as long as the aggregate number of days does not exceed the maximum authorized by section 16.

This Court holds that the use of the article "a" appearing in the phrase "a further period" authorized the lower court to recommit *one* time while awaiting the execution of the governor's warrant. It is interesting to note that the New York version of the uniform criminal extradition act has clarified this situation by authorizing several commitments as long as the aggregate does not exceed 60 days. It provides in the pertinent part:

"A justice, judge or magistrate may discharge him or may recommit him for a further period of 60 days, *or for further periods not to exceed in the*

aggregate 60 days." (Emphasis supplied.) 66 McKinney's Consolidated Laws of New York, Code of Criminal Procedure, Part 3, § 846, p 203.

The defendant is ordered discharged from the custody of the sheriff of St. Clair county.

FITZGERALD and WATTS, JJ., concurred.

BURG *v.* B & B ENTERPRISES, INC.

1. PARTIES—INTERVENTION BY STOCKHOLDER—ACTION AGAINST CORPORATION.

   Intervention as a matter of right by stockholder in suit against the corporation requires showing that corporation is not adequately defending the stockholder's interests (GCR 1963, 209.1[4]).

2. SAME—INTERVENTION—COMMON ISSUE OF LAW OR FACT—DISCRETION OF COURT.

   Right to intervene should be granted, where there is a common question of law or fact, unless court in its discretion determines that intervention would delay or prejudice the adjudication of the rights of the original parties (GCR 1963, 209.2).

3. SAME—INTERVENTION—COMMON ISSUE OF LAW OR FACT—PREPONDERANCE OF EVIDENCE.

   Determination by trial court that there was no issue of fact or law common to the claim of petition to intervene and that

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REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur, Parties § 69.
19 Am Jur 2d, Corporations §§ 574, 575.
[2] 39 Am Jur, Parties §§ 55–57, 75.
[3] 39 Am Jur, Parties § 75.
[4] 39 Am Jur, Parties § 123.
41 Am Jur, Pleading §§ 288, 293.
[5] 41 Am Jur, Pleading § 294.

of the plaintiff in the case *held,* in conflict with the preponderance of evidence in deposition, interrogatories, and pleadings, making denial of intervention an abuse of discretion (GCR 1963, 209.2).

4. PLEADING—AMENDMENT—DISCRETION OF COURT.
Leave to amend should be freely given unless court finds that justice would not be served by the amendment (GCR 1963, 118.1).

5. SAME—AMENDMENT—DISCRETION OF COURT.
Amendment of answer in action for repayment of debt should have been granted where deposition, interrogatories, and pleadings reveal that justice would be served thereby (GCR 1963, 118.1).

Appeal from Oakland; Thorburn (James S.), J. Submitted Division 2 November 4, 1965, at Lansing. (Docket No. 291.) Decided March 22, 1966.

Complaint by Saul Burg against B & B Enterprises, Inc., a Michigan corporation, for failure to repay loans of money. Defendant's motion to amend answer and state a counterclaim denied. Motion by Jean Burg to intervene as defendant denied. Summary judgment for plaintiff. Defendant appeals. Reversed and remanded.

Schon & Wise (*Stanley E. Wise,* of counsel), for plaintiff.

Watson, Lott & Wunsch (*Fred H. Keidan,* of counsel), for defendant.

T. G. KAVANAGH, J. This is an appeal from a summary judgment for plaintiff following the denial of a motion for leave to file an amended answer and counter complaint and a motion for leave to intervene.

The complaint alleged a loan of money to defendant and demand and refusal to repay. The answer was a simple denial.

After a considerable time—almost a year—during which a deposition was taken, a request for admission of facts and genuineness of documents was made and answered, and written interrogatories presented and answered, the motion for summary judgment was made by plaintiff. At the hearing on such motion the defendant made the motion for leave to amend and a third party moved for leave to intervene.

The answer to plaintiff's interrogatories and the deposition of Jean Burg, a 50% stockholder in defendant corporation, was to the effect that plaintiff owed Jean Burg approximately $20,000 and that the payment by plaintiff to defendant corporation was in discharge of this obligation.

The petition for leave to intervene alleged facts establishing the same charge and constituted the basis for the defendant's proposed amended answer and cross complaint.

We will treat the court's ruling on the motion to intervene first. The motion averred that the petitioner, as a substantial (50%) shareholder in defendant corporation, would be adversely affected by a judgment against the corporation, and that the petitioner personally had a claim against plaintiff which had questions of law and fact common to the main action.

Motions for leave to intervene are governed by GCR 1963, 209, the pertinent part of which reads:

".1 Intervention of Right. Anyone shall be permitted to intervene in an action * * *

"(4) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject

to the control or disposition of the court or officer thereof.

".2 Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action * * *

"(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

"In all cases the court, in exercising its discretion, shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

We believe the right to intervene contemplated in GCR 1963, 209.1(4) asserted by a stockholder in a suit against the corporation in which the stock is owned, must be established by a showing that the corporation is not adequately defending the stockholder's interest. This is necessary in order to show that he is "so situated" as required. We feel this is in line with the rationale set forth in 18 CJS, Corporations, § 560, p 1276; *City of Detroit* v. *Dean* (1883), 106 US 537 (1 S Ct 560, 27 L ed 300); and *Stradley* v. *Chippewa Circuit Judge* (1893), 96 Mich 287.

Accordingly it cannot be said that the petitioner could intervene as a matter of right.

However, the common question of law and fact alleged should be the basis for granting the motion for leave to intervene unless the court in his discretion determines that the intervention would unduly delay or prejudice the adjudication of the rights of the original parties.

In his opinion the court stated that, "The third paragraph recites a legal conclusion that the main action has questions of law or fact in common."

If this be a determination by the court that there is no issue of fact or law common to the claim of intervenor and that of the plaintiff in the instant

suit we find it in conflict with the preponderance of evidence in the deposition, interrogatories, and pleadings, and hence erroneous.

A denial on such basis we deem an abuse of discretion. Leave to intervene should have been granted.

The denial of defendant's motion to amend his pleadings also appears to us to be an abuse of discretion.

The court stated in his opinion:

"The only reason advanced in the pleading for filing at this late date of an amended answer and counterclaim is in paragraph 2, to the effect that the law firm in question has assigned this case from one lawyer to another within that firm."

This does not in our view fairly evaluate the following paragraphs of the motion:

"1. That the filing of an amended answer and counterclaim is essential and necessary, so that at the trial of this cause the defendant can fully and fairly present its defenses and claims and it can be in a position to prove the same. * * *

"4. That in his interviews and conferences with shareholders of the defendant, defendant's current attorney discovered facts which require a further and better statement than is currently set forth in the answer filed herein."

On the contrary, we believe that the language of GCR 1963, 118.1, "Leave shall be freely given when justice so requires," imposes a limitation on the discretion of the court necessitating a finding that justice would not be served by the amendment. Here there is a preponderance of evidence in the pleadings, depositions, interrogatories, and affidavits requiring a contrary conclusion.

For the foregoing reasons leave to intervene should have been granted; the motion to amend

should have been allowed and the case set for trial upon the issues thus framed.

Judgment reversed with instructions for the entry of orders consistent with this opinion. Appellant may have his costs.

McGREGOR, P. J., and FITZGERALD, J., concurred.

BIELSKI v. WOLVERINE INSURANCE COMPANY.

1. INSURANCE—COMPULSORY ARBITRATION—WAIVER.
   Conduct of insurer with reference to arbitration, pursuant to compulsory arbitration provisions of policy, may give insured right to sue.

2. SAME—WAIVER—QUESTION FOR TRIER OF FACTS.
   Whether facts on which a claim of waiver is based are proved is a question for the trier of the facts.

3. SAME—WAIVER—QUESTION OF LAW.
   Whether facts showing waiver, if proven, amount to a waiver is a question of law.

4. CONTRACTS—WAIVER—INTENT—QUESTION FOR TRIER OF FACTS.
   The waiver of a provision in a contract is a matter of intent to be tried by the trier of the facts.

5. INSURANCE—WAIVER OF COMPULSORY ARBITRATION CLAUSE—SUMMARY JUDGMENT—QUESTION FOR TRIER OF FACTS.
   Summary judgment in action on uninsured motorist provision of insurance contract is reversed and remanded for trial, where

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REFERENCES FOR POINTS IN HEADNOTES

[1] 29A Am Jur, Insurance § 1627.
Failure of attempted appraisal under policy of insurance as affecting rights and remedies of parties. 94 ALR 499.
[2–4] 56 Am Jur, Waiver § 23.
[5] 56 Am Jur, Waiver § 23.
29A Am Jur, Insurance §§ 1013, 1617, 1628.

claim of waiver of compulsory arbitration clause was a question for trier of facts under evidence adduced.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted Division 3 November 4, 1965, at Lansing. (Docket No. 694.) Decided March 22, 1966. Leave to appeal granted by Supreme Court May 23, 1966. See 377 Mich 711, 379 Mich 280.

Complaint by Donald C. Bielski against Wolverine Insurance Company, a Michigan corporation, for benefits under an uninsured motorist provision of an insurance policy. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded.

van Benschoten & van Benschoten (*Duane S. van Benschoten,* of counsel), for plaintiff.

Stanton, Taylor, McGraw & Collison, for defendant.

T. G. KAVANAGH, J. This is an appeal from a summary judgment dismissing plaintiff's suit under the uninsured motorist provision of his contract with the defendant.

The plaintiff, Donald C. Bielski, was injured in an automobile collision with another motorist alleged to be uninsured. He notified the defendant, Wolverine Insurance Company, of the collision and made claim under such uninsured motorist provision.

The insurance company disputed the claim and although both parties talked about arbitration, no arbitration was begun. The contract provisions regarding arbitration were as follows:

"1. *Damages for Bodily Injury Caused by Uninsured Automobiles.*

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an unin-

sured automobile because of bodily injury, sickness or disease, including death resulting therefrom, * * * sustained by the insured, * * * and arising out of the * * * use of such uninsured automobile; provided, for the purposes of this indorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration. * * *

6. *Arbitration.* If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile, * * * then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association. * * * Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this indorsement. Such an award shall be a condition precedent to any action against the company."

At length, more than a year after the collision, the plaintiff started suit against the motorist and notified the defendant insurance company and advised them to take what steps they wished to protect their interest.

The company did not intervene in the suit and a default judgment for $10,000 against the uninsured motorist was taken by plaintiff.

The instant suit was thereafter brought for the amount of the default judgment and defended by the insurance company on the theory that plaintiff had breached the terms of his contract by not submitting to arbitration and under the contract was

excluded from recovery by the terms of the following provision:

"EXCLUSIONS

"This indorsement does not apply: (a) to bodily injury to an insured, * * * with respect to which such insured, * * * shall, without written consent of the company, make any settlement with or prosecute to judgment any action against any person * * * who may be legally liable therefor."

The plaintiff claims (1) that he made written demand to defendant to arbitrate his claim and that by defendant's delay and refusal to arrange for arbitration waived the contract requirement of arbitration, and (2) because of his refusal to arbitrate or to intervene in the suit against the uninsured motorist after notice, the defendant waived the right to enforce exclusion "a" of the policy.

The defendant denied refusing to arbitrate and maintained that the arbitration provisions were not waived, that the plaintiff breached the arbitration requirements of the contract, and by proceeding to judgment against the driver without the consent of the defendant under exclusion "a" of the policy absolved the company from liability.

The trial court in granting the motion for summary judgment determined that exclusion "a" was not waived and that by proceeding to judgment the plaintiff was excluded from coverage under the uninsured motorist provision. The appeal tests the correctness of the court's determination.

The conduct of an insurance company may amount to waiver of compulsory arbitration provisions and thus give the insured the right to sue. *Shapiro* v. *Patrons' Mutual Fire Insurance Co. of Michigan* (1922), 219 Mich 581.

In *Garvy* v. *Blatchford Calf Meal Co.* (CA 7, 1941), 119 F2d 973 the seventh circuit court of appeals said at page 975:

"Whether facts on which a claim of waiver is based have been proved, is a question for the trier of the facts, but whether those facts, if proved, amount to a waiver is a question of law."

The Michigan Supreme Court said in *Fothergill* v. *McKay Press* (1960), 361 Mich 666, at page 676: "Waiver, of course, is a matter of intent and will be so determined by the trier of facts."

See, also, *Superior Steel Spring Co.* v. *New Era Spring & Specialty Co.* (1921), 215 Mich 594, and *Strom Johnson Construction Co.* v. *Riverview Furniture Store* (1924), 227 Mich 55.

It cannot be said that if proved the facts upon which the plaintiff here claims waiver would not amount to waiver as a matter of law. The trial court's ruling has this effect and for this reason must be set aside.

This case is remanded for trial. The appellant may have his costs.

MCGREGOR, P. J., and FITZGERALD, J., concurred.

QUINLAN *v.* GUDES.

1. LIMITATION OF ACTIONS—EFFECTIVE DATE OF STATUTE—ACCRUED RIGHTS.

   Limitation of action contained in revised judicature act of 1961 does not govern rights accruing, accrued, or acquired prior to effective date of act, except as specifically stated or reasonably inferred from the provisions of the act (CLS 1961, §§ 600.5805, 600.5838, 600.9905, 600.9911).

2. SAME—MALPRACTICE—DISCOVERY.

   Statute of limitations in action for malpractice in effect at time when alleged malpractice occurred and which had been interpreted as not starting to run until date of discovery, or date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act controlled right of action for malpractice and survived effective date of revised judicature act providing for 2-year statute beginning on date of last treatment (CLS 1956, § 609.13; CLS 1961, §§ 600.5805, 600-.5838, 600.9905, 600.9911).

3. PHYSICIANS AND SURGEONS—MALPRACTICE—X RAY—LIMITATION OF ACTIONS—DISCOVERY OF CANCER—SUMMARY OF JUDGMENT.

   Action for damages for cancer, allegedly caused by X-ray treatments, begun within 2 years after discovery of cancer but more than 10 years after the last treatment of plaintiff *held*, improperly dismissed on motion for summary judgment, wherein action was governed by prior statute and plaintiff commenced action within the time allowed by the former statute (CLS 1956, § 609.13 and CLS 1961, §§ 600.5805, 600.5838, 600.9905, 600.9911).

Appeal from Wayne; Rashid (Joseph G.), J. Submitted Division 1 November 4, 1965, at Detroit.

REFERENCES FOR POINTS IN HEADNOTES

[1] 34 Am Jur, Limitation of Actions § 43.
Construction of statutes of limitation as regards their retrospective application to causes of action already barred. 67 ALR 297.
[2, 3] 34 Am Jur, Limitation of Actions § 43.
41 Am Jur, Physicians and Surgeons §§ 122, 123.

(Docket No. 776.) Decided March 22, 1966. Leave to appeal denied by Supreme Court May 25, 1966. See 377 Mich 712.

Complaint by James Francis Quinlan and Villana P. Quinlan against David S. Gudes for damages for injuries arising from excessive exposure to X rays. Accelerated judgment for defendant. Plaintiffs appeal. Reversed and remanded.

E. R. Whinham, Jr., for plaintiffs.

Moll, Desenberg, Purdy, Glover & Bayer (*Harold B. Desenberg,* of counsel), for defendant.

LESINSKI, C. J. The plaintiffs, Villana P. Quinlan and her husband James F. Quinlan, commenced this action in the circuit court for the county of Wayne on December 15, 1964, to recover for injuries suffered "because of excessive exposures to X rays" given by the defendant medical doctor to Villana P. Quinlan for the treatment of facial skin eruptions. The defendant filed a motion for summary judgment[1] and for accelerated judgment[2] invoking the statute of limitations, CLS 1961, § 600.5805 (Stat Ann 1962 Rev § 27A.5805), as an affirmative defense. On the basis of the affirmative defense, the trial court granted defendant's motion and dismissed the case. From this ruling, appeal was taken.

In August of 1952 the plaintiff, Mrs. Villana Quinlan, sought out the defendant for treatments for her facial skin eruptions. X-ray treatments were given to Mrs. Quinlan from August of 1952 through June of 1954. In January of 1963 when she was operated on for cancer of the soft palate, the plaintiffs were informed by the surgeon who operated on Mrs.

[1] GCR 1963, 117.—REPORTER.
[2] GCR 1963, 116.1(5).—REPORTER.

Quinlan "that the cause of the cancer was the receiving of X-ray treatments." Suit for malpractice was begun 23 months after the discovery of the cancer.

The question facing this Court revolves around the effective date of the section limiting actions for malpractice found in the revised judicature act, hereinafter called RJA.[3] Plaintiffs contend that this cause of action, having arisen prior to January 1, 1963, the date the revised judicature act (RJA) went into effect (see CLS 1961, § 600.9911 [Stat Ann 1962 Rev § 27A.9911]), the action is controlled by the statute of limitations in effect at the time the cause of action arose, namely CLS 1956, § 609.13 (Stat Ann 1959 Cum Supp § 27.605). It is the defendant's contention, on the other hand, that since this action was begun in December of 1964, it should be controlled by the new statute of limitations created by the RJA, namely CLS 1961, § 600.5805 (Stat Ann 1962 Rev § 27A.5805) and by CLS 1961, § 600.5838 (Stat Ann 1962 Rev § 27A.5838).

This question must be considered the crux of the case as by its determination the remaining issue of when does the statute of limitations begin to run is readily resolved.

The effectuating clause of the RJA, CLS 1961, § 600.9911 (Stat Ann 1962 Rev § 27A.9911) states that "This act shall become effective on January 1, 1963." As of that date the various sections of the RJA were to be considered the law of this State, but as to a right accruing, accrued, or acquired prior to this date, the statute CLS 1961, § 600.9905 (Stat Ann 1962 Rev § 27A.9905[1]) states:

"Except as specifically stated or reasonably inferred from the *provisions of this act, this act shall*

[3] CLS 1961, § 600.101 *et seq.* (Stat Ann 1962 Rev § 27A.101 *et seq.*)

not impair or affect any act done, offense committed or *right accruing, accrued* or *acquired,* or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the *same may be enjoyed,* asserted, enforced, prosecuted, or inflicted as if the *act had not been passed.*" (Emphasis supplied.)

The treatments in this case were done and completed nine years prior to the effective date of the RJA. Though the plaintiffs did not discover their rights to a cause of action in this case until the RJA was in effect, it is the Court's view they had acquired these rights prior to January 1, 1963.

This Court deems this case to be of the exact type contemplated by the legislature when it enacted CLS 1961, § 600.9905 (Stat Ann 1962 Rev § 27A.9905). It is, therefore, this Court's construction that this case is controlled by CLS 1956, § 609.13 (Stat Ann 1959 Cum Supp § 27.605) as to when the statute of limitations began to run against the plaintiffs.

There are two basic theories of the running of statutes of limitations in malpractice cases. The first theory is the "last treatment"[4] rule. This theory contemplates that the statute of limitations in malpractice actions begins to run as soon as the plaintiff discontinues receiving treatments or service from the accused professional.

The other theory commonly known as the "discovery rule" was laid down in *Johnson* v. *Caldwell* (1963), 371 Mich 368 as the rule in Michigan in malpractice cases prior to the institution of the RJA. As Justice O'HARA stated in the *Johnson Case* at page 379:

[4] The RJA, CLS 1961, § 600.5838 (Stat Ann 1962 Rev § 27A.5838) has instituted the above-named rule for determining the running of the statute of limitations in malpractice cases. It has been the determination of this Court that this statute only affects those causes of actions accruing after January 1, 1963.

"Simply and clearly stated the discovery rule is: The limitation statute or statutes in malpractice cases does not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act."

The Court continued at page 379:

"We are persuaded we should adopt the rationale of the discovery rule."

Thus, using the rule enunciated in the *Johnson Case,* the plaintiffs timely instituted this action within the limitation under CLS 1956, § 609.13 (Stat Ann 1959 Cum Supp § 27.605) which is two years from the time of discovery of the malpractice.

This cause is remanded to the trial court for entry of an order setting aside the accelerated judgment and for this cause to be set for trial. Costs to the appellant.

QUINN and WATTS, JJ., concurred.

HALL *v.* IOSCO COUNTY BOARD OF ROAD COMMISSIONERS.

1. APPEAL AND ERROR—DEATH—PRESUMPTION OF DUE CARE—EYE-WITNESSES—NEGLIGENCE.

   Court of Appeals will not reverse on ground that defendant did not introduce credible admissible evidence to rebut presumption of due care on part of decedent, where there were no eye-witnesses to accident causing his death, jury returned general verdict and made no special findings, and evidence in record raised question of fact as to defendant's negligence.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INTOXICATING LIQUORS—EVIDENCE—PLEADING—PREJUDICE.

   Admission of evidence of blood alcohol content much greater than that accounted for by 2 bottles of beer *held*, prejudicial error, even though plaintiff's witness had testified on direct and cross-examination, that decedent had consumed two bottles of beer, where answer did not raise the question of decedent's sobriety.

3. WITNESSES—IMPEACHMENT—COLLATERAL MATTER.

   Witness may not be impeached on collateral matter.

4. SAME—COLLATERAL MATTER.

   Collateral matter is determined by the issues in the case and whether direct evidence to establish it could be introduced.

5. PLEADINGS—NOTICE OF CLAIM OR DEFENSE.

   Essential requirement of pleading is to give the other party reasonable notice of the claim or defense.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 948; 38 Am Jur, Negligence §§ 286, 332, 336, 337, 372.
[2] 38 Am Jur, Negligence §§ 322, 331.
20 Am Jur, Evidence § 262.
[3] 58 Am Jur, Witnesses § 783.
[4] 58 Am Jur, Witnesses § 785.
20 Am Jur, Evidence § 248.
[5, 6] 41 Am Jur, Pleading § 3.
[7] 53 Am Jur, Trial §§ 828–830, 833.

6. SAME—DISCLOSURE OF CLAIM—TRIAL.

Pleading is intended for the intelligible disclosure of the real nature of the respective claims of the parties, who must stand or fall on their pleadings, proofs, and theory of case presented thereby.

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

Asserted error in instruction on intoxication of plaintiff's decedent will not be considered on appeal, where there was a failure to comply with court rule requiring statement of specific grounds for a given objection to instruction before the jury retired to consider the verdict (GCR 1963, 516.2).

Appeal from Arenac; O'Keefe (Dennis J.), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 610.) Decided March 22, 1966.

Complaint by Augusta O. Hall, special administratrix of the estate of Hilmer J. Hall, against the Iosco County Board of Road Commissioners for damages from decedent's wrongful death when he was struck by defendant's earth moving equipment. Verdict and judgment for defendant. Plaintiff's motion for judgment *non obstante veredicto* or, in the alternative, new trial denied. Plaintiff appeals. Reversed and remanded.

Edwin W. Koepke (*Merritt R. Jones,* of counsel), for plaintiff.

H. Read Smith (*John R. Watkins,* of counsel), for defendant.

T. G. KAVANAGH, J. Plaintiff's decedent was run over by defendant's road grader on July 1, 1961. Suit for damages was brought under the wrongful

death statute* and tried before a jury which returned a verdict of no cause of action.

Plaintiff's motion for judgment *non obstante veredicto* was denied by the trial court, and the plaintiff's appeal of that order asserts the following errors:

1. The defendant did not introduce any credible admissible evidence to rebut the presumption of due care on the part of plaintiff's decedent which attaches in a case where there are no eyewitnesses to the accident.

2. The court erred in allowing defendant to introduce testimony regarding the blood alcohol content in deceased's body so as to prove intoxication although intoxication was not pleaded as a defense.

3. The court erred in charging the jury on decedent's theorized intoxication.

The first allegation of error is based in part upon the assumption that the jury found the plaintiff's decedent guilty of contributory negligence.

The jury returned a general verdict and made no special finding, and accordingly from the record before us, we'll never know whether appellant's assumption is correct or whether the jury found no negligence on the part of defendant.

Our examination of the record satisfied us that there was a question of the defendant's negligence raised by the evidence and that there was no circumstance requiring a directed verdict in plaintiff's favor. Thus the matter was properly submitted to the jury. We find no merit in the first assertion of error.

The second issue, however, has considerable merit. The pleadings framed the issue of defendant's negligence by virtue of the careless operation of the grader and the affirmative defense of contributory

* CL 1948, § 691.581 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 27.711 *et seq.*).—REPORTER.

negligence by virtue of decedent's asserted voluntary exposure to conspicuous dangers. There was no issue raised by the pleadings about decedent's intoxication. One of plaintiff's witnesses, however, testified on direct examination that decedent had drunk one bottle of beer shortly before the accident and on cross-examination stated he had drunk two bottles.

The defense was permitted to introduce testimony of a pathologist over plaintiff's timely objection, to the effect that his examination indicated a blood content of alcohol much too great to be accounted for by two bottles of beer.

The trial court ruled that in view of the testimony of plaintiff's witness that deceased had two bottles of beer, that the defendant should be allowed to introduce the pathologist's findings by way of impeachment. We think this was error.

A witness may not be impeached on a collateral issue. *Mills* v. *Warner* (1911), 167 Mich 619; *People* v. *Cutler* (1917), 197 Mich 6, 13; *Kingston* v. *Fort Wayne & E. R. Co.* (1897), 112 Mich 40.

Whether a matter is collateral or not depends upon whether direct evidence to establish it could be introduced. See *Shannon* v. *Township of Jamestown* (1930), 251 Mich 597. There the court says on page 599, "What is a collateral matter depends upon the issue in the case."

The issue of decedent's intoxication was not raised by defendant's pleadings and hence, the admission of evidence to establish it is prejudicial error. *Scott* v. *Cleveland* (1960), 360 Mich 322, at page 330:

"This court has frequently considered the proper role of pleadings in today's practice, particularly in the light of present pretrial conference procedures. In *Manley, Bennett & Co.* v. *Woodhams,* 349

Mich 586, the Court said, at p 592: 'The essential requirement of pleading came to be recognized as nothing more complicated than giving the other party reasonable notice of the claim or defense. As Sunderland [14 Mich L Rev 551, 553] puts it, "The purpose of pleading has ceased to be the exemplification of the subtleties of pleader's logic and has become the intelligible disclosure of the real nature of the respective claims of the parties."' "

What is said in the case of *Hormel Estate* v. *Harris* (1957), 348 Mich 201, at page 206: "Plaintiff must stand or fall on its pleadings, proofs, and theory of the case presented thereby," applies as well to the defendant.

In view of the foregoing, the third allegation of error regarding the trial court's charge to the jury has no significance.

It might be helpful to note however that the record does not show compliance with the provisions of GCR 1963, 516.2. This would preclude our consideration of the error asserted in the instruction.

The judgment of the court below is set aside and the case remanded for a new trial. Appellant may tax his costs.

FITZGERALD, P. J., and HOLBROOK, J., concurred.

WHYBRA *v.* GUSTAFSON.

1. BASTARDS—SUPPORT OF CHILD—UNIFORM SCHEDULE OF SUPPORT PAYMENTS—DISCRETION OF COURT.

   Support order, that accompanied order of filiation, awarding $9 a week for care of child, which did not follow uniform schedule of support payments usable in divorce cases but took into consideration the over-all condition of the parties concerned *held,* not an abuse of judicial discretion which the Court of Appeals will disturb on appeal.

2. SAME—SUPPORT OF CHILD—PAYMENT SCHEDULE—DISCRETION OF COURT.

   Judge should not blindly follow any support payment schedule in a filiation proceeding in abdication of his duty to exercise judicial discretion.

3. SAME—SUPPORT OF CHILD—PAYMENT SCHEDULE—CIRCUMSTANCES OF PARTICULAR CASE.

   Support payment schedule should not serve as a substitute for an examination and careful evaluation of the circumstances of each filiation proceeding.

4. SAME—SUPPORT OF CHILD.

   Any support order in a filiation proceeding should take into consideration the living situation of the child, the amount of care and support available to it from the mother, and the father's ability to pay.

Appeal from Chippewa; Baldwin (George S.), J. Submitted Division 3 December 8, 1965, at Lansing. (Docket No. 19.) Decided March 22, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 10 Am Jur 2d, Bastards § 127.

Complaint by Muriel Whybra against Richard B. Gustafson under paternity act. Order of filiation entered with provision for lump-sum payment and discharge of defendant from further liability. Plaintiff appealed. Reversed and remanded. See 365 Mich 396. On remand, order of filiation and support in the amount of $9 a week was entered. Plaintiff appeals. Affirmed.

Clevenger & James (*Raymond F. Clevenger,* of counsel), for plaintiff.

Coates & Kline (*C. W. Coates,* of counsel), for defendant.

McGREGOR, J. Plaintiff appeals from the judgment of the circuit court awarding her $9 per week against the defendant for the support of their illegitimate child. This judgment was entered upon retrial as ordered by the Supreme Court in *Whybra* v. *Gustafson* (1961), 365 Mich 396, in which the facts are fully stated. Plaintiff contends that the judgment below is erroneous because the amount awarded is approximately half of the amount proposed under the uniform schedule for support payments in use as a guide by the local circuit court in divorce cases.

No judge may blindly follow any support payment schedule in abdication of his duty to exercise judicial discretion therein. No such schedule may serve as a substitute for an examination and careful evaluation of the circumstances of each particular case. The duty of the trial court is summarized in *Whybra* v. *Gustafson, supra,* at p 400:

"Any support order should, of course, take into account the living situation of the child, the amount of care and support available to it from the mother, and the father's ability to pay."

The trial judge found that the defendant, at the hearing on remand, was earning a net weekly wage of $84 but that until three months before hearing, the defendant had no substantial income because of his attendance at college and service in the army. The court further found that the cost of raising the child was exaggerated by the plaintiff in view of the fact that she has married and the child is now part of a three-child household. The trial judge stated in his findings that he took into consideration the overall picture of the parties concerned in reaching his decision. Plaintiff can demand no more.

In the absence of any showing by the plaintiff of an abuse of judicial discretion this Court will not disturb the judgment of the circuit court. The judgment is affirmed, and costs are awarded to the appellee.

LESINSKI, C. J., and QUINN, J., concurred.

BECK *v.* DELTA RECREATION CORPORATION.

1. JUDGMENT—MOTION FOR SUMMARY JUDGMENT—OPPOSING AFFIDAVITS.

A motion for summary judgment, directed to the sufficiency of the pleadings, requires plaintiff to allege facts in affidavits in opposition to the motion, which could justify a court in finding a meritorious cause of action (GCR 1963, 117).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 7] 41 Am Jur, Pleadings § 340 *et seq.*
[3–5] 36 Am Jur, Mechanics' Liens § 130 *et seq.*
[6] 36 Am Jur, Mechanics' Liens § 181 *et seq.*

2. SAME—SUMMARY JUDGMENT—PLEADINGS—ISSUES OF FACT.

Trial judge's determination that plaintiffs-appellants seeking to foreclose mechanics' liens, had not raised issues of fact going to the matter of perfecting the lien for decision *held,* proper under record presented, it being permissible for the court to consider pleadings as a whole, including affidavits filed in support of motion to amend complaint, hence, defendant's motion for summary judgment was properly granted (CLS 1961, § 570.6; GCR 1963, 117).

3. MECHANICS' LIENS—DEALING DIRECTLY WITH OWNER—STATEMENT OF ACCOUNT—PERSONAL SERVICE.

Direct dealing between parties, seeking to foreclose mechanics' liens, and the owner, so as to excuse them from necessity of making personal service of a copy of the statement of account *held,* not shown in plaintiffs' pleading or affidavits (CLS 1961, § 570.6).

4. SAME—DEALING DIRECTLY WITH OWNER—EVIDENCE—CONSTRUCTION OF STATUTE.

Direct dealings with an owner can consist of something less than an express contract so far as provision in mechanic's lien law excepting persons dealing directly from making personal service of the statement of account, but casual conversations, expressions of concern over payment, and being asked to bid on a job directly with a contractor are not construed as "dealing directly with the owner" (CLS 1961, § 520.6).

5. SAME—STATEMENT OF ACCOUNT—PERSONAL SERVICE—CERTIFIED LETTER.

Service of statement of account by certified letter is not acceptable as personal service of such statement as required by mechanic's lien law (CLS 1961, § 570.6).

6. SAME—MORTGAGES—SUMMARY JUDGMENT.

Claims of invalid mechanic's lien and foreclosure thereof are subordinate to lien of claimant under duly filed lien and of defendant-appellee, the assignee of mortgage given by the owner to the prime contractor as security for payment, where summary judgment for such defendant is affirmed (CLS 1961, § 570.6; GCR 1963, 117).

7. JUDGMENT—SUMMARY JUDGMENT—EVIDENCE.

A party opposing a motion for summary judgment may obtain a denial thereof upon production of some evidence (GCR 1963, 117).

Appeal from Delta; Davidson (Bernard H.), J. Submitted Division 3 January 4, 1966, at Grand Rapids. (Docket No. 180.) Decided March 22, 1966.

Complaint by Ragnar G. Beck, doing business as R. G. Beck & Company, Omar Morey, doing business as Morey Construction Company, Art DeGrand, doing business as DeGrand Excavating, Arthur DeCamp, Emer R. Peterson, doing business as Bay De Noc Roofing, Moe Northern Company, and Northern Terrazzo & Tile Company against Delta Recreation Corporation, Peninsula Construction & Supply Company, and Thorp Finance Corporation to foreclose mechanics' liens on property constructed, owned, and financed by defendants. Summary judgment for defendant Thorp Finance Corporation against all plaintiffs, except Northern Terrazzo & Tile Company. Plaintiffs appeal. Affirmed.

Nicholas P. Chapekis and *James P. Chapekis,* for plaintiffs, except Northern Terrazzo & Tile Company.

Strom, Hoehn & Shipman (*Wheaton L. Strom* and *Clair J. Hoehn,* of counsel), for defendant Thorp Finance Corporation.

John G. Erickson, for defendant Delta Recreation Corporation.

FITZGERALD, J. This appeal arises from a summary judgment* granted defendant Thorp Finance Corporation against a group of business firms seeking to foreclose mechanics' liens against premises owned

* See GCR 1963, 117.—REPORTER.

by defendant Delta Recreation Corporation. Peninsula Construction & Supply Company was the prime contractor on the building, a bowling alley, and Thorp Finance is the assignee of a mortgage given by the owner to the contractor as security for payment. The original complaint alleges that the necessary procedures for perfection of mechanics' liens were taken and that a statement of claim was served on the owner by certified mail, return receipt requested.

Defendant-owner answered the complaint, neither admitting nor denying any of the allegations and defendant Thorp Finance filed a motion for summary judgment claiming that the plaintiffs' mechanics' liens were defective. The reason given by Thorp Finance was that plaintiffs failed to serve the owner, Delta Recreation, with a statement of claim of lien by personal service as required by section 6 of the mechanics' lien law, CLS 1961, § 570.6 (Stat Ann 1965 Cum Supp § 26.286) which reads in part as follows:

"Every person recording such statement or account as provided in the preceding section, except those persons contracting or dealing directly with the owner, part owner or lessee of such premises, shall within 10 days after the recording thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county or in case of his absence from the county, on his agent having charge of such premises, within the county wherein the property is situated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within 5 days after the same might have been served personally, could the principal or agent, as aforesaid, have been found."

Plaintiffs, who had alleged certified mail service, sought refuge in the exception which is to be noted in the previously quoted statute, "except those persons contracting or dealing directly with the owner, part owner or lessee." The trial court granted plaintiffs' leave to amend their complaint to this effect, based on a motion and supporting affidavits.

The answers of Thorp Finance and Delta Recreation specifically deny allegations of direct dealing and of acceptance of service by mail in lieu of personal service. The trial court held that the plaintiffs, with the exception of the Northern Terrazzo Tile Company, which had filed a proof of personal service, had failed to comply with the previously quoted statutory requirements of service and granted the summary judgment prayed for against the six plaintiffs who served the statement of lien by certified mail.

Once again we are met with the devastating consequences of a motion for summary judgment when a plaintiff must scramble to "put his house in order" and to make sure that he may not be successfully challenged as to the existence of the facts upon which he purports to build his case.

It is obvious that the motion for summary judgment, directed to the sufficiency of the pleadings, immediately brings plaintiffs under a duty to allege facts in their affidavits which could justify a trial court in finding a meritorious cause of action. *Dionne* v. *Pierson Contracting Co.* (1965), 2 Mich App 134.

Appellants' first two questions on appeal are necessarily inseparable. Plaintiffs first ask whether the record states a cause of action for foreclosure of perfected mechanics' liens and also whether there was "direct dealing" between plaintiffs and the owner, Delta Recreation, so as to abrogate the statutory

requirement of personal service of the statement of lien.

In the first instance we find that the trial court was correct in its decision that there was no issue of fact to be decided. Indeed, no factual controversy is raised going to the matter of perfecting the lien. Specifically, plaintiffs complain that the trial court, in its opinion granting the motion, took as evidence to decide the factual issue of direct dealing, certain affidavits filed by the plaintiffs in connection with their motion for leave to amend the complaint claiming that they are not a part of the amended complaint. They state that only an actual court hearing or trial with the right to cross-examine defendant-owners could determine this matter. We are constrained to say that this is simply not the law once a motion for summary judgment is made. The question we posed in *Dionne, supra* (p 137), "Did the pleadings and affidavits set forth any material facts calling for a trial on the merits?" must be answered in the negative. Neither did they allege personal service or bring themselves within the direct dealing exception. That the trial judge may consider the pleadings as a whole, including the affidavits filed by plaintiffs, is without question.

Plaintiffs have not offered by affidavit or otherwise any contracts between the several plaintiffs and the owner. In the absence of such contracts, it was necessary for plaintiffs to demonstrate some other basis on which a court could infer "direct dealing" so as to bring them within the statutory exception wherein they would not be required to obtain personal service.

We do not believe that the affidavits or amended pleadings under any construction allege sufficient facts to yield an interpretation of direct dealing. One affiant stated that he was contacted by the owner and asked to make a bid on decorating and paint-

ing with the contractor; one states that he asked for assurance of payment if he took the job; others state that they were asked to submit bids to the contractor; others say that they had conversations on various occasions with officers of the owner regarding payment.

To appellants' contention that direct dealings can consist of something less than an express contract, we agree, but we cannot conceivably construe casual conversations, expressions of concern over payment, nor being asked to bid on a job directly with a contractor as the "dealing directly" meant by the legislature in the mechanics' lien statute.

Having decided that plaintiffs do not fall within the statutory exception, we return once more to the question of whether acceptance of a certified letter can substitute for personal service. Plaintiffs plead the legal conclusion that service was accepted, but we have no doubt that a defendant may not abrogate the requirements of a statute by accepting a letter not authorized by the statutory mandates. Plaintiffs rely on *Mouat* v. *Fisher* (1895), 104 Mich 262. That case is not in point. There the defendant signed a waiver of service stating that he accepted service of a copy in lieu of posting the same on his building or other notice under the statute. In the instant case, a letter delivered to the owner cannot substitute for the rigid service requirements of a mechanics' lien. *Hannah & Lay Mercantile Company* v. *Mosser* (1895), 105 Mich 18.

A final contention of plaintiffs is that the claims for lien and foreclosure thereof remain as to the defendant-owner, Delta Recreation, the summary judgment having been granted to Thorp Finance.

Thorp Finance was the moving party and was granted the summary judgment, and we note that defendant owners took no part in the proceedings on Thorp's motion. This, in and of itself, appears

to answer plaintiffs' question. Furthermore, the last paragraph of the trial court's opinion spells out with particularity the exact posture of the suit and plaintiffs are left to any further remedies they may wish to pursue. The court states:

"For the above reasons defendant's (Thorp) motion for summary judgment as to all plaintiffs except Northern Terrazzo is granted, limited, however, to the claim for lien and foreclosure thereof. The suit remains as to Northern Terrazzo in all respects and as to the other plaintiffs on their claim for judgment against the contractor and owner-defendants."

The particularity with which a mechanics' lien must be claimed and perfected is demonstrated with force by this appeal, as is the searchlight directed upon pleadings by a motion for summary judgment.

The acuteness with which the appellate courts of this State deal with matters of summary judgment was pointed up in *Dionne, supra,* and in the case of *Durant* v. *Stahlin (Appeal in re Van Dusen, Elliott, Romney)* (1965), 375 Mich 628, wherein it was stated (p 638), "The party opposing the motion is given the benefit of all doubt. If he produces some evidence, the motion is denied." Such evidence was not forthcoming and in this case the summary judgment motion was granted.

The decision of the trial court, being proper, is affirmed. Costs to appellee.

WATTS, P. J., and HOLBROOK, J., concurred.

DUSENDANG *v.* THOMPSON.

1. NEGLIGENCE—WORKMEN'S COMPENSATION INSURER—PARTIES.
   Addition as plaintiff of workmen's compensation insurance carrier of injured plaintiff's employer, which had paid compensation to plaintiff, in action against third-party tort-feasor on latter's motion is not disturbed on appeal, where insurer voluntarily appeared, answered, and participated in trial, since the insurer was an interested party entitled to first proceeds of recovery (CLS 1961, § 413.15; GCR 1963, 205.1).

2. SAME—WORKMEN'S COMPENSATION INSURER—PARTIES.
   Relationship of insurer to injured employee is effected by provision of workmen's compensation act entitling carrier of workmen's compensation insurance of plaintiff's employer to first proceeds of injured employee's recovery in negligence action against third-party tort-feasor, hence, latter's motion to add the insurer as a party plaintiff was proper to rendition of complete relief (CLS 1961, § 413.15; GCR 1963, 205.1).

3. SAME—EVIDENCE—WORKMEN'S COMPENSATION—WAIVER.
   Admission of evidence of workmen's compensation benefits being paid to an injured employee, plaintiff in action against a third-party tort-feasor, should not normally be permitted, but where record does not show that plaintiff objected to introduction of such evidence or presented requests to charge in such respect, the Court of Appeals will not reverse because of waiver.

4. EVIDENCE—WAIVER.
   A rule of evidence that is not invoked is waived.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 58 Am Jur, Workmen's Compensation § 63.
[3] 58 Am Jur, Workmen's Compensation § 63.
Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workmen's compensation benefits. 77 ALR2d 1154.
[4] 5 Am Jur 2d, Appeal and Error § 552.

5. TRIAL—WORKMEN'S COMPENSATION INSURER—ANONYMOUS PARTICIPATION.

That trial judge did not order workmen's compensation insurer, added as a party plaintiff on defendant third-party tort-feasor's motion, to participate anonymously at trial of injured employee's action for negligence *held*, not to require a new trial, where record is barren of any request by plaintiff to trial judge to make such order.

Appeal from Ottawa; Smith (Raymond L.), J. Submitted Division 3 January 4, 1966, at Grand Rapids. (Docket No. 201.) Decided March 22, 1966.

Complaint by Frank H. Dusendang against Ronald J. Thompson and Mrs. Ronald J. Thompson for injuries allegedly sustained in a fall at defendants' home. Defendants' motion to add Boston-Old Colony Insurance Companies, workmen's compensation carrier for plaintiff's employer, as plaintiff granted. Verdict and judgment for defendants. Plaintiff Frank H. Dusendang appeals. Affirmed.

Marcus, McCroskey, Libner, Reamon, Williams & Dilley (*Robert W. Dilley,* of counsel), for plaintiff.

Harry Lieffers, Jr., for defendants.

HOLBROOK, J. This case is an appeal by Frank H. Dusendang, plaintiff-appellant, from a judgment of no cause for action for defendants-appellees in the trial court tried before a jury. Boston-Old Colony Insurance Companies has not appealed. The parties by stipulation in accord with GCR 1963, 812.2(b)[1] waived filing of transcript of the testimony and hearings before the Court, and specified the contents of the record on appeal.

[1] See 373 Mich preliminary page 1.—REPORTER.

This case arose out of injuries sustained in a fall by plaintiff Dusendang in January, 1963, in the early morning at the residence of defendants in Spring Lake, Michigan.

Plaintiff was then acting in the course of his employment with Town and Country Food Company as a grocery deliveryman, and thereafter received about $1,400 in workmen's compensation benefits from coplaintiff, Boston-Old Colony Insurance Companies, the workmen's compensation carrier, for his employer.

Plaintiff Dusendang commenced suit against defendants as third-party tort-feasors pursuant to CLS 1961, § 413.15 (Stat Ann 1960 Rev § 17.189). Defendants filed their answer denying liability, and filed their motion asking that the court order the joinder of the workmen's compensation carrier as an added party-plaintiff. The motion was heard and granted by the court at the pretrial conference. The order is as follows:

"Motion having been made by the attorney for the defendant, to join, by order, the Boston-Old Colony Insurance Companies, the carrier for Frank H. Dusendang, compensation recipient, such motion, after having been duly considered by the court, it is ordered, adjudged, and decreed that the said compensation carrier is deemed a necessary party, and in the interest of complete determination of all of the rights of the parties herein, it is ordered, adjudged and decreed that the plaintiff shall allow 20 days for the *voluntary appearance* of the company herewith, and upon their failure to so appear, that, such company may be joined, by a summons causing them to enter this case by service of process, they to have 20 days thereafter to make such answer and such appearance as they shall see fit." (Emphasis supplied.)

As a result of the trial court's order, Boston-Old Colony Insurance Companies voluntarily filed its complaint and participated fully in its own name in all the proceedings.

Upon trial, the jury was fully advised of said workmen's compensation benefits theretofore received by plaintiff Dusendang as well as availability to him of future benefits, both for medical care and treatment and weekly payments for any period up to a total of 750 weeks during which he might be disabled.

After the verdict of no cause for action, plaintiff Dusendang made motion for new trial upon grounds asserted in the appeal to this Court and upon one other ground since abandoned. Upon denial of said motion for new trial, plaintiff Dusendang appeals.

Plaintiff-appellant poses two questions involved:

"(1) In the suit brought by plaintiff-employee pursuant to authorization of the workmen's compensation act against third-party tort-feasors, did the trial court commit reversible error in requiring joinder of the workmen's compensation carrier as an added party-plaintiff?"

"(2) Even if the trial court properly required the joinder of the workmen's compensation carrier as an added party-plaintiff, did the trial court commit reversible error in failing to order that the compensation carrier participate anonymously in the name of plaintiff-appellant-employee?"

As to the first question, we note that there is no record of the plaintiff-appellant's objection to the granting of the motion of defendants to add the workmen's compensation carrier as party-plaintiff.

Also, the workmen's compensation carrier did not object to joining as a party-plaintiff, it having voluntarily filed its complaint and participated in the entire trial of the matter. Plaintiff's action herein

was based upon the workmen's compensation act, *supra,* which permits an employee to sue and seek damages from a third-party tort-feasor. Said pertinent provisions of said act appear as follows:

"Sec. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section. If the injured employee or his dependents or personal representative does not commence such action within 1 year after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of such other person in the name of that person. * * *

"In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the workmen's compensation act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits."

In the case of *Hill* v. *Harbor Steel & Supply Corporation* (1965), 374 Mich 194, in a concurring opinion Mr. Justice O'HARA, on p 220, states:

"I turn now to the question of the admissibility of evidence concerning the receipt of and the amount of workmen's compensation payments in cases where the compensation insurer is a party plaintiff (and in my view he can't be kept 'out' if he wants 'in' despite our equivocal writings on the point)."

The workmen's compensation carrier was definitely an interested party, for, in the event of recovery, the first proceeds were to be paid it for moneys advanced.

The joinder of the workmen's compensation carrier was effected by reason of GCR 1963, 205.1:

"Necessary Joinder. Subject to the provisions of Rule 208 and of sub-rule 205.2, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief shall be made parties and be joined as plaintiffs or defendants and aligned in accordance with their respective interests."

In 1 Honigman and Hawkins, Michigan Court Rules Annotated, pp 556, 557, appears the following comment:

"The new rule was intended to convert this into a problem of required joinder of parties. It will continue to be recognized that both insured and insurer are real parties in interest as to that which they own under the substantive law. Therefore, either may bring an action in his own right, but the defendant is protected against a multiplicity of actions by the rule governing required joinder of parties. That is, if either the insured or insurer brings an action against a defendant without joining the other, the defendant may protect himself by moving to have both plaintiffs joined as necessary parties under sub-

rule 205.1. Both are persons having such interest in the subject matter that their presence is essential to permit the court to render complete relief."

The applicability of this comment to our case may be questioned inasmuch as the workmen's compensation carrier is not the plaintiff's insurer. The relationship is effected, however, by reason of the statute.[2]

Arguendo, the plaintiff-appellant did not object according to the record to the bringing in of the workmen's compensation carrier nor did the workmen's compensation carrier object, but *contra,* participated voluntarily in all the proceedings, including the trial.

As to the second question raised by plaintiff-appellant, *Hill* v. *Harbor Steel & Supply Corporation, supra,* is authority for the present rule of law that evidence concerning receipt of workmen's compensation payments by an injured workman and his dependents should not be admitted in the trial of a negligence case against a third-party defendant.

The rule does not appear to be as broad or all encompassing as appellant herein asserts, but unquestionably applies as to the introduction of such evidence on the trial of the case.

This conclusion calls into application another rule requiring the objection to improper evidence in the trial court as a prerequisite to review of the error on appeal.

In 1 Wigmore on Evidence (3d ed), § 18, p 321, appears the following:

"The judge may of his own motion deal with offered evidence; but for all subsequent purposes, it must appear that the opponent invoked some rule of evidence. A rule of evidence not invoked is *waived.*"

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[2] See CLS 1961, § 413.15 (Stat Ann 1960 Rev § 17.189).

See, also, *Kemp* v. *Aldrich* (1938), 286 Mich 591.

In a headnote, in the case of *Vass* v. *Schrotenboer* (1951), 329 Mich 642, 644, appears the following:

"Reversible error did not result from statement by one of plaintiff's witnesses that statement which had been taken was by someone from defendant's insurer, where no objection was made by counsel for plaintiff."

In our stipulated record on appeal, it does not appear that the plaintiff Dusendang objected to the admission of the testimony concerning payments by the workmen's compensation carrier nor that appellant made appropriate requests to charge.

Plaintiff Dusendang claims reversible error by reason of the circuit judge *failing* to order that the compensation carrier participate anonymously in the name of plaintiff-appellant-employee. The record is barren of any request by appellant of the trial judge to so order.

The workmen's compensation carrier's participation in the lawsuit was without objection and its complaint advanced the objectionable evidence by specifically stating:

"In performance of its liability as described in the immediately foregoing paragraph, said added party plaintiff has heretofore paid out to or for the benefit of said plaintiff Frank H. Dusendang the sum of $1,103.05. Said added party plaintiff is informed and believes that it will hereafter incur further liability to said plaintiff Dusendang for additional medical treatment and additional weekly benefits which he will hereafter become entitled under the Michigan workmen's compensation law."

In the record before us, we must assume that there was no objection to such allegations in the pleadings of the coplaintiff, Boston-Old Colony Insurance Companies, by appellant.

We believe that where the objectionable evidence was introduced by both parties or without objection, our ruling herein must follow the ruling in *Wright* v. *Delray Connecting Railroad Company* (1960), 361 Mich 619, wherein Mr. Justice CARR stated on pp 629, 630, as follows:

"In view of the fact that the matter of compensation had been brought before the jury, the trial court was not in error in charging that the plaintiff would, in the event of his recovery of a judgment, be required to repay to the insurance company the amount so received. This was in substance a statement of the law with reference to the matter.[3] The jury was further charged that the amount of such payments should have nothing to do with the determination of the question of liability and should be disregarded. It may be noted also that the trial judge repeated in the charge the amount of the payment to date, namely $9,684.45, which was in accord with the statement of counsel to the jury at the opening of the trial, and with the testimony."

It appears that all the parties without objection, after Boston-Old Colony Insurance Companies entered the case, treated the matter of compensation payments as part of the case. To allow appellant a new trial after he apparently was willing to take his chances for recovery, in the trial held, with an improper element injected in the case, without objection, would in effect grant him a second time at bat and be unfair to defendants herein.

Judgment affirmed, costs to appellees.

WATTS, P. J., and FITZGERALD, J., concurred.

[3] See CLS 1961, § 413.15 (Stat Ann 1960 Rev § 17.189).

NORWOOD *v.* CONNECTICUT GENERAL LIFE INSURANCE COMPANY.

1. INSURANCE—CONSTRUCTION OF POLICY—TERMINATION OF EMPLOYMENT.

   Termination of employment for purposes of group insurance policy must be based upon records of employer, without reference to union contract (CLS 1961, § 500.2226[2]).

2. SAME—GRACE PERIOD—GROUP POLICY—TERMINATION OF EMPLOYMENT.

   Grace period under group insurance policy which began to run as of actual date of termination by layoff of insured notwithstanding fact that insured did not receive actual notice of layoff until 4 days later, where insured was subject to immediate layoff without advance notification, the notice given did not relate to termination of employment but to re-employment, hence, where insured died after expiration of grace period without exercising conversion privilege under group policy, it was no longer in force as to him (CLS 1961, § 500.2226[2]).

Appeal from Wayne; Montante (James), J. Submitted Division 1 January 5, 1966, at Detroit. (Docket No. 938.) Decided March 22, 1966.

Complaint by Octavene Norwood against Connecticut General Life Insurance Company, a Connecticut corporation, as beneficiary under a life insurance policy covering her deceased husband, Charles H. Norwood. Summary judgment for defendant. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29A Am Jur, Insurance §§ 1771–1773.
Termination of coverage under group policy with regard to termination of employment. 68 ALR2d 8.

Goldstein & Goldstein (*Alan P. Goldstein,* of counsel), for plaintiff.

Miller, Canfield, Paddock & Stone (*Wolfgang Hoppe,* of counsel), for defendant.

QUINN, J. As a beneficiary under a group life insurance policy carried by Gar Wood Industries on its employees, plaintiff sued defendant, the insurer, to recover the proceeds of the policy on the theory that Charles H. Norwood, her husband, was insured thereunder at the time of his death. Defendant denied that Charles H. Norwood was covered by the insurance at the date of his death. Parties agreed there were no factual issues requiring jury determination and filed cross-motions for summary judgment.[1] The trial court granted defendant's motion and plaintiff appeals.

The only issue presented is whether the insurance was in force as to Charles H. Norwood on the date of his death. Plaintiff and defendant each state three questions involved, but an answer to the issue as above stated necessarily resolves all questions raised by the parties.

April 27, 1949, Gar Wood entered into an insurance contract with defendant insuring the lives of certain Gar Wood employees. This contract was effective May 1, 1949, and continued in force through date of Charles H. Norwood's death. July 2, 1960, Gar Wood executed a union contract with Local No. 250 (UAW) AFL-CIO which was effective through September 1, 1962. August 22, 1960, Charles H. Norwood was hired by Gar Wood and became insured under defendant's policy July 1, 1961. Under the union contract, Gar Wood's regular work week was Monday through Friday and

[1] See GCR 1963, 117.2(3).—REPORTER.

Thanksgiving was a holiday. By company policy, the Friday following Thanksgiving was not a work day. Thanksgiving of 1961 fell on November 23d. Having two days' vacation coming and desiring to take his family out of State over Thanksgiving, Charles H. Norwood arranged with the employer to take his two days' vacation November 20th and November 21st and for a leave of absence November 22d. By so doing, he had from November 17th, when he finished work, to the start of the shift November 27th for the trip. Norwood took the trip. November 17th, Bee Cox, a Gar Wood employee with more seniority than Norwood, was laid off. He was reinstated November 21st and assigned to Norwood's job.[2] Since Norwood was not at work November 21st, he was not given a layoff determination. November 22d, Norwood was notified by telegram of his displacement, but he did not receive this notice until he returned home November 26th. November 27th, Norwood signed a standard "determination of placement and recall procedure" form[3] which indicated his layoff was effective November 22d. Charles H. Norwood died on December 24, 1961. He was not employed by Gar Wood after November 22d and he did nothing to convert his insurance.[4]

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[2] This procedure is known as "bumping" and is provided for in article 13 of the union contract. Section 8 of this article provides that when "bumping" occurs, the displaced person is subject to immediate layoff without advance notification. This section also provides, "Such employees shall be given a layoff determination prior to leaving the plant which shall be processed in accordance with section 5 above."

[3] Details of this procedure are found in section 5 of article 13 of the union contract.

[4] The conversion privilege provided in the insurance contract is as follows: "If written application and payment of premium are made by any insured employee to the insurance company within 31 days after termination of his employment for any reason whatsoever, the insurance company will issue, without evidence of insurability, any policy of life insurance (without disability benefit) applied for, which is customarily issued by it, except term insurance, in an amount not greater than the amount of the employee's life insurance under the group policy at the time of such termination. The new

The language of the insurance contract in effect during the events just recounted and dealing with termination of insurance is as follows:

"Termination of Insurance. The insurance on any employee shall automatically cease at the earliest time indicated below:

1. On the date of termination of his employment. Termination of active service shall constitute termination of employment, except as provided below." (The balance of this provision has no application to one in the position of Charles H. Norwood.)

The insurance contract further provided:

"Payment After Termination of Insurance. If any employee dies within 31 days after the termination of his insurance and while he is entitled to convert his insurance in accordance with the paragraph entitled "Conversion Privilege" herein, then the company will pay the amount of insurance which was in force on the date of termination of insurance immediately upon receipt of due proofs of death."

To bring herself within this 31-day period, plaintiff contends the union contract must be considered in construing the termination of insurance provision of the insurance contract. She claims if this is done, Norwood's termination of employment was November 26th, when he actually received the telegram notifying him of his displacement. If plaintiff is correct in this position, she is entitled to recover.

It is the opinion of this Court that plaintiff is not correct for two reasons. The insurance contract provides:

"The policy and the application of the employer, copy of which is attached to and made a part of

policy will be issued at the attained age of the employee, for the premium applicable to the class of risk to which such employee then belongs and will be effective at the end of 31 days after the termination of his employment. This conversion privilege shall be in lieu of all other benefits under the policy."

this policy, and the applications of the employees, if any, shall constitute the entire contract between the parties."

This provision complies with the statutory requirements found in CLS 1961, §§ 500.2226(2) and 500.4434 (Stat Ann 1957 Rev §§ 24.12226[2] and 24.14434). It means plaintiff's recovery must be based on the insurance contract. *Hawthorne* v. *Metropolitan Life Insurance Co.* (1938), 285 Mich 329. Under the insurance contract, termination of Norwood's employment was determined by Gar Wood, and its records clearly established November 22d as the termination date.

In the second place, accepting *arguendo* plaintiff's position that the union contract must be considered in construing the termination of insurance provision, section 8, article 13 of the union contract provides that a "bumped" employee is subject to immediate layoff without advance notification. The telegraphic notice plaintiff relies on is not part of termination under section 8, but is rather notice to qualify for re-employment under section 5 of article 13.

The insurance relied on by plaintiff was not in force on the date Charles H. Norwood died and the trial court is affirmed, with costs to defendant.

LESINSKI, C. J., and J. H. GILLIS, J., concurred.

LARSON *v.* EMPLOYMENT SECURITY COMMISSION.

1. UNEMPLOYMENT COMPENSATION—ECONOMIC STRESS.

Economic stress from involuntary unemployment was considered by the legislature in providing for payment of unemployment compensation benefits (CL 1948, § 421.2).

2. SAME—SETTLEMENT AGREEMENT FOR WORKMEN'S COMPENSATION—VOLUNTARILY LEAVING WORK—DISQUALIFICATION FOR BENEFITS.

Signing of settlement agreement for workmen's compensation which also included a resignation from the employment and waiver of seniority with the employer, signed by employee who had sustained a back injury at appellant's foundry disabling him from work of making cores and wheeling core boxes, involving standing and lifting weights in excess of 25 pounds *held*, not to have been a voluntary leaving of work in view of the circumstances under which the agreement was arrived at and executed, hence plaintiff was not disqualified from receiving unemployment benefits (CLS 1956, § 421.29).

3. SAME—CONSTRUCTIVE VOLUNTARY LEAVING WORK—DISQUALIFICATION FOR BENEFITS.

Constructive voluntary leaving of work is not an accepted doctrine for amending or broadening plain language of statute disqualifying a person from receiving unemployment compensation benefits (CLS 1956, § 421.29).

Appeal from Muskegon: Beers (Henry L.), J. Submitted Division 3 January 5, 1966, at Grand Rapids. (Docket No. 940.) Decided March 22, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 10.

[2, 3] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 35.

Certiorari by Paul A. Larson against the Appeal Board of the Employment Security Commission and Campbell, Wyant & Cannon Foundry Company, Division of Textron, Inc., to review denial of unemployment compensation benefits to claimaint. Order entered reversing appeal board. Campbell, Wyant & Cannon Foundry Company appeals. Affirmed.

Marcus, McCroskey, Libner, Reamon, Williams & Dilley (*Jerry S. McCroskey, of counsel*), for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Arthur W. Brown,* Assistant Attorney General, for defendant appeal board.

Varnum, Riddering, Wierengo & Christenson (*Carl E. Ver Beek,* of counsel), for defendant Campbell, Wyant & Cannon Foundry Company, Division of Textron, Inc.

FITZGERALD, J. The duties of claimant-appellee, Paul A. Larson, in the Campbell, Wyant & Cannon Foundry from July 11, 1962, for the duration of his employment, consisted of making cores and wheeling core boxes, involving standing and lifting weights in excess of 25 pounds.

On March 6, 1963, claimant reported a back injury and after examination by the company doctor and his own physician, the claimant stopped working on April 3, 1963.

The substance of medical statements was that he was unable to continue working and that his back trouble would never improve "beyond a point."

His doctor furnished a statement authorizing light work, but no such work was available and he re-

mained on a lay-off or medical leave status, never actually returning to work for the appellant.

On April 17th, a determination was made that he was entitled to workmen's compensation benefits because of the back injury and he was also granted unemployment compensation benefits, the State law at that time permitting recovery of both workmen's compensation and unemployment compensation benefits simultaneously in situations of limited disability.

On May 17, 1963, the claimant signed a written statement entitled "Resignation of employment and waiver of seniority" for a total settlement of $2,000. This resignation read as follows:

"The undersigned, Paul Larson, because of physical inability to perform the work required at Campbell, Wyant & Cannon Foundry Division of Textron hereby resigns his employment and waives all seniority with Campbell, Wyant & Cannon Foundry Division of Textron and agrees that any contract of hire he may have or has had with Campbell, Wyant & Cannon Foundry Co. Division of Textron is terminated upon the approval of the workmen's compensation department of an agreement to redeem liability in the amount of $1,142 based on an injury of March 6, 1963.

"If the workmen's compensation department does not approve the said agreement to redeem liability then this resignation and waiver of seniority are void and of no force or effect.

"Dated this 17 day of May, 1963.

"PAUL A. LARSON"

The employment security commission issued a redetermination on June 19th confirming prior determinations holding that claimant was eligible for unemployment compensation benefits.

This redetermination was appealed for a referee's hearing, and on September 20, 1963, following a

hearing, the referee affirmed the redetermination allowing benefits.

On January 21, 1964, the MESC appeal board reversed the referee's decision and held that the claimant was not qualified for benefits. The appeal board's decision was reversed by an order of the circuit court for the county of Muskegon on May 3, 1965, and this decision comes to us on appeal.

In reversing the board, the trial court stated as follows:

"It seems to me in examining this file that any holding that this man voluntarily left his employment would be against the great and overwhelming evidence in this case. Whether you call it the great weight of the evidence or whether you call it a matter of law I don't think it makes much difference."

The court's order, entered May 18th, stated that the decision of the Michigan employment security commission appeal board "is reversed and set aside for the reason that the same is contrary to law and the great weight of the evidence."

This appeal from the trial court's holding requires a two-pronged examination of the decision of the employment security commission appeal board. Was that decision contrary to the great weight of evidence, contrary to law, contrary to neither, or contrary to both?

Undisputed evidence furnishes the facts that claimant's work, combined with a congenital condition of his spine, brought about a spinal injury such that he could no longer perform work for appellant. Further, there is no question that the injury was the reason why he left his work and that the reason why he did not return to work was because the company had no lighter work for him to do.

It is interesting to note that the settlement statement specifically recites that, "The undersigned,

Paul Larson, because of physical inability to perform the work required * * * hereby resigns his employment."

Appellant bases its claim that claimant left work voluntarily largely upon the content of the redemption statement signed by claimant and on testimony at the hearing.

Appellee states that economic pressures caused the claimant to enter into the agreement with little regard for its consequences.

The record furnishes support for the contention that economic pressures were the motivating factor in obtaining the resignation, as witness the following colloquy:

"*Q.* And then subsequently you did sign this resignation of employment and waiver of seniority on May 17th, is that correct?

"*A.* I did sign it, yes.

"*Q.* And what caused you to sign this?

"*A.* Well, it was put to me. I didn't receive any compensation up to this time and I was not working and I was not earning money and I had a few obligations to meet and they said, well ———

"*Q.* Who's they?

"*A.* The insurance man, I forget his name right now, Ollie Devett (phonetic) I think, eh, said that they would settle, they would, well, they would settle at their convenience to their amount they wanted to.

"*Q.* Would settle what?

"*A.* Eh, if I agreed to sign this waiver they would come to a settlement if it was agreeable to me to the effect that if it was agreeable with the referee as he called him I would receive the compensation that I had been entitled to up to that point, up to 36 weeks, I believe."

In section 2 of the Michigan employment security act (PA 1936 [Ex Sess], No 1, as amended [CL 1948 and CLS 1961, § 421.1 *et seq.* (Stat Ann 1960 Rev

§ 17.501 *et seq.*)]), the legislature has expressly stated, "Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden *which so often falls with crushing force upon the unemployed worker and his family to the detriment of the welfare of the people of this State.*" (Emphasis supplied.) That the question of economic stress was considered by the legislature cannot be gainsaid.

When a claimant under this act makes the following statement, "If I agreed to sign this waiver they would come to a settlement", it seems to us that we have come to the very matter aimed at in subsequent interpretations of this law. We do not deny that the claimant undoubtedly knew what he was doing when he signed this instrument, but it is another thing to say that he had a tenable alternative. Signing a settlement agreement under the circumstances in which Paul A. Larson found himself does not equate with leaving work voluntarily.*

Likewise, it cannot be called "constructive" voluntary leaving. The Supreme Court has consistently rejected "constructive disqualification" and though the circumstances in those cases may have been different, the theory was the same. In *Copper Range Company* v. *Unemployment Compensation Commission* (1948), 320 Mich 460, it was stated (p 469): "We are not as yet prepared to accept and apply the doctrine of constructive voluntary leaving." This holding was echoed in *Thomas* v. *Employment Security Commission* (1959), 356 Mich 665, 669, and amplified by the statement, "It is not the proper function of the court to amend the statute to broaden or extend the disqualifications fixed, in plain language, by the legislature. Whether one in claimant's situa-

* See CLS 1956, § 421.29, subd (1)(a) (Stat Ann 1955 Cum Supp § 17.531, subd [1][a]).—REPORTER.

tion ought to be disqualified is a question of policy for the legislature, not a judicial question to be determined by the court."

The issue before us, *i.e.*, whether the claimant voluntarily left his work without good cause attributable to his employer by virtue of executing the settlement statement with a termination of employment therein, appears not to have been ruled upon directly in this State. Such tangential situations as have come before our courts have dealt largely with personal motivations or circumstances rather than those arising from health or injury.

Appellant says, "Undoubtedly, the claimant would have preferred to avoid the necessity of being faced with the decision of a cash settlement versus weekly benefits. Nevertheless, he had a choice to make and he made it. In so doing, he quit his job." *Post hoc, ergo propter hoc.*

Under the facts presented to us, voluntariness under these circumstances comes down to one thing. He may have "voluntarily" *signed* the settlement statement, which included the termination of employment, but it does not necessarily follow that he left work "voluntarily." Even the board's reasons for disqualifying the claimant are cryptic, ignoring all the surrounding circumstances, "It is the opinion of this board that the claimant, by his actions in accepting a workmen's compensation redemption settlement and agreeing to terminate his employment, voluntarily left his employment without good cause attributable to the employer."

One spectre looms throughout this entire transaction: economic straits. The employment security act was intended to protect just such a person as claimant from the subtly coercive effects of economic pressure, and to prevent just such a consequence as we have here.

Claimant was forced to cease working because of his work-connected injury. His signature on the combined resignation and settlement represents the act of a necessitous man faced with only one tenable alternative. This is not the "voluntary" termination of employment contemplated by the statute.

The technique of the carrot on the stick, while permissible in some areas of the law, is not a proper approach to the employment security act.

The conclusion is inescapable that claimant's unemployment is the consequence of his work-related injury. The concept of voluntary termination of employment is not compatible with these particular facts and circumstances.

Judgment of the trial court reversing the appeal board decision is affirmed. Costs to appellee.

WATTS, P. J., and HOLBROOK, J., concurred.

ORTIZ *v.* TRAVELERS INSURANCE COMPANY.

1. FRAUDS, STATUTE OF—INSURER'S AGREEMENT OF COMPROMISE.

   Provision of statute of frauds requiring that a promise to pay the debt of another must be in writing may not be applied to defeat action on insurer's oral agreement of compromise of claim of plaintiff against insured within term of coverage of policy, since the compromise was not only of a potential obligation of the insured but also of insurer's own written obligation to pay and its own duty to defend the insured (CL 1948, § 566.132).

2. APPEAL AND ERROR—SUMMARY JUDGMENT—PLEADING.

   Allegations of fact in complaint are accepted as true on appeal from order granting defendant's motion for summary judgment (GCR 1963, 117.2[1]).

3. JUDGMENT—SUMMARY JUDGMENT—PLEADING—ADJUSTER AS AGENT OF INSURER.

   Allegation in complaint on settlement agreement that insurer's adjuster was acting as agent of the insurer in effecting compromise agreement is accepted as true on appeal from order grant-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur, Insurance §§ 189, 190.
49 Am Jur, Statute of Frauds § 145.
[2–4] 4 Am Jur 2d, Appeal and Error § 104; 5 Am Jur 2d, Appeal and Error § 853.
Right to appellate review of decision refusing motion for summary judgment. 103 ALR 1104.
[5] 1 Am Jur 2d, Accord and Satisfaction § 47.
[6] 29A Am Jur, Insurance § 1441.
[7] 22 Am Jur 2d Damages § 11.
[8, 9] 30A Am Jur, Judgments § 144 *et seq.*
[10] 30A Am Jur, Judgments §§ 150–154.
Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 ALR2d 514.
[11] 15 Am Jur 2d, Compromise and Settlement § 1.
[12] 30A Am Jur, Judgments § 990.
[13] 5 Am Jur 2d, Appeal and Error § 1014.

ing insurer's motion for summary judgment because "pleadings * * * failed to disclose that plaintiff has any cause of action against defendants" (GCR 1963, 117.2[1]).

4. SAME—SUMMARY JUDGMENT—PLEADING—INSURANCE—AUTHORITY TO BIND INSURED.

Allegation that insurance adjuster was acting "on behalf of" insured, set forth in complaint on settlement agreement *held*, an insufficient allegation of agency or other authority to bind the insured, when motion for summary judgment for failure to state a cause of action was interposed, hence, summary judgment was properly entered for the insured (GCR 1963, 117-.2[1]).

5. ACCORD AND SATISFACTION—CONTRACT—ACTION.

An accord is a binding contract, but if it is repudiated or otherwise breached by the obligor, the injured party may sue on the original obligation or upon the accord at his election.

6. COMPROMISE AND SETTLEMENT—DISCLOSURE TO OTHER TORT-FEASORS.

Injured party's duty of disclosure to defendant bottler or manufacturer of ginger ale, that settlement agreement had been previously arrived at with insurer of grocer where loss of eye occurred when ginger ale bottle exploded, was a duty, if one existed, owed to the bottler that cannot inure to the benefit of the grocer's insurer in action against it on the settlement agreement it had made with plaintiff.

7. DAMAGES—ONE SATISFACTION FOR ONE INJURY.

One satisfaction for one injury is a rule that assumes that full damages be given the injured party.

8. JUDGMENT—CONSENT JUDGMENT.

A consent judgment differs from the litigated judgment in that the former is primarily the act of the parties rather than the considered judgment of the court and cannot ordinarily be set aside by the court without the consent of the parties.

9. SAME—CONSENT JUDGMENT FOLLOWING VERDICT—REMITTITUR.

A judgment entered for $25,000 without costs, following rendition of verdict for $35,000 and costs, was a consent judgment, based upon a meeting of the minds of the litigants rather than the verdict of the jury, notwithstanding the verdict may have loomed large in the minds of the parties during negotiations for settlement, there being an agreement to remission of $10,000 and costs.

10. ACCORD AND SATISFACTION—CONSENT JUDGMENT AGAINST OTHER TORT-FEASOR.

Plaintiff who lost an eye when bottle of ginger ale exploded and who thereafter effected a consent judgment against the manufacturer or bottler for $25,000 was not barred from recovery in action on previously made oral accord with defendant grocer's insurer by such judgment, since neither settlement may be said to be the measure of the single satisfaction to which plaintiff was limited.

11. COMPROMISE AND SETTLEMENT—DAMAGES.

A plaintiff's damages is but one of the many factors considered in making a settlement of an action for personal injuries.

12. DAMAGES—LOSS OF EYE.

It may not be said that $25,000 is the limit of recovery for the loss of an eye.

13. COSTS—NEITHER SIDE PREVAILING IN FULL.

No costs are allowed in action against grocer's estate and his insurer on compromise agreement for loss of eye sustained when ginger ale bottle exploded, where summary judgment in favor of grocer's estate is affirmed, and summary judgment against his insurer who had effected the agreement is reversed, since neither side has fully prevailed.

Appeal from Wayne: Brennan (Thomas E.), J. Submitted Division 1 January 6, 1966, at Detroit. (Docket No. 774.) Decided March 22, 1966.

Complaint by Asterio Ortiz against The Travelers Insurance Company, a Connecticut Corporation, and Louis Gach, administrator of the estate of Basil Gach, on a compromise settlement. Summary judgment for both defendants. Plaintiff appeals. Affirmed as to Gach estate. Reversed and remanded for trial as to Travelers Insurance Company.

Robert W. Moss, for plaintiff.

Vandeveer, Haggerty, Doelle, Garzia, Tonkin & Kerr (*Samuel A. Garzia*, of counsel), for the defendants.

J. H. GILLIS, J. On April 22, 1958, plaintiff was injured and ultimately suffered the loss of an eye when a bottle of Vernors ginger ale exploded in a grocery store owned by Basil Gach.[1] Gach's liability to plaintiff, if any, was covered by insurance he carried with the defendant, The Travelers Insurance Company.

On December 18, 1958, Travelers, through one of its agents, in culmination of negotiations with plaintiff's attorney orally offered to compromise the plaintiff's claim for $5,184.[2] This offer was accepted by a letter from plaintiff's attorney to Travelers two days later. Subsequently, Travelers refused to honor its agreement despite plaintiff's demand.

On March 3, 1959, plaintiff sued Vernors for $150,000 for the injuries he sustained from the exploding bottle. On June 8, 1961, after jury trial, plaintiff received a verdict for $35,000 with judgment reserved under the Empson act.[3] Subsequently, plaintiff and Vernors negotiated an agreement that a consent judgment be entered for $25,000, without costs. The judgment was entered and satisfied by Vernors.

On October 29, 1964, plaintiff sued Travelers and Gach's estate on the settlement agreement. Defendants moved for summary judgment claiming that the complaint failed to state a cause of action. The ensuing briefs and oral arguments of the parties in the lower court delved into what effect plaintiff's recovery against Vernors had on his cause of action against Travelers and Gach's estate. The court

[1] Gach has since died and this suit was instituted against the administrator of Gach's estate.

[2] Travelers Insurance Company also agreed to pay $1,000 under a medical payments provision which was due plaintiff without consideration of Gach's liability. Plaintiff was paid the $1,000.

[3] CL 1948, § 691.691 *et seq.* (Stat Ann § 27.1461 *et seq.*), since repealed by PA 1961, No 236 (CLS 1961, § 600.9901 [Stat Ann 1962 Rev § 27A.9901]). Equivalent provisions are now embodied in GCR 1963, 515.

granted defendants' motion and entered a judgment of no cause for action, from which plaintiff appeals.

The Statute of Frauds.

Travelers asserted below, but not here, that the oral agreement of compromise is a promise to pay the debt of another—their insured—and, therefore, must be in writing to be enforceable.[4] This ignores the fact that Travelers did agree in its written policy with Gach to pay certain of Gach's obligations which might arise in the future up to the policy limits. Travelers' oral agreement with plaintiff was within the limits of its written agreement with Gach. Furthermore, Travelers was settling not only Gach's potential liability but its own possible obligation to pay and its own duty to defend Gach. *Cf. Wakefield* v. *Globe Indemnity* (1929), 246 Mich 645; *Kallas* v. *Lincoln Mutual Casualty Co.* (1944), 309 Mich 626. We hold that the statute of frauds has no application here.

The Authority of the Agent to Make the Settlement Agreement.

Defendants argue that the adjuster had no authority to bind either Travelers or Gach to a settlement agreement. The difficulty with this argument as to Travelers is that plaintiff alleged that the adjuster was acting as an agent of Travelers. At this stage of the proceedings that allegation must be accepted as true.[5]

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[4] Although the lower court did not mention this point in its opinion, appellant has briefed the point mindful that we would sustain the result below if it is correct for any reason. *McNair* v. *State Highway Department* (1943), 305 Mich 183, 188. [See CL 1948, § 566.132 (Stat Ann 1953 Rev § 26.922).—REPORTER.]

[5] Defendants' motion for summary judgment was clearly based upon GCR 1963, 117.2(1). The applicable language of the motion is "the pleadings * * * failed to disclose that plaintiff has any cause of action against defendants."

But as to Gach's estate, we have another problem. Plaintiff alleged merely that the adjuster was acting "on behalf of" Gach. This is not a sufficient allegation of agency or other authority to bind Gach.[6] *Cf.* Restatement of Agency 2d, § 20(b), § 225(c); *Kelly* v. *United States Steel Corporation* (WD Pa, 1959), 170 F Supp 649; *Appleby* v. *Kewanee Oil Company* (CA 10, 1960), 279 F2d 334. Accordingly, the judgment in favor of Gach was properly entered.[7]

The Compromise Agreement as an Enforceable Accord.

The opinion below stated that a compromise agreement to settle a personal injury claim is a contract in the nature of an accord and satisfaction. The judge then held that although plaintiff alleged an accord, he did not allege a satisfaction and that there must be "payment of the settlement amount before the compromise ascends to the status of a contract," citing *Stadler* v. *Ciprian* (1933), 265 Mich 252; *Fricke* v. *Forbes* (1940), 294 Mich 375; and *Mundhenk* v. *Liverpool & London & Globe Insurance Company, Ltd.* (1945), 311 Mich 571. But these cases do not involve an action to seek satisfaction of an accord. They each involve parties setting up an unsatisfied accord as a defense to a lawsuit on the original but disputed obligation.[8]

An accord is as much a binding contract as any other agreement. If it is repudiated or otherwise

[6] There is no showing in the record of any attempt by the plaintiff to amend his pleadings properly to allege an agency nor is this point raised on appeal.

[7] Plaintiff's action is based upon the settlement agreement. His original cause of action against Gach or his estate is barred by the statute of limitations.

[8] Thus, if plaintiff had elected to sue Gach on the original cause of action, it is probable that under the authority of these cases, Travelers and Gach could not plead an accord *and satisfaction* since they breached the accord by failing to satisfy.

breached by the obligor, the injured party may sue on the original obligation or upon the accord at his election. 1 Am Jur 2d, Accord and Satisfaction, § 52; 2 Restatement of Contracts, § 417. See annotation, Remedies for breach of valid accord or compromise agreement involving disputed or unliquidated claim. 94 ALR2d 504.

The Effect of Plaintiff's Recovery Against Vernors.

Throughout the trial of the Vernors case and the subsequent settlement negotiations with Vernors, plaintiff failed to disclose his agreement of settlement with Travelers. The court below held that plaintiff had a duty of disclosure and the breach of that duty estops plaintiff from enforcing the settlement agreement with Travelers.

It may well be that a duty of disclosure existed.[9] But if such a duty exists, it is a duty that plaintiff owes Vernors. Whatever remedy Vernors may have cannot inure to the benefit of Travelers. To the extent that we deny plaintiff his contract right against Travelers, to the same extent we deny Vernors its right to recover from plaintiff for fraudulent nondisclosure.[10] To that same extent Travelers is unjustly enriched at Vernors' expense.

Finally, Travelers argues that to allow plaintiff to recover here would do violence to the rule that there can be but one satisfaction for one injury.

[9] CLS 1961, § 600.2925(2) (Stat Ann 1962 Rev § 27A.2925[2]) dealing with settlements with joint tort-feasors, states that a plaintiff may settle with one and have the right to "demand and collect the *balance* of said claim." (Emphasis supplied.) The trial court thought that this meant "that a plaintiff who has settled with one or more of several joint tort-feasors has the affirmative burden of showing what the balance of his claim actually is." We do not now express an opinion whether such is the law or whether Gach and Vernors were joint tort-feasors. *Cf. Geib* v. *Slater* (1948), 320 Mich 316.

[10] This assumes Travelers' premise that plaintiff owed Vernors a duty of disclosure.

Cf. Restatement of Restitution, § 147(3). This argument assumes that plaintiff's full damages in dollars were determined in the Vernors' litigation. This is not so.

We must keep in mind that plaintiff's cause of action against Vernors was settled. True, there was a trial and a jury verdict. But the verdict never ripened into judgment. The parties, for reasons which are not here a matter of record, agreed to a settlement of $25,000 without costs. The agreement was implemented by entry of a consent judgment.

A consent judgment differs substantially from the usual litigated judgment. It is primarily the act of the parties rather than the considered judgment of the court. *Union* v. *Ewing* (1963) 372 Mich 181. *Cf. Tudryck* v. *Mutch* (1948), 320 Mich 99. It ordinarily cannot be set aside by the court without the consent of the parties. *In re Estate of Meredith* (1936), 275 Mich 278 (104 ALR 348). Here the judgment followed execution of a written agreement, the preamble of which read in part, "An amicable settlement having been reached in the amount of $25,000 without costs * * * ." Although the agreement was not precisely drafted,[11] it is clear that the parties settled. That the jury verdict may have loomed large in the minds of the parties during the negotiations for settlement doesn't alter the fact that the judgment was based upon a meeting of the minds of the litigants rather than the verdict of the jury.

In essence, then, we have a situation where a plaintiff has made two settlements with two separate parties who were arguably liable for plaintiff's single injury. We know of no rule that either settlement would be the measure of the single satisfaction

[11] For example, it authorized a judgment upon a settlement and also recited that the judgment should be "in full satisfaction of" the jury verdict. Plaintiff likewise agreed "to a remittitur of $10,000 and costs."

to which plaintiff is limited. Travelers' agreement to settle was at a figure substantially lower than the Vernors' settlement, perhaps because of doubtful liability.[12] Vernors' settlement was less than the jury verdict, perhaps because of a possible challenge to the validity of the verdict. In nearly every settlement, the total extent of the plaintiff's damages is but one of the many factors considered.[13]

Even if we accept the $35,000 verdict of the Vernors' jury as the limit of the amount to which plaintiff was entitled, he has not received full satisfaction. Nor are we prepared to say that, as a matter of law, $25,000 is the limit of recovery for the loss of an eye.

The summary judgment in favor of Gach's estate is affirmed. The summary judgment in favor of Travelers Insurance Company is reversed and remanded to the Wayne county circuit court for trial. No costs, neither side having fully prevailed.

LESINSKI, C. J., and QUINN, J., concurred.

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[12] A point raised by Travelers—that the answer to a special question by the Vernors' jury absolved Gach—is clearly without merit for at least 3 reasons: (1) Plaintiff's complaint having been based on a settlement agreement, Gach's original liability is immaterial; (2) Gach was not a party to the Vernors' litigation, Restatement, Judgments, § 93b; (3) A verdict decides nothing until it becomes the judgment of the court even as between the parties to the litigation. *Whitney* v. *Bayer* (1894), 101 Mich 151.

[13] The experienced lawyer handling negligence cases, in approaching a settlement conference, will take into consideration the forum of the action, the collectibility of the defendant, the appearance and demeanor of the potential witnesses and the skill of opposing counsel, to mention only a few of the pragmatic considerations which no one would suggest this Court should consider in determining what is full satisfaction for a particular injury.

RUHALA *v.* ROBY.

1. WITNESSES—OPPOSITE PARTIES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—DRIVER OF CAR IN WHICH DECEDENT WAS RIDING.

   Testimony of defendant in action by administrator of estate of decedent who was killed in an automobile accident as to whether such defendant or decedent was driving the car was barred by statute prohibiting testimony as to matters equally within knowledge of the decedent (CLS 1961, § 600.2160).

2. SAME—OPPOSITE PARTIES—CROSS-EXAMINATION.

   A plaintiff may call an opposite party as a witness, and make the opposite party plaintiff's witness, or call him for cross-examination under the statute, and not make the opposite party plaintiff's witness, in which latter event the plaintiff is required to announce the purpose for calling the witness or offering his deposition (CLS 1961, § 600.2161).

3. SAME—OPPOSITE PARTY—CROSS-EXAMINATION—DEPOSITION—DISCRETION OF COURT.

   Denial of right to consider deposition of witness as offered for purpose of cross-examination *held*, not an abuse of discretion, where such witness, although an opposite party, had not been called for cross-examination under the statute, and right of cross-examination had been denied (CLS 1961, § 600.2161; GCR 1963, 302.4[2], 302.6).

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses §§ 219, 250.
Testimony to facts of automobile accident as testimony to a "transaction" or "communication" with a deceased person, within dead man statute. 80 ALR2d 1296.
[2, 5] 58 Am Jur, Witnesses § 560.
[3, 4] 23 Am Jur 2d, Depositions and Discovery § 7.
[6] 4 Am Jur 2d, Appeal and Error §§ 537, 538.

4. DEPOSITIONS—WITNESS PRESENT IN COURT.

None of a deposition is admissible in evidence where witness who deposed, not called for cross-examination, is present in court, since there is no necessity for resorting to it, although had the witness who was an opposite party, been called for cross-examination under the statute, the deposition might then have been used for purposes of impeachment, if necessary (CLS 1961, § 600.2161; GCR 1963, 302.4[2], 302.6).

5. WITNESSES—OPPOSITE PARTY—CROSS-EXAMINATION.

Denial of request to cross-examine opposite party whom plaintiff had called as a witness without having announced the purpose for calling such witness *held*, not error, where no showing was made of necessity for cross-examination of such witness (CLS 1961, § 600.2161).

6. APPEAL AND ERROR—QUESTIONS REVIEWABLE—REQUEST TO CHARGE—DAMAGES.

Claim of error in omission to give requested instruction relative to damages is not discussed, where jury's verdict constituted a finding of no liability on part of defendant.

Appeal from Shiawassee; Carland (Michael), J. Submitted Division 2 February 9, 1966, at Lansing. (Docket No. 832.) Decided March 22, 1966. Leave to appeal granted by Supreme Court May 25, 1966. See 377 Mich 712, 379 Mich 102.

Complaint by Richard Ruhala, administrator of the estate of Esther Kingsley, against James Roby and William Burditt for the wrongful death of decedent in an automobile accident. Directed verdict and judgment for defendant Burditt. Verdict and judgment for defendant Roby. Plaintiff appeals only as to defendant Roby. Affirmed.

Leitson, Dean, Dean, Abram & Segar (*Max Dean*, of counsel), for plaintiff.

Des Jardins & Des Jardins (*Jerry L. Des Jardins*, of counsel), for defendant Roby.

QUINN, J. The trial court directed a verdict of no cause for action as to Burditt. The jury returned

a verdict of no cause for action as to Roby. Judgment entered on the verdicts. Plaintiff's motion for a new trial as to Roby was denied and plaintiff appeals from the order denying the new trial.

Plaintiff states the first two issues on appeal as follows:

"May plaintiff's offer of defendant's discovery deposition be received without making the defendant plaintiff's witness?"

"May plaintiff, after receipt into evidence of defendant's discovery deposition on plaintiff's offer, call defendant for cross-examination?"

A full understanding of these issues and their resolution requires that they be considered together and in context with trial procedure adopted by plaintiff.

Plaintiff's decedent died as the result of injuries received in a motor vehicle accident December 7, 1963, on Dixie highway in Saginaw county. The complaint alleged decedent was a nonguest passenger in her automobile being driven in a northerly direction by defendant Roby. It further alleged that this car went out of control because of Roby's reckless and negligent driving, crossed the center line and entered the southbound lane where it was struck by defendant Burditt's motor vehicle as it proceeded south. The complaint specified several items of negligence attributable to Burditt.

In his answer, Roby denied he was driving the automobile involved and also pleaded this fact together with an allegation of decedent's negligence as an affirmative defense. Burditt's answer denied any negligence and pleaded affirmatively that the negligence of the driver of plaintiff's vehicle was the sole cause of the accident.

The only eyewitnesses to the accident were Fred Rosenberger, who was following plaintiff's car;

Harold Wallner, who was following the Burditt vehicle; Roby; and Burditt. Plaintiff called Rosenberger as a witness but did not ask him any questions regarding the identity of the driver of plaintiff's car. Plaintiff also called Wallner but he did not know who was driving plaintiff's vehicle. Roby's testimony as to the driver of plaintiff's automobile was barred by the statute.[1] If plaintiff were to establish the identity of the driver of the car in which plaintiff's decedent was riding, she then had to do it by the testimony of Burditt, and any available physical evidence tending to establish that fact.

Plaintiff had taken Burditt's discovery deposition, and although Burditt was present in court, plaintiff did not call him as a witness initially but did offer the discovery deposition in evidence without announcing the purpose therefor. Opposing counsel were afforded an opportunity to determine whether the deposition contained inadmissible evidence, and a conference between court and all counsel resulted in a ruling that parts of the deposition were inadmissible. Thus restricted, the deposition was received and read into evidence. Later in the trial, plaintiff called Burditt for cross-examination under the statute.[2] Objection of defense counsel to this procedure was sustained and cross-examination was not permitted, except on a separate record.[3] Plaintiff then examined Burditt directly.

Plaintiff contends the trial court erred in holding that under the above procedure, Burditt became plaintiff's witness and was not subject to cross-examination by plaintiff. He supports this contention by the language of GCR 1963, 302.6 and 302.4(2) which is as follows:

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[1] CLS 1961, § 600.2160 (Stat Ann 1962 Rev § 27A.2160).
[2] CLS 1961, § 600.2161 (Stat Ann 1962 Rev § 27A.2161).
[3] GCR 1963, 604.

".6 Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subrule 302-.4(2)."

".4(2) The deposition of a party or anyone who at the time of the transaction or occurrence out of which the action arose or at the time of taking the deposition was an officer, director, employee, or agent of any party may be used by an adverse party for any purpose."

It is clear that the exception provided in 302.6 in regard to the use of the deposition of a party by an adverse party as described in 302.4(2) is for the purpose of having the use of depositions conform to the practice applicable if the deponent was called as a witness. Plaintiff could have called Burditt as his witness, or he could have called him for cross-examination under the statute, *supra,* and not made him his witness. If the latter result is desired, counsel is required to announce the purpose for calling the witness or offering the deposition. *Mally* v. *Excelsior Wrapper Co.* (1914), 181 Mich 568. It is true that at the time right to cross-examine Burditt was denied, plaintiff requested the trial court to consider the deposition as offered for the purpose of cross-examination, but this request is addressed to the court's discretion. At the stage the request was made, we hold it was not an abuse of discretion to deny it. (Compare *Walter* v. *Detroit, J. & C. R. Co.* [1916], 191 Mich 181.)

Plaintiff next contends the trial court erred in ruling inadmissible parts of Burditt's deposition.

These parts were excerpts of Burditt's testimony on deposition relating to statements made by him in extrajudicial statements to the State police and an insurance adjuster. In the testimony on deposition, which was excluded at trial, Burditt confirmed the following questions and answers in his statement to the State police:

"*Q.* William, did you see the passengers in the car before you hit?
"*A.* Yes sir.
"*Q.* Could you tell me the sex of the passengers and where they were sitting in the car?
"*A.* A male and a female, the woman was sitting on the passenger's side where we hit.
"*Q.* Then you saw this woman in the car before you hit?
"*A.* Yes."

He likewise confirmed the following questions and answers in a statement to the adjuster.

"*Q.* The question I am asking you and the answer is correct?
"*A.* Yeah.
"*Q.* Now, the next question that was asked you: 'I see, do you know who was driving the other car?' and the answer, 'Well I'll tell you the same as I told the State Police and his wife, the man was not driving the car'?
"*A.* The woman was not driving the car.
"*Q.* Excuse me, 'The woman was not driving the car,' is that correct?
"*A.* That's right.
"*Q.* Now, the next question is, 'The woman was not driving?'" and the answer, 'Right, not driving the car' is that correct?
"*A.* Uh-huh."

Plaintiff's contention cannot be sustained. As stated in 5 Wigmore on Evidence (3d ed), § 1415, p 192:

"It is clear, therefore, that if the witness is present in the court-room at the time when his deposition is offered, the deposition is inadmissible, because there is no necessity for resorting to it."

To the same effect see *Dunn* v. *Dunn* (1863), 11 Mich 284. It is the opinion of this Court that none of the deposition should have been received in evidence.[4] Its proper use would have been for purposes of impeachment, if necessary.[5]

During plaintiff's direct examination of Burditt, plaintiff requested the right to cross-examine the witness. The request was denied and plaintiff claims this was error. The trial court properly denied this request. No showing was made to indicate the necessity for cross-examination. *Dompier* v. *Lewis* (1902), 131 Mich 144.

The jury found no liability. This obviates discussion of plaintiff's final claim of error with respect to a requested instruction on damages that the trial court did not give.

We find no error. The trial court is affirmed, with costs to appellees.

LESINSKI, C. J., and T. G. KAVANAGH, J., concurred.

[4] See GCR 1963, 302.4(3[5]).—REPORTER.
[5] See GCR 1963, 302.4(1).—REPORTER.

JEAN *v.* CHRYSLER CORPORATION.

1. WORKMEN'S COMPENSATION—PASSAGE BETWEEN PARTS OF EMPLOYER'S PREMISES—PUBLIC ROAD—PRESUMPTIONS.

   Mere act of crossing a public road between employer's building, in which decedent employee had finished his usual duties and punched a time clock, and parking lot which employer had leased for employees' use *held*, not to have removed employee from the basic protection of the provision of the workmen's compensation act that an employee should "be presumed to be in the course of his employment" while "going to or from his work while on the premises where his work is to be performed and within a reasonable time before and after his working hours" (CL 1948, § 412.1, as amended by PA 1954, No 175).

2. SAME—PASSAGE OVER PUBLIC ROAD TO PARKING LOT—PERSONAL ERRAND.

   Passage across a public road situated between building where decedent employee worked in order to reach parking lot, leased by employer for use of employees, which use was an adjunct of the employment, may not be said to be a personal errand precluding recovery of workmen's compensation (CL 1948, § 412.1, as amended by PA 1954, No 175).

3. SAME—ADJUNCT OF EMPLOYMENT—PARKING LOT ACROSS PUBLIC ROAD.

   Reaching the employee parking lot after completion of day's work in the plant with no unwarranted lapse of time was a necessary adjunct of decedent employee's employment, hence, his dependents were entitled to workmen's compensation benefits for death from fatal injuries received while crossing public road en route to parking lot leased by employer for use of employees (CL 1948, § 412.1, as amended by PA 1954, No 175).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 58 Am Jur, Workmen's Compensation §§ 217, 221, 226.

[2] 58 Am Jur, Workmen's Compensation § 240.

Workmen's compensation: deviation on personal errand as affecting question whether injury to employee on street or highway arose out of and in the course of employment. 76 ALR 356.

4. ACTION—CONJECTURAL POSTURE.

Recovery in a proper case should not be suppressed because of conjectural posture which may never arise and which, if it does, will be decided in the light of then-existing law.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 1 February 9, 1966, at Detroit. (Docket No. 528.) Decided March 22, 1966.

Hazel B. Jean, widow of Aaron Jean, presented her claim for workmen's compensation against Chrysler Corporation for injuries to her deceased husband sustained leaving defendant's plant. Workmen's compensation appeal board upheld referee's grant of compensation. Defendant appeals. Affirmed.

Goodman, Crockett, Eden, Robb & Philo (*Morton A. Eden* and *George W. Crockett III,* of counsel), for plaintiff.

Lacey & Jones (*William J. Jones,* of counsel), for defendant.

FITZGERALD, J. Aaron Jean was an hourly-rated employee of the Chrysler Corporation working the second shift from 2:30 p.m. to midnight. On January 2, 1962, he finished his usual duties at midnight, punched the time clock and left the building. The west side of the building was adjacent to Mound road in the city of Detroit, and it is necessary to cross Mound road to reach the area leased by Chrysler and designated for employee parking. Mr. Jean proceeded through the plant gate, across the sidewalk, and started to cross Mound road at an angle which would place him at the entrance to the parking area. Halfway across the west lane he was struck by an

automobile, sustaining injuries which resulted in his death. The driver of the automobile was not an employee of Chrysler Corporation.

The workmen's compensation appeal board entered an order on January 21, 1965, holding that the deceased's fatal injuries arose "out of" and in the "course of" his employment and awarded compensation to his dependents, a wife and two children. Defendant Chrysler Corporation appeals, contending that the board erred in its findings.

It is obvious from the foregoing that the basic question before us, just as before the appeal board, is this: Did the deceased's injuries which occurred in a public street while he was passing from one property controlled by his employer to another property controlled by his employer, come within the purview of the workmen's compensation act?

Narrowing the question down even further, we are in effect being asked to rule whether the deceased was still "on the premises" of his employer though he was struck in the middle of a public highway.

Once again we are required to sail through the uncharted shoals of statutory interpretation: a logical common-sense application on one side, reflecting legislative intent, versus the possibility of an unwarranted extension not contemplated in the statute's enactment.

The question before us is *res nova* in this State, a fact which in and of itself is intriguing when one considers that workmen's compensation legislation has been in effect since 1912 and that the amendment we find before us in this appeal has been in effect since 1954.

Defendant cites cases which stand for the broad proposition that an employee sustaining injuries at a place other than where his duties are directly per-

formed does not come under the benefits of the act. These cases stand further for the proposition that the test of whether an injury arises out of and in the course of employment largely revolves around whether the employee was performing a service or duty owed his employer or whether he had further work or duties to perform for his employer on the day of the injury. *Pearce* v. *Michigan Home & Training School* (1925), 231 Mich 536; *Appleford* v. *Kimmel* (1941), 297 Mich 8; *Daniel* v. *Murray Corporation of America* (1949), 326 Mich 1; and *Stornant* v. *Licari-Packard Grosse Pointe, Inc.* (1952), 332 Mich 210.

Had our specific fact situation arisen only a few short years ago, there is scarce doubt that this appeal might not be before us and these cases standing alone might deny an award in this case. That they represented proper judicial interpretation of the act at the time is not questioned, but it is to be noted that all of them were decided prior to PA 1954, No 175,[1] amending the workmen's compensation act by adding the following language:

"Every employee going to or from his work while on the premises where his work is to be performed and within a reasonable time before and after his working hours, shall be presumed to be in the course of his employment."

A direct confrontation between our fact situation and the language, *supra,* liberally sprinkled with logic and common sense, brings us to a conclusion which seems inescapable: that the mere act of crossing a public road from employer's premises to employer's premises and being injured while on that road does not remove the deceased from the basic protection which the legislature intended by the act and its 1954 amendment. An incidental departure

[1] CLS 1961, § 412.1 (Stat Ann 1960 Rev § 17.151).

from the premises does not rebut the amendment's presumption. That the employer owes, so to speak, a duty of "safe passage" to an employee to the point where he can reach the proper arrival or departure from his work seems without question.

The parking lot the deceased was headed for had been leased by his employer and had been offered to him as a part of his employment. Indeed, the parking lot and its attendant use were a necessary adjunct of his employment and under no circumstance could travel to and from it be called a personal errand. The employer realized full well that the parking lot was separated from the main plant by a main-traveled thoroughfare and it was defendant who secured this parking lot, not the employees.

The instant facets of the workmen's compensation act have been the subject of a logical progression of judicial interpretation over the years, more specifically in *Dyer* v. *Sears Roebuck & Company* (1957), 350 Mich 92, and *Lasiewicki* v. *Tusco Products Company* (1963), 372 Mich 125. While there are fundamental differences between those cases and the one before us, we see no startling extension of interpretation of the act in saying that the employee who leaves work and within a reasonable time is injured in reaching other premises maintained by his employer as an adjunct of the employment is covered by the act. It was in *Lasiewicki* in which the following statement was made, pointing inexorably to the proper decision of this case (pp 130, 131):

"Long prior to the clarifying amendment of 1954, quoted above, when this, and other courts, had the responsibility of construing what the language 'arising out of and in the course of employment' meant in relation to place of injury, this Court stated an important principle in the 1914 case of *Hills* v. *Blair,* 182 Mich 20, 27 (7 NCCA 409):

"'In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. *A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labor, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act.*'" (Emphasis in original.)

With a guideline like this, we deem it unnecessary to go into the case law of other States where a considerable body of litigation has developed in which the instant problem has been considered and decided, we believe, rightly. Our own jurisprudence is vigorous enough to support the decision of the appeal board without extrinsic aid, though we are impressed by this passage from *Bountiful Brick Co.* v. *Giles* (1927), 276 US 154, 158 (48 S Ct 221, 72 L ed 507) in which it was said:

"If the employee be injured while passing with the express or implied consent of the employer, to or from his work by a way over the employer's premises or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises the injury is one arising out of and in the course of employment as much as though it had happened while the employee was engaged in his work at the place of its performance."

The converse of the problem before us arose in *Manni* v. *Hastings Manufacturing Co.* (1958),

WCABO 502, a case which, though of no precedential value to an appellate court, contains in its opinion a persuasive passage regarding an employee injured as the result of a fall on a public sidewalk separating the employer's plant from its parking lot. The board there said:

"The only possible way she could proceed from the parking lot to her assigned post for the balance of her day's duties was to cross a public-way. Such facts then give rise to the question: After the course of the employment had begun for the day are we then to interpret Act No 175 so as to grant workmen's compensation benefits as if they were dispensed from a faucet that can be turned on and off as the employee proceeds through the routine of duties required of his employment as the day progresses? We do not believe the word 'premises' should be interpreted so as to control the ebb and flow of workmen's compensation benefits. We hold that plaintiff was in the course of her employment when the injury occurred. By reason of her employment plaintiff was passing along the sidewalk at the time of the accident and the hazard of its icy condition was incidental thereto. We hold her injury arose out of her employment."

This logic can apply with equal force to the case before us. Reaching the employee parking lot after his day's work with no unwarranted lapse of time was a necessary adjunct of the deceased's employment.

To let the employer now turn its back and say that crossing the highway was a risk which the deceased assumed by coming to work for it is to return to an era where human lives and suffering were considered a raw material of production, just as a ton of steel might be considered today.

We feel that the emphasized portion of *Hills* v. *Blair, supra,* while it may have been dictum in its

day (1914), is the law today and the only proper viewpoint which may be applied by virtue of the clear legislative intent of the 1954 amendment.

Helmic v. *Paine* (1963), 369 Mich 114, a tort case urged by defendant as having significance to this decision, really settles nothing of instant import when read in the light of this case. There, consideration in depth is given to whether both litigants were "in the same employ," a factor not present here. Further, *Helmic* remands for trial with the language (p 120): "The question of where the accident happened has not been decided."

Defendant in its brief states an ingenious hypothetical situation as a counter to the decision of the appeal board: assume two employees had left the actual premises of the employer and were crossing the public highway. Assume further that one of these employees was going to catch a bus on the corner of the highway, the other was going to a parking lot on the far side of the street. The parking lot was owned by the employer. Assume further that both employees were struck by the same automobile and both injured. Can it be said that under these circumstances that employee A, the one who was catching the bus, suffered a noncompensable injury while employee B, who was going to the parking lot to get his car, suffered a compensable one?

We could, of course, say "this is not the case before us" and utilize the old saw, "that which is not before us we do not decide." Instead, we prefer to utilize the considerably older saw: "Sufficient unto the day is the evil thereof,"[2] appending, however, this admonition: no statute is static; it must remain constantly viable to meet new challenges placed to it. Recovery in a proper case should not be

[2] Matthew 6:34.

suppressed because of conjectural posture which may never arise and which, if it does, will be decided in the light of then-existing law.

Involuntary exposure to a twice-daily street hazard, incidental to his employment, was a part of the job of Aaron Jean and is considered a part of his employment as properly as if he had been injured or killed in the direct course of performing his work. To paraphrase a term used in *Dyer, supra,* we say that we do not wish to fashion and affix another "tort-shaped barnacle" to the hull of workmen's compensation.

Affirmed. Costs to appellees.

J. H. GILLIS, P. J., and WATTS, J., concurred.

STATE HIGHWAY COMMISSIONER *v.* ENGLEBRECHT.

1. EMINENT DOMAIN—JUST COMPENSATION—TAKING OF PART OF PARCEL OF LAND.

   Just compensation, for the taking of part of a parcel of land, is allowable for the value of the part actually taken as direct compensation and the decreased value of the residue is also allowable as compensation (CL 1948, § 213.176).

2. SAME—CONTIGUOUS LOTS—REMAINDER—INTEREST IN LEASED LOT.

   Contiguous lots, a part of both of which owner had leased to another and the remainder of which owner and lessee were negotiating a lease, *held,* a single parcel of land so that condemnation of part of the lot which was not leased resulted in part condemnation of the entire tract, consisting of both lots, and the decreased value of the residue of the entire tract was a proper basis for award of compensation.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 18 Am Jur, Eminent Domain § 265 *et seq.*

Appeal from Macomb; Deneweth (George R.), J. Submitted Division 2 February 10, 1966, at Lansing. (Docket No. 332.) Decided March 22, 1966. Rehearing denied May 3, 1966.

Petition by John C. Mackie as State Highway Commissioner of the State of Michigan to condemn certain lands in Clinton township, Macomb county, including that owned by Wesley Englebrecht and his wife. From an award for defendants, plaintiff appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Louis J. Caruso* and *Robert J. Taube,* Assistant Attorneys General, for plaintiff.

Kenneth N. Sanborn, for defendant.

QUINN, J. Plaintiff appeals from an award of damages to defendants by Macomb county circuit court in a condemnation proceeding incident to improving highway US–25. The only issue raised by the appeal is whether any award is legal under the facts of the case.

Defendants are the owners of lots 32 and 44, Meadows Subdivision, Clinton township, Macomb county. The lots are contiguous. February 17, 1958, defendants leased a major portion of lot 44 and a part of lot 32 to B. F. Goodrich Company for a term of 10 years. The lessee constructed a retail store on part of the leased premises and used the remainder for customer parking. Plaintiff acquired a portion of lot 32 for highway improvement. The taking did not touch lot 44 or the leasehold, although it came within 7/10 of a foot of the leasehold. Being unable to agree on defendants' claim for damages as it related to the leased portions of lots 44 and 32, the

parties stipulated for two awards and designated the unleased portion of the lots as parcel C–19 and the leased portion as parcel C–19A. An award was made and paid as to parcel C–19. This appeal is from the award made for parcel C–19A.

Although admitting that at one time C–19 and C–19A were one parcel, plaintiff contends that by leasing C–19A defendants divided the one parcel, and since there is no taking of any part of C–19A, there is no compensation allowable as to it. To sustain this position, plaintiff argues that the statute, CL 1948, § 213.176 (Stat Ann 1958 Rev § 8.177), fixes the time of taking as the time of recording the determination of necessity, which in this case was October 12, 1962. On this date, the only factors linking C–19 and C–19A were the reversionary interest of defendants in C–19A and the physical contiguity of the two properties. Plaintiff argues that these factors are insufficient as a basis for determining that the two parcels constitute a tract from which the taking occurred because they do not meet 2 of 3 recognized tests utilized for this purpose; namely, uniformity of ownership in both properties and unity of use. The other test, contiguity, is clearly met.

The keystone of plaintiff's argument is the assumption that by leasing parts of the lots, defendants subdivided what plaintiff concedes was one parcel prior to the leasing. On the facts presented here, this Court will not make that assumption. The fee to all of lots 44 and 32 is in defendants. By leasing part of each, it can be said this was recognition of the fact the lots were one parcel as well as it can be said such leasing constituted a subdivision of the parcel. The testimony indicates that the lessee was negotiating with defendants for an expansion of its lease over the unleased portion. The

unleased portion of lot 44 is a strip approximately 34 feet deep by 200 feet wide, or approximately 6,800 square feet. The unleased portion of lot 32 west of the right-of-way is approximately 34 feet by 102 feet, or approximately 3,500 square feet. This land is zoned C–1. Section 4:09–2 of the township zoning ordinance requires 10,000 square feet of land before a building can be constructed in a C–1 zone. Under these facts, this Court holds that lots 44 and 32 are one parcel of land, part of which is under lease.

From *Port Huron & S. W. R. Co.* v. *Voorheis* (1883), 50 Mich 506, through *In re Grand Haven Highway* (1959), 357 Mich 20, our Supreme Court has held (p 26):

"'Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue of the parcel on account of the use made of the land taken is also allowable as compensation.'"

The award of the trial court is affirmed, with costs to defendants.

LESINSKI, C. J., and T. G. KAVANAGH, J., concurred.

APRIL SESSION, 1966.

DONELLON *v.* COUNTY OF WAYNE.

1. APPEAL AND ERROR—CLAIM OF APPEAL—FILING.

   Appeal as to defendant in whose favor judgment had been entered more than 20 days prior to filing claim of appeal *held,* not properly before Court of Appeals for review (GCR 1963, 803.1).

2. TORTS—GOVERNMENTAL IMMUNITY—ABROGATION OF RULE OF IMMUNITY.

   The rule of governmental immunity from tort liability as to all political subdivisions of government is abrogated whether the involved political subdivision is functioning governmentally or proprietarily.

3. COUNTIES—ABROGATION OF GOVERNMENTAL IMMUNITY.

   Summary judgment for defendant county employees in action for wrongful death of plaintiff's decedent, based on governmental immunity of county and its employees when carrying out governmental functions, *held,* improperly entered, where defense of governmental immunity has been abrogated by judicial decisions.

4. COSTS—PUBLIC QUESTION—GOVERNMENTAL IMMUNITY.

   No costs are allowed on appeal in action against county employees for wrongful death of plaintiff's decedent, where rule of governmental immunity from tort liability has been abrogated, a public question being involved.

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 314.
[2, 3] 38 Am Jur, Municipal Corporations § 572.
Municipal immunity from liability for torts. 60 ALR2d 1198.
[4] 5 Am Jur 2d, Appeal and Error § 1009.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted Division 1 October 5, 1965, at Detroit. (Docket No. 350.) Decided April 12, 1966. Rehearing denied May 27, 1966. Leave to appeal denied by Supreme Court August 25, 1966. See 378 Mich 727.

Complaint by Janette Shock Donellon, special administratrix of the estate of Charles Shock, against the county of Wayne, a body politic, Dr. Samuel Jacobson, Walter B. Furay, Sylvester Echols, Charles S. Vanoy, and Richard Charles Kilponen, for the wrongful death of her husband, Charles Shock. Summary judgment as to all defendants. Motion for rehearing as to individual defendants denied. Plaintiff appeals. Reversed and remanded as to individual defendants.

Riseman, Lemke & Piotrowski (*Carl M. Riseman,* of counsel), for plaintiff.

Samuel H. Olsen, Prosecuting Attorney, *Aloysius J. Suchy* and *George H. Gross,* Assistant Prosecuting Attorneys, for defendants.

LESINSKI, C. J. Janette Shock Donellon, the plaintiff-appellant, sued the county of Wayne and individual defendants Dr. Samuel Jacobson, Walter B. Furay, Sylvester Echols, Charles S. Vanoy, and Richard Charles Kilponen jointly and severally for the wrongful death of her husband, Charles Shock. On motion of defendants, the trial court on September 29, 1964, entered an order for summary judgment in favor of all defendants based on the governmental immunity of the county and its employees when carrying out governmental functions. On October 17, 1964, the plaintiff moved for a rehearing of the order granting summary judgment *only* in respect to the individual defendants and not

as to the county. This motion was denied on November 18, 1964, and from this determination and the order for summary judgment, the plaintiff took a claim of appeal to the Michigan Supreme Court. The case was then transferred by the Supreme Court to the Court of Appeals on January 7, 1965.

As to the county of Wayne, the appeal was not timely filed in the Supreme Court and therefore cannot be heard by our Court under GCR 1963, 803.1 (as effective prior to January 1, 1965)[1] as an appeal as of right. The appellant first filed this appeal in the Supreme Court on December 7, 1964, 19 days after plaintiff's motion for rehearing was denied. This motion for rehearing was only taken in regards to the individual defendants and not as to the county of Wayne. Therefore, as to the county, the judgment appealed from was the initial summary judgment granted by the court on September 29, 1964. Plaintiff in order to appeal the judgment respecting the county, would have had to file his appeal within 20 days of that judgment. Not having done so, the appeal regarding the county of Wayne is not properly before this Court.

The basic question remaining before this Court is whether the individual defendants, employees of the county, can be shielded from liability by the defense of governmental immunity.

As the law stands with respect to this case, the shield of immunity has been lifted from the county. *Myers* v. *Genesee County Auditor* (1965), 375 Mich 1, indicates that a majority of the Court concurs in the abrogation of the governmental immunity doctrine. In the opinion by Justice O'HARA in the *Myers Case,* concurred in by Chief Justice T. M. KAVANAGH, it is said at page 11:

[1] See currently, GCR 1963, 803.1 as amended October 9, 1964, 373 Mich xxxiv.

"The rule of governmental immunity as to all political subdivisions of government is hereby abrogated as it has heretofore been abrogated as to municipal corporations, *i.e.*, cities. No longer is the defense of governmental immunity for tort liability available, irrespective of whether the involved political subdivision is functioning 'governmentally' or 'proprietarily.'"

And Justice SOURIS in an opinion concurred in by Justice ADAMS states:

"I concur in Mr. Justice O'HARA's decision, the result of which is to overrule *Lewis* v. *Genesee County* (1963), 370 Mich 110."

Thus Justice SOURIS is overruling a case that held governmental immunity a valid defense for the county and its agents. By doing so a majority of the seven men sitting in the *Myers Case* have expressly overruled the right of the county or its agents to raise the immunity doctrine as a defense to their alleged tort liability.

Therefore, in the case at bar the summary judgment in favor of all the defendants was improperly granted in light of the rule of the *Myers Case*[2] as reaffirmed in *Keenan* v. *County of Midland* (1966), 377 Mich 57. See, also, *Picard* v. *Greisinger* (1965), 2 Mich App 96.

Reversed and remanded for trial as to the individual defendants. No costs, a public question being involved.

FITZGERALD and J. H. GILLIS, JJ., concurred.

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[2] Though PA 1964, No 170 (CL 1948, § 691.1401 *et seq.* [Stat Ann 1965 Cum Supp § 3.996(101) *et seq.*]) went into effect on July 1, 1965, it could not affect the prospective liabilities of the parties in the case at bar. Therefore for the period prior to July 1, 1965 the rule of the *Myers Case* stands as the law in respect to the use of governmental immunity as a defense.

HOGERHEIDE *v.* HICKEY.

1. IMPROVEMENTS—RIGHT TO COMPENSATION—GOOD FAITH—POSSESSION—COLOR OF TITLE.

   To entitle one in equity to compensation for improvements made upon another's property they must have been made in good faith by improver while holding possession under color of title adverse to the title of the true owner.

2. SAME—RIGHT TO COMPENSATION—INNOCENT MISTAKE.

   Requirements of color of title and adverse possession have no application in case of improvements on another's property through an innocent mistake.

3. SAME—RIGHT TO COMPENSATION—COURT RULES—BURDEN OF PROOF.

   Court-rule provision foreclosing collection for value of improvements if they were made in bad faith, shifts burden of proof and emphasis as to element of good faith from improver to owner (GCR 1963, 754.5[3]).

4. SAME—CONSTRUCTION OF COURT RULE—BAD FAITH—FRAUD.

   Term *bad faith* in the context of court rule relative to compensation for improvements on real estate is construed to mean not *fraud* or *overreaching,* but simply a *lack of good faith* (GCR 1963, 754.5[3]).

5. COURTS—CONSTRUCTION OF COURT RULES—SUBSTANTIVE RIGHTS—PROCEDURE.

   The Court of Appeals will adopt an interpretation of a court rule which preserves the substantive rights of the parties and merely regulates the procedure for enforcing them, where to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 27 Am Jur, Improvements § 20.
Compensation for improvements made or placed on premises of another by mistake. 57 ALR2d 263.
[3] 20 Am Jur, Evidence § 131.
20 Am Jur 2d, Courts § 85.
[4, 5] 20 Am Jur 2d, Courts § 86.
[6] 27 Am Jur, Improvements § 32.

construe it otherwise is to give court rule effect of changing substantive rights (GCR 1963, 754.5[3]).

6. IMPROVEMENTS—FINDING OF TRIAL COURT—PREPONDERANCE OF EVIDENCE.

Finding of trial court that plaintiff who had improved real estate to which title had been held by his late wife and her brother as joint tenants had failed to establish a case for equitable intervention and to obtain compensation for the improvements *held*, not against the clear preponderance of evidence.

Appeal from Kent; Vander Wal (John H.), J. Submitted Division 3 October 5, 1965, at Grand Rapids. (Docket No. 518.) Decided April 12, 1966.

Complaint by Francis Hogerheide against Leo M. Hickey for a determination of rights in certain real property or, in the alternative, reimbursement for the value of certain improvements to the property. Counterclaim by defendant that plaintiff had no interest in either the property or improvements. Judgment for defendant. Plaintiff appeals. Affirmed.

Dilley & Dewey (*Newton Dilley,* of counsel), for plaintiff.

Roach, Smolenski & Twohey (*Robert A. Benson,* of counsel), for defendant.

T. G. KAVANAGH, J. In 1955 defendant Leo M. Hickey, pursuant to a land contract, took title to a lot near Barlow lake in Barry county as a joint tenant with his sister, Marguerite Hogerheide, then wife of the plaintiff.

During the years 1956 through 1960 the plaintiff, primarily with his own labor, constructed a home on the lot.

In May, 1961, Marguerite Hogerheide died, and in the summer of 1962 the plaintiff remarried.

When later the question of ownership of the property arose, defendant started suit for ejectment and plaintiff brought the instant suit in equity praying for determination of his rights in the property asking either for title or reimbursement for the value of the improvements he made. Defendant filed a counterclaim and asked the court to determine that plaintiff had no interest in the property or improvements.

The trial judge determined that defendant alone held title by reason of surviving the joint tenant Marguerite Hogerheide and found that the plaintiff's possession was not under "color of title," that it was not adverse to defendant's title and that the plaintiff did not show "good faith" within the definition of that phrase contained in *Whitehead* v. *Barker* (1939), 288 Mich 19. The court ruled that plaintiff had no interest in the property and was not entitled to reimbursement for the improvements, and ordered the plaintiff to give possession thereof to defendant.

The appellant alleges error in the court's affirmative answer to the following question:

"Does Michigan law require a court of equity to deny relief to an occupying claimant unless the claimant can establish:

"1. That his possession was under 'color of title',

"2. That his possession was adverse to the title of the true owner.

"3. That he acted in good faith?"

His argument is to the effect that the requirements of the "color of title" and "adverse possession" are not required under the cases of *Ollig* v. *Eagles* (1956), 347 Mich 49, and *Hardy* v. *Burroughs* (1930), 251 Mich 578; and the requirement of the demonstration of "good faith" as a qualification as in *Whitehead, supra,* is replaced by the requirement of the demonstration of "bad faith" as a disqualifica-

tion under GCR 1963, 754.5(3). We do not agree completely.

While the requirements of "color of title" and "adverse possession" have no application in the case of improvement of another's property through an innocent mistake as in *Hardy, supra,* they are still required under *Whitehead, supra.*

In the *Ollig Case, supra,* though there was no mistake, the Court permitted recovery on the theory that the defendant there was estopped to interpose a defense because of his conduct.

The cases are clearly distinguishable among themselves and from the case at bar. Here the court found that the improvements were not made under a mistake as in *Hardy, supra,* but on the contrary, with knowledge of the defendant's ownership. He also found that the conduct of the owner did not estop him from asserting his defense as in *Ollig, supra.*

This leaves only the consideration of the effect of GCR 1963, 754.5, which reads:

"5. Claim for the Value of Buildings Erected and Improvements Made on the Premises.

"(1) Within 30 days after the finding of title any party may file a claim against the party found to have title to the premises for the amount that the present value of the premises has been increased due to the erection of buildings on the premises or the making of improvements on the premises by the party making the claim or those through whom he caims.

"(2) Evidence shall be taken as to the value of the buildings erected and improvements made on the premises and as to the value which the premises would now have had they not been improved or built upon. Thereafter, findings shall be made determining the amount that the premises would be worth at the time of the claim had the premises not been improved and determining the amount that the value

of the premises was increased at the time of the claim by reason of the buildings erected and improvements made on the premises.

"(3) The party claiming the value of the improvements shall not collect for the value of the improvements if they were made in bad faith."

We perceive the effect of (3) above as shifting the burden of proof and emphasis in the inquiry involved in these cases.

Whereas prior to the adoption of the court rule, except in case of mistake, the improver had to show the three elements listed in *Whitehead, supra; viz.*, "color of title", "adverse possession", and "good faith"; under the court rule the burden is on the owner (once the first two elements are established) to show "bad faith."

"Bad faith" has often been equated with fraud or overreaching. In this context, however, in light of the use of the term "good faith" in the prior decisions on the subject, we believe it is used here to signify simply a lack of "good faith."

To construe it otherwise is to give the court rule the effect of changing substantive rights. We are persuaded it was not so intended. See committee comment on GCR 1963, 754.5. Under the interpretation we adopt, the rule preserves the substantive rights of the parties and merely regulates the procedure for enforcing them.

In the case before us the chancellor found that the plaintiff failed to establish a case for equitable intervention. A careful review of the evidence convinces us that the chancellor had ample evidence upon which to base his judgment and there is no preponderance of evidence to require a contrary conclusion.

Affirmed, with costs to appellee.

BURNS, P. J., and HOLBROOK, J., concurred.

MINOR-DIETIKER *v.* MARY JANE STORES OF MICHIGAN, INC.

1. JUDGMENT—SUMMARY JUDGMENT—EXISTENCE OF VALID DEFENSE TO CLAIM.

   Summary judgment may be granted where the opposing party has failed to state a valid defense to the claim asserted against him (GCR 1963, 117.2[2]).

2. APPEAL AND ERROR—PLEADINGS—SUMMARY JUDGMENT.

   All of appellant's fact allegations must be considered as true on appeal from order granting partial summary judgment (GCR 1963, 117.2).

3. LANDLORD AND TENANT—STATUTE OF FRAUDS—MODIFICATION OF WRITTEN LEASE—NEW CONSIDERATION.

   An oral contract to modify a written lease can be enforced, where supported by new consideration (CL 1948, § 566.1).

4. SAME—STATUTE OF FRAUDS—ORAL MODIFICATION OF WRITTEN LEASE.

   Oral modification of a 15-year lease comes within statute of frauds (CL 1948, § 566.132).

5. SAME—STATUTE OF FRAUDS—ORAL MODIFICATION OF WRITTEN LEASE—ESTOPPEL.

   Lessor accepting benefits of oral modification of 15-year lease is estopped from claiming modification was void under statute of frauds (CL 1948, § 566.132).

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading §§ 340–342.
[2] 5 Am Jur 2d, Appeal and Error § 853.
[3] 49 Am Jur, Statute of Frauds § 301.
32 Am Jur, Landlord and Tenant §§ 147, 149.
[4] 49 Am Jur, Statute of Frauds § 301.
32 Am Jur, Landlord and Tenant §§ 133, 147, 149.
[5] 49 Am Jur, Statute of Frauds § 581.
[6] 49 Am Jur, Statute of Frauds §§ 581, 583.
41 Am Jur, Pleading §§ 340–342.
[7] 49 Am Jur, Statute of Frauds § 301.
32 Am Jur, Landlord and Tenant §§ 147, 149.

6. JUDGMENT—SUMMARY JUDGMENT—ESTOPPEL—ORAL MODIFICATION OF WRITTEN LEASE.

Proof of existence of oral modification agreement and consideration therefor to determine whether plaintiffs are estopped from claiming invalidity of oral agreement must go to trial and cannot be determined by a judge at hearing on motion for summary judgment.

7. LANDLORD AND TENANT—ORAL MODIFICATION OF WRITTEN LEASE—CONSIDERATION—STATUTES.

An oral modification of a 15-year lease, supported by a new consideration is not invalid under statute providing that modifications of leases in writing are not invalid for lack of consideration, since the statute does not apply (CL 1948, § 566.1).

Appeal from Wayne; Kaufman (Charles), J. Submitted Division 1 October 5, 1965, at Detroit. (Docket No. 561.) Decided April 12, 1966. Leave to appeal denied by Supreme Court July 6, 1966. See 378 Mich 721.

Complaint by Minor-Dietiker, a partnership, Martha F. Dietiker, Marilyn Minor, and Wesley C. Dietiker against Mary Jane Stores of Michigan, Inc., a Delaware corporation, for damages for breach of a lease. Partial summary judgment for plaintiffs. Defendant appeals. Reversed and remanded.

Jack N. Tucker and *Goodman, Crockett, Eden, Robb & Philo,* for plaintiffs.

Honigman, Miller, Schwartz & Cohn (*Maurice S. Binkow* and *Asher Rabinowitz,* of counsel), for defendant.

LESINSKI, C. J. The appellant, Mary Jane Stores of Michigan, Inc., appeals from a partial summary judgment granted in favor of the appellees, Minor-Dietiker, a copartnership, consisting of Martha F. Dietiker, Marilyn Minor, and Wesley C. Dietiker,

individually, and as copartners. The dispute arose out of a lease agreement in which the appellees were landlords and the appellant was tenant. The lease agreement was for a term of 15 years commencing on February 15, 1958, and expiring on February 14, 1973, with minimum rentals of $600 per month. Beginning January, 1961, the appellant paid and the appellees accepted $300 monthly until September, 1964. In September of 1964, the lessors refused the $300 rental tendered and demanded $600 monthly. Upon the lessee's refusal to pay more than $300 per month, the lessors instituted suit to collect the difference in back rentals and to collect the rentals accruing after August, 1964 at $600 per month.

The plaintiffs initially instituted a garnishment proceeding and the defendant posted bond to terminate the garnishment proceedings and answered plaintiffs' pleadings. At this point in the proceedings the plaintiffs moved for partial summary judgment claiming that defendant had failed to state a valid defense to their demands for a $600 per month rental as stated in the written lease for the months for which defendant had tendered $300 and plaintiffs refused to accept. Defendant filed affidavits in reply to plaintiffs' motion and alleged that the rent reduction was made in accordance with an oral modification agreement accompanied by consideration. The consideration alleged was threefold. (1) Defendant agreed not to vacate the premises. (2) Defendant would pay arrearages on plaintiffs' mortgage. (3) Defendant's parent corporation would reaffirm defendant's guarantee to plaintiffs.

Upon contemplation of these allegations, the trial court granted plaintiffs' partial summary judgment in the sum of $1,800 for those months for which the lessee had tendered $300 and the lessors had refused to accept that as payment in full.

The basis for granting partial summary judgment is delineated in GCR 1963, 117.2. This rule contemplates in part the use of summary judgments where "the opposing party has failed to state a valid defense to the claim asserted against him." (GCR 1963, 117.2[2].) Thus, for its determination here, this Court must consider all of the lessee's fact allegations to be true and in the light of this determine if a judgment in plaintiffs' favor was proper.

The basic question the Court must face is whether an oral contract supported by new consideration can be enforced to modify a written lease. In other words, if all of the defendant's allegations are true, could he enforce the modification agreement even though that agreement is not in writing?

The law in Michigan on this point though sparse, clearly indicates that the defendant, if able to prove the agreement he alleges, would be able to enforce that agreement. In *Eisenberg* v. *C. F. Battenfeld Oil Co.* (1930), 251 Mich 654, the Supreme Court quoting from LRA1915B, 66 note, states at pp 656, 657:

"'After an occupation of rented premises has begun and continued for a year and upwards, under a lease in writing for a 10-year term, and the tenant's covenant to pay the stipulated rent has been broken, an oral agreement between the landlord and tenant to abrogate the provision fixing the amount of rent payable, and substitute a new agreement reducing the amount of rent payable, where the tenant continues in possession and pays the reduced rent, is valid, the *continuing tenancy being a sufficient consideration for the new contract.*'" (Emphasis supplied.)

Under the doctrine espoused in the *Eisenberg Case,* the alleged oral agreement made by the Mary Jane Stores with their landlords, Minor-Dietiker,

would be valid and enforceable, as they have continued in their tenancy. They also allege additional consideration which would indicate a stronger case for finding validity of the oral modification agreement than in *Eisenberg*.

The statute of frauds comes under consideration in this case as the alleged contract was oral and not to be performed within one year, contrary to CL 1948, § 566.132 (Stat Ann 1953 Rev § 26.922). The Supreme Court of this State invoked the estoppel doctrine in favor of an injured party when the other party had enjoyed the fruits of an orally amended contract and then sought to invoke the statute of frauds to void the contract. The defendant in this case has raised the estoppel issue in his complaint, thus satisfying GCR 1963, 111.7. This estoppel doctrine was employed in *Zannis* v. *Freud Hotel Co.* (1932), 256 Mich 578, on facts similar to those before this Court. The plaintiff in *Zannis* leased a hotel dining room and the lease agreement stipulated that defendant was to do some major alterations and build a coffee shop adjacent to the dining room. An oral modification agreement was subsequently made in which plaintiff agreed to use the old coffee shop and not have the building altered. Plaintiff in a few years demanded the alterations required in the original lease agreement be made. In finding for the defendant that the oral modification did not violate the statute of frauds, the Court said at p 584:

"Had defendant claimed such verbal lease to be void under the statute of frauds, it would have been estopped for the same reason that we determine that plaintiffs are estopped from so claiming. The facts of the case, as confirmed by the verdict of the jury, establish the fact that a consideration was received and acted upon by each of the parties for the mod-

ification of the written lease. There is no question but that the modification itself comes within the statute of frauds, it being an oral change of a written lease. *Abell* v. *Munson,* 18 Mich 306 (100 Am Dec 165). While the law of this State has consistently held that an agreement required by the statute of frauds to be in writing may not be substantially altered by a verbal agreement, *it has also held that parties may not accept the benefits from such alteration and then claim the transaction is void.*" (Emphasis added.)

The defendant, in the case at bar, should be allowed to prove the facts alleging a modification agreement and the consideration for same to determine if the plaintiffs thereby are estopped from claiming the invalidity of the oral agreement if made. This is a question that must go to trial and cannot be determined by a judge sitting on motion for partial summary judgment.

The remaining question before this Court is whether CL 1948, § 566.1 (Stat Ann 1953 Rev § 26.-978[1]) precludes the parties from making any oral modification agreement. The statute in its relevant parts reads as follows:

"An agreement * * * to modify * * * any * * * lease * * * shall not be invalid because of the absence of consideration: *Provided,* that the agreement * * * modifying * * * shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the * * * modification."

The intention of this statute is not to make unenforceable all oral modification agreements, but only those in which no valid consideration is alleged. An oral modification agreement supported by new consideration does not fall within the language of this statute.

Consequently the facts as alleged in this case called for a denial of the motion for partial summary judgment under the grounds indicated in GCR 1963, 117.2.

Reversed and remanded for trial. Costs to appellant.

FITZGERALD and J. H. GILLIS, JJ., concurred.

NORTHVILLE COACH LINES, INC., *v.* CITY OF DETROIT.

DECISION OF THE COURT.

1. MUNICIPAL CORPORATIONS—TRANSPORTATION SYSTEM—OPERATION OUTSIDE CORPORATE LIMITS.

   Operation of municipally-owned transportation system outside the corporate limits is not exempted by the Constitution from the provisions of statutory law (Const 1963, art 7, § 24; CLS 1961, § 117.4f).

2. SAME—TRANSPORTATION SYSTEM—CONSTRUCTION OF STATUTES—ADJACENT—ADJOINING.

   Adjacent and *adjoining*, as terms are used in provision of home-rule act authorizing a city to operate a transportation facility "within its limits, and its adjacent and adjoining suburbs within a distance of 10 miles from any portion of its city

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REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5, 7, 11] 38 Am Jur, Municipal Corporations § 570.
Power of municipal corporation to extend its service beyond corporate limits. 49 ALR 1239, 98 ALR 1001.
[4] 50 Am Jur, Statutes §§ 303–308.
[6] 43 Am Jur, Public Utilities and Services § 195.
[8] 38 Am Jur, Municipal Corporations § 567.
[9] 5 Am Jur 2d, Appeal and Error § 1009.
[10] 50 Am Jur, Statutes § 358.
[12] 50 Am Jur, Statutes §§ 156–158.

limits" are construed to mean having a common boundary (CLS 1961, § 117.4f).

3. SAME—CONSTRUCTION OF STATUTE—TRANSPORTATION SYSTEM.

Legislative intent relative to whether or not a municipal transportation system can extend itself into noncontiguous suburbs within a 10-mile limit should be discerned from that portion of pertinent statute dealing most specifically with the situation rather than a seemingly inconsistent provision where a phrase dealing with transportation systems was included with other matters (CLS 1961, § 117.4f).

4. STATUTES—CONSTRUCTION—PURPOSE.

It is not to be supposed that any section of a statute was inserted with no intelligible purpose.

5. MUNICIPAL CORPORATIONS—TRANSPORTATION SYSTEM—NONCONTIGUOUS SUBURB.

Requirement of home-rule act that suburb to which city-owned transportation facility could be extended be *adjacent and adjoining* was not satisfied, where the suburb was within 10 miles of city limits, but not contiguous thereto at any point or line (CLS 1961, § 117.4f).

6. SAME—TRANSPORTATION SYSTEM—PUBLIC SERVICE COMMISSION.

A municipally-owned transportation system is not subject to the jurisdiction of the public service commission and city need not seek commission approval for any action it may lawfully undertake (CLS 1961, § 117.4f).

7. SAME—TRANSPORTATION SYSTEM—EXTENSIONS TO SUBURBS.

A municipally-owned transportation system may only do that which the home-rule act permits, and operate extensions of the system in suburbs that touch upon the city, not in suburbs not adjacent and adjoining (CLS 1961, § 117.4f).

8. SAME—TRANSPORTATION SYSTEM—CONSTITUTIONAL LAW—STATUTES.

The authority of a city to operate a transportation facility is governed by the Constitution as limited by the home-rule act (Const 1963, art 7, § 24; CLS 1961, § 117.4f).

9. COSTS—PUBLIC QUESTION—MUNICIPAL TRANSPORTATION SYSTEM—SUBURBS.

No costs are allowed on appeal in suit involving extension of operation of municipally-owned transportation system into noncontiguous suburbs, a public question being involved (Const 1963, art 7, § 24; CLS 1961, § 117.4f).

DISSENTING OPINION.

FITZGERALD, J.

10. STATUTES—CONSTRUCTION.

A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative and superfluous, void, or insignificant.

11. MUNICIPAL CORPORATIONS—CONSTRUCTION OF HOME-RULE ACT.

Adjacent and adjoining suburbs, *as used in provision of the home-rule act relative to operation of municipally-owned transportation system, is construed to mean two different kinds of suburbs, (1)* those nearby but not touching the city *and (2)* those touching or bounding at some point or on some line *(CLS 1961, § 117.4f).*

12. STATUTES—CONSTRUCTION—NONREPEATED WORDS.

Words enacted in one section of a statute do not become inoperative merely by the fact of their nonrepetition in a later subparagraph of the same section.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted Division 1 October 7, 1965, at Detroit. (Docket No. 365.) Decided April 12, 1966. Leave to appeal granted by Supreme Court June 1 and June 20, 1966. See 377 Mich 712, 378 Mich 720, 379 Mich 317.

Complaint by Northville Coach Line, Inc., against the Detroit Street Railway of the city of Detroit seeking to enjoin defendant from extending bus service into Livonia on Seven Mile road. Michigan Motor Bus Association, a Michigan corporation, intervened as plaintiff. Judgment for defendant. Plaintiff and intervenor appeal. Reversed and remanded.

Leib & Leib (*Samuel W. Leib,* of counsel) for plaintiff.

Edmund M. Brady and *John M. Veale,* for intervenor.

Manuel Zechman, for defendant.

J. H. GILLIS, J. Plaintiff Northville Coach Lines, Inc., and its predecessor have conducted bus service from Northville, via Livonia, to Detroit and return, since 1932. This service has been operated under the appropriate orders and certification of the Michigan public service commission under the provisions of the Michigan motor carrier act, CL 1948 and CLS 1961, § 475.1 *et seq.*, as amended, (Stat Ann and Stat Ann 1963 Cum Supp § 22.531 *et seq.*).

The defendant city of Detroit acquired a system of transportation lines in 1922 and since then has operated bus lines both within and outside its corporate limits through a municipally owned public utility now called the department of street railways (DSR).

On August 10, 1964, defendant extended its route to include a newly constructed shopping center near the northwesterly corner of Seven Mile and Middlebelt roads in Livonia. This route extended via the city of Dearborn, city of Dearborn Heights, and city of Garden City into a part of Livonia which it had not serviced previously.

Both the Northville Coach Lines service and the DSR service extended along Seven Mile road.

Concurrent with the extension of service by the DSR, Northville instituted this cause in the Wayne county circuit court, asking a determination that Detroit was not authorized to undertake the expansion of service without application to and receipt of authority from the Michigan public service commission, and an injunction.

Plaintiff intervenor, Michigan Motor Bus Association, a group of privately owned and operated motor carriers, operating in various localities of the State, appeared as *amicus curiae*.

Following hearings, the court held that the DSR's operations as a motor carrier in the area involved

outside its corporate boundaries were authorized by the home-rule act (PA 1909, No 279, as amended [CL 1948 and CLS 1961, § 117.1 *et seq.*, as amended, (Stat Ann 1949 Rev and Stat Ann 1963 Cum Supp § 5.2071 *et seq.*)]), and that such operations were exempt from the provisions of the Michigan motor carrier act. Judgment was entered December 21, 1964, dismissing the complaint. A claim of appeal was filed with the Supreme Court and subsequently transferred to this Court by order dated January 4, 1965.

Plaintiffs, at the outset of their argument, point out that they do not seek to prohibit absolutely the defendant's motor carrier operations outside its boundaries, but only to subject them to the same provisions of the motor carrier act as apply to plaintiffs. That act authorizes the Michigan public service commission to grant the requisite operating authority whenever required by "public convenience and necessity." Thus, they conclude, if, as defendant claims, there were a public need for additional transportation service in Livonia, defendant would have the same opportunity to meet such need as plaintiff.

In essence, Northville challenges the right of the DSR to operate *outside* the city of Detroit into Livonia, serving the same areas it serves without coming within the purview of the rules that apply to it.

No case is cited by either side which would be decisive in the matter. The entire outcome of the cause rises or falls upon the interpretation of the Constitution and statutes which govern. Our Constitution does not exempt an operation such as that of the DSR from the provisions of statutory law. In Const 1963, art 7, § 24, it is provided that transportation may be provided to the municipality and

the inhabitants thereof, but more in point, further goes on to say:

"Services outside corporate limits. Any city or village * * * may operate transportation lines *outside the municipality within such limits as may be prescribed by law.*" (Emphasis supplied.)

What, then, has been "prescribed by law?" The home-rule act, *supra,* section 4f, provides:

"Each city may in its charter provide: * * * (2) For owning, constructing and operating transportation facilities within its limits, and its *adjacent* and *adjoining* suburbs within a distance of 10 miles from any portion of its city limits." (Emphasis supplied.)

There is no dispute but that the service under consideration falls within the 10-mile limitation. The issue here is whether or not the DSR is authorized under the home-rule act, *supra,* and under the provisions of the charter of the city of Detroit to operate a bus line in a municipality which is not contiguous to its corporate limits. This Court's decision must turn on the construction of the term "adjacent and adjoining" as found in section 4f(2) of the home-rule act, *supra.*

Plaintiffs supply dictionary definitions of adjacent, of adjoining, and of words synonymous with these two terms. Case law, too, is furnished by plaintiffs to support their contention that "adjacent and adjoining" mean suburbs joined to Detroit physically, an interpretation which would automatically rule out Livonia. The trial court departed from plaintiff's interpretation and held that the home-rule act did not limit operation of transportation facilities by a municipality in any respect other than to restrict such operations to a distance of 10

miles from the city limits. The trial court based its opinion on section 4f(3) of the home-rule act which provides:

"Each city may in its charter provide: * * * (3) * * * and for the operation of transportation lines without the municipality and within 10 miles from its corporate limits."

Most significantly, the adjectives "adjacent and adjoining" do not appear in subparagraph (3). The trial judge, in his opinion, states:

"Had the legislature desired to limit such operations to the adjacent and adjoining suburbs only, it would have specifically applied that limitation to permissible charter provisions in paragraph 3 as well as in paragraph 2."

With this conclusion we do not agree. If the legislature intended to permit a municipally owned transportation system to operate anywhere within a 10-mile radius of its city limits, there was no need to include the adjectives "adjacent and adjoining" in the language of subparagraph (2). Without these adjectives, this present extension of service by the DSR would clearly be authorized. It is not a question of why didn't the legislature include the adjectives in subparagraph (3) but why did they use them in subparagraph (2). The terms adjacent and adjoining as used in this act are construed to mean having a common boundary.

Subparagraph (2) deals solely with permissible charter provisions concerning transportation facilities, whereas subparagraph (3) deals with a multitude of subjects including the purchase and condemnation of private property for public use.

The legislative intent relative to whether or not a municipal transportation system can extend itself into noncontiguous suburbs within a 10-mile limit

should be discerned from that portion of the act which deals most specifically with the situation.

Thus, this Court is compelled to resolve the issue by reference to subparagraph (2), not unmindful of its seeming inconsistency with subparagraph (3). It is not to be supposed that any section of a statute was inserted with no intelligible purpose. See *People, ex rel. Bristol,* v. *Board of Supervisors of Ingham County* (1870), 20 Mich 95.

Since there is intervening noncontiguous space between Detroit and Livonia, the requirement of the home-rule act, *supra,* has not been satisfied.

Defendant contends that it is exempt from the provisions of the Michigan public service commission act, CLS 1961, § 460.1 *et seq.* (Stat Ann 1963 Cum Supp § 22.13[1] *et seq.*) and the Michigan motor carrier act, *supra,* and therefore its extension of DSR service into Livonia is not and cannot be subject to regulation by the public service commission.

With this contention we agree. The DSR is not subject to the jurisdiction of the public service commission. It need not seek the approval of the commission for any action it might lawfully undertake. The point remains that the DSR, as a municipally owned transportation system, may only do that which the home-rule act permits. Its authority to do or not to do any particular act is governed by our Constitution as limited by the provisions of the home-rule act. This act only permits the Detroit department of street railways to operate in suburbs that touch upon the city limits of Detroit.

It may well be that modern day urban needs cannot adequately be met in these circumstances, but this problem is one of legislative concern and cannot be considered a relevant issue in this Court.

Judgment reversed and the case remanded to the circuit court for entry of an order enjoining the DSR from extending its operation into the city of Livonia and such further relief as the circuit court deems appropriate in accordance with this opinion. No costs, a public question being involved.

LESINSKI, C. J., concurred with J. H. GILLIS, J.

FITZGERALD, J. (*dissenting*). We venture an answer to the question posed in the majority opinion which was phrased thus: It is not a question of why didn't the legislature include the adjectives (adjacent and adjoining) in subparagraph (3) but why did they use them in subparagraph (2)?

Our answer is this: because they intended that the words in (2) be given an effect and intended certain clear definitions by their inclusion.

The majority, without elaboration, makes the statement that, "The terms adjacent and adjoining as used in this act are construed to mean having a common boundary."

This writer believes that the proper construction of the term "adjacent and adjoining suburbs" is that the legislature had reference to two different kinds of suburbs: "adjacent suburbs" and "adjoining suburbs", either being sanctioned, so long as the 10-mile limitation is adhered to.

In the "common boundary" construction placed on the words by the majority, the term "adjacent and adjoining" is defined to mean "adjoining and adjoining".

It is difficult to believe that the legislature joined conjunctively two terms meaning the identical thing with the word *and,* as the majority would have the reader believe.

Sutherland's Statutory Construction, § 4705, states, "A statute should be construed so that effect

is given to all its provisions, so that no part will be inoperative and superfluous, void or insignificant." Clearly, a construction which holds that "adjacent and adjoining" means "adjoining and adjoining" is a judicial determination that the word adjacent is superfluous.

In *Stadle* v. *Township of Battle Creek* (1956), 346 Mich 64, we find the statement, "In construing the statute, words and phrases are accepted in their ordinary sense."

In a matter of first impression involving definition, we turn to Webster, New International Dictionary (3d ed), which furnishes as the first definition of "adjacent", "1 a: not distant or far off: nearby but not touching", presumptively stating these as the common usages of the word.

On the other hand, the same volume defines "adjoining" as: "touching or bounding at some point or on some line: near in space."

Can it then be said that "adjacent and adjoining" mean "having a common boundary?" To say so is to repudiate clear dictionary definition and say that two similar words are better than one and that legislative intent is best effectuated by redundancy.

To the contrary, it is the writer's opinion that "adjacent and adjoining suburbs" means *two* different kinds of Detroit suburbs: (1) *those nearby but not touching;* (2) *those touching or bounding at some point or on some line.*

The majority suggests a "seeming inconsistency" between subparagraphs 4f(2) and 4f(3) because the terms "adjacent and adjoining" are not reiterated in 4f(3). This objection vanishes, however, when it is remembered that words enacted in one section do not become inoperative merely by the fact of their nonrepetition in a later subparagraph of the same section.

Authority for a 10-mile operation of the DSR is found in both 4f(2) and 4f(3). It is in 4f(2) that we are told that this 10 miles encompasses both adjacent suburbs and adjoining suburbs and that no artificial restriction of contiguity or actual physical touching is to be imposed as is imposed by the majority opinion.

On the total record before us, no ground is presented which would have warranted granting the injunction prayed for and the judgment should be affirmed.

PEOPLE *v.* NAPOLITANO.

PEOPLE *v.* KEDZIERSKI.

1. ARREST—WITHOUT WARRANT—PROBABLE CAUSE.

   A police officer who believes, or has good reason to believe, that a person has committed a felony, or has good reason to believe, that a person is committing a felony in his presence, has probable cause to arrest the person without a warrant (CL 1948, § 764.15).

2. SEARCHES AND SEIZURES—PROBABLE CAUSE—NARCOTIC DRUGS—SUPPRESSION OF EVIDENCE.

   Search and seizure of contraband by police officers when investigating a call at 10:55 p.m. at apartment in which defendants were present, after observing vials appearing to contain narcotic drugs, whereby there was obtained 83 morphine tablets, 91 codeine tablets, 40 pantopon tablets, and 251 grains of powdered opium *held,* not unlawful as in violation of either United States or State Constitutions prohibiting unreasonable searches and seizures, hence, motion to suppress the evidence and quash

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Arrest § 25.
[2] 47 Am Jur, Searches and Seizures §§ 6–10, 54.
[3] 21 Am Jur 2d, Criminal Law §§ 449, 450.

the information was properly denied (US Const, Am 4; Mich Const 1963, art 1, § 11).

3. CRIMINAL LAW—BINDING OVER FOR TRIAL—DISCRETION OF COURT—EVIDENCE.

Record in prosecution for unlawful possession of narcotic drugs *held,* not to disclose an abuse of discretion on part of examining magistrate in binding defendants over for trial, there being ample evidence to support his finding of probable cause (CL 1948 and CLS 1961 §§ 335.51–335.98, 335.153).

Appeal from Recorder's Court; Gillis (Joseph A.), J. Submitted Division 1 November 2, 1965, at Detroit. (Docket No. 67.) Decided April 12, 1966. Leave to appeal denied by Supreme Court to defendant Kedzierski August 27, 1966. See 378 Mich 729.

Frank Sam Napolitano and Fred Ambrose Kedzierski were convicted for unlawful possession of narcotics without a license. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel E. Olsen,* Prosecuting Attorney, *Samuel J. Torina,* Chief Appellate Lawyer, and *Angelo A. Pentalino,* Assistant Prosecuting Attorney, for the people.

Nick Arvan, for defendant.

WATTS, J. Frank Sam Napolitano and Fred Ambrose Kedzierski were convicted and sentenced for unlawfully possessing or having under their control certain narcotic drugs in violation of PA 1937, No 343, as amended (CL 1948 and CLS 1961, §§ 335.51–335.98, inclusive [Stat Ann 1957 Rev §§ 18.1071–18.1098, inclusive]) and PA 1952, No 266, § 3 (CLS 1961, § 335.153 [Stat Ann 1957 Rev § 18.1123]). The defendants appeal.

On March 19, 1963, at approximately 10:55 in the evening, 3 Detroit police officers went to an address known as 687 Brainard street, Detroit, in response to a call that something unusual was going on in apartment 208.

Officer Cowan had been a member of the Detroit police department for 9 years, and on 7 or 8 different occasions as a police officer, he had come in contact with situations involving narcotic drugs. He testified that the door to the apartment was opened by defendant Napolitano, who was holding a bag of trash in one hand and bending down to pick up a second bag; and that from the open doorway he observed vials in an open container which appeared to contain narcotic drugs. Cowan identified himself as a police officer, placed defendant Napolitano under arrest, walked in and picked up the vials. At that time he saw Fred Kedzierski standing in the apartment. Kedzierski was shirtless and his arm showed signs of fresh needle punctures of the skin. Kedzierski told the officers that he was a "user". Napolitano and Kedzierski were placed under arrest; they told the police officers that they did not live on the premises. When the officers searched the apartment incident to the arrest, they found narcotic drugs.

The information alleges that the defendants on March 19, 1963, in the city of Detroit, not then and there having a license as required, did then and there unlawfully possess and have under their control certain narcotic drugs, to wit: 83 morphine tablets, 91 codeine tablets, 40 pantopon tablets, and 251 grains of powdered opium.

The trial court held the arrest of the defendants lawful and the subsequent search and seizure of narcotic drugs reasonable; denied the defendants' motion to suppress the evidence, quash the informa-

tion, and discharge the defendants; received in evidence the narcotic drugs seized incident to the arrest; and found the defendants guilty of the alleged offense.

The defendants contend: (1) the search and seizure of the contraband in question was a violation of the Fourth Amendment of the Constitution of the United States; (2) the lower court erred in denying appellants' motion to suppress the evidence, quash the information, and discharge the defendants; (3) the search and seizure of the contraband in question was in violation of article 1, § 11, of the 1963 Michigan Constitution; and (4) the examining magistrate abused his discretion in binding the defendants over for trial, no probable cause having been shown at the preliminary examination.

The rule of law is well established that if a police officer believes, or has good reason to believe, that a person has committed a felony, or has good reason to believe that a person is committing a felony in his presence, he has probable cause to arrest the person without a warrant. See CL 1948, § 764.15 (Stat Ann 1954 Rev § 28.874).

The first three contentions of defendants were decided adversely to them in *People* v. *Kuntze* (1963), 371 Mich 419. See, also, *People* v. *Orlando* (1943), 305 Mich 686; *People* v. *Licavoli* (1928), 245 Mich 202; and *People* v. *Chomis* (1928), 223 Mich 289.

The record does not support defendants' fourth contention that the examining magistrate abused his discretion in binding defendants over for trial. The record contains ample evidence to support the magistrate's finding of probable cause.

Affirmed.

LESINSKI, C. J., and QUINN, J., concurred.

WALLACE *v.* PERE MARQUETTE FIBERGLASS BOAT COMPANY, INC.

1. TRIAL—FINAL ARGUMENT—COUNSEL'S THEORY OF THE LAW—READING LAW TO JURY.

   Counsel has a right on final argument to state to the jury his theory of the law, but he does not have the right to read law to the jury or to usurp the province of the court.

2. SAME—FINAL ARGUMENT—READING LAW TO JURY—PROVINCE OF COURT.

   Counsel usurps the function of the court when he attempts to cite a specific case to the jury and discuss it on final argument.

3. SAME—FINAL ARGUMENT—READING LAW TO JURY.

   Trial court's direction to defendants' counsel that he avoid discussion of details of the law during final argument, after plaintiff's counsel objected to reading of a case to jury *held,* proper.

4. APPEAL AND ERROR—INSTRUCTIONS CONSIDERED IN ENTIRETY.

   Instruction to jury must be considered in entirety when reversible error is claimed in a portion thereof.

5. SAME—INSTRUCTIONS—COUNTERCLAIM.

   Rights under defendants' counterclaim *held,* fully protected in instructions to jury, where trial judge specifically covered the matter on 2 separate occasions, and left issue of fact as to such matter to the jury.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 492.
Counsel's right in civil case to argue law or to read lawbooks to the jury. 66 ALR2d 9.
[2, 3] 53 Am Jur, Trial § 493.
[4, 5] 5 Am Jur 2d, Appeal and Error § 894.
[6, 12] 19 Am Jur 2d, Corporations §§ 1365–1368.
[7] 4 Am Jur 2d, Appeal and Error §§ 537, 538.
[8] 5 Am Jur 2d, Appeal and Error § 891.
[9, 10] 19 Am Jur 2d, Corporations §§ 1500, 1502.
[11] 5 Am Jur 2d, Appeal and Error §§ 831, 882.
[13] 5 Am Jur 2d, Appeal and Error § 1014.

6. CORPORATIONS—FAILURE TO FILE REPORTS—PRESUMPTION OF NEGLIGENCE.

Presumption that officer of corporation was guilty of wilful negligence in refusal to file annual corporate report is open to rebuttal and is not conclusive (CLS 1961, § 450.87).

7. APPEAL AND ERROR—REQUEST TO CHARGE CONTRARY TO STATUTE.

Trial court was correct in refusing to submit a requested instruction which was in direct conflict with the plain terms of a statute (CL 1948, § 450.87).

8. SAME—REQUESTED INSTRUCTIONS—OBJECTIONS.

Appellant may not assign error on trial court's refusal to give a requested instruction, where no specific objections were made to the instructions given to the jury on the point (GCR 1948, § 450.87).

9. CORPORATIONS—MERGER OR CONSOLIDATION—QUESTION FOR JURY.

Question of merger or consolidation of defendant corporations was a question of fact for the jury even though steps required by statute to complete a merger or consolidation may not all have been taken (CL 1948, § 450.52 *et seq.*).

10. SAME—INSTRUCTIONS—MERGER OR CONSOLIDATION.

Court correctly instructed jury on factors to be considered in determining whether or not a merger or consolidation had taken place, where steps required by statute to complete a merger or consolidation were not taken, and he need not limit the instruction to the statute involved (CL 1948, § 450.52 *et seq.*).

11. APPEAL AND ERROR—EVIDENCE—QUESTION FOR JURY.

Appellants' claim that verdict was against the great weight of the evidence is rejected, where case was tried before jury, there was a direct conflict of testimony, and sufficient evidence produced for jury to render a verdict.

12. CORPORATIONS—PRORATION OF LIABILITY OF OFFICERS—FAILURE TO FILE REPORTS—CONSTRUCTION OF PENAL STATUTE.

Judgment against corporate officers based upon statute imposing liability on officers of corporations "during the period of such neglect or refusal" to file the annual report should be prorated as to the individual liability of such officers based upon their terms in office, since the statute, being penal in its nature, must be strictly construed (CL 1948, § 450.87).

13. COSTS—NEITHER SIDE PREVAILING IN FULL.

No costs are allowed on appeal, where judgment is affirmed in part and reversed in part, neither side prevailing in full.

Appeal from Mason; Stephens (Rupert B.), J. Submitted Division 3 November 3, 1965, at Grand Rapids. (Docket No. 337.) Decided April 12, 1966.

Complaint by Charles F. Wallace against Pere Marquette Fiberglass Boat Company, Inc., a Michigan corporation, Industrial Fiberglass Products Corporation, an Illinois corporation, Thomas C. Billig, Jr., and Helen H. Billig to recover wages due under an employment contract. Judgment for plaintiff. Defendants appeal. Affirmed in part and reversed in part.

George O. Walters, for plaintiff.

John W. Claire, for defendants.

BURNS, J. The plaintiff-appellee claims that he entered into a contract with Thomas C. Billig, Jr., manager of the Pere Marquette Fiberglass Boat Company, Inc., a Michigan corporation, hereinafter referred to as Pere Marquette, to work for said corporation for the sum of $650 per month. He commenced work on or about May 22, 1962, and continued his employment until December 6, 1962, when he was discharged. Appellee further claims he has received no compensation and is entitled to $4,225, less a small amount owed the defendant-appellants, and for social security and withholding taxes paid on his behalf by the appellants.

The appellee also contends there was a merger between Pere Marquette and the Industrial Fiberglass Products Corporation, an Illinois corporation, hereinafter referred to as Industrial, and as a result of this merger, Industrial is also liable for the wages.

Appellee further claims that Thomas C. Billig, Jr., and Helen H. Billig are liable individually, as officers of Pere Marquette during a period when the corporation had neglected or refused to pay the statutory fee required with the annual report, due May 15, 1962.

Conversely, the appellants claim the appellee's salary was $450 per month and his employment did not commence until July 20, 1962. Appellants filed a counterclaim alleging that appellee owed Pere Marquette $222.32 on invoices, and that he had removed certain tools and equipment belonging to the company valued at $135, which interrupted production and caused damages to Pere Marquette of $1,353.57. Consequently, appellants contend they do not owe the appellee anything.

The appellants deny there was a merger between Pere Marquette and Industrial. Appellants further deny that Thomas C. Billig, Jr., and Helen H. Billig are liable individually, as the corporation had already defaulted in the filing of the annual report and payment of the statutory fee at the time the parties were appointed officers of the corporation.

The jury returned a verdict for the appellee.

Appellants raise several issues on appeal.

The appellants assert the court erred in refusing counsel the prerogative to read Michigan law to the jury during his final argument. During final argument to the jury, the following occurred while appellants' counsel had a volume of the Michigan Reports in his hand:

"*Mr. Claire:* Again, I say, that Mr. Wallace looked to the credit of Pere Marquette, if any, if it ever developed, this is where he was looking for his money. Now, the Michigan Supreme Court ruled—there was a case in, a quite a few years back in 201 Michigan, the Reports—

"*Mr. Walters:* I hesitate to object, Your Honor, however, I think it is not the province of the attorney to instruct the jury in the law.

"*Mr. Claire:* I think it's proper, Your Honor, to cite a case and what it holds without reading the case in to the jury.

"*The Court:* I think it is better for counsel to avoid a discussion of the details of the law during their argument."

Unfortunately, only the preceding portion of the entire argument was transcribed. From the available record we do not know if counsel ever stated his theory of the law to the jury. The law in Michigan is clear. Counsel has a right to state his theory of the law, but he does not have the right to read law to the jury or to usurp the province of the court. See *Fosdick* v. *VanArsdale* (1889), 74 Mich 302; *Pallas* v. *Crowley-Milner Co.* (1952), 334 Mich 282.

When the appellants' counsel attempted to cite a specific case to the jury and discuss it, he was usurping the function of the court. The court did not refuse the appellants' counsel the opportunity to discuss his theory of law. The court asked him to avoid a discussion of the details of the law during his argument. The court correctly upheld the objection of the attorney for the appellee.

The appellants insist the court erred in several of its instructions.

In reading one of the controlling statutes, CL 1948, § 450.87 (Stat Ann 1963 Rev § 21.87), the court omitted part of the statute. The court stated:

"You are further instructed that, under the laws of this State, if any corporation neglects or refuses to make and file the annual reports, and/or pay the privilege fees within the time specified, and shall continue in default for 10 days after May 15th, that its corporate powers shall be suspended thereafter

until it shall file such report, and that it may not maintain any action or suit in any court of this State during the time of such default. Now, the laws of this State also provide that any officer or officers of such corporation so in default, who have neglected or refused to join in making the reports and/or pay such fees shall be liable for all of the debts of such corporation contracted during the period of such neglect or refusal."

The pertinent portion of the statute actually reads as follows:

"and it shall not maintain any action or suit in any court of this State *upon any contract entered into* during the time of such default." (Emphasis supplied.)

The appellants maintain that omitting the words "upon any contract entered into" was prejudicial, and the omission was detrimental to them as the jury could have interpreted said language to bar the appellants' counterclaim.

The Supreme Court of the State of Michigan has consistently held that instructions must be viewed in their entirety. *Cree Coach Company* v. *Wolverine Insurance Company* (1962), 366 Mich 449. The trial judge, on two separate occasions in his charge specifically covered the matter set forth by the appellants in their counterclaim, and told the jury in effect that if they found from the evidence that the appellants' claims were correct, the jury should return a verdict for the appellants. Therefore, the appellants' rights concerning their counterclaim were fully protected.

Counsel for the appellants requested the trial judge to submit the following instruction regarding the individual liability of Mr. and Mrs. Billig:

"You may, in determining whether they are personally liable, also consider whether plaintiff was

prejudiced or misled as to the condition of the corporation when extending credit to it."

The appellants based this instruction on the case of *Macbeth-Evans* v. *Gumbinsky* (1918), 201 Mich 18.

The *Macbeth Case* stands for the proposition of law that the presumption of wilful negligence or refusal arising from proof that the (annual corporate) report was not filed is open to rebuttal and is not a conclusive presumption. That portion relied upon by the appellants was dictum, and the court also stated, "*While not controlling,* this is regarded." (Emphasis supplied.)

The instruction requested by the appellants was in direct conflict with the plain terms of the statute and the trial court was correct in refusing to submit the requested instructions.

The appellants state the trial court erred in the following instructions:

"Now the defendant, Pere Marquette Fiber Glass Boat Company, claims damages against the plaintiff for loss of profits. Prospective profits on an established and going business can often be estimated in the light of the past. But, a new or uncertain business may be in the realm of conjecture. If you are satisfied from a preponderance of the evidence that the defendant, Pere Marquette Fiber Glass Boat Company, Incorporated, has proven loss of its profits, you should set off damages suffered by the plaintiff by that amount. However, you may not guess at the amount of damage or loss of profits."

Appellants made no specific objections to the instructions given to the jury on this point and, therefore, under GCR 1963, 516.2,[1] they cannot now assign it as error on appeal.

[1] "Objections. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the

The appellants object to the instruction by the court relating to a merger between Pere Marquette and Industrial. It is their contention that the court should have limited its instructions to the statute involved.[2]

In this case the parties did not take the steps required by the statute to complete a merger or consolidation, but there were several acts by both corporations which could be interpreted as indications of a merger or consolidation in fact. The court fairly and correctly instructed the jury on the factors to be considered in determining if in fact a merger or consolidation had taken place. It has been held that upon the trial of a case a party could show that a merger or consolidation had in fact taken place. See *Green* v. *Michigan United Railways Co.* (1909), 159 Mich 58.

Lastly, appellants claim the verdict was against the great weight of evidence. The case was tried before a jury and there was a direct conflict of the testimony. The jury chose to believe the appellee, and there was sufficient evidence produced for the jury to render a verdict.

However, the jury did return a verdict in the amount of $3,071.50 against all of the appellants. The testimony clearly indicates that to arrive at this sum the verdict was based upon the salary of $650 per month, for a period of 6-1/2 months, less moneys advanced by the appellants on behalf of the appellee.

The judgment against the appellants, Thomas C. Billig, Jr., and Helen H. Billig, was based upon the statute imposing liability on the officers of a cor-

jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." GCR 1963, 516.2.

[2] See CL 1948, § 450.52 *et seq.* (Stat Ann § 21.52 *et seq.*).—REPORTER.

poration "during the period of such neglect or refusal"[3] to file the annual report. The provision of the statute being penal in its nature must be strictly construed. See *Macbeth-Evans* v. *Gumbinsky, supra.*

The term of employment of the appellee was 6–1/2 months or 28 weeks. The Billigs were officers of the corporation for a period of 7 weeks, while said corporation was in default for failure to file its annual report. The judgment against the Billigs should be prorated as to their individual liability accordingly.

The cause is remanded to the circuit court for entry of a judgment consistent with this opinion. Neither side prevailing in full, no costs are awarded.

HOLBROOK, P. J., and J. H. GILLIS, J., concurred.

[3] CL 1948, § 450.87 (Stat Ann 1963 Rev § 21.87).

WAIT *v.* CITY OF STURGIS.

1. MUNICIPAL CORPORATIONS—REDEVELOPMENT OF DOWNTOWN AREA—SPECIAL ASSESSMENT—NOTICE.

   Special assessment of property for redevelopment of downtown business area of defendant city *held,* not invalid, where there was substantial compliance with mandates of the city charter and parties challenging the proceedings had received actual notice of pendency of the proceedings (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10).

2. SAME—REDEVELOPMENT OF DOWNTOWN AREA—SPECIAL ASSESSMENT—CITY-OWNED PROPERTY.

   Special assessment of property for redevelopment of downtown business area in defendant city *held,* not to have been shown invalid for failure of city to make an estimated assessment on city-owned property, where city assumed $59,000 of estimated cost of $344,000 of the project (Sturgis Charter, chap 19, §§ 1–10).

3. SAME—REDEVELOPMENT OF DOWNTOWN AREA—SPECIAL ASSESSMENT—PRESUMPTION OF VALIDITY.

   The presumption of validity attaches to the action of a city commission with respect to what property should be included in establishing a special assessment district for redevelopment of a downtown business area (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10).

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 38 Am Jur, Municipal Corporations §§ 381, 385, 389.
[4] 5 Am Jur 2d, Appeal and Error § 822.
[5] 38 Am Jur, Municipal Corporations §§ 385, 389.
[6] 20 Am Jur, Evidence §§ 403, 405.
[7] 5 Am Jur 2d, Appeal and Error § 1009.

4. APPEAL AND ERROR—CHANCERY CASES—FINDINGS OF TRIAL COURT —RECORD.

The Court of Appeals will not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, it reaches the conclusion that it would have arrived at a different result had it been in the position of the trial court.

5. MUNICIPAL CORPORATIONS—REDEVELOPMENT OF DOWNTOWN AREA—FINDING.

Finding of trial judge in action to invalidate special assessment for redevelopment of downtown business area that city commission had not abused its discretion in establishing the limits of the district is not disturbed on review by Court of Appeals (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10).

6. EVIDENCE—INTERROGATORIES.

Interrogatories and answers thereto of city clerk were properly excluded as evidence, not used for cross-examination but to show what was in them, where the clerk was a witness in court and did testify.

7. COSTS—PUBLIC QUESTION—SPECIAL ASSESSMENT DISTRICT.

No costs are allowed in action to enjoin proceeding with a special assessment district for redevelopment of downtown business area and to declare rights relative to validity of the district, a public question being involved.

Appeal from St. Joseph; Andrews (Mark S.), J. Submitted Division 3 November 4, 1965, at Grand Rapids. (Docket Nos. 594, 595.) Decided April 12, 1966. Leave to appeal denied by Supreme Court June 21, 1966. See 378 Mich 720.

Complaint by J. Paul Wait and Eathel Cole Wait against the City of Sturgis, a municipal corporation, to enjoin proceeding with a special assessment district and to declare rights relative to the validity of the special assessment district. Similar action by the Sturgis Foreign Veterans Club, a nonprofit corporation. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. Paul Wait, in propria persona.

Roy H. Hagerman, for plaintiff Sturgis Foreign Veterans Club.

Dresser & Dresser (*Raymond H. Dresser, Jr.,* of counsel) and *Dickinson, Wright, McKean & Cudlip* (*Charles R. Moon* and *George E. McKean,* of counsel), for defendant.

BURNS, J. These actions are brought to challenge the validity of proceedings taken by the city of Sturgis determining a public improvement and levying special assessments to defray part of the cost thereof.

The Sturgis city commission, acting under authority of PA 1961, No 120, § 1 (CLS 1961, § 125.981 [Stat Ann 1965 Cum Supp § 5.3533(1)]) on May 8, 1963, adopted a resolution regarding the redevelopment of the downtown business area. Due to the development of the outlying shopping areas many store buildings in the downtown area were vacant, and in the resolution it was stated that the city of Sturgis desired to improve the principal downtown shopping area and that it was necessary for off-street parking lots to be developed. The complex consisted of 7 parking lots, to be known as the "Sturgis Center Parking System." It was determined that the parking system was a necessary public improvement which benefited the city as a whole, and conferred a special benefit to property included within the "Sturgis *Center Improvement* Project." The resolution further provided that the improvement should be financed by a special assessment district, and that the city would contribute $59,000 toward the cost thereof, by reason of city-owned land being included within the "Sturgis Cen-

ter Parking System," and the entire city would be benefited. The resolution was unanimously adopted.

Under date of May 20, 1963, the city engineer prepared estimates of expense in the amount of $343,763. The city assessor prepared a memorandum indicating that the assessment would affect four parcels of public property: the library, city offices, fire station, and land referred to as the Spence property, for a total of $17,500.

At a regular meeting of the city commission on May 22, 1963, the general plans of the work, the estimate of the cost, together with the plan of the area to be improved, were adopted by resolution. In this resolution the proposed parking complex was referred to as "Sturgis *Improvement Center* Project" consisting of the establishment and operation of automobile parking facilities to be known as "Sturgis Center Parking System" and contained a determination to make the proposed improvement at the estimated cost of $344,000; $59,000 of which would be paid from city funds, and the balance financed from special assessments against the property benefited, and described the special assessment district by metes and bounds. The resolution also fixed a date to hear objections.

A notice was prepared, reciting among other things that the city commission would hear objections on June 12, 1963, to the proposed public improvement known as "Sturgis Improvement Center Project" for the establishment of a "Sturgis Center Parking System" which stated that "a copy of the area to be included in the Sturgis Improvement Center Project is available for public inspection in the city office." This notice was mailed to the owners of the property in the special assessment district, including plaintiffs herein. On May 28, 1963, and June 3, 1963, two notices were published in the

Sturgis Daily Journal, both entitled "Notice of Objection Meeting." Reference was therein made to the "Sturgis Improvement Center Project" and "Sturgis Center Parking System." The notice stated the estimated cost to be $285,000, that a copy of the plat and diagrams of the work and area to be improved was available for public inspection in the city office. The area was further described by metes and bounds.

At the city commission meeting of June 12, 1963, objections were heard to the proposed "Sturgis Center Improvement Project" to be known as the "Sturgis Center Parking System." An attorney representing a group of objectors, including the Waits, filed two petitions on their behalf.

Thereafter, the commission, with one commissioner abstaining, adopted a resolution ratifying and confirming the resolution of May 22d. The resolution directed the assessor to prepare a special assessment roll and assess the land in the district according to benefits. The resolution described the district as it was described in the resolution of May 22d, and directed that the special assessments were to be divided into 10 annual installments.

However, at a meeting on July 10, 1963, the city commission resolved to meet on July 24, 1963, to hear further objections to the "Sturgis Improvement Center Project" and directed that notice thereof be published in the Sturgis Daily Journal once a week for 2 consecutive weeks. This resolution was unanimously adopted.

Two notices, one entitled "Notice of Special Assessment" and one entitled "Notice of Objection Meeting" were published in the Sturgis Daily Journal on July 15th and 22d. The notices, as published, contained the names of the owners of land within the assessment district, except the owners of land

to be acquired; described the "Sturgis Center Improvement Project"; stated the assessment roll was on file in the office of the city clerk for inspection; that hearing would be held on July 24th; and the estimated cost of the project. Notices were mailed to all property owners listed on the special assessment roll.

At the July 24th meeting, 2 petitions were received objecting to the proposed project. The mayor stated that he had been served with process in an action brought against the city by the Waits. Minutes of the meeting disclose that the mayor announced the hearing on objections to the special assessments would not be heard at that time, but objections to the proposed project would be heard. Objections were then heard, including those of the Waits.

The commission by resolution, with one member abstaining, ratified and confirmed the action taken on June 12th. The commission resolved it would again meet on August 14th to review and hear objections to the special assessment for the proposed project. Again, notices of special assessment were published on July 30, 1963, and August 6, 1963, and an abbreviated form thereof was mailed to the owners of property listed on the assessment roll.

At the meeting of August 14, 1963, the commission, after hearing objections to the special assessment by the Waits and others, confirmed the assessment roll with one member abstaining. The city clerk was directed to indorse the assessment roll, and the mayor to attach his warrant. The commission authorized the employment of counsel for the project and ratified all action taken concerning the project. In late August the commission directed the issuance of bonds in the sum of $255,000 to finance the project.

The city assessor computed the assessments upon all privately-owned property within the assessment district, except for 2 parcels occupied as private dwellings, and land which was to be acquired for additional parking.

The Sturgis chapter of the Veterans of Foreign Wars occupies, as tenant, real estate located within the assessment district, owned by plaintiff, Sturgis Foreign Veterans Club of Sturgis, Michigan, a non-profit corporation. The real estate is exempt from general taxation and appeared on the tax roll *sub nom* Sturgis Veterans of Foreign Wars. Notices of the proposed improvement were mailed to Veterans of Foreign Wars, and this name appears in the published notices. The commander of the VFW post, who was also president of the corporate owner of the property, signed the petition protesting the improvement. It is evident from the testimony that because the property was exempt from general taxation the commander of the VFW post ignored the notices and was unaware the property was to be assessed for the proposed improvement until so informed by an officer of the post.

From a dismissal of the cause of action, plaintiffs appeal.

The appellants allege that compliance with provisions of sections 1–10 of chapter 19 of the charter for the city of Sturgis relative to special assessments is mandatory and jurisdictional; that the city's failure to comply with the provisions void the proceedings.

The appellants do not say that they did not receive notice, nor that they did not have knowledge of the proceedings. They did have notice and appeared in person and by attorneys at the objections hearings. In fact, this suit was instituted prior to the last objection hearing. They claim the proceedings are void because the city did not state in the

printed notice of objections that the estimate of cost was on file at the city clerk's office for inspection, although the printed notice did contain the estimate of cost and was, in fact, on file in the city clerk's office.

PA 1962, No 162, § 5 (CL 1948, § 211.745 [Stat Ann § 5.3534(5)]) states in part:

"Any such special assessment hearing is also validated as to any owner or party in interest *who has actually received* notice of hearing, has waived such notice, or has paid any part of the special assessment." (Emphasis supplied.)

The appellants in the present case did have actual notice, and there was substantial compliance with the mandates of the city charter.

Next, the appellants complain that the city assessor failed to assess city-owned property and privately-owned property, the title to which the city expected to acquire in the future for public parking, and the city commission failed to apportion the publicly-owned property situated within the special assessment district, according to the charter.

The city charter does not require the assessor to assess city-owned property. Section 8 of chapter 19 of said charter states:

"If there shall be included in any special assessment district, lots belonging to the city, school buildings, or other public buildings or public grounds not taxable, such part of the expense of such improvement as in the opinion of the commission or city assessor making the special assessment, would be justly apportionable to such public grounds, buildings and city property, and to any interior squares or places formed by intersection of streets, were they taxable, shall be paid from the general fund, or from the proper street district fund, or partly from each, as the commission shall determine to be just."

However, the city assessor did make an estimated assessment on the city-owned property which was considered by the city commission in determining if the city was assuming its fair share of the special assessment by contributing $59,000, and in effect did apportion its share of the special assessment.

Plaintiffs assert the city commission did not act in good faith and abused its discretion in defining the perimeter of the special assessment district. The trial court stated:

"'Invariably when a special assessment district is created, * * * opinions may differ as to its proper extent and its inclusion, or noninclusion, of specific property therein. The creating of the district was within the legislative powers of the commission, and the presumption of validity attaches to the action taken.' *Crampton* v. *City of Royal Oak* (1961), 362 Mich 502, p 514.

"The Court there found that the objectors had failed to show an abuse of discretion by the city of Royal Oak in creating the district and the court finds none by the Sturgis city commission."

An appellate court gives great weight to the findings of the trial court and does not ordinarily disturb the findings of the trial judge unless, after an examination of the entire record, we reach the conclusion that we would have arrived at a different result had we been in the position of the trial judge. *Christine Building Company* v. *City of Troy* (1962), 367 Mich 508.

After a review of the entire record we agree with the conclusions of the trial judge.

Lastly, appellants assert the trial court erred by excluding from evidence interrogatories and answers.

The interrogatories and answers offered in evidence were interrogatories of the city clerk. The witness was in court and did testify. These inter-

rogatories and answers were not used for cross-examination. When counsel was asked by the court the purpose of admission, counsel replied, "The purpose of showing what they show." The trial court properly excluded said interrogatories and answers from evidence.

The Court has considered the other issues raised by the appellants, but does not consider that they are pertinent to the decision of this case.

Judgment of the lower court is affirmed. No costs, a public question being involved.

HOLBROOK, P. J., and J. H. GILLIS, J., concurred.

PEOPLE v. RAY.

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE—PROBABLE CAUSE—BINDING OVER FOR TRIAL.

Magistrate at preliminary examination may bind defendant over to circuit court for trial if it shall appear from the proofs that an offense not cognizable by a justice of peace has been committed and that there is probable cause that defendant committed the offense, it not being required that guilt of defendant be established beyond a reasonable doubt (CL 1948, § 766.13).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 6] 21 Am Jur 2d, Criminal Law §§ 449-451.
[3] 21 Am Jur 2d, Criminal Law § 343.
Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial. 15 ALR 495, 79 ALR 1392, 122 ALR 425, 159 ALR 1242.
[4] 20 Am Jur, Evidence § 758.
[5] 20 Am Jur, Evidence § 755.
[7, 8] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 984, 985.
Opinion evidence as to speed of automobile or motorcycle. 70 ALR 540, 94 ALR 1190.
[9] 7 Am Jur 2d, Automobiles and Highway Traffic § 330.
[10] 7 Am Jur 2d, Automobiles and Highway Traffic § 337.
[11] 39 Am Jur, New Trial § 13.

2. SAME—PRELIMINARY EXAMINATION—EVIDENCE—DISCRETION OF MAGISTRATE.

The examining magistrate has a large discretion as to the extent and range of inquiry made when a person is brought before him for preliminary examination to ascertain whether a crime has been committed and whether there is probable cause to believe such person was guilty, and the strict rules of evidence may not be applied, where to do so would defeat the object of the inquiry (CL 1948, § 766.13).

3. EVIDENCE—PRELIMINARY EXAMINATION—UNAVAILABLE EXPERT.

Testimony of expert as to speed of defendant's car at time it was involved in alleged manslaughter of 8-year-old bicyclist, taken at preliminary examination *held,* properly ruled inadmissible at trial, notwithstanding unavailability of the expert at the time of trial, where there was a lack of certain facts showing in the record which might or might not have been supplied by the expert had he been available.

4. SAME—EXPERIMENTS—ADMISSIBILITY.

Experiments, made out of court, may be admitted into evidence even though not performed under identical conditions with those existing at time of occurrence if there is substantial similarity between conditions.

5. CRIMINAL LAW—MANSLAUGHTER—PRELIMINARY EXAMINATION—EXPERIMENT—EVIDENCE.

Testimony of experiment by police officer as to speed and braking distance of a car under substantially the same conditions as confronted defendant, charged with manslaughter by operation of a motor vehicle *held,* properly admitted at preliminary examination (CL 1948, § 766.13).

6. SAME—PRELIMINARY EXAMINATION—FINDINGS OF EXAMINING MAGISTRATE—EVIDENCE.

Examining magistrate properly bound defendant over to circuit court for trial on charge of manslaughter by operation of a motor vehicle, where evidence adduced at preliminary examination supported each of 2 findings by the magistrate, either of which would justify his action, it being found that defendant was driving his car while under the influence of intoxicating liquor which proximately caused the death of the decedent, and it being found the defendant operated his car with knowledge of a situation requiring the exercise of ordinary care and with ability to avoid the harm failed to do so when apparent result would be disastrous to another (CL 1948, §§ 750.324, 750.325).

7. SAME—EVIDENCE—OPINION TESTIMONY—EXPERIENCE OF EYEWITNESS.

Admission of opinion testimony that defendant, charged with manslaughter by operation of a motor vehicle, was operating his car much faster than the 35 miles per hour posted speed limit *held,* not prejudicial error notwithstanding the eyewitness so testifying was a 16-year-old boy who had previously only been a passenger in his father's car and had operated his own motor scooter, his lack of greater experience affecting the weight to be given his testimony by jury (CL 1948, §§ 750.324, 750.325).

8. SAME—EXAMINATION BY COURT—DISCRETION OF COURT—SPEED.

Questioning by court of 16-year-old boy, eyewitness to accident resulting in death of an 8-year-old girl bicyclist when hit by defendant's car, *held,* not an abuse of discretion in prosecution for manslaughter by operation of a motor vehicle, where it was done for purpose of shedding light on speed of defendant's car and witness was visibly confused by the rules of evidence but still qualified to present an opinion as to defendant's speed.

9. SAME—DRIVING CAR WHILE INTOXICATED—DIRECTED VERDICT—EVIDENCE.

Directed verdict on count charging defendant with having driven his car while under the influence of intoxicating liquor at a time when he was guilty of acts of gross negligence *held,* properly denied, in view of testimony adduced from police officers as to his condition immediately after accident in which an 8-year-old child was killed, other witnesses who had observed defendant drinking in the course of the afternoon, and defendant's own testimony.

10. SAME—MANSLAUGHTER—NEGLIGENT HOMICIDE—EVIDENCE.

Evidence presented in prosecution for manslaughter while operating an automobile in a grossly negligent manner and for negligent homicide *held,* sufficient to present issues for consideration of jury on both charges (CL 1948, §§ 750.324, 750.325).

11. SAME—MANSLAUGHTER—NEGLIGENT HOMICIDE—NEW TRIAL.

New trial was properly denied defendant, prosecuted on charge of manslaughter while operating a motor vehicle and convicted of negligent homicide, where record shows he had a fair trial (CL 1948, §§ 750.324, 750.325).

Appeal from Berrien; Zick (Karl F.), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 9.) Decided April 12, 1966.

Frank Seth Ray was convicted of negligent homicide. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *John T. Hammond,* Prosecuting Attorney, and *Harry J. Creager,* Assistant Prosecuting Attorney, for the people.

Killian, Spelman & Taglia (*Paul A. Taglia,* of counsel), for defendant.

HOLBROOK, J. Defendant was charged with manslaughter by operation of an automobile and convicted of negligent homicide[1] in the circuit court for Berrien county before a jury, June 27, 1962, and sentenced August 13, 1962. Defendant's motion for a new trial was denied. On appeal to this Court, defendant asserts error on four grounds:

(1) There was not sufficient competent evidence presented at the preliminary examination to sustain the examining magistrate's binding defendant to the circuit court and to thereafter justify the trial court's denial of the motion to quash timely made.

(2) The trial court erred in receiving testimony from the witness Michael Quirk relating to speed of defendant's automobile without a proper basis therefor, and in the court's questioning of Michael Quirk.

(3) The trial court erred in refusing defendant's motion for a directed verdict as to count 2, there not being sufficient, competent evidence to submit the issue of defendant's being under the influence of intoxicating liquor.

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[1] CL 1948, §§ 750.324, 750.325 (Stat Ann 1954 Rev §§ 28.556, 28.557).—REPORTER.

(4) The trial court erred in refusing defendant's motion for a new trial. (Confined on appeal to the first three claimed errors hereinabove.)

The first issue to be considered is the sufficiency of the evidence produced at the examination to warrant binding the defendant over for trial in the circuit court. The test, upon preliminary examination, is stated by Mr. Justice CARR in the case of *People* v. *Asta* (1953), 337 Mich 590, on p 609 as follows:

"Under the statute relating to preliminary examinations (CL 1948, § 766.13 [Stat Ann 1954 Rev § 28.931]) the magistrate may bind a defendant, or defendants, over to the circuit court for trial if it shall appear from the proofs that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause for charging defendant, or defendants, therewith. In the instant case it was not required that the justice find the guilt of the defendants established beyond a reasonable doubt. *People* v. *Hirschfield,* 271 Mich 20, 27; *People* v. *Wilkin & Walsh,* 276 Mich 679, 687. It was essential, however, under the provisions of the statute, to determine that the offense charged had been committed, and that there was probable cause to believe that defendants were guilty."

Gillespie in 1 Michigan Criminal Law and Procedure (2d ed), § 303, p 361, stated:

"All facts and incidents which plainly relate to the offense are admissible. In many cases the application of strict rules of evidence would go far to defeat the object of the inquiry. The examining magistrate must be allowed a large discretion as to the extent and range of the inquiry.[2] The magistrate does not act judicially in the technical sense, and the proceeding is one which, at common law,

[2] *Turner* v. *People* (1876), 33 Mich 363.

was conducted very much at the discretion of the magistrate."[3]

In reviewing the testimony presented at the preliminary examination, we find the following pertinent facts:

The time of the occurrence was June 21, 1961, about 4:30 in the afternoon. The scene was on M–60, an east and west highway, also known as Oak street, paved and 22 feet in width, with gravel berms of eight feet on each shoulder. The immediate scene was just a few feet outside the east city limits of Niles, Michigan. The weather was clear, warm, and sunny, and the pavement dry. Visibility was excellent for a considerable distance both east and west. The vicinity had commercial buildings on the north and residences on the south side of this street. A Standard service station was just north of the impact and two service stations and a shopping center were to the east thereof, and a Lutheran church to the north and west, among other buildings in the area. The approximate place of impact was near the center of the north half of the said street in front of the west driveway of a Standard service station and at the T intersection of said street (M–60) and 20th Place, a street intersecting said highway from the south. Defendant was driving his 1959 Cadillac convertible in a westerly direction on M–60 approaching the city of Niles. A speed limit sign of 35 miles per hour was posted on the north side of the highway a few hundred feet to the east and had to be passed by defendant prior to reaching the scene of the impact. The speed limit east of this area was 40 miles per hour.

The decedent, an eight-year-old girl, and her older brother were riding their bicycles at the scene. Michael Quirk, a 16-year-old boy, was riding his motor scooter on 20th Place going north and had

[3] *Hamilton* v. *People* (1874), 29 Mich 173.

stopped at the south side of M–60 or Oak street and saw decedent's brother finishing the crossing of the highway on his bike and entering the west driveway of the Standard service station, and also, observed the decedent apparently following her brother by a few seconds, crossing the highway, and momentarily going east in the center of the highway for a length of the bicycle before attempting the completion of crossing the highway to the north. When she was about in the center of the north portion of the pavement, she and her bike were struck by defendant's automobile and thrown in the air with great force. There was no sounding of a horn, but there was a loud screech of brakes and tires skidding. The decedent was thrown through the air and landed on the north berm of the road, approximately 150 feet west of the approximate point of impact. The bicycle finally stopped in the highway about a hundred feet west of decedent. The skid marks were plainly visible for 176 feet and started in front of the west drive of the Standard service station and proceeded west. The defendant's automobile finally stopped after turning around, evidently from the force of the stopping operation, after which it was driven to the south side of the road prior to the officer's arrival. The decedent was taken to the local hospital and expired as a result of the many injuries received.

The defendant after stopping his automobile, got out and went over on the north side of the highway and sat down on a piece of cement or rock where he was when trooper Beebe, the first officer, arrived. Officer Beebe testified that he noticed an unusual odor on the defendant and asked him if he had been drinking. Defendant replied that he had had a couple of beers. Another officer, Savoie, testified that he also smelled intoxicants on the defendant at the scene. Photographs of the scene, the automobile and the bicycle were introduced into evidence at the preliminary examination.

A Dr. Witte, doctor of physics and professor of physics at Notre Dame University, testified as an expert that in his opinion from certain facts given him, defendant was driving 56 miles per hour.

The testimony of Norman Schoenmaker, a State trooper, was to the effect that he came to the scene within an hour after the occurrence wherein the decedent was struck by defendant's automobile, and driving a 1960 coach police car, he drove in the same direction as defendant, and on the same highway, and in the same location, at a speed of 46 miles per hour, and applied his brakes, and skidded to a stop. A measurement of the skid marks that he made in this experiment was 136 feet in length.

The testimony of Dr. Witte given at the examination, when offered at the trial, by reason of Dr. Witte having moved to the west coast and being unavailable, was ruled inadmissible because of lack of certain facts showing in the record. The trial judge stated such facts may or may not have been supplied by Dr. Witte if he were available in person. This ruling of the trial judge was correct.

Because of Schoenmaker's unavailabilty, his testimony given at the preliminary examination was offered at the trial with the testimony of Dr. Witte. Upon Dr. Witte's testimony being ruled inadmissible, the people did not offer Schoenmaker's testimony separately.

Was the testimony of Schoenmaker's experiment properly admitted by the examining magistrate?

In 8 ALR 18, annotated, under title of Experimental evidence as affected by similarity or dissimilarity of conditions, pp 18, 26, it is stated:

"The general rule, as stated in the cases below cited, is that to render experiments permissible, or to admit evidence of experiments made out of court, the conditions need not be identical with those ex-

isting at the time of the occurrence, but that it is sufficient if there is a substantial similarity."[4]

"If the essential conditions under which the experiment or observation is made are substantially the same as those of the actual occurrence which is being investigated, any departure or minor variation goes to the weight rather than the admissibility of the evidence."

Also, see, 85 ALR 479, 480.[5]

In *Siegel* v. *Detroit Cab Co.* (1929), 246 Mich 620, an action for death of a pedestrian caused by being struck by an automobile at a street intersection where the pavement at the time of the accident was dry, and the driver of the car testified that when he first saw the deceased, he was 18 or 20 feet from the car and that he was not driving more than 12 or 13 miles an hour, it was held that evidence was properly admitted of witnesses for plaintiff who from tests made by them with a similar car, testified that if the brakes were in good condition when being driven 12 miles an hour, the car could be stopped within 2 feet when on a dry pavement. Also, see, 78 ALR2d 218, § 2, pp 220, 221.[6]

We conclude that the examining magistrate properly admitted the testimony of the experiment of officer Schoenmaker, bearing on the issue of speed.

The complaint and warrant charged defendant with manslaughter by operation of a motor vehicle, contrary to CL 1948, § 750.321 (Stat Ann 1954 Rev § 28.553).

Either of two findings by the examining magistrate would justify binding defendant over to the circuit court for trial:

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[4] *Klanowski* v. *Grand Trunk Railway Company* (1887), 64 Mich 279; *People* v. *Auerbach* (1913), 176 Mich 23 (Ann Cas 1915A, 968).

[5] *Smith* v. *Grange Mutual Fire Insurance Co.* (1926), 234 Mich 119.

[6] *People* v. *Davis* (1955), 343 Mich 348.

(1) The driving by defendant of his motor vehicle while under the influence of intoxicating liquor which was the proximate cause of the death of the deceased, or

(2) By defendant causing the death of the decedent due to the operation of his automobile with these three elements present: (a) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (b) ability to avoid the resulting harm by the ordinary care and diligence in the use of the means at hand; and, (c) the omission to use such care and diligence to avert the threatened damage when to the ordinary mind it must have been apparent that the result was likely to prove disastrous to another.

After a careful review of the testimony given at the preliminary examination, together with the physical facts proven and logical inferences that could be drawn, even without Dr. Witte's expert testimony as to speed, we find sufficient evidence present to allow the examining magistrate to find that the crime had been committed and probable cause to charge the defendant therewith. Defendant was properly bound over to the circuit court for trial.

The next issue to be considered is the claimed error of the trial court in examining the witness Michael Quirk, the 16-year-old boy, and allowing him to testify as to speed of defendant's automobile. The pertinent testimony appears in the record as follows:

(By Mr. Lange, for people.)

"*Q.* In the course of your experience of driving a motor scooter, Mike, and of being a passenger in a motor vehicle, have you observed motor vehicles being driven at different speeds?

"*A.* Yes, I have.

"*Q.* And how many such observations would your best estimate be that you have made?

"*A.* Quite a few. I have done a lot of traveling with my dad.

"*Q.* Have you done a lot of driving with a motor scooter?

"*A.* Yes.

"*Q.* And that was over a period of how many years?

"*A.* It was about two years.

"*Q.* And based on your experience, can you tell whether or not the motor vehicle is being driven at a fast or slow rate of speed?

"*A.* Yes.

"*Q.* Now, on the day and time in question, could you tell, based on your prior experience, whether or not this Cadillac automobile was—strike that. At what rate of speed on the day and time in question, based on your prior experience, was this Cadillac automobile being driven?

"*Mr. Taglia:* Don't answer the question. I will object again on the same grounds, that the witness is not properly qualified to testify. There is no evidence that he is a licensed automobile driver. At this time, before the court rules, I would like to be heard outside the presence of the jury.

"*The Court:* Will you ask him one question, and depending on that answer I will rule. Ask him about how fast he drives his motor scooter.

"*Q.* What is the fastest speed you have ever driven your motor scooter?

"*A.* About 35. * * *

"*Q.* Are you acquainted, Mike, with this intersection of 20th Place and Oak? (M–60)

"*A.* Yes, I am, quite familiar.

"*Q.* How close do you live to that intersection?

"*A.* Just five houses down from Lewis Drive, which is one block.

"*Q.* How long have you lived there?

"*A.* About seven years.

"*Q.* During that time have you had the opportunity to observe the speed of vehicles traveling on Oak street on M–60?

"*A.* Yes.

"*Q.* And that observation has been made over a period of seven years?

"*A.* Yes.

"*Q.* And you state that this car was traveling faster than normal?

"*A.* Yes, it was.

"*Q.* And is your conception of normal speed based on seven years of observation?

"*A.* Yes.

"*Mr. Taglia:* Your Honor, same objection; and I move to strike the testimony.

"*The Court:* Let me inquire before I rule. Now, what is the speed limit in there?

"*A.* I believe it's about 35 by these gasoline stations.

"*The Court:* I think the evidence is that there is a speed sign down—that would be the bottom of the map.

"*A.* Yes.

"*The Court:* 35?

"*A.* Yes.

"*The Court:* Now, I will ask you whether or not, in your opinion, Michael—Can't you give the jury some idea in relation to the speed limit there?

"*A.* What do you mean? You want the speed limit of the area?

"*The Court:* No, can't you give an opinion as to the speed of this Cadillac in relation to what the speed limit is there, keeping in mind that the speed limit is 35?

"*A.* Well, it was faster than that. It was faster than the speed limit.

"*The Court:* Do you have any idea how much faster?

"*A.* Well, not exactly, but he appeared to be coming much more faster than what people usually come down there—you know, after while you can tell.

"*The Court:* You are saying that it was much faster than 35 miles an hour?

"*A.* Yes.

"*The Court:* I will allow that, and you may inquire further if you want to; but as to the defense counsel's objection as to 'faster than normal' the jury should disregard that because we don't know what that means. Maybe people driving normally in there could be 15 miles per hour—or could be 35 or 45, even though the speed limit may be 35. I want the jury to understand that; so the jury will disregard his testimony as to 'faster than normal.'

"*Mr. Taglia:* In order to clarify the ruling of the court—if I understand the court's ruling correctly, this witness' testimony to the effect that the automobile appeared to be coming 'much more faster than 35 miles per hour' is admissible?

"*The Court:* Yes, it is."

It is evident that the trial judge in questioning Michael Quirk was only endeavoring to have him testify as to matters within his knowledge. He had driven his motor scooter for two years and had driven it up to a speed of 35 miles per hour. He had also traveled a lot with his father and had thus gained knowledge as to the speed of automobiles. This qualified him to express an opinion as to the speed of defendant's automobile. The lack of greater experience would go to the weight but not to the admissibility of the testimony.

Mr. Tuttle, a garage man and for 26 years a driver of motor vehicles, testified that the speed of defendant's automobile at the scene was well over 50 miles per hour.

Defendant cites the case of *City of Grand Rapids* v. *Crocker* (1922), 219 Mich 178, in support of his position that the admission of the testimony was error. Even in the cited case where admitting the testimony was error, it was determined that where other testimony concerning speed was admitted, it was not prejudicial. However, the facts in the cited

case are not the same as in the case at hand. It is therefore not analogous and not applicable.

We conclude that the trial judge possessed the right in the conduct of the trial to question the witness, a boy of 16 years, for the purpose of shedding light on the speed of defendant's automobile where the witness was visibly confused by the rules of evidence but was still qualified to present an opinion. This was not an abuse of discretion. *People* v. *Fedderson* (1950), 327 Mich 213, and *People* v. *Salem* (1923), 224 Mich 114.

The third assignment of error to be considered is the claim that the trial judge should have granted defendant's motion for directed verdict as to count 2 for the reason that there was insufficient competent evidence to submit the issue of defendant's being under the influence of intoxicating liquor. The pertinent testimony in the record bearing upon this issue appears as follows:

Officer Beebe testified in part as follows:

"*Q.* What did he tell you?

"*A.* He said that he had had a couple of beers.

"*Q.* Did you have any further conversation with him regarding the use of intoxicants, other than what you testified to? Did you ask him where he had been drinking?

"*A.* Yes.

"*Q.* What did he tell you?

"*A.* He said he—I believe it was his daughter's birthday or something, and he had been over to his brother-in-law's house; and that is where he had the couple of beers. * * *

"*Q.* How long have you been a police officer?

"*A.* It will be five years, five years next month.

"*Q.* And during that five-year period, officer, have you come in contact with persons who have been under the influence of intoxicants or alcoholic liquors?

"*A.* Yes.

"*Q.* On how many occasions, as near as you can tell?

"*A.* That is hard to say, the number of occasions. Quite a number.

"*Q.* And based on that five years of experience as a police officer and based on the observation you made that you testified to here, do you have an opinion as to whether or not the defendant was under the influence of intoxicants when you talked to him?

"*A.* In my opinion, he was under the influence."

Officer Savoie testified in part as follows:

"*Q.* How close were you to Dr. Ray during the course of this investigation?

"*A.* At different times I was within 2-1/2 to 3 feet.

"*Q.* Did you notice any unusual odor about his person?

"*A.* I smelled a smell of intoxicants on his person.

"*Q.* And where were you when you made that observation?

"*A.* The south edge of the road, just west of 20th Place, at which time Dr. Ray was seated in the patrol car."

Roy Huss, witness for the people, testified in part as follows:

"*Q.* I take you back to the 21st day of June, 1961, at approximately 4 p.m. in the afternoon, and ask you where you were at that time.

"*A.* Lake Shore Lounge, Barron lake.

"*Q.* And that is at Barron lake?

"*A.* Yes.

"*Q.* What kind of an establishment is that?

"*A.* It's a liquor and beer tavern.

"*Q.* Are you acquainted with the defendant, Dr. Ray?

"*A.* Yes.

"*Q.* Did you see him on that occasion?

"*A.* Yes.

"*Q*. Approximately what time did you arrive at the Lake Shore Lounge?

"*A*. Approximately 3:30.

"*Q*. Who was with you, if anyone?

"*A*. My wife.

"*Q*. Was Dr. Ray in the establishment at the time you arrived?

"*A*. Yes.

"*Q*. Did you see him leave the establishment?

"*A*. Yes.

"*Q*. Approximately what time did you see him leave?

"*A*. It was in the neighborhood of 4 o'clock.

"*Q*. Now, during the time that you observed him in the Lake Shore Lounge at Barron lake did you observe him consuming any alcoholic beverage?

"*A*. I seen him order one.

"*Q*. Do you recall what type of drink it was?

"*A*. It was a mixed drink—whiskey.

"*Q*. Did you see the bartender pour whiskey into the glass?

"*A*. Yes.

"*Q*. When you arrived, Dr. Ray was already there?

"*A*. Yes.

"*Q*. And at the time you arrived did he have some drink or liquid in a glass at his table?

"*A*. Yes. * * *

"*Q*. What did you see him have when you arrived?

"*A*. Something in a glass.

"*Q*. You don't know what it was?

"*A*. No. * * *

"*Q*. Do you recall anything unusual about the doctor's appearance that day?

"*A*. He was playing shuffleboard.

"*Q*. Can you describe his conduct to the jury.

"*A*. He was noisy, but nothing out of the ordinary.

"*Q*. Was he noisy at shuffleboard?

"*A*. He was hollering at his partner. * * *

"*Q.* Have you drunk on occasions intoxicating liquors?

"*A.* Yes.

"*Q.* How long have you drunk them?

"*A.* Probably 20 years.

"*Q.* And have you seen persons under the influence of intoxicants?

"*A.* Yes.

"*Q.* And has that been an experience you have had on several occasions?

"*A.* Yes.

"*Q.* Do you have an opinion, Mr. Huss, based on your experience and your observation at Lake Shore Tavern that afternoon as to whether or not Dr. Ray was under the influence of intoxicants?

"*A.* Yes.

"*Q.* What is that opinion?

"*A.* I wouldn't say he was drunk, but he was drinking."

Mrs. Huss testified in part as follows:

"*Q.* Mrs. Huss, I take you back to the 21st day of June, 1961, and ask you where you were at about 4 o'clock that afternoon?

"*A.* I was out at Avalon Market or Lounge.

"*Q.* And where is that located?

"*A.* Barron lake.

"*Q.* What time did you arrive there?

"*A.* It was after 3.

"*Q.* Are you acquainted with Dr. Ray?

"*A.* I know him.

"*Q.* Did you see him there on that occasion?

"*A.* I did.

"*Q.* Was he there when you arrived?

"*A.* Yes.

"*Q.* Was there anyone in his company?

"*A.* There was a man with him.

"*Q.* Did you see whether or not he consumed any liquid on that occasion?

"*A.* He was drinking, yes.

"*Q.* Do you know what he was drinking?

"*A.* It was a mixed drink.

"*Q.* How many mixed drinks did you see him drink?

"*A.* He had a drink in front of him when we got there, and he had ordered one more and finished a game of shuffleboard and left.

"*Q.* Can you tell the court and the jury approximately what time Dr. Ray and his companion left?

"*A.* I think they left around 4—maybe a few minutes after. I know he wasn't there very long after we arrived there."

Officer Jack Paul testified in part as follows:

"*Q.* Officer, do you know approximately what time of day you arrived at the scene?

"*A.* Approximately 4:45 or 4:50.

"*Q.* Do you know approximately what time it was that the defendant got into the patrol car?

"*A.* It would be within five minutes of that time.

"*Q.* Did you notice any unusual odor about his person at that time?

"*A.* I could detect the odor of alcoholic beverages on his breath."

The defendant testified in his own behalf and the record in part discloses the following:

"*Q.* Doctor, I take you back to the 21st day of June, 1961, and ask you if you can reconstruct the events of that day immediately prior to the accident which occurred about 4:30 p.m. Initially, I ask you do you recall where you were at or about noon on that particular day?

"*A.* Yes.

"*Q.* Tell the court and jury where you were at that time.

"*A.* I had been to the hospital to visit patients; and I met two doctors that I am closely associated with; and one of them—

"*Q.* Who are they?

"*A.* Dr. Fox and Dr. Ikert.

"*Q.* Where did you meet them that day?

"*A.* At the hospital. They were making rounds, and I saw them while I was at the hospital.

"*Q.* Did you go anywhere with them after you left the hospital?

"*A.* Dr. Fox, I believe, suggested we go down to Eddie's Restaurant and have lunch. He said, 'We will have to hurry because I have a tee-off time at Morris Park Country Club to play golf at 1:15.

"*Q.* Did you go to Eddie's Restaurant?

"*A.* Dr. Fox and Dr. Ikert and I went to Eddie's Restaurant.

"*Q.* Did you eat lunch there?

"*A.* No, sir.

"*Q.* What happened there?

"*A.* By the time we got into the restaurant it was probably a little after 12. A crowd was coming in, and Dr. Fox had this early tee-off time; so he suggested we go in and have a drink; so Dr. Fox and Dr. Ikert and I went in and had a beer. In the meantime, Dr. Fox kept checking his watch to make sure he wasn't going to be late at the country club.

"*Q.* Did anyone order another drink?

"*A.* Dr. Fox did; and when the waitress came he said, 'I won't have time to stay—I'm going to have to leave.' So I suggested to Dr. Ikert that we might as well leave, too. I don't remember whether we finished the beer that came to the table or whether we got up and left without finishing it.

"*Q.* You remember having one full bottle of beer?

"*A.* Yes.

"*Q.* And you aren't sure if you finished the second?

"*A.* No.

"*Q.* But you do know you did drink something from the second beer?

"*A.* Yes.

"*Q.* What did you do then, Doctor?

"*A.* I had told Dr. Ikert that we were having a birthday party for the children that afternoon at

Dr. Dill's house down in Niles. We were going down there because they have a swimming pool and the kids could have more fun. * * *

"*Q*. What time do you think you arrived at Cassopolis and picked up the children with Dr. Ikert?

"*A*. About 2 o'clock.

"*Q*. Did you then proceed on to Niles?

"*A*. We had the top down on the car. The kids were hollering, 'It's hot back here' and they wanted a pop or something; so we—there was a grocery store in the vicinity of the Avalon, Barron lake. I said, 'Wait until we get to the Avalon, and I will get some pop.'

"*Q*. Is this grocery store a part of the same building?

"*A*. It is in the same building.

"*Q*. Did you, in fact, go in?

"*A*. Yes.

"*Q*. What did you do inside?

"*A*. Well, I went into the bar there to go to the men's room while they were getting pop for the children; and when I came out Dr. Ikert and Mrs. Ray were sitting at a table having a drink.

"*Q*. Did you have a drink?

"*A*. No. * * *

"*Q*. Did you have anything to drink while you were at this party?

"*A*. No. The swimming pool—there's an entrance from the basement to the pool, and as I—the children were running in and out and getting dressed after going out and back down the steps and going back up to make sure that somebody was watching them; and I came back downstairs once into the basement. Mr. Deam and Dr. Dill were having a beer; and there was one open, and they said, 'We will open a beer.' I said, 'I don't want one; I'm watching the kids.' So I didn't have one. * * *

"*Q*. Did you pick up the medical bag?

"*A*. He stayed in the car, and I got out and went in and picked up my bag and came directly back out and got back in the car, and we started back

for Niles; so we probably weren't stopped over two minutes or three minutes.

"*Q.* Then you started back toward Niles?

"*A.* Yes.

"*Q.* Did you come directly back to Niles?

"*A.* No, we stopped at the Avalon.

"*Q.* Did you go inside?

"*A.* Yes.

"*Q.* What did you do inside the Avalon?

"*A.* Went in to play shuffleboard.

"*Q.* Now, Dr. Ray, you were present in court when Mr. Huss and Mrs. Huss testified, were you not?

"*A.* Yes.

"*Q.* You heard their testimony?

"*A.* Yes.

"*Q.* I ask you, Doctor, did you have a drink of any kind while you were at the Avalon?

"*A.* I didn't drink a drink."

Under count 2, defendant was charged with having driven his automobile while under the influence of intoxicating liquor at a time when he was guilty of acts of gross negligence. The jury was instructed that they could not find defendant guilty of manslaughter because of such intoxication alone, if they did so find, unless they also found defendant guilty of one or more of the charged acts of negligence causing the death of deceased.

Two officers testified in their opinion, defendant was under the influence of intoxicating liquor. One of the officers stated defendant told him that he had had two beers at Niles at the party that afternoon. Defendant said he had one or two beers at noon while waiting for lunch. Two witnesses observed him drinking mixed drinks at the Avalon bar just a few minutes before the death of the deceased. This evidence was admitted and properly so, and the jury, the triers of the facts, had an opportunity to observe the demeanor and the manner of testify-

ing by the various witnesses. We conclude there was sufficient evidence on intoxication of the defendant to submit it to the jury in count 2, and apply to this case the reasoning stated in the case of *People* v. *Layman* (1941), 299 Mich 141, pp 146, 147, where Mr. Chief Justice SHARPE stated as follows:

"The trial court also instructed the jury upon the question of gross negligence as above noted. These instructions were taken from what we said in the *Orr Case*.[7] Under the test as laid down in that case, defendant as a driver on the highway had knowledge of a situation requiring the exercise of ordinary care and diligence to avoid injury to another. He had the ability to avoid the resulting harm by the use of ordinary care and diligence in the use of his automobile and there was evidence that defendant was intoxicated and driving at the rate of 55 miles per hour as he was entering the intersection. From such testimony, a jury could determine that defendant failed to use such care and diligence to avert the threatened danger when to an ordinary mind it must have been apparent that the result was likely to prove disastrous to another.

"There was evidence from which a jury could determine that defendant was guilty under either theory as outlined by the trial court. The weight to be given to the evidence introduced is the problem of the jury and we cannot say that its verdict was contrary to the law of evidence in criminal cases."

Originally, there were 5 counts contained in the information: The first 3 charged involuntary manslaughter and the last 2 negligent homicide. Count 1 charged defendant with negligently and unlawfully driving his motor vehicle while under the influence of intoxicating liquor and causing the death of decedent. This count was dismissed upon motion of

[7] *People* v. *Orr*, 243 Mich 300.—REPORTER.

defendant upon close of the proofs. Counts 2 and 3 charged defendant with manslaughter in that he operated his automobile in such a manner so as to be guilty of gross negligence, and caused the death of the decedent. The allegation as to defendant being under the influence of intoxicating liquor was not contained in count 3. Counts 4 and 5 charged negligent homicide, and count 5 was dismissed on motion of the people.

Defendant has not raised objection nor briefed the law concerning the submission by the court to the jury of counts 3 and 4. Upon review of the record, we believe the evidence was sufficient and presented issues of fact to be determined by the jury both as to the charges of manslaughter by operation of a motor vehicle and negligent homicide.

We conclude that the defendant's three stated claims of error are without merit. Lastly, defendant asserts that the trial judge should have granted a new trial based upon the 3 grounds of error herein set forth. Our ruling herein precludes granting a new trial. The record satisfies us that the defendant had a fair trial. There was no prejudicial error committed and the judgment of conviction is affirmed.

FITZGERALD, P. J., and T. G. KAVANAGH, J., concurred.

PEOPLE *v.* DICKINSON.

1. INDICTMENT AND INFORMATION—RES GESTAE WITNESSES.
   Generally a prosecuting attorney is required to indorse only *res gestae* witnesses (CLS 1961, § 767.40).

2. CRIMINAL LAW—RES GESTAE.
   Res gestae are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction and render the latter necessary to exhibit the former in its proper effect.

3. SAME—RES GESTAE.
   Acts and deeds emanating from the transaction as long as it continues become part of it, the time limits not being arbitrary, and are admissible in evidence as *res gestae*.

4. SAME—PRESENTATION OF ONLY PART OF RES GESTAE.
   Conviction of a crime may not properly be claimed by prosecution upon evidence which expressly or by implication shows but a part of the *res gestae*, if it appear that evidence of the rest of the transaction is attainable.

5. SAME—INDORSEMENT AND CALLING OF WITNESS BY PROSECUTION—RES GESTAE—FALSE ACCUSATION.
   Prosecution may not be required to indorse name of witness nor call him unless he is a *res gestae* witness; nor need it indorse and call all such witnesses, especially when crime charged is not one of violence; but he should be called if his

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REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur, Indictments and Informations § 43.
[2] 20 Am Jur, Evidence § 661 *et seq.*
[3] 20 Am Jur, Evidence § 669 *et seq.*
[4, 9] 20 Am Jur, Evidence § 551.
[5] 58 Am Jur, Witnesses §§ 3, 111.
[6, 7] 20 Am Jur, Evidence § 672.
44 Am Jur, Rape §§ 85, 86.
Declarant's age as affecting admissibility as res gestae. 83 ALR2d 1368.
[8] 39 Am Jur, New Trial §§ 13, 131, 201.
[10] 58 Am Jur, Witnesses § 418.

testimony is reasonably necessary to protect accused against a false accusation.

6. RAPE—RES GESTAE—EXAMINATION OF PROSECUTRIX BY PHYSICIANS.

Results of the examination of 13-year-old prosecutrix by 2 physicians following alleged statutory rape was a part of the *res gestae,* as such, essential to trial of the case, and failure of the prosecutor to indorse their names on the information and secure their testimony was clearly prejudicial error (CLS 1961, §§ 750.520, 767.40).

7. SAME—RES GESTAE—EXAMINATION OF PROSECUTRIX BY PHYSICIANS.

Lapse of 2 days between alleged statutory rape and examination of 13-year-old prosecutrix by 2 physicians did not prevent the examination from being a part of the *res gestae,* where there was testimony of intimidation by defendant in the interim but prompt report to the authorities by her mother on receipt of information from the child (CLS 1961, § 750.520).

8. NEW TRIAL—DISCRETION OF COURT.

A motion for a new trial is addressed to the discretion of the trial court.

9. CRIMINAL LAW—RES GESTAE.

Requirement of presentation of the entire *res gestae* in a prosecution for crime is a safeguard of the defendant's fundamental rights.

10. RAPE—EXAMINATION OF PROSECUTRIX BY PHYSICIANS—RES GESTAE—NEW TRIAL.

Examination of 13-year-old prosecutrix by physicians selected by the people for the purpose of securing medical opinion as to the fact of the commission of the statutory rape some 2 days theretofore *held,* an ongoing part of the transaction, under evidence adduced showing intimidation of prosecutrix by defendant, and the findings of the examination a part of the *res gestae,* hence, the failure to call the physicians requires that new trial be granted to permit their corroboration or refutation of the prosecutrix (CLS 1961, §§ 750.520, 767.40).

Appeal from Saginaw; O'Neill (James E.), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 366.) Decided April 12, 1966.

Willie N. Dickinson was convicted of statutory rape. Defendant appeals. Reversed and new trial granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert B. Currie,* Prosecuting Attorney, and *Gerald K. Dent,* Assistant Prosecuting Attorney, for the people.

William J. Ginster, for defendant.

FITZGERALD, P. J. Upon conviction of the crime of statutory rape under CLS 1961, § 750.520 (Stat Ann 1954 Rev § 28.788) defendant Willie Dickinson brings to this Court a substantial number of errors from a trial which consumed one day.

Chief among his allegations of error is that the prosecuting attorney should have been compelled to indorse on the information the names of two physicians who had examined the private parts of the 13-year-old prosecutrix following the alleged statutory rape, and further that the State should have been compelled to produce each of the physicians to testify at the trial. He charges that the prosecutor, in effect, suppressed evidence of the findings of the physician who, at the request of the authorities, examined the prosecutrix.

The prosecution counters this argument by citing *People* v. *Prescott* (1934), 268 Mich 606, for the fact that no motion was made by defendant to require indorsement of the names on the information and that the failure of the prosecuting attorney to indorse names of witnesses not to be called does not constitute error. Specifically, the prosecution states that the trial record fails to show that any such motion to indorse was made by the defendant and that the issue is being raised for the first time on

appeal. We note, however, that despite the absence of a motion, the record is replete with unavailing efforts on the part of defendant to secure the medical testimony.

We are met first with a statute, CLS 1961, § 767.40 (Stat Ann 1965 Cum Supp § 28.980):

"All informations shall be filed in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate, by the prosecuting attorney of the county as informant; he shall indorse thereon the names of the witnesses known to him at the time of filing the same. The information shall be subscribed by the prosecuting attorney or in his name by an assistant prosecuting attorney. Names of additional witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

Was the prosecutor required to indorse the name of the two physicians who had examined the prosecutrix some time after the alleged statutory rape? While a cursory reading of the statute, *supra,* might indicate that the prosecutor is required to indorse the names of all known witnesses, the scope and extent of his duties under this statute have been the subject of refined judicial interpretation over the years. Generally stated, the prosecutor is required to indorse only *res gestae* witnesses, with various exceptions even as to *res gestae* witnesses. *People* v. *Keywell* (1931), 256 Mich 139; *People* v. *Kayne* (1934), 268 Mich 186; *People* v. *Tann* (1949), 326 Mich 361.

An exhaustive analysis of the prosecutor's duty regarding indorsement of *res gestae* witnesses and its underlying rationale can be found in *Kayne, supra,* which was decided at a time when a statute substantially the same as CLS 1961, § 767.40, *supra,* was in effect. As there stated (omitting citations):

" 'No inflexible rule has ever been and probably never can be adopted as to what is a part of the *res gestae.* It must be determined largely in each case by the peculiar facts and circumstances incident thereto; but it may be stated as a fixed rule that, included in the *res gestae* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.'

" 'And as long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that, describing it in a court of justice, they can be detailed. * * * Nor are there any limits of time within which the *res gestae* can be arbitrarily confined.' "

Kayne goes on further to quote (p 193) from *Hurd* v. *People* (1873), 25 Mich 405, 415–417:

" 'But the prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestae,* or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. It is the *res gestae,* or whole transaction, the burden of proving which rests upon the prosecution (so far at least as the evidence is attainable). It is that which constitutes the prosecutor's case, and as to which, the defendant has the right of cross-examination; it is that, which the jury are entitled to have before them, and "until this is shown, it is difficult to see how any legitimate inference of guilt, or of the degree of the offense, can be drawn."

" 'The prosecutor in a criminal case, is not at liberty like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then, to put the defendant to the

proof of the other part, so long as it appears at all probable from the evidence, that there may be any other part of the transaction undisclosed; especially, if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is, "to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence." * * * But, certainly, if the facts stated by those who are called show *prima facie,* or even probable reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner.'"

Summing up, *Kayne* makes the following analysis of Michigan law (p 194):

"The indorsement and calling of a witness by the prosecution is not required unless he is a *res gestae* witness. *People* v. *Grant* (1896), 111 Mich 346. And it is not the rule that all *res gestae* witnesses must be indorsed on the information and called by the State. *People* v. *Kindra* (1894), 102 Mich 147. Especially is this true when the offense charged is not a crime of violence. *Bonker* v. *People* (1877), 37 Mich 4. Instead the rule is that, apart from cumulation of testimony, any *res gestae* witness should be indorsed and called by the prosecution if the testimony of such witness is reasonably necessary to protect the accused against a false accusation. * * *

"But where a fair presentation of the *res gestae* of the crime charged cannot otherwise be made to the court or jury, the State is required to indorse and call the witness or witnesses whose testimony is necessary to protect the accused from being the victim of a false accusation. Such is the rule, as stated in *Hurd* v. *People, supra,* 'so long as it appears at all probable from the evidence, that there

may be any other part of the transaction undisclosed; especially, if it appears to the court that the evidence of the other portion is attainable.' "

Heeding the rationale of *Kayne,* we conclude that the results of the examination by the two physicians was a part of the *res gestae* and, as such, essential to the trial of this case. The failure of the prosecutor to indorse their names upon the information and secure their testimony was clearly prejudicial error.

The lapse of time from the alleged criminal act to the examination does not remove it from the *res gestae* under these particular facts, since the lapse of time was brought about by the defendant's intimidation of the prosecutrix.

The record discloses the following events, as an aftermath of the alleged rape on Saturday:

"*Q.* Did you talk to your mother on Sunday about this?

"*A.* No.

"*Q.* Why didn't you tell her on Sunday?

"*A.* No, because every place my mom went, he followed her around. I didn't get a chance to.

"*Q.* Did you go to school on the following Monday, then?

"*A.* Yes.

"*Q.* Did you talk to your mother about this before you went to school on Monday?

"*A.* No.

"*Q.* Why not?

"*A.* Because he left for work late that morning. He stayed there late. He went to work just about before I left."

The record then discloses that the prosecutrix informed her mother on Monday, when she returned from school.

This sequence of events, followed by the mother's immediate notification of the authorities, indicates

to us that the transaction was an ongoing one, not limited solely to events directly following the alleged rape, thus bringing it clearly within the contemporaneous quality generally surrounding *res gestae.*

Regarding the prosecution's contention that *Prescott, supra,* conclusively decides the matter, we cannot agree. That case is limited to the holding that the indorsement of names may not be reserved as a basis for a new trial where no motion to so indorse was made at the time of trial. Though in this case, no motion was made, the considerations on a motion for a new trial and an appellate review are not necessarily coextensive, the former being addressed to the discretion of the trial court, the latter being a safeguard of defendant's fundamental rights.

Examination of the 13-year-old prosecutrix by a physician selected by the authorities for the purpose of securing medical opinion as to the fact of the commission of the crime was an ongoing part of this "transaction" and the findings of such examination are part of the *res gestae.* The virtually uncorroborated testimony of the prosecutrix might have been enhanced or destroyed by the testimony of either or both of the physicians in question and certainly such testimony could not be called cumulative. The State's failure to produce these witnesses taints this prosecution and calls for a new trial where such testimony will be available.

The judgment is set aside and a new trial ordered.

HOLBROOK and T. G. KAVANAGH, JJ., concurred.

In re OAK STREET, PLEASANT VIEW SUBDIVISION.

VANBURGER *v.* WIDDIS.

1. HIGHWAYS AND STREETS—VACATION—OBJECTION—PUBLIC HEALTH, SAFETY, AND WELFARE.

   Vacation of street, upon petition, shall not be ordered, when reasonable objections are interposed, unless vacation, upon proof, appears to be necessary for public health, safety, and welfare (CLS 1961, § 560.62).

2. APPEAL AND ERROR—NONJURY CASE—FINDINGS OF FACT—PREPONDERANCE OF EVIDENCE.

   Court of Appeals is bound by trial judge's findings of fact in a nonjury case unless the contrary appears by a clear preponderance of evidence.

3. HIGHWAYS AND STREETS—VACATION—PUBLIC HEALTH, WELFARE, COMFORT, OR SAFETY—EVIDENCE.

   Finding of trial court that vacation of portion of street was necessary to public health, welfare, comfort, or safety *held*, unsupported by record presented.

4. APPEAL AND ERROR—GRATUITOUS DETERMINATION—ABANDONMENT OF STREET.

   Abandonment of portion of street, as determined by trial court gratuitously, since plaintiff had not sought it and no evidence was adduced to support it, is not binding on Court of Appeals.

5. SAME—TRIAL COURT'S GRATUITOUS DETERMINATION.

   Gratuitous determination by trial court of an issue of fact not raised by pleading and as to which no evidence has been adduced, is not binding on Court of Appeals.

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Highways §§ 118, 119.
[2] 5 Am Jur 2d, Appeal and Error § 839.
[3] 25 Am Jur, Highways §§ 120, 124.
[4, 5] 5 Am Jur 2d, Appeal and Error § 545.

Appeal from Roscommon; O'Keefe (Dennis J.), J. Submitted Division 3 December 7, 1965, at Grand Rapids. (Docket No. 651.) Decided April 12, 1966.

Petition by Albert and Dora VanBurger to alter plat of Pleasant View Subdivision and to vacate a part of Oak street in that subdivision. Objection to vacation by Donald and Maxine Widdis. Judgment for petitioners. Objectors appeal. Reversed and petition denied.

Robert O. Boyle, for petitioners.

Hughes & Trucks (*Howard B. Hughes,* of counsel), for objectors.

T. G. KAVANAGH, J. This case involves a petition and hearing to vacate that part of Oak street in Pleasant View Subdivision, Roscommon county, lying south of highway M-55.

Oak street is 25 feet in width and extends from the water's edge of Houghton lake in a southerly direction to M-55 and after crossing M-55 proceeds southerly a distance of 125 feet. The plat of Pleasant View Subdivision was approved and filed September 25, 1922, and the streets on the plat were dedicated to the public and were taken into the county road system by resolution dated August 20, 1950, when the board of county road commissioners for Roscommon county formally accepted Oak street.

In 1938 Albert and Dora VanBurger purchased lots 71, 72, and 73 of Pleasant View Subdivision and constructed a resort consisting of several cottages and a residence. Some of the cottages and porches encroach upon the portion of Oak street

here involved. In 1956 the VanBurgers sold the resort to Donald and Phyllis Luchenbill on land contract.

Oak street has been used over the years to gain access to the land south of Pleasant View Subdivision but was not improved except as the VanBurgers and Luchenbills put gravel on it for the purpose of providing access to their back cottages. That part of Oak street north of M-55 has been in general use for access to Houghton lake apparently since its dedication.

In 1962 Donald and Maxine Widdis, who are the appellants and objectors herein, purchased a parcel of land adjoining Pleasant View Subdivision to the south and east. In 1963 they filed and obtained tentative approval of a plat of their property known as Sunny Brook Estates. Oak street in the proposed Sunny Brook Estates connects with Oak street in Pleasant View Subdivision, and has been used by lot owners and others as a means of ingress and egress.

On June 5, 1965, the VanBurgers filed this petition to vacate that part of Oak street lying south of M-55 in Pleasant View Subdivision. Testimony on the petition was taken on July 20 and July 29, 1964, and the court granted the petition February 9, 1965.

The pertinent provision of the statute (CLS 1961, § 560.62 [Stat Ann 1963 Cum Supp § 26.492]), under which this petition was filed reads as follows:

"Any person owning any land immediately adjoining that part which it is proposed to alter or vacate, correct or revise, may appear in opposition to the petition; and if upon the hearing the applicant shall produce to the court satisfactory evidence that the notice required by the preceding section of

this act[1] has been given, the court shall proceed to alter or vacate, correct or revise, the plat or part thereof, unless there is reasonable objection to making the alteration or vacation, correction or revision, in which case the court shall not proceed to alter or vacate, correct or revise the plat or part thereof unless it is deemed necessary for the health, welfare, comfort or safety of the public."

Under the provisions of the above statute, such petition for vacating of a street, when reasonable objections are interposed, shall not be granted unless it appears by the proofs that it is necessary for the health, safety, and welfare of the public. From the record it appears to this Court that the objections to the granting of the petition were reasonable. *In re Petition of Carson* (1961), 362 Mich 409.

Our sole inquiry then will be to determine whether there was any evidence upon which the court could base a finding of necessity for public health, welfare, comfort, or safety. If we find such, this being a nonjury law case, we are bound thereby unless it appears contrary to the clear preponderance of the evidence. *In re Petition of Carson, supra; Shaw* v. *Wiegartz* (1965), 1 Mich App 271.

From the exhibits—photographs of the area—nothing appears which would establish or support an inference of a condition necessitating vacating the road. If present at all, such necessity must be shown by the testimony of the witnesses.

There were only three witnesses whose testimony could fairly be said to bear on the question of welfare, comfort, or safety of the public and none on the question of health.

Of these three witnesses, a resident of the Pleasant View Subdivision, Mr. Smith, testified it was

[1] CLS 1961, § 560.61, as amended by PA 1962, No 154 (Stat Ann 1965 Cum Supp § 26.491).

quite a job to get on M-55 during the season—"It is a hazard. * * * It is a normal hazard comparable to any area along M-55." Mr. Whitechurch, the chairman of the road commission testified that the road commission had no objection to the vacating of Oak street because public safety is better served by fewer entrances to the State highway bordering the plat of Pleasant View Subdivision. He said, "This is the opinion of the board where there is a heavily traveled highway like 55 we try to have as few entrances on it as possible." But he, "couldn't say" whether the entrance of the road involved was a desirable situation from a safety standpoint. Neither of these witnesses' testimony in our opinion would support a reasonable inference that it was necessary to vacate the road in the interests of public welfare, comfort, or safety.

This leaves us then only with the testimony of Mrs. Luchenbill, the land-contract purchaser of the lots bordering the road in question. She testified that there were encroachments of concrete steps and parts of cottages on the road; that, since the opening of Oak street in Sunny Brook Estates, the traffic was disgustingly heavy; that some of it was so fast that when one driver was told to stop he slammed on his brakes and threw stones up and hit the chairs; that the drivers didn't care whether one were sitting there or not they slam on their brakes and, when they do, cause the dirt to fly; that after some nights of travel over this road by the general public, her property was littered with vodka and beer bottles and other debris; that people park on Oak street late at night with their car lights out, and that her guests often bring children ranging from 3 years to 11 years who play all over the resort. Nowhere is there any evidence that the proper use of this street is a danger to the public. Thus from a care-

ful examination of the record we find no evidence to support a conclusion that it was necessary for the public health, welfare, comfort, or safety to vacate Oak street.

The trial court's opinion stated that under *Leelanau County Board of Road Commissioners* v. *Bunek* (1956), 344 Mich 605; *Bain* v. *Fry* (1958), 352 Mich 299; and *Snow* v. *Murphy* (1929), 248 Mich 659, since, "the testimony fails to show any such use of said portion of Oak street, or that any public funds were spent for the maintenance of said portion of Oak street sought to be vacated, * * * and [it] must be considered as abandoned."

These cases being authority for the user required to establish acceptance of a highway are not in point in determining whether an established highway was abandoned. See *Rice* v. *Clare County Road Commission* (1956), 346 Mich 658.

The plaintiff did not claim below that the road was abandoned nor does he do so here, and since no evidence was adduced to establish it, we are not bound by the trial court's gratuitous determination of abandonment.

The judgment is set aside and an order may enter denying the petition. Appellant may have his costs.

Fitzgerald, P. J., and Holbrook, J., concurred.

SLOAN *v.* SILBERSTEIN.

1. TRUSTS—ANNUAL ACCOUNTING—TRUSTEE—BREACH OF DUTY.
   Trustee was guilty of a breach of duty where he failed to render an annual written accounting to the beneficiaries, which duty was required by the will creating the trust and by statute (CL 1948, § 704.38).

2. SAME—DUTIES OF TRUSTEE—ADMINISTRATION OF TRUST.
   The trustee owes a duty of ordinary skill and diligence in the administration of the affairs of the trust.

3. SAME—DUTIES OF TRUSTEE—LOYALTY TO BENEFICIARIES.
   Trustee owes complete loyalty to the interest of the beneficiaries.

4. SAME—TRUSTEE—DEALINGS WITH BENEFICIARIES.
   A trustee owes a duty to show good faith and fair play in direct dealings with the beneficiaries of trust.

REFERENCES FOR POINTS IN HEADNOTES

[1, 20] 54 Am Jur, Trusts § 497.
[2] 54 Am Jur, Trusts § 321.
[3] 54 Am Jur, Trusts § 311.
[4] 54 Am Jur, Trusts § 318.
[5] 54 Am Jur, Trusts § 311 *et seq.*
[6] 54 Am Jur, Trusts § 219.
[7–9, 22] 54 Am Jur, Trusts § 218 *et seq.*
[10] 34 Am Jur, Limitation of Actions §§ 107, 175.
[11] 54 Am Jur, Trusts § 579.
[12] 34 Am Jur, Limitation of Actions § 5.
[13] 19 Am Jur, Equity § 490.
[14–16] 19 Am Jur, Equity §§ 496, 497.
34 Am Jur, Limitation of Actions § 5.
[17] 54 Am Jur, Trusts §§ 336, 578, 579.
Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets. 29 ALR2d 1034.
[18] 54 Am Jur, Trusts § 578.
[19] 54 Am Jur, Trusts §§ 218, 578, 579.
[21] 54 Am Jur, Trusts § 538.
Compensation of trustee as affected by neglect or violation of his duties. 110 ALR 566.
[23] 5 Am Jur 2d, Appeal and Error § 974.
[24] 54 Am Jur, Trusts § 300.
[25] 5 Am Jur 2d, Appeal and Error § 1014.

5. SAME—TRUSTEE—TRUST PROPERTY—ILLEGAL PROFIT—TRUST PURPOSES.

Trustee may at no time use or deal with trust property for his own profit or for any other purpose unconnected with the trust (CL 1948, § 704.37).

6. SAME—CONSTRUCTIVE FRAUD—BREACH OF DUTY—UNJUST ENRICHMENT.

Nondisclosure by trustee of material facts relating to the purchase of debentures, issued by a corporation of which he was president and a principal stockholder, with trust funds, coupled with his breach of duties imposed upon him by terms of will creating the trust, statutory and case law, and his retention of unmerited benefits, constitute constructive fraud in which plaintiffs were deceived and defendant appellant was unjustly enriched (CL 1948, §§ 704.37, 704.38).

7. SAME—CONSTRUCTIVE TRUST—BREACH OF TRUST.

Constructive trust was properly imposed upon stock or proceeds from stock which fiduciary wrongfully derived from his breach of trust.

8. SAME—CONSTRUCTIVE TRUSTS—BREACH OF TRUST.

Courts will impose a constructive trust whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee and breaches his trust.

9. SAME—BREACH OF TRUST—EQUITY.

Equity will hold for the benefit of the *cestui que trust* that which the trustee has acquired through the medium of the trust by a breach thereof, no matter how good a legal title the trustee may have.

10. LIMITATION OF ACTIONS—BREACH OF EXPRESS TRUST—EQUITY.

The statute of limitations in effect did not apply to litigation based on breach of an express trust, where the breach of trust occurred prior to the effective date of the revised judicature act (CLS 1961, §§ 600.5815, 600.5869).

11. TRUSTS—LACHES—ACTIONS—BREACH OF TRUST.

Plaintiff beneficiary was not guilty of laches, or wanting in diligence in prosecuting her right of action against appellant fiduciary, where the breach of trust occurred on June 1, 1946, she did not have knowledge of breach until 1957 and the suit was commenced in August, 1959.

12. EQUITY—LACHES—LIMITATION OF ACTIONS.
Laches differs from limitations in that limitations are concerned with the *fact* of delay, laches with the *effect* of delay.

13. SAME—LACHES—ENFORCEMENT OF CLAIMS.
Laches is concerned primarily with the question of the inequity of permitting a claim to be enforced and depends on whether plaintiff has been wanting in due diligence.

14. SAME—LACHES—LIMITATIONS OF ACTIONS.
Limitations are statutory, while laches is not.

15. SAME—LACHES—LAW—LIMITATION OF ACTIONS.
Laches applies only in equity, while in Michigan prior to January 1, 1963, limitations applied only at law (CLS 1961, § 600.5815).

16. SAME—LACHES—LIMITATIONS OF ACTIONS.
Limitations are based on fixed time, while laches is not.

17. TRUSTS—BENEFICIARIES—BREACH OF TRUST—CONSENT—NOTICE—LACHES—ESTOPPEL.
Claims of beneficiaries of a trust against trustee for breach of trust are barred by laches and estoppel, where they had actual or constructive knowledge of the breach several years prior to the inception of the suit, and where they consented to the allowance of each of several annual accounts which were inconsistent with the asserted claim.

18. SAME—TRUSTEE—BENEFICIARIES—BREACH OF TRUST—ESTOPPEL.
Claim of plaintiff in behalf of trustee who is also beneficiary of trust is estopped by his act and conduct in causing the breach of which complaint is made.

19. JUDGMENT — CONSTRUCTIVE TRUSTS — UNJUST ENRICHMENT — LACHES — ESTOPPEL.
Judgment of lower court, which required defendant, who profited from breach of duty to trust while serving as trustee, to pay over to the current trustee all the fruits of the breach as a constructive trust, is modified and the amount to be paid over is reduced by portion of the claim of beneficiaries barred by laches and estoppel.

20. SAME—ANNUAL ACCOUNTS—TRUSTS.
Annual accounts rendered by the various trustees in the court below are allowed and approved, except as modified because of dereliction of trustee who breached his trust.

21. SAME—MANAGEMENT FEES—TRUSTEES' FEES—CLAIMS.
All claims for additional management fees and trustees' fees are denied, where trustee breached trust by failing to file annual accounts and by investing trust funds in debentures issued by corporation in which he was 1 of 2 principal stockholders and its president.

22. SAME—ANNUAL ACCOUNTS—CONSTRUCTIVE TRUST.
Allowance and approval of various annual accounts *held*, not to deprive any beneficiary of the trust of the right to receive distribution of constructive trust paid into testamentary trust by trustee who breached the trust.

23. APPEAL AND ERROR—REMAND—JURISDICTION—ENFORCEMENT—REIMBURSEMENT—COMPENSATION.
Trial court, on remand, is specifically ordered to retain jurisdiction of suit to impose a constructive trust upon proceeds of acquisitions by trustee who breached trust for enforcement of future orders, to hear and determine rights of plaintiffs and guardians *ad litem* for reimbursement and compensation, and for other matters properly brought before the trial court.

24. TRUSTS—BREACH OF TRUST—MEASURE OF LIABILITY—EVIDENCE.
Measure of liability of trustee who breached trust in acquiring debentures issued by corporation of which he was president and a principal stockholder is limited to stock acquired by reason of purchase of the debentures rather than stock otherwise purchased by him under evidence adduced.

25. COSTS—TRUSTS—NEITHER PARTY PREVAILING IN FULL.
No costs are allowed on defendant's appeal or on plaintiffs' cross-appeal in action for breach of duty by trustee upon affirmance in part and reversal as to part of lower court judgment, as neither party has prevailed in full.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted Division 1 December 8, 1965, at Detroit. (Docket No. 672.) Decided April 12, 1966. Rehearings denied July 27, 1966.

Bill of complaint by Hattie S. Sloan and others against Ben L. Silberstein and others for an accounting of the assets of an express trust of which defendants were trustees and to impress a constructive trust on all the stock owned by defendant Ben L. Silberstein in National Building Corporation

allegedly improperly acquired by defendant's improper use of trust funds. Counterclaim by defendants to allow annual accountings of trust fund. Judgment for plaintiffs. Defendant Silberstein appeals and plaintiffs cross-appeal claiming that the constructive trust was impressed on the wrong amount of stock. Judgment for Hattie S. Sloan modified and affirmed. Judgment for all other beneficiaries reversed and the cause remanded to the lower court for further proceedings.

Wunsch, Aiken & Lungerhausen (*Harry M. Nayer* and *Chris M. Youngjohn,* of counsel), for plaintiffs.

George E. Brand, Jr., for defendant Ben L. Silberstein.

WATTS, P. J. This is a suit in equity brought by Hattie S. Sloan and others against Ben L. Silberstein and Robert Silberstein, individually and as trustees, and Irwin I. Cohn, as executor of the estates of Harry and Joseph Silberstein. Plaintiffs seek an accounting of all real and personal property of the Mary Silberstein trust and the impressing of a constructive trust on all stock of the National Building Corporation owned by Ben L. Silberstein, hereinafter referred to as appellant, or on the proceeds of the stock, said constructive trust being for the benefit of the plaintiffs and all the other beneficiaries of the express trust created in the will of Mary Silberstein. Judgment was entered for the plaintiffs against the appellant, who filed a claim of appeal in the lower court on March 25, 1965. On April 9, 1965, the plaintiffs filed a cross appeal. On December 7, 1965, the Court of Appeals granted plaintiffs' motion to add Calvin C. Rock, current successor trustee, as party plaintiff.

On March 18, 1941, Mary Silberstein, the mother of Hattie S. Sloan, Gertrude Marks, Joseph, Harry, Ben L. and Robert Silberstein, died. Her will was probated in Wayne county. On December 15, 1943, trustees qualified under the Mary Silberstein express trust, which left the entire residuary estate in trust, the income to be paid in equal shares to her 6 children during their lifetime, the corpus to their issue, the remainder beneficiaries.

Joseph and Harry Silberstein were appointed cotrustees of the family trust. Joseph died March 25, 1946. Harry was the sole trustee from March 23, 1946 to May 6, 1946, on which day appellant was appointed cotrustee. Harry died February 28, 1955. Appellant was the sole trustee from February 28, 1955, to March 31, 1955, when Robert Silberstein was appointed cotrustee. Appellant and Robert Silberstein served as cotrustees until June, 1960, when appellant resigned. Robert Silberstein and the National Bank of Detroit served as cotrustees until December 3, 1962, when Calvin C. Rock was appointed and qualified successor trustee.

On March 7, 1946, appellant, one of the beneficiaries of the trust, received information from Edwin Gage that the National Bank Building could be purchased from the First Liquidation Corporation for $6,000,000 cash. On March 13, 1946, appellant and associates submitted a written offer to purchase the bank building for $5,900,000 cash. A deposit of $100,000 accompanied the offer to purchase and an additional $150,000 was deposited upon acceptance of the purchase offer (March 16, 1946). The total deposit of $250,000 was to be forfeited if the remainder of the entire $5,900,000 purchase price were not paid within 3 months after delivery of abstract of title. Jason Honigman and family furnished $125,000 of the deposit money, appellant

$62,500 (which money was loaned to him by Harry Galperin), and $62,500 by Harry Galperin.

A mortgage on the property was acquired for $5,000,000. The total amount to be raised by the sale of debentures and common stock was $1,000,000: $900,000 was to be raised by the sale of debentures; $100,000 by the sale of common stock. This left a balance of $100,000 in reserve over the purchase price of $5,900,000. The record indicates that to facilitate the raising of this amount of money within a relatively short period, the privilege of purchasing common stock was generally extended to those who bought debentures.

On May 9, 1946, the National Building Corporation filed articles of incorporation in Lansing, and on May 16th these were put on file in Wayne county. Appellant was a principal stockholder, its director and president. He became cotrustee of the Mary Silberstein trust on May 6, 1946.

On May 24, 1946, appellant and Harry Silberstein, cotrustee of the trust, issued a check in the amount of $50,000 payable to the National Building Corporation for the purchase of a National Building Corporation debenture or promissory note.

On June 1, 1946, the corporation delivered its $50,000 debenture or promissory note, bearing 6% interest and signed by appellant, the president of the corporation, payable to himself and Harry Silberstein, cotrustees of the Mary Silberstein trust. On the same day, appellant *personally* signed an agreement to purchase the debenture or promissory note held by the trust within 60 days of demand. Approximately 2 years later, the debenture or promissory note was redeemed by the corporation and the trust received payment of $50,000 plus interest.

In 1954 and 1955 when rumors came to the attention of Hattie S. Sloan of the possible misuse of

trust assets, she hired an accountant to audit the books. The audit was completed in 1957, and Hattie S. Sloan subsequently brought suit in chancery in 1959.

Hattie S. Sloan alleged that defendant trustees improperly and fraudulently advanced funds from the trust to themselves for their own use. She sought that a constructive trust be placed on all the stock of the National Building Corporation owned by appellant, or the proceeds of the said stock, and that an accounting be had of all the assets of the trust.

Plaintiffs seek to impress a constructive trust upon certain assets acquired by appellant during his administration of the trust.

Appellant denies that he was guilty of a breach of trust and claims that plaintiff Hattie S. Sloan had knowledge of, acquiesced in, and consented to the purchase of National Building Corporation debentures.

More specifically, *the plaintiffs claim:*

On or about June 1, 1946, the defendant, Ben L. Silberstein, caused the trust to purchase a $50,000 promissory note of National Building Corporation. Said defendant was the principal promoter and one of the incorporators of this corporation. Pursuant to his agreement with the other promoters, said defendant was obligated to raise approximately $406,875 for the new corporation, and upon fulfilling this obligation said defendant or persons named by him became entitled to receive approximately 39,375 shares of the common stock of said corporation.

As a direct result of the use of trust funds for the purchase of such promissory notes of said corporation, the defendant acquired the right to receive approximately 7,633 shares of common stock of National Building Corporation, which shares were acquired by him in his own name. The plaintiffs

claim that these shares were acquired by said defendant without their knowledge or consent and without disclosure by said defendant of his interest in said corporation or his rights and obligations in connection with the financing of said corporation.

The plaintiffs seek on behalf of the trust to impose a constructive trust upon 7,633 shares of said common stock acquired by said defendant or upon the proceeds of such shares or to surcharge said defendant for the value of said shares. The plaintiffs also contend that they are entitled to an accounting of the benefits accruing to said defendant as a result of the ownership of such shares and to surcharge said defendant for dividends received by him thereon and for such other benefits as he may have received through such ownership.

Defendant-appellant Ben L. Silberstein contends:

The loan to National Building Corporation and the $50,000 note (a debenture) were not concealed. The transaction was discussed with, and approved by, the beneficiaries, was promptly entered upon the books and records of the trust and the debenture was inventoried in determining the distribution of trust property made in 1947 to the beneficiaries including plaintiff Hattie S. Sloan. The beneficiaries, including said plaintiff, also received 6% interest income from the debenture and the income was also reflected on the books and records. The debenture and the income therefrom were also reflected upon the current statements to the beneficiaries.

Availability of the funds loaned for future trust use was assured by the written agreement of appellant that he would personally purchase the note or debenture from the trust, upon demand and at the full unpaid balance plus accrued interest. Appellant's share of the trust income was then approximately $25,000 a year; he was also of independent means.

The debenture was purchased with idle funds borrowed before appellant became a trustee and which

were drawing approximately 2% interest in a savings account. By reason of the loan the funds produced 6%.

The note or debenture was partially repaid in 1947 and completely repaid by May, 1948. Interest at 6% was paid throughout. At no time since the repayment in 1948 has the trust had any funds loaned to, or risk in connection with, National Building Corporation. Since 1948 the trust has had the use of the $50,000 for other purposes. Even had an improper loan been made in 1946, or had a proper investment been omitted, the sole period to be considered is that when the loan made was outstanding.

Appellant did not "acquire the right to receive" or receive 7,633 shares, or any shares, of common stock of National Building Corporation "as a direct result of the use of trust funds for the purchase of such promissory notes". Appellant purchased from National Building Corporation his 16,825 shares of stock therein, paid the full price of $16,825 therefor, and so acquired his stock pursuant to his personal and individual right to do so.

The opportunity to purchase the National Building property and the right to invest in, and to permit others to invest in, the stock of the National Building Corporation were opportunities and rights of appellant. They arose, and were exercised by appellant, in March, 1946. In March, 1946, he was not a trustee and owed no duty to share his opportunities and rights with plaintiffs or with the trust and his interest in the building was not concealed.

The agreements between appellant and his associates as to who would purchase the stock of the National Building Corporation were all made both before he was a trustee and before any purchase of notes or debentures by the trust was considered. There were no agreements "with the other promoters" or otherwise that any stock in National Building Corporation would be offered to, or sold to, the trust. To the contrary, the agreements made required that appellant purchase and hold 16,825

shares that he did purchase, both to equalize stockholdings and to retain control of the corporation. The agreement that he would raise $406,875 for the new corporation was tentative, was modified and was never put into effect; there was no agreement that said appellant or persons named by him would become entitled to receive 39,375 shares of stock.

The suggestion that the trust loan $50,000 to National Building Corporation was made in April, 1946, by Harry Silberstein. Harry Silberstein was then sole trustee, Joseph having died and appellant not having been appointed. Purchase of common stock by the trust was never suggested or considered. The suggestion was agreed to before appellant became a trustee, upon the condition that all of the beneficiaries approve and upon the report of Harry that they had so approved. The fact that appellant had purchased the National Building property was well known at the time.

Appellant first became one of the cotrustees on May 6, 1946. As cotrustee his only participation with respect to the loan and the note or debenture was in the ultimate disbursement and the receipt of the debenture on or about June 1, 1946.

The agreement to loan and the loan were made in good faith and for the best interests of the trust. The loan was profitable to the trust. Appellant owed no duty to offer any investment in common stock to the trust, none was ever offered, considered, or made, and any such investment would have been grossly improper and illegal. The Court should not now substitute its judgment for that of the trustees exercised in 1946 as to whether a speculative investment, rather than a safe loan should have been made.

The trial court found that the defendant breached his trust and made the following finding of fact:

"The evidence is undisputed in the case that at a time when defendant Ben Silberstein was a cotrustee of the Mary Silberstein estate, June 1, 1946,

he purchased $50,000 of debentures from the National Building Corporation without prior court approval and without notice by him directly to all of the beneficiaries of the estate—particularly Hattie Sloan, the principal plaintiff in this case. The record further shows, and this court finds the fact to be, that plaintiffs did not have notice, nor did they have full knowledge of the facts of the transaction in question until 1957. * * *

"Notwithstanding this background, Ben Silberstein—the trustee—made no disclosure of the format or details of this plan to plaintiffs—and indeed the full picture of distribution of shares in proportion to debenture purchase was apparently not even known to some of the beneficiaries permitted to purchase shares."

No accounts were filed by the trustees with the probate court prior to April 17, 1959; on that date there were filed:

(a) The final account of Joseph Silberstein, former trustee for the period December 21, 1943, to March 25, 1946;

(b) The final account of Harry Silberstein, former trustee for the period December 21, 1943, to March 31, 1955;

(c) The first account of Ben L. Silberstein, trustee for the period May 6, 1946, to March 31, 1955;

(d) The second account of Robert and Ben L. Silberstein, trustees for the period March 31, 1955, to March 31, 1956;

(e) The third account of Robert and Ben L. Silberstein, trustees for the period April 1, 1956, to March 31, 1957; and

(f) The fourth account of Robert and Ben L. Silberstein, trustees for the period April 1, 1957, to March 31, 1958.

There is competent and sufficient testimony that the appellant did breach the duties imposed upon

him by the terms of the will of Mary Silberstein and the statutes of the State of Michigan, namely:

The tenth paragraph of the Mary Silberstein will required that the trustees render a written accounting and statement to the beneficiaries at least annually.

CL 1948, § 704.38 (Stat Ann 1962 Rev § 21.3178 [289]), reads in part as follows:

"Every fiduciary shall file at least once a year, or oftener if the court directs, a complete itemized accounting of all of his doings in the estate, showing in detail all of the receipts and disbursements and the property remaining in his hands."

CL 1948, § 704.37 (Stat Ann 1962 Rev § 27.3178 [288]), reads in part as follows:

"Every fiduciary entitled by law to make investments of property of the estate of which he is representative, shall keep the funds of the estate reasonably invested. Except as the court may expressly authorize, he may make only such investments as conform with the provisions of Act No 177 of the Public Acts of 1937,[1] and any amendments thereto or any investments expressly authorized by the will, or other instrument creating a trust. Except with the written approval of the probate court, a fiduciary of his personal capacity shall not engage in any transaction whatsoever with the estate which he represents, nor shall he invest estate funds in any company, corporation or association with which he is affiliated, other than as a bondholder or minority stockholder. A fiduciary in his personal capacity shall not personally derive any profit from the purchase, sale or transfer of any property of said estate."

We have reviewed *de novo* the record in the instant case in its entirety and find it to be extensive,

[1] CL 1948 and CLS 1961, § 555.201 *et seq.* (Stat Ann 1957 Rev § 26.85 *et seq.*)

comprehensive, and most thoroughly prepared as to all the parties within the jurisdiction of this Court. We find no inequities with the exception of the purchase of National Building Corporation debenture, which is the principal issue in this suit by the plaintiffs to restore to the *cestui que trust* the fruits or profits realized by the appellant as a result of certain alleged self-dealing by him when he was cotrustee of the Mary Silberstein trust and promoter, president, director, and 1 of 2 principal stockholders of the National Building Corporation, a mere conduit for the transaction of his own private business.

The issues in the main are:

Does the record support plaintiffs' allegations of fraud?

May a constructive trust be impressed on the profit wrongfully derived by a testamentary trustee from a breach of trust?

Are the claims of the plaintiff Hattie S. Sloan and other beneficiaries of the Mary Silberstein trust barred by laches, estoppel, and the statute of limitations?

In general, the trustee owes a duty of ordinary skill and diligence in the administration of the affairs of the trust, complete loyalty to the interest of the *cestui que trust,* to show good faith and fair play in direct dealing with the beneficiaries of the trust, and at no time may he use or deal with trust property for his own profit or for any other purpose unconnected with the trust.

The nondisclosure by cotrustee, the appellant, of material facts relating to the purchase of said debenture, coupled with his breach of duties imposed upon him by the terms of the Mary Silberstein will, the statutory and case law, and his retention of

unmerited benefits, constitutes constructive fraud in which plaintiffs were deceived and appellant unjustly enriched.

The record substantiates the imposition of a constructive trust on stock or proceeds from stock of the appellant wrongfully derived from his breach of trust. *Nelson* v. *Woodworth* (1961), 363 Mich 244; *Kent* v. *Klein* (1958), 352 Mich 652; *Mackey* v. *Baker* (1950), 327 Mich 57; *Goodrich* v. *Waller* (1946), 314 Mich 456; *Burgess* v. *Jackson Circuit Judge* (1930), 249 Mich 558.

In *Stephenson* v. *Golden* (1937), 279 Mich 710, 738, Lewin on Trusts (13th ed), p 191, is cited with approval as follows:

"A constructive trust is raised by a court of equity wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee; for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his *cestui que trust*."

Plaintiff Hattie S. Sloan requested that the constructive trust be placed on all the stock of the National Building Corporation owned by appellant or on the proceeds of the said stock, the constructive trust to be for the benefit of plaintiff Hattie S. Sloan and all other beneficiaries of the trust created in the will of Mary Silberstein.

Appellant contends that the plaintiffs' claims are barred by laches, estoppel, and the statute of limitations.

The statutes of limitations as enacted in some States apply by force of their own terms to suits for equitable relief and to actions at law.

The Michigan statute, CLS 1961, § 600.5815 (Stat Ann 1962 Rev § 27A.5815), effective January 1, 1963, reads as follows:

"The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. The equitable doctrine of laches shall also apply in actions where equitable relief is sought."

CLS 1961, § 600.5869 (Stat Ann 1962 Rev § 27A.5869), effective January 1, 1963, reads as follows:

"All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry."

In the instant case, the breach of trust occurred on June 1, 1946, but plaintiff Hattie S. Sloan did not have knowledge of the said breach of trust until the year 1957. The present litigation was commenced on August 12, 1959; therefore, the statute of limitations in effect at that time did not apply. *Bolt* v. *Hackley National Bank* (1929), 246 Mich 1; *Roemelmeyer* v. *Roemelmeyer's Estate* (1922), 219 Mich 322; *In re Sellman's Estate* (1913), 175 Mich 700.

In regard to the defense of laches, the trial court found as a fact that the plaintiff Hattie S. Sloan was not guilty of laches. The court's findings of fact in this respect are as follows:

"There is no convincing proof in the record in this case that the plaintiff, Hattie Sloan, had actual or constructive knowledge of the details of the National Building Corporation transaction upon which she could make an intelligent judgment that either she or the estate had been injured by the manner in which this transaction was executed until 1957 when she got her accountant's report. The first

indication in the record that something might be amiss in the estate (and this would seem to fall considerably short of knowledge or information placing plaintiff Hattie Sloan upon inquiry) was in late 1954 or early 1955. How early in 1955 is not disclosed by the record. The record does disclose that Harry Silberstein, Hattie's brother and cotrustee, who conveyed the message that all might not be well with the estate, died February 28, 1955. It can hardly be seriously argued therefore that the plaintiff should have commenced her suit between 'early 1955' and February 28, 1955 when Harry died, and that failure to do so constitutes laches. This is the only 'change of circumstances' defendants can point to and it obviously is not a convincing one—even if she had 'knowledge.'"

While laches is similar to statutory limitations, there is a substantial difference between them. Laches differs from limitations in that limitations are concerned with the *fact* of delay, laches with the *effect* of delay. Laches is concerned principally with the question of the inequity of permitting a claim to be enforced and depends on whether plaintiff has been wanting in due diligence. Limitations are statutory, while laches is not. Laches applies only in equity, while limitations prior to January 1, 1963, apply only at law. Limitations are based on fixed time, while laches is not.

We find considerable merit to the contention of appellant Ben L. Silberstein that the claims asserted by Hattie S. Sloan in behalf of the other beneficiaries of the Mary Silberstein trust, namely: Arnold Silberstein, Joan Silberstein, and Richard Stevens, the children of Harry Silberstein, deceased; Robert Silberstein; and Ben L. Silberstein himself, are barred by laches and estoppel. The appellant's contention is substantiated by competent and sufficient testimony.

This Court does not have jurisdiction over the rights of Gertrude Marks, the remaining beneficiary, who is not a party to the instant litigation and is a resident of the State of New York. It is noted that on April 17, 1959, she consented to the allowance of each of the annual accounts filed by the trustees in the probate court, which is inconsistent with the asserted claim.

The right of action of the 3 children of Harry Silberstein in the instant litigation stems from their father (Harry Silberstein, deceased), who on June 1, 1946, was a cotrustee of the Mary Silberstein trust, one of the original stockholders of the National Building Corporation, and a holder of National Building Corporation debentures. On June 1, 1946, Harry Silberstein knew or should have known of the wrongdoings of appellant, cotrustee of the said trust. On April 17, 1959, the children of Harry Silberstein consented to the allowance of each of the annual accounts filed by the trustees with the probate court, which is inconsistent with the asserted claim in the instant litigation.

On June 1, 1946, Robert Silberstein was one of the original stockholders of the National Building Corporation and a holder of National Building Corporation debentures. He also consented to the allowance of each of the said annual accounts, which is inconsistent with the asserted claim in the instant case. Robert Silberstein also had actual or constructive notice of the wrongdoings of the appellant on June 1, 1946.

Appellant is precluded by his act and conduct from benefiting from the asserted right of action in the instant case.

We agree with the trial judge when he held: (1) that appellant, cotrustee of the Mary Silberstein trust, breached his duty; (2) that plaintiff Hattie

S. Sloan was not wanting in diligence in prosecuting her right of action against appellant; and (3) that since June 1, 1946, appellant has held 5,000 shares of common stock of National Building Corporation, a Michigan corporation, and since January 1, 1964, he has held the proceeds realized therefrom upon the dissolution and complete liquidation of the said corporation as constructive trustee for the said trust created by the last will and testament of Mary Silberstein, deceased (Wayne county probate court file 287158).

The judgment of the trial judge shall be modified in accordance with the following findings of this Court:

1. The National Building Corporation has been dissolved and completely liquidated. Therefore, defendant Ben L. Silberstein shall pay or cause to be paid to Calvin C. Rock, current successor trustee, hereinafter referred to as said trustee, certain sums:

(a) The sum of $140,000 plus the statutory interest on said sum, this being the value of 1/5 of the said 5,000 shares of National Building Corporation common stock; less, however, $1,000 plus statutory interest (the amount paid by defendant Ben L. Silberstein for the said 1/5 of 5,000 shares of stock) less tax paid by the defendant Ben L. Silberstein on 1/5 of the said 5,000 shares of stock;

(b) All additional sums which have been or may be distributed with respect to 1/5 of the said 5,000 shares of National Building Corporation common stock, from the reserve fund of $6 per share, which was established at the time of this litigation for tax claims or other contingencies;

(c) Further, 1/5 of an additional sum of $7,000, being the aggregate of the dividends plus statutory interest, declared and paid on the said 5,000 shares of National Building Corporation common stock at

the rate of 10 cents per share from 1949 to and including June 22, 1964, the date of dissolution of the National Building Corporation; and

(d) And the sum of all other moneys to which the holder of a 1/5 interest of the said 5,000 shares of National Building Corporation common stock shall be lawfully and rightfully entitled.

2. All moneys paid to the said trustee as ordered and adjudged in paragraphs 1(a), 1(b), 1(c), and 1(d) of this opinion shall be for the benefit of Hattie S. Sloan, one of the surviving children of the late Mary Silberstein, and such other of her issue as may become entitled thereto in accordance with the provisions of the said will and testament of Mary Silberstein.

3. That except as modified by this opinion, the final accounts of Joseph Silberstein, trustee, and of Harry Silberstein, trustee; the first account of Ben L. Silberstein, trustee, for the period May 6, 1946, through March 31, 1955; and the second through seventh accounts of Robert Silberstein and Ben L. Silberstein, trustees, for the period April 1, 1955, through June 30, 1960, are each allowed and approved as stated; provided that all claims for additional management fees and for trustees' fees are hereby denied; and provided further that this allowance and approval of said accounts shall not in any way deprive any beneficiary of the Mary Silberstein trust of the right to receive distribution (in accordance with the provisions of the last will and testament of Mary Silberstein, deceased) of any part of the income from, or the principal of, the sums ordered and adjudged in paragraphs 1(a), 1(b), 1(c), and 1(d) of this opinion to be paid into the Mary Silberstein trust.

4. That, except as hereinabove ordered and adjudged, all other claims of plaintiffs and of defendants are dismissed, and plaintiffs and defendants shall take nothing as to any of such claims.

5. The trial court shall specifically retain jurisdiction over this action, the subject matter thereof, and the parties thereto:

(a) To enforce the provisions of this opinion and to enter any further orders or judgment in respect to the manner in which this opinion is to be carried out and satisfied;

(b) To hear and determine a motion or application by plaintiffs for reimbursement, out of the sums hereinabove ordered and adjudged to be paid into the principal of said trust;

(c) To hear and determine motions or applications for reasonable compensation for guardians *ad litem* in this action; and

(d) To hear and determine such other matters in respect of this opinion as may be properly brought before the trial court.

The plaintiffs, who are appellees and cross-appellants, contend that the trial court erred in determining the measure of liability of the appellant on the basis of 5,000 shares of stock of the National Building Corporation and that the testimony clearly indicates that the basis for measurement of liability should have been 7,620 shares of said stock.

We have examined the record repeatedly in reference to the measure of liability of appellant and find no merit to the said claim of plaintiffs on their cross appeal.

Affirmed in part with noted modifications. Reversed as to the claims of all beneficiaries except Hattie S. Sloan and her issue, namely, Robert, David, Daniel, Michael, Lisa, Heather, Steven, and

Joshua Sloan, minors, and Eugene Sloan, Richard Sloan, Jerome Sloan, and Ronald Sloan, and such other of her issue as there may be. Remanded to the trial court for the required accounting and for the entry of a decree not inconsistent herewith. No costs, neither party having prevailed in full.

BURNS and J. H. GILLIS, JJ., concurred.

LAND v. CITY OF GRANDVILLE.

1. MUNICIPAL CORPORATIONS—SEWER RATES—UNIFORMITY.
   Sewer rates paid to city supplying the service pursuant to reasonable regulations need not be uniform nor be based upon the value of the property where the service is supplied.

2. SAME—SEWER RATES.
   What is a reasonable charge for sewer service supplied by a municipality is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION—MUNICIPAL CORPORATIONS—SEWER RATES.
   The equal protection clauses of the State and Federal Constitution do not take from the municipality the power to classify users of sewer service supplied by the municipal corporation, but admits of the exercise of a wide discretion, avoiding what is

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 38 Am Jur, Municipal Corporations §§ 565, 567.
25 Am Jur 2d, Drains and Drainage Districts §§ 45, 47.
[3] 25 Am Jur 2d, Drains and Drainage Districts § 47.
[4] 25 Am Jur 2d, Drains and Drainage Districts § 41.
[5, 7–9] 38 Am Jur, Municipal Corporations § 343.
[6] 37 Am Jur, Municipal Corporations § 178.
[10] 5 Am Jur 2d, Appeal and Error § 1009.

done only when it is without any reasonable basis and therefore is purely arbitrary (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2).

4. MUNICIPAL CORPORATIONS—CLASSIFICATION OF USERS OF SEWER SERVICE.

A classification of users of sewer service supplied by a municipality having some reasonable basis does not offend the equal protection clauses because it is not made with mathematical nicety or because in practice it results in some inequality (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2).

5. SAME—CLASSIFICATION.

Classification of users of sewer service supplied by a municipality will be sustained if any state of facts can reasonably be conceived that would sustain it (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2).

6. SAME—BURDEN OF SHOWING ARBITRARINESS.

Burden of showing that classification of users of sewer service supplied by a municipality does not rest upon any reasonable basis is upon the party assailing it.

7. SAME—ORDINANCES—CLASSIFICATION.

Classification of objects to which a municipal ordinance may be made applicable must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the ordinance (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2).

8. SAME—CLASSIFICATION—TRAILER PARK—MOTEL—SEWER SERVICE RATES.

A classification of users of sewer service supplied by defendant city whereby owner of resident trailer park and motel was charged according to each dwelling unit, the same as other multiple dwelling unit structures, rather than his single ownership of the property serviced by a single meter for water used in the premises, *held,* a justified basis for charging for service supplied (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2; Grandville Ordinances Nos 110, 110-B, 121).

9. SAME—SEWER SERVICE—CLASSIFICATION.

The imposition of charges for sewer service supplied by a city based principally on the total of individual residents living in dwelling units in the city is a reasonable basis for classification of charges (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2; Grandville Ordinances Nos 110, 110-B, 121).

10. COSTS—PUBLIC QUESTION—SEWER SERVICE.

No costs are allowed in action for declaration of rights with respect to charges for sewer service to trailer court and motel, a public question being involved.

Appeal from Kent; Vander Wal (John H.), J. Submitted Division 3 December 8, 1965, at Grand Rapids. (Docket No. 740.) Decided April 12, 1966.

Complaint by Robert G. Land, Paul Land, Henry Land, and Jennie Land, doing business as Henry Land & Sons, against City of Grandville, a municipal corporation, for judgment declaring that defendant's sewer ordinances were invalid and that the rates for water and sewer services were unreasonable and arbitrary as applied to plaintiffs' business, and for an accounting of charges previously paid. Judgment for defendant. Plaintiffs appeal. Affirmed.

Vander Veen, Freihofer & Cook (*Walter B. Freihofer,* of counsel), for plaintiffs.

Bergstrom, Slykhouse, Shaw, Van Orden, DeYoung & Boyles (*Richard M. Van Orden,* of counsel), for defendant.

HOLBROOK, J. Plaintiffs-appellants are the owners of a 150-unit mobile trailer park and a 15-unit motel with a manager's apartment in connection situated in the defendant-appellee city of Grandville, a municipal corporation located in Kent county.

Plaintiffs brought suit in circuit court for declaratory judgment declaring defendant's "sewer ordinances" invalid, claiming the rates applicable to plaintiffs' motel and trailer home park were unrea-

sonable and arbitrary, and also for an accounting. After presenting testimony December 10, 1964, the parties signed an agreed statement of facts February 3, 1965, filed briefs, and submitted the case for decision. The trial judge ruled March 18, 1965, against plaintiffs' contentions and dismissed their complaint. From this judgment of dismissal, plaintiffs appeal.

A single question is presented by plaintiffs in their brief on appeal to-wit:

Does the sewer charge ordinance of the city of Grandville create an arbitrary and discriminatory classification of persons required to pay the quarterly "minimum fee," sewer use fee, contrary to the equal protection clauses of the Michigan Constitution[1] and 14th Amendment to the Federal Constitution?

The pertinent facts necessary for decision appear in the record to be as follows:

Upon petition of the State of Michigan in April, 1962, the Kent county circuit court enjoined the city of Grandville from disposing of its sewage in Grand River, and the city thus became obligated to build a sewage disposal plant. Construction of the plant was commenced in 1963, and completed in late 1964.

Plaintiffs' trailer park and motel are hooked into and are customers of defendant water and sewer systems. The trailer park and motel each have a single water meter.

On August 28, 1961, defendant city adopted Ordinance No 110 pertaining to charges for sewer services. On December 23, 1963, defendant city adopted Ordinance No 110-B which raised the minimum rates from $3 to $5 per quarter. On May 25, 1964, defendant city adopted "sewer Ordinance No 121." Article 8 of the ordinance imposes the same sewer

[1] See Const 1963, art 1, §§ 1, 2.—REPORTER.

rates as set forth under Ordinance No 110-B and the pertinent parts of said ordinance are as follows:

"Sec. 803(a). The rates and charges for each quarter shall be determined by each user's quarterly water use, the billing for which includes the month of January, and which said rates shall be as follows:

Sewage Service Rates
Quarterly Billing Period

Quantity of Water Used	Rate
First 15,000 gallons	$5.00 (minimum charge)
Next 85,000 gallons	.25 per 1000 gallons
Next 200,000 gallons	.22 per 1000 gallons
Next 200,000 gallons	.20 per 1000 gallons
Over 500,000 gallons	.10 per 1000 gallons

* * *

"(c). In the event two or more lots, parcels of real estate, residences, dwelling units, or buildings discharging sanitary sewage, water, or other liquids into the sanitary sewage system of the city either directly or indirectly, are users of water and the quantity of water is measured by a single water meter, then, in each case for billing purposes, the minimum charge for sewer rates and charges shall be multiplied by the number of lots, parcels of real estate, residences, dwelling units, or buildings served through the single water meter."

It is the application of subparagraph (c) quoted above (which is identical in Ordinance No 110 and Ordinance No 110-B) to the property of the plaintiffs that forms the basis for the controversy in these proceedings. The sewer lateral and interceptor system located within the property lines of the plaintiffs and servicing the trailer park were installed by them at their expense the same as required by the defendant city of all developers of any plat or subdivision.

Plaintiffs could have had separate meters installed for each of the 150 trailer units and each of the 16 motel units upon payment of connection charges as provided in said ordinance.

The power of the defendant city to own and operate a sanitary sewer system and by ordinance to impose charges, rentals or rates for such service is not questioned by plaintiffs.

The trailers using the park are typically equipped with a toilet, bathing accommodations, and kitchen sinks. These trailers are not transit, but usually stay six months or longer. Plaintiffs restricted the number of children per trailer to two. The average occupancy per trailer is about 2.1 persons. Each trailer is connected by sewage lateral to a gathering system of interceptors running throughout the trailer park, which interceptor system then connects into the trunk sewer of the city at plaintiffs' property line. The trailer park has a near 100% occupancy.

Each unit of the motel has a toilet, shower, and sink and sleeping accommodations and contributes a daily laundry of toweling and linen. The motel has a 65–70% occupancy rate.

By reason of the ordinance the trailer park has been charged a minimum quarterly sewage rental of $5 per quarter for those trailer spaces actually occupied by trailers during each billing period. The motel has been charged for 16 units each quarter on a minimum charge basis.

The trailer park has not paid more than a minimum rental as the water used per unit for the winter control period has been about 10,000 gallons, however, their maximum use of water per quarter in the summer has approached 50,000 gallons of water per trailer. This is also true for the charges of the motel units, as its winter average has been about

5,000 gallons of water per unit with the summer quarter approaching 40,000 gallons of water used per unit.

The sewage plant of defendant city was designed to accommodate the entire population of the city, but at the time of this lawsuit, only about 1/3 of the area was so serviced. The income from rental or charges for services of the sewer system were not enough to defray the cost of operations and the city has imposed a 3-mill ad valorem tax against all of the property of the city to supplement the sewer systems income.

All of the multiple dwelling unit properties in defendant city are charged the minimum rate for sewer services on a per-unit basis the same as plaintiffs' property. These include two other motels and four separate multiple dwelling complexes of apartment buildings.

Billings by defendant city for sewer service to plaintiffs for the trailer park and motel is by way of one bill for each quarter. The meter is read and then the gallonage divided by the number of units occupied to ascertain the gallonage used by each unit. Always the minimum has been charged per unit. The cost of meter reading and billing is no greater for the trailer park than for a factory or business building. The cost of processing the sewage is no greater from the trailer park than a like amount from a business or commercial plant, however, under certain conditions, sewage from the commercial plants must be processed before being placed in the sewer system.

The basis upon which defendant city justifies the minimum charge to dwelling units is contained in the testimony of Mr. Raymond Bruggink, consulting engineer to the city of Grandville. His testimony is to the effect that the design and construction of the sewage disposal system for the city was

the population unit. The capacity of the sewage plant was predicated upon the average amount of contribution by the average individual residing in the community. That the presence in the community of business or commercial operations such as laundromats, schools, and businesses was of little significance and had relatively little bearing on considerations of capacity or maintenance for the disposal system because as stated in his words:

"*A.* Because we have made our design on the basis of the population equivalent which includes the kitchen waste, sanitary waste from the individual, and also the laundry waste, whether it is done at home or at a laundromat would not affect our load on the sewage materially."

The domestic unit composed of individuals according to Mr. Bruggink was the reason for the classification for rate charges for use of the sewer system contained in the defendant city ordinance authorizing minimum charges for each individual residence or dwelling unit, whether it be a house, a trailer home, an apartment, or motel room or rooms. In the city of Grandville, the average family unit was 3.5 persons.

Plaintiffs maintained that their motel and trailer home park constitute businesses or commercial enterprises and by reason of their using only one water meter for each business, should be treated the same as a laundromat, factory, or other business in the city with one minimum rate plus charges for excess use of water at the reduced rate. If plaintiffs' position is tenable, its sewer rentals would be about 1/3 the fees computed under the said ordinance.

The rule governing a municipality's right to regulate rates for its public utilities is dealt with in the early case of *Preston* v. *Board of Water Commis-*

sioners of Detroit (1898), 117 Mich 589, p 598, wherein it is stated:

"It is true, if he is in the water district, he is entitled to the use of the water by complying with the regulations of the water board; it is also true these regulations must be reasonable; but it is not true they must be uniform or that they must be based upon the value of the property where the water is used."

This rule is further explained in the case of *Township of Meridian* v. *City of East Lansing* (1955), 342 Mich 734, wherein Mr. Justice TALBOT SMITH stated on p 749 as follows:

"The word 'reasonable' with respect to rates charged by utilities is a word of the most universal employment. It may be provided by ordinance, statute, or constitution (*e.g. Simons* v. *City Council of Charleston,* 181 SC 353 [187 SE 545]) that rates shall be 'reasonable' or 'fair and reasonable.' Moreover, should the question of rate arise on a contract implied in law, the judicial requirement is that the rate to be paid shall be 'reasonable.' *City of Detroit* v. *City of Highland Park,* 326 Mich 78, 100. It may also be employed (as in the case at bar) in a contract. The determination of its meaning, in any case, is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use."

The standards applicable in evaluating the reasonableness of a municipality's system of classification are set forth by our Supreme Court in *Cook Coffee Co.* v. *Village of Flushing* (1934), 267 Mich 131, where the Court citing the earlier Michigan case of *Naudzius* v. *Lahr* (1931), 253 Mich 216 (74 ALR 1189, 30 NCCA 179), stated on p 134 as follows:

"The standards of classification given in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 US 61, 78 (31 S Ct 337, 55 L ed 369, Ann Cas 1912C, 160), were quoted by this court in *Naudzius* v. *Lahr, supra,* at pp 222, 223:

" '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' "

This rule was considered recently in a municipal rate case involving a sewer in *Beauty Built Construction Corporation* v. *City of Warren* (1965), 375 Mich 229, wherein Mr. Chief Justice T. M. KAVANAGH on pp 235, 236, stated as follows:

"This Court has repeatedly held that classification of objects to which a municipal ordinance may be made applicable *must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the ordinance.* See *Palmer Park Theatre Company* v. *City of Highland Park,* 362 Mich 326; *Mulloy* v. *Wayne County Board of Supervisors,* 246 Mich 632.

"Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them

to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions. See *Haynes* v. *Lapeer Circuit Judge*, 201 Mich 138. * * *

"In *Seltzer* v. *Sterling Township*, 371 Mich 214, this Court held that an ordinance imposing privilege fees on all homes connecting to the water system subsequent to the adoption of the ordinance not to be unconstitutional; no arbitrary classification or exemption was attempted by the ordinance in *Seltzer* as in the instant case."

There does not appear to be precedent in the decisions of our State under identical or similar fact situations with the case at hand. We do have the benefit of recent decisions from other jurisdictions where our question or a similar one is presented. The case with the fact situation most similar to our case appears to be that of *Caldwell* v. *City of Abilene* (Texas Civ App, 1953), 260 SW2d 712. The city of Abilene enacted a new sewer ordinance which provided in part (p 713):

" 'In all cases where more than one living or business unit is supplied through one meter, a minimum charge will be made for each living unit or business unit supplied through such meter. If two or more living or business units are supplied through one meter, a minimum charge will be made each month for each unit regardless of whether units are occupied.' "

A group of apartment owners who had previously enjoyed a minimum rate as applied to each apartment building regardless of the number of living units therein, objected, contending any differentiation in water rates must be based upon the economical factor of cost and any classification for rate purposes not so based is arbitrary and unreason-

able. The court stated beginning at p 714, as follows:

"We cannot agree with this contention. Many factors are properly considered in determining the reasonableness of a classification and there is no one factor which is of itself controlling to the exclusion of all others. Each case must be decided upon its own facts and the burden of proof is on the party claiming an unreasonable discrimination. *Ford* v. *Rio Grande Valley Gas Co.,* 141 Tex 525 (174 SW2d 479).

"It is well established that a municipal corporation operating its water works or other public utility has the right to classify consumers under reasonable classification based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction. 73 CJS, Public Utilities, § 27, p 1049, 43 Am Jur, Public Utilities and Services, § 178, p 689; *American Aniline Products, Inc.,* v. *City of Lock Haven,* 288 Pa 420 (135 A 726, 50 ALR 121). * * *

"The classification of apartment houses under a residential classification based for rate purposes upon consuming units is not, in our opinion, without reasonable basis and justification. Such users constitute a type of class substantially different and distinct from other users. This is sufficient basis for the classification. * * *

"If appellants should prevail in this case, there would be a discrimination against consumers in single unit dwellings. Not every discrimination, however, is condemned, but only a discrimination that is arbitrary and without a reasonable fact basis or justification. *The discrimination in this case is not arbitrary. On the contrary, it is supported and justified by a factual basis for classification and by substantial evidence which justifies the charges*

made to that class of users. Such discrimination as there is need not be suffered by appellants. They have the right to have additional meters installed so that charges may be made directly to each household unit." (Emphasis supplied.)

Also, see, *Lewis* v. *Mayor & City Council of Cumberland* (1947), 189 Md 58 (54 A2d 319); *Brooklyn Apartments, Inc.,* v. *Mayor & City Council of Baltimore* (1947), 189 Md 201 (55 A2d 500); *City of Clovis* v. *Crain* (1960), 68 NM 10 (357 P2d 667, 88 ALR2d 1243); and, *Knotts* v. *Nollen* (1928), 206 Iowa 261 (218 NW 563).

Classification of consumer units rather than to ownership of properties was upheld by the Court in the case of *Brown* v. *Pennsylvania Public Utility Commission* (1943), 152 Pa Super 58 (31 A2d 435), wherein the court stated:

"The fact that the owner of a property is the sole contracting party for water is not controlling in determining whether the consumer is entitled to a rate based on a single unit. Nor may the amount of water used be the correct criterion to determine whether a single unit rate is applicable. The use made of the property is an important factor to be considered in determining the proper applicable rates. Classification by consumer units rather than according to ownership of properties was sustained by this court in *Hunter* v. *Public Service Commission,* 110 Pa Super 589, 597 (168 A 541)."

In 12 McQuillin, Municipal Corporations (3d ed), 1965 Cum Supp, § 35.37, p 104, it is stated in part as follows:

"Variances in rates must have a rational basis and not be purely arbitrary, and must be fair and equal to similarly situated properties, that is, there must be uniformity within the class.[2] Held not dis-

[2] *Town Board of Town of Poughkeepsie* v. *Poughkeepsie,* 22 App Div 2d 270 (255 NYS2d 549).

criminatory is an ordinance providing that each separate house, residence, apartment building, structure, trailer house and/or mobile home shall have a separate water meter or pay a separate monthly minimum charge for water, while classifying such businesses as hotels and motels as single unit users subject to assessment of one minimum water rate per month."[3]

Appellants cite in their brief the case of *Kliks* v. *Dalles City* (1959), 216 Or 160 (335 P2d 366), as authority for their position that the defendant city of Grandville's sewer ordinance as applied to them is arbitrary and unreasonable. We quote from said opinion as follows (pp 164, 171, 172, 175, 176, 181):

"The ordinances in question, which establish the water rate structure, are challenged on two principal grounds; (1) that the inclusion of rooming houses, boarding houses, motels, hotels and trailer courts under a classification distinct from, and under a more favorable rate structure than, apartment houses constituted an unreasonable discrimination, and (2) that the minimum service charge applicable to apartment houses was based upon the use of a quantity of water which so far exceeded the actual use of the water by the plaintiffs' tenants that the charge was arbitrary, unreasonable and confiscatory. * * *

"'The capital investment necessary to serve a customer is not limited by his average consumption, but must include water supply and mains sufficient to supply his *maximum* use.' *Lewis* v. *Mayor and City Council of Cumberland,* 189 Md 58, 71 (54 A2d 319, 325). * * *

"In arriving at the estimated average amount of water which would be consumed in all apartments as a class, it would be permissible to take into consideration the use of water for the irrigation of apartment house lawns, common laundry facilities,

[3] *Kermit* v. *Rush* (Tex Civ App), 351 SW2d 598.

automobile washing facilities and other types of use which some, but not all, apartment houses will require. If the inclusion of such demands in computing the average increased the minimum set by the city, the plaintiffs could not complain merely because they did not happen to need water for all such purposes. The establishment of a rate structure does not require that the components used in creating it fit all persons within the class exactly alike. * * *

"It is our conclusion, then, that the plaintiffs have not shown that the multiple minimum rate is unreasonable merely because it sets a minimum monthly apartment unit charge for 7,500 gallons of water. * * *

"It is urged that even though the rates applicable to them are regarded as reasonable in terms of their use and demand for water, and that such rates may be reasonable vis-a-vis other apartment owners, there is undue discrimination in classifying differently in the rate structure the use of water for apartment house purposes and the use of water in hotels, motels and other similar uses. It will be noted that under Ordinance 721 the minimum charge for rooming houses, boarding houses, hotels, motels and trailer courts with facilities for the accommodation of more than four persons is $2 per month, which entitles the owner to 7,500 gallons of water during the month. The minimum charge is not made separately for each unit under this classification, the user paying for the water on the basis of metered rates after the minimum of 7,500 gallons is consumed. * * *

"In *Knotts* v. *Nollen* (1928), 206 Iowa 261 (218 NW 563), the city established a schedule of rates which classified apartment house units as separate residences. This resulted in denying to apartment house owners the benefit of a sliding meter rate which was given to hotels, department stores and other commercial users. The court held that the classification did not constitute an unlawful discrim-

ination against apartment owners. In doing so, the court noted that water consumers in an apartment house are the families and not the proprietor and that to classify an apartment house as a quantity consumer would be to discriminate in favor of such families and against families occupying dwellings under separate roofs. It was also noted that the city had no control over the charges which the apartment house owner could impose upon the tenants for the use of the water.

"This argument is deceptively appealing. Unquestionably, there are similarities between the manner in which apartment tenants and those in separate dwellings use water. But the important consideration is not the similarities between these two types of use of water, but the differences, if any, between apartment houses and hotels, motels, and other commercial users to whom a lower rate is charged. * * *

"The trial court held that the classification of the plaintiffs' apartment house as an aggregation of residential living units rather than as a single commercial unit was valid, but that the unit rates under Ordinances No 706 and No 721 as they applied to plaintiffs' property were unreasonable. It is our conclusion that the rates charged the plaintiffs were not shown to be so excessive as to be unreasonable, but that they are unreasonable because the classification is arbitrary."

The issue upon which plaintiffs in the *Kliks Case, supra,* prevailed was contained in their claim that the inclusion of rooming houses, boarding houses, motels, hotels and trailer courts under a classification distinct from and under a more favorable rate structure than apartment houses constituted unreasonable discrimination. In our case the city of Grandville's ordinance treats all of these types of dwelling units exactly the same.

Modern trailer parks afford modern living accommodations for many of the families in America

today, and should not be classified other than dwellings or residences. The fact that there is only one meter servicing the 150 trailers is a convenience and saving of expense to the trailer owners as well as the city of Grandville. The defendant city of Grandville's basis of operation and rental charges to pay the costs of operation is founded principally on the total of individual residents living in dwelling units in the city. This we find is a reasonable basis for the classification contained in the sewer ordinance in question and is not arbitrary or unreasonable in its application to plaintiffs' properties.

Arguendo, each unit of the motel and each trailer home pays not one penny more than any of its counterparts any place in the city of Grandville for sanitary sewage services to-wit: less than $1.70 per month. This certainly cannot be considered more than the fair share properly to be allocated to these individuals and families using the sewer facilities of defendant city.

We conclude that the sewer ordinance of the city of Grandville is valid and constitutional.

Judgment affirmed, no costs, a public question being involved.

FITZGERALD, P. J., and T. G. KAVANAGH, J., concurred.

STATE HIGHWAY COMMISSIONER *v.* FEGIN.

1. EMINENT DOMAIN—AWARD—TAKING OF MATERIALS.
   Award for condemnation of right of entry and of materials for use in highway construction *held,* not a condemnation of entire property and award extends to the value of materials taken (CL 1948, § 213.171 *et seq.*, as amended).

2. SAME—TAKING OF FEE ESTATE—MEASURE OF DAMAGES.
   Damages for condemnation of fee or right-of-way are measured by the difference in value of land before and after the taking.

3. SAME—CONDEMNATION OF MINERALS—MEASURE OF DAMAGES.
   Damages for condemnation of right to remove minerals is measured by their value in place.

4. SAME—MARKET PRICE OF MINERALS TAKEN—OCCASIONAL LOCAL DEMAND.
   Occasional local demand for minerals from contractors and county road commission is sufficient to establish a general market price in the area even though there is no commercial exploitation of the materials.

5. SAME—PROFIT A PRENDRE—FILL DIRT—DAMAGES—EVIDENCE.
   An award for fill dirt taken for highway construction from defendant's land was the taking of a *profit à pendre* and where the amount was within the range of the evidence, it was properly confirmed (CL 1948, § 213.171 *et seq.*).

Appeal from Chippewa; Baldwin (George S.), J. Submitted Division 3 December 8, 1965, at Grand

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REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Eminent Domain §§ 57, 82.
[2] 18 Am Jur, Eminent Domain § 240 *et seq.*
[3–5] 18 Am Jur, Eminent Domain § 242.
Determination in eminent domain proceedings of market value of land as affected by mineral deposits or similar conditions. 156 ALR 1416.

Rapids. (Docket No. 895.) Decided April 12, 1966. Rehearing denied May 27, 1966. Leave to appeal denied by Supreme Court August 26, 1966. See 378 Mich 728.

Condemnation proceedings by John C. Mackie, as State Highway Commissioner, for right to enter and remove rock, sand, and gravel from land owned by Andrew Fegin. Defendant moved to confirm determination of commissioners as to damages. Award confirmed. Plaintiff appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso* and *Donald K. Golais,* Assistant Attorneys General, for plaintiff.

Coates & Kline (*C. W. Coates,* of counsel), for defendant.

T. G. KAVANAGH, J. This appeal arises out of proceedings in eminent domain, instituted by appellant pursuant to PA 1925, No 352 (CL 1948, § 213.171 *et seq.,* as amended [Stat Ann 1958 Rev and Stat Ann 1965 Cum Supp § 8.171 *et seq.*]), for the proposed improvement of State trunkline highway I–75 in Chippewa county. The court commissioners, appointed by the court, made an award in the amount of $6,475 for the taking. The circuit court confirmed said award, from which appellant takes this appeal.

Appellee owned a parcel containing 72.94 acres of land located approximately one-half mile west of highway US–2 in Chippewa county. By determination of necessity dated May 22, 1962, appellant took 18.1 acres thereof. The proceedings involved the taking of:

"The right to enter upon and occupy with the necessary machinery and equipment the hereinafter described lands and to take and remove therefrom

rock, sand, gravel, and/or earth in any quantity for highway construction purposes, and to store and stockpile highway material thereon, which right shall expire upon the completion of the construction of the proposed project: * * * (Description) * * * The lands described above for borrow purposes contain an area of 18.1 acres, more or less."

Appellee's lands are not contiguous to highway I–75 and no use thereof was required for right-of-way purposes. It was stipulated that approximately 393,000 cubic yards of dirt were removed from said parcel of land.

Earl Closser, expert real-estate appraiser, was called as a witness on behalf of the appellant and testified that the highest and best use of the property was for farming and, particularly, for the growing of hay and the pasturage of cattle. He testified that, in his opinion, the 72.94 acres (considered as an 80-acre tract, less the railroad right-of-way) had a value before the taking of $3,600. He also testified that, in his opinion, the value of the remaining lands, after the taking of the 18.1 acres was $2,600. He further stated that, in his opinion, the portion taken had no after-value and that, in effect, he considered it as a taking in fee. The difference in the value was thus $1,000 which, in his opinion, was the amount of the damages sustained by the appellee. Mr. Closser based his opinion of values upon three sales of comparable properties and the offering for sale of two others.

Millar Fleming was called as a witness on behalf of the appellant and testified that the purpose for the taking of appellee's lands was for the removal of borrow earth material in the amount of approximately 393,000 cubic yards. Mr. Fleming stated that the sand was a porous-A material of well-drained quality, suitable for a road base under the gravel course and concrete. He further stated that

the fill sand from this area would be utilized within a range of two miles from the subject premises.

Appellee introduced exhibits which indicated acquisition of fill material from the department of conservation for a "3¢ exchange credit", and from the "Lawrence girls" for the sum of 3¢ per cubic yard for all sand and 10¢ per cubic yard for all gravel.

Earl Worthy, called as a witness on behalf of appellee, testified that the market price for the type of sand here involved was 3¢ per yard and up. He said that the highest and best use of this land was for fill sand. He estimated the value to be 3¢ per yard for what was taken. He said the property had a market value for farming of $3,000 for 74 acres. He said that the highway construction gave the added value to the land.

The trial court's opinion indicated that the proceedings here amounted to a taking of personal property and that the appellant should pay the value of the materials as merchandise.

Stripped of the legal niceties urged in the briefs the case presents a forthright question:

"When proceedings are brought to condemn the right to remove materials for use in the construction of a highway is the proper measure of damages the value of the materials taken as such or the value of the land before and after the taking?"

The appellant's arguments are persuasive and his conclusions consistent with the cases cited to support them, but not directly in point.

We agree that the subject matter of this proceeding is an interest in land—a *profit à prendre* no less, but to say this is not to agree that all interests in land are measured by the same yardstick.

We think the supreme court of North Dakota has stated the correct rule for distinguishing among the

various types of condemnation proceedings where it says in the case of *Sheridan County* v. *Davis* (1932), 61 ND 744 (240 NW 867), at page 751:

"The power of eminent domain is not so circumscribed that its exercise for a limited public purpose must include a taking of the fee of that portion of real property affected by the use. The power itself extends to private property of every kind, to land, timber, stone, gravel, water, and water rights. In short, there is no species of property, nor any kind of property rights, which may not be seized under the right of eminent domain. See 1 Elliott, Roads and Streets (4th ed), § 239. Our statute* seems to have been drawn in recognition of this principle, for it authorizes the taking of the fee where a permanent use is to be subserved, an easement where that will suffice, and a right of entry and occupation where only materials are to be taken.

"From this it follows that the damages recoverable consist of the value of the right condemned and of the incidental damages to the freehold and to the land not directly affected by the right condemned."

Contrary to the view expressed by the appellee here that under CL 1948, § 213.171, subd (b) (Stat Ann 1958 Rev § 8.171, subd [b]) the highway department must condemn materials as personalty, we believe the other subsections of that statute when read in conjunction with CL 1948, § 225.2b (Stat Ann 1958 Rev § 9.204) give our statute the same effect as that indicated for the North Dakota statute; *viz,* "to take a fee, or easement, or right of entry and occupation to remove materials."

In the case at bar as in *Sheridan, supra,* the same arguments were advanced. We think the correct rule implicit in the court's further language there (page 752):

* North Dakota Compiled Laws of 1913 and 1915 Supp §§ 8203, 8204.—REPORTER.

"The case was tried, over the objection of the defendant, on the theory that the damages were to be assessed according to the value of the land taken, rather than according to the value of the right of entry and occupation for the purpose of removing the gravel. It is true that some evidence was permitted to be introduced tending to show the number of yards of gravel in the parcel in question and the value per yard. On the other hand, there was considerable evidence on behalf of the plaintiff of the value of the land per acre, but both the rulings of the court and the instructions to the jury were such as to readily convey the impression that the value per acre with damages to the part not taken was the true criterion. For instance, after directing the jury to determine the damages accruing to the portion of the land not sought to be taken and to consider the benefits, if any, to such land, they were directed to add such damages, if any, to 'the reasonable market value of the portion and parcel of land actually taken and occupied and appropriated for the purpose of the gravel pit in question.' They were directed to 'consider the difference between the market value of the entire tract before the taking and appropriation, and the market value of what is left after the taking * * * that the market value is not to be determined by the value of the strip in question, to the county by reason alone of its necessity of acquiring it; nor of its peculiar value to the defendants, the owners. These considerations must in no way be allowed to affect the determination by the jury of the value of the whole property or the strip of land sought to be appropriated by the plaintiff county, in this proceeding.' In view of the character of the only right which the county is permitted to condemn, we are of the opinion that the evidence should have had a more direct bearing upon the quantity and the value of the gravel in its natural bed and that the court should have instructed more with reference to that value than to the market value of the land itself."

This reasoning is also followed by the New Mexico supreme court in *Board of County Commissioners of Roosevelt County* v. *Good* (1940), 44 NM 495 (105 P2d 470). There the proceedings were brought to condemn certain of appellant's lands for the purpose of securing rock, sand, gravel, and *caliche* for use upon a public highway and the court said at page 499:

"Appellant had the right to have the jury hear the evidence and determine the actual market value of the *caliche* rock taken from his land, without reference to the value of the land itself. 'The inquiry in such cases must be what is the property worth in the market.' "

Accord 4 Nichols, Eminent Domain (3d ed), § 13.22 (1), p 422:

"The second exception to the general rule is applied where the mineral deposit itself is the subject of the condemnation. In such case the deposit is treated as so much merchandise rather than as land. The rule applicable to personal property is invoked and the condemnor is liable for the market value of the mineral deposit as separately evaluated."

We think the correct rule regarding condemnation of land containing valuable mineral deposits may be summed up as follows:

If a fee or a right-of-way is condemned the before and after value of the land measures the damage and mineral deposits may be shown to affect its value per acre. 29A CJS, Eminent Domain, § 174, p 735 *et seq.*, 156 ALR 1416 *et seq.*

If the right to remove minerals is condemned their value in place must be established to fix the damage, *ibid.*

We do not believe it is necessary to establish that a market exists warranting commercial exploitation of the materials. We deem it sufficient to say that

if occasional demand from the contractors, and county road commission has established a general price in the area, there is a market apart from that created by the project itself.

The appellee's appraiser testified that from both open pits and from pits they opened up whoever bought sand in this area paid 3¢ per yard and up. This is enough.

The award here of $6,475 is within the range of evidence and accordingly should be affirmed. *State Highway Commission* v. *Schultz* (1963), 370 Mich 78.

Affirmed, with costs to appellee.

FITZGERALD, P. J., and HOLBROOK, J., concurred.

SHULMAN *v.* LERNER.

1. PHYSICIANS AND SURGEONS—UNAUTHORIZED SURGERY—ASSAULT AND BATTERY.

   Surgery performed without patient's consent and not under emergency situation is an unwarranted touching constituting an assault and battery.

2. SAME—CONSENT TO SURGERY—FAILURE TO REMONSTRATE—PRIOR TREATMENTS.

   Claim that failure of plaintiff, a dentist, to remonstrate to surgery on eyelid constituted consent *held*, without merit, where

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REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Physicians and Surgeons § 108.
Liability of physician or surgeon for extending operation or treatment beyond that expressly authorized. 56 ALR2d 695.

[2] 6 Am Jur 2d, Assault and Battery § 155.
Malpractice in eye treatment and surgery. 68 ALR2d 426.

[3] 5 Am Jur 2d, Appeal and Error § 839 *et seq.*

the eye was draped with a sterile towel and anesthetized, as plaintiff could neither see nor feel the surgery as it progressed, and previous infections had been treated without surgery.

3. APPEAL AND ERROR—NONJURY CASE—COURT OF APPEALS.
Court of Appeals will not substitute its judgment for that of trial court in a nonjury case unless preponderance of evidence is clearly contrary to findings of trial judge.

Appeal from Wayne; Bowles (George E.), J. Submitted Division 1 December 9, 1965, at Detroit. (Docket No. 846.) Decided April 12, 1966.

Declaration by Albert B. Shulman against Leonard Lerner for damages arising from the performance of surgery on plaintiff's eyelid. Judgment for plaintiff. Defendant appeals. Affirmed.

Gussin, Weinstein & Kroll (*William J. Weinstein*, of counsel), for plaintiff.

Giltner, Taub & Still (*Justin L. Giltner*, of counsel), for defendant.

BURNS, J. This is an action for damages for failure by the defendant physician to obtain the consent of the plaintiff to perform surgery upon him.

In January of 1959 the plaintiff went to the defendant, an ophthalmologist, with what seemed to be a sty on his left eye. Prior to this time, in 1954 and 1956, defendant had similar difficulty and had treated with a Dr. Stocker, an associate of the defendant, who had merely punctured the infected area and removed the infection. As Dr. Stocker was out of town, plaintiff consulted with the defendant, who diagnosed the condition as infected Meibomian glands on the lower left eyelid (marginal chalazia), and informed the plaintiff that the marginal chalazia would have to be opened and drained in order to

relieve the pain. Defendant then administered a local anesthetic in the eye, draped the lid with a sterile towel with a circular perforation in the center, and removed some Meibomian glands and also a freckle from the eyelid. In the course of the operation the tarsus which supports the eyelid was cut, thus causing the lid to droop. A patch with antibiotic ointment was applied.

Upon arriving home plaintiff experienced acute pain in the area of the left eye and so informed Dr. Lerner by telephone. The defendant then told the plaintiff that he could expect some pain after surgery. Plaintiff was disturbed, and informed Dr. Lerner that he did not desire any surgery and this was the first time he had any knowledge that surgery was performed on his eyelid.

Plaintiff alleged there was no conversation between the parties relating to Dr. Lerner's diagnosis of the condition and intended treatment.

Plaintiff claimed his out-of-pocket expense amounted to $120 for medical treatment, and special damages amounted to $2,000 in loss of income.

Since surgery and up to the time of trial, plaintiff had experienced constant irritation in the area, and had undergone 3 subsequent operations on the eye.

As an affirmative defense the defendant claimed that the plaintiff, a dentist by profession, was familiar with surgical techniques and observed the preparation of a syringe and the draping of the eye without remonstration, thus granting consent.

The trial court granted judgment in the amount of $12,500 and the defendant appeals.

This is not a case of claimed malpractice, the surgical procedure not being questioned, but rather that the consent of the patient was not obtained; *i.e.,* an unwarranted "touching" constituting assault and battery.

The definitive case on this subject in Michigan is *Franklyn* v. *Peabody* (1930), 249 Mich 363, where our Supreme Court stated, pp 367, 368:

"The operation on plaintiff's finger was not a major one, and the disclosure, when the finger and palm were opened, presented no emergency authorizing an operation on her thigh to obtain tissue for the finger. The case does not present the essentials of an implied authority arising from discovery, while performing an operation, of a condition so serious to the life or health of the patient as to demand a more extended or a further operation without consulting the patient. * * * The operation on plaintiff's thigh constituted an assault, not justified by any emergency, and not authorized by plaintiff or within the implied appointment of the surgeon employed to operate upon the finger."

See, also, *Zoski* v. *Gaines* (1935), 271 Mich 1.

The present case is even more flagrant. The plaintiff, Dr. Shulman, was fully conscious, and could easily have been informed and his consent obtained (or denied). The defendant physician was consulted for an infected gland in the eyelid. No mention was made as to removal of the freckle, and from the record, its removal was unauthorized and unwarranted. Obviously, no emergency existed, and while the defendant's surgical procedure is not questioned, he nevertheless should have informed the plaintiff.

The defendant's claim that the plaintiff, being a dentist, knew that surgery was being performed and made no remonstrance, is without merit. The eye was draped with a sterile towel and anesthetized, thus he could not see or feel the surgery as it progressed. Previously the infections had been removed by nonsurgical procedure; certainly it was not unreasonable for him to assume the same was to be done on his visit to Dr. Lerner.

Unless the preponderance of evidence is clearly contrary to the findings of the trial judge, we will not substitute our judgment for that of the trial court. *Barnes* v. *Beck* (1957), 348 Mich 286.

Judgment of the trial court is affirmed. Costs to appellee.

WATTS, P. J., and J. H. GILLIS, J., concurred.

HOFFMASTER *v.* McNETT.

1. AUTOMOBILES—AMBULANCES—EMERGENCY RUN—SPECIAL TRAFFIC PRIVILEGES—QUESTION OF FACT.

   Evidence adduced in nonjury actions by 2 women and their husbands for injuries received at intersection in collision with defendants' ambulance *held,* to present a question of fact as to whether such emergency vehicle was on an emergency run to pick up a woman who had been injured in a fall and which, if true, would bring into play provisions of statutes according the ambulance traffic privileges and require others to yield right-of-way at intersections (CLS 1961, §§ 257.2, 257.603, 257.632, 257.653).

2. APPEAL AND ERROR—NONJURY CASES—PREPONDERANCE OF EVIDENCE.

   Absent a showing that judgment, as a matter of law, is contrary to preponderance of evidence, Court of Appeals will not reverse in nonjury case.

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 754–757.
Liability for personal injury or property damage from operation of ambulance. 84 ALR2d 121.
[2] 5 Am Jur 2d, Appeal and Error §§ 834, 841.
[3] 5 Am Jur 2d, Appeal and Error § 831.

3. SAME—CREDIBILITY OF WITNESS—NONJURY CASE.

Court of Appeals will not reverse trial judge's findings of fact in a nonjury case which are based upon weight to be accorded testimony of witnesses unless the evidence clearly preponderates in the opposite direction as trial judge saw and heard the witnesses and was best able to judge their credibility.

Appeal from Oakland; Moore (Arthur E.), J. Submitted Division 2 January 4, 1966, at Lansing. (Docket Nos. 355, 356.) Decided April 12, 1966.

Complaint by Edward Hoffmaster and Janet Hoffmaster against Ralph McNett and Steve Slovik, doing business as Gold Cross Ambulance Service Company, for injuries arising when an automobile, in which plaintiff was riding, collided with defendants' ambulance. Similar case by Jack Taylor and Georgia Taylor. Cases consolidated for trial. Default judgment for plaintiffs against defendant Slovik. Judgment for plaintiffs after trial, against defendant McNett. Defendant McNett appeals. Affirmed.

Sauer & Gerard (*Charles J. Porter,* of counsel), for plaintiffs.

Richard L. Wolk, for defendant McNett.

T. G. KAVANAGH, P. J. On June 2, 1962, plaintiffs, Janet Hoffmaster and Georgia Taylor, were injured in a collision of their automobile with defendants' ambulance at the intersection of West Huron and Johnson avenues in the city of Pontiac.

On their suit for damages the matter was tried by the court without a jury and resulted in judgment for the plaintiffs.

Only three witnesses testified about the collision. Two were plaintiffs, Georgia Taylor, the driver of plaintiff's car, and Janet Hoffmaster, her passenger.

The defendants produced one—the attendant who had been riding in the ambulance. The driver of the ambulance had died before trial from causes unrelated to the collision.

The plaintiff witnesses testified they entered the intersection on a green light, the passenger saying she heard no unusual sound.

The defendants' witness testified they had received a call described as an emergency to pick up a woman who had hurt her hip or back in a fall and that they were on their way to do so with their warning lights flashing and their siren sounding.

The appeal asserts that the evidence thus established that the defendants' ambulance was an emergency vehicle on an emergency run and that the plaintiffs were guilty of negligence in failing to yield the right-of-way.

The trial court stated that he was unable to square the testimony of defendants' witness with a photographic exhibit. Primarily on the basis of credibility the court ruled that no emergency had been shown by defendants and that plaintiffs had made a showing of failure to use due care amounting to negligence on the part of the driver of defendants' ambulance. He found no negligence on the part of plaintiffs.

Whether or not there was an emergency (or circumstances warranting the driver's belief that there was) bringing into play the provisions of the applicable statutes CLS 1961, § 257.2 (Stat Ann 1960 Rev § 9.1802); CLS 1961, § 257.603 (Stat Ann 1961 Cum Supp § 9.2303); CLS 1961, § 257.632 (Stat Ann 1960 Rev § 9.2332); CLS 1961, § 257.653 (Stat Ann 1963 Cum Supp § 9.2353) is a matter of fact. The trial judge heard the witnesses and evaluated their testimony. Absent a showing that the judgment as a matter of law is contrary to the preponderance

of the evidence we do not reverse. *Kevreson* v. *Michigan Consolidated Gas Co.* (1965), 374 Mich 465; *Shaw* v. *Wiegartz* (1965), 1 Mich App 271 (quoting *Mallory* v. *Pitcairn* (1943), 307 Mich 40, at page 47):

"The trial court saw and heard the witnesses and, as trier of the facts, was best able to judge the credibility of, and the weight to be accorded, their testimony. We have repeatedly said that in cases tried without a jury the trial judge may give such weight to the testimony as in his opinion it is entitled to, and that in such cases we do not reverse unless the evidence clearly preponderates in the opposite direction."

We have carefully reviewed the record and while we find the evidence exceedingly slim, we find no such contrary preponderance authorizing the substitution of our judgment for the trial court's.

Affirmed, with costs to appellee.

BURNS and MCGREGOR, JJ., concurred.

PEOPLE *v.* LEACH.

1. CRIMINAL LAW—DEFENDANT NOT REPRESENTED BY COUNSEL—FAIR TRIAL.

   Fair trial can be conducted and justice accorded a defendant even though he is not represented by counsel.

2. SAME—INFORMATION TO ACCUSED—PLEA OF GUILTY—SENTENCE.

   Trial court has a duty to inform accused of the nature of the accusation against him after accepting a plea of guilty and before imposing sentence (GCR 1963, 785.3[2]).

3. SAME—ACCEPTANCE OF PLEA OF GUILTY—SENTENCE—CONDITIONS.

   Court must ascertain whether or not the plea of guilty is freely, voluntarily, and understandingly made before accepting plea or imposing sentence (GCR 1963, 785.3[2]).

4. SAME—ACCEPTING PLEA OF GUILTY—EXPLAINING MAXIMUM SENTENCE.

   Defendant must depend upon court for understanding of complaint and consequences of plea of guilty and trial judge has duty to define maximum sentence specifically when asked by defendant (GCR 1963, 785.3[2]).

5. SAME—PLEA OF GUILTY—UNEXPLAINED MAXIMUM SENTENCE.

   Defendant's plea of guilty after trial judge failed to explain maximum sentence that defendant could get even though defendant stated he did not understand maximum *held*, not freely nor voluntarily made (GCR 1963, 785.3[2]).

Appeal from Ionia; Bebeau (Leo B.), J. Submitted Division 3 January 4, 1966, at Grand Rapids. (Docket No. 807.) Decided April 12, 1966.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 317, 318.

[2–5] 21 Am Jur 2d, Criminal Law §§ 486, 487.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

Fred C. Leach was convicted of escape and as a third offender. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Walter M. Marks,* Prosecuting Attorney, for the people.

Harry H. Gemuend, for defendant.

WATTS, P. J. Defendant Fred C. Leach pleaded guilty in the Ionia circuit court of feloniously leaving the Michigan reformatory, a prison of the State of Michigan, without being discharged from the prison by due process of law.[1] The offense was charged as a third felony under CLS 1961, § 769.11 (Stat Ann 1954 Rev § 28.1083). He was sentenced to a minimum of 2 years and a maximum of 6 years, the sentence was to run consecutively, that is, to be added to any sentence or sentences that he was then required to serve. Defendant's motion to vacate sentence, to withdraw plea of guilty, and for a new trial was denied, and defendant appeals.

A motion for a new trial was filed by court-appointed counsel for the defendant.

"*The Court:* I would say also this motion presents the question as to whether the court should appoint counsel for an indigent person when he doesn't want counsel and when he does not want to be tried by a jury.

"Those are—those pretty well sum up the facts of this matter. * * *

"Now, as I understand the *Gideon Case,*[2] it was a case where the defendant in that case requested counsel and the court refused him. We have a situ-

1 CLS 1961, § 750.193 (Stat Ann 1962 Rev § 28.390).

2 *Gideon* v. *Wainwright* (1963), 372 US 335 (83 S Ct 792, 9 L ed 2d 799, 93 ALR2d 773).

ation here where the court offered the defendant counsel, offered a trial, and the examination of the defendant indicated very distinctly and clearly that he did [not] want a jury trial, nor did he want counsel.

"Now the question arises as to whether or not this court can force every defendant that appears before it to accept counsel, to cooperate with counsel, and to aid in his defense, and to take a jury trial. I just wonder whether or not we are violating the constitutional rights of a person if he very clearly and distinctly states that he doesn't want either a trial or counsel. How is this court going to force both upon the defendant? And a defendant may be severely embarrassed by going through a trial. He may be punished by going through a trial, and he wants to avoid that. Can this court force it on him? And that's what the court would have had to have done in this particular case is force the defendant to trial and force an attorney upon him. And I think I would be violating his constitutional rights if I put him through a trial, through the possible embarrassment and possible misery of a trial.

"Now he has changed his mind, and he said he would like to have a trial and like to have an attorney. And if he has changed his mind and would like to have a trial and would like to have an attorney, then it seems as though we can't hold arraignments without forcing an attorney upon the defendant. Possibly that's what it will come to, that we will take it upon ourselves by law or court rule to force every defendant to accept the services of an attorney and force every defendant to have a trial. That might resolve some of the problems that we have and let them have their appeal after the trial. Now, it appears as though if they don't want a trial and the court cooperates with them and they don't want an attorney and the court cooperates with them, then later on they ask to withdraw the plea and they want a trial and then after that they're

going to ask for an appeal if there happens to be a conviction. So we would never get through with it.

"So, I am going to deny the motion."

We do not agree with the issues as stated by the trial judge, neither do we subscribe to the proposition that no trial can be fairly conducted and justice accorded a defendant who is not represented by counsel. *People* v. *Henley* (1965), 2 Mich App 54.

We do subscribe to GCR 1963, 785.3(2):

"If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly, and voluntarily made, without undue influence, compulsion, or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted."

The trial court owes a duty to inform the accused of the nature of the accusation. As a condition of accepting the plea of guilty and imposing sentence, the court shall ascertain whether or not the plea was freely, understandingly, and voluntarily made. In our opinion, the key requirement is that the defendant shall understand the nature of the accusation and the consequences of his plea of guilty to the alleged violation of the law.

The question involved in the instant case is: Was the defendant afforded procedural protection stated in the said court rule?

The record clearly indicates that the defendant did not understand the consequences of his plea of

guilty to the violations of the law with which he is charged.

"*The Court:* It is your desire to plead guilty to this charge of escape which is charged as a third felony?

"*Defendant:* Yes, Your Honor.

"*The Court:* And you understand the possible consequences of such a plea that you may be confined to prison for a number of years?

"*Defendant:* The only thing I don't understand, Your Honor, is the maximum.

"*The Court:* Well, do you understand that you can be sentenced to prison in making this plea, that you can be sentenced to prison as a result of your plea of guilty?

"*Defendant:* Yes, Your Honor.

"*The Court:* I accept your plea as having been freely and voluntarily made at a time when the defendant understands the possible consequences of such a plea."

The court did not answer the defendant's question relative to the maximum penalty.

We are cognizant of the facts of life that man is not created with equal mental capabilities, that even intelligent laymen have little or no skill in the science of the law when appearing in court without counsel. A defendant must depend upon the court for his understanding of the complaint and the consequences of a plea of guilty. The trial judge had the duty when asked the maximum term to define it specifically. See *People* v. *Johnson* (1966), 2 Mich App 182; *People* v. *Barrows* (1959), 358 Mich 267.

It is our opinion that the defendant made a confession in open court to the commission of a crime, the consequences of which he did not know. The record clearly shows that the defendant's plea of guilty was not voluntarily made.

Judgment is reversed, and the cause is remanded to the trial court for further action not inconsistent with this opinion. We limit our holding to the particular facts and circumstances of the instant case.

FITZGERALD and HOLBROOK, JJ., concurred.

PEOPLE *v.* ANDERSON.

1. WITNESSES—PRIOR STATEMENTS—IMPEACHMENT—INSTRUCTIONS.
   Testimony at prior proceedings, statements, or declarations of witness which are inconsistent with testimony at trial, may be used to refresh memory of the witness or to impeach her but, may not be received as substantive evidence in proof of alleged crime and trial judge should so instruct jury.

2. CRIMINAL LAW—RAPE—VICTIM'S STATEMENTS AT PRELIMINARY EXAMINATION—EVIDENCE—REFRESHING RECOLLECTION.
   Statements by alleged victim of statutory rape made at preliminary examination, which were inconsistent with victim's testimony at trial, *held*, admissible for the purposes of refreshing witness's recollection but not as evidence of the substantive facts (CLS 1961, § 750.520).

Appeal from Berrien; Hadsell (Phillip A.), J. Submitted Division 3 January 5, 1966, at Grand Rapids. (Docket No. 117.) Decided April 12, 1966.

James Ivan Anderson was convicted of statutory rape. Defendant appeals. Reversed and conviction set aside.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Witnesses §§ 596, 790.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solictor General, *John T. Hammond,* Prosecuting Attorney, and *Harry J. Creagar,* Assistant Prosecuting Attorney, for the people.

Hartwig, Crow & Jones (*F. A. Jones,* of counsel), for defendant.

WATTS, P. J. Defendant James Ivan Anderson was convicted of statutory rape and sentenced to 3 years' probation and a fine. Motion to set aside conviction and request for a new trial was denied, and defendant appeals. The case was transferred to the Court of Appeals on October 14, 1964.

Defendant was convicted under CLS 1961, § 750-.520 (Stat Ann 1954 Rev § 28.788) of rape upon a 13-year-old girl. She testified at the examination before a municipal judge that she had sexual intercourse with the defendant in Berrien county on the day alleged in the complaint. The examining judge found probable cause of the offense having been committed by the defendant on June 8, 1964, and held the defendant for trial before the circuit court.

In the circuit court trial, the complainant testified that the defendant did not have sexual intercourse with her on June 8, 1964. The assistant prosecuting attorney questioned the complainant in detail relative to the testimony she gave at the examination. The complaining witness testified that she did not tell the truth at the examination and repeated her testimony that she did not have sexual intercourse with the defendant on June 8, 1964.

The defendant in the circuit court trial denied that he had sexual intercourse with the complainant on the alleged date.

The court instructed the jury in part as follows:

The Court: "Now, the people claim that they have proved beyond a reasonable doubt that the defendant did have sexual relations with this girl on the date in question, at Benton township in Berrien county, Michigan. The defendant denies that he had sexual relations with her on that date. The prosecuting witness testified that she did not have sexual relations with him on that date. She also testified that on previous occasions and under oath she testified that she did have sexual relations with him on that date, so that becomes the sole question for you to determine in this case. Did the defendant have sexual relations with the prosecuting witness on the day in question?"

Under the instructions of the court, the jury was permitted to convict the defendant upon the testimony of the complainant taken before the examining judge. At the trial the only two witnesses to the alleged offense both denied emphatically that the complainant had sexual intercourse with the defendant on the alleged date.

The issue involved in the instant case is: Did the trial court err in refusing to grant a motion for directed verdict of acquittal where there was no evidence offered that defendant had sexual intercourse on the date charged in the complaint for statutory rape and the only testimony of defendant's guilt was the testimony of the complaining witness given at the preliminary hearing, the truth of which she denied when asked at the trial if she recalled her previous testimony?

Justice GRANT, writing the opinion of the Court in *People* v. *Miner* (1904), 138 Mich 290, 292, said:

"This same question was before us in the case of *People* v. *Elco,* 131 Mich 519, 523, in which the majority of the court held that, where a witness whom

the people were bound to produce had made prior statements contradictory to those made upon the trial, such prior statements could be introduced to impeach her testimony. The respondent was entitled to have the witnesses against him produced in open court. The people could not introduce the prosecutrix's deposition taken upon the examination, where the prosecutrix herself could be produced upon the trial. We are cited to no case which has gone further than to hold that prior statements can be introduced for the purpose of impeachment. No case holds that they be considered by the jury as substantive evidence of the commission of the crime charged.[1] The case is ruled by *People* v. *Elco*.

"The crime charged is one of the most heinous and revolting known to the law. If the sole evidence is that of the alleged victim, and she has asserted under oath the commission of an offense, and afterwards denied it under oath, and there is no other evidence pointing to guilt, it would seem that neither law nor justice would permit a conviction."

Justice WIEST, writing the opinion of the Court in *People* v. *Korn* (1921), 217 Mich 170, 172, said:

"Against objection, the prosecutor was permitted to question the complaining witness about his testimony given at the examination. This might have been proper for the purpose of refreshing his recollection, but not to get before the jury as substantive evidence what he testified to on the examination. The jury should have been warned at the time, or at least instructed in the charge, of the only legitimate purpose of such questioning. We note, however, that this was not done."

See, also, *People* v. *Ayers* (1915), 186 Mich 366.

We are mindful that on occasion counsel may be taken by surprise by the unexpected and unfavorable testimony of a witness which he calls to the

[1] See, also, CL 1948, § 768.26 (Stat Ann 1954 Rev § 28.1049).

stand. Under such a circumstance, it may be necessary for counsel in his search for the truth to interrogate the witness in respect to his prior declarations, statements, and testimony given at prior proceedings which are inconsistent with the testimony given in the instant case for the purpose of refreshing the witness' recollection.

When such an occasion arises, the prior declarations, statements, and testimony given at such prior proceedings cannot be received as substantive evidence in proof of the alleged crime, and the jury should be so instructed.

It is our opinion that there is no question of fact to be submitted to the jury. The conviction of the defendant is set aside.

FITZGERALD and HOLBROOK, JJ., concurred.

ST. PIERRE *v.* ESTATE OF ST. PIERRE.

DECISION OF THE COURT.

1. DEEDS—TITLE—ESTOPPEL.
   Estoppel will be applied by court to protect rights of others than grantees, their heirs or estate, where such rights depend upon apparent title created by deed.

2. SAME—PARTY CLAIMING UNDER A DEED MUST CONFIRM IT IN ITS ENTIRETY.
   One who claims under a deed confirms all its provisions, and cannot establish his claim by adopting those provisions, only, which are in his favor, while he repudiates or contradicts others that are repugnant thereto.

3. SAME—HUSBAND AND WIFE—TENANCY BY THE ENTIRETIES—TENANCY IN COMMON.
   A conveyance to a man and a woman referred to as husband and wife, but who legally do not sustain that relation, does not create a tenancy by the entirety, but at most a tenancy in common.

4. SAME—TITLE—RECITALS—THIRD PARTIES—ESTOPPEL.
   Widow and heirs of decedent are not estopped to question recitals in deeds describing decedent and plaintiff as husband and wife, where they did not sustain that relation and no intervening rights of third parties for value are involved in suit to quiet title, hence, are entitled to share in undivided half interest which trial court found was owned by decedent.

DISSENTING OPINION.

T. G. KAVANAGH, J.

5. DEEDS—RECITALS—ESTOPPEL—ESTATES OF DECEDENTS.
   Estate of decedent is estopped from claiming title to property conveyed by deeds reciting decedent and plaintiff in suit to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 19 Am Jur, Estoppel §§ 27-30.
[2] 19 Am Jur, Estoppel § 21.
[3] 26 Am Jur, Husband and Wife §§ 68, 87.
Character and incidents of estate created by a deed to persons as husband and wife who are not legally married. 83 ALR2d 1051.

quiet title were husband and wife, where they did not sustain that relation, issue of estoppel was raised at the trial, and decedent himself would have been estopped from claiming title under facts presented.

Appeal from Livingston; Carland (Michael), J. Submitted Division 2 January 5, 1966, at Lansing. (Docket No. 864.) Decided April 12, 1966. Rehearing denied August 5, 1966. Leave to appeal denied by Supreme Court October 21, 1966. See 378 Mich 736. Reconsideration of denial granted and leave to appeal granted by Supreme Court April 12, 1967. See 379 Mich 759.

Bill of complaint by Angeline St. Pierre against Estate of Sam St. Pierre, Ilene Timmons, administratrix, and others to quiet title to certain lands conveyed to Sam St. Pierre and Angeline St. Pierre as grantees. Judgment for defendants. Plaintiff appeals. Affirmed.

E. Reed Fletcher, for plaintiff.

Martin J. Lavin and *William D. McCririe,* for defendants.

MCGREGOR, J. Angeline St. Pierre filed a complaint to quiet title to various pieces of land, the title to which had been obtained by deeds naming as grantees Sam St. Pierre and Angeline St. Pierre, his wife. Angeline and Sam lived together as husband and wife from April 15, 1938, until Sam's death on December 27, 1961. During the intervening years they platted several tracts of land which they purported to hold as husband and wife. At the time of Sam's death, they had deeded away many lots, some had been sold on contract, and the remaining lots were still owned by them. About

the time of Sam St. Pierre's death, the plaintiff discovered that he had been married prior to April 15, 1938, to defendant Irene St. Pierre, had fathered seven children by her who are also defendants herein, and that Sam had never obtained a divorce from Irene.

Plaintiff's motion for summary judgment, relying principally on the doctrine of estoppel, was denied by the court, and upon the subsequent trial, the trial court in pertinent findings decreed:

"The court * * * finds that the plaintiff, Angeline St. Pierre, was never the wife of Sam St. Pierre because of a prior undissolved marriage between Sam St. Pierre and Irene St. Pierre, the latter having been determined by the probate court of Livingston county to be the widow of the deceased Sam St. Pierre. The court further finds that Irene St. Pierre, by her own disclaimer, has no interest in any lands or premises conveyed to any person by either the plaintiff, Angeline St. Pierre, or Sam St. Pierre deceased, or either or both of them, prior to December 27, 1961, the date of the death of the said Sam St. Pierre. * * *

"The court therefore finds that all real estate ostensibly owned by Sam St. Pierre and Angeline St. Pierre as tenants by the entireties, on the date of the death of the said Sam St. Pierre, December 27, 1961, was, in fact, owned by the said parties as tenants in common, each as to an undivided one-half interest therein."

Plaintiff contends that Irene St. Pierre and the children of Sam St. Pierre by her and the administratrix of his estate are estopped to question the recital in all deeds describing Sam St. Pierre and Angeline St. Pierre as husband and wife.

Defendants contend that Sam St. Pierre was married to Irene St. Pierre at the time of his death and that the title to the real estate described in the bill

of complaint could only be that of tenants in common. The crux of this case is the defendants' right to show the true relationship between Sam St. Pierre and Angeline St. Pierre.

Both parties concerned agree that the doctrine of estoppel applies where innocent parties have obtained title from a man and woman not married, who had obtained title to such real estate as man and wife and conveyed it in the same manner.

Does estoppel apply in the instant situation and, if so, was it raised timely? There appear to be two lines of cases in Michigan where a man and woman who were, in fact, not man and wife took title to lands as man and wife. In one line of these cases it is held that the heirs of the decedent were estopped to put in proof as to the true relationship of the grantees as not being man and wife.

Plaintiff contends that the applicable law is stated in *Porter* v. *Landis* (1950), 329 Mich 76. In that case, it appeared that a common-law relationship existed between Ernest Porter and Bessie Landis, as husband and wife, and that at the commencement of such relationship, in 1933, Bessie Landis had not obtained a divorce from her husband, Ed Landis, and did not do so until August 31, 1942. Prior to her divorce from Ed Landis, certain real estate was conveyed to "Ernest Porter and Bessie Porter, his wife". Bessie Landis Porter died, intestate, on January 29, 1944, and two years later, Ernest Porter executed a deed to the lots in question to his brother, Henry J. Porter, and Bertha Porter, his wife. Henry J. Porter and wife, after one year of ownership, filed a bill to quiet title. The trial court quieted title in the names of plaintiffs Henry J. Porter and Bertha Porter, his wife. The defendants appealed and claimed that as heirs of Bessie Landis they were not estopped from offering testimony

showing that their mother was not the wife of Ernest Porter at the time Ernest Porter and Bessie Porter acquired title to the lands in question and that their title was as tenants in common. The Supreme Court barred the dead woman's children from denying the existence of a valid marriage between the grantees, Ernest Porter and Bessie Porter, his wife, and quoted with approval from *Hawley* v. *Dibble* (1915), 184 Mich 298, 303:

"One who claims under a deed confirms all its provisions and cannot establish his claim by adopting those provisions only which are in his favor while he repudiates or contradicts those which are repugnant thereto."

In *Porter* v. *Landis, supra,* the third-party interest had intervened because the plaintiffs had obtained title from the surviving grantee and had come into possession of the property a year before suit was instituted by them to quiet title.

Plaintiff urges that the decision in *Franklin* v. *Franklin* (1958), 354 Mich 543, establishes that the *seasonable* raising of the doctrine of estoppel was the governing factor in that case. The *Franklin Case* is distinguishable in that the defendant claimed fraud by plaintiff, the purported wife, to divert plaintiff's claim but the court found defendant failed to plead actionable fraud.

A thorough examination of the cases upon which the plaintiff relies indicates a distinguishing factor in cases which applied the doctrine of estoppel, that is, the intervening rights of innocent third parties for value. In the instant matter, no third party interest is indicated.

The defendants herein base their right of recovery on *Daniels* v. *Daniel* (1960), 362 Mich 176, the exhaustive opinions of which considered many prior decisions, some of which are quoted by both plaintiff

and defendants herein. In the *Daniels Case, supra,* the appellant claimed that the plaintiff, administratrix, was estopped to assert that the conveyance to the deceased and the purported wife did not create a tenancy by the entireties. The defense of estoppel was not raised at trial in that case. The trial court found that a valid marriage had existed between the plaintiff and the decedent until the death of the decedent, that the purported wife never became the lawful wife of Joseph Daniels, and that the deeds in question created a tenancy in common. On appeal, the Justices voted unanimously to affirm the trial court, but divided equally on the reason therefor. Justice CARR in one opinion held (p 189):

"That appellant's claim that plaintiff administratrix is estopped to assert that the grantees in the deed to Joseph Daniel and defendant created a tenancy in common, each party having an undivided 1/2 interest, is not well-founded, and is not properly before this Court. The decree of the circuit court is affirmed."

and Justice SOURIS held in the other opinion (pp 189, 191):

"I concur in affirmance on the ground that in the absence of a valid marriage between defendant and Joseph Daniel or Daniels, *as between themselves, their heirs and their estates,* no tenancy by the entireties was created.

"Like *Spence* v. *Jones,* 359 Mich 231, and *Collins* v. *Norris,* 314 Mich 145, no facts appear in this case that would bar plaintiff from contradicting the apparent legal effect of the deed upon which defendant must rely. * * *

"Where rights of others than the grantees, their heirs or estates depend upon the apparent title created, this Court will apply a theory of estoppel to protect such rights."

The doctrine of estoppel is not applicable in the instant case. The decision of the circuit court is affirmed, with costs to the appellees.

BURNS, J., concurred with MCGREGOR, J.

T. G. KAVANAGH, P. J. (*dissenting*). For the reasons set forth in the case of *Porter* v. *Landis* (1950), 329 Mich 76, and the cases cited therein, I do not believe the defendants here can be heard to question the effect of the deed through which they claim title. I believe that Sam St. Pierre would be estopped to do so under the facts of this case and if this be true his estate should stand in no better position. See *Stone* v. *Culver* (1938), 286 Mich 263 (119 ALR 512) and cases cited therein.

I do not read the case of *Daniels* v. *Daniel* (1961), 362 Mich 176, as controlling. There the matter of estoppel was not raised at the trial. Here it was.

I would reverse and award the appellant costs.

CHRISTY *v.* DETROIT EDISON COMPANY.

1. JUDGMENT—SUMMARY JUDGMENT—ISSUES OF FACT—AFFIDAVITS.
   Summary judgment for defendant was proper where plaintiff chose to file affidavits which were not responsive to defendant's affidavits, which were in part based upon information and belief instead of personal knowledge of affiant, and which were cast in conclusionary language instead of stating with particularity facts admissible as evidence (GCR 1963, 117).

2. SAME—SUMMARY JUDGMENT—ISSUES OF FACT—AFFIDAVITS.
   No genuine issue as to any material fact is established sufficient to bar entry of summary judgment on defendant's motion, if otherwise defendant is entitled thereto, where plaintiff, opposing the motion, chose to file affidavits not responsive to defendant's affidavits, which were in part based upon information and belief instead of personal knowledge of affiant, and were cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence (GCR 1963, 117).

3. ELECTRICITY—SECURITY DEPOSIT—APARTMENT DWELLER.
   Apartment dweller who had recently moved from out of State and requested to make a $25 deposit for electrical service as he had not established a proper credit rating, *held*, not entitled to recover such sum, paid under protest, nor entitled to injunction against discontinuance of service, where he failed to raise issue of fact by responsive affidavits when defendant supplier of electricity interposed motion for summary judgment (GCR 1963, 117).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 41 Am Jur, Pleading § 342.
[3] 41 Am Jur, Pleading § 342.
43 Am Jur, Public Utilities and Services §§ 50, 64, 73.

Appeal from Washtenaw; Ager (William F.), J. Submitted Division 2 January 5, 1966, at Detroit. (Docket No. 1,263.) Decided April 12, 1966. Leave to appeal denied by Supreme Court June 28, 1966. See 378 Mich 720.

Complaint by Perry T. Christy against Detroit Edison Company, a New York corporation, for return of a security deposit paid to defendant and to enjoin defendant from discontinuing plaintiff's electrical service. Judgment for defendant. Plaintiff appeals. Affirmed.

Perry T. Christy, in propria persona.

Fischer, Sprague, Franklin & Ford (*Ralph H. Houghton,* of counsel), for defendant.

LESINSKI, C. J. The plaintiff appeals *in propria persona* from a summary judgment granted defendant by the circuit court for the county of Washtenaw.

This cause arose when the plaintiff moved into Ann Arbor, Michigan from out of State, and was requested to leave a $25 security deposit for electricity in his apartment, as he had not established a proper credit rating. The plaintiff after many contacts with the defendant's agents filed suit against the defendant charging that the defendant discriminated in its charging of deposits for electrical service in that only certain customers were required to leave the deposit, and sought a temporary injunction against any discontinuance of his electrical service. After denial of the temporary injunction, the plaintiff paid the $25 security deposit under protest, and amended his complaint to reflect that payment had been made. He thus sought the return of the security deposit as well as an injunction against discontinuance of service. Both plain-

tiff and defendant filed motions for summary judgments and on January 13, 1965, the trial court granted defendant's motion for summary judgment. The plaintiff then moved to set aside the summary judgment. From a denial of this motion, plaintiff took this appeal.

The issue before this Court revolves around the granting of the summary judgment. Was there "any genuine issue as to any material fact" so that the defendant was not entitled to a summary judgment as a matter of law? The summary judgment procedure as defined by GCR 1963, 117.2(3), requires that a summary judgment be granted if the party opposing the motion has failed to show any evidence by affidavit, that would give rise to a genuine issue of fact. In *Durant* v. *Stahlin* (1965), 375 Mich 628, Justice ADAMS states at p 640:

"Once a party is challenged as to the existence of the facts upon which he purports to build his case, the sum and substance of the summary judgment proceeding is that general allegations and notice pleading are not enough. Matters upon information and belief and alleged common knowledge are not enough. That party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted. In the language of GCR 1963, 117.3:

"'*Judgment shall be rendered forthwith* if the pleadings show that any party is entitled to judgment as a matter of law or *if the affidavits or other proof show that there is no genuine issue of fact.*' (Emphasis supplied.)"[1]

Justice SOURIS speaking in concurrence in the *Durant Case* stated at page 657:

[1] This opinion of Justice ADAMS was concurred in by Justice DETHMERS and Justice O'HARA.

"Plaintiff chose to file affidavits * * * which were not responsive to the defendants' affidavits, which were in part based upon information and belief instead of personal knowledge of the affiant, and which were cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence. In short, the plaintiff's affidavits were inadequate to bar entry of summary judgment on defendants' motions *if otherwise defendants were entitled thereto.*"[2]

This language of Justice SOURIS in the *Durant Case* embodies our findings regarding the plaintiff's reply affidavits to the defendant's motion for summary judgment in this case. See also *Green* v. *Lundquist* (1966), 2 Mich App 488. The trial judge, on the basis of this record, could do no other than grant the defendant's motion for summary judgment.

Judgment affirmed. Costs to the appellee.

J. H. GILLIS and QUINN, JJ., concurred.

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[2] Justice SOURIS' opinion was concurred in by Chief Justice T. M. KAVANAGH and Justice SMITH.

OLEPA *v.* MAPLETOFF.

1. PHYSICIANS AND SURGEONS—IMMUNITY FROM LIABILITY—SANITY PROCEEDINGS.

   Doctors who certify as to sanity of plaintiff which was basis for custodial order of municipal judge were acting under *color of law* and their action is privileged (CLS 1961, § 330.19).

2. SAME—OFFICIAL CAPACITY—IMMUNITY FROM LIABILITY—SANITY PROCEEDINGS.

   Doctors who in their official capacity certify as to sanity of plaintiff in sanity proceedings had an unqualified privilege so as to be able to discharge their duties without fear of retaliation (CLS 1961, § 330.19).

3. JUDGES—COLOR OF LAW—IMMUNITY FROM LIABILITY—SANITY PROCEEDINGS.

   Judge who committed plaintiff to a mental institution in a sanity proceeding was acting under the *color of law* in fulfilling the requirements of the statute and his actions were privileged (CLS 1961, § 330.19).

4. SAME—ACTIONS—IMMUNITY FROM LIABILITY—OFFICIAL CAPACITY.

   No suits will lie against any judge for an act carried out in his official capacity.

5. SAME—ACTIONS—IMMUNITY FROM LIABILITY—OFFICIAL CAPACITY—GOOD FAITH—MALICE—COMMON LAW.

   No action will lie against a judge for a judicial act, though it is alleged to have been done maliciously and corruptly.

6. SAME—IMMUNITY FROM LIABILITY—JUDICIAL ACT—PUBLIC POLICY—VEXATIOUS ACTIONS.

   Common law principle that *no action will lie against a judge for a judicial act* was established in order to secure the independ-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur, Insane and Other Incompetent Persons § 38.
[2, 7, 8] 43 Am Jur, Public Officers § 272 *et seq.*
[3–6] 30A Am Jur, Judges § 73 *et seq.*

ence of the judges and prevent their being harassed by vexatious actions.

7. APPEAL AND ERROR—PHYSICIANS—JUDGES—SANITY PROCEEDINGS—SUMMARY JUDGMENT.

Order granting summary judgment for defendant certifying doctors and committing judge is affirmed in action to recover damages allegedly sustained by plaintiffs during commitment to a mental hospital (CLS 1961, § 330.19).

8. OFFICERS—IMMUNITY FROM LIABILITY—COLOR OF LAW.

The immunity from liability provided by the statute reflects the continued need for those acting under *color of law* to be allowed the immunity so necessary for proper disposition of their duties (CLS 1961, § 330.19).

Appeal from Wayne; Moynihan, Jr. (Joseph A.), J. Submitted Division 1 January 6, 1966, at Detroit. (Docket No. 394.) Decided April 12, 1966.

Complaint by Walter L. Olepa and Richard L. Olepa, by his next friend, Walter L. Olepa, against Kenneth R. Mapletoff, Aloysius A. Church, Donald C. Neitzel, individually and as municipal judge of Southgate, and Jeanne L. Olepa for unlawful commitment to a hospital as a mentally ill person. Summary judgment for defendants. Plaintiffs appeal. Affirmed.

Kenneth M. Davis, for plaintiffs.

Moll, Desenberg, Purdy, Glover & Bayer (*Harold B. Desenberg,* of counsel), for defendants Mapletoff and Church.

Donald C. Neitzel, in propria persona.

LESINSKI, C. J. Walter L. Olepa and Richard Olepa, a minor, by his next friend, Walter L. Olepa, are appealing a summary judgment granted in favor

of the defendants by the circuit court for the county of Wayne.

The plaintiff, Walter Olepa, alleges that he was taken into custody and held in Wayne County General Hospital from August 14 to August 22, 1962, upon an order issued by the defendant municipal judge Donald C. Neitzel pursuant to CLS 1961, § 330.19 (Stat Ann 1956 Rev § 14.809). Those charged in the suit were the plaintiffs' wife and mother who filed the petition for commitment, the two doctors who signed the certificate which was presented to the judge as the basis for the custodial order, and the judge who granted the petition.

From the granting of the summary judgment, pursuant to GCR 1963, 117.2, appeal was taken against all the defendants except Jeanne L. Olepa.

The basic question before this Court is whether the plaintiffs stated a claim upon which relief could be granted. This issue under the alleged facts of this case raises the vital question of liability of public officials and their agents for acts committed in their official capacity.

The legislature through CLS 1961, § 330.19 (Stat Ann 1956 Rev § 14.809) has empowered the courts that:

"Whenever it shall appear to a judge of any court of record, justice of the peace, or a police justice of any city or county where such person may be, upon evidence produced and from a certificate of 2 legally qualified physicians, to be necessary and essential to public safety so to do, said judge or police justice may authorize any superintendent of the poor or peace officer of said city or county to take into custody and cause to be removed to any hospital or other place of detention, any person believed to be mentally ill against whom no proceedings have been instituted under this act, and such person may be detained until such proceedings

as hereinafter provided shall be instituted in the probate court: Provided, That the period of such temporary detention shall not exceed 5 days, unless the probate court shall by special order enlarge the time: Provided further, That no person arrested under this act shall be confined in a jail or other lock-up unless such person manifests homicidal or other dangerous tendencies: Provided further, That any peace officer of this State with the approval of the prosecuting attorney, obtained within 24 hours of the taking into custody and confinement, is hereby authorized to take into temporary protective custody and confine for a period of not to exceed 48 hours, not counting Sundays and legal holidays, any person believed to be mentally ill manifesting homicidal or other dangerous tendencies; proceedings under this act; temporary or permanent, to be instituted by such peace officer within said 48 hour period, not counting Sundays and legal holidays."

Under this statute, the actions of the certifying doctors and the committing judge were privileged. They were each acting under "color of law" in fulfilling the requirements of the statute. The Michigan Supreme Court in *Dabkowski* v. *Davis* (1961), 364 Mich 429 was faced with a similar question. In *Dabkowski* the appellant charged the two certifying* doctors with assault and battery and false imprisonment. The lower court dismissed the action on motion of the defendant doctors, and on appeal the Supreme Court affirmed. The Court said at page 433:

"It is clear that the statements of opinion by the doctors in the certificates before us are absolutely privileged. They were submitted while a sanity

* Note that the doctors in *Dabkowski* were acting pursuant to CLS 1956, § 330.21 as amended by PA 1957, No 313 (Stat Ann 1959 Cum Supp § 14.811) which indicates a similar duty for the examining physician as CLS 1961, § 330.19 (Stat Ann 1956 Rev § 14.809).

proceeding of plaintiff was pending, related to the emergency commitment of the plaintiff, and were submitted to the court having jurisdiction in the premises."

Thus the Court found the doctors acting in their official capacity had an unqualified privilege so as to be able to discharge their duties without fear of retaliation.

The judicial privilege was reaffirmed in *Mundy* v. *McDonald* (1921), 216 Mich 444 (20 ALR 398) wherein the Court in an exhaustive study of judicial privilege reaffirmed the doctrine and aptly quoted at page 453 from the English case of *Fray* v. *Blackburn*, 3 B & S 576, wherein Justice Crompton stated (p 578):

"'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions.'"

It is this agelong policy, as old as the English common law, that prevents any suit against Judge Neitzel for an act carried out in his official capacity.

This theory of immunity from liability for action taken in regards to CLS 1961, § 330.19 (Stat Ann 1956 Rev § 14.809) is substantiated in *Kenney* v. *Fox* (WD Mich, 1955), 132 F Supp 305, affirmed (CA 6), 232 F2d 288; *Kenney* v. *Hatfield* (WD Mich, 1955), 132 F Supp 814, affirmed (CA 6) 232 F2d 288, cert denied 352 US 856 (77 S Ct 84, 1 L ed 2d 66); and *Kenney* v. *Killian* (WD Mich, 1955), 133 F Supp 571, affirmed (CA 6) 232 F2d 288,

cert denied 352 US 855 (77 S Ct 84, 1 L ed 2d 66). Though these cases are based on a Federal theory of deprivation of rights, they do reflect in their interpretation the continued need for those acting under color of law to be allowed the immunity so necessary for proper disposition of their duties.

It is therefore the decision of this Court that the summary judgment was properly granted in favor of all the appellees herein.

Affirmed, costs to appellees.

T. G. KAVANAGH and QUINN, JJ., concurred.

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ABANDONMENT—See APPEAL AND ERROR (57); DEDICATION (4, 5); VENDOR AND PURCHASER (2).

ABSENCE—See OFFICERS (1).

ABUTTING OWNERS—See APPEAL AND ERROR (21); HIGHWAYS AND STREETS (1).

ACCELERATED JUDGMENT—See JUDGMENT (19, 20).

ACCEPTANCE—See CONTRACTS (4, 5, 7); DEDICATION (7–13, 15, 17); OFFICERS (1).

ACCIDENT—See ACTION (2); CRIMINAL LAW (63); INSURANCE (1–5); TRIAL (4).

ACCOMPLICE—See INDICTMENT AND INFORMATION (3).

ACCORD AND SATISFACTION.

1. An accord is a binding contract, but if it is repudiated or otherwise breached by the obligor, the injured party may sue on the original obligation or upon the accord at his election. *Ortiz* v. *Travelers Insurance Company*, 549.
2. Plaintiff who lost an eye when bottle of ginger ale exploded and who thereafter effected a consent judgment against the manufacturer or bottler for $25,000 was not barred from recovery in action on previously made oral accord with defendant grocer's insurer by such judgment, since neither settlement may be said to be the measure of the single satisfaction to which plaintiff was limited. *Id.* 550.

ACCOUNTING.

1. Record in suit for accounting *held*, to sustain trial court's finding that parties were engaged in a joint venture for the acquisition, development, and sale of real estate. *Bednarsh* v. *Winshall*, 355.
2. Facts are reviewed *de novo* on appeal in suit for accounting. *Id.*
3. Plaintiff has the burden of proof insofar as a right to be credited with any controverted item involved in a suit for accounting. *Id.*

See APPEAL AND ERROR (30–32); PARTNERSHIP (1, 3); TRUSTS (1).

ACCOUNTS—See JUDGMENT (39–41); TRUSTS (11).

ACCRUED RIGHTS—See LIMITATION OF ACTIONS (1).

ACKNOWLEDGMENT.

Holding by trial court that technical deficiency in acknowledgment of plat had been cured by statutory provision validating recorded plats that had not been acknowledged in accordance with statute and that plat was valid *held,* not error, where dedicator and its grantees had asserted the legality of the plat from time to time in the past (CL 1948, § 560.69). *West Michigan Park Association* v. *Department of Conservation,* 257.

See DEDICATION (2).

ACTION.

1. Refusal to enforce a right of action accruing under the laws of any other State or country must be based upon the fact that the right is against good morals or natural justice, or that it would be prejudicial to the general interest of the citizens of the State of the forum, the mere fact that a statute might differ from the law of the forum not necessarily making enforcement contrary to the public policy of the State. *Growe* v. *Growe,* 26.
2. Plaintiff insured, whose tractor and trailer equipment were damaged in an accident and thereafter taken by the defendant insurer to defendant garagekeepers for repairs, had alternative remedies for alleged failure to make acceptable repairs and subsequent sale of vehicles, by suit on the contracts of insurance for breach or suit in tort for conversion, but only 1 cause of action. *Swindlehurst* v. *American Fidelity Fire Insurance Company,* 329.
3. Recovery in a proper case should not be suppressed because of conjectural posture which may never arise and which, if it does, will be decided in the light of then-existing law. *Jean* v. *Chrysler Corporation,* 565.

See ACCORD AND SATISFACTION (1); JUDGES (2, 3); PARTIES (1); TRUSTS (10).

ACTIONS RATHER THAN WORDS—See FALSE PRETENSES (3).

ADEQUACY OF INSTRUCTION—See APPEAL AND ERROR (9, 10).

ADJACENT—See MUNICIPAL CORPORATIONS (13, 15, 17).

ADJOINING—See MUNICIPAL CORPORATIONS (13, 15, 17).

ADJOINING TOWNSHIPS—See HEALTH (5).

ADJUNCT OF EMPLOYMENT—See WORKMEN'S COMPENSATION (16).

ADJUSTER—See JUDGMENT (32).

ADMINISTRATION OF TRUST—See TRUSTS (2).

ADMINISTRATIVE LAW—See PARDON (4); RAILROADS (5); WORKMEN'S COMPENSATION (11).

ADMISSIONS—See JUDGMENT (28); LIBEL AND SLANDER (1).

ADVANCES—See APPEAL AND ERROR (40); BROKERS (4); COSTS (17).

ADVERSE POSSESSION—See IMPROVEMENTS (1, 2).

ADVERTISING—See TAXATION (1).

ADVICE OF COUNSEL—See CRIMINAL LAW (19, 22, 32).

AFFIDAVITS—See CORPORATIONS (1); ELECTRICITY; JUDGMENT (7–11, 27–30, 42, 43); MASTER AND SERVANT (2); MECHANICS' LIENS (1).

AGE OF DEPENDENTS—See WORKMEN'S COMPENSATION (12).

AGRICULTURAL USES—See TOWNSHIPS (3).

ALCOHOL CONTENT OF BLOOD—See CRIMINAL LAW (36); TRIAL (4).

ALIBI—See ROBBERY (2).

ALIMONY—See COSTS (2); JUDGMENT (2, 3).

ALTERATION OF AWARD—See WORKMEN'S COMPENSATION (9).

AMBIGUITY—See CONTRACTS (2); COVENANTS (1, 2).

AMBULANCES—See AUTOMOBILES (14).

AMENDMENT—See AUTOMOBILES (2); COSTS (3); DEATH; INDICTMENT AND INFORMATION (3); INTEREST; JUDGMENT (30); PLEADING (1–4, 6, 7); STATUTES (9); WORKMEN'S COMPENSATION (4–6).

ANESTHETIC—See PHYSICIANS AND SURGEONS (3).

ANONYMOUS PARTICIPATION—See TRIAL (12).

APARTMENT DWELLER—See ELECTRICITY.

APPEAL AND ERROR.

1. Whether appellant was entitled to damages, attorney fees, and costs for an illegal arrest is not determined in action he had brought to enjoin enforcement of township zoning ordinance under which complaint and warrant were issued and which action is still pending, since any action taken by the Court of Appeals in such matter would be premature. *Kersheske* v. *Township of Thomas*, 1.

2. Record in suit for declaratory judgment as to rights of firemen and policemen under charter of newly created city with respect to civil service and pension provisions under pertinent statute and charter provisions, failing to show duration of their previous service essential to qualify them for participation, required remand of case for the making of such finding and the taking of additional testimony if necessary (CLS 1961, § 38.596; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2). *Cockerline* v. *City of Warren*, 9.

3. The Court of Appeals does not substitute its judgment on questions of fact for that of a jury unless the facts clearly preponderate in the opposite direction. *Schmidt* v. *Robinet*, 46.

APPEAL AND ERROR—Continued.

4. The Court of Appeals will not set aside the findings of fact in a nonjury suit whereby plaintiffs sought specific performance of alleged agreement to procure a written lease from landlord of premises upon which restaurant business was conducted or, in the alternative, rescission of the agreement of sale of the business and return of all moneys paid by them to defendant, unless the findings are clearly erroneous (GCR 1963, 517.1). *Teachout* v. *Maiers*, 69.

5. Admission in evidence of certain medical bills without it having been established they were necessary and reasonable was error, but not reversible error, where the bills were not made a part of the record so that an appropriate reduction of the judgments could be made in actions by husband and wife for injuries latter sustained as a result of defendant hospital's alleged negligence. *Fogel* v. *Sinai Hospital of Detroit*, 100.

6. The Court of Appeals will not reverse the judgment of a trial court in a nonjury case on a finding of fact unless the evidence clearly preponderates in a direction opposite to the finding by the trial court. *People* v. *Doris White*, 104.

7. Findings of the trial court in chancery matters are not disturbed on appeal, where supported by credible evidence and no credible evidence to the contrary is adduced. *Hazelton* v. *Hazelton*, 110.

8. The credibility of a witness is better judged by the trier of the facts who has an opportunity to see and hear the witness testify than an appellate court which must depend entirely on the printed record. *Id.*

9. An appellate court views a trial court's instructions as a whole in determining their adequacy. *King* v. *Daly*, 121.

10. The test applied by an appellate court in determining adequacy of instructions in a civil case is whether they inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case. *Id.*

11. The fact that individual sentences in instructions, when considered independent of the context, are objectionable, does not constitute reversible error, where the charge, taken as a whole, correctly states the law applicable to the particular case. *Id.*

12. Prolixity in instructions in a case does not necessarily equate with error. *Id.*

13. Whether or not violation of city ordinance, prohibiting maintenance of a nuisance and authorizing the commissioner of health to abate the same, is a crime *held*, unnecessary to determination of issue presented in proceeding designed to compel circuit court to review *de novo* the conviction of plaintiff herein, of violation of such ordinances, since there is statutory and court rule provision for appeals from all final judgments from the recorder's court to the Court of Appeals (PA 1961, No 236, § 308, as added by PA 1964, No 281; GCR 1963, 806.1; Detroit Ordinances 39-1-40, 39-1-42). *Walber* v. *Wayne Circuit Judge*, 145.

APPEAL AND ERROR—Continued.

14. An abuse of discretion by a court involves far more than a difference in judicial opinion between the trial and appellate courts, where the exercise of discretion turns upon a factual determination made by the trier of the facts, since the term *discretion* involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. *People* v. *Wolschon*, 186.

15. An abuse of discretion by a trial court in making a determination of fact, requires the reviewing court to find that the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Id.*

16. An order of the common pleas court of the city of Detroit setting aside a default judgment is interlocutory and not a matter of which the Court of Appeals has jurisdiction to hear an appeal (GCR 1963, 801.3). *Solner Investment Company* v. *Thoms*, 189.

17. An order of the common pleas court of the city of Detroit setting aside a default judgment is interlocutory and not a matter of which the Court of Appeals has jurisdiction to hear an appeal (GCR 1963, 801.3). *Sears, Roebuck & Company* v. *Holmes*, 190.

18. Interlocutory orders of the common pleas court of Detroit are appealable to the circuit court by leave of that court (GCR 1963, 806.1). *Id.* 191.

19. A chancery case is heard by the Court of Appeals *de novo* on the record. *Michigan Central Park Association* v. *Roscommon County Road Commission*, 192.

20. Great weight is given by the Court of Appeals to the findings of fact by the trial judge in a chancery case, and reversal is not made unless convinced from a reading of the entire record that the Court of Appeals would have reached a different conclusion. *Id.*

21. Adjudication of separate rights, if any, of owners of lots of the subdivision not abutting lake shore boulevard, other than as they are members of the general public, is not made on appeal in class action by plaintiff, a voluntary association of owners of lots abutting the boulevard to enjoin defendant board of county road commissioners and township board from converting lakeside area in front of plaintiffs' lots into a public bathing beach. *Id.*

22. The Court of Appeals does not substitute its judgment on questions of fact for that of the trial court in a nonjury case, unless the evidence presented clearly preponderates in the opposite direction. *West Michigan Park Association* v. *Department of Conservation*, 256.

23. The function of the Court of Appeals upon review of a nonjury action at law is to determine whether the judgment was against the preponderance of the evidence. *Berger* v. *Travelers Insurance Company*, 269.

APPEAL AND ERROR—Continued.

24. The Court of Appeals does not substitute its judgment on questions of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction, since the trial judge has the benefit of observing and hearing the witnesses. *Id.* 270.

25. Claim of appellant in action for fraud that judgment against him was against the great and overwhelming weight of the evidence *held*, not sustained in view of the conflict in the facts and that, in weighing the evidence, the trial judge had the advantage of hearing and observing the witnesses. *Oppenhuizen* v. *Wennersten*, 289.

26. Special appeals from municipal courts to the circuit courts are now provided for by a court rule wherein leave to appeal is required (GCR 1963, 702). *Domestic Finance Company* v. *Purser*, 300.

27. An appeal from a municipal court to a circuit court is limited to the reasons and grounds for appeal stated in the claim of appeal (GCR 1963, 701). *Id.*

28. Court of appeals is bound by trial judge's findings of fact, in nonjury case, absent a showing that the facts are contrary to a clear preponderance of the evidence. *Manie* v. *Matson Oldsmobile-Cadillac Company*, 315.

29. Claim of plaintiff, in action for negligence without an accompanying physical injury, whose proof of emotional harm was by her husband, friend, and sister that she was nervous, and no testimony of physician, as to effects of defendant's negligence on plaintiff's nervous system, was introduced *held*, so remote and proof thereof so inadequate that an award of damages could not be sustained under negligence theory. *Id.*

30. Finding of trial judge in suit for accounting for alleged profits in joint venture for acquisition, development, and sale of real estate that plaintiffs had failed to sustain their burden of proof *held*, sustained under record presented. *Bednarsh* v. *Winshall*, 355.

31. The Court of Appeals does not reverse a decree in suit for accounting based on a determination of fact, where the evidence taken in open court is conflicting and apparently evenly balanced, since the trial court has had the opportunity to weigh the testimony in the light of the appearance, manner, and deportment of the witnesses. *Id.*

32. Issue of laches is not discussed on appeal, where determination of trial court was that plaintiffs had failed to sustain their burden of proof in suit for accounting for alleged profits in a joint venture in real estate. *Id.*

33. Defendant is precluded from claiming error on appeal based on trial judge's failure to give an instruction when defendant was afforded an opportunity to object to charge given before jury retired and made no objection (GCR 1963, 516.2). *People* v. *Mallory*, 360.

34. It was not error for trial judge to refuse to give plaintiff's request to charge that defendant had ratified his wife's action

APPEAL AND ERROR—Continued.

in making revolving charge account agreement, where there is no proof that he had ratified it. *Sears, Roebuck & Company* v. *Jones*, 385.

35. Submission of case to jury on theory that merchandise purchased from plaintiff was necessaries *held*, not permissible, where plaintiff chose to stand on its declaration on a specific contract. *Id.*

36. Record in action to recover alleged balance due from defendant husband under revolving charge account agreement *held*, to support trial court's finding that defendant had not suppressed evidence material to plaintiff's case. *Id.* 386.

37. Claims of error dealing with rulings of the trial court on evidentiary matters which are unsubstantial or unsubstantiated on the record presented are not discussed. *Id.*

38. The Court of Appeals does not substitute its judgment on questions of fact in a nonjury case, where the trial court's findings are based on credible evidence and the evidence does not clearly preponderate in the opposite direction. *Beacon Plaza Shopping Center, Inc.*, v. *Tri-Cities Construction & Supply Company*, 417.

39. Court of Appeals will not substitute its judgment for trial judge who saw and heard the witnesses, and formed an opinion that their conflicting testimony was sufficient to cast doubts on their credibility. *Wechsler* v. *Zen*, 439.

40. Findings of trial judge in broker's nonjury action for commissions and advances are not disturbed, where record does not clearly preponderate against such findings that are made after listening to the witnesses of the respective parties, since the trial court has seen and heard the witnesses and evaluated their testimony (GCR 1963, 517.1). *Cataldo* v. *Winshall*, 442.

41. Denial of defendant's motion to reopen case for introduction of supplemental proofs and denial of his motion for new trial *held*, not an abuse of discretion under record presented. *Id.* 443.

42. The finding of fact in a nonjury case will not be reversed on appeal unless the evidence clearly preponderates against the finding by the trial court. *Bill* v. *Brown*, 455.

43. The Court of Appeals views the evidence and draws reasonable inferences therefrom in the light most favorable to the opposite party on motion for a directed verdict or judgment, hence, facts testified to by the plaintiff are accepted as true. *Music* v. *New York Central Railroad Company*, 467.

44. Court of appeals will not reverse on ground that defendant did not introduce credible admissible evidence to rebut presumption of due care on part of decedent, where there were no eyewitnesses to accident causing his death, jury returned general verdict and made no special findings, and evidence in record raised question of fact as to defendant's negligence. *Hall* v. *Iosco County Board of Road Commissioners*, 511.

45. Asserted error in instruction on intoxication of plaintiff's decedent will not be considered on appeal, where there was a failure to comply with court rule requiring statement of specific

APPEAL AND ERROR—Continued.

grounds for a given objection to instruction before the jury retired to consider the verdict (GCR 1963, 516.2). *Id.* 512.

46. Allegations of fact in complaint are accepted as true on appeal from order granting defendant's motion for summary judgment (GCR 1963, 117.2[1]). *Ortiz* v. *Travelers Insurance Company,* 548.

47. Claim of error in omission to give requested instruction relative to damages is not discussed, where jury's verdict constituted a finding of no liability on part of defendant. *Ruhala* v. *Roby,* 558.

48. Appeal as to defendant in whose favor judgment had been entered more than 20 days prior to filing claim of appeal *held,* not properly before Court of Appeals for review (GCR 1963, 803.1). *Donellon* v. *County of Wayne,* 576.

49. All of appellant's fact allegations must be considered as true on appeal from order granting partial summary judgment (GCR 1963, 117.2). *Minor-Dietiker* v. *Mary Jane Stores,* 585.

50. Instruction to jury must be considered in entirety when reversible error is claimed in a portion thereof. *Wallace* v. *Pere Marquette Fiberglass Boat Company, Inc.,* 605.

51. Rights under defendants' counterclaim *held,* fully protected in instructions to jury, where trial judge specifically covered the matter on 2 separate occasions, and left issue of fact as to such matter to the jury. *Id.*

52. Trial court was correct in refusing to submit a requested instruction which was in direct conflict with the plain terms of a statute (CL 1948, § 450.87). *Id.* 606.

53. Appellant may not assign error on trial court's refusal to give a requested instruction, where no specific objections were made to the instructions given to the jury on the point (GCR 1948, § 450.87). *Id.*

54. Appellants' claim that verdict was against the great weight of the evidence is rejected, where case was tried before jury, there was a direct conflict of testimony, and sufficient evidence produced for jury to render a verdict. *Id.*

55. The Court of Appeals will not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, it reaches the conclusion that it would have arrived at a different result had it been in the position of the trial court. *Wait* v. *City of Sturgis,* 615.

56. Court of Appeals is bound by trial judge's findings of fact in a nonjury case unless the contrary appears by a clear preponderance of evidence. *In re Oak Street, Pleasant View Subdivision (VanBurger* v. *Widdis),* 654.

57. Abandonment of portion of street, as determined by trial court gratuitously, since plaintiff had not sought it and no evidence was adduced to support it, is not binding on Court of Appeals. *Id.*

58. Gratuitous determination by trial court of an issue of fact not raised by pleading and as to which no evidence has been adduced, is not binding on Court of Appeals. *Id.*

APPEAL AND ERROR—Continued.

59. Trial court, on remand, is specifically ordered to retain jurisdiction of suit to impose a constructive trust upon proceeds of acquisitions by trustee who breached trust for enforcement of future orders, to hear and determine rights of plaintiffs and guardians *ad litem* for reimbursement and compensation, and for other matters properly brought before the trial court. *Sloan* v. *Silberstein*, 663.

60. Court of Appeals will not substitute its judgment for that of trial court in a nonjury case unless preponderance of evidence is clearly contrary to findings of trial judge. *Shulman* v. *Lerner*, 706.

61. Absent a showing that judgment, as a matter of law, is contrary to preponderance of evidence, Court of Appeals will not reverse in nonjury case. *Hoffmaster* v. *McNett*, 709.

62. Court of Appeals will not reverse trial judge's findings of fact in a nonjury case which are based upon weight to be accorded testimony of witnesses unless the evidence clearly preponderates in the opposite direction as trial judge saw and heard the witnesses and was best able to judge their credibility. *Id.* 710.

63. Order granting summary judgment for defendant certifying doctors and committing judge is affirmed in action to recover damages allegedly sustained by plaintiffs during commitment to a mental hospital (CLS 1961, § 330.19). *Olepa* v. *Mapletoff*, 735.

See ACCOUNTING (2); CONSTITUTIONAL LAW (3); COSTS (4, 5, 8–10, 22, 25); COURTS (10); CRIMINAL LAW (31); TRIAL (9); VENDOR AND PURCHASER (2).

APPEARANCE—See COURTS (8); NEGLIGENCE (8).

APPORTIONMENT OF AWARD—See WORKMEN'S COMPENSATION (4–8).

APPROVAL—See MUNICIPAL CORPORATIONS (1); OFFICERS (1).

ARBITRATION—See INSURANCE (8, 11).

ARCHITECTS—See CONTRACTS (19).

ARGUMENT TO JURY—See CRIMINAL LAW (55); TRIAL (3, 4, 13).

ARMED ROBBERY—See CRIMINAL LAW (46–48, 50).

ARRAIGNMENT—See CRIMINAL LAW (19, 33).

ARREST.

A police officer who believes, or has good reason to believe, that a person has committed a felony, or has good reason to believe, that a person is committing a felony in his presence, has probable cause to arrest the person without a warrant (CL 1948, § 764.15). *People* v. *Napolitano*, 601.

See APPEAL AND ERROR (1).

ARTERIOSCLEROSIS—See INSURANCE (4).

ARTICLES OF INCORPORATION—See CORPORATIONS (1); JUDGMENT (10, 11).

ASSAULT—See CRIMINAL LAW (1, 10, 24, 26, 28–30); INDICTMENT AND INFORMATION (3); RAPE (2).

ASSAULT AND BATTERY—See PHYSICIANS AND SURGEONS (2).

ASSAULT WITH INTENT TO RAPE—See WITNESSES (3, 6).

ASSETS—See PARTNERSHIP (1–3).

ASSIGNMENT—See MECHANICS' LIENS (4).

ASSIGNMENT OF COUNSEL—See CRIMINAL LAW (4).

ASSIGNMENT OF LEASE—See CONTRACTS (3).

ASSISTANCE OF COUNSEL—See CRIMINAL LAW (46).

ASSISTANT PROSECUTING ATTORNEY—See CRIMINAL LAW (46).

ASSOCIATION—See APPEAL AND ERROR (20).

ASSURED CLEAR DISTANCE AHEAD—See RAILROADS (4).

ATTEMPT—See CRIMINAL LAW (24, 29, 30).

ATTESTATION CLAUSE—See WILLS (1–5).

ATTORNEY AND CLIENT—See CRIMINAL LAW (2–4, 13, 19, 22, 40, 46, 71); EVIDENCE (4); TORTS (1); WILLS (3); WITNESSES (2, 13, 14).

ATTORNEY FEES—See APPEAL AND ERROR (1); CONSTITUTIONAL LAW (5); COSTS (12); EMINENT DOMAIN (1, 2).

AUDITOR GENERAL—See OFFICERS (1).

AUTHORITY—See CONTRACTS (13, 14); HIGHWAYS AND STREETS (2); JUDGMENT (33); PHYSICIANS AND SURGEONS (2).

AUTOMOBILE DEALER—See NEGLIGENCE (3).

AUTOMOBILES.

1. Evidence presented in actions for injuries sustained by 2-1/2 year old girl when she came into contact with the left side of defendant's southbound car after coming from behind a parked car on east side of street *held*, to present a question for jury as to whether defendant was negligent in failing to see the child in time to stop and avoid the accident, hence, directed verdict for defendant was error. *O'Dell* v. *Decker*, 14.
2. Amendment of complaint which averred the defendant's vehicle "was negligently driven into the plaintiff" and that "defendant was negligent in hiring its driver" who "was habitually negligent and was driving without a license, said license having

AUTOMOBILES—Continued.

been revoked" was not barred by the statute of limitations, where the claim sought to be asserted in the amendment arose out of the occurrence set forth, or attempted to be set forth, in the original complaint (CLS 1961, § 600.2301; GCR 1963, 118). *Huizenga* v. *Yellow Transit Freight Lines, Inc.*, 36.

3. Failure of driver of motor vehicle to keep on the right side of the road as required by statute may be excused when, through no fault of his own, his car skids across road on slippery pavement but if skidding is result of his own negligence he is not absolved from consequence thereof (CLS 1961, § 257.634). *Schmidt* v. *Robinet*, 45.

4. Evidence adduced in action against defendant driver for injuries to plaintiff passenger arising out of injuries received when defendant lost control of his car on ice-covered pavement, skidded to wrong side of street, and collided with another car, *held*, to present question for jury as to whether defendant was guilty of negligence, and to support jury's verdict for defendant. *Id.*

5. Jury's verdict for defendant driver in passenger's action against him for injuries received when his car skidded out of control on ice-covered pavement to wrong side of street where it collided with another car, *held*, not against the great weight of evidence, there being dispute in the testimony as to whether defendant had previously bumped the curb several times, had stopped at an intersection, or had slackened his speed before skidding. *Id.* 46.

6. Determination by trial court that defendant automobile dealer was owner of car under Ohio law at time it was involved in accident in this State *held*, proper, where the dealer had never given Ohio certificate of title to a previous purchaser of the vehicle, dealer had regained possession of it and sold it to driver but had not yet had the title transferred to such driver, hence, summary judgment for plaintiffs on issue of ownership in actions for damages by reason of personal injuries to plaintiff wife was proper (Page's Ohio Revised Code, § 4505.4). *Ritter* v. *Derrow Motor Sales, Inc.*, 116.

7. Instructions given in actions arising from injuries pedestrian woman received when struck by defendant's car at a street intersection in downtown section of a city *held*, to have outlined adequately the relative positions of both plaintiff and defendant, in view of all instructions given on the subjects of negligence, contributory negligence, and proximate cause and in view of failure to object to instructions of which complaint is now made. *King* v. *Daly*, 121.

8. Instruction in actions against motorist for injuries inflicted upon plaintiff wife while crossing a street at an intersection that the "mere fact that an accident has happened" is not evidence of negligence *held*, not prejudicial in view of detailed instructions which followed. *Id.*

9. Sale of stolen car by junkyard dealer to repairer, together with forged title thereto, who used it and parts of another car and resold the stolen vehicle to plaintiff was properly held

AUTOMOBILES—Continued.

to have intended that repairer represent to a prospective purchaser that the title was valid, and thereby supply the connection necessary to hold the dealer responsible to the ultimate purchaser. *Oppenhuizen* v. *Wennersten*, 289.

10. It was not error to instruct jury that if they found plaintiff's southbound driver on stop road was the sole, proximate cause of accident with defendant's westbound car on through highway at intersection protected by red flashing light in plaintiff's direction and yellow flashing light in defendant's direction, plaintiff could not recover (CLS 1961, § 257.614). *DePriest* v. *Kooiman*, 431.

11. A driver on a through highway may properly assume and act on the assumption that others using the highways will comply with the rules of the road and properly posted signs as to right-of-way but he must remain alert to the hazards surrounding him and with which he is confronting others (CLS 1961, § 257.614). *Id.*

12. Plaintiff's driver who stopped before entering intersection with through highway protected by a red flashing light had the duty thereafter not to proceed into the through highway in front of defendant's vehicle which was then and there so close as to constitute an immediate hazard (CLS 1961, § 257.614). *Id.*

13. Instructions relative to right-of-way of plaintiff's driver on stop road and defendant motorist on through highway at intersection protected by red and yellow flashing lights *held*, proper (CLS 1961, §§ 257.614, 257.627). *Id.* 432.

14. Evidence adduced in nonjury actions by 2 women and their husbands for injuries received at intersection in collision with defendants' ambulance *held*, to present a question of fact as to whether such emergency vehicle was on an emergency run to pick up a woman who had been injured in a fall and which, if true, would bring into play provisions of statutes according the ambulance traffic privileges and require others to yield right-of-way at intersections (CL 1961, §§ 257.2, 257.603, 257.632, 257.653). *Hoffmaster* v. *McNett*, 709.

See ACTION (2); CRIMINAL LAW (34, 36, 59–62, 64, 65); DAMAGES (3, 4); EVIDENCE (3, 7); FALSE PRETENSES (1, 5); FRAUD (15, 17); INSURANCE (4); MASTER AND SERVANT (2); PLEADING (4); RAILROADS (1, 4); TRIAL (4); WITNESSES (2, 7, 9, 17).

AWARD—See EMINENT DOMAIN (5).

BACK INJURY—See UNEMPLOYMENT COMPENSATION (2).

BAD FAITH—See IMPROVEMENTS (3, 4).

BANKRUPTCY—See FRAUD (1).

BANKS AND BANKING.

Clear and persuasive proof is needed to rebut statutory presumption that joint deposit became the property of survivor of the joint depositors (CL 1948, § 487.703). *Wechsler* v. *Zen*, 438.

BASE FEE—See DEDICATION (3, 6, 18).

BASKETBALL—See SCHOOLS AND SCHOOL DISTRICTS (2).

BASTARDS.

1. Support order, that accompanied order of filiation, awarding $9 a week for care of child, which did not follow uniform schedule of support payments usable in divorce cases but took into consideration the over-all condition of the parties concerned *held*, not an abuse of judicial discretion which the Court of Appeals will disturb on appeal. *Whybra* v. *Gustafson*, 516.
2. Judge should not blindly follow any support payment schedule in a filiation proceeding in abdication of his duty to exercise judicial discretion. *Id.*
3. Support payment schedule should not serve as a substitute for an examination and careful evaluation of the circumstances of each filiation proceeding. *Id.*
4. Any support order in a filiation proceeding should take into consideration the living situation of the child, the amount of care and support available to it from the mother, and the father's ability to pay. *Id.*

BEACHES—See APPEAL AND ERROR (21); COSTS (11); HIGHWAYS AND STREETS (1).

BEAUTICIANS—See NEGLIGENCE (1); NEW TRIAL (1).

BEER—See NEGLIGENCE (7).

BELL FOR OKINAWA—See LIBEL AND SLANDER (2, 5).

BENEFICIARIES—See JUDGMENT (38, 41); TRUSTS (1, 3, 4, 9, 11, 12).

BIAS—See WITNESSES (1).

BICYCLIST—See CRIMINAL LAW (62); EVIDENCE (7).

BILLS AND NOTES—See SET-OFF AND COUNTERCLAIM (2).

BINDING OVER FOR TRIAL—See CRIMINAL LAW (56, 57).

BLEACH TREATMENT—See NEGLIGENCE (1); NEW TRIAL (1).

BLOOD ALCOHOL CONTENT—See NEGLIGENCE (7).

BONDS—See SET-OFF AND COUNTERCLAIM (2).

BOTTLER—See ACCORD AND SATISFACTION (2).

BOUNDARY—See MUNICIPAL CORPORATIONS (13).

BREACH OF CONTRACT—See ACTION (2); CONTRACTS (8, 10, 11); DAMAGES (1); JUDGMENT (25, 26); VENDOR AND PURCHASER (5).

BREACH OF TRUST—See APPEAL AND ERROR (59); JUDGMENT (39, 41); LIMITATION OF ACTIONS (3); TRUSTS (1, 6–13).

BREAKING AND ENTERING—See CRIMINAL LAW (12, 32, 33).

BRIEFS—See COSTS (9, 10).

BROKERS.

1. A broker is not entitled to a commission for the sale of land until he has done the thing he has agreed to do before a revocation or withdrawal of the offer, but the owner may not defeat the broker's right to a commission by terminating the agency after the broker has procured a purchaser ready, willing, and able to buy the property on the terms suggested by the owner and has communicated that fact to the owner. *Seelye* v. *Broad*, 177.
2. An owner becomes liable to a broker for a commission when the latter produces an enforceable contract and the owner then neglects or refuses to complete the deal, sells to another, or takes such action as may prevent the completion of the transaction. *Lee* v. *Desenberg*, 365.
3. The failure of the completion of transaction by reason of owner's settlement of his suit for specific performance of contract for sale of premises which plaintiff broker had negotiated did not relieve the owner of liability for *any* of the *entire* commission plaintiff had earned under agreement permitting broker only half the commission in the event the purchaser forfeited the deposit, since the owner himself has prevented completion of the transaction. *Id.*
4. Admission of check in evidence against 1 of 4 defendants in broker's action for commissions and advances should not have been considered by trial court in rendering judgment against appellant, one of the other defendants, hence judgment against such appellant is reduced by amount of improperly allowed credit. *Cataldo* v. *Winshall*, 442.

See APPEAL AND ERROR (4); CONTRACTS (7); COSTS (17).

BROTHERS—See PARTNERSHIP (1, 3).

BUILDING—See CONTRACTS (15, 19, 20); CRIMINAL LAW (16, 17); SET-OFF AND COUNTERCLAIM (1, 2).

BURDEN OF PROOF—See ACCOUNTING (3); APPEAL AND ERROR (30, 32); DEDICATION (5); FRAUD (2); IMPROVEMENTS (3); MUNICIPAL CORPORATIONS (28); TOWNSHIPS (2).

BUSINESS AFFECTED WITH PUBLIC INTEREST—See CONSTITUTIONAL LAW (6); HEALTH (6).

CANADA—See EVIDENCE (3).

CANALS—See WATER AND WATER COURSES (3).

CANCELLATION OF INSURANCE—See MASTER AND SERVANT (2).

CANCER—See PHYSICIANS AND SURGEONS (1).

CARPENTRY LABOR—See CONTRACTS (11).

CERTIFICATE OF TITLE—See AUTOMOBILES (6).

CERTIFIED LETTER—See MECHANICS' LIENS (3).

CERTIORARI.

The writ of certiorari has been superseded by the writ of superintending control (GCR 1963, 711). *Domestic Finance Company* v. *Purser*, 300.

CHANCERY CASES—See APPEAL AND ERROR (7, 19, 20).

CHANGE OF CIRCUMSTANCES—See WORKMEN'S COMPENSATION (13).

CHARGE ACCOUNT—See APPEAL AND ERROR (34, 36); CONTRACTS (13, 14).

CHARGES—See TOWNSHIPS (4–6).

CHARTERS—See APPEAL AND ERROR (2); COSTS (1); DECLARATORY JUDGMENT; MUNICIPAL CORPORATIONS (1–3, 20–23).

CHARTER TOWNSHIP—See TOWNSHIPS (4, 6).

CHECKS—See BROKERS (4); FALSE PRETENSES (2).

CHEMIST—See CRIMINAL LAW (36); TRIAL (4).

CIRCUIT COURT—See APPEAL AND ERROR (26); CONSTITUTIONAL LAW (3); COSTS (7); COURTS (3); EVIDENCE (4); JUDGMENT (19, 20); VENDOR AND PURCHASER (2); WILLS (5).

CITY CLERK—See EVIDENCE (6).

CITY COMMISSION—See MUNICIPAL CORPORATIONS (22, 23).

CITY-OWNED PROPERTY—See MUNICIPAL CORPORATIONS (21).

CIVIL ENGINEERS—See CONTRACTS (19).

CIVIL SERVICE—See COSTS (1); MUNICIPAL CORPORATIONS (1, 2).

CLAIM OF APPEAL—See APPEAL AND ERROR (27, 48); JUDGMENT (19, 20).

CLASS ACTION—See APPEAL AND ERROR (21); COSTS (11); HIGHWAYS AND STREETS (1).

CLASSIFICATION—See MUNICIPAL CORPORATIONS (26–31).

CLOSING ARGUMENT—See CRIMINAL LAW (17).

CODEINE—See SEARCHES AND SEIZURES (2).

COERCION—See STATUTES (11).

COLLATERAL ATTACK—See WORKMEN'S COMPENSATION (3).

COLLATERAL MATTER—See WITNESSES (15, 16).

COLOR OF LAW—See JUDGES (1); OFFICERS (2); PHYSICIANS AND SURGEONS (4).

COLOR OF TITLE—See IMPROVEMENTS (1, 2).

COLOR TREATMENT—See NEGLIGENCE (1); NEW TRIAL (1).

COMITY—See JUDGMENT (3).

COMMISSIONS—See APPEAL AND ERROR (40); BROKERS (1–4); CONTRACTS (7); COSTS (17).

COMMITMENT—See APPEAL AND ERROR (63); EXTRADITION (1, 2); HABEAS CORPUS; PHYSICIANS AND SURGEONS (4).

COMMON ISSUE OF LAW—See PARTIES (2, 3).

COMMON LAW—See RAILROADS (5).

COMMON PLEAS COURT OF DETROIT—See APPEAL AND ERROR (16–18); COSTS (8); COURTS (2–4, 6); MUNICIPAL CORPORATIONS (4).

COMPENSATION—See APPEAL AND ERROR (59); CONSTITUTIONAL LAW (5); DAMAGES (6, 7); EMINENT DOMAIN (3); IMPROVEMENTS (1–3, 5); TORTS (1).

COMPLAINT—See JUDGMENT (27).

COMPLETION OF DEAL—See BROKERS (2, 3).

COMPROMISE AND SETTLEMENT.

1. Injured party's duty of disclosure to defendant bottler or manufacturer of ginger ale, that settlement agreement had been previously arrived at with insurer of grocer where loss of eye occurred when ginger ale bottle exploded, was a duty, if one existed, owed to the bottler that cannot inure to the benefit of the grocer's insurer in action against it on the settlement agreement it had made with plaintiff. *Ortiz* v. *Travelers Insurance Company*, 549.

2. A plaintiff's damages is but one of the many factors considered in making a settlement of an action for personal injuries. *Id.* 550.

See ACCORD AND SATISFACTION (2); FRAUDS, STATUTE OF; JUDGMENT (33, 35).

COMPUTATION OF TIME—See MUNICIPAL CORPORATIONS (10).

CONCLUSIONS—See CORPORATIONS (1); JUDGMENT (9–11, 42, 43).

CONDEMNATION PROCEEDINGS—See COSTS (12); EMINENT DOMAIN (1, 2, 4–7).

CONFESSION—See CRIMINAL LAW (8, 37, 46, 47, 49).

CONJECTURES—See ACTION (3).

CONSENT—See COURTS (8); PHYSICIANS AND SURGEONS (2, 3); TRUSTS (11).

CONSENT JUDGMENT—See ACCORD AND SATISFACTION (2); JUDGMENT (34, 35).

CONSERVATION DEPARTMENT—See DEDICATION (18, 19).

CONSIDERATION—See CONTRACTS (6); LANDLORD AND TENANT (1, 4); SET-OFF AND COUNTERCLAIM (2).

CONSISTENT STATEMENTS—See WITNESSES (5, 6).

CONSOLIDATION—See CORPORATIONS (3, 4).

CONSTITUTIONAL LAW.

1. The prohibition against arbitrary deprivation of life, liberty, or property by a State and requirement of equal and impartial justice under the law, contained in the Constitution of the United States, does not limit the powers of a State to deal with crimes committed within its own borders or with the punishment (US Const, Am 14). *People* v. *Pate*, 66.
2. A provision of the Constitution could not mean one thing at the time of its adoption, and another thing at a subsequent time; and, hence, it is to be construed with reference to the state of the law or custom at the time of its adoption. *Walber* v. *Wayne Circuit Judge*, 145.
3. The term *appeal*, as used in provision of the Constitution according one accused of crime an appeal as a matter of right, as applied to a conviction of person charged with violation of a city ordinance in the recorder's court of Detroit, a court of record, means an appeal to the Court of Appeals and not to the circuit court of Wayne county (Const 1963, art 1, § 20; PA 1961, No 236, § 308, as added by PA 1964, No 281; GCR 1963, 806.1). *Id.*
4. Local conditions and interests demand different regulations than are required for statewide observance and violations thereof relating to acts and omissions not embraced in the general criminal legislation of the State may be treated differently than violations of the general laws without offending the equal protection of laws provisions of the Federal and State Constitutions (US Const, Am 14; Mich Const 1908, art 1, § 2). *Id.*
5. Attorney fees are not embraced within *just compensation* for land taken by eminent domain (US Const, Ams 5, 14; Mich Const 1908, art 13, § 1; Const 1963, art 10, § 2). *City of Muskegon* v. *Slater*, 235.
6. The State has power, under the police power, to regulate businesses affected with a public interest, where the regulation may reasonably promote the public welfare. *Moorman* v. *State Health Commissioner*, 447.
7. The equal protection clauses of the State and Federal Constitution do not take from the municipality the power to classify users of sewer service supplied by the municipal corporation, but admits of the exercise of a wide discretion, avoiding what is done only when it is without any reasonable basis and therefore is purely arbitrary (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2). *Land* v. *City of Grandville*, 681.

See COSTS (22); CRIMINAL LAW (2, 3, 13, 49); MUNICIPAL CORPORATIONS (12, 18, 26, 27, 29–31); SEARCHES AND SEIZURES (2); STATUTES (8, 9, 11); WORKMEN'S COMPENSATION (7, 8).

CONSTRUCTION—See INSURANCE (12).

CONSTRUCTION CONTRACTS—See CONTRACTS (15, 17, 19); SET-OFF AND COUNTERCLAIM (1, 2).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (2).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (1, 16, 18); INDEMNITY; JUDGMENT (4).

CONSTRUCTION OF COURT RULES—See COURTS (11); IMPROVEMENTS (4).

CONSTRUCTION OF COVENANTS—See COVENANTS (1, 2).

CONSTRUCTION OF DEED—See DEEDS (2).

CONSTRUCTION OF HOME-RULE ACT—See MUNICIPAL CORPORATIONS (19).

CONSTRUCTION OF POLICY—See INSURANCE (1, 6, 7).

CONSTRUCTION OF SIDEWALKS—See MUNICIPAL CORPORATIONS (6).

CONSTRUCTION OF STATUTES—See CORPORATIONS (5); COSTS (18); JUDGMENT (1); MECHANICS' LIENS (2); MUNICIPAL CORPORATIONS (8, 13, 14); STATUTES (1–3, 12–14); WORKMEN'S COMPENSATION (6).

CONSTRUCTION SUPERVISOR—See CONTRACTS (19).

CONSTRUCTIVE FRAUD—See TRUSTS (6).

CONSTRUCTIVE TRUSTS—See JUDGMENT (38, 41); TRUSTS (7, 8).

CONSTRUCTIVE VOLUNTARY LEAVING WORK—See UNEMPLOYMENT COMPENSATION (3).

CONTIGUOUS LOTS—See EMINENT DOMAIN (4).

CONTRACTORS—See CONTRACTS (20); MECHANICS' LIENS (4); SET-OFF AND COUNTERCLAIM (2).

CONTRACTS.

1. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties, all other rules being subordinate thereto. *Teachout* v. *Maiers*, 69.
2. Parol evidence may be admitted to show preliminary negotiations, not to vary or contradict the plain terms of an ambiguous instrument, but to aid the court in determining the intent with which the words were used. *Id.*
3. Parol evidence was properly admitted in suit seeking the alternative relief of specific performance of an agreement to assign lease of premises on which restaurant business was being conducted or rescission and return of sums paid, in order to show true intent of the sales agreement was that the lease involved was an oral lease. *Id.*
4. Any material departure from the terms of an offer invalidates the offer as made and results in a counter proposition which, unless accepted, cannot be enforced. *Seelye* v. *Broad*, 177.

CONTRACTS—Continued.

5. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. *Id.*
6. A written offer purporting on its face to be irrevocable for 1 day is terminable at any time, where there is not shown to be any consideration for the irrevocability of the unilateral contract. *Id.*
7. Finding of trial judge that defendant property owners had, in good faith, effected a revocation of their offer to sell their property by selling it to another party, before plaintiff had effected an acceptance of their offer to sell and had communicated such fact to defendants *held*, sustained under record presented in broker's action for commission. *Id.*
8. Record in subcontractors' nonjury action against contractor for construction of low-rent housing project *held*, to support trial court's finding that defendant refused to allow plaintiffs to continue on the job after they had failed to meet a payroll which defendant paid, such refusal constituting the alleged breach of contract relied upon by plaintiff as constituting basis for recovery. *Baith* v. *Knapp-Stiles, Inc.*, 305.
9. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform. *Id.*
10. Determination of whether recovery for failure of performance of a contract by a defendant is to be denied plaintiff by reason of a substantial prior breach by plaintiff is tested by factors of (a) the extent to which defendant will obtain the substantial benefit which he could have reasonably anticipated, (b) the extent to which defendant may be adequately compensated in damages for lack of complete performance by plaintiff, (c) the extent to which plaintiff has already partly performed or made preparations for performance, (d) the greater or lesser hardship on the plaintiff in terminating the contract, (e) the wilful, negligent, or innocent behavior of the plaintiff, and (f) the greater or lesser uncertainty that plaintiff will perform the remainder of the contract. *Id.*
11. Plaintiff subcontractors' breach of their contract to supply carpentry labor for construction of low-rent housing project to defendant contractor *held*, so substantial as to preclude recovery from defendant, where plaintiffs' failure to meet their payroll was met by defendant's payment thereof and removal of plaintiffs from project, where it is found that defendant would obtain no substantial benefit until the work is completed, the only adequate compensation for defendant is completion of the work, plaintiffs had been fully paid for the duration of their performance, there was less hardship on them by reason of such payment, the cost of completion was more than they had coming, their behavior was wilful, and there was less certainty of performance of the remainder because of their questionable financial position. *Id.* 306.
12. There is an implied agreement that the promisor will place no obstacle in the way of the happening of a future event upon

CONTRACTS—Continued.

the occurrence of which the contract is performable, particularly where it is dependent in whole or in part on the promisor's own act. *Lee* v. *Desenberg*, 365.

13. Authorization or ratification of wife's action in signing a revolving charge account agreement *held*, not shown in record in action against husband for balance alleged to be due under the agreement. *Sears, Roebuck & Company* v. *Jones*, 385.

14. Trial court's limitation of jury decision to question of authorization of the revolving charge account contract by defendant *held*, not error, where there is no proof of authorization or proof from which authorization might be inferred. *Id.*

15. Finding of trial court that shopping center owner had contracted to do the foundation work upon which defendant was to erect steel structure and that the inadequacy of the piling was due to derelictions of plaintiff, not defendant *held*, amply supported by the evidence. *Beacon Plaza Shopping Center, Inc.*, v. *Tri-Cities Construction & Supply Company*, 415.

16. Instruments executed at the same time by the same parties, for the same purpose, and in the course of the same transaction, will be read and interpreted together as one instrument. *Id.* 416.

17. Contracts whereby defendant was to erect a steel building and to act as a contractor for plaintiff and a subcontract between defendant and a lumber company wholly owned by the same person who owned plaintiff, which were executed simultaneously evidenced an intent to impose responsibility for the construction of the shopping center upon plaintiff with the exception of the furnishing and erection of the steel building. *Id.*

18. Evidence may be admitted on the practical interpretation given simultaneously executed documents, where the proper interpretation of them as to the responsibility of the parties thereunder is in dispute and the terms are not clear. *Id.*

19. Inadequacy of piling by reason of insufficient number, placement, and length to reach solid ground or bearing to support steel structure defendant had contracted to supply and erect was properly found to be a dereliction of plaintiff, not defendant, where latter duly reported to plaintiff owner when pile drivers discovered their 20-foot lengths were not reaching supporting subsoil and installation was completed pursuant to directions of plaintiff's construction supervisor without benefit of architect and civil engineer as to on-the-job inspection, hence defendant may not be held responsible for ensuing settlement of building. *Id.*

20. Plaintiff owner may not hold a defendant contractor under a building contract liable for defective workmanship which was the responsibility of owner's sole stockholder by reason of a subcontract imposed on the contractor as a condition of granting the contract. *Id.*

21. The waiver of a provision in a contract is a matter of intent to be tried by the trier of the facts. *Bielski* v. *Wolverine Insurance Company*, 501.

CONTRACTS—Continued.

See ACCORD AND SATISFACTION (1); ACTION (2); APPEAL AND ERROR (35); DAMAGES (1); FRAUD (11); INDEMNITY; INSURANCE (1); JUDGMENT (4, 25, 26); VENDOR AND PURCHASER (5).

CONTRIBUTION—See STATUTES (7).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (7); NEGLIGENCE (7); RAILROADS (4, 6).

CONTROL—See HEALTH (3, 4).

CONVERSION—See ACTION (2); JUDGMENT (25, 26); TROVER AND CONVERSION.

CONVERSION OF INSURANCE—See INSURANCE (13).

CONVEYANCE—See DEDICATION (2, 3).

CONVICTION—See COSTS (7); CRIMINAL LAW (53).

CORES—See UNEMPLOYMENT COMPENSATION (2).

CORPORATIONS.

1. Holders of stock certificates in defendant corporation, which were not redeemed at times provided therein and in the articles of incorporation for their redemption, were properly granted summary judgments, where defendant's affidavit was either conclusionary, in that he stated his answer raised material questions of fact, or upon information and belief that surplus was insufficient, since the affidavits were not made on personal knowledge nor did they set forth such facts with particularity as would be admissible as evidence to deny the grounds stated in the motion (GCR 1963, 116.4, 117.3). *Dionne (Garavaglia)* v. *Pierson Contracting Company*, 134.
2. Presumption that officer of corporation was guilty of wilful negligence in refusal to file annual corporate report is open to rebuttal and is not conclusive (CLS 1961, § 450.87). *Wallace* v. *Pere Marquette Fiberglass Boat Company, Inc.*, 606.
3. Question of merger or consolidation of defendant corporations was a question of fact for the jury even though steps required by statute to complete a merger or consolidation may not all have been taken (CL 1948, § 450.52 *et seq.*). *Id.*
4. Court correctly instructed jury on factors to be considered in determining whether or not a merger or consolidation had taken place, where steps required by statute to complete a merger or consolidation were not taken, and he need not limit the instruction to the statute involved (CL 1948, § 450.52 *et seq.*). *Id.*
5. Judgment against corporate officers based upon statute imposing liability on officers of corporations "during the period of such neglect or refusal" to file the annual report should be prorated as to the individual liability of such officers based upon their terms in office, since the statute, being penal in its nature, must be strictly construed (CL 1948, § 450.87). *Id.*

See JUDGMENT (10, 11, 40); PARTIES (1); TRUSTS (6, 13); VENDOR AND PURCHASER (5).

CORRECTION OF ERRORS—See ACKNOWLEDGMENT; CRIMINAL LAW (17).

CORROBORATION—See RAPE (1, 6).

CORRUPTION—See JUDGES (3).

COSTS.

1. No costs are allowed in suit for declaration of rights by policemen and firemen under charter of newly created city with respect to civil service and pension plan, a public question being involved (CLS 1961, § 38.506; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2). *Cockerline* v. *City of Warren*, 9.

2. No costs are allowed in action presenting a novel question as to enforcement of a judgment for alimony of a court of the Province of Ontario, Canada, a public question being involved. *Growe* v. *Growe*, 26.

3. Costs are ordered to abide determination of trial court on remand for reconsideration of denial of plaintiff's motion to amend complaint and grant of defendant's motion for summary judgment in the light of recent interpretation by the Supreme Court of pertinent court rule (CLS 1961, § 600.5805; GCR 1963, 117, 118). *Hwizenga* v. *Yellow Transit Freight Lines, Inc.*, 37.

4. Costs in action under death act wherein defendant impleaded her late husband's employer as a third-party defendant, are awarded to plaintiff on appeal of defendants from denial of their motion to add a count based on negligence of the third-party defendant and latter cross-appealed from denial of its motion for summary judgment, and both denials are affirmed, plaintiff alone having prevailed in full (CL 1948, § 691.581 *et seq.*). *Vannoy* v. *City of Warren (Johnson & Anderson, Inc., v. Nelson M. Sharrow Excavating Co., Inc.)*, 79.

5. No costs are allowed on appeal where order denying defendant's motion for summary judgment is affirmed and order granting plaintiff's motion for summary judgment is reversed, since neither party has prevailed in full (GCR 1963, 117). *Lee* v. *Fidelity Life & Income Mutual Insurance Company*, 83.

6. No costs are allowed in habeas corpus proceeding by person charged with parole violation who had not been accorded a hearing by members of the parole board, a public question being involved (CLS 1961, § 791.240). *In re Lane*, 141.

7. No costs are awarded in mandamus proceeding to compel circuit court to review *de novo* plaintiff's conviction of violation of city ordinance, a public question being involved (Detroit Ordinances 39-1-40, 39-1-42). *Walber* v. *Wayne Circuit Judge*, 146.

8. No costs are allowed on city's appeal in action against it in common pleas court of Detroit, where that court has no jurisdiction over the subject matter of the action, a public question being involved (CLS 1961, § 728.1). *Millman Brothers, Inc.*, v. *City of Detroit*, 162.

COSTS—Continued.

9. No costs are allowed appellee upon dismissal of appeal, where appellee had failed to file a brief. *Solner Investment Company* v. *Thoms*, 189.

10. No costs are allowed appellee upon dismissal of appeal, where appellee had failed to file a brief. *Sears, Roebuck & Company* v. *Holmes*, 191.

11. No costs are allowed in class action by owners of lots abutting a boulevard along a shore of an inland lake to restrain defendant public authorities from converting the premises into a public beach, a public question being involved. *Michigan Central Park Association* v. *Roscommon County Road Commission*, 193.

12. No costs are allowed on appeal to Court of Appeals in condemnation proceeding for urban renewal project from order allowing $1,250 attorney fee, where pertinent statute limited such fee to $25 (CL 1948, § 213.37). *City of Muskegon* v. *Slater*, 235.

13. No costs are allowed on appeal in proceeding to reduce workmen's compensation awarded to claimant with dependents consisting of a married daughter and the daughter's 3 minor children upon the daughter's divorce and remarriage and reduction in proportion of the employee's proportion of support to less than 50% for the children, a public question being involved (CLS 1961, § 412.9). *Pendell* v. *Northwestern Leather Company*, 250.

14. No costs are allowed in action to enjoin defendant county and State officers from using and possessing certain areas in summer resort subdivision which had been dedicated to the public for park purposes, a public question being involved. *West Michigan Park Association* v. *Department of Conservation*, 257.

15. No costs are allowed on appeal in nonjury action for negligence, where judgment of $500 is reduced to disallow recovery of so-called emotional damages, since neither party has prevailed. *Manie* v. *Matson Oldsmobile-Cadillac Company*, 316.

16. No costs are allowed on appeal in proceeding to compel city to install sidewalks on streets adjacent to public school, a public question being involved. *Keller* v. *City of Southfield*, 323.

17. No costs are allowed, where plaintiff's $12,666.34 judgment against 1 of 4 defendants in broker's nonjury action for commissions and advances is ordered reduced by $3,000, since neither party has prevailed. *Cataldo* v. *Winshall*, 443.

18. No costs are allowed in action for declaratory judgment by owners of land who used it to park 19 occupied trailer coaches, where construction of statutes is involved (PA 1958, No 172; PA 1959, No 243, as amended by PA 1963, No 161). *Moorman* v. *State Health Commissioner*, 447.

19. No costs are allowed in action to recover damages from city for personal injuries sustained by reason of defective sidewalk in defendant city, a public question being involved in deter-

COSTS—Continued.

mining whether statutory requirement that notice of claim be served within 60-day period that ended on a Sunday was waived by city ordinance adopted prior to happening of injury (CL 1948, § 242.8; Detroit Municipal Code, pt 2, chap 1, § 1–1–2). *Murphy* v. *City of Detroit*, 474.

20. No costs are allowed in action against grocer's estate and his insurer on compromise agreement for loss of eye sustained when ginger ale bottle exploded, where summary judgment in favor of grocer's estate is affirmed, and summary judgment against his insurer who had effected the agreement is reversed, since neither side has fully prevailed. *Ortiz* v. *Travelers Insurance Company*, 550.
21. No costs are allowed on appeal in action against county employees for wrongful death of plaintiff's decedent, where rule of governmental immunity from tort liability has been abrogated, a public question being involved. *Donellon* v. *County of Wayne*, 576.
22. No costs are allowed on appeal in suit involving extension of operation of municipally-owned transportation system into noncontiguous suburbs, a public question being involved (Const 1963, art 7, § 24; CLS 1961, § 117.4f). *Northville Coach Lines, Inc.*, v. *City of Detroit*, 592.
23. No costs are allowed on appeal, where judgment is affirmed in part and reversed in part, neither side prevailing in full. *Wallace* v. *Pere Marquette Fiberglass Boat Company, Inc.*, 606.
24. No costs are allowed in action to enjoin proceeding with a special assessment district for redevelopment of downtown business area and to declare rights relative to validity of the district, a public question being involved. *Wait* v. *City of Sturgis*, 615.
25. No costs are allowed on defendant's appeal or on plaintiffs' cross-appeal in action for breach of duty by trustee upon affirmance in part and reversal as to part of lower court judgment, as neither party has prevailed in full. *Sloan* v. *Silberstein*, 663.
26. No costs are allowed in action for declaration of rights with respect to charges for sewer service to trailer court and motel, a public question being involved. *Land* v. *City of Grandville*, 683.

See APPEAL AND ERROR (1).

COUNTER AFFIDAVITS—See JUDGMENT (15).

COUNTERCLAIM—See APPEAL AND ERROR (51).

COUNTIES.

Summary judgment for defendant county employees in action for wrongful death of plaintiff's decedent, based on governmental immunity of county and its employees when carrying out governmental functions, *held*, improperly entered, where defense of governmental immunity has been abrogated by judicial decisions. *Donellon* v. *County of Wayne*, 576.

See COSTS (14, 21); DEDICATION (2, 6, 17–19).

COUNTY ROAD COMMISSION—See EMINENT DOMAIN (8).

COURT OF APPEALS—See APPEAL AND ERROR (1, 3, 4, 13, 16, 17, 19, 20, 22, 23, 31, 38, 39, 43, 44, 48, 55–58, 60, 62); BASTARDS (1); CONSTITUTIONAL LAW (3); COSTS (12); CRIMINAL LAW (11, 31, 51); FRAUD (1); MUNICIPAL CORPORATIONS (11, 23); NEGLIGENCE (10).

COURTROOM—See WITNESSES (12).

COURT RULES—See APPEAL AND ERROR (4, 13, 16–18, 26, 27, 33, 40, 45, 46, 48, 49, 53); AUTOMOBILES (2); CERTIORARI; CORPORATIONS (1); COSTS (3, 5); COURTS (11); CRIMINAL LAW (2–4, 6–8, 10, 18, 19, 21–23, 32, 33, 49, 72–75); DAMAGES (2); DEPOSITIONS; EASEMENTS (3); ELECTRICITY; IMPROVEMENTS (3, 4); JUDGMENT (5–16, 19, 20, 27–33, 36, 42, 43); MASTER AND SERVANT (2); MECHANICS' LIENS (4); MUNICIPAL CORPORATIONS (6); NEGLIGENCE (8, 9); PARTIES (1–3); PLEADING (1, 2, 4, 6, 7); TRIAL (5–7); WITNESSES (19).

COURTS.

1. A rule of law relative to support of children that was established by the Supreme Court upwards of 75 years ago, reiterated by the Supreme Court upwards of 45 years ago, and not changed by the legislature will be recognized as controlling recovery, where applicable. *Growe* v. *Growe,* 26.
2. Jurisdiction of the common pleas court of Detroit is delineated by statute, hence, any case heard before that court must be within its enumerated powers and rights to hear (CLS 1961, § 758.1). *Millman Brothers, Inc.,* v. *City of Detroit,* 161.
3. The common pleas court of Detroit has concurrent jurisdiction with the circuit court in civil actions, wherein the debt or damages do not exceed $3,000 including actions against municipal public utilities operated as if privately owned but excepting other actions against municipal corporations (CLS 1961, § 728.1). *Id.*
4. The department of public works, including its snow and ice removal activities, is an integral part of the city structure and is not run as if privately owned, hence, the common pleas court would not have jurisdiction over an action against such department by virtue of jurisdiction conferred by statute (CLS 1961, § 728.1). *Id.*
5. Municipal courts of this State are not courts of general jurisdiction, but derive their power only from enumeration within the statutes. *Id.* 162.
6. The common pleas court of Detroit may not expand or contract, enlarge or diminish, the jurisdiction conferred upon it by statute, by rule or otherwise (CLS 1961, § 728.1). *Id.*
7. Any action, except to dismiss, a court may take with respect to subject matter before it of which it does not have jurisdiction is absolutely void. *Id.*
8. A general appearance, answer, demand for jury trial, or participation in the trial itself, where the action is absolutely void by reason of lack of jurisdiction of the court over the subject matter, can never constitute a waiver, or consent to jurisdiction by either party. *Id.*

COURTS—Continued.

9. Jurisdiction of the subject matter of a suit cannot be conferred upon a court by conduct of litigants. *Id.*
10. Question of jurisdiction of the subject matter can be raised on appeal, or in any proceedings wherein the enforcement of the action may be sought. *Id.*
11. The Court of Appeals will adopt an interpretation of a court rule which preserves the substantive rights of the parties and merely regulates the procedure for enforcing them, where to construe it otherwise is to give court rule effect of changing substantive rights (GCR 1963, 754.5[3]). *Hogerheide* v. *Hickey*, 580.

See COSTS (8); COUNTIES; DEDICATION (1, 19); MUNICIPAL CORPORATIONS (4); WORKMEN'S COMPENSATION (11).

COVENANTS.

1. Construction of a covenant by examination of only the words used is proper when their meaning is clear and unambiguous. *Sun Oil Company* v. *Trent Auto Wash, Inc.*, 389.
2. Covenant will be construed in light of circumstances surrounding its execution, the relation of the parties, the nature of the subject matter, and the apparent purpose in making the agreement only when the language is ambiguous, but these considerations will not be applied when the language of the agreement leaves no doubt as to the meaning of the covenant. *Id.*
3. Covenant will be determined as personal or to run with land in light of the intent of the parties. *Id.* 390.
4. Covenant restricting property to prohibit sale and storage of gasoline and petroleum products *held*, not ambiguous and meant to bind subsequent grantees even though words, "heirs and assigns," are not used. *Id.*

CREDIT RATING—See ELECTRICITY.

CRIMINAL LAW.

1. Defendant who so conducted himself during prosecution on charges of assault with intent to commit rape and an attempt to procure an act of gross indecency between male and female persons as to make it necessary for the trial court to have defendant be forcefully clothed and shackled to a chair, may not complain if such conduct prejudiced the jury, since he cannot claim the benefit of error he himself occasioned (CLS 1961, §§ 750.85, 750.338). *People* v. *Henley*, 54.
2. The Constitution of the United States and the Constitution and statutes of this State do not oblige one charged with crime to have a lawyer, and, if the defendant knows what he is doing and chooses not to have an attorney, he may waive assistance of counsel (US Const, Am 6; Mich Const 1963, art 1, § 13; CL 1948, § 763.1; GCR 1963, 785). *Id.*
3. A defendant in a prosecution for crime has a right to discharge his attorney, whether the attorney be of his own choosing or an attorney appointed by the court to defend him,

CRIMINAL LAW—Continued.

and proceed with the trial in person, hence, the trial court committed reversible error in refusing to permit defendant to discharge his attorney and proceed with the trial representing himself (US Const, Am 6; Mich Const 1963, art 1, § 13; CL 1948, § 763.1; GCR 1963, 785). *Id.* 55.

4. The obligation of the State to provide counsel for a defendant who is charged with felony has been satisfied by the appointment of 3 counsel who were discharged by defendant or allowed to withdraw for reasons attributed to him, hence, where new trial is ordered, no counsel need be assigned (GCR 1963, 785). *Id.*

5. Contention that trial court committed error in failing to examine defendant as to whether undue influence had been exerted upon him in eliciting a plea of guilty *held,* untenable, where it is clear the trial judge satisfied himself that the plea was voluntary (CL 1948, § 768.35). *People* v. *Kearns,* 60.

6. A trial judge must examine one accused of crime and who pleads guilty thereto as to whether the plea was made freely, that it was made with full knowledge of the nature of the accusation, and that the plea was made without undue influence or promise of leniency (CL 1948, § 768.35; GCR 1963, 785.3[2]). *Id.*

7. The form and manner of the examination which a trial judge must make before accepting a plea of guilty has not been prescribed, but is left to his discretion, to be exercised by him in the manner best suited to the parties and the offense (CL 1948, § 768.35; GCR 1963, 785.3[2]). *Id.* 61.

8. One who pleads guilty to a crime charged against him and admits that the confession he had made was of his own free will would be precluded from claiming the trial judge needed to question him specifically as to whether there was any undue influence, for a voluntary confession indicates there was no undue influence (CL 1948, § 768.35; GCR 1963, 785.3[2]). *Id.*

9. The withdrawal of a plea of guilty on motion for new trial after sentence rests upon the sound discretion of the trial judge. *Id.*

10. Record in prosecution for robbery armed in which defendant pleaded guilty to included offense of assault with intent to rob being armed, and that trial court ascertained plea had been made voluntarily and sentenced defendant to 8 to 10 years in prison *held,* not to show there was an abuse of discretion in denying subsequent motion for new trial (CL 1948, §§ 750.89, 768.35; CLS 1961, § 750.388; GCR 1963, 785.3[2]). *Id.*

11. The Court of Appeals does not have supervisory control over the punishment imposed by a trial court in the exercise of the wide discretion accorded it, when a sentence has been imposed within the maximum provided by statute (CL 1948, § 769.1). *People* v. *Pate,* 66.

12. Sentence of 5 to 10 years imposed after defendant pleaded guilty to breaking and entering, a crime carrying a maximum penalty of 10 years, *held,* neither arbitrary nor in violation of defendant's rights, where it was his second felony and he

CRIMINAL LAW—Continued.

was on probation at the time the second offense was committed, and trial court recommended the minimum (CL 1948, § 750-.110). *Id.*

13. Interrogation of defendant by police which resulted in a statement by him that was later introduced in evidence on trial for statutory rape *held,* not to have deprived him of his constitutional rights, where he had previously consulted counsel and sought the interview, although his counsel was not present thereat (US Const, Am 6; Mich Const 1908, art 2, § 19; Mich Const 1963, art 1, § 20). *People* v. *Donald D. Williams,* 91.

14. The trial judge is the trier of the facts in a nonjury trial of a prosecution for crime and may give such weight to the testimony as it is entitled to in his opinion. *People* v. *Doris White,* 104.

15. Evidence presented in prosecution of appellant and another for larceny by trick *held,* sufficient to support finding of guilt by trial court sitting without a jury, notwithstanding claim on part of appellant that 80-year-old complainant, having been ill, was unable to identify defendant (CLS 1961, § 750.356). *Id.*

16. Verdict of guilty in prosecution for larceny in a building *held,* supported by ample proof as to elements of the alleged crime and identity of the alleged defendant and sufficient to permit jury to find defendant guilty beyond a reasonable doubt of the crime charged (CL 1948, § 750.360). *People* v. *Floyd,* 168.

17. Inadvertent misstatement of prosecutor as to whether defendant had a mustache, made in his closing argument in prosecution for larceny in a building *held,* corrected when objected to by defense counsel and not to have resulted in prejudicial error in view of the subsequent statement (CL 1948, § 750.360). *Id.*

18. All of the proceedings involved in the sentencing of a defendant who has pleaded guilty to crime should be recorded, whether in court or in conference in chambers and thereby enable appellate courts to examine a record on which they can judge compliance with pertinent court rule requiring the trial court to inform the accused of the nature of the accusation and consequences of his plea (GCR 1963, 785.3[2]). *People* v. *Johnson,* 182.

19. Record on application for delayed appeal, which shows trial court had failed to inform defendant of the nature of the charges of forgery and uttering and publishing a forged instrument before accepting plea of guilty and the effect of such plea at second arraignment where defendant then had no counsel, justified peremptory order setting aside plea of guilty and vacating sentence, the mandatory provisions of the pertinent court rule not being supplied by defense counsel's waiver of the reading of the information at the first arraignment (CL 1948, §§ 750.248, 750.249; GCR 1963, 785.3[2], 806.7). *Id.*

20. The withdrawal of a plea of guilty after sentence rests upon the sound discretion of the trial judge. *People* v. *Wolschon,* 186.

CRIMINAL LAW—Continued.

21. Trial court in prosecution for murder wherein defendant pleaded guilty to manslaughter in the presence of counsel, defendant was exhaustively examined by court before acceptance of the plea and court properly apprised himself that the plea had been made freely, voluntarily, and without undue influence, then sentenced defendant to 7–1/2 to 15 years *held*, not to have abused his discretion in denying motion to withdraw plea of guilty after sentence (CL 1948, §§ 750.316, 750.321, 768.35; GCR 1963, 785.3[2]). *Id.*

22. Trial court committed reversible error in prosecution of 16-year-old minor for uttering and publishing a forged check and forgery, where defendant was told he might hire counsel or have one furnished to him and, without having an opportunity to request counsel, was asked to plead, especially where record shows a lack of comprehension of the proceedings on the part of the immature defendant (CL 1948, §§ 750.248, 750.249; GCR 1963, 785.3). *People* v. *Atkins*, 199.

23. Court's statement to 16-year-old defendant in prosecution for uttering and publishing a forged check and for forgery that he would be dealt with according to law in such kind of a case *held*, insufficient compliance with requirement of court rule that trial court inform the defendant of the consequences of plea of guilty, it being requisite that the defendant be informed of the elements of the crime and the possible minimum and maximum sentences for the crimes charged (CL 1948, §§ 750.248, 750.249; GCR 1963, 785.3). *Id.*

24. Refusal to strike claimed unresponsive answers of mother of allegedly assaulted 10-year-old girl as mother testified in trial of defendant on charge of assaulting and attempting to take indecent and improper liberties with a child under the age of 16 years *held*, proper, where the obviously responsive parts of the answers were followed by explanation not connecting the defendant more than the direct evidence (CLS 1961, § 750.336). *People* v. *Carr*, 222.

25. A judgment or verdict in a criminal case may not be set aside or reversed or new trial granted on the ground of misdirection of the jury, improper admission or rejection of evidence, or error as to any matter of procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice (CL 1948, § 769.26). *Id.*

26. Explanatory portions of answers of mother of allegedly assaulted 10-year-old girl involved in prosecution of defendant on charge of assaulting and attempting to take indecent and improper liberties with a child under the age of 16 years, even if irrelevant and unresponsive, *held*, not reversibly prejudicial, when considered with all the evidence in the case (CLS 1961, § 750.336; CL 1948, § 769.26). *Id.* 223.

27. Jury instructions in a criminal case must be read in their entirety in order to determine whether prejudicial error is present. *Id.*

CRIMINAL LAW—Continued.

28. An assault or assault and battery is necessarily involved in crime of taking indecent and improper liberties with a female child under 16 years of age (CLS 1961, § 750.336). *Id.*

29. An assault is a necessary element in the crime of attempting to take indecent and improper liberties with a female child under 16 years of age (CLS 1961, § 750.336). *Id.*

30. Supplemental instructions to jury requesting an explanation of the difference between "assault and simple assault" in prosecution for assaulting and attempting to take indecent liberties with a 10-year-old girl *held,* not to contain prejudicial error or to result in a miscarriage of justice, when the instructions to the jury are considered in their entirety (CLS 1961, § 750.336; CL 1948, § 769.26). *Id.*

31. The credibility of witnesses is a matter for the trial judge when sitting without a jury and the finding of guilty by the trial judge in a criminal case will not be disturbed upon appeal unless the Court of Appeals is satisfied that the guilt of the accused was not established beyond a reasonable doubt. *People* v. *Dolphus,* 229.

32. It was reversible error for trial court to accept plea of guilty from 16-year-old defendant, charged with breaking and entering in the nighttime, where court advised him of his right to counsel but gave defendant no opportunity to request counsel and failed to inform defendant of the consequences of his plea of guilty (CL 1948, § 750.110; GCR 1963, 785.3). *People* v. *Curtis Lee Williams,* 232.

33. It was reversible error for trial court to accept plea of guilty to charge of breaking and entering with intent to commit a felony from defendant not represented by counsel at arraignment, where, trial court stated defendant was entitled to a trial but failed to indicate he was entitled to a trial by *jury* as required by court rule (CL 1948, § 750.110; GCR 1963, 785.3). *People* v. *Demers,* 238.

34. Sentence for unlawfully driving away an automobile to commence after expiration of life sentence for first-degree murder *held,* valid, where statute permitted commencement of sentence for crime committed by escapee to start after expiration of sentence being served at time of escape (CL 1948, § 750.413; CLS 1961, § 768.7a). *People* v. *Davis,* 245.

35. Sentence for escape from prison to commence after expiration of life sentence for first-degree murder *held,* valid, where statute authorized imposition of sentence to run consecutively (CLS 1961, § 750.193). *People* v. *Hall,* 247.

36. Instructions to jury in prosecution of motorist for manslaughter, relative to presumptions arising from blood alcohol test which were limited to alcohol content of .05% or less and to content of .05% to .15% did not contain reversible error, so far as defendant is concerned, where the testimony on the subject was from a State health department chemist who stated that sample taken from defendant about 4 hours after accident in which another motorist was killed contained .12% and that

CRIMINAL LAW—Continued.

in chemist's opinion defendant's blood would have contained .18% at time of accident, where statute relative to such test provided that if test showed alcohol content of between .05% and .15% the jury could consider such fact along with other competent evidence in determining guilt or innocence of accused (CL 1948, § 750.321; CLS 1961, § 257.625a). *People* v. *Holmes*, 284.

37. Determination as to voluntariness of confession is not a ground for remanding prosecution for manslaughter, where the confession was not admitted in evidence. *Id.*

38. The granting of probation to one convicted is a matter of grace and confers no vested right to its continuance (CL 1948, § 771.4). *People* v. *Wood*, 342.

39. Written copy of the charges against probationer for violation of his probation must be served upon him and at least a summary informal hearing accorded to him before revocation of the probation (CL 1948, § 771.4). *Id.*

40. There is presently no guarantee of right to counsel at a hearing on the revocation of probation (CL 1948, § 771.4). *Id.*

41. Statutory requirement that probationer be furnished a written copy of the charges for revocation of his probation is not met by a reading of the charges to him when he is standing before the court during a hearing or at some other time (CL 1948, § 771.4). *Id.*

42. Hearing contemplated by statute to be accorded a probationer includes affording him the opportunity to produce witnesses in his behalf and it was reversible error not to afford such opportunity that had not been waived (CL 1948, § 771.4). *Id.*

43. Order revoking probation that is set aside for failure to accord probationer a proper hearing before issuing such order and remand of petitioner to custody of trial court is without prejudice on the part of the trial court after probationer is served a written copy of the probation charges he is required to meet and a proper hearing had thereon (CL 1948, § 771.4). *Id.* 343.

44. Proof of possession of narcotics without a license therefor is sufficient to sustain conviction under the uniform narcotic drug act, it being unnecessary to show accused possessed the narcotics with intent to place them in commerce and traffic (CLS 1961, § 335.153). *People* v. *Mallory*, 359.

45. Defendant's claim that the record did not show clearly that defendant did not have license to possess narcotics *held*, refuted by record containing ample evidence for jury to find defendant was not licensed (CLS 1961, § 335.153). *Id.*

46. Confession of defendant to crime of robbery armed, obtained from him without his court-appointed counsel being present although the assistant prosecuting attorney knew defendant had counsel, *held*, not illegal and involuntary, where defendant solicited the statement and did not request that his attorney be present (CLS 1961, § 750.529). *People* v. *Daniels*, 395.

47. Claim that plea of guilty was based upon an illegal and involuntary confession to crime of robbery armed failed, where

CRIMINAL LAW—Continued.

trial court's finding on remand to determine voluntariness of confession that it had been made voluntarily is supported by the record (CLS 1961, § 750.529). *Id.*

48. Sentence of 10 to 25 years for armed robbery may not be vacated, plea of guilty withdrawn, and new trial granted merely because defendant, at the time he pleaded guilty, was nervous and tense (CLS 1961, § 750.529). *Id.*

49. Interrogation of defendant under oath after he had indicated he would plead guilty, required by court rule to ascertain whether such plea was being made freely, understandingly, voluntarily, and without undue influence, compulsion, duress, or promise of leniency *held*, not to have effected a violation of the constitutional prohibition against compelling a person charged with crime to be a witness against himself (Const 1963, art 1, § 17; GCR 1963, 785.382). *Id.*

50. Fact that defendant-appellant who pleaded guilty to armed robbery received sentence of 10 to 25 years, whereas another defendant charged with the same crime in the same county received a sentence of 2 to 10 years would not entitle appellant to have sentence set aside, where the sentence imposed upon him is within maximum term provided by statute (CLS 1961, § 750-.529). *Id.* 396.

51. The Court of Appeals does not have supervisory control over punishment imposed by trial court within statute. *Id.*

52. All of the testimony or evidence in a prosecution for crime need not be supplied at the preliminary examination. *People* v. *Likely*, 458.

53. Generally, counsel may not sit idly by during the trial and then, for the first time, interpose objections after the accused has been convicted of a felony. *People* v. *Hicks*, 461.

54. Record in prosecution for statutory rape is examined in a search for error reflecting clear injustice, notwithstanding no objection was made at the trial (CLS 1961, § 750.520). *Id.*

55. Cross-examination of defendant and prosecutor's argument to jury in prosecution for statutory rape *held*, not to contain any prejudicial attack on defendant's rights (CLS 1961, § 750-.520). *Id.* 462.

56. Record in prosecution for unlawful possession of narcotic drugs *held*, not to disclose an abuse of discretion on part of examining magistrate in binding defendants over for trial, there being ample evidence to support his finding of probable cause (CL 1948 and CLS 1961, §§ 335.51–335.98, 335.153). *People* v. *Napolitano*, 602.

57. Magistrate at preliminary examination may bind defendant over to circuit court for trial if it shall appear from the proofs that an offense not cognizable by a justice of peace has been committed and that there is probable cause that defendant committed the offense, it not being required that guilt of defendant be established beyond a reasonable doubt (CL 1948, § 766.13). *People* v. *Ray*, 623.

CRIMINAL LAW—Continued.

58. The examining magistrate has a large discretion as to the extent and range of inquiry made when a person is brought before him for preliminary examination to ascertain whether a crime has been committed and whether there is probable cause to believe such person was guilty, and the strict rules of evidence may not be applied, where to do so would defeat the object of the inquiry (CL 1948, § 766.13). *Id.* 624.
59. Testimony of experiment by police officer as to speed and braking distance of a car under substantially the same conditions as confronted defendant, charged with manslaughter by operation of a motor vehicle *held,* properly admitted at preliminary examination (CL 1948, § 766.13). *Id.*
60. Examining magistrate properly bound defendant over to circuit court for trial or charge of manslaughter by operation of a motor vehicle, where evidence adduced at preliminary examination supported each of 2 findings by the magistrate, either of which would justify his action, it being found that defendant was driving his car while under the influence of intoxicating liquor which proximately caused the death of the decedent, and it being found the defendant operated his car with knowledge of a situation requiring the exercise of ordinary care and with ability to avoid the harm failed to do so when apparent result would be disastrous to another (CL 1948, §§ 750.324, 750.325). *Id.*
61. Admission of opinion testimony that defendant, charged with manslaughter by operation of a motor vehicle, was operating his car much faster than the 35 miles per hour posted speed limit *held,* not prejudicial error notwithstanding the eyewitness so testifying was a 16-year-old boy who had previously only been a passenger in his father's car and had operated his own motor scooter, his lack of greater experience affecting the weight to be given his testimony by jury (CL 1948, §§ 750.324, 750.325). *Id.* 625.
62. Questioning by court of 16-year-old boy, eyewitness to accident resulting in death of an 8-year-old girl bicyclist when hit by defendant's car, *held,* not an abuse of discretion in prosecution for manslaughter by operation of a motor vehicle, where it was done for purpose of shedding light on speed of defendant's car and witness was visibly confused by the rules of evidence but still qualified to present an opinion as to defendant's speed. *Id.*
63. Directed verdict on count charging defendant with having driven his car while under the influence of intoxicating liquor at a time when he was guilty of acts of gross negligence *held,* properly denied, in view of testimony adduced from police officers as to his condition immediately after accident in which an 8-year-old child was killed, other witnesses who had observed defendant drinking in the course of the afternoon, and defendant's own testimony. *Id.*
64. Evidence presented in prosecution for manslaughter while operating an automobile in a grossly negligent manner and for negligent homicide *held,* sufficient to present issues for consideration of jury on both charges (CL 1948, §§ 750.324, 750.325). *Id.*

CRIMINAL LAW—Continued.

65. New trial was properly denied defendant, prosecuted on charge of manslaughter while operating a motor vehicle and convicted of negligent homicide, where record shows he had a fair trial (CL 1948, §§ 750.324, 750.325). *Id.*

66. *Res gestae* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction and render the latter necessary to exhibit the former in its proper effect. *People* v. *Dickinson*, 646.

67. Acts and deeds emanating from the transaction as long as it continues become part of it, the time limits not being arbitrary, and are admissible in evidence as *res gestae*. *Id.*

68. Conviction of a crime may not properly be claimed by prosecution upon evidence which expressly or by implication shows but a part of the *res gestae*, if it appear that evidence of the rest of the transaction is attainable. *Id.*

69. Prosecution may not be required to indorse name of witness nor call him unless he is a *res gestae* witness; nor need it indorse and call all such witnesses, especially when crime charged is not one of violence; but he should be called if his testimony is reasonably necessary to protect accused against a false accusation. *Id.*

70. Requirement of presentation of the entire *res gestae* in a prosecution for crime is a safeguard of the defendant's fundamental rights. *Id.* 647.

71. Fair trial can be conducted and justice accorded a defendant even though he is not represented by counsel. *People* v. *Leach*, 713.

72. Trial court has a duty to inform accused of the nature of the accusation against him after accepting a plea of guilty and before imposing sentence (GCR 1963, 785.3[2]). *Id.*

73. Court must ascertain whether or not the plea of guilty is freely, voluntarily, and understandingly made before accepting plea or imposing sentence (GCR 1963, 785.3[2]). *Id.*

74. Defendant must depend upon court for understanding of complaint and consequences of plea of guilty and trial judge has duty to define maximum sentence specifically when asked by defendant (GCR 1963, 785.3[2]). *Id.*

75. Defendant's plea of guilty after trial judge failed to explain maximum sentence that defendant could get even though defendant stated he did not understand maximum *held*, not freely or voluntarily made (GCR 1963, 785.3[2]). *Id.*

76. Statements by alleged victim of statutory rape made at preliminary examination, which were inconsistent with victim's testimony at trial, *held*, admissible for the purposes of refreshing witness's recollection but not as evidence of the substantive facts (CLS 1961, § 750.520). *People* v. *Anderson*, 718.

See APPEAL AND ERROR (13); ARREST; CONSTITUTIONAL LAW (1, 3); FALSE PRETENSES (1–5); INDICTMENT AND INFORMATION (1–3); JURY (1); LARCENY; RAPE (1, 2, 4–6); ROBBERY (1, 2); SEARCHES AND SEIZURES (2); TRIAL (4); WITNESSES (12).

CROSS-APPEAL—See COSTS (4, 25).

CROSSBUCK—See RAILROADS (4).

CROSS-EXAMINATION—See CRIMINAL LAW (55); DEPOSITIONS; EVIDENCE (3); WITNESSES (1, 2, 7–10, 18–20).

CUSTOMER'S ARREST—See NEGLIGENCE (3).

DAMAGES.

1. No recovery for mental anguish as an element of damages for breach of contract is allowed, where plaintiff's complaint neither alleges a contract nor the breach of a contract. *Brabant* v. *Michigan Consolidated Gas Company*, 107.
2. Complaint by elderly woman who conveyed an easement across her property for a gas line failed to state a cause of action for fraud entitling her to damages for mental anguish, where averments of fraud or mistake failed to set forth circumstances of any fraud or mistake with particularity (GCR 1963, 112.2). *Id.*
3. Jury's verdict of $15,000 for plaintiff wife in action arising from a rear-end automobile collision *held*, not reversible error, where it appears she spent 12 days in the hospital and was under a physician's care for more than 3 years. *Hugener* v. *Michlap*, 157.
4. Plaintiff husband whose wife was injured when defendant's car collided with the rear end of their car which she was driving *held*, to have conclusively and irrefutably established a portion of his alleged damages in an amount grossly in excess of jury's verdict of $1.05, liability having been admitted by defendant. *Id.* 158.
5. Exemplary damages are recoverable in actions based upon tortious acts which involve intentional or wanton and reckless disregard of plaintiff's rights. *Oppenhuizen* v. *Wennersten*, 289.
6. Exemplary damages are recoverable, where the act or trespass complained of arises from wilful and malicious conduct, such damages not being awarded as a punishment to the wrongdoer but to compensate the injured party. *Id.*
7. Exemplary damages must not be so oppressive as to shock the sense of fair minded men nor beyond an amount fairly compensating a party entitled thereto. *Id.*
8. One satisfaction for one injury is a rule that assumes that full damages be given the injured party. *Ortiz* v. *Travelers Insurance Company*, 549.
9. It may not be said that $25,000 is the limit of recovery for the loss of an eye. *Id.* 550.

See APPEAL AND ERROR (1, 29, 47); AUTOMOBILES (6); COMPROMISE AND SETTLEMENT (2); COSTS (15); EMINENT DOMAIN (6, 7, 9); FRAUD (3, 10, 15–17); NEGLIGENCE (5); NEW TRIAL (1, 2); TORTS (1).

DANCING LESSONS—See FRAUD (7, 9, 10); INTEREST (1).

DEALERS—See AUTOMOBILES (6).

DEALING DIRECTLY WITH OWNER—See MECHANICS' LIENS (1, 2).

DEATH.

Permission to amend third-party complaint by city and its engineers, defendants in action under the wrongful death act by the widow of third-party defendant's employee so as to charge such latter defendant with negligence *held*, properly denied, since the liability to an employee of an employer subject to the workmen's compensation act is confined to the liability thereunder (CL 1948, § 411.1 *et seq.*, as amended; § 691.581 *et seq.*). *Vannoy* v. *City of Warren (Johnson & Anderson, Inc.,* v. *Nelson M. Sharrow Excavating Co., Inc.),* 78.

See APPEAL AND ERROR (44, 45); COSTS (21); COUNTIES; CRIMINAL LAW (36, 62, 63); INSURANCE (1–5, 13); JUDGMENT (4); TRIAL (4); WORKMEN'S COMPENSATION (2, 16).

DEBENTURES—See JUDGMENT (40); TRUSTS (13).

DEBT OF ANOTHER—See FRAUDS, STATUTE OF (1).

DEBTS—See PLEADING (7).

DEBT SERVICE CHARGES—See TOWNSHIPS (6).

DECLARATION OF RIGHTS—See COSTS (1).

DECLARATORY JUDGMENT.

Declaratory judgment that plaintiffs, former members of village volunteer fire department, were entitled to participate in pension fund established under charter of newly organized city is affirmed without remand, where it is now conceded plaintiffs qualified for participation in the fund by reason of sufficient previous service (CLS 1961, § 38.506; CL 1948, § 38.554; City of Warren Charter, §§ 7.18[c], 16.2). *Cockerline* v. *City of Warren,* 9.

See COSTS (18, 26).

DEDICATION.

1. A dedication by the owner-plattor of land to public use becomes irrevocable upon the sale of lots by reference to the plat, estops him to vacate it, except through court proceedings as provided by statute, and binds the grantees of the dedicators (CLS 1961, § 560.62). *West Michigan Park Association* v. *Department of Conservation,* 254.

2. Original plat of land, made in 1886, *held,* a sufficient conveyance to vest in the county wherein the land was located the fee of such parcels of land as were therein expressed to be for public uses, in trust to and for the uses and purposes therein expressed, and for no other use or purposes whatever, where statute then in force provided that the due making, acknowledgment, and recording of a plat should be deemed a sufficient conveyance to vest in the county in which the land lies the fee of parcels of land expressed for public uses, in trust (PA 1839, No 91, § 2, as last amended by PA 1885, No 111). *Id.*

DEDICATION—Continued.

3. The term *base fee*, as used with reference to description of estate in land dedicated to public uses conveyed to the county by plat, was used in the sense of a fee which has a qualification annexed to it (PA 1839, No 91, § 2, as last amended by PA 1885, No 111). *Id.* 255.

4. Plaintiff association, whose members are lot owners of subdivision used for summer resort purposes, and who have used the areas dedicated to public use and designated as park areas may not be said to have abandoned the areas so dedicated, where the use of them has been continuous. *Id.*

5. The burden of proving abandonment of land dedicated by owner-plattor to public uses is upon the party asserting abandonment. *Id.*

6. The dedication by the owner-plattor of lands in a subdivision for park purposes effected a transfer from the dedicator to the county in which the land was situated a base fee title, the qualifications attaching to the dedication being for park purposes (PA 1839, No 91, § 2, as last amended by PA 1885, No 111). *Id.*

7. Acceptance of an offer to dedicate land to public use is ordinarily essential to a complete dedication, and to work an exemption of the dedicated property from taxation, especially where the public body is to be charged with the duty to maintain and repair the facility offered to the public, and subjected to liability for nonperformance of such duty. *Id.*

8. A plat of land is generally taken as a mere offer to dedicate the areas indicated for public use which must be accepted before the dedication is complete. *Id.*

9. An offer to dedicate land as contained in a plat may be accepted either by public authorities or by the public. *Id.* 256.

10. The right to accept land offered in a plat to public use will ordinarily continue until the wants and convenience of the public require the use of the land, or until the offer is withdrawn or revoked. *Id.*

11. A dedication of land for the public use, being merely an appropriation of land for such purpose, may be accepted by a formal acceptance for such use by or in behalf of the public. *Id.*

12. Determination by trial judge that land within a plat dedicated to public use for park purposes had been used by the public for such purpose for upwards of 65 years qualified as an acceptance by the public of the dedication. *Id.*

13. An acceptance of a dedication of park areas by the grantees of the dedicators made the original dedication irrevocable. *Id.*

14. An unaccepted offer of land for public uses, unless there are facts equivalent to a continuous renewal of the offer, cannot be considered open after the lapse of time enough to bar all actions for the recovery of lands under the statute of limitations. *Id.*

DEDICATION—Continued.

15. Rights based upon dedication and acceptance of a plat are assertable, if at all, as a right or use to which public in general is entitled. *Id.*
16. The essence of a dedication to public uses is that it shall be for the use of the public at large and while there may be a dedication of lands for special uses, it must be for the benefit of the public and not for any particular part of it. *Id.*
17. Finding of trial judge that area adjacent to State park which area was within summer resort subdivision and had been dedicated to public use for park purposes was owned by county in trust for the public *held,* not error under record presented in action to enjoin State and county officers from using such park area and to declare that plaintiff lot owners have exclusive right to use thereof, since there had been acceptance of the dedication through user thereof (PA 1839, No 91, § 2, as last amended by PA 1885, No 111). *Id.* 257.
18. Defendant county in which summer resort subdivision was located and in which plat dedicating certain areas for public use for park purposes had effected a base fee title in county was empowered to lease such dedicated area to the State department of conservation for purposes within the dedication so limited (CL 1948, § 318.7). *Id.*
19. Retention of jurisdiction in circuit court *held,* ample to preserve and protect rights of lot owners of summer resort subdivision and the general public in portions of plat dedicated by owner-plattor for park purposes and thereafter leased by county to State department of conservation. *Id.*

See ACKNOWLEDGMENT; COSTS (14); HIGHWAYS AND STREETS (1).

DEEDS.

1. Estoppel will be applied by court to protect rights of others than grantees, their heirs or estate, where such rights depend upon apparent title created by deed. *St. Pierre* v. *Estate of St. Pierre,* 723.
2. One who claims under a deed confirms all its provisions, and cannot establish his claim by adopting those provisions, only, which are in his favor, while he repudiates or contradicts others that are repugnant thereto. *Id.*
3. A conveyance to a man and a woman referred to as husband and wife, but who legally do not sustain that relation, does not create a tenancy by the entirety, but at most a tenancy in common. *Id.*
4. Widow and heirs of decedent are not estopped to question recitals in deeds describing decedent and plaintiff as husband and wife, where they did not sustain that relation and no intervening rights of third parties for value are involved in suit to quiet title, hence, are entitled to share in undivided half interest which trial court found was owned by decedent. *Id.*
5. *Estate of decedent is estopped from claiming title to property conveyed by deeds reciting decedent and plaintiff in suit to*

DEEDS—Continued.

quiet title were husband and wife, where they did not sustain that relation, issue of estoppel was raised at the trial, and decedent himself would have been estopped from claiming title under facts presented, per T. G. KAVANAGH, J. *Id.*

DEFAULT—See APPEAL AND ERROR (16, 17); VENDOR AND PURCHASER (1).

DEFECTIVE SIDEWALK—See COSTS (19); MUNICIPAL CORPORATIONS (7, 9–11).

DEFECTIVE WORKMANSHIP—See CONTRACTS (19, 20).

DEFENDANT'S MISCONDUCT—See CRIMINAL LAW (1).

DEFENSE TO CLAIM—See JUDGMENT (36).

DELAY—See EQUITY (1); PARTIES (2); RAPE (2).

DEMAND—See COURTS (8); INTEREST.

DEMINERALIZATION—See HOSPITALS (3).

DE NOVO REVIEW—See ACCOUNTING (2); APPEAL AND ERROR (13, 19); COSTS (7).

DE NOVO TRIAL—See EVIDENCE (4).

DEPENDENTS—See COSTS (13); WORKMEN'S COMPENSATION (12, 13).

DEPOSIT—See BROKERS (3).

DEPOSITIONS.

None of a deposition is admissible in evidence where witness who deposed, not called for cross-examination, is present in court, since there is no necessity for resorting to it, although had the witness who was an opposite party, been called for cross-examination under the statute, the deposition might then have been used for purposes of impeachment, if necessary (CLS 1961, § 600.2161; GCR 1963, 302.4[2], 302.6). *Ruhala* v. *Roby*, 558.

See JUDGMENT (28); PARTIES (3); PLEADING (7); WITNESSES (18, 19).

DEPUTY—See OFFICERS (1).

DESCENT AND DISTRIBUTION—See DEEDS (4).

DETROIT—See APPEAL AND ERROR (13); COSTS (7, 19); MUNICIPAL CORPORATIONS (10, 11).

DIESEL ENGINE—See RAILROADS (1).

DIRECTED VERDICT—See APPEAL AND ERROR (43); AUTOMOBILES (1); CRIMINAL LAW (63); HOSPITALS (2); JUDGMENT (14); TRIAL (6); TROVER AND CONVERSION.

DISCHARGE—See MASTER AND SERVANT (2).

DISCHARGE OF COUNSEL—See CRIMINAL LAW (3, 4).

DISCLOSURE—See COMPROMISE AND SETTLEMENT (1).

DISCOVERY—See LIMITATION OF ACTIONS (2); PHYSICIANS AND SURGEONS (1).

DISCRETION OF COURT—See APPEAL AND ERROR (14, 15, 41); BASTARDS (1, 2); CRIMINAL LAW (7, 9–11, 20, 21, 56, 62); DIVORCE (2); NEW TRIAL (3, 4); PARTIES (2, 3); PLEADING (2, 4, 6, 7); RAPE (3); STIPULATIONS (1, 2); TRIAL (9); WITNESSES (1, 9–12, 19).

DISCRETION OF MAGISTRATE—See CRIMINAL LAW (58).

DISCRETION OF OFFICERS—See MUNICIPAL CORPORATIONS (6, 23).

DISEASE—See INSURANCE (4).

DISMISSAL AND NONSUIT—See COURTS (7); TRIAL (7, 8).

DISMISSAL OF APPEAL—See COSTS (9, 10); VENDOR AND PURCHASER (2).

DISQUALIFICATION—See JURY (1).

DISQUALIFICATION FOR BENEFITS—See UNEMPLOYMENT COMPENSATION (2, 3).

DISSOLUTION—See PARTNERSHIP (1–3).

DIVISION OF PROPERTY—See DIVORCE (2).

DIVORCE.

1. Trial court's finding that defendant husband had been guilty of extreme cruelty to plaintiff wife in suit for divorce by reason of his associations with other women *held*, amply supported by testimony in the record. *Hazelton* v. *Hazelton*, 110.
2. An award of something less than half of the property of the parties to plaintiff wife upon grant to her of divorce terminating 25-year marriage *held*, not to indicate an abuse of discretion lodged in the court in making division of the property (CL 1948, § 552.101). *Id.* 111.

See BASTARDS (1); COSTS (13); TRIAL (11); WORKMEN'S COMPENSATION (13).

DOMINANT OWNER—See EASEMENTS (2).

DRUGS—See SEARCHES AND SEIZURES (2).

DUE PROCESS—See JUDGMENT (3).

DURESS—See CRIMINAL LAW (49).

DUST DISEASES—See WORKMEN'S COMPENSATION (4–6).

DWELLING UNIT—See MUNICIPAL CORPORATIONS (30).

EASEMENTS.

1. Fee owner of 50′ x 75′ strip of land retains full dominion over his land subject merely to the right-of-way conveyed by deed granting perpetual easement of right to cross, and may make any use of his land which does not interfere with a reasonable use of the way. *Lee* v. *Fidelity Life & Income Mutual Insurance Company*, 83.
2. The rights of the owner of an easement of passage are paramount to the extent of the grant. *Id.*
3. What may be a reasonable and proper use of a fee and what may be necessary to the beneficial use and enjoyment of the easement of passage over a 50′ x 75′ strip of land by the owner of the easement are questions of fact to be determined upon a trial, hence, it was error to grant plaintiff's motion for summary judgment (GCR 1963, 117). *Id.*

See DAMAGES (2); JUDGMENT (5, 6).

ECONOMIC STRESS—See UNEMPLOYMENT COMPENSATION (1).

EFFECTIVE DATE—See LIMITATION OF ACTIONS (1, 2).

ELECTRICITY.

Apartment dweller who had recently moved from out of State and requested to make a $25 deposit for electrical service as he had not established a proper credit rating, *held*, not entitled to recover such sum, paid under protest, nor entitled to injunction against discontinuance of service, where he failed to raise issue of fact by responsive affidavits when defendant supplier of electricity interposed motion for summary judgment (GCR 1963, 117). *Christy* v. *Detroit Edison Company*, 730.

EMBARRASSMENT—See FRAUD (16, 17).

EMERGENCY—See AUTOMOBILES (14); PHYSICIANS AND SURGEONS (2).

EMINENT DOMAIN.

1. Attorney fees in condemnation proceeding for urban renewal project are allowable only when permitted, and in amount limited, by statute (CL 1948, § 213.21 *et seq.*). *City of Muskegon* v. *Slater*, 235.
2. Attorney fee of $1,250, allowed by trial judge in condemnation proceeding for urban renewal project *held*, not proper, where statute set maximum limit for attorney fee in the amount of $25 (CL 1948, § 213.37). *Id.*
3. Just compensation, for the taking of part of a parcel of land, is allowable for the value of the part actually taken as direct compensation and the decreased value of the residue is also allowable as compensation (CL 1948, § 213.176). *State Highway Commissioner* v. *Englebrecht*, 572.
4. Contiguous lots, a part of both of which owner had leased to another and the remainder of which owner and lessee were negotiating a lease, *held*, a single parcel of land so that condemnation of part of the lot which was not leased resulted

EMINENT DOMAIN—Continued.

in part condemnation of the entire tract, consisting of both lots, and the decreased value of the residue of the entire tract was a proper basis for award of compensation. *Id.*

5. Award for condemnation of right of entry and of materials for use in highway construction *held*, not a condemnation of entire property and award extends to the value of materials taken (CL 1948, § 213.171 *et seq.*, as amended). *State Highway Commissioner* v. *Fegin*, 698.
6. Damages for condemnation of fee or right-of-way are measured by the difference in value of land before and after the taking. *Id.*
7. Damages for condemnation of right to remove minerals is measured by their value in place. *Id.*
8. Occasional local demand for minerals from contractors and county road commission is sufficient to establish a general market price in the area even though there is no commercial exploitation of the materials. *Id.*
9. An award for fill dirt taken for highway construction from defendant's land was the taking of a *profit à prendre* and where the amount was within the range of the evidence, it was properly confirmed (CL 1948, § 213.171 *et seq.*). *Id.*

See CONSTITUTIONAL LAW (5); COSTS (12).

EMOTIONAL DAMAGES—See COSTS (15).

EMOTIONAL HARM—See APPEAL AND ERROR (29); NEGLIGENCE (5, 6).

ENDING COMPENSATION—See WORKMEN'S COMPENSATION (10, 11).

ENGINEERS—See DEATH; JUDGMENT (4).

ENGINES—See RAILROADS (1).

ENTRANCE-EXITWAY—See NEGLIGENCE (2).

EQUAL PROTECTION OF LAWS—See CONSTITUTIONAL LAW (1, 4, 7); JURY (1); MUNICIPAL CORPORATIONS (26).

EQUITY.

1. Laches differs from limitations in that limitations are concerned with the *fact* of delay, laches with the *effect* of delay. *Sloan* v. *Silberstein*, 662.
2. Laches is concerned primarily with the question of the inequity of permitting a claim to be enforced and depends on whether plaintiff has been wanting in due diligence. *Id.*
3. Limitations are statutory, while laches is not. *Id.*
4. Laches applies only in equity, while in Michigan prior to January 1, 1963, limitations applied only at law (CLS 1961, § 600.5815). *Id.*
5. Limitations are based on fixed time, while laches is not. *Id.*

See IMPROVEMENTS (5); LIMITATION OF ACTIONS (3); STATUTES (2); TRUSTS (9).

ESCAPES—See CRIMINAL LAW (34, 35).

ESSENTIAL SERVICES—See TOWNSHIPS (1).

ESTATES OF DECEDENTS—See DEEDS (5).

ESTOPPEL—See DEDICATION (1); DEEDS (1, 4, 5); JUDGMENT (37, 38); LANDLORD AND TENANT (3); TRUSTS (11, 12); STATUTES (11); WORKMEN'S COMPENSATION (3, 7).

EVIDENCE.

1. Claim of error in admission of mortality tables in action by 79-year-old patient in defendant hospital for injuries received from hip fracture *held*, eliminated by reason of holding that there was evidence the injury was permanent. *Fogel* v. *Sinai Hospital of Detroit*, 100.

2. Mortality tables are admissible and to be used by jury if it determines the issue of reasonable health favorably to the one offering the tables, where there is evidence the injuries involved were permanent. *Id.*

3. Unverified, but duly authenticated, copy of pleading in a case commenced by plaintiff in Canada but settled before trial, which contained a statement of her claim tending to controvert her testimony as to nature of injury sustained in the Canadian case *held*, properly received on cross-examination for purpose of impeaching plaintiff in her action for personal injuries arising from rear-end collision (CLS 1961, § 600.2104). *Schwartz* v. *Triff*, 380.

4. Testimony of 2 attorneys as to what they had told client, adduced on *de novo* trial in circuit court of proceeding to probate a will was properly admitted, where client had previously testified in probate court that both attorneys knew of the will and gave her incorrect advice regarding it, since she thereby waived any privilege which she possessed. *In re Arnson Estate*, 478.

5. A rule of evidence that is not invoked is waived. *Dusendang* v. *Thompson*, 526.

6. Interrogatories and answers thereto of city clerk were properly excluded as evidence, not used for cross-examination but to show what was in them, where the clerk was a witness in court and did testify. *Wait* v. *City of Sturgis*, 615.

7. Testimony of expert as to speed of defendant's car at time it was involved in alleged manslaughter of 8-year-old bicyclist, taken at preliminary examination *held*, properly ruled inadmissible at trial, notwithstanding unavailability of the expert at the time of trial, where there was a lack of certain facts showing in the record which might or might not have been supplied by the expert had he been available. *People* v. *Ray*, 624.

8. Experiments, made out of court, may be admitted into evidence even though not performed under identical conditions with those existing at time of occurrence if there is substantial similarity between conditions. *Id.*

EVIDENCE—Continued.

See APPEAL AND ERROR (3, 6, 7, 22–25, 28–31, 34, 36–38, 40–44, 54, 56, 58, 60, 61); AUTOMOBILES (4, 5, 8); BROKERS (4); CONTRACTS (2, 3, 7, 13–15, 17); CORPORATIONS (1); CRIMINAL LAW (14–16, 25, 31, 36, 37, 45, 52, 56–64, 66–68, 76); DAMAGES (4); DIVORCE (1); EMINENT DOMAIN (9); FALSE PRETENSES (1, 4, 5); FRAUD (7–9); HIGHWAYS AND STREETS (4); HOSPITALS (2, 3); IMPROVEMENTS (5); INSURANCE (5, 11); JUDGMENT (8, 9, 28, 31, 42, 43); LARCENY; LIBEL AND SLANDER (4); MECHANICS' LIENS (2); NEGLIGENCE (1, 7, 10); NEW TRIAL (1); PARTIES (3); PLEADINGS (9); RAILROADS (2, 4, 6); RAPE (1, 4–6); ROBBERY (1, 2); SEARCHES AND SEIZURES (1, 2); SET-OFF AND COUNTERCLAIM (1); TRIAL (5); TROVER AND CONVERSION; TRUSTS (13); VENDOR AND PURCHASER (6); WILLS (2, 3, 5); WITNESSES (3, 7, 9, 16).

EXAMINATION—See MUNICIPAL CORPORATIONS (2); RAPE (3).

EXAMINATION BY COURT—See CRIMINAL LAW (5–7, 18, 19, 21, 62).

EXAMINING MAGISTRATE—See CRIMINAL LAW (56–58, 60).

EXCHANGE OF NAMES—See STIPULATIONS (2).

EXECUTION OF INSTRUMENTS—See WILLS (1–3).

EXECUTORS AND ADMINISTRATORS—See WITNESSES (17).

EXEMPLARY DAMAGES—See DAMAGES (5–7); FRAUD (15–17).

EXEMPTION—See DEDICATION (7).

EXISTING FACTS—See FALSE PRETENSES (4).

EXPENSES—See TORTS (1).

EXPERIMENTS—See CRIMINAL LAW (59); EVIDENCE (8).

EXPERT TESTIMONY—See CRIMINAL LAW (36); EVIDENCE (7); HOSPITALS (1); TRIAL (4).

EXPLANATION—See CRIMINAL LAW (24, 26).

EXPLOSION—See ACCORD AND SATISFACTION (2); COSTS (20).

EXTRADITION.

1. Commitment of accused, arrested without warrant of governor as a fugitive from another State, may, in the event bail is not posted, be to the custody of the county sheriff for a period of 30 days and, then, for *one* additional period which is not to exceed 60 days (CL 1948, § 780.16). *In re Albert L. White,* 493.
2. Accused, who was committed 3 different times, to the custody of the county sheriff, for a period of 30 days each *held,* unlawfully detained as the statute provides for a maximum of 2 commitments (CL 1948, §§ 780.14, 780.16). *Id.*

See HABEAS CORPUS.

EXTRAS—See SET-OFF AND COUNTERCLAIM (1).

EXTREME CRUELTY—See DIVORCE (1).

EYE INJURY—See COSTS (20); DAMAGES (9).

EYELID—See PHYSICIANS AND SURGEONS (3).

EYEWITNESSES—See APPEAL AND ERROR (44); CRIMINAL LAW (61, 62).

FACIAL INJURIES—See NEGLIGENCE (1); NEW TRIAL (1).

FAILURE OF PERFORMANCE—See CONTRACTS (9, 10).

FAILURE TO REMONSTRATE—See PHYSICIANS AND SURGEONS (3).

FAIR TRIAL—See CRIMINAL LAW (71).

FALSE ACCUSATION—See CRIMINAL LAW (69).

FALSE PRETENSES.

1. Record in prosecution for obtaining property of a value of more than $100 by false pretenses *held,* to clearly indicate defendant falsely represented himself under another name, that he was in the real-estate business, that a $2,660 car was being purchased for his wife, that the complainant believed and relied on the defendant's false pretenses and was induced to give up possession of the car, and that like false representations were made by defendant to other persons the day before and on the same day as false representations were made to complainant (CLS 1961, § 750.218). *People* v. *Vida,* 409.
2. It was not error for trial court to deny motion to strike paragraphs of information relative to what might occur in the future from information in prosecution for obtaining property by false pretenses by use of postdated check and in instructing jury that the false pretense may consist of issuing such check knowing there would be no money in the bank when it was presented, since such check was relevant and material as to defendant's motive, intent, scheme, plan, or system in doing the act (CLS 1961, § 750.218; CL 1948, § 768.27). *Id.*
3. It was not error for trial court to instruct jury in prosecution for obtaining property by false pretenses that they might consider the nondisclosure of the purchase of other automobiles as a false pretense, since it is not essential that the pretenses by which a fraud is accomplished be expressed in words, falsehood deliberately acted being the same as spoken word (CLS 1961, § 750.218; CL 1948, § 768.27). *Id.*
4. Rule that postdated check does not constitute grounds for a charge of false pretenses is not applicable to case where false pretenses and false representations were made by the defendant to complainant relative to present existing facts, past facts, and supported by testimony of like or similar acts of defendant tending to show his motive, intent, scheme, plan, or system in doing the act (CLS 1961, § 750.218; CL 1948, § 768.27). *Id.*

FALSE PRETENSES—Continued.

5. Defendant in prosecution for obtaining property by false pretenses was not under an obligation to disclose to the complainant that he had purchased 2 automobiles for his wife just prior to negotiations with complainant, but testimony relating to such purchases was admissible as proof of intent (CLS 1961, § 750.218; CL 1948, § 768.27). *Id.*

FEE ESTATE—See EMINENT DOMAIN (6).

FEE OWNER—See EASEMENTS (1).

FEE TITLE—See DEDICATION (2).

FEES—See JUDGMENT (40).

FELONY—See CRIMINAL LAW (4).

FIDUCIARY—See APPEAL AND ERROR (59); JUDGMENT (38-40); TRUSTS (1-5, 7-11).

FILIATION PROCEEDING—See BASTARDS (1-4).

FILING—See APPEAL AND ERROR (48); CORPORATIONS (2, 5); JUDGMENT (40, 43).

FILL DIRT—See EMINENT DOMAIN (9).

FINAL ARGUMENT—See TRIAL (13-15).

FINANCIAL STATEMENTS—See FRAUD (1, 4).

FIREMEN—See APPEAL AND ERROR (2); COSTS (1); DECLARATORY JUDGMENT; MUNICIPAL CORPORATIONS (1-3).

FLASHING LIGHTS—See AUTOMOBILES (10, 12, 13).

FOOD—See ACCORD AND SATISFACTION (2); COSTS (20).

FORECLOSURE—See JUDGMENT (30).

FOREIGN COUNTRIES—See ACTION (1); JUDGMENT (1-3).

FORFEITURE—See BROKERS (3); VENDOR AND PURCHASER (1, 5).

FORGED TITLE—See AUTOMOBILES (9); FRAUD (15).

FORGERY—See CRIMINAL LAW (19, 22, 23).

FOUNDATION—See CONTRACTS (15).

FOUNDRY—See UNEMPLOYMENT COMPENSATION (2); WORKMEN'S COMPENSATION (7).

FRAUD.

1. The Court of Appeals does not interpret the bankruptcy act, or amendments thereto, in an action for fraud in obtaining funds from plaintiff through use of false financial statement (11 USC, § 1 *et seq.*, as amended). *Seaboard Finance Company* v. *Barnes (Blair)*, 5.

FRAUD—Continued.

2. The party who alleges fraud in action based upon fraud has the burden of proof. *Id.*
3. Plaintiff in action for fraud must prove that he has suffered a loss directly from, and as a clear consequence of, the fraud, and the damages to be recovered must always be the natural and proximate consequence of the act of which complaint is made. *Id.* 6.
4. Recovery in action for fraud through use of false financial statements is limited to amount of moneys advanced pursuant to use of such false statements and does not embrace entire debt of obligor including debt theretofore owed. *Id.*
5. One of the remedies for fraud is a suit for damages caused by the fraud. *Kraus* v. *Arthur Murray Studios of Michigan, Inc.*, 130.
6. Fraud is a question of fact to be deduced from all the circumstances. *Id.*
7. Evidence adduced in student's nonjury action against dance studio to recover prepayments for dancing lessons she did not receive because of ill health, *held*, to sustain trial court's finding of fraud. *Id.*
8. Trial court's finding of fraud in student's nonjury action against dance studio to recover prepayments for dancing lessons she did not receive because of ill health must be sustained, where it cannot be said to be against the clear preponderance of the evidence. *Id.*
9. Trial court's finding that plaintiff was prevented from completing her lessons at defendant's dance studio by reason of her physical condition is sustained in her nonjury action to recover prepayments made for such lessons, where it cannot be said to be against the preponderance of the evidence in action for fraud. *Id.*
10. The proper measure of damages in action of fraud for recovery of prepayments for dancing lessons not received is the amount paid for such lessons. *Id.* 131.
11. One who, by fraudulent representation, induces another to act to his damage is liable for the damages suffered, and it is not essential that there should have been privity of contract. *Oppenhuizen* v. *Wennersten*, 288.
12. False representations need not be made directly to plaintiff claiming to have relied upon them, where made by a defendant to another party with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving the third party and such third party becomes the plaintiff. *Id.*
13. False representations must have been intended to influence the complaining party directly or indirectly, in order that recovery may be based thereon. *Id.*
14. The fact that representations were intended to deceive the person to whom they were made as well as a third person will not affect the right of the latter. *Id.*

FRAUD—Continued.

15. Act of junkyard dealer as representing as valid a forged title of an automobile and making the sale, understanding that resale would take place in the near future, must have been done with design and from wilful motives that infer malice, entitling the person to whom resale was made to collect exemplary damages resulting from the wilful wrong. *Id.* 289.
16. Embarrassment in being questioned about the purchase of a stolen vehicle and the necessity for incurring liability for the costs of collecting damages justified award of $500 exemplary damages. *Id.*
17. Embarrassment from innocent involvement by automobile repairer with the purchase and sale of a stolen automobile, damage to reputation, questioning by the authorities, and being required to defend his rights in action by person to whom he had resold the car, justified an award to repairer of $250 exemplary damages. *Id.* 290.

See APPEAL AND ERROR (25); AUTOMOBILES (9); DAMAGES (2); IMPROVEMENTS (4); TRUSTS (6).

FRAUDS, STATUTE OF.

Provision of statute of frauds requiring that a promise to pay the debt of another must be in writing may not be applied to defeat action on insurer's oral agreement of compromise of claim of plaintiff against insured within term of coverage of policy, since the compromise was not only of a potential obligation of the insured but also of insurer's own written obligation to pay and its own duty to defend the insured (CL 1948, § 566.132). *Ortiz* v. *Travelers Insurance Company,* 548.

See LANDLORD AND TENANT (1–3).

FREIGHT CARS—See RAILROADS (4–6).

FUGITIVES—See EXTRADITION (1).

FUTURE EVENTS—See CONTRACTS (12); FALSE PRETENSES (2–4).

GARAGEKEEPERS—See ACTION (2); TROVER AND CONVERSION (1).

GARBAGE SERVICE—See TOWNSHIPS (1).

GASOLINE—See COVENANTS (4).

GASOLINE SALES—See MONOPOLIES (2).

GINGER ALE—See ACCORD AND SATISFACTION (2); COSTS (20).

GOOD FAITH—See CONTRACTS (7); IMPROVEMENTS (1, 3, 4); JUDGES (3); TRUSTS (4).

GOVERNMENTAL IMMUNITY—See COSTS (21); COUNTIES; SCHOOLS AND SCHOOL DISTRICTS (1, 2); TORTS (2).

GRACE PERIOD—See INSURANCE (13).

GRADE CROSSING ACCIDENT—See RAILROADS (6).

GRANDCHILDREN—See COSTS (13); WORKMEN'S COMPENSATION (12).

GRANDVILLE—See MUNICIPAL CORPORATIONS (30, 31).

GRATUITOUS DETERMINATION—See APPEAL AND ERROR (57, 58).

GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (25, 54); AUTOMOBILES (5).

GROCER—See ACCORD AND SATISFACTION (2); COSTS (20).

GROSS INDECENCY—See CRIMINAL LAW (1).

GROSS NEGLIGENCE—See CRIMINAL LAW (63).

GROUP POLICY—See INSURANCE (13).

GUARDIANS AD LITEM—See APPEAL AND ERROR (59).

GYM CLASS—See SCHOOLS AND SCHOOL DISTRICTS (2).

HABEAS CORPUS.

Habeas corpus will lie to discharge an accused who was unlawfully committed, as a fugitive from another State, to the custody of the county sheriff under the extradition statute (CL 1948, §§ 780.14, 780.16). *In re Albert L. White*, 493.

See COSTS (6); PARDON (3).

HABITUAL CRIMINAL—See CRIMINAL LAW (12).

HEAD INJURIES—See NEGLIGENCE (1); NEW TRIAL (1).

HEALTH.

1. Statute providing for taxation of occupied trailer coaches located outside of licensed trailer parks was intended to apply to less than 3 trailers on a lot or tract of land not regulated by the "trailer coach park act of 1959," which latter act specifically required an annual license by the owner of land under the control of any person upon which 3 or more occupied trailer coaches are harbored (PA 1958, No 172; PA 1959, No 243, as amended by PA 1963, No 161). *Moorman* v. *State Health Commissioner*, 446.
2. The purpose of the trailer coach park act of 1959 is to take over the entire field of regulation and supervision of trailer coach parks in the State (PA 1959, No 243, as amended by PA 1963, No 161). *Id.*
3. *Control*, as the term is used in the trailer coach park act of 1959, has no legal or technical meaning distinct from that given in its popular acceptation such as to manage, to keep under check, to govern, or to restrain (PA 1959, No 243, § 2, as amended by PA 1963, No 161). *Id.*
4. Owners of land who leased 19 sites on their tract for occupancy by house trailers under written leases terminable upon 10 days' notice did not thereby relinquish *control* of such areas, as the term is used in the trailer coach park act of 1959,

HEALTH—Continued.

since they limited the use for which the premises could be occupied, had control of the means of ingress and egress, and had reserved the right to terminate the lease, hence, were subject to licensure under the act (PA 1959, No 243, § 2, as amended by PA 1963, No 161). *Id.*

5. Fact that plaintiffs' tract of land was in 2 different adjoining townships would not relieve them from being subject to trailer coach park act of 1959 in each township, where all of the land is contiguous and used by them to carry on their lakeside resort business (PA 1959, No 243, as amended by PA 1963, No 161). *Id.* 447.

6. The occupation of operating a trailer coach park is an enterprise peculiarly affecting the public interest, since there is a direct relation between such businesses and the public health, safety, or morals (PA 1959, No 243, as amended by PA 1963, No 161). *Id.*

7. Owners of land who used it to park 19 occupied trailer coaches *held,* subject to trailer coach park act of 1959, as amended (PA 1959, No 243, as amended by PA 1963, No 161). *Id.*

See EVIDENCE (2); FRAUD (7, 9); INTEREST.

HEALTH COMMISSIONER—See APPEAL AND ERROR (13).

HEARING—See CRIMINAL LAW (39–43); JUDGMENT (3); PARDON (1–4).

HEART DISEASE—See INSURANCE (4).

HEIRS—See DEEDS (4).

HIGHWAYS AND STREETS.

1. Finding of fact in class action by voluntary association of owners of lots abutting a boulevard, dedicated to public use, along an inland lake shore, whereby an injunction was sought restraining public authorities from turning the boulevard into a public beach, that each plaintiff abutting lot owner had riparian rights to the shore and lake opposite his lot except where there was privately owned land between his property and the beach is affirmed under record presented. *Michigan Central Park Association* v. *Roscommon County Road Commission,* 192.

2. Part of judgment of trial court ordering township board to assume the policing of a boulevard along an inland lake shore dedicated to public use, wherein plaintiffs have riparian rights is ordered vacated, where there is no record showing of legislative authority for enforcement of such an order. *Id.* 193.

3. Vacation of street, upon petition, shall not be ordered, when reasonable objections are interposed, unless vacation, upon proof, appears to be necessary for public health, safety, and welfare (CLS 1961, § 560.62). *In re Oak Street, Pleasant View Subdivision (VanBurger* v. *Widdis),* 654.

4. Finding of trial court that vacation of portion of street was necessary to public health, welfare, comfort, or safety *held,* unsupported by record presented. *Id.*

HIGHWAYS AND STREETS—Continued.

See APPEAL AND ERROR (57); AUTOMOBILES (7, 10–13); EMINENT DOMAIN (5); WORKMEN'S COMPENSATION (14, 16).

HIP FRACTURE—See EVIDENCE (1); HOSPITALS (2, 3).

HOME-RULE CITY—See MUNICIPAL CORPORATIONS (13, 17, 18).

HOMICIDE—See CRIMINAL LAW (36, 37); TRIAL (4).

HOSPITAL EXPENSES—See DAMAGES (3).

HOSPITALS.

1. The standard of care required of a defendant hospital in an action against it for injuries received by a patient therein alleged to be due to defendant's negligence is that of an ordinary, careful, and prudent person under the same circumstances, where the situation is one not requiring expert testimony. *Fogel* v. *Sinai Hospital of Detroit*, 99.
2. Denial of defendant hospital's motions for directed verdict and for judgments notwithstanding verdicts in actions by husband and wife for fractured hip latter sustained while a patient en route to toilet with the assistance of only 1 nurse's aide *held*, not error, a jury question being presented as to whether defendant had been negligent. *Id.*
3. Requested charge that there was no evidence of permanent injury as result of fracture of hip by plaintiff, a 79-year-old woman, who fell while en route to toilet while a patient in defendant hospital *held*, properly denied, where prior medical reports indicated demineralization, and, at time of trial some 3 years later, she still could not move the leg nor walk on it. *Id.*

See APPEAL AND ERROR (5); EVIDENCE (1).

HOUSE TRAILERS—See HEALTH (4).

HOUSING PROJECT—See CONTRACTS (8, 11).

HUSBAND AND WIFE—See APPEAL AND ERROR (5); CONTRACTS (13); DEEDS (3–5).

ICE-COVERED PAVEMENT—See AUTOMOBILES (4, 5).

IDENTIFICATION—See CRIMINAL LAW (15–17).

ILLEGAL PROFITS—See JUDGMENT (38); TRUSTS (5).

IMMUNITY FROM LIABILITY—See JUDGES; OFFICERS (2); PHYSICIANS AND SURGEONS (4, 5).

IMPEACHMENT—See DEPOSITIONS; EVIDENCE (3); WITNESSES (3, 6, 15, 21).

IMPROVEMENTS.

1. To entitle one in equity to compensation for improvements made upon another's property they must have been made in good faith by improver while holding possession under color of title adverse to the title of the true owner. *Hogerheide* v. *Hickey*, 580.

IMPROVEMENTS—Continued.

2. Requirements of color of title and adverse possession have no application in case of improvements on another's property through an innocent mistake. *Id.*
3. Court-rule provision foreclosing collection for value of improvements if they were made in bad faith, shifts burden of proof and emphasis as to element of good faith from improver to owner (GCR 1963, 754.5[3]). *Id.*
4. Term *bad faith* in the context of court rule relative to compensation for improvements on real estate is construed to mean not *fraud* or *overreaching*, but simply a *lack of good faith* (GCR 1963, 754.5[3]). *Id.*
5. Finding of trial court that plaintiff who had improved real estate to which title had been held by his late wife and her brother as joint tenants had failed to establish a case for equitable intervention and to obtain compensation for the improvements *held*, not against the clear preponderance of evidence. *Id.* 581.

See VENDOR AND PURCHASER (4).

INADEQUATE VERDICT—See DAMAGES (4); NEW TRIAL (2).

INCEST—See RAPE (2).

INCLUDED OFFENSE—See CRIMINAL LAW (10); INDICTMENT AND INFORMATION (2, 3); RAPE (2).

INDECENT LIBERTIES—See CRIMINAL LAW (24, 26, 28–30).

INDEMNITY.

Indemnity contracts are to be so expounded as to effectuate the intentions of the parties, and in ascertaining such intentions the court must take into consideration not only the language of the contract, but the situation of the parties and the circumstances surrounding them at the time the contract was made. *Vannoy* v. *City of Warren (Johnson & Anderson, Inc.*, v. *Nelson M. Sharrow Excavating Co., Inc.)*, 78.

See JUDGMENT (4).

INDICTMENT AND INFORMATION.

1. The basic reason for an information is to apprise the defendant of the charges against him, and an information which fulfills such requirement is a good and proper information. *People* v. *Kearns*, 60.
2. An information which may be defective in its averments as to a higher crime but which contains a full description of a lesser included offense is a good and proper information as to the included offense. *Id.*
3. Information which charged defendant and an accomplice with crime of robbery armed and which information fully informed defendant of the included offense of assault with intent to rob being armed did not require that an amendment be made by the trial court in order to enable the court to accept a plea of guilty to the lesser included offense (CL 1948, § 750.89; CLS 1961, § 750.529). *Id.*

INDICTMENT AND INFORMATION—Continued.

4. Generally a prosecuting attorney is required to indorse only *res gestae* witnesses (CLS 1961, § 767.40). *People* v. *Dickinson*, 646.

See CRIMINAL LAW (69); FALSE PRETENSES (2); RAPE (4).

INFANTS—See AUTOMOBILES (1); CRIMINAL LAW (22–24, 26, 28–30, 32).

INFERENCES—See JUDGMENT (15); STATUTES (4).

INJUNCTION—See APPEAL AND ERROR (21); COSTS (11, 14–24); DEDICATION (17); ELECTRICITY; TOWNSHIPS (6).

INLAND LAKE—See COSTS (11).

INSPECTION—See CONTRACTS (19).

INSTRUCTIONS—See APPEAL AND ERROR (9–12, 33, 45, 50, 51, 53); AUTOMOBILES (7, 8, 10, 13); CORPORATIONS (4); CRIMINAL LAW (25, 27, 30, 36); FALSE PRETENSES (2, 3); RAILROADS (1, 3); TRIAL (1); WITNESSES (7, 21).

INSURANCE.

1. Construction of an accidental death insurance policy must be as fair and as reasonable as the limiting language will permit in order to have such contracts of value to the insured. *Berger* v. *Travelers Insurance Company*, 269.

2. An accidental injury must stand out as the prominent factor in the production of death of the insured in order to recover under an accidental death insurance policy. *Id.*

3. Parties to an accidental death insurance policy are deemed to have intended that the active, efficient, proximate cause of death be the ultimate test of liability. *Id.*

4. Finding of trial judge in nonjury action under accidental death insurance policies that primary cause of death of insured was severe arteriosclerotic heart disease, not the automobile accident in which insured had been involved 2 weeks before his death, *held*, supported by competent evidence. *Id.* 270.

5. It is a question for the trier of the facts to determine what the active, efficient, and precipitating cause of death may be when conflicting evidence of relations between alleged causes and effects are presented in action under accidental death insurance policies. *Id.*

6. The construction of insurance contracts should be in accordance with the standard of the understanding of the ordinary person. *Michigan Mutual Liability Company* v. *Mesner*, 350.

7. Clause of automobile insurance policy insuring against injury by uninsured motorists is construed as imposing liability on the insurer to amount of insured's loss less sum received from workmen's compensation carrier with a maximum of $10,000 rather than $10,000 maximum less amount of recovery of workmen's compensation. *Id.*

INSURANCE—Continued.

8. Conduct of insurer with reference to arbitration, pursuant to compulsory arbitration provisions of policy, may give insured right to sue. *Bielski* v. *Wolverine Insurance Company*, 501.
9. Whether facts on which a claim of waiver is based are proved is a question for the trier of the facts. *Id.*
10. Whether facts showing waiver, if proven, amount to a waiver is a question of law. *Id.*
11. Summary judgment in action on uninsured motorist provision of insurance contract is reversed and remanded for trial, where claim of waiver of compulsory arbitration clause was a question for trier of facts under evidence adduced. *Id.*
12. Termination of employment for purposes of group insurance policy must be based upon records of employer, without reference to union contract (CLS 1961, § 500.2226[2]). *Norwood* v. *Connecticut General Life Insurance Company*, 535.
13. Grace period under group insurance policy which began to run as of actual date of termination by layoff of insured notwithstanding fact that insured did not receive actual notice of layoff until 4 days later, where insured was subject to immediate layoff without advance notification, the notice given did not relate to termination of employment but to re-employment, hence, where insured died after expiration of grace period without exercising conversion privilege under group policy, it was no longer in force as to him (CLS 1961, § 500.2226 [2]). *Id.*

See ACCORD AND SATISFACTION (2); ACTION (2); COSTS (20); FRAUDS, STATUTE OF; JUDGMENT (32, 33); MASTER AND SERVANT (2); NEGLIGENCE (8, 9); TRIAL (12); WITNESSES (2).

INTENT—See AUTOMOBILES (9); CONTRACTS (1–3, 17, 21); COVENANTS (2–4); CRIMINAL LAW (33, 44); DAMAGES (5); FALSE PRETENSES (2, 4, 5); FRAUD (12–14); INDEMNITY (1); INSURANCE (3); STATUTES (4, 6, 10); TOWNSHIPS (1); WITNESSES (3, 6).

INTEREST.

Interest at 5% is payable on amount to which plaintiff is entitled to recover for prepayments made for dancing lessons, which were not received because of her physical condition, from date of demand, here the date when suit was commenced, until entry of amended judgment in the trial court. *Kraus* v. *Arthur Murray Studios of Michigan, Inc.*, 131.

See TOWNSHIPS (6).

INTERFERENCE WITH RELATIONS—See MASTER AND SERVANT (2).

INTERLOCUTORY ORDER—See APPEAL AND ERROR (16–18).

INTERROGATION BY POLICE—See CRIMINAL LAW (13).

INTERROGATION OF DEFENDANT—See CRIMINAL LAW (49).

INTERROGATORIES—See EVIDENCE (6); PARTIES (3); PLEADING (7).

INTERSECTIONS—See AUTOMOBILES (5, 7, 8, 10, 12–14).

INTERVENTION—See PARTIES (1–3).

INTIMIDATION—See RAPE (5, 6).

INTOXICATING LIQUOR—See APPEAL AND ERROR (45); CRIMINAL LAW (60, 63); NEGLIGENCE (7); RAILROADS (1); TRIAL (4).

INVESTMENT—See JUDGMENT (40); TRUSTS (13).

JOINT ACCOUNT—See BANKS AND BANKING.

JOINT ADVENTURES—See ACCOUNTING (1); APPEAL AND ERROR (30, 32).

JOINT TENANCY—See IMPROVEMENTS (5).

JOINT TORT-FEASOR—See MASTER AND SERVANT (1).

JUDGES.

1. Judge who committed plaintiff to a mental institution in a sanity proceeding was acting under the *color of law* in fulfilling the requirements of the statute and his actions were privileged (CLS 1961, § 330.19). *Olepa* v. *Mapletoff*, 734.
2. No suits will lie against any judge for an act carried out in his official capacity. *Id.*
3. No action will lie against a judge for a judicial act, though it is alleged to have been done maliciously and corruptly. *Id.*
4. Common law principle that *no action will lie against a judge for a judicial act* was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions. *Id.*

See APPEAL AND ERROR (63).

JUDGMENT.

1. The term *another State*, as used in statute permitting enforcement of a decree for alimony by courts of this State, is not construed as including a foreign country (CL 1948, § 552.121) *Growe* v. *Growe*, 25.
2. Recovery in this State may not be had on a judgment for alimony rendered by a court in the Province of Ontario, Canada, under statute of this State limiting actions for enforcement of alimony decrees to decrees of other States (CL 1948, § 552.121). *Id.*
3. The requirements for proper application of comity are satisfied with respect to the enforcement in this State of a judgment of a court of the Province of Ontario, Canada, where it appears that the basic rudiments of due process were followed in that the parties were present in court, a hearing on the merits was had, and judgment for alimony is not subject to modification of arrears or increase under Canadian law, and no cogent reason for nonenforcement of the decree is presented. *Id.*
4. Trial court's denial of third-party defendant's motion for summary judgment in action under death act against de-

JUDGMENT—Continued.

fendant city and its engineers which had contracted with the third-party defendant to install a sewer, in which activity plaintiff's husband had been killed, *held*, proper, where construction of indemnity contract, forming the basis of the third-party complaint, was properly determinable at the trial (CL 1948, § 691.581 *et seq.*). *Vannoy* v. *City of Warren (Johnson & Anderson, Inc.,* v. *Nelson M. Sharrow Excavating Co., Inc.)*, 79

5. Defendant's motion for summary judgment was properly denied, where plaintiff's complaint stated a cause of action by alleging that her easement of passage over 50′ x 75′ strip of land had been converted into a parking lot for parking cars of defendant's employees (GCR 1963, 117). *Lee* v. *Fidelity Life & Income Mutual Insurance Company*, 82.

6. Order granting owner of dominant tenement's motion for summary judgment in her action against fee owner of 50′ x 75′ strip of land in which plaintiff had an easement of passage *held*, error, where in effect the court ruled defendant could use the disputed piece of land only for the purposes of ingress and egress (GCR 1963, 117). *Id.* 83.

7. A motion for summary judgment should be granted forthwith if the pleadings show that a party is entitled to a judgment as a matter of law or if the affidavits or other proof show there is no genuine issue of fact (GCR 1963, 117.3). *Dionne (Garavaglia)* v. *Pierson Contracting Company*, 134.

8. An affidavit opposing a motion for summary judgment must be made on personal knowledge and set forth with particularity such facts as would be admissible as evidence to deny the grounds stated in the motion (GCR 1963, 116.4, 117.3). *Id.*

9. An affidavit by defendant which is cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence fails to comply with court rule requirements pertaining to testing a plaintiff's motion for summary judgment (GCR 1963, 116.4, 117.3). *Id.*

10. Assertion in affidavit for defendant corporation that its creditors might be prejudiced if plaintiffs' stock were redeemed as provided for therein and in the articles of incorporation was a conclusion and insufficient to prevent the grant of plaintiffs' motions for summary judgments (GCR 1963, 116.5, 117.3). *Id.* 135.

11. Assertion that the actual value of defendant corporation's property *might* have been considerably less than that shown on the corporate books, is a conclusionary utterance that is insufficient to prevent entry of summary judgment for plaintiff stockholders whose stock was not redeemed at times provided for in the stock certificates and in the articles of incorporation (GCR 1963, 116.4, 117.3). *Id.*

12. Existence of a material issue of fact raised by the pleading bars entry of a summary judgment (GCR 1963, 117). *Beardsley* v. *R. J. Manning Company*, 172.

JUDGMENT—Continued.

13. Summary judgment is inappropriate in a negligence case where the qualitative issue of whether defendants exercised reasonable care is in dispute, a question for the jury (GCR 1963, 117). *Id.*

14. Summary judgment may properly be granted in a negligence case where on the undisputed physical facts the trial judge would say that a directed verdict would be required (GCR 1963, 117). *Id.*

15. Inferences to be drawn from the underlying facts pleaded or contained in the counter affidavit to motion for summary judgment must be viewed in the light most favorable to the party opposing the motion (GCR 1963, 117). *Id.*

16. Summary judgment procedure cannot impinge upon a party's right to trial of disputed factual issues by a jury or usual court procedure (GCR 1963, 117). *Id.*

17. Judgment of court of competent jurisdiction upon a point is, as a plea, a bar, or as evidence conclusive, between the same parties, or their privies, upon the same matter directly in question in another court, and no matter once litigated and determined, by proper authority, shall a second time be brought in controversy between the same parties or their privies. *Knibbe* v. *City of Warren*, 241.

18. Judgment in first suit or proceeding by court of competent jurisdiction upon a particular matter, fact, or point is conclusive between the same parties or their privies in second suit even though the object and subject matter of the second suit may be different from the first suit. *Id.*

19. Failure to specify claimed jurisdictional objection to judgment of municipal court in the statement of reasons and grounds for appeal precluded using such unstated grounds as a basis for motion for accelerated judgment in the circuit court (GCR 1963, 116.1, 701, 702, 711). *Domestic Finance Company* v. *Purser*, 301.

20. Denial of defendant's motion for accelerated judgment for lack of jurisdiction of municipal court to enter judgment after expiration of 10 days from date case is alleged to have been submitted to it for determination, *held*, proper, where such ground for lack of jurisdiction had not been specified in claim of appeal from the municipal court to the circuit court (GCR 1963, 116.1, 701, 702, 711). *Id.*

21. A party who fails to make a full presentation of his case, whereby judgment passes against him, cannot be permitted to make a better showing in a new suit. *Swindlehurst* v. *American Fidelity Fire Insurance Company*, 329.

22. *Res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Id.*

23. *Res judicata* rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them are concerned. *Id.*

JUDGMENT—Continued.

24. A judgment for defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law, but if the judgment determines that the plaintiff has no cause of action, it is on the merits. *Id.* 330.

25. Consequences of adverse judgment in action for breach of contract of insurance policies, from which plaintiff did not appeal may not be avoided by bringing a new action for conversion but based on the same cause of action, where the justiciable controversy was determined by a court of competent jurisdiction. *Id.*

26. Directed verdict for defendant insurer was erroneously denied in action for conversion of tractor and trailer equipment belonging to plaintiff and which had been damaged in an accident, where a judgment had previously been rendered for defendant in action plaintiff had brought for breach of insurance policies and no appeal taken, the doctrine of *res judicata* being applicable. *Id.*

27. Court rule provision that judgment be rendered forthwith if pleadings show a party entitled to judgment as a matter of law or if affidavits or other proof show there is no genuine issue of fact does not permit the balancing of defendants' sworn allegations of fact against unsworn allegations of plaintiff's complaint (GCR 1963, 117.2[3], 117.3). *Green* v. *Lundquist Agency, Inc.*, 488.

28. The trial judge to whom a defendant's motion for summary judgment is addressed is not limited to a consideration of the affidavits supporting and opposing the motion, but may also consider pleadings, depositions, admissions, and documentary evidence then filed (GCR 1963, 117). *Id.*

29. A motion for summary judgment, directed to the sufficiency of the pleadings, requires plaintiff to allege facts in affidavits in opposition to the motion, which could justify a court in finding a meritorious cause of action (GCR 1963, 117). *Beck* v. *Delta Recreation Corporation*, 518.

30. Trial judge's determination that plaintiffs-appellants seeking to foreclose mechanics' liens, had not raised issues of fact going to the matter of perfecting the lien for decision *held*, proper under record presented, it being permissible for the court to consider pleadings as a whole, including affidavits filed in support of motion to amend complaint, hence, defendant's motion for summary judgment was properly granted (CLS 1961, § 570.6; GCR 1963, 117). *Id.* 519.

31. A party opposing a motion for summary judgment may obtain a denial thereof upon production of some evidence (GCR 1963, 117). *Id.*

32. Allegation in complaint on settlement agreement that insurer's adjuster was acting as agent of the insurer in effecting compromise agreement is accepted as true on appeal from order granting insurer's motion for summary judgment because "pleadings * * * failed to disclose that plaintiff has any cause of action against defendants" (GCR 1963, 117.2[1]). *Ortiz* v. *Travelers Insurance Company*, 548.

JUDGMENT—Continued.

33. Allegation that insurance adjuster was acting "on behalf of" insured, set forth in complaint on settlement agreement *held,* an insufficient allegation of agency or other authority to bind the insured, when motion for summary judgment for failure to state a cause of action was interposed, hence, summary judgment was properly entered for the insured (GCR 1963, 117.2[1]). *Id.* 549.

34. A consent judgment differs from the litigated judgment in that the former is primarily the act of the parties rather than the considered judgment of the court and cannot ordinarily be set aside by the court without the consent of the parties. *Id.*

35. A judgment entered for $25,000 without costs, following rendition of verdict for $35,000 and costs, was a consent judgment, based upon a meeting of the minds of the litigants rather than the verdict of the jury, notwithstanding the verdict may have loomed large in the minds of the parties during negotiations for settlement, there being an agreement to remission of $10,000 and costs. *Id.*

36. Summary judgment may be granted where the opposing party has failed to state a valid defense to the claim asserted against him (GCR 1963, 117.2[2]). *Minor-Dietiker* v. *Mary Jane Stores,* 585.

37. Proof of existence of oral modification agreement and consideration therefor to determine whether plaintiffs are estopped from claiming invalidity of oral agreement must go to trial and cannot be determined by a judge at hearing on motion for summary judgment. *Id.* 586.

38. Judgment of lower court, which required defendant, who profited from breach of duty to trust while serving as trustee, to pay over to the current trustee all the fruits of the breach as a constructive trust, is modified and the amount to be paid over is reduced by portion of the claim of beneficiaries barred by laches and estoppel. *Sloan* v. *Silberstein,* 662.

39. Annual accounts rendered by the various trustees in the court below are allowed and approved, except as modified because of dereliction of trustee who breached his trust. *Id.*

40. All claims for additional management fees and trustees' fees are denied, where trustee breached trust by failing to file annual accounts and by investing trust funds in debentures issued by corporation in which he was 1 of 2 principal stockholders and its president. *Id.* 663.

41. Allowance and approval of various annual accounts *held,* not to deprive any beneficiary of the trust of the right to receive distribution of constructive trust paid into testamentary trust by trustee who breached the trust. *Id.*

42. Summary judgment for defendant was proper where plaintiff chose to file affidavits which were not responsive to defendant's affidavits, which were in part based upon information and belief instead of personal knowledge of affiant, and which were cast

JUDGMENT—Continued.

in conclusionary language instead of stating with particularity facts admissible as evidence (GCR 1963, 117). *Christy* v. *Detroit Edison Company*, 730.

43. No genuine issue as to any material fact is established sufficient to bar entry of summary judgment on defendant's motion, if otherwise defendant is entitled thereto, where plaintiff, opposing the motion, chose to file affidavits not responsive to defendant's affidavits, which were in part based upon information and belief instead of personal knowledge of affiant, and were cast in conclusionary language instead of stating with particularity facts which would be admissible as evidence (GCR 1963, 117). *Id.*

See APPEAL AND ERROR (16, 17, 39, 49); CORPORATIONS (1); COSTS (2, 4, 17, 20); COUNTIES; EASEMENTS (3); INSURANCE (11); INTEREST (1); LIBEL AND SLANDER (5); MUNICIPAL CORPORATIONS (5, 6); NEGLIGENCE (2); VENDOR AND PURCHASER (2, 4).

JUDGMENT NOTWITHSTANDING VERDICT—See HOSPITALS (2).

JUNKYARD DEALER—See AUTOMOBILES (9).

JURISDICTION—See APPEAL AND ERROR (16, 17, 59); COSTS (8); COURTS (2–10); DEDICATION (19); JUDGMENT (17–20, 25); MUNICIPAL CORPORATIONS (4, 16); PARDON (1); TRIAL (7); WORKMEN'S COMPENSATION (9).

JURY.

1. Jury selection, in which prospective jurors may be disqualified by board of jury commissioners when prospective jurors have a criminal record or are related, in their immediate family, to those who have criminal records, *held*, not to be violation of equal protection of the law, when record indicates that selection of jury was in compliance with statutory requirements, and not a systematic exclusion of a class as claimed (US Const, Am 14; Const 1963, art 1, § 1; CL 1948, §§ 725.108–725.110, 725.115). *People* v. *Mallory*, 359.

2. Jury selection for January, 1965, trial from 1962 list of electors *held*, not to have resulted in improper jury, notwithstanding statutory requirement that lists of jurors should be made biennially or more often if necessary, where current list was not available because of apportionment problems (CL 1948, § 725.103). *Id.*

See COURTS (8); CRIMINAL LAW (33).

LACHES—See APPEAL AND ERROR (32); EQUITY; JUDGMENT (38); TRUSTS (10, 11).

LAKES—See WATERS AND WATER COURSES (1–3).

LAKESIDE RESORT—See HEALTH (5).

LAKE SHORE BOULEVARD—See APPEAL AND ERROR (21); COSTS (11); HIGHWAYS AND STREETS (1, 2).

LAND CONTRACT—See VENDOR AND PURCHASER (1–3, 5).

LANDFILL—See TOWNSHIPS (3).

LANDLORD AND TENANT.

1. An oral contract to modify a written lease can be enforced, where supported by new consideration (CL 1948, § 566.1). *Minor-Dietiker* v. *Mary Jane Stores*, 585.
2. Oral modification of a 15-year lease comes within statute of frauds (CL 1948, § 566.132). *Id.*
3. Lessor accepting benefits of oral modification of 15-year lease is estopped from claiming modification was void under statute of frauds (CL 1948, § 566.132). *Id.*
4. An oral modification of a 15-year lease, supported by a new consideration is not invalid under statute providing that modifications of leases in writing are not invalid for lack of consideration, since the statute does not apply (CL 1948, § 566-.1). *Id.* 586.

See APPEAL AND ERROR (4); CONTRACTS (3).

LARCENY—See CRIMINAL LAW (16, 17).

Testimony, showing defendant was encountered with complainant's portable television set in hand soon after complainant's apartment had been broken into, *held*, sufficient to permit trial judge, as trier of fact, to find that defendant's guilt of larceny from a building was established beyond a reasonable doubt (CL 1948, § 750.360). *People* v. *Dolphus*, 229.

See CRIMINAL LAW (15–17).

LAST TREATMENT—See LIMITATION OF ACTIONS (2).

LAYOFF—See INSURANCE (13).

LEADING QUESTIONS—See RAPE (3).

LEASED PREMISES—See EMINENT DOMAIN (4); WORKMEN'S COMPENSATION (14–16).

LEASES—See CONTRACTS (3); DEDICATION (18, 19); HEALTH (4); JUDGMENT (37); LANDLORD AND TENANT.

LEAVE TO AMEND—See PLEADING (4).

LEAVE TO APPEAL—See APPEAL AND ERROR (26).

LEGISLATIVE INACTIVITY—See COURTS (1).

LIBEL AND SLANDER.

1. The question of privilege was properly determined by the trial court as a matter of law, where the circumstances giving rise to the occasion of televising the film which plaintiff claimed was defamatory of him are all admitted in the pleadings. *Weeren* v. *Evening News Association*, 74.
2. Finding of trial court that defendant telecaster enjoyed a qualified privilege in televising documentary film "A Bell for Okinawa" *held*, amply supported by circumstances of the occasion. *Id.*

LIBEL AND SLANDER—Continued.

3. A qualified privilege may be lost by abuse, as with publication with actual malice or excessive publication. *Id.*
4. The showing of malice required for the forfeiture of a qualified privilege is not presumed but is a matter of proof by the plaintiff, it being necessary to show both the falsity of the statement and express malice. *Id.*
5. Summary judgment was properly granted defendant telecaster who had telecast "A Bell for Okinawa" twice, where record shows trial court properly found no showing of material falsity or malice and excessive publication could not be claimed (GCR 1963, 117). *Id.*

LICENSE—See AUTOMOBILES (2); CRIMINAL LAW (45); HEALTH (1, 4).

LIENS—See TROVER AND CONVERSION.

LIGHTS—See RAILROADS (5).

LIMITATION OF ACTIONS.

1. Limitation of action contained in revised judicature act of 1961 does not govern rights accruing, accrued, or acquired prior to effective date of act, except as specifically stated or reasonably inferred from the provisions of the act (CLS 1961, §§ 600.5805, 600.5838, 600.9905, 600.9911). *Quinlan* v. *Gudes*, 506.
2. Statute of limitations in action for malpractice in effect at time when alleged malpractice occurred and which had been interpreted as not starting to run until date of discovery, or date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act controlled right of action for malpractice and survived effective date of revised judicature act providing for 2-year statute beginning on date of last treatment (CLS 1956, § 609.13; CLS 1961, §§ 600.5805, 600.5838, 600.9905, 600.9911). *Id.*
3. The statute of limitations in effect did not apply to litigation based on breach of an express trust, where the breach of trust occurred prior to the effective date of the revised judicature act (CLS 1961, §§ 600.5815, 600.5869). *Sloan* v. *Silberstein*, 661.

See AUTOMOBILES (2); EQUITY (1, 3–5); PLEADING (1, 4); PHYSICIANS AND SURGEONS (1); STATUTES (3).

LIMITED NEW TRIAL—See MUNICIPAL CORPORATIONS (11); NEW TRIAL (2).

LIQUOR CONTROL COMMISSION—See VENDOR AND PURCHASER (6).

LIQUOR LICENSE—See VENDOR AND PURCHASER (6).

LIST OF ELECTORS—See JURY (2).

LOCAL ACTIVITY—See TAXATION (1).

LOCAL REGULATIONS—See CONSTITUTIONAL LAW (4).

LOSS OF EYE—See COSTS (20); DAMAGES (9).

LUMINOUS PAINT MARKINGS—See RAILROAD (5).

MAINTENANCE—See DEDICATION (7).

MALICE—See DAMAGES (6); FRAUD (15); JUDGES (3); LIBEL AND SLANDER (3–5).

MALPRACTICE—See LIMITATION OF ACTIONS (2); PHYSICIANS AND SURGEONS (1).

MANAGEMENT FEES—See JUDGMENT (40).

MANDAMUS—See COSTS (7); PARDON (3).

MANSLAUGHTER—See CRIMINAL LAW (21, 36, 37, 59, 62, 64, 65); EVIDENCE (7); TRIAL (4).

MANUFACTURER—See ACCORD AND SATISFACTION (2).

MARKET PRICE OF MINERALS—See EMINENT DOMAIN (8).

MASTER AND SERVANT.

1. An employer, covered by the workmen's compensation act, may not be held to respond in damages as a joint tort-feasor for negligence in addition to his liability under the workmen's compensation act (CL 1948, § 411.1 *et seq.*, as amended). *Vannoy* v. *City of Warren (Johnson & Anderson, Inc.)*, v. *Nelson M. Sharrow Excavating Co., Inc.*, 78.
2. Summary judgment for defendant insurance agency and its officer who wrote letter to plaintiff truck driver's employer complaining about plaintiff's carelessness and suggesting cancellation of the employer's insurance *held*, proper, in action for interference with employment relation, where defendants' uncontroverted affidavits disclosed an adequate basis for plaintiff's discharge and explicitly negate any factual basis for a claim of an unlawful interference by the defendants (GCR 1963, 117). *Green* v. *Lundquist Agency, Inc.*, 488.

See DEATH (1); WORKMEN'S COMPENSATION (2).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (17).

MECHANICS' LIENS.

1. Direct dealing between parties, seeking to foreclose mechanic's lien, and the owner, so as to excuse them from necessity of making personal service of a copy of the statement of account *held*, not shown in plaintiffs' pleading or affidavits (CLS 1961, § 570.6). *Beck* v. *Delta Recreation Corporation*, 519.
2. Direct dealings with an owner can consist of something less than an express contract so far as provision in mechanic's lien law excepting persons dealing directly from making personal service of the statement of account, but casual conversations, expressions of concern over payment, and being asked to bid on a job directly with a contractor are not construed as "dealing directly with the owner" (CLS 1961, § 520.6). *Id.*

MECHANICS' LIENS—Continued.

3. Service of statement of account by certified letter is not acceptable as personal service of such statement as required by mechanic's lien law (CLS 1961, § 570.6). *Id.*

4. Claims of invalid mechanic's lien and foreclosure thereof are subordinate to lien of claimant under duly filed lien and of defendant-appellee, the assignee of mortgage given by the owner to the prime contractor as security for payment, where summary judgment for such defendant is affirmed (CLS 1961, § 570.6; GCR 1963, 117). *Id.*

See JUDGMENT (30).

MEDICAL EXPENSES—See APPEAL AND ERROR (5); DAMAGES (3).

MEDICAL REPORTS—See WITNESSES (7).

MENTAL ANGUISH—See DAMAGES (1, 2).

MERGER—See CORPORATIONS (3, 4).

METERS—See MUNICIPAL CORPORATIONS (30).

MINES AND MINERALS—See EMINENT DOMAIN (7, 8).

MINORS—See AUTOMOBILES (1); CRIMINAL LAW (22–24, 26, 28–30, 32).

MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (25, 30).

MISTAKE—See DAMAGES (2); IMPROVEMENTS (2).

MODIFICATION OF LEASE—See JUDGMENT (37); LANDLORD AND TENANT.

MONOPOLIES.

1. Restraint of trade is prohibited only when it is unreasonable. *Sun Oil Company* v. *Trent Auto Wash, Inc.*, 389.

2. Restrictive covenant reserved by common grantor on defendant's 4 lots, adjacent to plaintiff's 2 lots used in connection with gasoline station, which prohibited storage and sale of gasoline and petroleum products on defendant's premises *held*, not an unreasonable restraint of trade. *Id.*

MORPHINE—See SEARCHES AND SEIZURES (2).

MORTALITY TABLES—See EVIDENCE (1, 2).

MORTGAGES—See MECHANICS' LIENS (4).

MOTELS—See COSTS (26); MUNICIPAL CORPORATIONS (30).

MOTION FOR DIRECTED VERDICT—See TRIAL (6).

MOTION TO DISMISS—See TRIAL (5, 6).

MOTOR SCOOTER—See CRIMINAL LAW (61).

MUNICIPAL CORPORATIONS.

1. The adoption of a charter creating a new municipality renders it subject to the civil service act for municipal firemen and policemen (CLS 1961, § 38.506). *Cockerline* v. *City of Warren*, 8.

2. Charter provision of newly incorporated city, relative to civil service plan for policemen and volunteer firemen of village whose territory was included, which blanketed in the personnel in the city civil service without examination *held*, not contrary to statutory provisions implementing policy of continuity of service and protection insofar as personnel was qualified by 6 months of previous service (CLS 1961, § 38.506; City of Warren Charter, § 7.18[c]). *Id.*

3. Charter provision of newly incorporated city, relative to inclusion of prior service in pension plan of the city of policemen and part-time volunteer firemen who had so served the village, *held*, not contrary to statute, providing, at time of incorporation, that all service performed by members prior to the enactment of the act by any city or village should be computed to the credit of the member so affected (CL 1948, § 38.554; City of Warren Charter, § 16.2). *Id.*

4. Action by plaintiff in common pleas court of Detroit against city's department of public works for damages to store front and merchandise by reason of snow removal activities is ordered dismissed, since such court has no jurisdiction over the subject matter of the action (CLS 1961, § 728.1). *Millman Brothers, Inc.*, v. *City of Detroit*, 162.

5. Judgment that plaintiff trailer coach park was not covered by ordinance concerning sewer-tap permits fixed rights of parties respecting such subject matter, hence, subsequent resolution by city to raise such fees for trailer parks was invalid and unenforceable against plaintiff notwithstanding charge to plaintiff would be smaller than others to whom applicable. *Knibbe* v. *City of Warren*, 242.

6. Record in proceeding to compel city to construct sidewalks in residential area adjacent to public school *held*, not to show city officials abused their discretion in relation to the proposed public improvement upon which relief may be granted; hence, summary judgment was properly granted (GCR 1963 117.2). *Keller* v. *City of Southfield*, 323.

7. The statute permitting one sustaining damages by reason of injuries to person or property because of a defect in a sidewalk in a city street requires that written notice be served upon the city within 60 days from time of happening of the injury, and Sunday is not precluded from being counted as the last of the 60 days (CL 1948, § 242.8). *Murphy* v. *City of Detroit*, 473.

8. Statutes requiring notice to municipal corporations of claims for personal injuries are liberally construed, and relief is not denied when, by any reasonable interpretation, the notice can be said to be in substantial compliance with the statute, or the defect in the notice has been effectively waived by the council (CL 1948, § 242.8). *Id.*

MUNICIPAL CORPORATIONS—Continued.

9. The statutory requirement that notice of claim for personal injury alleged to have been due to defect in a city sidewalk may be waived by an ordinance adopted before the happening of the injury (CL 1948, § 242.8). *Id.*

10. Statutory notice of claim for personal injury, alleged to be due to defective sidewalk and required to be served upon city within 60 days, *held*, to have been received timely, where last of 60-day period fell on Sunday, city ordinance excluded such day from computation, and notice was received on the next day, strict compliance with the statute having been waived by proper municipal authority, and there being no pertinent statutory computation of time (CL 1948, § 242.8, Detroit Municipal Code, pt 2, chap 1, § 1–1–2). *Id.* 474.

11. New trial, limited to determination of damages, is ordered in action against city for injuries alleged to have been sustained by reason of long-standing defect in city sidewalk, where trial judge had determined that the sidewalk was defective, that plaintiff was not guilty of contributory negligence, and that the defect was the proximate cause of plaintiff's injuries, but that plaintiff's failure to give notice within 60-day period as provided by statute barred recovery, and Court of Appeals determines that strict compliance with statute had been so waived by city ordinance that where 60-day period ended on Sunday receipt of notice on following day was timely (CL 1948, § 242.8; Detroit Municipal Code, pt 2, chap 1 § 1–1–2). *Id.*

12. Operation of municipally-owned transportation system outside the corporate limits is not exempted by the Constitution from the provisions of statutory law (Const 1963, art 7, § 24; CLS 1961, § 117.4f). *Northville Coach Lines, Inc.*, v. *City of Detroit*, 591.

13. *Adjacent* and *adjoining*, as terms are used in provision of home-rule act authorizing a city to operate a transportation facility "within its limits, and its adjacent and adjoining suburbs within a distance of 10 miles from any portion of its city limits" are construed to mean having a common boundary (CLS 1961, § 117.4f). *Id.*

14. Legislative intent relative to whether or not a municipal transportation system can extend itself into noncontiguous suburbs within a 10-mile limit should be discerned from that portion of pertinent statute dealing most specifically with the situation rather than a seemingly inconsistent provision where a phrase dealing with transportation systems was included with other matters (CLS 1961, § 117.4f). *Id.* 592.

15. Requirement of home-rule act that suburb to which city-owned transportation facility could be extended be *adjacent and adjoining* was not satisfied, where the suburb was within 10 miles of city limits, but not contiguous thereto at any point or line (CLS 1961, § 117.4f). *Id.*

16. A municipally-owned transportation system is not subject to the jurisdiction of the public service commission and city need not seek commission approval for any action it may lawfully undertake (CLS 1961, § 117.4f). *Id.*

MUNICIPAL CORPORATIONS—Continued.

17. A municipally-owned transportation system may only do that which the home-rule act permits, and operate extensions of the system in suburbs that touch upon the city, not in suburbs not adjacent and adjoining (CLS 1961, § 117.4f). *Id.*

18. The authority of a city to operate a transportation facility is governed by the Constitution as limited by the home-rule act (Const 1963, art 7, § 24; CLS 1961, § 117.4f). *Id.*

19. Adjacent and adjoining suburbs, *as used in provision of the home-rule act relative to operation of municipally-owned transportation system, is construed to mean two different kinds of suburbs,* (*1*) those nearby but not touching the city *and* (*2*) those touching or bounding at some point or on some line *(CLS 1961, § 117.4f),* per FITZGERALD, J. *Id.* 593.

20. Special assessment of property for redevelopment of downtown business area of defendant city *held,* not invalid, where there was substantial compliance with mandates of the city charter and parties challenging the proceedings had received actual notice of pendency of the proceedings (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10). *Wait* v. *City of Sturgis,* 614.

21. Special assessment of property for redevelopment of downtown business area in defendant city *held,* not to have been shown invalid for failure of city to make an estimated assessment on city-owned property, where city assumed $59,000 of estimated cost of $344,000 of the project (Sturgis Charter, chap 19, §§ 1–10). *Id.*

22. The presumption of validity attaches to the action of a city commission with respect to what property should be included in establishing a special assessment district for redevelopment of a downtown business area (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10). *Id.*

23. Finding of trial judge in action to invalidate special assessment for redevelopment of downtown business area that city commission had not abused its discretion in establishing the limits of the district is not disturbed on review by Court of Appeals (PA 1962, No 162, § 5; Sturgis Charter, chap 19, §§ 1–10). *Id.* 615.

24. Sewer rates paid to city supplying the service pursuant to reasonable regulations need not be uniform nor be based upon the value of the property where the service is supplied. *Land* v. *City of Grandville,* 681.

25. What is a reasonable charge for sewer service supplied by a municipality is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved. *Id.*

26. A classification of users of sewer service supplied by a municipality having some reasonable basis does not offend the equal protection clauses because it is not made with mathematical nicety or because in practice it results in some inequality (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2). *Id.* 682.

27. Classification of users of sewer service supplied by a municipality will be sustained if any state of facts can reasonably

MUNICIPAL CORPORATIONS—Continued.

be conceived that would sustain it (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2). *Id.*

28. Burden of showing that classification of users of sewer service supplied by a municipality does not rest upon any reasonable basis is upon the party assailing it. *Id.*

29. Classification of objects to which a municipal ordinance may be made applicable must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the ordinance (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2). *Id.*

30. A classification of users of sewer service supplied by defendant city whereby owner of resident trailer park and motel was charged according to each dwelling unit, the same as other multiple dwelling unit structures, rather than his single ownership of the property serviced by a single meter for water used in the premises, *held*, a justified basis for charging for service supplied (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2; Grandville Ordinances Nos 110, 110-B, 121). *Id.*

31. The imposition of charges for sewer service supplied by a city based principally on the total of individual residents living in dwelling units in the city is a reasonable basis for classification of charges (US Const, Am 14; Mich Const 1963, art 1, §§ 1, 2; Grandville Ordinances Nos 110, 110-B, 121). *Id.*

See APPEAL AND ERROR (2, 29); CONSTITUTIONAL LAW (7); COSTS (1, 16, 19, 22); COURTS (3, 4); DEATH; DECLARATORY JUDGMENT; JUDGMENT (4).

MUNICIPAL COURTS—See APPEAL AND ERROR (26, 27); COURTS (2–6); JUDGMENT (19, 20).

MURDER—See CRIMINAL LAW (34, 35).

MUSTACHE—See CRIMINAL LAW (17).

NARCOTICS—See CRIMINAL LAW (44, 45); SEARCHES AND SEIZURES (1, 2).

NECESSARIES—See APPEAL AND ERROR (35).

NEGLIGENCE.

1. Exclusion of testimony of defendant beauticians as to standard of care used by such operators in the county *held*, reversible error, requiring new trial, in action for head and facial injuries received by plaintiff from bleach and color treatment administered by defendants without a pretreatment patch test, where one of the defendants had been in the business for 24 years and the other for 14 years, had attended conventions of beauticians and observed their practices and said they were abreast of the practices of other beauticians in the county, since no one can be held to a higher standard of care than the average in the industry. *Doutre* v. *Niec*, 88.

2. Whether design of entrance-exitway of defendants' store is proper *held*, a question for consideration by jury, where it

NEGLIGENCE—Continued.

appears one walkway was 106″ long with a continuous rise of 9″ from sidewalk to door and other had a terrazzo floor for some 59″ with a slope of 6″ down to a 6″ step at window line and then slope continued to sidewalk for another 44″, hence, summary judgment for defendants in action by customer who fell at the step was error (GCR 1963, 117). *Beardsley* v. *R. J. Manning Company*, 172.

3. Plaintiff, who was driving recently purchased automobile, on which dealer had placed stolen dealer license plates, and who was arrested for driving an automobile with stolen registration plates, *held*, entitled to recover for dealer's negligence, since dealer plates were in the sole control of defendant, as slight precautionary methods, at dealer's place of business, could have been taken to insure plates, placed on plaintiff's automobile, were not stolen. *Manie* v. *Matson Oldsmobile-Cadillac Company*, 315.

4. Negligence is a question of fact and not of law. *Id.*

5. Damages will not be awarded for an emotional or mental disturbance, without accompanying physical injury, caused by defendant's negligence because there is no duty to exercise care to avoid causing mental or emotional harm. *Id.* 316.

6. Mere fact that an act involves an undue probability of mental or emotional harm, and does in fact result therein, is not regarded as a sufficient basis for the maintenance of an action. *Id.*

7. Admission of evidence of blood alcohol content much greater than that accounted for by 2 bottles of beer *held*, prejudicial error, even though plaintiff's witness had testified on direct and cross examination, that decedent had consumed two bottles of beer, where answer did not raise the question of decedent's sobriety. *Hall* v. *Iosco County Board of Road Commissioners*, 511.

8. Addition as plaintiff of workmen's compensation insurance carrier of injured plaintiff's employer, which had paid compensation to plaintiff, in action against third-party tort-feasor on latter's motion is not disturbed on appeal, where insurer voluntarily appeared, answered, and participated in trial, since the insurer was an interested party entitled to first proceeds of recovery (CLS 1961, § 413.15; GCR 1963, 205.1). *Dusendang* v. *Thompson*, 526.

9. Relationship of insurer to injured employee is effected by provision of workmen's compensation act entitling carrier of workmen's compensation insurance of plaintiff's employer to first proceeds of injured employee's recovery in negligence action against third-party tort-feasor, hence, latter's motion to add the insurer as a party plaintiff was proper to rendition of complete relief (CLS 1961, § 413.15; GCR 1963, 205.1). *Id.*

10. Admission of evidence of workmen's compensation benefits being paid to an injured employee, plaintiff in action against a third-party tort-feasor, should not normally be permitted, but where record does not show that plaintiff objected to introduc-

NEGLIGENCE—Continued.

tion of such evidence or presented requests to charge in such respect, the Court of Appeals will not reverse because of waiver. *Id.*

See APPEAL AND ERROR (5, 29, 44); AUTOMOBILES (1, 2, 4, 7, 8, 10); CORPORATIONS (2); COSTS (4, 15); DEATH; HOSPITALS (1, 2); JUDGMENT (13, 14); MASTER AND SERVANT (1); RAILROADS (3); TRIAL (12).

NEGLIGENT HOMICIDE—See CRIMINAL LAW (64, 65).

NEITHER PARTY PREVAILING IN FULL—See COSTS (5, 15, 17, 20, 23, 25).

NERVOUSNESS—See CRIMINAL LAW (48).

NEW TRIAL.

1. New trial, not limited to liability, is ordered in action for damages because of head and facial injuries received in bleach and color treatment by defendant beauticians without a pretreatment patch test having been made, where there was an error made in the exclusion of evidence touching upon the issue of liability, justice requiring that the jury which determines the liability or the lack of it should have the responsibility for measuring any damages, especially when they are unliquidated. *Doutre* v. *Niec*, 88.
2. New trial limited to damages only is ordered in action by plaintiff husband, where his action and that of his wife had been consolidated for trial and appeal, liability in both cases was admitted by defendant, a verdict of $15,000 was awarded wife, and a grossly inadequate verdict of $1.05 awarded husband. *Hugener* v. *Michlap*, 158.
3. A motion for a new trial is addressed to the sound discretion of the trial court and a showing of abuse of discretion is required before an appellate court will reverse the trial court's ruling. *Cataldo* v. *Winshall*, 443.
4. A motion for a new trial is addressed to the discretion of the trial court. *People* v. *Dickinson*, 647.

See APPEAL AND ERROR (41); CRIMINAL LAW (4, 10, 48, 65); MUNICIPAL CORPORATIONS (11); RAPE (6); TRIAL (12).

NONDISCLOSURE—See FALSE PRETENSES (3, 5).

NONJURY CASES—See APPEAL AND ERROR (4, 6, 22–24, 28, 38, 40, 42, 56, 60–62); COSTS (17); CRIMINAL LAW (14, 31); ROBBERY (1); TRIAL (5); VENDOR AND PURCHASER (6).

NONREPEATED WORDS—See STATUTES (14).

NONUSERS—See TOWNSHIPS (4–6).

NOTICE—See COSTS (19); CRIMINAL LAW (39, 41, 43); HEALTH (4); INSURANCE (13); MUNICIPAL CORPORATIONS (7–11, 20); PLEADINGS (8); TRUSTS (10, 11); VENDOR AND PURCHASER (1); WORKMEN'S COMPENSATION (4, 8).

NUISANCE—See APPEAL AND ERROR (13).

NURSE'S AIDE—See HOSPITALS (2).

OBJECTIONS—See APPEAL AND ERROR (33, 45, 53); AUTOMOBILES (7); CRIMINAL LAW (53, 54); HIGHWAYS AND STREETS (3); PHYSICIANS AND SURGEONS (3); TRIAL (15).

OFFER—See DEDICATION (8–10, 14).

OFFER AND ACCEPTANCE—See CONTRACTS (4, 5, 7).

OFFICERS.

1. A plat which was recorded in 1886 is not declared invalid nearly 80 years later merely because the deputy auditor general, rather than the auditor general himself, approved the plat, since the acceptance by the deputy may well have been done in the absence of the auditor general himself (How Stat, § 283). *West Michigan Park Association* v. *Department of Conservation*, 257.
2. The immunity from liability provided by the statute reflects the continued need for those acting under *color of law* to be allowed the immunity so necessary for proper disposition of their duties (CLS 1961, § 330.19). *Olepa* v. *Mapletoff*, 735.

See CORPORATIONS (5); COSTS (14); JUDGES (2, 3); MUNICIPAL CORPORATIONS (6); PHYSICIANS AND SURGEONS (5).

OHIO—See AUTOMOBILES (6).

ONTARIO—See COSTS (2); JUDGMENT (2, 3).

OPINION EVIDENCE—See CRIMINAL LAW (36, 61, 62); TRIAL (4).

OPIUM—See SEARCHES AND SEIZURES (2).

OPPOSITE PARTY—See DEPOSITIONS; WITNESSES (17–20).

ORAL MODIFICATION OF WRITTEN LEASE—See JUDGMENT (37); LANDLORD AND TENANT.

ORDINANCES—See APPEAL AND ERROR (1, 13); CONSTITUTIONAL LAW (3); COSTS (7, 19); MUNICIPAL CORPORATIONS (5, 9, 10, 29–31); TOWNSHIPS (1, 2).

OTHER ACTS—See FALSE PRETENSES (1, 3–5).

OTHER OFFENSES—See RAPE (1).

OTHER STATES—See ACTION (1); JUDGMENT (2).

OUT-OF-STATE SUPPLIER—See TAXATION (1).

OVERREACHING—See IMPROVEMENTS (4).

OWNERS—See AUTOMOBILES (6).

PANTOPON—See SEARCHES AND SEIZURES (2).

PARDON.

1. Failure to hold a fair and impartial hearing before 2 members of the parole board on charge of parole violation within 30 days after obtaining jurisdiction over and custody of the prisoner does not bar further action upon such alleged violation (CLS 1961, § 791.240). *In re Lane*, 140.

2. Statutory provision according one accused of violation of parole a hearing before 2 members of the parole board within 30 days of such accusation is designed to assure an alleged parole violator a speedy hearing on the charge of the parole violation (CLS 1961, § 791.240). *Id.*

3. Failure of the parole board to comply with statutory requirement according one accused of parole violation a hearing within 30 days of accusation gives the accused a basis for a remedy by way of mandamus, not habeas corpus (CLS 1961, § 791.240). *Id.*

4. A fair and impartial hearing of one accused of a parole violation requires that the accused be apprised of the rules and regulations governing such a hearing in advance thereof either by submitting to the accused a copy of rules adopted by the parole board or through publication in usual method for publication of administrative rules. *Id.*

PARENT AND CHILD.

The obligation of a mother to care for, support, nourish, and educate her child is as much of a moral obligation upon her as the father, hence, she will not be permitted to recover for doing so simply because the father omits his duty. *Growe* v. *Growe*, 26.

See COSTS (13); PARTNERSHIP (1–3).

PARKING—See JUDGMENT (5).

PARKING LOT—See PARTNERSHIP (1–3); WORKMEN'S COMPENSATION (14–16).

PARKS—See COSTS (14); DEDICATION (4, 6, 12, 13, 17–19).

PAROL EVIDENCE—See CONTRACTS (2, 3).

PAROLE VIOLATION—See COSTS (6); PARDON (1–4).

PARTIAL JUDGMENT—See APPEAL AND ERROR (49).

PARTIAL TAKING—See EMINENT DOMAIN (3).

PARTIES.

1. Intervention as a matter of right by stockholder in suit against the corporation requires showing that corporation is not adequately defending the stockholder's interests (GCR 1963, 209.1 [4]). *Burg* v. *B & B Enterprises, Inc.*, 496.

2. Right to intervene should be granted, where there is a common question of law or fact, unless court in its discretion determines that intervention would delay or prejudice the adjudication of the rights of the original parties (GCR 1963, 209.2). *Id.*

PARTIES—Continued.

3. Determination by trial court that there was no issue of fact or law common to the claim of petition to intervene and that of the plaintiff in the case *held,* in conflict with the preponderance of evidence in deposition, interrogatories, and pleadings, making denial of intervention an abuse of discretion (GCR 1963, 209.2). *Id.*

See AUTOMOBILES (9); FRAUD (14); JUDGMENT (17); NEGLIGENCE (8, 9).

PARTNERSHIP.

1. A week-to-week tenancy at the whim and caprice of the parents of defendant and his deceased brother whose widow sought an accounting of assets of parking lot operation the brothers had conducted as a partnership on land leased from their parents *held,* not an asset of the partnership for which the surviving brother who continued the business must account under the uniform partnership act, where evidence showed parents had declined to rent the premises to others than the sons for a substantially higher rent at about the time the brothers took over the operation of the lot (CL 1948, § 449.42). *Clements* v. *Clements,* 370.
2. The determination of a court that the leasee's interest in a parking lot, owned by parents of the men who formed a partnership to operate it, constituted a partnership asset of value when partnership was dissolved by death of one of the brothers, cannot rest upon mere conjecture or speculation (CL 1948, § 449.42). *Id.*
3. Accounting for partnership assets of parking lot operation which had been conducted by 2 brothers as a partnership until death of 1 of them is limited to determination of the value of a time clock, the sole tangible asset, where the lease of the premises was on a week-to-week basis from the parents of the brothers (CL 1948, § 449.42). *Id.*

PASSAGE BETWEEN PARTS OF EMPLOYER'S PREMISES—See WORKMEN'S COMPENSATION (14).

PASSAGE TO PARKING LOT—See WORKMEN'S COMPENSATION (15).

PASSENGERS—See CRIMINAL LAW (61).

PATCH TEST—See NEGLIGENCE (1); NEW TRIAL (1).

PATIENT—See EVIDENCE (1); HOSPITALS (1–3).

PAVEMENT—See RAILROADS (4).

PAYMENT—See ELECTRICITY; TOWNSHIPS (6); WORKMEN'S COMPENSATION (3).

PAYMENT SCHEDULE—See BASTARDS (1–3).

PAYROLL—See CONTRACTS (8).

PEDESTRIANS—See AUTOMOBILES (1, 7, 8); WITNESSES (2).

PENSION PLAN—See APPEAL AND ERROR (2); COSTS (1); DECLARATORY JUDGMENT; MUNICIPAL CORPORATIONS (3).

PERFORMANCE—See BROKERS (3); CONTRACTS (9–12).

PERJURY—See WITNESSES (3).

PERMANENT INJURIES—See EVIDENCE (1, 2); HOSPITALS (3).

PERSONAL ERRAND—See WORKMEN'S COMPENSATION (15).

PERSONAL INJURIES—See AUTOMOBILES (6); COSTS (19); EVIDENCE (3); MUNICIPAL CORPORATIONS (7, 8, 11); WITNESSES (7, 9).

PERSONAL SERVICE—See MECHANICS' LIENS (1–3).

PHYSICIANS AND SURGEONS.

1. Action for damages for cancer, allegedly caused by X-ray treatments, begun within 2 years after discovery of cancer but more than 10 years after the last treatment of plaintiff *held*, improperly dismissed on motion for summary judgment, wherein action was governed by prior statute and plaintiff commenced action within the time allowed by the former statute (CLS 1956, § 609.13 and CLS 1961, §§ 600.5805, 600.5838, 600.9905, 600.9911). *Quinlan* v. *Gudes*, 506.
2. Surgery performed without patient's consent and not under emergency situation is an unwarranted touching constituting an assault and battery. *Shulman* v. *Lerner*, 705.
3. Claim that failure of plaintiff, a dentist, to remonstrate to surgery on eyelid constituted consent *held*, without merit, where the eye was draped with a sterile towel and anesthetized, as plaintiff could neither see nor feel the surgery as it progressed, and previous infections had been treated without surgery. *Id.*
4. Doctors who certify as to sanity of plaintiff which was basis for custodial order of municipal judge were acting under *color of law* and their action is privileged (CLS 1961, § 330.19). *Olepa* v. *Mapletoff*, 734.
5. Doctors who in their official capacity certify as to sanity of plaintiff in sanity proceedings had an unqualified privilege so as to be able to discharge their duties without fear of retaliation (CLS 1961, § 330.19). *Id.*

See APPEAL AND ERROR (63); DAMAGES (3); LIMITATION OF ACTIONS (2); RAPE (4–6).

PILING—See CONTRACTS (15, 19).

PLATS—See ACKNOWLEDGMENT (1); DEDICATION (1–3, 8, 9, 19); OFFICERS (1).

PLEADING.

1. The amendment of a pleading is not barred by the statute of limitations whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,

PLEADING—Continued.

even though new facts, a new theory, or even a different cause of action be introduced (CLS 1961, § 600.5805; GCR 1963, 118.4). *Huizenga* v. *Yellow Transit Freight Lines, Inc.*, 36.

2. Whether an amendment of a pleading should be allowed is within the discretion of the trial judge, but it is provided by court rule that leave to amend shall be freely given when justice so requires (GCR 1963, 118). *Id.*

3. It is provided by statute that a trial court has power to amend before judgment a pleading either in form or substance for the furtherance of justice (CLS 1961, § 600.2301). *Id.*

4. Denial of motion for leave to amend and grant of motion for summary judgment in action arising out of a motor vehicle accident in Ohio is reversed for reconsideration of such motions in the light of a recent interpretation by Supreme Court of pertinent court rule provisions in the application of test for granting amendments when the statute of limitations is involved (CLS 1961, § 600.5805; GCR 1963, 117, 118). *Id.* 37.

5. Facts presented to court, no matter how extraordinary, are the basis for judging sufficiency of pleadings. *Manie* v. *Matson Oldsmobile-Cadillac Company*, 315.

6. Leave to amend should be freely given unless court finds that justice would not be served by the amendment (GCR 1963, 118.1). *Burg* v. *B & B Enterprises, Inc.*, 497.

7. Amendment of answer in action for repayment of debt should have been granted where deposition, interrogatories, and pleadings reveal that justice would be served thereby (GCR 1963, 118.1). *Id.*

8. Essential requirement of pleading is to give the other party reasonable notice of the claim or defense. *Hall* v. *Iosco County Board of Road Commissioners*, 511.

9. Pleading is intended for the intelligible disclosure of the real nature of the respective claims of the parties, who must stand or fall on their pleadings, proofs, and theory of case presented thereby. *Id.* 512.

See APPEAL AND ERROR (46, 49, 58); AUTOMOBILES (2); CRIMINAL LAW (22); DAMAGES (1, 2); EVIDENCE (3); JUDGMENT (7, 27, 28, 30, 32, 33); LIBEL AND SLANDER (1); MECHANICS' LIENS (1); NEGLIGENCE (7); PARTIES (3).

PLEA OF GUILTY—See CRIMINAL LAW (5–10, 18–21, 23, 32, 33, 47–49, 72–75); INDICTMENT AND INFORMATION (3).

POLICEMEN—See APPEAL AND ERROR (2); COSTS (1); CRIMINAL LAW (13, 59, 63); MUNICIPAL CORPORATIONS (1–3); SEARCHES AND SEIZURES (1); WITNESSES (6).

POLICE POWER—See CONSTITUTIONAL LAW (6).

POLICING—See HIGHWAYS AND STREETS (2).

POSSESSION—See CRIMINAL LAW (44, 45, 56); FALSE PRETENSES (1); IMPROVEMENTS (1).

POSTDATED CHECK—See FALSE PRETENSES (2, 4).

POSTED SIGNS—See AUTOMOBILES (11).

PRACTICAL INTERPRETATION—See CONTRACTS (18).

PRECEDENTS—See COUNTIES; COURTS (1).

PREJUDICE—See ACTION (1); CRIMINAL LAW (1, 17, 26, 27, 30, 43, 55); JUDGMENT (10); NEGLIGENCE (7); PARTIES (2); RAPE (2); STIPULATIONS (1); WITNESSES (2).

PRELIMINARY EXAMINATION—See CRIMINAL LAW (52, 57–60, 76); EVIDENCE (7).

PREPAYMENTS—See FRAUD (7).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (3, 6, 22–24, 28, 38, 40, 42, 56, 61); FRAUD (8, 9); IMPROVEMENTS (5); PARTIES (3); SET-OFF AND COUNTERCLAIM (1); VENDOR AND PURCHASER (6).

PRESIDENT—See JUDGMENT (40); TRUSTS (6, 13).

PRESUMPTIONS—See APPEAL AND ERROR (44); BANKS AND BANKING (1); CORPORATIONS (2); CRIMINAL LAW (36); MUNICIPAL CORPORATIONS (22); STATUTES (10); TOWNSHIPS (2); TRIAL (4); WILLS (1–4); WORKMEN'S COMPENSATION (14).

PRINCIPAL AND AGENT—See JUDGMENT (32).

PRIOR SERVICE—See APPEAL AND ERROR (2); MUNICIPAL CORPORATIONS (3).

PRIOR STATEMENTS—See CRIMINAL LAW (76); WITNESSES (21).

PRIOR TREATMENTS—See PHYSICIANS AND SURGEONS (3).

PRIVIES—See JUDGMENT (23).

PRIVILEGE—See LIBEL AND SLANDER (1–4).

PRIVILEGED COMMUNICATION—See EVIDENCE (4); WITNESSES (13, 14).

PRIVITY OF CONTRACT—See FRAUD (11).

PROBABLE CAUSE—See ARREST; CRIMINAL LAW (57); SEARCHES AND SEIZURES (2).

PROBATE COURT—See EVIDENCE (4); WILLS (5).

PROBATION—See CRIMINAL LAW (12, 38–43).

PROCEDURE—See COURTS (11).

PROFIT A PRENDRE—See EMINENT DOMAIN (9).

PROFITS—See APPEAL AND ERROR (32); RAILROADS (6).

PROLIXITY—See APPEAL AND ERROR (12).

PROMISE OF LENIENCY—See CRIMINAL LAW (6, 49).

PRORATION OF LIABILITY—See CORPORATIONS (5).

PROSECUTING ATTORNEY—See TRIAL (4).

PROSECUTION—See CRIMINAL LAW (69).

PROSPECTIVE OPERATION—See STATUTES (4, 9, 10); WORKMEN'S COMPENSATION (6).

PROTEST—See ELECTRICITY.

PROXIMATE CAUSE—See AUTOMOBILES (7, 10); CRIMINAL LAW (60); INSURANCE (2, 3, 5); RAILROADS (4–6).

PUBLICATION—See LIBEL AND SLANDER (3, 5); PARDON (4).

PUBLIC BEACH—See APPEAL AND ERROR (20); COSTS (11).

PUBLIC HEALTH—See HIGHWAYS AND STREETS (3, 4).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (6).

PUBLIC POLICY—See ACTION (1); JUDGES (4).

PUBLIC QUESTION—See COSTS (1, 2, 6–8, 11, 13, 14, 16, 19, 21, 22, 24, 26).

PUBLIC SAFETY—See HEALTH (6); HIGHWAYS AND STREETS (3, 4).

PUBLIC SERVICE COMMISSION—See MUNICIPAL CORPORATIONS (16).

PUBLIC USES—See COSTS (14); DEDICATION (2–5, 7, 8, 10–12, 15–17, 19).

PUBLIC UTILITIES—See COURTS (3).

PUBLIC WELFARE—See CONSTITUTIONAL LAW (6); HIGHWAYS AND STREETS (3, 4).

PUBLIC WORKS DEPARTMENT—See COURTS (4); MUNICIPAL CORPORATIONS (4).

PUNISHMENT—See CONSTITUTIONAL LAW (1); CRIMINAL LAW (11); DAMAGES (6).

QUALIFIED PRIVILEGE—See LIBEL AND SLANDER (2–4).

QUESTION FOR TRIER OF FACTS—See APPEAL AND ERROR (3, 22, 24, 31, 38, 44, 51, 54); AUTOMOBILES (1, 4, 14); CONTRACTS (21); CORPORATIONS (3); CRIMINAL LAW (64); EASEMENTS (3); FRAUD (6); HOSPITALS (2); INSURANCE (9, 11); JUDGMENT (7, 12, 13, 16, 27, 30, 42, 43); MASTER AND SERVANT (2); NEGLIGENCE (2, 4); NEW TRIAL (1).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (1, 13, 21, 32, 37, 45, 47).

QUIETING TITLE—See DEEDS (4, 5).

RAILROADS.

1. Instructions to jury relative to railroad right-of-way trespass statute and its application to the facts in action by truck driver who, after drinking intoxicating liquor, had driven his truck some 45′ west on railroad's right-of-way and then returned to crossing at 3:55 a.m. before being hit by defendant's diesel engine *held*, when viewed in its entirety, to be clear, fair, proper, and amply supported by the record (CL 1948, § 469.421). *LaCroix* v. *Grand Trunk Western Railroad Company*, 151.
2. Plaintiff's request to charge relative to wilful and wanton misconduct by defendant railroad was properly denied, where there was no evidence that conduct of railroad employees was either wilful or wanton, it being the function of the jury to determine the issues in a case on the basis of the facts found to be established by the proofs. *Id.* 152.
3. Instructions relative to subsequent negligence in action against railroad company for injuries plaintiff sustained *held*, properly given and supported by the record. *Id.*
4. Plaintiff motorist was properly found guilty of contributory negligence as a matter of law proximately causing his injuries when he ran into the side of the 92d car of defendant's freight train on a dark, clear, cold night, where the pavement was dry after skidding some 164 feet and bending over a standard for railroad crossbuck sign, since there was reckless driving and a failure so to drive as to be able to stop within the assured clear distance ahead (CLS 1961, §§ 257.626, 257-.627). *Music* v. *New York Central Railroad Company*, 467.
5. A railroad had no duty imposed by common law, or administrative regulation to equip the side of its freight cars with lights, reflectors, or luminous paint markings in 1962. *Id.*
6. Testimony relating to pictures of railroad engines, cars, train control signals, and signs showing reflective materials, the cost thereof for use on sides of freight cars, evidence of certified copies of ICC reports as to grade crossing accidents in prior years, and of net profits of the railroad, were all immaterial and irrelevant, where trial court found plaintiff motorist's contributory negligence was the proximate cause of his injuries received in grade crossing accident. *Id.*

RAPE.

1. A qualified exception to the general rule that evidence of the commission of another offense by the defendant cannot be admitted for the purpose of showing that defendant was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense, is made in cases involving statutory rape to permit admission of specific acts of impropriety between the prosecutrix and the accused for the purpose of showing opportunity, disposition of the parties, and intimate relations tending to break down self-respect and modesty (CLS 1961, § 750.520). *People* v. *Donald D. Williams*, 91.
2. Record on trial of defendant on charge of statutory rape of his daughter, a trial had some 7 months after arraignment and which resulted in conviction of included offense of assault

RAPE—Continued.

with intent to rape *held*, not to show he was prejudiced, as a result of the delay and no request was made for a more speedy trial, notwithstanding the State had been dilatory in processing the previous charge of incest (CLS 1961, § 750.520). *Id.* 92.

3. Examination of complainant, a 15-year-old girl, in prosecution for statutory rape *held*, not violative of defendant's rights, since it was within discretion of the trial court to allow considerable latitude in asking leading questions of young girls in such prosecution in order to elicit specific details of the event (CLS 1961, § 750.520). *People* v. *Hicks*, 462.

4. Results of the examination of 13-year-old prosecutrix by 2 physicians following alleged statutory rape was a part of the *res gestae*, as such, essential to trial of the case, and failure of the prosecutor to indorse their names on the information and secure their testimony was clearly prejudicial error (CLS 1961, §§ 750.520, 767.40). *People* v. *Dickinson*, 647.

5. Lapse of 2 days between alleged statutory rape and examination of 13-year-old prosecutrix by 2 physicians did not prevent the examination from being a part of the *res gestae*, where there was testimony of intimidation by defendant in the interim but prompt report to the authorities by her mother on receipt of information from the child (CLS 1961, § 750.520). *Id.*

6. Examination of 13-year-old prosecutrix by physicians selected by the people for the purpose of securing medical opinion as to the fact of the commission of the statutory rape some 2 days theretofore *held*, an ongoing part of the transaction, under evidence adduced showing intimidation of prosecutrix by defendant, and the findings of the examination a part of the *res gestae*, hence, the failure to call the physicians requires that new trial be granted to permit their corroboration or refutation of the prosecutrix (CLS 1961, §§ 750.520, 767.40). *Id.*

See CRIMINAL LAW (1, 13, 54, 55, 76); WITNESSES (3, 6).

RATIFICATION—See APPEAL AND ERROR (34); CONTRACTS (13).

READING LAW TO JURY—See TRIAL (13–15).

READOPTION—See WITNESSES (14).

READY TO SERVE CHARGE—See TOWNSHIPS (6).

REAR-END COLLISION—See DAMAGES (3, 4); EVIDENCE (3); WITNESSES (7, 9).

REASONABLE DOUBT—See CRIMINAL LAW (31); LARCENY (1).

REBUTTAL—See BANKS AND BANKING; TRIAL (2); WILLS (3, 4); WITNESSES (12).

RECITALS—See DEEDS (4, 5).

RECKLESS DRIVING—See RAILROADS (4).

RECONSIDERATION—See COSTS (3).

RECORD—See APPEAL AND ERROR (5, 8, 19, 20, 30, 36, 40, 41, 44, 55); CONTRACTS (7, 13); CRIMINAL LAW (18, 19, 22, 47, 54, 65); DEDICATION (17); DIVORCE (1); EVIDENCE (7); HIGHWAYS AND STREETS (1, 2, 4); JUDGMENT (30); LIBEL AND SLANDER (5); NEGLIGENCE (10); RAILROADS (1, 3); ROBBERY (1); SET-OFF AND COUNTERCLAIM (1); TRIAL (12); WILLS (5); WITNESSES (3).

RECORDER'S COURT OF DETROIT—See APPEAL AND ERROR (13); CONSTITUTIONAL LAW (3).

RECORDING—See ACKNOWLEDGMENT; DEDICATION (2).

REDEMPTION—See CORPORATIONS (1); JUDGMENT (10, 11); VENDOR AND PURCHASER (1, 2); WORKMEN'S COMPENSATION (3).

REDEVELOPMENT OF DOWNTOWN AREA—See COSTS (24); MUNICIPAL CORPORATIONS (20-23).

REDUCTION OF COMPENSATION—See COSTS (13); WORKMEN'S COMPENSATION (11, 12).

RE-EMPLOYMENT—See INSURANCE (13).

REFLECTORS—See RAILROADS (5, 6).

REFRESHING RECOLLECTION—See CRIMINAL LAW (76); WITNESSES (21).

REFUND—See VENDOR AND PURCHASER (6).

REFUTATION—See RAPE (6).

REGULATION—See CONSTITUTIONAL LAW (6); HEALTH (1, 2, 6).

REIMBURSEMENT—See APPEAL AND ERROR (59).

REMAINDER—See EMINENT DOMAIN (4).

REMAND—See APPEAL AND ERROR (2, 59); COSTS (3); CRIMINAL LAW (43); DECLARATORY JUDGMENT; INSURANCE (11).

REMARKS OF TRIAL JUDGE—See TRIAL (10, 11).

REMARRIAGE—See COSTS (13); WORKMEN'S COMPENSATION (13).

REMEDY—See FRAUD (5); PARDON (3); WORKMEN'S COMPENSATION (1).

REMITTITUR—See JUDGMENT (35).

RENT—See VENDOR AND PURCHASER (5).

REOPENING CASE—See APPEAL AND ERROR (41).

REOPENING PROOFS—See TRIAL (9).

REPAIRER—See AUTOMOBILES (9); FRAUD (17).

REPAIRS—See ACTION (2); DEDICATION (7); TROVER AND CONVERSION.

REPAYMENT—See PLEADING (7).

REPORTS—See CORPORATIONS (2, 5); RAILROADS (6).

REPOSSESSION—See AUTOMOBILES (6).

REPRESENTATIONS TO INTERMEDIARY—See FRAUD (12).

REPUTATION—See FRAUD (17).

REQUESTS TO CHARGE—See APPEAL AND ERROR (34, 47, 52, 53); HOSPITALS (3); NEGLIGENCE (10); RAILROADS (2).

RESCISSION—See APPEAL AND ERROR (4).

RESERVATION—See WATERS AND WATER COURSES (2).

RES GESTAE—See CRIMINAL LAW (66–70); INDICTMENT AND INFORMATION (4); RAPE (4–6).

RES JUDICATA—See JUDGMENT (17, 18, 21–26); TRIAL (7); WORKMEN'S COMPENSATION (2).

RESOLUTIONS—See MUNICIPAL CORPORATIONS (5).

RESORT—See HEALTH (5).

RESPONSIVE ANSWERS—See CRIMINAL LAW (24).

RESTAURANT—See APPEAL AND ERROR (4).

RESTITUTION—See VENDOR AND PURCHASER (2, 4).

RESTRAINT OF TRADE—See MONOPOLIES (1, 2).

RESTRICTIVE COVENANT—See MONOPOLIES (2).

RETIRED FARMER—See WITNESSES (2).

RETROACTIVE OPERATION—See STATUTES (6, 10).

REVENUE BONDS—See TOWNSHIPS (4).

REVOCATION—See BROKERS (1); CONTRACTS (6, 7); CRIMINAL LAW (39–43); DEDICATION (1, 10).

REVOLVING CHARGE ACCOUNT—See APPEAL AND ERROR (34, 36); CONTRACTS (13, 14).

RIGHT OF ENTRY—See EMINENT DOMAIN (5).

RIGHT-OF-WAY—See AUTOMOBILES (11, 14); EMINENT DOMAIN (6); RAILROADS (1).

RIPARIAN RIGHTS—See HIGHWAYS AND STREETS (1, 2); WATERS AND WATERCOURSES (1–3).

ROAD COMMISSION, BOARD OF COUNTY—See APPEAL AND ERROR (21).

ROBBERY.

1. Finding of guilty beyond a reasonable doubt *held*, supported by record in nonjury prosecution for unarmed robbery (CL 1948, § 750.530). *People* v. *Likely*, 458.

ROBBERY—Continued.

2. Claim of alibi in prosecution for unarmed robbery *held*, insufficient to create a reasonable doubt as a matter of law, where the trial court, hearing the case without a jury could believe the complaining witness and reject the testimony of defendants and their supporting alibi witnesses or conclude that they were mistaken as to the element of time (CL 1948, § 750.530). *Id.*

See CRIMINAL LAW (46–48, 50).

ROBBERY ARMED—See CRIMINAL LAW (10); INDICTMENT AND INFORMATION (3).

RULE OF REASON—See MONOPOLIES (1).

RULES AND REGULATIONS—See PARDON (4); RAILROADS (5).

RUNNING WITH LAND—See COVENANTS (3).

SALES—See AUTOMOBILES (9); BROKERS (1); DEDICATION (1); FRAUD (15, 17).

SALES TAX—See TAXATION.

SAME TRANSACTION—See PLEADING (1).

SANITARY LANDFILL—See TOWNSHIPS (3).

SANITY PROCEEDINGS—See APPEAL AND ERROR (63); JUDGES (1); PHYSICIANS AND SURGEONS (4, 5).

SATISFACTION—See DAMAGES (8).

SCHOOLS AND SCHOOL DISTRICTS.

1. A school district, as an agency of the State, is clothed with the State's immunity from liability for ordinary torts committed in the course of its exercise of the governmental function entrusted to it. *Picard* v. *Greisinger*, 96.
2. No recovery of damages from either the school board or school district is permitted for injuries plaintiff minor sustained when basketball was thrown at him by defendant teacher while such plaintiff was watching a gym class at defendants' school, the defense of governmental immunity being available to such agencies as a bar to an action for tort. *Id.*

See COSTS (16); MUNICIPAL CORPORATIONS (6).

SEARCHES AND SEIZURES.

1. Defendant's claim that narcotics seized by police officer should be suppressed as evidence *held*, not valid, where police officer discovered evidence by the use of his sense of sight while defendant was stopped for a traffic light, and not while officer was engaged in a searching operation (CLS 1961, § 335.153). *People* v. *Mallory*, 360.
2. Search and seizure of contraband by police officers when investigating a call at 10:55 p.m. at apartment in which defendants were present, after observing vials appearing to con-

SEARCHES AND SEIZURES—Continued.

tain narcotic drugs, whereby there was obtained 83 morphine tablets, 91 codeine tablets, 40 pantopon tablets, and 251 grains of powdered opium *held*, not unlawful as in violation of either United States or State Constitutions prohibiting unreasonable searches and seizures, hence, motion to suppress the evidence and quash the information was properly denied (US Const, Am 4; Mich Const 1963, art 1, § 11). *People* v. *Napolitano*, 601.

SECURITY DEPOSIT—See ELECTRICITY.

SELECTION—See JURY (1, 2).

SELF-INCRIMINATION—See CRIMINAL LAW (49).

SENIORITY—See UNEMPLOYMENT COMPENSATION (2).

SENTENCE—See CRIMINAL LAW (9–12, 18, 21, 23, 34, 35, 50, 51, 72–75).

SEQUESTRATION—See WITNESSES (11, 12).

SET-OFF AND COUNTERCLAIM.

1. Trial court's allowance of defendant contractor's contested counterclaim for extras is not disturbed, where the conflicting evidence presented a fact question and record does not disclose allowance made was against the clear preponderance of the evidence. *Beacon Plaza Shopping Center, Inc.*, v. *Tri-Cities Construction & Supply Company*, 416.
2. Counterclaim for amount due on note given by plaintiff to defendant to get it to function as general contractor which could furnish a performance bond that had to be obtained in order for plaintiff to finance construction of shopping center *held*, to have been properly allowed, even though defendant is not held liable on the general contract, where obtaining performance bond necessitated that members of defendant firm and their wives execute mortgages to the bonding company and the bond was a material benefit to the plaintiff, there being consideration for the note. *Id.* 417.

SETTING ASIDE STIPULATIONS—See STIPULATIONS (1, 2).

SETTLEMENT AGREEMENT—See UNEMPLOYMENT COMPENSATION (2).

SEWERS—See CONSTITUTIONAL LAW (7); COSTS (26); JUDGMENT (4); MUNICIPAL CORPORATIONS (24–28, 30, 31); TOWNSHIPS (4–6).

SEWER-TAP FEES—See MUNICIPAL CORPORATIONS (5).

SHACKLING TO CHAIR—See CRIMINAL LAW (1).

SHERIFFS AND CONSTABLES—See EXTRADITION (1); HABEAS CORPUS.

SHOPPING CENTER—See CONTRACTS (15, 17); SET-OFF AND COUNTERCLAIM (2).

SIDEWALKS—See COSTS (16, 19); MUNICIPAL CORPORATIONS (6, 7, 9–11).

SIGNALS—See RAILROADS (6).

SILICOSIS—See WORKMEN'S COMPENSATION (4–8).

SIMULTANEOUSLY EXECUTED DOCUMENTS—See CONTRACTS (16–18).

SKIDDING—See AUTOMOBILES (3–5); RAILROADS (4).

SNOW REMOVAL—See COURTS (4); MUNICIPAL CORPORATIONS (4).

SOBRIETY—See NEGLIGENCE (7).

SPECIAL APPEAL—See APPEAL AND ERROR (26).

SPECIAL ASSESSMENT—See COSTS (24); MUNICIPAL CORPORATIONS (20–23).

SPECIAL FINDINGS—See APPEAL AND ERROR (44).

SPECIFIC PERFORMANCE—See BROKERS (3); CONTRACTS (3).

SPECULATION—See PARTNERSHIP (2).

SPEED—See AUTOMOBILES (5); CRIMINAL LAW (59, 61, 62); EVIDENCE (7).

SPEEDY TRIAL—See RAPE (2).

STANDARD OF CARE—See HOSPITALS (1); NEGLIGENCE (1).

STATEMENT OF ACCOUNT—See MECHANICS' LIENS (1, 2, 3).

STATEMENT OF REASONS AND GROUNDS FOR APPEAL—See JUDGMENT (19).

STATES—See CONSTITUTIONAL LAW (1, 4); DEDICATION (18).

STATUTE OF LIMITATIONS—See AUTOMOBILES (2); DEDICATION (14); LIMITATION OF ACTIONS (3); PLEADING (1, 4); STATUTES (3).

STATUTES.

1. A statute will be construed in accordance with the affirmatively and clearly expressed wording contained therein, where the legislature has not provided otherwise. *Growe* v. *Growe*, 25.
2. The certain and definite language used in a statute must be construed as it may read, without reference to equitable considerations. *Id.* 26.
3. The language of a statute must expressly state that it constitutes a statute of limitations in order to be so construed. *In re Lane*, 140.
4. Statutes are prospective in their operation excepting in such cases as the contrary is expressed by clear and positive command, or is to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the

STATUTES—Continued.

occasion of the enactment admits of no reasonable doubt, but precludes all question of such intention. *Briggs (Habetler, Harris, Wright)* v. *Campbell, Wyant & Cannon Foundry Company (Harrington* v. *Gale Manufacturing Company)*, 204.

5. Vested rights may not be impaired by legislative action. *Id.*

6. Interpretation of a statute imputes an intention against retrospective action unless the terms clearly indicate an intention in favor of it. *Id.*

7. The right to hold a party liable for the payment of contribution toward the retirement of a statutory obligation, and the right to defend against any such liability where the liability to contribute did not exist when the party seeking contribution was compelled to pay, alike are vested and substantive rights. *Id.* 205.

8. Generally, an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void and ineffective for any purpose where it denies due process, since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it; an unconstitutional law, in legal contemplation, being as inoperative as if it had never been passed. *Id.*

9. An unconstitutional statute may be rendered valid by removing the objectionable features or by supplying essential features by amendment, but validity would be prospective only. *Id.*

10. The presumption that the legislature intended that a statute should have prospective effect only is especially true when giving it retroactive operation will create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed. *Id.*

11. The general rule that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens does not apply where the statute requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive, since the element of voluntary action essential to waiver or estoppel is absent. *Id.* 206.

12. It is not to be supposed that any section of a statute was inserted with no intelligible purpose. *Northville Coach Lines, Inc.*, v. *City of Detroit*, 592.

13. *A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative and superfluous, void, or insignificant,* per FITZGERALD, J. *Id.* 593.

14. *Words enacted in one section of a statute do not become inoperative merely by the fact of their nonrepetition in a later subparagraph of the same section,* per FITZGERALD, J. *Id.*

See ACKNOWLEDGMENT; APPEAL AND ERROR (2, 13, 63); ARREST; AUTOMOBILES (2, 3, 6, 10, 13, 14); BANKS AND BANKING; CONSTITUTIONAL LAW (3, 4); CORPORATIONS (3–5); COSTS (1, 3, 4, 6, 8, 12, 18, 19, 22); COURTS (2–6); CRIMINAL LAW (1–3, 5–8, 10–13, 15–17, 19, 21–26, 28–30, 32–36, 38–48, 50, 51, 54–

STATUTES—Continued.

61, 64, 65, 76); DEATH; DECLARATORY JUDGMENT; DEDICATION (1–3, 6, 17, 18); DEPOSITIONS; DIVORCE (2); EMINENT DOMAIN (1–3, 5, 9); EQUITY (3, 4); EVIDENCE (3); EXTRADITION (1, 2); FALSE PRETENSES (1–5); FRAUDS, STATUTE OF; HABEAS CORPUS; HEALTH (1–7); HIGHWAYS AND STREETS (3); INDICTMENT AND INFORMATION (3, 4); INSURANCE (12, 13); JUDGES (1); JUDGMENT (1, 2, 4, 30); JURY (1, 2); LANDLORD AND TENANT; LARCENY; LIMITATION OF ACTIONS (1–3); MASTER AND SERVANT (1); MECHANICS' LIENS (1–4); MUNICIPAL CORPORATIONS (1–4, 7–18, 20, 22, 23); NEGLIGENCE (8, 9); OFFICERS (1, 2); PARDON (1–3); PARTNERSHIP (1–3); PHYSICIANS AND SURGEONS (1, 4, 5); PLEADING (1, 3, 4); RAILROADS (1, 4); RAPE (1–6); ROBBERY (1, 2); SEARCHES AND SEIZURES (1); TAXATION; TOWNSHIPS (4–6); TRIAL (4); TROVER AND CONVERSION; TRUSTS (1, 5, 6); VENDOR AND PURCHASER (1, 2); UNEMPLOYMENT COMPENSATION (1–3); WILLS (2, 5); WITNESSES (3, 17–20); WORKMEN'S COMPENSATION (1–8, 10–16).

STEEL STRUCTURE—See CONTRACTS (15, 17, 19).

STIPULATIONS.

1. Stipulation of attorneys relating to conduct of pending cause may be set aside, within the discretion of the court, where the enforcement of stipulation would result in injury to one of the parties and the other party would not be materially prejudiced if the stipulation were set aside. *Wechsler* v. *Zen*, 438.

2. Stipulation that neither party to an action concerning rights in joint bank deposit, would call witnesses without giving the other party 48-hour notice *held*, properly set aside by trial judge when he felt that he could not do justice to the cause and, hence, it was not an abuse of discretion. *Id.*

See VENDOR AND PURCHASER (2, 6).

STOCKS AND STOCKHOLDERS—See CONTRACTS (20); CORPORATIONS (1); JUDGMENT (10, 11, 40); PARTIES (1); TRUSTS (6, 7, 13).

STOLEN CAR—See AUTOMOBILES (9); FRAUD (16, 17).

STOLEN DEALER LICENSE PLATES—See NEGLIGENCE (3).

STOPPING—See AUTOMOBILES (1, 5, 10, 12, 13).

STORES—See MUNICIPAL CORPORATIONS (4); NEGLIGENCE (2).

STURGIS—See MUNICIPAL CORPORATIONS (20–23).

SUBCONTRACTORS—See CONTRACTS (8, 11, 20).

SUBDIVISION—See COSTS (14); DEDICATION (4, 17, 19); WATERS AND WATERCOURSES (2, 3).

SUBDIVISION LOT OWNERS—See APPEAL AND ERROR (21).

SUBPURCHASERS—See VENDOR AND PURCHASER (3).

SUBSEQUENT NEGLIGENCE—See RAILROADS (3).

SUBSOIL—See CONTRACTS (19).

SUBSTANTIVE RIGHTS—See COURTS (11).

SUBURBS—See COSTS (22); MUNICIPAL CORPORATIONS (13–15, 17).

SUMMARY JUDGMENT—See APPEAL AND ERROR (46, 49, 63); AUTOMOBILES (6); CORPORATIONS (1); COSTS (3–5, 20); COUNTIES; EASEMENTS (3); ELECTRICITY; INSURANCE (11); JUDGMENT (4–16, 27–33, 36, 37, 42, 43); LIBEL AND SLANDER (5); MASTER AND SERVANT (2); MECHANICS' LIENS (4); MUNICIPAL CORPORATIONS (6); NEGLIGENCE (2); PHYSICIANS AND SURGEONS (1); PLEADING (4).

SUMMER RESORTS—See COSTS (14); DEDICATION (4, 17–19).

SUNDAY—See COSTS (19); MUNICIPAL CORPORATIONS (7, 10, 11).

SUPERINTENDING CONTROL—See CERTIORARI.

SUPPORT OF CHILDREN—See BASTARDS (1–4); PARENT AND CHILD; WORKMEN'S COMPENSATION (12).

SUPPRESSION OF EVIDENCE—See APPEAL AND ERROR (36).

SUPREME COURT—See COSTS (3); COURTS (1); PLEADING (4); VENDOR AND PURCHASER (2).

SURGERY—See PHYSICIANS AND SURGEONS (2, 3).

SURPLUS—See CORPORATIONS (1).

SURVIVORS—See BANKS AND BANKING.

TAKING OF MATERIALS—See EMINENT DOMAIN (5).

TAXATION.

Conduct of plaintiffs in this State in selling advertising specialties and novelties to customers in this State by taking orders for such goods in this State and ordering such materials imprinted with the customers' identification from suppliers outside the State, who ship them directly to the customers who are billed by plaintiffs *held*, a sufficient local activity for the imposition of the State sales tax (CL 1948, § 205.51 *et seq.*, as amended). *Beitzel* v. *Department of Revenue*, 311.

See DEDICATION (7); HEALTH (1); TOWNSHIPS (5).

TELECAST—See LIBEL AND SLANDER (1, 2, 5).

TELEVISION SET—See LARCENY.

TENANCY BY THE ENTIRETIES—See DEEDS (3).

TENANCY IN COMMON—See DEEDS (3, 4).

TERMINATION OF EMPLOYMENT—See INSURANCE (12, 13).

THEORY OF CASE—See APPEAL AND ERROR (35); PLEADING (9); TRIAL (2).

THEORY OF LAW—See TRIAL (3, 13).

THIRD PARTIES—See DEEDS (4).

THIRD-PARTY COMPLAINT—See COSTS (4); DEATH; JUDGMENT (4).

THOMAS TOWNSHIP—See TOWNSHIPS (1).

THROUGH HIGHWAYS—See AUTOMOBILES (10–13).

TIME—See EQUITY (5); MUNICIPAL CORPORATIONS (10, 11); ROBBERY (2); TORTS (1).

TITLE—See AUTOMOBILES (6, 9); DEEDS (1, 4, 5); IMPROVEMENTS (1, 5); VENDOR AND PURCHASER (5).

TORT-FEASORS—See ACCORD AND SATISFACTION (2); COMPROMISE AND SETTLEMENT (1).

TORTS.

1. A person who through the tort of another has been required to act in the protection of his interest by bringing an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees, and other expenses incurred. *Oppenhuizen* v. *Wennersten*, 290.
2. The rule of governmental immunity from tort liability as to all political subdivisions of government is abrogated whether the involved political subdivision is functioning governmentally or proprietarily. *Donellon* v. *County of Wayne*, 576.

See COSTS (21); MASTER AND SERVANT (1); NEGLIGENCE (8–10); SCHOOLS AND SCHOOL DISTRICTS (1, 2); TRIAL (12).

TOTAL DISABILITY—See WORKMEN'S COMPENSATION (5).

TOWNSHIPS.

1. *Essential services* permitted as authorized and regulated by law and other ordinances of the township, as term is used in township zoning ordinance wherein it was declared to be the intention to except *essential services* from the provisions of the ordinance, is construed as an exemption of essential municipal services which the township might operate and does not except privately operated garbage collection and disposal service conducted by plaintiffs (Thomas Township Zoning Ordinance, § 6.13). *Kershesle* v. *Township of Thomas*, 1.
2. A township zoning ordinance is presumed to be valid, and the party attacking it has the burden of proving affirmatively that the ordinance is an arbitrary and unreasonable restriction upon his use of his property. *Id.*
3. Township ordinance zoning for agricultural uses area including land plaintiffs sought to use for sanitary landfill operation *held*, not an arbitrary or unreasonable zoning. *Id.*

TOWNSHIPS—Continued.

4. A charter township, acting under the authority of the revenue bond act of 1933 in establishing and maintaining a water and sewer system, is limited in making charges for services, facilities, and commodities furnished to *users* of the system and may not charge *nonusers* (CLS 1961, § 141.104). *Smith* v. *Township of Norton*, 17.
5. A charge to nonusers of a township water and sewer system for services made available but not used is, in legal effect, a tax and can be effected only by complying with statutory requirements and not by creation of a charge within the rate structure of the public service established under the revenue bond act of 1933 (CLS 1961, § 141.104 *et seq.*). *Id.*
6. Nonusers of township water system *held*, entitled to injunction against enforcement of collection of so-called *ready to serve* and *debt service* charges defendant charter township sought to impose under ordinances for the establishment of a township water and sewer system, as authorized by the revenue bond act of 1933, and to recover payments made together with interest at 5% from date of payment (CL 1948 and CLS 1961, § 141.101 *et seq.*). *Id.*

See APPEAL AND ERROR (1, 21); HEALTH (5).

TRACTORS—See ACTION (2).

TRAFFIC LIGHT—See AUTOMOBILES (10, 12); SEARCHES AND SEIZURES (1).

TRAFFIC PRIVILEGES—See AUTOMOBILES (14).

TRAILER COACH—See COSTS (18): HEALTH (1–7).

TRAILER COACH PARK—See COSTS (26); MUNICIPAL CORPORATIONS (5, 30).

TRAILERS—See ACTION (2); TROVER AND CONVERSION.

TRANSFER OF LICENSES—See VENDOR AND PURCHASER (6).

TRANSPORTATION SYSTEM—See COSTS (22); MUNICIPAL CORPORATIONS (12–18).

TRESPASS—See DAMAGES (6); RAILROADS (1).

TRIAL.

1. The purpose of court's instructions to the jury is to assist the jury in deliberating upon the facts in order to better understand the entire case. *People* v. *Carr*, 223.
2. Plaintiff who has finished proof and rested case on one theory cannot, under claim of rebuttal, put in a new and different case as a ground of recovery. *Berger* v. *Travelers Insurance Company*, 269.
3. An attorney does not have the right to read law to the jury but does have the right to argue his theory of the law. *People* v. *Holmes*, 283.

TRIAL—Continued.

4. It was not reversible error for prosecuting attorney to argue to the jury in prosecution for manslaughter by defendant motorist that if there was more than .15% alcohol in defendant's blood at time of the accident in which another motorist was killed, defendant was presumed to be under the influence of intoxicating liquor, where there was testimony by State health department chemist that sample of blood taken from defendant about 4 hours after the accident showed .12% and opinion testimony that as of time of accident defendant's blood would have contained .18% alcohol (CL 1948, § 750.321; CLS 1961, § 257.625a). *Id.*

5. A motion to dismiss is defendant's proper motion when plaintiff has completed the presentation of his evidence to the court in a nonjury trial, since such a motion may be made without waiving his right to offer evidence in case the motion is denied (GCR 1963, 504.2). *Irwin* v. *Via*, 375.

6. A motion to dismiss, made in a nonjury trial after plaintiff has rested has a different effect than a motion for a directed verdict at such time in a jury trial (GCR 1963, 504.2, 515). *Id.*

7. An order dismissing plaintiff's action at the close of plaintiff's proofs operates as an adjudication on the merits unless the dismissal is for lack of jurisdiction or the court otherwise specifies (GCR 1963, 504.2). *Id.*

8. An order dismissing plaintiff's cause of action without prejudice would allow plaintiff to recommence his action. *Id.*

9. A motion to reopen proof is addressed to the sound discretion of the trial court and a reversal of a ruling thereon by an appellate court required a showing of abuse of discretion on the part of the trial court. *Cataldo* v. *Winshall*, 443.

10. Unsolicited remarks or expressions of ill humor by the trial court are best judged in the light of the circumstances under which they are made. *In re Arnson Estate*, 479.

11. Trial court's remarks that actions of divorced wife of decedent, proponent of at least 2 instruments for probate "are reprehensible and she should be penalized and in any event not allowed to profit by such tactics" *held*, not to constitute reversible error, where he reached the proper decision and used valid legal reasoning. *Id.* 480.

12. That trial judge did not order workmen's compensation insurer, added as a party plaintiff on defendant third-party tort-feasor's motion, to participate anonymously at trial of injured employee's action for negligence *held*, not to require a new trial, where record is barren of any request by plaintiff to trial judge to make such order. *Dusendang* v. *Thompson*, 527.

13. Counsel has a right on final argument to state to the jury his theory of the law, but he does not have the right to read law to the jury or to usurp the province of the court. *Wallace* v. *Pere Marquette Fiberglass Boat Company, Inc.*, 605.

14. Counsel usurps the function of the court when he attempts to cite a specific case to the jury and discuss it on final argument. *Id.*

TRIAL—Continued.

15. Trial court's direction to defendants' counsel that he avoid discussion of details of the law during final argument, after plaintiff's counsel objected to reading of a case to jury *held*, proper. *Id.*

See APPEAL AND ERROR (33); CRIMINAL LAW (33); PLEADINGS (9); RAPE (2).

TROVER AND CONVERSION.

Defendant garagekeeper was entitled to directed verdict in action for alleged conversion of plaintiff's damaged trailer defendant insurer had left for repairs and which was sold for charges, where plaintiff failed to introduce material evidence that the garagekeeper had not complied with the garagekeeper's lien law, since plaintiff failed to establish a prima facie case of conversion (CL 1948, § 570.301 *et seq.*). *Swindlehurst* v. *American Fidelity Fire Insurance Company*, 330.

TRUCKS—See MASTER AND SERVANT (2); RAILROADS (1).

TRUSTEES—See APPEAL AND ERROR (59); JUDGMENT (38–41); TRUSTS (1–5, 8, 9, 11–13).

TRUSTS.

1. Trustee was guilty of a breach of duty where he failed to render an annual written accounting to the beneficiaries, which duty was required by the will creating the trust and by statute (CL 1948, § 704.38). *Sloan* v. *Silberstein*, 660.

2. The trustee owes a duty of ordinary skill and diligence in the administration of the affairs of the trust. *Id.*

3. Trustee owes complete loyalty to the interest of the beneficiaries. *Id.*

4. A trustee owes a duty to show good faith and fair play in direct dealings with the beneficiaries of trust. *Id.*

5. Trustee may at no time use or deal with trust property for his own profit or for any other purpose unconnected with the trust (CL 1948, § 704.37). *Id.* 661.

6. Nondisclosure by trustee of material facts relating to the purchase of debentures, issued by a corporation of which he was president and a principal stockholder, with trust funds, coupled with his breach of duties imposed upon him by terms of will creating the trust, statutory and case law, and his retention of unmerited benefits, constitute constructive fraud in which plaintiffs were deceived and defendant appellant was unjustly enriched (CL 1948, §§ 704.37, 704.38). *Id.*

7. Constructive trust was properly imposed upon stock or proceeds from stock which fiduciary wrongfully derived from his breach of trust. *Id.*

8. Courts will impose a constructive trust whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee and breaches his trust. *Id.*

TRUSTS—Continued.

9. Equity will hold for the benefit of the *cestui que trust* that which the trustee has acquired through the medium of the trust by a breach thereof, no matter how good a legal title the trustee may have. *Id.*
10. Plaintiff beneficiary was not guilty of laches, or wanting in diligence in prosecuting her right of action against appellant fiduciary, where the breach of trust occurred on June 1, 1946, she did not have knowledge of breach until 1957 and the suit was commenced in August, 1959. *Id.*
11. Claims of beneficiaries of a trust against trustee for breach of trust are barred by laches and estoppel, where they had actual or constructive knowledge of the breach several years prior to the inception of the suit, and where they consented to the allowance of each of several annual accounts which were inconsistent with the asserted claim. *Id.* 662.
12. Claim of plaintiff in behalf of trustee who is also beneficiary of trust is estopped by his act and conduct in causing the breach of which complaint is made. *Id.*
13. Measure of liability of trustee who breached trust in acquiring debentures issued by corporation of which he was president and a principal stockholder is limited to stock acquired by reason of purchase of the debentures rather than stock otherwise purchased by him under evidence adduced. *Id.* 663.

See APPEAL AND ERROR (59); COSTS (25); DEDICATION (2, 17); JUDGMENT (38–41); LIMITATION OF ACTIONS (3).

UNARMED ROBBERY—See ROBBERY (1, 2).

UNAVAILABLE EXPERT—See EVIDENCE (7).

UNDUE INFLUENCE—See CRIMINAL LAW (5, 6, 8, 21, 49).

UNEMPLOYMENT COMPENSATION.

1. Economic stress from involuntary unemployment was considered by the legislature in providing for payment of unemployment compensation benefits (CL 1948, § 421.2). *Larson* v. *Employment Security Commission*, 540.
2. Signing of settlement agreement for workmen's compensation which also included a resignation from the employment and waiver of seniority with the employer, signed by employee who had sustained a back injury at appellant's foundry disabling him from work of making cores and wheeling core boxes, involving standing and lifting weights in excess of 25 pounds *held*, not to have been a voluntary leaving of work in view of the circumstances under which the agreement was arrived at and executed, hence plaintiff was not disqualified from receiving unemployment benefits (CLS 1956, § 421.29). *Id.*
3. Constructive voluntary leaving of work is not an accepted doctrine for amending or broadening plain language of statute disqualifying a person from receiving unemployment compensation benefits (CLS 1956, § 421.29). *Id.*

UNIFORMITY—See MUNICIPAL CORPORATIONS (24).

UNIMPEACHED WITNESS—See WITNESSES (6).

UNINSURED MOTORISTS—See INSURANCE (7, 11).

UNJUST ENRICHMENT—See JUDGMENT (38); TRUSTS (6).

UNLAWFULLY DRIVING AWAY CAR—See CRIMINAL LAW (34).

UNLIQUIDATED DAMAGES—See NEW TRIAL (1).

UNSUBSTANTIATED CLAIMS OF ERROR—See APPEAL AND ERROR (37).

URBAN RENEWAL PROJECT—See COSTS (12); EMINENT DOMAIN (1, 2).

USE—See VENDOR AND PURCHASER (5).

USER—See EASEMENTS (3); TOWNSHIPS (4).

UTTERING AND PUBLISHING—See CRIMINAL LAW (19, 22, 23).

VACATION—See DEDICATION (1); HIGHWAYS AND STREETS (3, 4).

VALUE—See EMINENT DOMAIN (3-8); VENDOR AND PURCHASER (4).

VENDOR AND PURCHASER.

1. Defendant corporate purchaser under land contract which had been given notice of forfeiture for default waived its right of redemption when it failed to pay amount due and the amount of costs awarded the party forfeiting the contract within 90-day period of redemption provided by statute (CLS 1961, § 600.5673). *Parrish* v. *Michigan Properties Corporation*, 49.
2. The dismissal by the Supreme Court, pursuant to a stipulation, of an appeal from a judgment of restitution in the circuit court is not a determination of the appeal but rather an abandonment of the land contract purchaser's interest in the property permitting redemption period to expire 90 days after entry of the judgment of restitution in the circuit court (CLS 1961, § 600.5673). *Id.*
3. Purchasers of part of premises which defendant corporation had purchased under a land contract had the right to purchase the entire tract for their own benefit and protection when the defendant's rights in the property were extinguished. *Id.* 50.
4. Improvements which were made on premises sold under land contract inured to the benefit of the vendor upon vendor's securing judgment of restitution, hence, parties who negotiated purchase of premises after such judgment would have to pay for the then value of the premises. *Id.*
5. Plaintiff purchasers under a land contract of a part of the premises which defendant corporation had itself purchased under a land contract from vendor of entire premises, were not required to pay rent for use of premises when they sued defendant corporation for breach of its contract after it had lost its interest in the premises through forfeiture of the contract, since they had not contracted to pay rent but to

VENDOR AND PURCHASER—Continued.

purchase the premises, a contract which defendant breached by not acquiring title it had contracted to buy, since to award rental would be tantamount to approving defendant's conduct and compensating it for its refusal to honor its contractual obligations. *Id.*

6. Finding for plaintiff by trial court in nonjury action by would-be purchaser of a liquor license to recover amount paid under memorandum agreement stipulating for refund thereof if through no default or misrepresentation in the terms and conditions by the parties, the State liquor control commission failed or refused to transfer the license to the purchaser *held*, not against the clear preponderance of the evidence. *Bill* v. *Brown*, 455.

VERDICTS AND FINDINGS—See ACCOUNTING (1); APPEAL AND ERROR (2, 4, 6, 7, 20, 28, 30, 36, 40, 42, 44, 54–56, 60); AUTOMOBILES (4); CONTRACTS (8, 15); CRIMINAL LAW (15, 47, 60); DAMAGES (4); DEDICATION (17); DIVORCE (1); FRAUD (7–9); HIGHWAYS AND STREETS (4); IMPROVEMENTS (5); INSURANCE (4); JUDGMENT (35); LIBEL AND SLANDER (2, 5); MUNICIPAL CORPORATIONS (23); RAPE (6); VENDOR AND PURCHASER (6); WILLS (5); WORKMEN'S COMPENSATION (3).

VESTED RIGHTS—See STATUTES (5, 7).

VEXATIOUS ACTIONS—See JUDGES (4).

VIOLATION OF ORDINANCES—See COSTS (7).

VOLUNTARILY LEAVING WORK—See UNEMPLOYMENT COMPENSATION (2, 3).

VOLUNTARINESS—See CRIMINAL LAW (37).

WAIVER—See CONTRACTS (21); COSTS (19); COURTS (8); CRIMINAL LAW (2, 19, 42); EVIDENCE (4, 5); INSURANCE (8–11); MUNICIPAL CORPORATIONS (8–11); NEGLIGENCE (10); UNEMPLOYMENT COMPENSATION (2); VENDOR AND PURCHASER (1); WITNESSES (13, 14).

WARNINGS—See RAILROADS (4).

WARRANT OF GOVERNOR—See EXTRADITION (1).

WARREN—See APPEAL AND ERROR (2); COSTS (1); DECLARATORY JUDGMENT; MUNICIPAL CORPORATIONS (2, 3).

WATER SYSTEM—See TOWNSHIPS (4–6).

WATERS AND WATER COURSES.

1. Riparian rights cannot be created in nonriparian land, but a single parcel of land abutting a lake is all riparian. *Thompson* v. *Enz*, 404.

2. Riparian rights in back lots of subdivision of parcel of land abutting a lake must be reserved when the riparian parcel is subdivided thereby preserving the right which the land has at the time of subdividing. *Id.*

WATERS AND WATER COURSES—Continued.

3. The owner of a large parcel of land abutting an inland lake may properly dig canals for access to the lake from lots within the parcel and grant riparian rights to purchasers thereof by proper conveyance. *Id.*

See HIGHWAYS AND STREETS (1).

WEEK-TO-WEEK TENANCY—See PARTNERSHIP (1, 3).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (25, 31, 54, 62); AUTOMOBILES (5); CRIMINAL LAW (14, 61).

WIDOWS—See DEATH; DEEDS (4).

WILFUL AND WANTON MISCONDUCT—See RAILROADS (2).

WILLS.

1. A presumption arises that a will was executed in accordance with the recitation contained in a complete attestation clause, where such a clause is present. *In re Arnson Estate,* 479.

2. A complete attestation clause in a will raises a presumption that the will was executed in accordance with the recitation therein that is not overcome by testimony of 1 of the attesting witnesses that he did not see the testator sign his name, did not see the testator's name, and that testator did not expressly say to them that he had signed it, especially where there is presented contradictory testimony in support of the due execution (CL 1948, § 702.5). *Id.*

3. The general rule that discrepancies in the testimony of attesting witnesses to a will such as the day of the week when the will was executed or that a particular pen was used, would not, standing alone, defeat the presumption of validity, but when such testimony is coupled with the testimony of attorneys casting grave doubt on the validity and very existence of the attestation, the presumption could be successfully rebutted. *Id.*

4. The presumption of validity arising from the presence of a complete attestation clause in a will is rebuttable. *Id.*

5. Finding of probate and circuit courts that second instrument presented by proponent as the last will of deceased did not meet the statutory requirements is not disturbed under record presented that contains evidence casting grave doubts as to validity or existence of the attestation clause (CL 1948, § 702.5). *Id.*

See EVIDENCE (4); TRIAL (11); TRUSTS (1, 6).

WITHDRAWAL OF PLEA—See CRIMINAL LAW (20, 21).

WITHOUT PREJUDICE—See TRIAL (8).

WITHOUT WARRANT—See ARREST.

WITNESSES.

1. The scope and duration permitted in the cross-examination of witnesses to show bias or interest rests in the sound discretion of the trial court, and the exercise thereof will not be reversed absent a clear showing of abuse. *King* v. *Daly,* 120.

WITNESSES—Continued.

2. Record in actions for personal injuries to plaintiff wife, a pedestrian, *held*, not to reveal that plaintiff was unduly or prejudicially restricted in the cross-examination of a witness for defendant motorist, where it appears he had identified himself as a retired nursery farmer but plaintiff elicited from him that he had retired after over 40 years' service as an attorney for different kinds of insurance companies and cross-examination was not stopped until plaintiff made the argumentative charge that he gave his talents to the defendant. *Id.*

3. Defense counsel's attempt to impeach credibility of mother of girl upon whom her defendant stepfather was charged with assault with intent to rape *held*, proper, where girl had testified it was possible her mother had told her what to say, hence, it was reversible error for trial court to sustain prosecutor's objection to defense counsel's inquiry of mother whether she had told her daughter what to say and admonish mother that if she changed her testimony she would be guilty of perjury under record failing to show that if the mother had been permitted to testify that she had told her daughter what to say, she would thereby be changing her testimony under oath (CLS 1961, § 750.85). *People* v. *Gardineer*, 337.

4. Cross-examination of a witness, devised for the discovery of truth, is a security for the correctness and completeness of testimony. *Id.*

5. Proof of consistent statements to those given by a witness on direct examination, without any impeachment, is unnecessary and valueless and would ordinarily be considered irrelevant and cumbersome. *Id.*

6. Admission of testimony of policeman regarding prior statement of defendant's stepdaughter, made in the presence of defendant after bias, interest, or corruption was shown to have existed, was error, where her testimony at stepfather's trial on charge of assault with intent to commit rape upon her had not been impeached. *Id.*

7. Cross-examination of plaintiff woman who claimed she had sustained personal injuries in a rear-end collision was not error, where although the information defendants' counsel obtained for his questions came from medical reports, the content of his questions was not evidence and jury was clearly instructed to decide the case from sworn testimony, received exhibits, and depositions read to jury. *Schwartz* v. *Triff*, 379.

8. The party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify, or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness. *Id.*

9. Cross-examination of plaintiff woman who had put her health in issue on direct examination in action for alleged personal injuries, which questioning tended to contradict and weaken her direct testimony as to injuries sustained in rear-end col-

WITNESSES—Continued.

lision *held,* proper and not an abuse of discretion, where the trial judge expressed his distrust of the witness in the absence of the jury. *Id.* 380.

10. Cross-examination of a witness is a matter of right when it relates either to facts at issue or relevant facts, but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge and, unless abused, the exercise of such discretion is not the subject of review. *Id.*

11. Sequestration of witnesses during the nonjury trial of a person charged with crime is discretionary with the court. *People* v. *Likely,* 458.

12. A witness is not disqualified from testifying for the prosecution on rebuttal in a nonjury criminal case, by reason of his having remained in the courtroom after order excluding all witnesses from the courtroom was followed by statement of trial court after first witness had testified that thereafter a witness who had testified might remain in the courtroom, the matter of sequestration of witnesses being discretionary with the trial court. *Id.*

13. The privilege of secrecy which attaches to what passes between attorney and client is the privilege of the client, and he may waive it if he so chooses. *In re Arnson Estate,* 478.

14. The privilege of secrecy which attaches to a communication between an attorney and client, once waived, is waived for all time and may not later be readopted as the advantage of the client dictates. *Id.*

15. Witness may not be impeached on collateral matter. *Hall* v. *Iosco County Board of Road Commissioners,* 511.

16. Collateral matter is determined by the issues in the case and whether direct evidence to establish it could be introduced. *Id.*

17. Testimony of defendant in action by administrator of estate of decedent who was killed in an automobile accident as to whether such defendant or decedent was driving the car was barred by statute prohibiting testimony as to matters equally within knowledge of the decedent (CLS 1961, § 600.2160). *Ruhala* v. *Roby,* 557.

18. A plaintiff may call an opposite party as a witness, and make the opposite party plaintiff's witness, or call him for cross-examination under the statute, and not make the opposite party plaintiff's witness, in which latter event the plaintiff is required to announce the purpose for calling the witness or offering his deposition (CLS 1961, § 600.2161). *Id.*

19. Denial of right to consider deposition of witness as offered for purpose of cross-examination *held,* not an abuse of discretion, where such witness, although an opposite party, had not been called for cross-examination under the statute, and right of cross-examination had been denied (CLS 1961, § 600.2161; GCR 1963, 302.4[2], 302.6). *Id.*

20. Denial of request to cross-examine opposite party whom plaintiff had called as a witness without having announced the

WITNESSES—Continued.

purpose for calling such witness *held*, not error, where no showing was made of necessity for cross-examination of such witness (CLS 1961, § 600.2161). *Id.* 558.

21. Testimony at prior proceedings, statements, or declarations of witness which are inconsistent with testimony at trial, may be used to refresh memory of the witness or to impeach her but, may not be received as substantive evidence in proof of alleged crime and trial judge should so instruct jury. *People* v. *Anderson*, 718.

See APPEAL AND ERROR (8, 24, 25, 31, 39, 40, 62); CRIMINAL LAW (24, 26, 31, 42, 69); DEPOSITIONS; EVIDENCE (3, 6); INDICTMENT AND INFORMATION (4); ROBBERY (2); STIPULATIONS (2).

WORDS AND PHRASES—See HEALTH (3); MUNICIPAL CORPORATIONS (13).

WORKMEN'S COMPENSATION.

1. The workmen's compensation act provides the exclusive remedy for recovery against the employer of a person injured or killed (CL 1948, § 411.4). *Jordan* v. *C. A. Roberts Company*, 113.

2. The decision of the workmen's compensation appeal board having jurisdiction to make an award of workmen's compensation, from which no appeal is taken, constitutes an adjudication that the person injured was an employee of the defendant employer to which the doctrine of *res judicata* is applicable as a bar to recovery from the employer in an action under the death act by the employee's widow (CL 1948, § 411.4; CLS 1961, § 600.2922). *Id.*

3. Unappealed workmen's compensation redemption order, followed by acceptance and payment thereunder, estops the beneficiary, or others, from collateral attack on findings necessary to validity of the order (CL 1948, § 411.4). *Id.*

4. Amendatory statute which supplied the necessary ingredients to satisfy constitutional requirements of notice and right of a former employer to contest a claim by an employee for an award of workmen's compensation for silicosis or other dust disease in the first instance *held*, inapplicable so as to permit apportionment of award in proceedings which related to disability or injury which took place prior to the effective date of the amendatory act (CL 1948, § 417.3, as amended by PA 1962, No 189). *Briggs (Habetler, Harris, Wright)* v. *Campbell, Wyant & Cannon Foundry Company (Harrington* v. *Gale Manufacturing Company)*, 205.

5. Recovery of workmen's compensation may be had from only the last of successive employers by claimant for total disability due to silicosis or other dust disease, and, prior to 1962 amendment no right of apportionment having existed, no apportionment may be recovered by the last employer on award for plaintiffs who became disabled and entitled to compensation prior to such amendment (CL 1948, § 417.9, as amended by PA 1962, No 189). *Id.*

WORKMEN'S COMPENSATION—Continued.

6. Neither the general public nor any employee in particular will be in any way adversely affected by holding that amendment of the workmen's compensation act providing a valid apportionment of an award to an employee for silicosis or other dust disease operated prospectively only (CL 1948, § 417.9, as amended by PA 1962, No 189). *Id.* 206.

7. Employers of plaintiffs were not estopped from raising question as to constitutionality of provision of workmen's compensation act apportioning awards for silicosis, where the act had been made compulsory as to them by the same statute as gave the employees compensation for silicosis acquired in a foundry (CL 1948, §§ 417.1, 417.4, 417.9). *Id.*

8. Statute apportioning liability for award for silicosis among all employers in whose employ claimant against last employer had served was unconstitutional so far as former employers were concerned, where it did not provide for notice to them nor afford them opportunity to defend in the first instance against the asserted liability (CL 1948, §§ 417.1, 417.4, 417.9). *Id.*

9. The workmen's compensation department has continuing jurisdiction to alter awarded compensation upon proof of changed facts. *Pendell* v. *Northwestern Leather Company*, 249.

10. The statutory method of ending workmen's compensation as specially fixed by the statute is exclusive (CLS 1961, § 412.9). *Id.*

11. Neither the administrative agency charged with the administration of the workmen's compensation act nor a court reviewing its action has the power to terminate or reduce an award of workmen's compensation in a situation not provided for by statute (CLS 1961, § 412.9). *Id.*

12. Reduction of award of workmen's compensation to employee whose 3 grandchildren were dependent upon her at time of injury may not be made merely because they cease to receive more than half of their support from the injured employee, where statute does not provide for termination of compensation in such a situation until the lapse of 6 months after children reach age of 16 and cease to receive more than half of their support from the injured employee (CLS 1961, § 412.9). *Id.*

13. Determination of workmen's compensation appeal board that injured employee's married daughter who was a dependent at the time of the injury was no longer a dependent *held*, supported by record, due to change of circumstances in that she was divorced and remarried (CLS 1961, § 412.9). *Id.* 250.

14. Mere act of crossing a public road between employer's building, in which decedent employee had finished his usual duties and punched a time clock, and parking lot which employer had leased for employees' use *held*, not to have removed employee from the basic protection of the provision of the workmen's compensation act that an employee should "be presumed to be in the course of his employment" while "going to or from his work while on the premises where his work is to be performed and within a reasonable time before and after his

WORKMEN'S COMPENSATION—Continued.

working hours" (CL 1948, § 412.1, as amended by PA 1954, No 175). *Jean* v. *Chrysler Corporation*, 564.

15. Passage across a public road situated between building where decedent employee worked in order to reach parking lot, leased by employer for use of employees, which use was an adjunct of the employment, may not be said to be a personal errand precluding recovery of workmen's compensation (CL 1948, § 412.1, as amended by PA 1954, No 175). *Id.*

16. Reaching the employee parking lot after completion of day's work in the plant with no unwarranted lapse of time was a necessary adjunct of decedent employee's employment, hence, his dependents were entitled to workmen's compensation benefits for death from fatal injuries received while crossing public road en route to parking lot leased by employer for use of employees (CL 1948, § 412.1, as amended by PA 1954, No 175). *Id.*

See COSTS (13); DEATH (1); INSURANCE (7); MASTER AND SERVANT (1); NEGLIGENCE (8–10); TRIAL (12); UNEMPLOYMENT COMPENSATION (2).

WORKMEN'S COMPENSATION APPEAL BOARD—See WORKMEN'S COMPENSATION (2, 3).

WRIT OF SUPERINTENDING CONTROL—See CERTIORARI (1).

WRONG SIDE OF ROAD—See AUTOMOBILES (3, 5).

X RAY—See PHYSICIANS AND SURGEONS (1).

YIELDING RIGHT-OF-WAY—See AUTOMOBILES (12, 14).

ZONING—See APPEAL AND ERROR (1); TOWNSHIPS (1–3).