MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

APRIL 5, 1963 to JULY 17, 1963

HIRAM C. BOND
STATE REPORTER

VOL. 370

FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1964

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SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
LELAND W. CARR, LANSING, ...	Dec. 31, 1963

ASSOCIATE JUSTICES.

JOHN R. DETHMERS, HOLLAND, ...	Dec. 31, 1969
HARRY F. KELLY, DETROIT, ...	Dec. 31, 1969
EUGENE F. BLACK, PORT HURON, ...	Dec. 31, 1963
THOMAS M. KAVANAGH, CARSON CITY, . .	Dec. 31, 1965
THEODORE SOURIS, GROSSE POINTE PARK, .	Dec. 31, 1967
OTIS M. SMITH, FLINT, ...	Dec. 31, 1965
MICHAEL D. O'HARA, MENOMINEE	Dec. 31, 1967

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CRIER—CLYDE E. SPRAGUE, LANSING.

ATTORNEY GENERAL—FRANK J. KELLEY, ALPENA.

SOLICITOR GENERAL—ROBERT A. DERENGOSKI, EAST LANSING.

1040645

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   KARL F. ZICK, Sodus.
3. VICTOR J. BAUM, Detroit.
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   CARL M. WEIDEMAN, Detroit.
   JOHN M. WISE, Detroit.
4. JOHN C. DALTON, Brooklyn.
   JOHN SIMPSON, Jackson.
5. ARCHIE D. McDONALD, Hastings.
6. CLARK J. ADAMS, Pontiac.
   WILLIAM JOHN BEER, Berkley.
   STANTON G. DONDERO, Royal Oak.
   ARTHUR E. MOORE, Pontiac.
   PHILIP PRATT, Pontiac.[1]
   JAMES S. THORBURN, Royal Oak.[1]
   FREDERICK C. ZIEM, Pontiac.
7. JOHN W. BAKER, Flint.
   LOUIS D. McGREGOR, Flint.
   STEWART A. NEWBLATT, Flint.
   DONN D. PARKER, Flint.
8. LEO BEBEAU, Belding.
9. RAYMOND W. FOX, Kalamazoo.
   LUCIEN F. SWEET, Kalamazoo.
10. FRED J. BORCHARD, Saginaw.
    EUGENE SNOW HUFF, Saginaw.
    JAMES E. O'NEILL, Saginaw.
11. GEORGE S. BALDWIN, Munising.
12. LEO J. BRENNAN, L'Anse.
13. CHARLES L. BROWN, Traverse City.
14. HENRY L. BEERS, Muskegon.
    JOHN H. PIERCEY, Muskegon Heights.

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[1] Appointed July 8, 1963; qualified July 10, 1963; term began September 6, 1963.

15. MARK S. ANDREWS, COLDWATER.
16. HOWARD R. CARROLL, MOUNT CLEMENS.
GEORGE R. DENEWETH, JR., MOUNT CLEMENS.
ALTON H. NOE, MOUNT CLEMENS.
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33. EDWARD H. FENLON, PETOSKEY.
34. DENNIS J. O'KEEFE, STANDISH.
35. MICHAEL CARLAND, OWOSSO.
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38. WILLIAM J. WEIPERT, JR., MONROE.
39. REX B. MARTIN, ADRIAN.
40. TIMOTHY C. QUINN, CARO.
41. ERNEST W. BROWN, IRON MOUNTAIN.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

ELVIN L. DAVENPORT.
JOSEPH A. GILLIS.
GERALD W. GROAT.
ARTHUR J. KOSCINSKI.
PAUL E. KRAUSE.
JOHN P. O'HARA.
JOHN A. RICCA.
JOHN P. SCALLEN.
FRANK G. SCHEMANSKE.
W. McKAY SKILLMAN.

TRAFFIC AND ORDINANCE DIVISION: JOHN D. WATTS.
ANDREW C. WOOD.

SUPERIOR COURT OF GRAND RAPIDS, CLAUDE VANDER PLOEG.

[1] Appointed and qualified July 8, 1963.
[2] Died May 29, 1963.
[3] Appointed July 5, 1963; qualified July 23, 1963; term began August 5, 1963.

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RULES OF PRACTICE OF THE PROBATE COURTS

Adopted by the Supreme Court July 17, 1963

Ordered to take effect July 17, 1963

Rule 5a. SPECIAL FIDUCIARY.

The judge of probate shall have authority to appoint a special fiduciary on his own motion, upon such notice as he may direct, or without notice in his discretion, in any proceeding pending before him in which the fiduciary has been removed, has removed from the state, has died, has become mentally incompetent in the opinion of such judge, or when his whereabouts is unknown, or when for good and sufficient cause, in the opinion of such judge, the affairs of the estate require immediate attention which is not being given by such fiduciary. Such special fiduciary shall give bond and have duties and powers as are now or shall hereafter be provided by law for special administrators. Upon his qualification the powers of the previous fiduciary shall be suspended pending hearing as hereinafter provided. Such special fiduciary shall be an interested party for the purpose of filing a petition for removal of the previous fiduciary and appointment of a successor general fiduciary as the cause requires, and shall file such petition forthwith upon appointment and qualification unless some other interested party

has filed such petition. The court shall immediately proceed with notice and hearing upon such petition in accordance with the law applicable to such original proceedings.

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APRIL TERM, 1963.*

BAREFIELD *v.* LA SALLE COCA-COLA BOTTLING COMPANY.

1. ACTION—DERIVATIVE ACTION BY HUSBAND.
   A husband's right to recover in his derivative action depends entirely upon wife's right to recover in her action for breach of implied warranty of defendant's product as fit for human consumption.

2. FOOD—IMPLIED WARRANTY OF FITNESS FOR HUMAN CONSUMPTION.
   A food processor's implied warranty that its product is fit for human consumption should be applied only when its food is used in the usual, rather than in the unusual and improper, manner, hence, plaintiff should not have continued to drink defendant's product after she discovered, or should have discovered, that it contained glass particles, a warrantor not being a guarantor against injury to consumers resulting from the consumer's misuse of the product.

3. SAME—IMPLIED WARRANTY OF FITNESS FOR HUMAN CONSUMPTION —SOFT DRINK—INSTRUCTIONS—EVIDENCE.
   Jury's verdict for defendant food processor *held,* not against the great weight of the evidence adduced in action for breach of implied warranty that the soft drink was fit for human consumption, where it appears that when contents of bottle were half consumed, plaintiff should have discovered something was wrong and that she should not have continued to drink it without examination, as she then proceeded without reliance upon defendant's implied warranty of fitness, and trial court's single use of technical term *assumption of risk* in instruction

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* Continued from Volume 369 Michigan.

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur, Husband and Wife § 501.
[2, 3, 4, 5] 22 Am Jur, Food §§ 103–108, 116.
Liability of manufacturer or seller for injury caused by beverage sold. 77 ALR2d 215.

did not erroneously distort an essentially correct statement of an available defense.

4. SAME—IMPLIED WARRANTY OF FITNESS FOR HUMAN CONSUMPTION —EVIDENCE OF TECHNIQUES FOR EXCLUSION OF IMPURITIES.

Admission of evidence of defendant food processor's methods and techniques for excluding impurities from its bottled product for the purpose of negating probability that glass particles entered the bottle at defendant's plant *held,* proper in action for breach of implied warranty of fitness for human consumption of its product.

5. SAME—IMPLIED WARRANTY OF FITNESS FOR HUMAN CONSUMPTION —GREAT WEIGHT OF EVIDENCE.

Verdict for defendant food processor in action for breach of implied warranty of fitness for human consumption *held,* not against the great weight of the evidence, where jury could have found that plaintiff had suffered no injury, that her injury occurred after she had discovered, or should have discovered the glass particles in the bottle of soft drink, or that the glass particles did not get into the bottle while it was under defendant's control.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted December 6, 1962. (Calendar Nos. 108, 109, Docket Nos. 49,160, 49,161.) Decided April 5, 1963.

Case by Annie Lee Barefield against La Salle Coca-Cola Bottling Company, a Delaware corporation, and others on implied warranty for personal injuries sustained by reason of glass particles in beverage. Derivative suit by Johnnie Barefield. Cases consolidated for trial and on appeal. Verdict and judgments for defendants. Plaintiffs appeal. Affirmed.

Henry G. Marsh, for plaintiffs.

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

SOURIS, J. The defendant beverage producer won jury verdicts of no cause in these consolidated suits by husband and wife for its alleged breach of an implied warranty that its product was fit for human consumption. Plaintiff wife claims to have been injured by particles of glass she ingested while consuming the contents of a bottle of defendant's product. Her husband's suit sought recovery of medical expenses and damages for loss of her services. For convenience, we shall speak only in terms of the wife's action, for her husband's right to recover depends entirely upon her right to recover.

Plaintiff testified that when she had consumed about 1/2 of a bottle of Coca-Cola, directly from the bottle, she gagged on what she thought was tobacco from the cigarette she then was smoking or on ice, which she noticed had formed inside the bottle. She went into a bathroom, cleared her throat, spat into a commode and, having gained relief, returned to finish the bottle of Coca-Cola. As she swallowed the last draught, she again gagged and again retreated to the bathroom where she removed a piece of glass from her mouth, again spat into the commode and, for the first time, saw blood there, which she might have expectorated on her first trip to the bathroom. When she put a napkin to her mouth, blood stained the napkin.

On such evidence the trial judge instructed the jury, at defendant's request, as follows:

"If you find by a preponderance of the evidence that the defendant's implied warranty of fitness was breached, then you must also consider whether or not the plaintiff Mrs. Barefield upon discovering that something had irritated her throat while consuming about 1/2 of the contents of such a bottle of Coca-Cola, and then proceeding to consume the balance of the contents of the Coca-Cola bottle, acted as a rea-

sonably prudent person would have acted under the same circumstances.

"If you find that plaintiff continued to finish the drink of Coca-Cola after she knew or had such a reason that she should have known of an irritation to her throat from some foreign substance in the bottle, and her assumption that it was either her cigarette tobacco or ice slivers, was unreasonable and that she should not therefore have assumed that the product was reasonably fit for consumption, you may find that she assumed the risk of whatever damages or injuries if any she sustained, and under those circumstances plaintiff cannot recover from the defendant company."

Plaintiff challenges the foregoing instruction on the ground that it improperly imports tort concepts into an assumpsit action for breach of implied warranty, citing *Bahlman* v. *Hudson Motor Car Co.*, 290 Mich 683 (7 NCCA NS 790).

Dean Prosser tells us that the action for breach of an implied warranty, as we know it today, is "a freak hybrid born of the illicit intercourse of tort and contract." Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale LJ 1099, 1126. Drawing upon Ames, Williston and Street, he concludes that, "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract." With such background and development, it is not surprising that concepts of tort law have been applied in such cases. See *Hertzler* v. *Manshum*, 228 Mich 416, at 423. *Bahlman* v. *Hudson Motor Car Co., supra,* relied upon by plaintiff, was an assumpsit action on an express warranty and may be distinguished on that ground,

although in other jurisdictions concepts akin to contributory negligence have been applied as defenses to actions on express warranties. See cases collected by Prosser at footnote 288, 60 Yale LJ 1099, at 1147.

In *Cheli* v. *Cudahy Brothers Co.*, 267 Mich 690, this Court held there was no implied warranty by defendant that its pork was fit for human consumption in a raw state. However, the opinion seems also to suggest, as an alternative ground for decision, that a food processor's implied warranty of fitness should be applied only when its food is used (p 697) "in the usual, rather than in the unusual and improper, manner." What this amounts to is recognition by this Court that warrantors are not to be held as guarantors against injury to consumers resulting from the consumer's misuse of the product. Just as it was appropriate for *Cudahy* to rely upon the defensive claim that its pork was improperly eaten raw, so the defendant at bar was entitled to claim that plaintiff should not have continued to drink its product after she discovered, or should have discovered, it contained glass particles. The proofs were such that the jury could have found, following the challenged instruction, that plaintiff's injuries occurred only after she had warning that something was wrong with her Coca-Cola; that she should not have continued thereafter, without examination, to consume the remainder of her drink; and that, having done so in disregard of the known danger, it cannot be said that she proceeded in reliance upon defendant's implied warranty of fitness. Use of the technical term "assumption of risk" in the instruction may better have been avoided, but its single use in this particular instruction, without encumbrance by its technical definition, did not distort what was essentially a correct statement of an available defense.

Plaintiff also complains that the trial court should have excluded evidence of defendant's processing methods and techniques for excluding impurities from its bottled product. As in *Manzoni* v. *Detroit Coca-Cola Bottling Co.*, 363 Mich 235, plaintiff's right to recover depended upon the jury's finding that the impurity was present when the product left the defendant's control. Defendant's challenged proofs of due care, while they would be admissible also in defense of a negligence action, were offered and admitted in this case for the purpose of negating the probability that the glass particles entered the bottle of Coca-Cola at defendant's plant, and for this purpose the proofs were properly received.

Finally, plaintiff asserts that the jury's verdict was against the great weight of the evidence. There would be no benefit to the profession in a detailed recitation of the testimonial record. It is sufficient to note that the jury properly could have found, on this record, that plaintiff suffered no injury, or that her injury occurred after she discovered or should have discovered the glass particles, or that the injurious glass particles did not get into the bottle while it was under defendant's control. Under such circumstances, we do not reverse on the claim that the jury's verdict was against the great weight of the evidence.

Affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SMITH, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

KASZA *v.* CITY OF DETROIT.

1. CARRIERS—BUSES—SUDDEN STOPPING—NEGLIGENCE—QUESTION FOR JURY.

   Question of negligence of defendant bus driver in suddenly stopping bus and thereby injuring plaintiff passenger who was thrown backwards while walking in aisle toward vacant seat in rear of bus *held*, to have been a question for jury, where the sudden stoppage was because a lady came from the left and ran in front of bus and driver offered no explanation of why he had not seen her earlier on the well-lighted street some 70' wide where traffic was not heavy.

2. TRIAL—MOTION FOR DIRECTED VERDICT AT CLOSE OF PLAINTIFF'S PROOFS—EVIDENCE THEREAFTER RECEIVED.

   The failure of the trial court to grant a motion for a directed verdict at the close of plaintiff's proofs constitutes a denial of the motion, but evidence thereafter received on issue of negligence which plaintiff had asserted caused her injuries was properly considered by jury.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted December 7, 1962. (Calendar No. 122, Docket No. 49,564.) Decided April 5, 1963. Rehearing denied May 9, 1963.

Case by Jean Kasza against City of Detroit, a municipal corporation, Department of Street Railways, for personal injuries sustained in fall when bus stopped abruptly. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Reversed and remanded for entry of judgment on jury verdict.

REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Motor Transportation § 151.
Motor carrier's liability for injury to passenger by sudden stopping, starting, or lurching of conveyance. 57 ALR2d 5.
[2] 53 Am Jur, Trial § 332 *et seq.*

Michael A. Guest, for plaintiff.

Leo A. Sullivan and *David Grainer,* for defendant.

DETHMERS, J. Plaintiff sues for damages resulting from injuries sustained while she was a passenger on defendant's bus. She was walking in the aisle, facing the back of the bus, going to a vacant seat, when the bus suddenly stopped, causing her to be thrown backwards and injured.

At the conclusion of plaintiff's proofs defendant moved for a directed verdict of no cause for action on the ground that, as a matter of law, no proof of defendant's negligence had been offered by plaintiff. The trial judge indicated that he thought the motion well founded but believed the purpose of the Empson act* to be to permit introduction of defendant's proofs and the taking of a jury verdict in order to avoid a second trial in the event this Court's view of the applicable law differed from his. The court, therefore, reserved decision on the motion under that act. Defendant's motion for directed verdict was renewed at the conclusion of defendant's proofs, but not then granted. The jury returned a verdict for plaintiff. Thereafter, the court granted defendant's motion for judgment *non obstante veredicto* on the ground above mentioned. Plaintiff appeals therefrom. Defendant has taken no cross-appeal.

Defendant says, as the trial judge appears to have agreed, that plaintiff's proofs showed nothing further than a sudden stopping of the bus, without showing the attending circumstances or reasons therefor. Defendant then cites a number of cases for the proposition that this alone does not suffice to establish defendant's negligence. *Longfellow* v. *City of Detroit,* 302 Mich 542; *Sherman* v. *Flint Trolley Coach,*

* CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 27.1461 *et seq.*).—REPORTER.

Inc., 304 Mich 404; *Bogart* v. *City of Detroit,* 252 Mich 534.

It happens, however, that after the court had reserved judgment on defendant's motion for directed verdict at the conclusion of plaintiff's proofs and the defendant proceeded with its defense and offering of proofs, that defendant's employee, the driver of the bus, was called by defendant to testify. He testified, *inter alia,* that he had applied the brakes of the bus suddenly because a lady came from the left and ran in front of the bus; that the street was well lighted and is about 70 feet wide; that traffic was not heavy; that when he first saw the lady she was about a foot in front of the bus and about halfway between the left front corner and the front center of the bus, headed toward the right side of the bus. He offered no explanation of why he had not seen her earlier. He testified that seeing her when and where he first did caused him to apply the brakes suddenly and that that caused plaintiff's fall and injuries. This, it seems to us, was sufficient to take to the jury the questions of the negligence of defendant's driver and proximate cause. *Mitcham* v. *City of Detroit,* 355 Mich 182; *Adelsperger* v. *City of Detroit,* 248 Mich 399; *Fish* v. *Grand Trunk Western Railway,* 275 Mich 718; *Routhier* v. *City of Detroit,* 338 Mich 449 (40 ALR2d 1114); *Wells* v. *Flint Trolley Coach, Inc.,* 352 Mich 35.

Defendant contends, however, that the proofs to be considered in the light most favorable to plaintiff (*McDuffie* v. *Root,* 300 Mich 286; *Indiana Lumbermens Mutual Insurance Co.* v. *Matthew Stores, Inc.,* 349 Mich 441; *Mitcham* v. *City of Detroit, supra,* 205) must be limited to proofs in the record at the time its first motion for directed verdict was made, namely, at the conclusion of plaintiff's proofs, citing *Taylor* v. *Butcher,* 349 Mich 581, *Snavely* v. *Di Julio,* 222 Mich 146, *Snyder* v. *Johnson,* 264 Mich 286.

A controlling question in the case, then, is whether, on review here, we judge the correctness of the trial court's entry of judgment *non obstante veredicto* on the most favorable view of the evidence at the conclusion of plaintiff's proof or of the evidence as the record stood when all the proofs were in both for plaintiff and defendant. The last above mentioned cases, cited by defendant, differ from the instant case in that there the defendants took the appeals.

In *Snyder* v. *Johnson, supra,* 288, and again in *Taylor* v. *Butcher, supra,* 585, it was held and this Court said concerning defendant's motion for directed verdict made at the conclusion of plaintiff's proofs, the following:

"When plaintiff rested her case there had been no showing of negligence on the part of defendant Johnson.

"At that time Johnson moved for direction of verdict. The court reserved the motion, to hear all the testimony. The failure of the court to grant the motion was a denial of it. Johnson is entitled to review of the motion and its denial as of the time it was made. CL 1929, §§ 14307, 14308.* *Snavely* v. *Di Julio,* 222 Mich 146; *Wasyluk* v. *Lubienski,* 244 Mich 695."

In this case the court reserved judgment on defendant's motion for directed verdict at the end of plaintiff's proofs. Under the above language this amounted to a denial of defendant's motion. But defendant has not appealed therefrom. In the *Mitcham Case,* under the same procedural situation as in the case at bar, plaintiff appealed from the judgment *non obstante veredicto* for defendant and defendant cross-appealed from the court's failure to grant its motion for directed verdict at the conclusion of plaintiff's proofs, thus preserving its right

* See CLS 1956, §§ 618.56, 618.57 (Stat Ann 1959 Cum Supp §§ 27.1036, 27.1037).—REPORTER.

to have the matter judged in this Court as of the time and state of the record when that first motion had been made. In the instant case defendant has not taken a cross-appeal. The case is here only on plaintiff's appeal from the trial court's grant of defendant's motion for judgment *non obstante veredicto* made after all the proofs were in and the jury had rendered a verdict for plaintiff. Under such circumstances we review the judgment *non obstante veredicto* by taking the view most favorable to plaintiff of all the proofs in the case. So viewed, plaintiff had proofs sufficient to go to the jury on the question of the negligence of defendant's driver.

Judgment *non obstante veredicto* for defendant is reversed and the case remanded to the trial court for entry of judgment for plaintiff based on the jury verdict. Costs to plaintiff.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

SOURIS, J. (*concurring in reversal*). I concur in reversal of defendant's judgment *non obstante veredicto* but, although agreeing with Mr. Justice DETHMERS' conclusion and generally with his reasoning, I cannot sign his opinion.

As I read Justice DETHMERS' opinion, he implies that *Mitcham* v. *City of Detroit,* 355 Mich 182, held that, by cross-appealing from the trial court's failure to grant its motion for directed verdict at the conclusion of plaintiff's proofs, defendant preserved "its right to have the matter judged in this Court as of the time and state of the record when that first motion had been made." It is quite true that the opinion signed by Justice DETHMERS in that case so said, but that opinion was not the opinion of a majority of this Court. On the other hand, Mr. Justice VOELKER's majority opinion in *Mitcham,* describing

the case as one in which our version of the doctrine of *res ipsa loquitur* applied, held that defendant's proofs, offered after denial of its motion for directed verdict, were subject to careful judicial scrutiny upon later renewal of defendant's motion for directed verdict and upon this Court's review. *Mitcham* v. *City of Detroit, supra,* pp 192, 193.

Granting that my difficulty with Justice DETHMERS' opinion goes to a collateral issue not essential to decision in this case, I deem it important to express my disapproval of what I consider to be an unwarranted modification of the salutary rule a majority of this Court so recently reaffirmed.

Subject to the foregoing, I concur in reversal and remand for entry of judgment for plaintiff on the jury's verdict. Costs to plaintiff.

BLACK, KAVANAGH, and SMITH, JJ., concurred with SOURIS, J.

O'HARA, J., took no part in the decision of this case.

PEOPLE *v.* AUSTIN.

1. CRIMINAL LAW—CONSTRUCTION OF STATUTES.

Penal responsibility cannot be extended beyond the fair scope of the statutory mandate.

2. HOMICIDE—MURDER—JUSTIFIABLE HOMICIDE BY VICTIM OF ATTEMPTED ROBBERY.

Two of 3 co-robbers may not properly be charged with the

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Criminal Law § 20; 50 Am Jur, Statutes § 408.
[2, 3] 26 Am Jur, Homicide §§ 54, 123.

murder of the third member, where he was killed by the victim of the attempted robbery, since the homicide was a justifiable homicide (CL 1948, § 750.316).

3. SAME—MURDER—ATTEMPTED ROBBERY—JUSTIFIABLE HOMICIDE—STATUTES.

To include the justifiable homicide of 1 of 3 co-robbers by the victim of an attempted robbery as within the statute setting forth that "all murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree" and charge the surviving robbers with murder would infringe legislative prerogatives as to what is necessary to the public's safety and security (CL 1948, § 750.316).

CARR, C. J., and DETHMERS, J., dissenting.

Appeal from Recorder's Court of Detroit; Ricca (John A.), J. Submitted October 5, 1962. (Calendar No. 79, Docket No. 49,598.) Decided April 5, 1963.

William James Austin and George Richard Bell were charged with first-degree murder when their accomplice in attempted robbery was shot and killed by their intended victim. Information quashed. The people appeal. Affirmed.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, and *Samuel J. Torina,* Assistant Prosecuting Attorney, for the people.

John H. Gillis, for defendant Bell.

DETHMERS, J. (*dissenting*). The stipulated facts for purposes of this appeal are as follows: The 2 defendants and George Rowe agreed to commit an armed robbery together. While they were attempting to perpetrate it Rowe was shot and killed by the intended robbery victim. Defendants were

charged with first-degree murder of Rowe. The examining magistrate bound them over to the recorder's court for the city of Detroit for trial. That court granted their motions to quash the information on the ground that the killing of 1 of the robbers by the victim during the robbery does not render the co-robbers guilty of murder in the first degree. The people appeal here.

It is not disputed that if defendants are guilty of any crime for the killing of their co-robber it is murder in the first degree. CL 1948, § 750.316 (Stat Ann § 28.548), provides that murder committed in the attempt to perpetrate a robbery shall be murder in the first degree.

The essence of the trial court's opinion and of defendants' theory is that the killing of the would-be robber by the intended robbery victim was a justifiable homicide, not murder, and, hence, no murder having been committed, defendants cannot be charged therewith.

Defendants' theory seems to fall into 2 parts. The first is, as stated by the recorder's court judge, "that a killing during the perpetration or attempted perpetration of a felony is not a murder if the person killed is a co-felon". This is reminiscent of the old story about a justice of an appellate court who, in explaining its operations, stated that, in reviewing convictions in murder cases, "the first thing we decide is 'should the deceased have went' ". In *Commonwealth* v. *Thomas,* 382 Pa 639 (117 A2d 204), the court's majority, after referring to cases in which first-degree murder convictions against those engaged in perpetrating a felony were upheld for the killing of robbery victims, policemen or bystanders, whether by accomplices or by others, during perpetration of the felony, went on to say (p 645): "We can see no sound reason for distinction merely because the one killed was a co-felon." With that

we agree. It is not the law that police officers or victims of robberies may inflict the death penalty upon robbers without benefit of judicial proceedings or court sentence. Indeed, capital punishment for robbery does not exist here. Robbers are not, legally and *per se,* the fair prey of every passing marksman. Accordingly, it may not be said that the killing of a person, which otherwise would be unlawful, becomes lawful for the sole reason that he is a robber, a felon. The shooting of a robber may be justifiable, however, not because he is a robber, a bad fellow who ought to be dead anyhow, but only because it may lawfully be done for the purpose of preventing robbery or the escape of robbers. Such purpose is hardly to be ascribed to the defendants here. However lawful or laudable the motive or purpose of the robbery victim who fired the shot may have been, it was not shared by defendants. If accepted criminal jurisprudence permits and sound legal reasoning leads to the conclusion, as we shall later see, that, under certain circumstances, robbers may be held for murder in the first degree for the killing by another of an innocent person during and arising out of the perpetration of the robbery, such reasoning permits of no other conclusion merely because the person killed happened to be one of the robbers.

The second part of defendants' theory seems to be that although a killing during and arising out of the perpetration of a robbery can render the robbers guilty of murder in the first degree, even when the killing was not specifically intended or done by them but perhaps by the robbery victim or a policeman or some other person, if the killing was accidental, that cannot be so if the killing by that same person was done purposefully, in an effort to prevent the robbery or escape of the robbers, because then it would be a justifiable homicide. This acknowledgment of criminal liability in the accidental

killing situation is undoubtedly in deference to our holding in *People* v. *Podolski,* 332 Mich 508. In that case police officers came upon the scene of a bank robbery just perpetrated by defendant and others who were about to escape. A gun battle ensued between the robbers and police officers. In the course of the shooting 1 officer was accidentally shot and killed by a bullet from the gun of a fellow officer. In affirming defendant's conviction of murder in the first degree, this Court, in effect, said that the jury had a right to consider that the armed robbers had the murderous intent that any innocent resisting person should die as a result of resistance and the resultant death of the policeman was within that murderous intent, even though the bullet came from another officer's gun; that when a robber deliberately engenders an affray, using a lethal weapon, it must be considered to be within his intent that death should result from the affray as a natural and probable consequence of his acts. This Court then said, in *Podolski,* that it approved the reasoning in *Commonwealth* v. *Moyer,* 357 Pa 181 (53 A2d 736), a 1947 case, in which the Pennsylvania court affirmed convictions of 2 robbers for murder for the killing, during the robbery, of a gasoline station attendant, saying that they were guilty regardless of whether the fatal bullet came from the gun of his employer who was shooting at the robbers, or the gun of 1 of defendants. This Court (pp 515, 516) adopted from the Pennsylvania opinion (pp 190, 191) the following:

"'It is * * * consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from

the initial criminal act. * * * Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible.'"

The court in *Moyer* also said (p 189), with respect to the Pennsylvania statute which makes murder committed during perpetration of a robbery murder in the first degree (from which Michigan's CL 1948, § 750.316 [Stat Ann § 28.548], was copied) the following:

"The numerous States which have copied this Pennsylvania statute (including the States of Massachusetts, New York, Connecticut, New Jersey and Michigan) all use in their respective statutes the word 'murder' instead of the word 'homicide' for the reason that a killer in the malicious perpetration of 1 of the specified felonies has committed common-law murder. The felon obviously possesses that 'wickedness of disposition, hardness of heart, cruelty and recklessness of consequences and a mind regardless of social duty' (*Commonwealth* v. *Drum,* 58 Pa 9) which constitutes malice."

The latter aptly answers defendants' argument here that upholding a charge of murder against them under the cited statute which makes "murder" during a robbery murder in the first degree, would amount to judicial legislation, that is, an amending of the statute so as to change the word "murder" therein to "homicide", because here the killing was not murder but justifiable homicide by the intended robbery victim. *Moyer* was followed by *Commonwealth* v. *Almeida* (1949), 362 Pa 596 (68 A2d 595, 12 ALR2d 183), certiorari denied 339 US 924 (70 S Ct 614, 94 L ed 1346), rehearing on certiorari denied 339 US 950 (70 S Ct 798, 94 L ed 1364),

in which the court upheld a first-degree murder conviction of a robber where an innocent person was killed during the robbery, even though the shot was fired by a policeman.

In 1955, after this Court had decided *Podolski,* the Pennsylvania court had before it the case of *Commonwealth* v. *Thomas,* 382 Pa 639 (117 A2d 204). There the facts were as here; 1 of the robbers was shot and killed by the robbery victim. A majority of the court held the surviving robber guilty of murder in the first degree for that killing, through an extension, as defendants view it, of the doctrine of the *Moyer* and *Almeida* decisions. In that case the Pennsylvania court said, *inter alia* (pp 642, 643):

"If the defendant sets in motion the physical power of another, he is liable for its result. 'Acts should be judged by *their tendency under the known circumstances,* not by the actual intent which accompanies them * * * "the law requires [men] at their peril to know the teachings of common experience, just as it requires them to know the law * * * the test of murder is the degree of danger to life attending the act under the known circumstances of the case."' * * * '"He whose act causes in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. It is a rule both of reason and the law that whenever one's will *contributes to impel a physical force, whether another's, his own, or a combined force, proceeding from whatever different sources, he is responsible for the result, the same as though his hand, unaided, had produced it.*"' * * * 'There can be no doubt about the "justice" of holding that felon guilty of murder in the first degree who engages in a robbery or burglary and thereby inevitably calls into action defensive forces against him, the activity of which forces result in the death of

a human being': *Commonwealth* v. *Almeida,* 362 Pa 596, 605, 629 (68 A2d 595, 12 ALR2d 183).

"As has been said many times, such a rule is equally consistent with reason and sound public policy, and is essential to the protection of human life. The felon's robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He therefore should be held responsible for *any death* which by direct and almost inevitable sequence results from the initial criminal act.

" 'For any individual forcibly to defend himself or his family or his property from criminal aggression is a primal human instinct. It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance * * * knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. *For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible': Commonwealth* v. *Moyer,* 357 Pa 181, 191 (53 A2d 736). (Italics supplied.)"

Defendants point out, however, that the majority decision in *Thomas* was overruled by a majority of the court in *Commonwealth* v. *Redline* (1958), 391 Pa 486 (137 A2d 472), and urge that fact as a reason why we should not extend *Podolski,* as they say, and thus follow *Thomas* here. The reasoning of the majority in *Redline* is essentially that of the trial court and defendants in this case, that the killing of the robber by a policeman in that case (robbery victim here) was justifiable homicide as to the one who shot him and hence could not be murder as to anyone else. The majority in *Redline,* nonetheless, continued adherence to the doctrine that robbers may be held guilty of murder for the killing, by another,

of an innocent person so long as it was accidental, not justifiable; hence, while overruling *Thomas,* they did not overrule *Commonwealth* v. *Moyer, supra,* or *Commonwealth* v. *Almeida, supra.* In fact, the majority, in *Redline,* sought to distinguish *Almeida* by saying (p 509):

"In short, the *Almeida Case* was concerned with the killing, during the perpetration of a felony, of an innocent and law-abiding person by someone other than the felons or ones acting in aid of their criminal conspiracy. The evidence warranted a finding that it was an accidental killing by an officer of the law, but the felons were held accountable nonetheless on the basis of proximate causation regardless of who fired the fatal shot. In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person? The mere statement of the question carries with it its own answer."

To this Mr. Justice Bell (now Chief Justice), in a dissenting opinion, responded (pp 515, 519):

"In order to free Redline of murder

"(1) the present majority has to *expressly* overrule the very important and controlling recent felony murder decisions of this court namely *Commonwealth* v. *Almeida,* 362 Pa 596. * * *

"The killing of the co-robber by a policeman was a justifiable killing qua the policeman, but not qua the robber who set in motion the felonious forces which he knew would likely cause death to his co-felon or to a policeman or the proposed victim or an innocent bystander."

We see no profit in an empty exercise in semantics. Certainly it must not be permitted to be controlling of legal responsibilities. Regardless of what has happened in Pennsylvania or any of the few other jurisdictions from which defendants are able to cite cases, in this State the law still is as announced in *Podolski*. There, this Court held robbers guilty of murder in the first degree when, during a robbery and ensuing gun battle between them and officers, a policeman is accidentally killed by a bullet from a fellow officer's gun. Defendants do not urge that this should be overruled. Yet, the only difference between that case and this is that there the person killed was 1 of the policemen while here it was 1 of the robbers, and that there the killing was accidentally done by a policeman and here purposely by the robbery victim. It is said that these differences present an accidental or, as it is sometimes termed, excusable killing in *Podolski* and a justifiable homicide in the instant case. This points up the vagaries of the semantical contest. Suppose the intended robbery victim here, in seeking to prevent robbery or escape, had shot the robber accidentally instead of by design. Would that have altered or improved the case for defendants? Despite the interesting differences there may be between the meanings of the 2 words "excusable" and "justifiable", neither legal principle or reasoning nor considerations of public policy are persuasive of a legal result different in the one case than in the other. In the one the deceased is just as dead and the robber just as much a moving cause and as responsible, as a matter of fact, for the occurrence of the death as in the other. No more guilt attached to the act, if excusable, of the policeman who fired the fatal shot in *Podolski* than to that of the intended robbery victim who shot in this case. Neither had a criminal intent. Both were prompted by the desire

to halt the robbery or robbers. As for the robbers in the 2 cases, they were equally possessed of that "wickedness of disposition, hardness of heart, cruelty and recklessness of consequences and a mind regardless of social duty * * * which constitutes malice" (*Commonwealth* v. *Moyer, supra,* 189, 190) which, coupled with actions resulting in a killing, make the offense murder. Of both sets of robbers it must be said, as we did of the one in *Podolski,* that they deliberately engendered an affray, deliberately using lethal weapons and that it must be considered to have been within their intent that death should result from the affray as a natural and probable consequence of these acts. The death here was a direct consequence of their deliberate acts as certainly as if they themselves had fired the fatal shot. In point is the following from Justice Bell's concurring opinion in *Commonwealth* v. *Thomas, supra* (p 647):

"Justice Jones states: 'I am at a loss to understand how anyone can be guilty of murder at common law for * * * a justifiable homicide.' We might fairly ask the analogous question: If Justice Jones is correct, 'How can anyone be guilty of murder [as *all* authorities agree they can] for an accidental or an unintentional homicide?' How is it possible to draw a logical or realistic or sound or legal distinction—so far as the crime of murder is concerned—between an unintentional or accidental killing in the perpetration of a robbery and (what the minority calls) a justifiable killing in the perpetration of a robbery? Another point overlooked by the minority is that the killing of a robber may be (and usually is) a justifiable killing so far as the intended victim or a police officer is concerned, but that does not make it a justifiable killing qua the co-felon who caused the shooting."

The order quashing the information and discharging defendants should be reversed and the cause

remanded for trial of defendants on the charge of murder in the first degree.

CARR, C. J., concurred with DETHMERS, J.

KELLY, J. This Court's 1952 *Podolski* opinion (*People* v. *Podolski,* 332 Mich 508) called attention to decisions in other States that were contrary to Pennsylvania[1] and concluded (p 515) "there are not a sufficient number of cases on the point to establish with finality the weight of authority", but "we think the better reasoning appears in a Pennsylvania case, *Commonwealth* v. *Moyer,* 357 Pa 181 (53 A2d 736)." Thus, in deciding *Podolski,* this Court adopted *Moyer.*

Justice DETHMERS' opinion (hereinafter referred to as the "opinion") quotes with approval Pennsylvania's *Moyer* and *Thomas* (*Commonwealth* v. *Thomas,* 382 Pa 639 [117 A2d 204]) decisions, but refuses to accept Pennsylvania's *Redline* decision (*Commonwealth* v. *Redline,* 391 Pa 486 [137 A2d 472]) repudiating *Thomas* and condemning as "dicta" important parts of *Moyer.*

The "opinion" admits that the facts in *Thomas* and *Redline* are identical with the facts in this appeal and that: "The reasoning of the majority in *Redline* is essentially that of the trial court and defendants in this case."

I dissent[2] to the "opinion" because I believe that the Pennsylvania supreme court's reasoning in *Redline* is sound; because no State in the Union has approved a policy such as is advocated in the

[1] *Butler* v. *People,* 125 Ill 641 (18 NE 338, 1 LRA 211, 8 Am St Rep 423); *Commonwealth* v. *Campbell,* 89 Mass 541 (83 Am Dec 705); *Commonwealth* v. *Moore,* 121 Ky 97 (88 SW 1085, 2 LRA NS 719, 123 Am St Rep 189); *State* v. *Majors* (Mo), 237 SW 486.

[2] Justice KELLY'S opinion in this case is the majority opinion.—REPORTER.

"opinion"; and, finally, because the "opinion" infringes upon legislative prerogatives.

The "opinion" seems to discredit *Redline* and holds onto *Thomas* because *Redline* "while overruling *Thomas,* they did not overrule *Commonwealth* v. *Moyer, supra,* or *Commonwealth* v. *Almeida,* 362 Pa 596 (68 A2d 595, 12 ALR2d 183)."

To understand *Redline's* appraisal of *Almeida,* we add the following from *Redline* (pp 508–510), which immediately precedes and follows the *Redline* quotation as contained in the "opinion" (underscoring denotes portion quoted in Justice DETHMERS' opinion):

"The instant appeal affords an appropriate occasion for the repudiation of *Commonwealth* v. *Thomas, supra,* which we now expressly overrule as an unwarranted judicial extension of the felony-murder rule. Fortunately, no one has suffered any penalty as a result of the holding in that case. Following our remand of the record in the *Thomas Case,* the district attorney moved the trial court for leave to *nol pros* the murder indictment. The court approved the motion, and a *nolle prosequi* was duly entered. At the same time, the court accepted the defendant's plea of guilty to an indictment charging him with armed robbery of which he was unquestionably guilty and for which he was immediately sentenced and committed to the penitentiary where he is now serving his sentence. Since we herewith overrule *Commonwealth* v. *Thomas,* it follows that the present appellant's conviction of murder cannot be sustained on the basis of the decision in that case.

"The Commonwealth contends, however, that, entirely apart from the *Thomas Case,* the appellant's conviction of murder can be upheld on the rationale of *Commonwealth* v. *Almeida.* As already indicated, *Almeida* was, itself an extension of the felony-murder doctrine by judicial decision and is not to be ex-

tended in its application beyond facts such as those to which it was applied. In short, the *Almeida Case* was concerned with the killing, during the perpetration of a felony, of an innocent and law-abiding person by someone other than the felons or ones acting in aid of their criminal conspiracy. The evidence warranted a finding that it was an accidental killing by an officer of the law, but the felons were held accountable nonetheless on the basis of proximate causation regardless of who fired the fatal shot. In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person? The mere statement of the question carries with it its own answer.

"It is, of course, true that the distinction thus drawn between *Almeida* and the instant case on the basis of the difference in the character of the victims of the homicide is more incidental than legally significant so far as relevancy to the felony-murder rule is concerned: *cf.* Morris, *op. cit., supra,* at p 56.[3] In other words, if a felon can be held for murder for a killing occurring during the course of a felony, even though the death was not inflicted by 1 of the felons but by someone acting in hostility to them, it should make no difference to the crime of murder who the victim of the homicide happened to be. However, the factual difference, so noted, admits of

[3] Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U of Pa L Rev 50.—REPORTER.

a recognizable distinction with respect to a felon's responsibility for an incidental killing (which another has committed), depending upon whether the homicide was justifiable or excusable, and such distinction serves the useful purpose of thwarting further extension of the rule enunciated in *Commonwealth* v. *Almeida* that it is immaterial who fires the fatal shot so long as the accused was engaged in a felony.

"The limitation which we thus place on the decision in the *Almeida Case* renders unnecessary any present reconsideration of the extended holding in that case. It will be time enough for action in such regard if and when a conviction for murder based on facts similar to those presented by the *Almeida Case* (both as to the performer of the lethal act and the status of its victim) should again come before this court."

Redline (p 505) refers to the "dicta" in *Moyer* and brands the statement in *Moyer* (p 189) that " 'A man or men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon but by the intended victim in repelling the aggressions of the felon or felons' " as a "palpable gratuity," and then proceeds to prove this point by an examination of the trial record in *Moyer,* stating (pp 505, 506):

"In its general charge, the court submitted the *Moyer and Byron Case* on the basis that, in order to convict, the jury would have to find, beyond a reasonable doubt, that either one or the other of the defendants fired the bullet which killed the innocent gasoline station attendant whose death was the subject-matter of the indictment. And, in addition, the court affirmed without qualification the defendants' second point for charge as follows: 'The defendant is entitled to an acquittal unless the commonwealth has produced evidence of such a quality as to prove beyond a reasonable doubt that the bullet

causing the death of the deceased was fired from the gun of either of the defendants.' Furthermore, at the conclusion of the charge and after reading to the jury the above-mentioned point as affirmed, the trial judge, at the insistence of counsel for the defendants, repeated to the jury verbatim this same requested instruction. Naturally, neither Moyer nor Byron charged the trial judge with any error in regard to his instructions on the law concerning what was necessary for the the jury to find, relative to who fired the fatal shot, before the defendants could be convicted of murder. Nor did the district attorney at any time argue or even intimate that the trial judge had charged the jury more favorably to the defendants than he should have. The indisputable fact is that the contention that it was *immaterial* who fired the fatal shot was never raised in the court below in the *Moyer and Byron Case.* Consequently, the point required no discussion by this court. What was said in the *Moyer and Byron* opinion in such connection was, therefore, no more than an expression of the opinion writer's individual view concerning a matter *coram non judice.* In the light of the trial court's charge, the jury's verdict in that case cannot be taken to mean otherwise than that the fatal bullet was fired by one of the felons in furtherance of their criminal conspiracy.

"It follows that the decision in the *Moyer and Byron Case* was in no sense authority for the ruling in *Almeida.*"

The "opinion" quotes with apparent approval the statement in *Moyer* that Michigan, Massachusetts, and New York "all use in their respective statutes the word 'murder' instead of the word 'homicide' for the reason that a killer in the malicious perpetration of 1 of the specified felonies has committed *common-law murder*" (emphasis ours), and the "opinion" states this "aptly answers defendants."

Redline, commenting on the fact that the common law did not recognize degrees of murder but did recognize classes of homicide, states (pp 492–494):

"Although degrees of murder were, and still are, unknown to the common law, 3 classes of homicide are there recognized, the term 'homicide' being generic and embracing every killing of a human being by another: 1 Warren, Homicide (Perm Ed), § 54; 4 Blackstone, Commentaries, *177. The classifications of homicide at common law are (1) justifiable, (2) excusable and (3) felonious. 'The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing': 4 Blackstone, Commentaries, *178. A justifiable homicide is such as is committed either by command or, at least, with the permission of the law, *e.g.*, execution of a convicted criminal, *apprehension of an escaping felon*, et cetera; an excusable homicide is such as is committed either *per infortunium* (*i.e.*, accidentally) or *se defendendo* (*i.e.*, in self defense): 4 Blackstone, Commentaries, *178–186; and a felonious homicide (*i.e.*, murder) occurs when a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign *with malice* prepense or aforethought, express or implied: see 4 Blackstone, Commentaries, *195; 1 Warren, Homicide, § 63; 1 Wharton, Criminal Law (12th ed), § 419. * * *

"Malice is the 'grand criterion which now distinguishes murder from other killing': 4 Blackstone, Commentaries, *198. * * *

"Thus, 'if one intends to do another felony, and undesignedly kills a man, this is also murder': 4 Blackstone, Commentaries, *200–201."

The "opinion" does not refer to decisions of other States to support its conclusion and this dissent[4]

[4] Justice KELLY'S opinion is the majority opinion in this case.—REPORTER.

will not review decisions in other jurisdictions opposite to the "opinion" but will answer *Moyer's* grouping of Michigan statutes with Massachusetts by stating that Massachusetts took an opposite position to *Moyer* at the time we adopted *Moyer,* and this dissent,[5] in an effort to eliminate the confusion caused by *Moyer's* reference to New York, calls attention to the New York statute and the recent decision of New York's court of last resort, namely *People* v. *Wood,* 8 NY2d 48 (167 NE2d 736), decided May 10, 1960. The New York statute[6] provides:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed * * * by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise."

People v. *Wood, supra,* decides contra to the "opinion" and refers to our *Podolski* decision and to Pennsylvania's *Almeida, Thomas,* and *Redline* decisions, as is disclosed by the following (pp 50–53):

"It is the people's contention that the statutory phrase, 'a person engaged in the commission of, or in an attempt to commit, a felony', was intended to include, in addition to the felon and accomplices, 'all persons *involved*', *e.g.,* the victim of the felony and those assisting him. They contend, therefore, that, since the deaths of Lee and Moses were the foreseeable consequence of this assault, the defendant should be held criminally responsible for felony murder. We do not so construe the statute. We shall not vindicate the wrong by a strained interpretation of this legislative codification of the common law. Penal responsibility, unlike moral responsibility,

[5] Justice KELLY'S opinion is the majority opinion in this case.—REPORTER.

[6] McKinney's Consolidated Laws of New York, Penal Code § 1044. —REPORTER.

cannot be extended beyond the fair scope of the statutory mandate. * * *

"In other words, in order for a felon to be guilty of the homicide, the act (as in agency) must be 'either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose.' (*Commonwealth* v. *Campbell,* 89 Mass 541, 544 [rioter not guilty of a murder for accidental killing of an innocent person by those suppressing the riot]; *Butler* v. *People,* 125 Ill 641 [18 NE 338, 1 LRA 211] [felon not guilty although rowdy conduct resulted in accidental killing of bystander by town marshal]; *People* v. *Garippo,* 292 Ill 293 [127 NE 75] [felon not guilty where unknown person killed his accomplice during course of a robbery]; *Commonwealth* v. *Moore,* 121 Ky 97 [88 SW 1085, 2 LRA NS 719, 123 Am St Rep 189] [felon not guilty where victim of robbery accidentally killed a bystander]; *State* v. *Oxendine,* 187 NC 658 [122 SE 568] [felon not guilty where victim of assault killed a bystander].) Where, however, the felon kills someone during the felony, but in a separate and distinct act and to satisfy his own end, his accomplice in the felony is not guilty of murder in the first degree (*People* v. *Sobieskoda,* 235 NY 411, 416 [139 NE 558]). If the lethal *act* is in furtherance of their common purpose, the accomplice is guilty even though there was an express agreement not to kill, and even if he actually attempts to prevent the homicide (*People* v. *Friedman,* 205 NY 161 [98 NE 471, 45 LRA NS 55]). * * *

"Although several jurisdictions (*People* v. *Wilburn* [Cal App], 314 P2d 590 affirmed 49 Cal 2d 714 [321 P2d 452][7]; *People* v. *Podolski,* 332 Mich 508; *cf. People* v. *Cabaltero,* 31 Cal App 2d 52 [87

[7] The California supreme court affirmed on a factual question of who fired the fatal shot and held immaterial the question discussed by the court of appeals. The Pacific Reporter contains the notation, "Opinion, 314 P2d 590, vacated."—REPORTER.

P2d 364]) would, by application of the proximate cause theory, hold a felon responsible for a homicide committed, by someone other than a coconspirator, during the commission of a felony, at least 1 jurisdiction has repudiated its former position as an 'unwarranted judicial extension of the felony-murder rule'. (*Commonwealth* v. *Redline,* 391 Pa 486, 508 [137 A2d 472].) Formerly the leading decision in that jurisdiction (*Commonwealth* v. *Almeida,* 362 Pa 596 [68 A2d 595, 12 ALR2d 183]) held the defendant liable for the killing of an innocent bystander by a police officer, because it was defendant's act which set in motion the chain of events which resulted in the homicide. This far-reaching extension was carried to its logical conclusion in *Commonwealth* v. *Thomas* (382 Pa 639 [117 A2d 204]) wherein the court found that a felon could be liable for the justifiable slaying of his accomplice by the robbery victim. The *Redline Case* (*supra*) expressly overruled the *Thomas* decision, and, in limiting the *Almeida Case* to its facts, cast serious doubt as to its rationale."

In our Michigan penal code, PA 1931, No 328, in chapter 45, entitled "Homicide", we find section 316, relative to the crime of murder in the first degree, which provides:

"All *murder* which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the State prison for life." CL 1948, § 750.316 (Stat Ann 1954 Rev § 28.548).

Defendants call attention to our Michigan statutes as follows:

"We must not lose sight of the fact that although given a common-law name, the crime herein involved

is a product of the legislature. The pertinent statute CL 1948, 750.316 (Stat Ann 1954 Rev § 28.548), commences 'all *murder* which' and therein lies our answer. If the legislature had used the term 'homicide' instead of 'murder,' the people's position in this case might be stronger. * * * Apparently the intent of the legislature was to make a murder committed during the perpetration of 1 of the 4 enumerated felonies, first-degree murder whether there was in fact, premeditation. If it is murder, there is only 1 possible degree but here, in our case, the killing of Rowe by the intended holdup victim, was not murder, but a justifiable homicide."

The trial judge did not repudiate *Podolski* in deciding to quash the indictment that charged appellees with murder. He drew a distinction between the *Podolski* accidental shooting of 1 police officer by another police officer during Podolski's attempt to escape the scene of a bank robbery and the present case where the shooting of felon Rowe was by the intended victim. The trial court concluded, as did *Redline,* that it would be an unwarranted extension of the policy of felony-murder in *Podolski* to rule Rowe's accomplices, defendants Austin and Bell, accountable for murder of Rowe.

The writer of this opinion was not a member of this Court when the *Podolski* decision was handed down.

This is not a rehearing of *People* v. *Podolski,* 332 Mich 508. We are deciding 1 important question, namely: Did the trial court err in refusing the people the right to try defendants Austin and Bell for the crime of murder?

It is not necessary to overrule *Podolski* to hold that the trial court did not commit error in quashing the indictment.

No killing under circumstances such as the instant case has ever been declared murder in this

State. This opinion has repeatedly referred to and quoted from *Redline* because of the belief that the decision in *Redline* more completely supports the trial court in this instant appeal than *Moyer* supported our opinion in *Podolski.*

In support of the previous statement that the "'opinion' infringes upon legislative prerogatives" there is set forth a final quote from *Redline* (p 490):

"If predominant present-day thinking should deem it necessary to the public's safety and security that felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of their felonies—regardless of how or by whom such fatalities came—the legislature should be looked to for competent exercise of the State's sovereign police power to that end which has never yet been legislatively ordained."

Affirmed.

BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred with KELLY, J.

O'HARA, J., took no part in the decision of this case.

In re BRUIN ESTATE.

MANN *v.* SALVATION ARMY.

WILLS — CONSTRUCTION OF HOLOGRAPHIC WILL — CASH — BONDS — EQUALLY DIVIDED COURT.

Construction of expression in a holographic will that "any cash over & above what it takes too pay Said persons off I want left too Salvation Army" by probate and circuit courts as including $50,000 in bonds otherwise left intestate, where commercial bank account was insufficient to pay all of the money bequests testator had made, elsewhere his sole heir was left a specific bequest, and elsewhere he had made a specific bequest of a bond is affirmed by an equally divided court.

Appeal from Chippewa; Baldwin (George S.), J. Submitted January 11, 1963. (Calendar No. 31, Docket No. 49,534.) Decided April 5, 1963.

In the matter of the estate of Archie T. Bruin, deceased. Final account of executor contained petition asking for construction of will and for instructions as to how to distribute residue, which was claimed by Helene Mann, heir-at-law, and by the Salvation Army, a legatee. In probate and circuit courts executor ordered to assign residue to Salvation Army. Plaintiff Mann appeals. Affirmed by an equally divided court.

Burney C. Veum, for plaintiff.

Clevenger & James, for defendant.

REFERENCES FOR POINTS IN HEADNOTE

57 Am Jur, Wills § 1150.

CARR, C. J. (*for reversal*). This case involves the interpretation of a clause of a holographic will executed by Archie T. Bruin, a resident of Chippewa county, Michigan, on October 18, 1958. Mr Bruin deceased on December 27, 1959. The instrument as written by the testator was admitted to probate, apparently without objection. It reads as follows:

"Archie T. Bruin

"I Leave

Oct. 18th 1958

"I leave my {farm rifel / form, rifly} ring, watch & five hundred dollars too Lawence Smart.

"My home 401 Dawson too Roberta Samuell. {when house is sold / Mrs. Royer too get / 1/2 the selling price

"Robert Kerr five hundred dollars

"Janett Zimmerman one thousand dollar & five thousand dollars Bond.

"My four sisters five hundred dollars each.
"Mrs. Gene Mann two thousand dollars
"Keneth Mann five hundred dollars
"Colista Mann McNabb, five hundred dollars
"Janett Zimmerman, my car and any furniture she wants from my house & shot gun, and all the furniture
"Len Bruin Jr. five hundred dollars. F. Bruins Son
"Alf Bruin five hundred dollars. Lions Head Ont.
"{Dicke Brown five hundred dollars. Janetts sister
"{Lou Sutts one hundred dollars " "
"{Tuets Sutts five hundred dollars. Lous daughter
"Mrs. Elizabeth Royer two hundred dollars.
"Bettie Kerr Bricker five hundred dollars
"Joe Trumbly five hundred dollars

"Any cash over & above what it takes too pay Said persons off I want left too Salvation Army Sault Ste. Marie, Michigan

"Any furniture Janet Zimmerman dont want } rest goes too } Roberta Samuells

"Witness J. WILLARD WALKER
"Witness VERNA DICKSON

"I want Lawrence Smart too be my Administrator.

"ARCHIE T. BRUIN"

At the time of his death Mr. Bruin was the owner of the real estate mentioned in the will, together with household furniture, personal effects, and an automobile. He had a commercial account in a Sault Ste. Marie bank containing a deposit of $3,827.75, and savings certificates therein in the aggregate sum of $13,000. He was also the owner of $50,000 in United States government bonds, $10,000 "series G" and $40,000 "series H." A "series H" bond in the sum of $5,000 stood in the joint names of Mr. Bruin and Janet Zimmerman, who was his housekeeper during the latter years of his life and 1 of the beneficiaries named in the will.

The stepson of testator was designated by the latter as administrator and was appointed executor by the court. In his final accounting showing receipts and disbursements he asked that the court construe the will and give instructions as to the distribution of the assets of the estate. The controversy between parties in interest on the hearing of the petition involved the interpretation of the clause of the will reading as follows:

"Any cash over & above what it takes too pay Said persons off I want left too Salvation Army. Sault Ste. Marie, Michigan."

The question at issue, as presented in the probate court and on appeal in circuit court, was whether

the $50,000 in bonds in the estate passed to the Salvation Army in addition to the balance of the cash remaining after the payment of the specific legacies. On behalf of the appellant here, the daughter and sole heir-at-law of Mr. Bruin, it was claimed that the balance of the cash was the sum of $6,527.75. On behalf of the Salvation Army it was insisted that the word "cash" should be construed to include not only the balance of cash on hand but also the government bonds. In support of such claim the testimony of Mrs. Janet Zimmerman was offered, apparently on the theory that the will was ambiguous, that the testator may have considered that the term "cash" included the bonds, and that Mr. Bruin had expressed an intent to leave the greater portion of his estate to the Salvation Army. The judge of probate, apparently impressed with such testimony, construed the clause in question as including the bonds, and the circuit court on appeal affirmed the decision. On behalf of testator's daughter and sole heir it was insisted that the will was not ambiguous, that the term "cash" has a definite fixed meaning, and that there was nothing in the will as drawn by testator to indicate that he intended to give it the comprehensive scope accepted by the circuit court.

It appears that Mr. Bruin had been engaged in his lifetime in the buying and selling of cattle. It is admitted that he was a successful businessman and familiar, at least, with ordinary business transactions. He purchased the bonds over a period of years and regularly drew the interest thereon. It appears from the record that the will in question was not his first attempt to make testamentary disposition of his property. The instrument in question indicates that he had in mind the parties to whom he wished to make specific bequests, and there is no question as to the clarity of the instrument in that respect.

It is also in evidence that during his lifetime Mr. Bruin had not been a member of, nor had he attended meetings of, the Salvation Army, nor had he made contributions to it. The specific provision of his will indicates that he desired to assist it in the manner stated, but it is significant that in so doing he referred to "any cash" over and above the amount necessary to satisfy the specific legacies previously stated. It is scarcely conceivable that he did not appreciate the difference between cash and the bonds in which he had invested. Instead of using a term of limited scope the question naturally suggests itself why, if such was his intent, he did not leave all property not disposed of by the specific language of the will to the Salvation Army. The fact remains that he did not do so, and in construing the instrument we must be governed by the language used. We are, of course, concerned with the intention of the testator, which under the general rule is to be carried out if it be possible to do so. However the intention is to be gleaned from the instrument itself, and we may not indulge in speculation that he intended to express a meaning other than appears from the language used.

As indicating that testator realized the difference between cash and bonds, attention is directed to the fact that he left to his housekeeper the sum of $1,000 and a $5,000 bond. This would appear to justify the inference that he did not regard the bonds as cash. It is also significant that in the clause especially in question here he used the expression "any cash" in excess of what was needed to pay off the legacies. Had he considered the bonds as cash, with the intention in mind of leaving to the Salvation Army all his property not specifically disposed of in the will, it is a fair conclusion that he would have used "all" instead of "any." As before noted, we must construe the intention of the testator on the basis of what he

said without attempting to enlarge the scope of his language or reading into the will a property disposition that he did not make.

On behalf of appellee it is urged that the language in dispute should be construed to avoid partial intestacy. However the evidenced intent is controlling. As was well said in *Williams* v. *McKeand,* 119 Mich 507, 510 (75 Am St Rep 420):

"The rule that such a construction should be given as will, if possible, avoid intestacy, is invoked; also, the rule that the will speaks from the time of the death of the testator; and undoubtedly the intention should be sought with both rules in mind, but neither rule should be so applied as to extend the force of terms which are obviously restricted."

Questions of construction analogous to that involved in the case at bar have frequently arisen. In *Christ's Home* v. *Mattson,* 140 NJ Eq 433 (55 A2d 14, 173 ALR 651), the testatrix, who apparently wrote the will herself, made a number of bequests to named parties and then provided in the final paragraph that:

"What money there is left to go *Crhist* Home, Warminster Bucks Co, Pa."

Testatrix at the time of her death had cash in a bank in the sum of $3,814.27. She also owned 2 parcels of real estate and some building and loan association stock. The trial court held that the clause quoted did not include the real property or the stock. On appeal the decision was affirmed, the court saying, in part (p 436):

"We have carefully considered the arguments of counsel and the authorities advanced by the parties in support of their respective contentions, and conclude that the decree appealed from is proper. It is well settled by the greater weight of respectable au-

thority that 'money' means money and money only unless there is in the context of the will something to indicate that the testator intended a more extended meaning. Confining our attention to the specific context of the will before us, we are unable to ascertain therefrom that the word 'money' appearing in the paragraph 'What money there is left to go *Crhist* Home, Warminster Bucks Co, Pa,' was intended by the testatrix to mean anything other than 'money,' as it is commonly and universally understood to mean cash in hand or on deposit to the credit of decedent. It has been said repeatedly, the court's main concern is not so much what the testator meant to say as it is to determine what he meant by what he did say. We cannot speculate as to the testator's intention; we must ascertain that intention from the 4 corners of the will. (Citing cases.)"

In support of its conclusion the court cited with approval *Ricardo* v. *Kelly, State Tax Commissioner,* 134 NJL 540 (48 A2d 897), where it was said (pp 543–545):

"The judicial interpretative function is to find the meaning of the testator's expression; and if the testamentary purpose is revealed by terms that are clear and unequivocable, viewed in the light of the surrounding circumstances, there is no room for construction in its general connotation. *In re Fisler's Estate,* 133 NJ Eq 421 (30 A2d 894). The spirit prevails over the letter of the testament. All principles and rules in aid of interpretation yield to the intention exposed by the context. The words are to be given their primary and natural significance unless the context makes it clear that they were employed in a different sense. The *prima facie* meaning of the terms cannot be rejected in favor of a larger construction without an explicit indication of such a purpose. *National State Bank of Newark* v. *Stewart,* 135 NJ Eq 603 (39 A2d 435). Conjecture and speculation as to the testamentary intention are inadmissible. The statute of wills (RS 3:2–3 [NJSA 3A:3–2])

directs that, except as to nuncupative wills, the testamentary design shall be in writing and authenticated as therein prescribed; and thus the testator's intention, to be enforceable, must be found in the words of the will, considered as a whole in relation to the attendant circumstances. The aim of construction is not to find the unexpressed intention of the testator, but that expressed in the language of the will. The judicial function is not to redraft or revise the will, but only to construe the will that the testator has made. (Citing cases.) * * * The words cannot be distorted or enlarged to effectuate a wholly unexpressed intention. The language may be changed or moulded to fulfill an intent clearly and indubitably revealed by the context, but not to give effect to some supposed unexpressed design not otherwise appearing or to do that which the testator did not have in view at all. *McDonald* v. *Clermont,* 107 NJ Eq 585 (153 A 601)."

Stannard v. *Barnum,* 51 Md 440, was a suit to obtain a judicial construction of a will. After certain specific bequests the testatrix provided that any "balance of money" left after the payment of debts and funeral expenses should be divided between 2 named individuals. It was contended that the clause was equivalent to a general residuary devise and included all of the estate of the testatrix not previously disposed of by her. The court declined to so consider it, saying (p 455):

"Here the bequest is simply of '*a balance of money.*' The context shows, that the testatrix meant to dispose of only what belonged to her consisting of money, and the language of the will does not support the theory of the appellant, that the testatrix meant by those words to dispose of her interest and estate in the hotel property. Such an interest and estate will not ordinarily pass under a bequest of 'money.' *Mann* v. *Ex'rs of Mann,* 1 Johns Ch (NY) 231. There is nothing in the context to show, that the testatrix

used the word money in any other than its customary and popular sense, and to extend its meaning, so as to embrace her interest in the hotel property would be doing violence to the real intent of the testatrix.

"In our opinion, the will operates only to dispose of the money belonging to the testatrix, arising from her annuity, and that she died intestate of all her interest and estate in the hotel property. We therefore, on this question, concur in the opinion of the circuit court."

A like conclusion was reached in *Mann* v. *Mann,* 14 Johns (NY) 1 (7 Am Dec 416), which involved the construction of a clause in a will in terms giving "all the rest, residue and remainder of the *moneys* belonging to my estate, at the time of my decease" to a named beneficiary. The question arose whether such beneficiary was entitled to all the bonds, mortgages, notes, and choses in action belonging to the estate of the testator, or only to the cash. The court recognized the generally accepted rule that the intention of a testator must be gathered from the language of the instrument. It was held that the term "moneys" could not be extended to include choses in action. It was pointed out specifically that the term was less applicable to a bond than to an account. It is of interest also to note that the court passed on the admissibility of parol evidence as bearing on the testator's intent, it being determined that there was no ambiguity calling for explanation and that the testator had used plain, intelligible, and appropriate terms. The court said, in part (pp 14, 15):

"The inquiry into the situation of the testator's property (admitting we were authorized to notice it) would not, in any manner, explain his intention with respect to his *choses in action.* Such intention would still be left to be collected from the will itself. To receive the verbal declarations of the testator to contradict or enlarge the plain and obvious import

of his written language, would not only be repugnant to the most sound and salutary rules of law, and an alarming precedent, but would infringe upon the spirit and policy of the statute, which declares, that no will in writing concerning any personal estate shall be repealed, or any part thereof revoked or altered by any words, or will, by word of mouth only."

In accord with the foregoing decisions are *In re Conlin's Estate,* 388 Pa 483 (131 A2d 117), and *In re Ware's Estate,* 218 Miss 694 (67 S2d 704). We think the rule of construction applied in the above decisions, and in others of like import, is applicable in the case at bar. Where a specific term is used with an apparent restricted meaning it should be so interpreted. *Stender* v. *Stender,* 181 Mich 648. The Court may not indulge in speculation or conjecture in construing a testamentary disposition of property. *LaMere* v. *Jackson,* 288 Mich 99, 103. Neither does the fact, as in the case at bar, that an heir is left a specific legacy bar the right to inherit intestate property. *In re Brown Estate,* 362 Mich 47.

For the reasons indicated the provision of the will of the testator here in question must be construed as it reads. An intent to give other than the ordinary meaning to the terms used does not appear from the instrument, the language of which must necessarily govern, notwithstanding claimed expressions by the testator of a different intention than that evinced by the expressions used by him. Ambiguous statements in a will may be explained by competent testimony, but where the intent of the written instrument clearly appears from language that is not ambiguous, such testimony is not competent, nor is testimony of the character introduced in the instant case competent for the purpose of laying a foundation for a claim of ambiguity.

The order of the circuit court should be reversed and the case returned to that court for remand to the probate court with directions for administration proceedings in accordance herewith.

DETHMERS, KELLY, and O'HARA, JJ., concurred with CARR, C. J.

SOURIS, J. (*for affirmance*). I do not agree with the opinion of the Chief Justice. While denying ambiguity in testator's use of the word "cash" in his bequest to the Salvation Army, and insisting that it is a term of "limited scope" and "ordinary meaning," the Chief Justice concludes that it means something more than the coin and currency of the realm, the record showing that testator had none at his death; that it means the $3,827.75 balance at death in a commercial bank account and, as well, $13,000 worth of certificates of deposit; but that it does not include series G and H United States savings bonds of the value of $50,000. Absent a residuary clause in the will, all of such bonds (over 50% of the estate) are said to pass by our rules of intestate distribution to testator's sole heir, a daughter born of a first marriage who resides in Canada and whom testator had not seen for several years, but to whom he had, by another provision of his will, bequeathed $2,000.

This result seems to me far from the testator's intention, which we are obliged to ascertain not by imposition of our own notions of the words he used to express his intentions and not by application of other courts' interpretations of similar language used by other testators in circumstances totally different from those faced by this testator, but rather "from a consideration of all the provisions of the will itself and in the light of the circumstances surrounding the testator at the time the will was made and his relations with the several objects of his

bounty." *Kirsher* v. *Todd,* 195 Mich 297, 309. See, also, *Mills* v. *Butler,* 364 Mich 422.

There is a strong presumption in this State against partial intestacy (*Toms* v. *Williams,* 41 Mich 552; *Mann* v. *Hyde,* 71 Mich 278; *Foster* v. *Stevens,* 146 Mich 131; *Shattuck* v. *Fagan,* 337 Mich 83; and *In re McKay Estate,* 357 Mich 447) and, although the presumption is not conclusive (*Shattuck* v. *Fagan, supra,* at p 89), we have said that we will adopt any reasonable construction of a will to avoid it (*In re Chapple's Estate,* 338 Mich 246, and *Hay* v. *Hay,* 317 Mich 370, at p 403). Bruin's partial intestacy can be avoided, quite reasonably in my view, by giving to the word "cash" that meaning which the record discloses Bruin himself and his farm neighbors and business associates gave to it,—a meaning which includes government bonds as well as certificates of deposit. The record discloses that Bruin during his lifetime referred to his bonds as cash and, in the conduct of his business, at times used bonds to buy cattle.

Our presumption against partial intestacy is reinforced by consideration of the obvious care Bruin exercised in the preparation of his holographic will to the disposition of all of his real estate, tangible personal belongings and his "cash." Intestacy results, not just as to property Bruin understandably could have overlooked, but as to the major portion of his estate, the bonds, only if we restrict the meaning of the word "cash" as he used it in the bequest to the Salvation Army.

While conceding that an heir who is left a specific bequest is not thereby barred from inheriting intestate property (*In re Brown Estate,* 362 Mich 47), it would seem to me that a bequest of a specified sum of money to testator's sole heir strongly suggests that he did not intend that all of his bonds also pass to her by intestacy.

Another factor worth considering is that Bruin did not possess, either when he made his will or when he died, sufficient funds in his commercial bank account to pay all of the money bequests he made. Having specifically devised and bequeathed all of his real estate and tangible personal property, obviously he must have contemplated use of his certificates of deposit or his bonds, or both, in addition to his commercial bank account to pay the bequests. In fact, the certificates of deposit were so used. There is nothing in his will, or in this record, to suggest that Bruin intended his certificates of deposit to be considered as "cash," but not his bonds; nor is there offered any explanation why his executor treated the certificates of deposit as cash, but not the bonds.*

Absent any indication in Bruin's will, or otherwise, that he intended the bulk of his estate to pass by intestacy to his sole heir to whom he otherwise bequeathed $2,000, and absent any other reason to give the word "cash" a meaning more restrictive than the record discloses he customarily gave that word during his lifetime, I would construe the bequest to the Salvation Army to include the testator's bonds as well as the remaining certificates of deposit, as did the probate judge and the circuit judge, thereby avoiding his partial intestacy. Accordingly, I would affirm the order below and award costs to appellee.

BLACK, KAVANAGH, and SMITH, JJ., concurred with SOURIS, J.

* Liquidity could not have been the determining factor, for the certificates of deposit were expressly made payable only at specified 6-month maturity date intervals, whereas the bonds were redeemable upon 1 month's notice.

TAYLOR *v.* TOWNSHIP OF DEARBORN.

1. MUNICIPAL CORPORATIONS—RACIAL DISCRIMINATION—POLITICAL RIGHTS—COURTS.

   The courts of this State are ever open for the hearing of any citizen who claims interference with his political rights on the ground of racial discrimination because of the location of city boundaries so as to deprive citizens of their pre-existing municipal vote.

2. SAME—INJUNCTION—INCORPORATION OF CITY.

   Findings of trial court in suit to enjoin further proceedings toward incorporation of a new home-rule city from hitherto unincorporated portions of township territory to the north and south of incorporated village and joined by a corridor 3 blocks wide which included 1 through street in easterly edge of village, which was not so arranged as to racially discriminate against anyone remaining in the village, and was not gerrymandering, *held,* supported by evidence and to have justified dismissal of the bill (US Const, art 6).

3. COSTS—INCORPORATION OF NEW CITY—INJUNCTION.

   No costs are allowed on appeal in suit to enjoin further proceedings toward incorporation of new home-rule city, where relief sought is presently denied.

4. MUNICIPAL CORPORATIONS — INCORPORATION OF NEW CITY — INJUNCTION.

   No right or penalty may accrue in favor of defendant township, new city officers or county officers on account of execution and filing of stay bond hitherto ordered in suit to enjoin further proceedings toward incorporation of new home-rule city from township and village territory (US Const, Ams 14, 16).

Per CARR, C. J., and DETHMERS, KELLY, BLACK, and KAVANAGH, JJ.

REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Elections § 13 *et seq.*
[2, 5] 18 Am Jur, Elections § 13 *et seq.*
37 Am Jur, Municipal Corporations § 7 *et seq.*
[3] 14 Am Jur, Costs §§ 10, 14, 22.
[4] 28 Am Jur, Injunctions § 342.
8 Am Jur, Bonds §§ 85–90.

5. SAME—JUDGMENT—CONTINUING JURISDICTION—RACIAL DISCRIMINATION.

Adjudication is made that proceedings to incorporate new home-rule city from township territory on north and south of incorporated village connected by corridor 3 blocks wide along easterly side of the village and from its territory are valid as against claim in class suit that constitutional rights are infringed, but jurisdiction is retained to permit future petitions seeking specific relief against new city from future action resulting in racial discrimination (US Const, Ams 14, 15).

Per BLACK, KAVANAGH, SOURIS, and SMITH, JJ.

Appeal from Wayne; Holbrook (Donald E.), J., presiding. Submitted December 4, 1962. (Calendar No. 124, Docket No. 50,020.) Decided April 5, 1963.

Bill by Thomasina Taylor, Lloyd Holt, Lillie Ammons, and Aaron Neal, taxpayers and registered voters as representatives of a class, against the Township of Dearborn, a public corporation, the Village of Inkster, a home-rule village, the Charter Commission of the proposed City of Dearborn Heights, the Wayne County Board of Supervisors, and various other bodies and public officials, to declare illegal and void the incorporation of the proposed city of Dearborn Heights and the incorporation therein of a portion of the village of Inkster, and to enjoin further proceedings in respect thereto. Bill dismissed. Plaintiffs appeal. Affirmed and cause remanded for retention of jurisdiction.

Rothe, Marston, Mazey, Sachs & O'Connell, and *Edward M. Turner* (*Theodore Sachs,* of counsel), for plaintiffs.

Richard D. Dunn (*Stanley E. Beattie,* of counsel), for defendants Township of Dearborn, Charter Commission of the proposed City of Dearborn Heights, and various individual public officials.

Albert H. Schlenker, Jr., for Village of Inkster, asking reversal.

BLACK, J. This case was conceived of *Gomillion* v. *Lightfoot,* 364 US 339 (81 S Ct 125, 5 L ed 2d 110), decided November 14, 1960. Prior to submission (October 18, 19, 1960) of *Gomillion* our own case of *Village of Inkster* v. *Wayne County Supervisors,* 363 Mich 165, was submitted for decision. The *Inkster Case* determined over objection of the village that the proceedings to incorporate Wayne county's new city of Dearborn Heights were statutorily valid. Now the village joins these class-acting plaintiffs in assailing the same proceedings as violative of rights protected by the Fourteenth and Fifteenth Amendments. All plaintiffs rely upon the *Gomillion Case* and its ban against the singling out by State action of readily isolated segments of racial minorities for discriminatory treatment.

Plaintiffs' bill was filed shortly after handing down of the mentioned *Inkster* decision. It gathers its whole thrust and force in complete paragraph 21:

"21. Plaintiffs allege that the inclusion in the proposed city of Dearborn Heights of all of the township of Dearborn, excepting only that portion of the township lying within the village of Inkster bounded on the west by Inkster road and on the east by Beech-Daly road, was made to effect and does effect a separation of persons on account of race, and an all-white proposed city of Dearborn Heights."

The trial chancellor, following an extended testimonial hearing of the merits, concluded that plaintiffs had failed to sustain the foregoing allegation and found that the legal need for contiguity of an incorporated city was the controlling reason for inclusion, by the statutory petitioners and the electors, of the rectangular "corridor" (see map, 363 Mich at 167) as a part of the new city of Dearborn Heights. He found further, and accordingly ruled, that the incorporation of such new city violated no right asserted by plaintiffs.

Bray v. *Stewart,* 239 Mich 340, upheld statutory validity of the proceedings by which Inkster village was incorporated. That was in 1927, following incorporation of the present city of Dearborn. The incorporation of Dearborn city and of Inkster village—the city east and the village west of Gulley road (see map)—changed the legal status of great portions of Dearborn township. The unincorporated remainder of the township was left in 2 separated segments, 1 north and 1 south of Dearborn and Inkster. However, the incorporation of the village differed from that of Dearborn city in that the village territory remained a part of the township.[1] It is this combined village-township status, of residence and franchise, which plaintiffs seek to preserve as against city incorporation of the 2 segments with the "corridor"; the corridor by which the segments were statutorily joined.

By delicate overture the controversy should be stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time —another thorny and trackless bramblebush of politics. Here are the standout specifics of the case, with respect to which there can be little if any serious disagreement:

First: If the separated segments were to be incorporated at all, *as one city,* it was legally, practically and politically necessary that the incorporating petitioners and electors include within the corporate limits some portion of Inkster village. Why necessary? Because the common law definitely requires contiguity of the territory of a city[2] and definitely

[1] "The territory taken into the village when incorporated is in no way separated from the township. It still remains a part thereof, is subject to taxation therein, and its residents are electors thereof." *Bray* v. *Stewart* at 344.

[2] See 37 Am Jur, Municipal Corporations, § 27, pp 644, 645; followed on this point in *Township of Genesee* v. *Genesee County,* 369 Mich 592.

permits (as held in the cited *Inkster Case*) incorporation of a new city partly from unincorporated territory and partly from incorporated village territory. And previous voting experiences shown in the record, all dismal of result, suggested that in all probability city status of the segments was politically attainable only by the means shown in the cited *Inkster Case.*

Second: The petitioners and electors chose to proceed as thus permitted, taking into the new city the narrowest and most feasible part of the village, the better as their proofs suggest and the trial chancellor found to leave the whole village (including its comparably greater area of exclusive white residence)[3] substantially intact.

Third: There is no suggestion that the "impenetrable wall," of which plaintiffs complain, exists with respect to the southerly boundary of the north segment which adjoins the village, or the north boundary of the south segment which borders the village on the south. Further, plaintiffs do not object to incorporation, separately as 2 distinct cities, of the north and south segments. The taking of the corridor thus becomes the real target of their charge. In such connection it is significant that there is no area of Negro residence at all east or west of that part of the corridor which is north of Michigan avenue.

The present issue cannot be one of motive on the part of the incorporators of and campaigners for the new city. Such an issue is not currently justiciable. See *Detroit United Railway* v. *City of Detroit,* 255 US 171 (41 S Ct 285, 65 L ed 570); *Deerfield Park District* v. *Progress Development Corp.,* 22 Ill 2d 132 (174 NE2d 850) on motion to dismiss; 26 Ill 2d

[3] We refer here to the whole northerly half (plus) of the village. Exhibit 2 shows it as exclusively white.

296 (186 NE2d 360) on review of tried issue; cert den 372 US 968 (83 S Ct 1093, 10 L ed 2d 131).[4] The motives of such incorporators and campaigners are important only as a possible link with racially discriminatory events which may, but as yet have not, occurred within the new city by action of or with tacit consent of the city fathers. This is not to suggest that plaintiffs have proved the invidious motive they allege. It is to say only that the issue is not as yet before us.

The real question is whether the electors (see tabulation of vote by areas, 363 Mich at 172) brought about a result which became and now is a violation of the rights of plaintiffs under the Fourteenth and Fifteenth Amendments. The answer depends in part on the persuasiveness of what is offered as proof supporting quoted paragraph 21 of the bill, and partly upon validity of plaintiffs' contention that their combined right of franchise (that of resident electors of the incorporated and unincorporated parts of Dearborn township as same stood prior to the incorporating vote of June 20, 1960) was and is a status the courts of Michigan must maintain by force of *Gomillion's* rule.

Turning now to the descriptive and largely undisputed facts. Exhibit 2 is a large map of the entire area of Inkster village and of the incorporated new city. It portrays with care and specificity the areas and locations of Negro and white residence in Inkster village and in the incorporated new city, all taken from the 1960 census. The situation thus portrayed may be summarized as follows:

(a) The village and new city consist almost entirely of areas of white residence excepting only as

[4] In *Deerfield* it was charged that the park district used its power of eminent domain "for the sole and exclusive purpose of preventing the sale of homes by Progress to Negroes." The charge failed for want of proof.

to the southerly portion of the village, referring to that part which lies south of Michigan avenue and west of Inkster's Bayhan street. Bayhan parallels the west line of the corridor and is distant some 1,750 feet westerly therefrom. East of Bayhan and west of the corridor are a few sporadic homes of Negro residence. These are all south of Yale avenue, which in turn is about 1,750 feet south of Michigan avenue. In the new city proper, but 2 small places are designated "Non-Negro, Non-White." The rest of the city is all white, excepting only that undisputed testimony shows that 9 Negroes reside in the north segment.

(b) The heaviest areas of Negro residence are in the southwest quadrant of the village, and in the westerly half of the southeast quadrant thereof west of Bayhan. They are separated from the corridor by what may be termed another parallel corridor. Michigan avenue and Bayhan being the north and west boundaries thereof and Beech-Daly being the east boundary. The corporate status of this last corridor was unchanged by the new incorporation.

Looking with care at exhibit 2, it is manifest that the petitioners for incorporation are criticized by plaintiffs for *not* having done what purposeful segregators would have prepared for elective approval, that is, a petition for incorporation which—in addition to the areas that were incorporated—would have taken in *all* of the huge areas of white residence of Inkster lying north of Michigan avenue. It is equally manifest that the petitioners for incorporation undertook to take into the new city as little as possible of the village. Thus they are damned for taking too little when in all probability they would have been denounced for taking too much.

In connection with the conclusions thus drawn the trial chancellor's question to plaintiffs' counsel and the latter's reply disclose with significance that plain-

tiffs' real contention is that the west boundary of the corridor could not have been designated anywhere with their approval. The chancellor inquired, and plaintiffs' counsel replied:

"*The Court:* Isn't it your contention, Mr. Sachs, that they should have included all of the village of Inkster in the township in this new incorporation?

Mr. Sachs: It is my suggestion, your Honor, that they could have drawn the line in any of several places. It's not appropriately my function, I respectfully say to the court, to tell them where the line is to be drawn."

The same question brought the same reply during oral argument here. Thus this Court of equity is left in the dark with respect to what the plaintiffs want, beyond of course a decree holding that Dearborn Heights was incorporated in violation of plaintiffs' federally-asserted rights, and so we come to consideration of the *Gomillion Case* and plaintiffs' contention that the facts here call for application of its rule.

In *Gomillion,* unlike the testimonially complete case before us, the supreme court was obliged to accept as true all conclusions of fact the complaining Negro citizens had properly pleaded. In that case, unlike this case again, the pleaded status of the complaining citizens was that of original resident voters of an existent city (Tuskegee); a status Alabama allegedly sought to destroy by legislation which if valid fenced such resident voters out of the city—in the absence of "any countervailing municipal function" to be served thereby—by means of monstrously drawn boundaries of apparently effective segregation (see chart, 364 US at 348). Here there is a countervailing municipal function to be served. It was found below and consists of the legal requirement of contiguity and of the practicality of joining the 2 unincorporated segments by a corridor

only of the village; a corridor providing convenient (for all) water and sewer connections and the only nearby straight-through public way (Beech-Daly) as west boundary thereof.

This is not to suggest that the defendants needed to show such countervail, since there is nothing beyond predictive testimony which tends reasonably to prove that the incorporation of Dearborn Heights could or will fence anyone out. It may be, in Alabama, that the establishment of new and exaltedly exclusive city limit lines can or does effectively fence out those who, by the standards of an elite or self-anointed peerage, constitute some mass or masses of undesirables or, possibly, belong to the class of the great unwashed who work manually and sweat daily for the living they make. But that is not true in Michigan, at least so far as present proof or judicial notice brings to view, and this Court may not just haul off and imagine that the incorporation of any new city in southeastern Michigan is going to fence any racially identifiable group therefrom just because that group happens to reside in another long standing incorporated area which is near 1 of the new lines of municipal limits.

The real fact of *Gomillion* is that the righteously complaining citizens were once inside the old and established city of Tuskegee; and that Alabama sought to subdivide that same city, by a demonstrable gerrymander, so that specific areas of Negro residence in the city would be separated from other areas of residence by an irregularly shaped new city. Here it is shown that the complainants are left to reside and vote as before, that is, in their original village and township. The only change is that the village is now reduced in size by the taking of the corridor only, and the township is reduced in size by the taking of the unincorporated remainder of such township. This leaves intact to plaintiffs the

actual village of their residence, the negligible corridor only excepted. Too, it leaves to them their right to vote in future village and township elections.

Whatever the fact in Alabama, the courts of this State are ever open for the hearing of any citizen who on account of provable racial discrimination says he cannot cross or recross at will, or reside and vote as a resident on either side of, or cannot buy or rent property on the other side of, an "impenetrable wall" made of a city limit or boundary. But up to the present time, for want of proof, plaintiffs' fears in such regard must be held as doubtfully anticipatory and justiciably premature. As said in *Warren Township School District, No 7* v. *Detroit,* 308 Mich 460, 479 (1 CCH Av 1162, 1944 US Av R 35), "We must consider conditions as they are now and do not indulge in speculations as to the future." Further, and to paraphrase the Court's conclusionary remarks in *Brown* v. *Shelby Township,* 360 Mich 299, 310, on the present record it may not be said with any degree of assurance that the incorporation of Dearborn Heights will erect or permit a racial "wall." If any such "wall" should come to equity's attention, that will be the time and occasion for action by equity. Of such point, more later.

The fact is that every new city incorporation requires—in Michigan at least—the drawing of municipal boundary lines for elective approval. Most of legal necessity "fence out" some citizens, principally white and occasionally Negro. But they cannot be attacked under *Gomillion's* rule unless by pleading and due proof it is shown that the substantial result is the segregation of Negroes and whites "so as to deprive them [Negroes] of their pre-existing municipal vote." (*Gomillion* at 341.) There is no such segregation here in fact, and none so far is threatened in fact distinguished from mere apprehension.

No right of constitutional substance has been taken thus far from anyone, no matter the color of his skin.

SUMMARY

The conclusion one is forced to draw from plaintiffs' present position is that they stand opposed to any change of the corporate status of Inkster village, fearing that such change will lead to that which was pleaded in the *Gomillion Case*. The contention goes too far and proves too much. To approve it by decree would vest with the same plaintiffs the right to object successfully to the abeyance-held proceedings (enjoined at behest of plaintiffs upon institution of this suit) which were petitioned for and designed toward incorporation as a city of Inkster village. Indeed, such a decree could at option of the plaintiff class stand permanently in the way of all proceedings which, *inter alia,* might at some future time be designed to incorporate all northwest Wayne county into a great new city, or several new cities.

The trial chancellor found "that the present strip area at the extreme easterly edge of the village of Inkster and proceeding westerly to Beech-Daly road, 3 blocks, being the first uninterrupted right-of-way completely from north to the south parts of the township, was the simplest and a practical defined area for effecting contiguity in order to connect the north and south parts of the unincorporated township of Dearborn into a new home-rule city." He found further that this "was not gerrymandering, but was prompted by a motive that was legitimate and not promoted for the purpose of discriminating against anyone in the village of Inkster." Such findings are fully supported. They with auxiliary findings recorded below call for affirmance of the decree

of dismissal, subject however to that which is to follow.

. . . . .

To affirm the trial chancellor's decree does not fully conclude equity's task. This case is an exceptional forerunner—in our State—of possible problems which, advanced as they have been upon combined strength of the Fourteenth and Fifteenth Amendments, press already on the courts of some of the States as well as the courts of the United States.[5] All courts of this country, the Sixth Article considered, are affirmatively bound to guard "every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them." (*United States* v. *Bank of New York & Trust Co.*, 296 US 463, 479 (56 S Ct 343, 80 L ed 331); following *Robb* v. *Connolly*, 111 US 624 [4 S Ct 544, 28 L ed 542]). Noticing judicially, as we do, the probable approach to appellate courts of the Atlanta decision, the recent executive order of the president and like efforts of lay and religious groups to promote racially "open" housing, and reflecting upon our own duty quoted above, we have determined to do more than was done in the *Warren Township Case* (*supra* at 479), where the Court affirmed "without prejudice" to a possible new suit disclosing that the plaintiffs' predictions had become veritable.

Our judgment is that jurisdiction to entertain and determine supplementary proceedings should be retained. By such retention an already well informed

[5] The recent and nationally reported litigation which arose in Georgia, after the aldermen of Atlanta had ordered the barricading of a street to separate white and Negro residential areas, is an example of what seems to be ahead for some of our State and Federal appellate courts. It suggests that we decide now only what is in need of specific decision, with retention of jurisdiction to consider impending precedents as well as developments after Dearborn Heights has undergone cityhood for such period as may calm or support plaintiff's fears.

trial chancellor may, subject to supervision of this Court as requested or needed, proceed to ensure that what is affirmed today will not become a means or the means by which plaintiffs' asserted constitutional rights are adversely affected. It is accordingly adjudged:

1. That the proceedings by which Dearborn Heights became incorporated as a city are valid as against plaintiffs' contention that such proceedings have infringed and will infringe upon their asserted constitutional rights.

2. That the cause be remanded with instruction that an order enter retaining the case on the docket of the circuit court, until further order of this Court, for the purpose of entertaining and determining below any future petition or petitions plaintiffs or any member of the class represented by them may wish to present, the design of which petition or petitions is that of seeking specific relief as against the new city, its officers, agents, employees, and representatives, from future action or conduct within the control of the city which results in racial discrimination inimical to and hence actionable under either or both the aforesaid amendments. In event the nature and scope of relief, if any, to be granted with respect to such petition or petitions is obscure or doubtful, the trial chancellor may apply to this Court for appropriate instructions.[6]

3. That no costs be awarded to any party in virtue of the present appeal, and that no right or penalty

[6] The trial chancellor will bear in mind, as we do, Justice Cardozo's enduring epigraph, "equity will find a way" (*Graf* v. *Hope Building Corp.*, 254 NY 1 [171 NE 884; 70 ALR 984], quoted in *Spoon-Shacket Company, Inc.*, v. *Oakland County*, 356 Mich 151, 165), and our approval (*Certain-teed Products Corp.* v. *Paris Township*, 351 Mich 434, 468) of Judge Frank's reminder that courts may regularly utilize "the inestimably valuable flexibility and capacity for growth and adaption to newly emerging problems which the principles of equity have supplied in our legal system."

accrue in favor of defendants on account of execution and filing of the stay bond hitherto ordered.

KAVANAGH, J., concurred with BLACK, J.

KELLY, J. (*concurring in part*). Plaintiff's appeal to this Court asking that we "restrain the incorporation of the proposed city of Dearborn Heights, Wayne county, Michigan, for the reason that the creation of such proposed city involves a racial gerrymander designed to exclude Negro citizens, all in contravention of the Fourteenth and Fifteenth Amendments to the United States Constitution."

In a well prepared opinion reviewing the record, Justice BLACK has definitely and clearly expressed this Court's answer to plaintiffs' claim of a designed "racial gerrymander" as disclosed by the following:

"Here it is shown that the complainants are left to reside and vote as before, that is, in their original village and township. The only change is that the village is now reduced in size by the taking of the corridor only, and the township is reduced in size by the taking of the unincorporated remainder of such township. This leaves intact to plaintiffs the actual village of their residence, the negligible corridor only excepted. Too, it leaves to them their right to vote in future village and township elections.

"Whatever the fact in Alabama, the courts of this State are ever open for the hearing of any citizen who on account of provable racial discrimination says he cannot cross or recross at will, or reside and vote as a resident on either side of, or cannot buy or rent property on the other side of, an 'impenetrable wall' made of a city limit or boundary. But up to the present time, for want of proof, plaintiffs' fears in such regard must be held as doubtfully anticipatory and justiciably premature. * * *

"On the present record it may not be said with any degree of assurance that the incorporation of

Dearborn Heights will erect or permit a racial 'wall.' If any such 'wall' should come to equity's attention, that will be the time and occasion for action by equity. * * *

"There is no such segregation here in fact, and none so far is threatened in fact distinguished from mere apprehension. No right of constitutional substance has been taken thus far from anyone, no matter the color of his skin. * * *

"The trial chancellor found 'that the present strip area at the extreme easterly edge of the village of Inkster and proceeding westerly to Beech-Daly road, 3 blocks, being the first uninterrupted right-of-way completely from north to the south parts of the township was the simplest and a practical defined area for effecting contiguity in order to connect the north and south parts of the unincorporated township of Dearborn into a new home-rule city.' He found further that this 'was not gerrymandering, but was prompted by a motive that was legitimate and not prompted for the purpose of discriminating against anyone in the village of Inkster.' Such findings are fully supported."

The issue submitted has been decided. After laying at rest the accusations of gerrymandering and improper motives, I see no reason why we should be "justiciably premature" and judge the future with apprehension, or prepare for "possible problems."

I do not agree with my Brother that "the cause be remanded with instruction that an order enter retaining the case on the docket of the circuit court, until further order of this Court."

I vote to affirm the lower court's decree, and adopt Justice BLACK's decision in re costs and penalties.

CARR, C. J., and DETHMERS, J., concurred with KELLY, J.

SOURIS, J. (*concurring in affirmance and remand*). I concur in Mr. Justice BLACK's disposition of this appeal. Plaintiffs' proofs failed to establish either present deprivation of due process or equal protection of the laws guaranteed by the Fourteenth Amendment or present denial or abridgement on account of race, color, or previous condition of servitude of their right to vote as guaranteed by the Fifteenth Amendment.

1. Inkster village straddles the boundary between Nankin and Dearborn townships. In that part of the village lying in Dearborn township, there are (1960 census data) 18,700 residents of whom 4,600 are Negro. Within the so-called strip area of Inkster included within the boundaries of the proposed city of Dearborn Heights reside 2,980 persons,* none of them Negro. Of the remaining 15,720 persons who reside in the Dearborn township portion of Inkster village, 11,120 whites and 4,600 Negroes are excluded from the new city. Whatever the incorporators' motives or purposes in drawing the new city's boundaries as they did, the results affected all remaining residents of the Dearborn township portion of Inkster village, both white and Negro, in precisely the same manner. If those who are Negro were excluded from the new city, so were the white residents. If the Negro residents were deprived of portions of their incorporated village and of their township, so were the more numerous white residents. If, by the contraction of the boundaries of the village and township resulting from incorporation of the new city, the Negro residents' right to vote was affected, so was the right to vote of each remaining white resident. The point is that Inkster's Negro residents were not affected in any manner different from the more numerous white residents who were not in-

* Computed from plaintiffs' Exhibit 3.

cluded in the new city. Their present exclusion from the new city was not discriminatory in the sense that only Negroes, but not whites, were excluded therefrom; nor, as Justice BLACK properly concludes, does this record show that by racially discriminatory action of defendants any citizen "cannot cross or recross at will, or reside and vote as a resident on either side of, or cannot buy or rent property on the other side of, an 'impenetrable wall' made of a city limit or boundary." From such facts there can be no judicial finding that defendants, whatever their motives, violated plaintiffs' Fourteenth or Fifteenth Amendment rights.

2. *Gomillion* v. *Lightfoot,* 364 US 339 (81 S Ct 125, 5 L ed 2d 110), was relied upon by plaintiffs in support of their Fifteenth Amendment claim. As I read Justice BLACK's opinion, he suggests that *Gomillion's* rule is inapplicable except when municipal boundaries are so drawn that Negroes are excluded from, and denied the right to vote in, the municipality in which they previously lived and voted. I agree that *Gomillion* is inapplicable, but only because plaintiffs' proofs failed to show that the suffrage rights of only, or substantially only, Negroes were affected. In fact, plaintiffs' proofs, as indicated above, show clearly that whatever present effect incorporation of the new city had on the rights of Inkster's Negroes, it affected likewise the rights of all white residents and voters remaining in the village of Inkster.

I cannot believe that the decision in *Gomillion* would be other than as we know it, as Justice BLACK seems to suggest, had Alabama's legislature created by statute a lily-white 28-sided monstrosity of a new city entirely within, and without alteration of, the pre-existing boundaries of racially impure Tuskegee. Fifteenth Amendment rights do not depend upon the formalistic distinction between fencing

Negroes out of their municipality and fencing them in. *Gomillion's* assertion of Fifteenth Amendment rights would be entitled to equal judicial regard had Alabama's legislature left Tuskegee's Negroes the heritage of their old municipal community, including its legislative charter and pre-ordained name, save only a withdrawn portion inhabited exclusively by whites.

I see no valid distinction between *Gomillion's* rule and these plaintiffs' *pleaded* constitutional claim. Had they *proved* that Negroes' rights to vote had been abridged discriminatorily by the contraction of the village and township in which they lived and voted, they would be entitled to judicial vindication of their constitutional rights.

3. That there is racial segregation in housing in the village of Inkster cannot be denied. Justice BLACK'S description of its racial composition portrays the brutal facts. Its existence, however, is not the result of the new city's incorporation nor does the record disclose that the incorporation of that new city presently discriminatorily denies or abridges Inkster's Negro residents' rights, as Justice BLACK has noted.

However, this record discloses sufficient evidence to convince me, reviewing this record *de novo,* that certain of the defendants and others associated with their incorporation efforts were not entirely free of racial bias in the performance of acts necessary to the new city's incorporation. That such evidence does not rise to the level of immutable truth is no deterrent to the exercise by this Court and by the chancellor of continuing jurisdiction, as Justice BLACK proposes, to guard every right secured to plaintiffs by the Constitution and laws of the United States and of this State.

We deal here with constitutional rights dependent for their universal enjoyment upon our judicial will

and skill to guard against sophisticated as well as unsophisticated restraints. By retaining jurisdiction this Court, through the chancellor, can deter rapidly and effectively any future infringement of plaintiffs' rights which existing patterns of racial segregation might otherwise encourage.

SMITH, J., concurred with SOURIS, J.

O'HARA, J., took no part in the decision of this case.

HORST v. TIKKANEN.

1. TRIAL—REQUEST TO CHARGE.
   Requests to charge may be presented before the case is argued or submitted to the jury, the better practice being to present them before argument (CL 1948, § 618.59).

2. SAME—REQUEST TO CHARGE—INSTRUCTIONS.
   Requests to charge need not be given in the exact language of the request, but where not substantially covered by the charge as given, will be deemed to have been refused (CL 1948, § 618.59).

3. SAME—INSTRUCTIONS—REQUEST TO CHARGE.
   It is the responsibility of the trial court to explain the issues and the principles of law applicable to the facts in issue including each party's theory of the case, where requests have been duly presented therefor (CL 1948, § 618.59).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 519, 520.
[2] 53 Am Jur, Trial §§ 527, 529.
[3] 53 Am Jur, Trial §§ 509, 512, 623–625.
[4] 53 Am Jur, Trial §§ 581, 582, 626.
[5, 6] 53 Am Jur, Trial §§ 554, 573, 579, 607, 608.
[7] 53 Am Jur, Trial §§ 542, 554, 573, 579, 607, 608.

4. AUTOMOBILES—THEORY OF CASE—REQUEST TO CHARGE—INSTRUCTIONS.

Instruction to jury in action arising from collision between plaintiff's eastbound car, just completing a left curve on ice-covered highway down a 3 to 3-1/2% grade, and defendant's westbound truck as it was passing another defendant's station wagon, also westbound but parked partially on the pavement, which failed to present plaintiff's theory of the case (1) with respect to the *sudden emergency doctrine*, (2) with respect to plaintiff's claim that the truck had crossed the yellow line in the center of the highway in passing the station wagon, and (3) with respect to negligence of the driver of the station wagon in making an impracticable stop on the paved portion of the highway, was reversible error, where plaintiff's requests to charge had covered such theory.

5. SAME—HEAD-ON COLLISION—INSTRUCTION—OBSERVATION.

Instruction to jury which assumed facts neither alleged nor proved with respect to observation by station wagon driver as to other traffic when she stopped partially on pavement and with respect to position of the other defendants' truck at time of head-on collision with plaintiff's car *held*, reversible error in action arising out of collision.

6. SAME—INSTRUCTION—NONEXISTENT INJURY OF DEFENDANT.

It was reversible error in action arising out of head-on collision between plaintiff's eastbound car just completing a left curve on ice-covered highway down a 3 to 3-1/2% grade as it collided with defendants' truck when it passed another defendant's station wagon parked partially on the pavement, to instruct jury that if plaintiff found the station wagon in a position of peril, plaintiff had a duty to exercise due care and diligence so as to avoid injury to defendant operator of the station wagon when there was no claim or proof that such operator had been injured.

7. SAME—STOPPING ON PAVEMENT—INSTRUCTIONS.

Instruction that stopping of defendant's station wagon partly on the pavement so as to pick up a friend was not a prohibited stopping or parking within the meaning of statute, being a temporary stop for a necessary reason not prohibited under the statute which made it unlawful to stop, park or leave standing any vehicle upon the paved part of a highway when it is practicable to stop, park or to leave such vehicle off such part of the highway, *held*, reversible error, since it added to the statutory test of practicability the test of whether the stopping to pick up a friend is a necessary reason (CLS 1956, § 257.672).

Appeal from Marquette; Nebel (Richard W.), J., presiding. Submitted January 10, 1962. (Calendar No. 62, Docket No. 48,597.) Decided April 5, 1963.

Case by Suoma S. Horst against Emil E. Tikkanen, Mildred L. Tikkanen, Paul Gelmi, and Raymond Pajula and Taisto Maki, doing business as Pajula and Maki, Contractors, and as P & M Transit Mix, for injuries sustained in automobile collision. Verdict and judgment for defendants. Plaintiff appeals. Reversed and remanded for new trial.

Aaron Lowenstein, for plaintiff.

McGinn & Fitzharris, for defendants Tikkanen.

Eldredge & McDonald (*John E. McDonald,* of counsel), for defendant Gelmi.

Davidson, Clancey & Hansen, (*Walter L. Hansen,* of counsel), for defendants Pajula and Maki.

SMITH, J. *Parties to the Action.* Plaintiff-appellant is Mrs. Suoma S. Horst, who was seriously injured in an automobile accident on an ice-slippery road when her car collided with a large dump truck owned and driven by Paul Gelmi, defendant-appellee. At the time, Gelmi was hauling a load of sand to a business establishment of defendants-appellees Raymond Pajula and Taisto Maki. Mildred Tikkanen was operating the station wagon involved in the accident owned jointly with her husband, Emil E. Tikkanen, both defendants-appellees. A jury verdict was rendered in favor of all defendants. From a denial of plaintiff's motion for a new trial, this appeal was taken.

Statement of Facts. The accident herein involved occurred on November 23, 1955, at or about 4 p.m. on highway 480, near Negaunee in Marquette county. Highway 480 is a 2-lane, paved road consisting of 22 feet of blacktop with 4-foot shoulders on each side. On the day in question, there was an encroachment on the shoulders in the form of a snowbank on each side about 1 and 1/2 feet in width. The road was covered with ice. In the area of the accident, the road as it proceeds westerly stretches upgrade and curves sharply to the north.

Shortly before the accident, the Tikkanen station wagon driven by Mrs. Tikkanen was proceeding westerly along the road heading towards Negaunee. Mrs. Tikkanen saw some friends walking in the same direction and stopped to offer them a ride. The station wagon was stopped with about 4 feet of the vehicle on the paved portion of the road, and the rest of it on the shoulder. While Mrs. Tikkanen was waiting for her passengers, the Gelmi truck, loaded with sand and traveling in the same direction (west), overtook the station wagon and proceeded to pass. In passing, the right side of the Gelmi truck scraped the left side of the stopped station wagon. Plaintiff was driving a sedan easterly, that is, in the opposite direction of the Tikkanen station wagon and the Gelmi truck. A head-on collision occurred between defendant Gelmi's truck and the sedan driven by plaintiff. The Tikkanen station wagon was not immediately involved in the collision. After the accident, both the sedan and truck had their front ends on or near the north shoulder. As to how the vehicles came to rest on the defendants' side of the road was in hot dispute.

It was plaintiff's claim that she was driving her sedan at the rate of 15 miles per hour. She said she made the big curve in the road and started down hill in her own lane, the eastbound lane. She testified

that she first saw defendant Gelmi's truck when she was about 150 feet west of the Tikkanen station wagon; that the truck was being driven at approximately 45 miles per hour; and that the truck was several hundred feet east of the Tikkanen station wagon when she first saw it. Her claim is that Gelmi pulled out around the stopped station wagon, crossed the center line of the highway substantially in the eastbound lane, colliding head-on with her sedan. She claims also that the heavily weighted truck pulled her lighter sedan into the westbound lane where both came to rest. Defendant Gelmi claims that he first saw plaintiff's sedan when he was alongside of the Tikkanen station wagon; that after scraping the side of the station wagon he stopped about 25 feet in front of it. He claimed that he was stopped 2 or 3 minutes before plaintiff's sedan, skidding out of control, crashed into his truck. He says definitely that he was stopped when plaintiff's sedan struck his truck; she claims that both cars were in motion. Defendant Tikkanen, apparently seeing that an accident was about to happen, diverted her attention to her children who were in the station wagon with her and therefore did not see the collision between the Horst sedan and Gelmi truck.

Theories of the Parties. Plaintiff's position was that she was placed in a circumstance of sudden emergency because, after rounding the sharp turn in the road, she was suddenly faced with a large truck partly in her lane as it passed the station wagon negligently parked to the side. It was her claim that defendant Tikkanen was guilty of negligence in stopping the station wagon on the highway in violation of the statute, CLS 1956, § 257.672 (Stat Ann 1952 Rev § 9.2372).* Plaintiff also contends

* "Outside of the limits of any city and village, it shall be unlawful to stop, park, or leave standing any vehicle, whether attended

that in view of the slippery road conditions defendant Tikkanen was negligent in stopping her station wagon so close to the hilltop as to create a hazard to other traffic; by not seeing that the highway was clear of vehicles before making the stop, and by not attempting to flag down defendant Gelmi in his truck once the alleged danger had been created. Plaintiff claimed further that defendant Tikkanen could have stopped more practicably in a large driveway somewhat east of the point where she stopped her station wagon and that her failure so to do was in violation of the statute.

Plaintiff Horst claimed that defendant Gelmi was negligent in that he was driving his truck without due care and caution so as to be unable to bring the truck to stop within the assured clear distance ahead; that he attempted to pass the Tikkanen station wagon while over the yellow line at a speed so unreasonable as to make an accident inevitable with plaintiff's vehicle approaching from the opposite direction; and that defendant Gelmi was also negligent in attempting to pass the Tikkanen station wagon, when the wagon itself had created a hazard to safe driving by its positioning on the road. She further alleges that Gelmi did not make a proper observation before passing the Tikkanen station wagon; that he was driving his truck at an excessive rate of speed; and that he had crossed over the center line of the highway into plaintiff's eastbound lane of traffic.

As to defendants Pajula and Maki, plaintiff claims that they were responsible for the acts of negligence of Gelmi in that they carelessly permitted him to transport materials used by the defendants when they knew or should have known of the allegedly

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or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or to leave such vehicle off such part of said highway."

careless driving record of defendant Gelmi. Plaintiff also claimed that inasmuch as Gelmi was paid according to the number of trips made per day that this encouraged him to engage in excessive speed while transporting materials to defendants' establishment. Plaintiff also contended that Gelmi was in the exclusive employ of Pajula and Maki at the time of the accident. Plaintiff claimed that as a result of the joint and several negligence of defendants and of their concurrent negligence, which negligence was the proximate cause of her injuries, she was entitled to substantial damages.

Defendant Tikkanen denied that plaintiff was placed in a position of sudden emergency, and all other acts of negligence claimed against this defendant. It was the Tikkanen position that plaintiff drove her car on the wrong side of the road "when she did not have her automobile under control, when she failed to keep a proper look-out" and that she was not able to stop within the assured clear distance ahead.

Defendant Gelmi admits that the Tikkanen station wagon was stopped but that there was enough clearing in which to pass. He admitted further that there was a yellow line where Mrs. Tikkanen had stopped and stated further that there was a double yellow line ahead and westerly of the station wagon. He admits grazing the left side of the Tikkanen wagon, and alleges that this was done because of the negligent driving of plaintiff. He also denies that plaintiff was put in a position of sudden emergency. He denies all allegations of negligence. He claims that plaintiff was contributorily negligent and that she was not driving at a reasonable and prudent speed for the conditions then and there existing and that she failed to keep a lookout "for obstructions in the road" and that she could not stop within the assured clear distance ahead. He also claims that

plaintiff failed to keep her vehicle in her own lane of traffic, but that she drove into his lane of traffic and into and against his truck.

Defendants Pajula and Maki denied all allegations of negligence and claimed contributory negligence on the part of plaintiff for substantially the same reasons claimed by the other defendants. These defendants also deny that defendant Gelmi was their employee. They say Gelmi was an independent contractor operating as a licensed common carrier by authority of the public service commission.

Claims of Error. The claims of error have to do mainly with the judge's instructions to the jury. Jury arguments were concluded at approximately 4:30 p. m. of one day. On the following morning, at approximately 9:20, plaintiff's counsel presented 25 requests to charge. We are advised that the requests covered approximately 7 pages, much of which was single-spaced. At chambers, the matter was discussed. Plaintiff's counsel claims that he assiduously labored to prepare the charges but that he was hampered by reason of the fact that his secretary had received a broken arm in an accident and therefore was unable to assist him in typing same. On objection of defense counsel the trial judge refused the request to charge, indicating that he would endeavor to cover the law in the case. Defendants' requests to charge were submitted some time earlier and a large number were read as submitted. Plaintiff's attorney sets forth in his brief 44 questions for review. Counsel for defendants Tikkanen accept plaintiff's statement of questions but paraphrase and regroup them into 32 questions. Attorneys for defendants Gelmi and Pajula and Maki reduce the number of questions to 5.

It would not be fruitful to discuss all of plaintiff's claims of error. We do discuss, however, several of those which we believe are patently reversible.

Plaintiff claims that her request to charge was submitted on time and therefore the trial judge erred in refusing to grant the requests to charge. Reliance is placed upon the statute. CL 1948, § 618.59 (Stat Ann § 27.1039):

"Sec. 59. After the evidence is concluded, and *before the case is argued or submitted to the jury,* either party may present written requests for instructions on any point of law arising in the cause, and upon such written requests so presented, an argument may be made by counsel for the respective parties previous to the court passing thereon. Any request not substantially covered by the charge as given shall be deemed to be refused."

In connection with this statute, we said in *Morrison* v. *W. R. Reynolds & Co.,* 224 Mich 61, at page 65, "Counsel are in time if they submit their written requests before the case is submitted to the jury, but the better practice is to present them before the arguments. This plan is more helpful to the court and most beneficial to counsel. Under the circumstances, we should consider defendant's requests refused. However, if none of the requests should have been given, the court's refusal to consider them was not reversible error." Consonant with plaintiff's theory that defendant Tikkanen created a hazardous condition on the highway by stopping the station wagon contrary to law; and that defendant Gelmi was negligent in attempting to pass the Tikkanen station wagon with his heavy-loaded dump truck, and that while in the act of passing crossed the center line of the highway and struck plaintiff's automobile, plaintiff requested instructions covering this theory. Further, plaintiff requested instructions as to her theory that she was faced with a sudden emergency as she rounded the big bend in the road. After reviewing plaintiff's requests to charge, we do not say that the various requests as made must

have been given in the exact language of plaintiff. The rule is clear that this is not required. It is clear, however, that it is the responsibility of the trial court to explain the issues and the principles of law applicable to the facts in issue. This would include each party's theory of the case.

In *Schattilly* v. *Yonker,* 347 Mich 660, 665, it was stated "There could be no error in the trial judge declining to accept plaintiff's requested instructions, in their exact wording, so long as in his own words he set forth plaintiff's theory of the case (in the event there was testimony to support it) and instructed the jury on the law applicable thereto."

First we quote from the trial court's charge to the jury that portion in which he purports to set out plaintiff's theory:

"Now, it is the claim of the plaintiff that on this day in question, November 23d, that as she was driving in an easterly direction, she was going to her home, and that her home was approximately 200 feet to the east of where the Tikkanen station wagon had come to pause or stop or park to permit the taking on of this lady and her child, and that as she came down this road she could look to the east and she observed there the station wagon and observed the gravel truck coming along, and that it was icy, and you will remember the testimony on that; that the road was slippery, that she was coming down a grade, I believe the testimony is all the way from 3% to 3.6, along about from 3 to 3-1/2% of a grade. * * *

"Now, it is her claim that as she drove along there on this icy road and over on her own side of the road, within about 6 inches of the edge of the road on her own side, that she was struck by the truck driven by the defendant, Paul Gelmi, and that from this collision that occurred she suffered these injuries for which she claims damages."

This above quoted section from the judge's charge does not fairly state plaintiff's theory of the case: it does not instruct with regard to the sudden emergency doctrine claimed by plaintiff; it fails to state plaintiff's claim that defendant Gelmi crossed the yellow line in the center of the highway in passing the Tikkanen station wagon; and it fails to set forth the theory that defendant Tikkanen was negligent in making an impracticable stop on the paved portion of the highway. An examination of the balance of the charge reveals that when either of these elements is alluded to, it is from the viewpoint and theory of one or the other defendants.

There is other reversible error which ought to be commented upon briefly. In other places, the charge assumes facts neither alleged nor proved. We quote the charge again: "It is the claim of the defendants, Emil and Mildred Tikkanen * * * that at the time that she (Mrs. Tikkanen) stopped the motor vehicle there were no cars coming from either direction that she observed." According to the record, Mrs. Tikkanen testified that she made no observations to the rear before she stopped her vehicle. Quoting further from the charge: "The Tikkanens further claim that after the Gelmi truck came to rest that the Horst vehicle came across the highway and struck the front of the Gelmi truck in a head-on position and the Gelmi truck was then stopped very close to the snowbank about in the same angle." We do not find from the record that the Tikkanens made any such claim.

We think error is manifest from an additional quotation from the trial court's charge to the jury:

"I charge you further, members of the jury, that if you find that the plaintiff, Suoma Horst, discovered, when the exercise of due care should have discovered, Mildred L. Tikkanen and her automobile station wagon in this case in a position of peril in

sufficient time to be able by the exercise of due care and diligence and the use of the means at hand, to avoid injury to Mildred L. Tikkanen and to avoid striking the truck or colliding with the truck, that Suoma Horst failed to exercise such care and use such means with the result that the accident occurred, the defendants Tikkanen would not be liable to Mrs. Horst regardless of whether Mrs. Tikkanen came into such position of peril without fault of negligence on her part or through her own negligence which had cause to operate as a proximate cause of the injury.

"Now, plaintiff has claimed that the defendant Tikkanen by stopping her station wagon on the highway violated a part of our law known as CLS 1956, § 257.672 (Stat Ann 1952 Rev § 9.2372), and I quote you that law on that. Section 672 provides: 'Outside of the limits of any city and village, it shall be unlawful to stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or to leave such vehicle off such part of said highway.'

"Now, that is if it was not practicable to stop or park her car off the main traveled part of the highway, then I charge you that the stopping of her station wagon by Mrs. Tikkanen on the shoulder and partly on the paved portion of the highway for the purpose of picking up her friend, does not constitute a prohibited stopping or parking within the meaning of the above statute. A temporary stop for a necessary reason is not prohibited under the statute."

It was clearly error to instruct the jury that if the Tikkanen station wagon were found in a position of peril by plaintiff that she had a duty to exercise due care and diligence so as to avoid injury to Mildred L. Tikkanen. This assumes a theory not expressly developed by defendants Tikkanen either

in the pleadings or the proofs. It also cites a nonexistent injury to Mrs. Tikkanen.

As to that portion of the instruction having to do with the statute pertaining to stopping, parking, or leaving a vehicle on a main traveled part of the highway, the instruction was in error. The issue of fact presented in the case, under the statute as cited, is whether or not it was practicable for Mrs. Tikkanen to stop her car off the main traveled part of the highway. The instruction as given adds another test of whether the stop was for "a necessary reason." The question was not whether stopping to pick up a friend is a necessary reason, but whether or not it was practicable to stop off the traveled part of the highway.

Reversed and remanded for new trial. Costs to plaintiff.

BLACK, KAVANAGH, and SOURIS, JJ., concurred with SMITH, J.

CARR, C. J., and DETHMERS and KELLY, JJ., concurred in result.

O'HARA, J., took no part in the decision of this case.

STATE HIGHWAY COMMISSIONER *v.* SCHULTZ.

1. EMINENT DOMAIN—COMPENSATION FOR TAKING PART OF A PARCEL.
   Just compensation in condemnation proceedings for the taking of a part of a parcel of property is not measured by the proportionate area taken but by the amount to which the value of the property from which it is taken is diminished (CL 1948, § 213.171 *et seq.*).

2. SAME—AWARD—REVIEW BY SUPREME COURT—EVIDENCE.
   The Supreme Court on appeal in condemnation proceedings reviews the finding of damages merely to see that it is supported by the evidence and will not disturb the award made when it is so supported, the case not being heard *de novo* (CL 1948, § 213.171 *et seq.*).

3. SAME—CONDEMNATION PROCEEDINGS—DUTIES OF COMMISSIONERS.
   Commissioners, when appointed in condemnation proceedings, are a constitutional tribunal with the same powers and duties as a jury, are expected to view the premises, and use their own knowledge gained from such view and their experience as freeholders, as well as the testimony of witnesses as to matters of opinion, as they are the judges both of the law and fact (Const 1908, art 13, §§ 1, 2; CL 1948, § 213.171 *et seq.*).

4. SAME—CONDEMNATION PROCEEDINGS—REVIEW BY SUPREME COURT.
   The proceedings in the Supreme Court to review an award in condemnation proceedings are in the nature of certiorari (CL 1948, § 213.171 *et seq.*).

5. SAME — INTERSTATE HIGHWAY — CONDEMNATION PROCEEDINGS — AWARD—GRAVEL—EVIDENCE.
   Order by circuit court confirming award of $64,042.37 by commissioners for the absolute taking of 16.5 acres for use in

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REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Eminent Domain §§ 265, 353.
[2, 4] 18 Am Jur, Eminent Domain §§ 373–377.
[3] 18 Am Jur, Eminent Domain § 339.
[5] 18 Am Jur, Eminent Domain §§ 342–356.

right-of-way, the ruination of .12 of an acre, and separation of 2.32 acres without access to remaining 13.3 acres of farm containing valuable sand and gravel deposits, *held,* not contrary to evidence presented in condemnation proceedings for interstate limited access highway (CL 1948, § 213.171 *et seq.*).

Appeal from Berrien; Hadsell (Philip A.), J. Submitted April 3, 1962. (Calendar No. 2, Docket No. 49,509.) Decided April 5, 1963. Rehearing denied May 9, 1963.

Condemnation proceedings by John C. Mackie, State Highway Commissioner, of land owned by Lydia Schultz. Plaintiff moved to set aside determination of commissioners as to damages. Award confirmed. Plaintiff appeals. Affirmed.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *Louis J. Caruso* and *Robert J. Taube,* Assistant Attorneys General, for plaintiff.

Hartwig & Crow (*John L. Crow,* of counsel), for defendant.

SMITH, J. This appeal arises out of proceedings in eminent domain instituted by appellant highway commissioner pursuant to PA 1925, No 352, as amended.* Said proceedings resulted from the improvement of trunk line highway US–12, now Interstate 94 or I–94. Appellant is appealing from an order entered in the circuit court of Berrien county confirming an award of damages rendered by 3 appointed commissioners in the amount of $64,042.37.

Appellee owned a rectangular parcel of land consisting of 32–1/2 acres facing the west side of trunk line M–140, a north-south highway, located south of the village of Watervliet in Berrien county. Ap-

* CL 1948, § 213.171 *et seq.* (Stat Ann 1958 Rev § 8.171 *et seq.*).—REPORTER.

pellant in laying out plans for the relocation of trunk line US–12 needed a strip of land across appellee's property. Negotiations for the purchase of this property were commenced in August 1957. The parties being unable to agree on a price, appellant initiated proceedings in eminent domain by first tendering a final offer to appellee and serving notice of a hearing on necessity to be conducted by appellant on July 22, 1958.

At the time appellant made his final offer of settlement, the property was devoted exclusively to farming. However, on July 18, 1958, appellee entered into a 3-year lease for the sale of sand, gravel, and soil from the west half of her property. The document was recorded in the office of the register of deeds for Berrien county on the afternoon of July 21, 1958, the day before the hearing on necessity. The lessees were Betty Jane Yerington and John S. Yerington, both of whom are associated in business with John G. Yerington, an established contractor in the road building business. This road builder became the subcontractor furnishing processed sand and gravel to the principal contractor in charge of construction along this section of US–12.

Appellant on July 28, 1958, secured the highway right-of-way by virtue of the determination of necessity. On August 30, 1958, the lessees under the gravel lease assigned their interest to appellee, the intention being "to release entirely any recovery had in connection with condemnation proceedings" affecting the property. Subsequent to the signing of the determination of necessity, appellant, upon becoming aware of the leasehold interest in the property, sought leave to amend the determination of necessity to include the lessees as parties in interest. By stipulation of counsel, the amendment was allowed. At the hearing on damages before the commissioners, appellee put into evidence the assign-

ment from the lessees to the appellee of any compensation which lessees would have been entitled to, by virtue of their leasehold interests in the property.

The highway right-of-way extended generally in an east-west direction across the property. It consisted of the absolute taking of 16–1/2 acres for limited access highway purposes for the relocation of trunk line US–12, now designated I–94. In addition, .12 acre was acquired north of and contiguous to the limited access right-of-way as an easement to be used only during the period of construction, although as a result of construction it was left at such an angle and grade it was of no practical use to the owner. The effect of the combined takings was to separate the remaining property into 2 parcels: (1), approximately 13.3 acres, containing the farmhouse and other improvements located south of the new highway, and (2), approximately 2.32 acres located north of the highway. Appellee had no means of access to the 2.32 acres of land.

At the hearing on damages, appellant highway commissioner presented 7 witnesses. One of his witnesses gave expert testimony as to the value of appellee's property, and he stated that the highest and best use was for farming. However, he admitted that he gave consideration to the fact that sand and gravel deposits enhanced the value of the property over and above its use solely as a farm. Another of appellant's witnesses, a real-estate broker doing business in Berrien county, testified that in attempting to evaluate the gravel potential of the property he talked to all available gravel contractors in the area regarding purchases they had made in the last 10 years. His opinion was that the sand and gravel deposits enhanced the value of the land by $17,800 (his opinion was that the value of the right-of-way before the taking was $32,800, and after was $15,800).

Appellee presented 6 witnesses to testify in her behalf. One of appellee's witnesses, the operator of a gravel pit, testified that the sand and gravel on appellee's property was of good quality and would justify a price of at least 20¢ to 25¢ per cubic yard. With these valuable deposits the property would be worth considerable more than $1,000 per acre, he said. Another witness for appellee was the principal contractor on the project. He testified that in his opinion the highest and best use of appellee's property was as a sand and gravel pit rather than a farm. This was due, he said, to the lack of availability of gravel in the area generally. He testified that of the 341,000 tons or more taken out of the right-of-way on appellee's property only about 150,000 tons were actually used on the project as it crossed appellee's property. He testified that prices quoted of $2.20 per ton represented the reasonable market value in the area at the time.

On April 4, 1960, the commissioners filed their report. It is quoted herewith, in part:

"We appraise the damages to be paid to the parties interested in said lands as compensation for the taking of an easement or fee in, over and upon the same for highway purposes, in the amounts set forth below. We have taken into consideration in connection therewith the benefits, due to such improvement, as were found to accrue to the remainder of the property from which the highway parcels are taken.

Parcel No. C–60 and C–60 GR

Damages	$64,042.37
Benefits	$ .....
Damages less benefits	$64,042.37"

The report was signed by all 3 commissioners.

Thereafter, appellant highway commissioner moved to set aside the award, chiefly on grounds that the commissioners' award exceeded the value

of the property by erroneously attributing value on each separate element of damage in the following manner: (a) $27,337.20 for loss of granular material; (b) $16,045.17 for loss of sand and gravel; (c) $17,000 for loss as an operating farm; (d) $3,660 for loss of fill material; (e) $300 for noise and disturbance. These allegations were based upon the affidavit of 1 of the commissioners who heard the matter and who signed the commissioners' report. Appellee opposed the motion on the grounds that the award represented the amount by which the value of the entire parcel was diminished by the taking based on its highest and best use as of July 28, 1958. The other 2 commissioners gave their affidavits in support of appellee's position. Over appellee's objection, testimony was taken from 1 of the commissioners. This commissioner was a lawyer; the other commissioners were laymen. It was his testimony that he gave 2 instructions to the other commissioners: (1) that the award had to be within the range of testimony; and (2) an instruction based upon the case of *In re Condemnation for Battle Creek Park*, 341 Mich 412, that the value of the minerals should be taken into consideration as affecting the total value of the property taken. The circuit judge after hearing the testimony refused to set aside the award, and thereafter entered his order for confirmation of the award. Upon application of the commissioner, we granted leave to appeal.

On appeal, the highway commissioner contends that: (1) the award did not represent the difference between the market value before the taking and after the taking of the right-of-way; (2) that the mineral deposits were evaluated separately from their relationship to the land; (3) that the over-all value was determined by adding together values from 2 different uses which were incompatible, that is, farming and a gravel pit; (4) that the value of

the mineral deposits was based upon a nonexistent market; and (5) that the award was predicated upon testimony that the over-all costs of the construction project were reduced as a result of the acquisition of appellee's property, in view of its rich mineral deposits in close proximity to the project. Appellee says the only question is, Was there evidence of such a nature that could properly be considered by the commissioners to justify the award?

The rule which governs when only a portion of property is taken by eminent domain has been set forth in numerous cases. It is stated succinctly in the case of *In re Widening of Fulton Street,* 248 Mich 13, 20 (as *City of Grand Rapids* v. *Barth,* 64 ALR 1507):

"The rule for compensation has been announced by this court as follows:

" 'Where only part of a parcel is taken, just compensation is not measured by proportionate acreage but by the amount to which the value of the property from which it is taken is diminished.' *Johnstone* v. *Detroit, G. H. & M. R. Co.,* 245 Mich 65, 81 (67 ALR 373)."

See, also, *State Highway Commissioner* v. *Specker,* 342 Mich 111; *In re State Highway Commissioner's Petition, State Highway Commissioner* v. *Sypher,* 310 Mich 93, at page 99.

It might be helpful to refer to some of the fundamental rules, which rules have stood the test of time. They are just as useful today in the era of superhighways as in the days of the wagon trails. First, it is not within the province of the Court to review the question further than to see that the finding is supported by the evidence. *Boyne City, G. & A. R. Co.* v. *Anderson,* 146 Mich 328 (8 LRA NS 306, 117 Am St Rep 642, 10 Ann Cas 283). If the jury's award is within the evidence, it may not be disturbed

on appeal. *In re Petition of the City of Detroit for a Park Site,* 227 Mich 132. We do not hear an appeal in a judgment from a condemnation proceeding *de novo. In re Petition of the City of Detroit for a Park Site, supra.* We said in *In re State Highway Commissioner,* 249 Mich 530, that commissioners, when appointed, are a constitutional tribunal with the same powers and duties as a jury, authorized to act in condemnation cases.* The commissioners are expected to view the premises and to use their own knowledge gained from such view and their experience as freeholders, as well as the testimony of witnesses as to matters of opinion. They are the judges both of the law and fact. Relative to the probative value of testimony concerning gravel on property to be taken, we held in *In re Condemnation for Battle Creek Park,* 341 Mich 412, at 421, that it was not improper for the court to receive testimony as to the content and price of gravel on the premises. In that case, the court instructed the jury that they might take this testimony into consideration in determining the value of the land. Accepting the minimal figure as to the amount and value of mineral deposits on appellee's property, even without other testimony, would place the commissioners' award well within the range of testimony. This must be viewed, of course, in connection with certain of the testimony presented by appellee that the highest and best use of the property was that of a gravel pit.

Appellant highway commissioner earnestly asserts that the method of arriving at the award is erroneous. Much of his case depends upon the assertions made by 1 of the commissioners in his affidavit. This commissioner, by his affidavit, denies that the commissioners followed the legally approved method of making an award as contained in the commis-

* See Const 1908, art 13, §§ 1, 2.—REPORTER.

sioners' report, to which he was a signatory without dissent. The other commissioners, in their affidavits, claimed they followed the method contained in their report. This is supported by testimony of 1 of the commissioners.* The proceedings before this Court to review an award are in the nature of certiorari. *Flint & Pere Marquette R. Co.* v. *Detroit and B. C. R. Co.*, 64 Mich 350. We cannot say, after full review of the record, that the award was palpably contrary to the evidence and that, as a matter of law, should be set aside.

We deem it unnecessary to discuss other issues presented.

Affirmed. Costs to appellees.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

* Although appellant originally petitioned to take the testimony of the 2 commissioners who made their affidavit in support of the award, appellant waived the nonappearance of the other commissioner, who apparently was attending a funeral out of State on the day testimony was taken.

INDIAN CLUB *v.* LAKE COUNTY ROAD COMMISSIONERS.

1. HIGHWAYS AND STREETS—ESTABLISHMENT BY USER.

   A highway which has not been established pursuant to existing statute must have a defined line, used and worked upon by the public authorities, traveled over and used by the public for 10 consecutive years, without interruption, and the possession thereof by the public must be open, notorious, and exclusive (CL 1948, § 221.20).

2. DEDICATION—HIGHWAYS—ACCEPTANCE—MAINTENANCE.

   A dedication of a highway must, in order to be rendered a public highway, be followed by an acceptance by the public authorities, with the way taken and maintained as other highways (CL 1948, § 221.20).

3. HIGHWAYS AND STREETS—ESTABLISHMENT BY USER—EVIDENCE.

   Woodland trail through resort area subdivision which evidence shows had been dedicated but not formally accepted, had been used by the public for approximately 60 years, and had been maintained in a passable condition by public authorities for about 20 years after it had been certified as a part of the county highway system *held*, to have been established as a public road (CL 1948, §§ 221.20, 247.1–247.13; CLS 1956, § 247.652 *et seq.*, as amended).

4. COSTS—PUBLIC QUESTION—HIGHWAYS AND STREETS—WOODLAND TRAIL.

   No costs are allowed in suit to enjoin defendant county road commissioners from claiming and maintaining woodland trail as a public road, a public question being involved (CL 1948, §§ 221.20, 247.1–247.13; CLS 1956, § 247.652 *et seq.*, as amended).

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Highways § 9 *et seq.*
[2] 16 Am Jur, Dedication §§ 6, 30–42.
[3] 25 Am Jur, Highways § 9 *et seq.*
16 Am Jur, Dedication §§ 6, 30–42.
[4] 14 Am Jur, Costs § 91.

Appeal from Lake; Stephens (Rupert B.), J. Submitted December 7, 1962. (Calendar No. 119, Docket No. 49,419.) Decided April 5, 1963.

Bill by the Indian Club, a Michigan corporation, John B. Stephanoff, Gatha Stephanoff, Harry S. Benedict, and Bernice V. Benedict against the Board of County Road Commissioners of Lake County, a body corporate, to enjoin defendant from claiming and maintaining woodland trail as public road. Bill dismissed and decree entered establishing way as public road. Plaintiff appeals. Affirmed.

Robert S. Tubbs (*Seth R. Bidwell,* of counsel), for plaintiffs.

Charles A. Wickens and *Nelson M. Willis* (*Jack Born* and *Paul Greer,* of counsel), for defendant.

SMITH, J. Plaintiffs brought this action for the purpose of having a certain "trail" declared to be a private road and further to enjoin the Lake county road commission from asserting jurisdiction over it. The road in question leaves the Baldwin-Irons county highway at a point approximately 600 feet north of the southeast corner of section 30, in Eden township, Lake county, and thence proceeds in a westerly direction to a resort and a platted area known as Little Manistee, where it crosses a railroad right-of-way; then it proceeds in a northerly and westerly direction into section 19, following roughly the course of the Little Manistee river, to property referred to as Stephanoff's. There, it formerly continued near Stephanoff's buildings in a westerly direction to a county highway. By agreement between the Lake county road commission and Stephanoff, in 1942, the road was relocated to a course somewhat farther away from the Stephanoff

buildings and now proceeds in a straight line westerly to the county highway.

The road in question enters the Little Manistee plat and proceeds along Nordheim road, one of a number of streets in the plat which has been dedicated but not formally accepted. There are a number of cottages and summer homes in this area, in addition to plaintiff's property. All of the owners are not included as plaintiffs, except by reference, although the only means of ingress and egress for them is by the road which is here in dispute. Testimony discloses that there was a take-over and certification of the road in 1942, and that the county has been receiving funds[1] since that year. At the pretrial conference, counsel stipulated that the road had been certified and that it presently appears on road maps as a county public road. Both plaintiffs and defendants agree that the only way that this road could become a public highway would be by "user" under the statute. CL 1948, § 221.20 (Stat Ann 1958 Rev § 9.21).[2]

Under the statute, however, to be a mere user for the specified period is not, in itself, sufficient to make the road a public highway. This Court has held the statute requires that "there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used by the public, for 10 consecutive years, without interruption, and the possession thereof by the public must be open, notorious, and exclusive." *Alton* v. *Meeuwenberg* (syllabus 4), 108 Mich 629. See,

[1] See citation to PA 1931, No 130 in footnote, *post*, 92.—REPORTER.

[2] "Sec. 20. All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act."

also, *Missaukee Lakes Land Company* v. *Missaukee County Road Commission,* 333 Mich 372, 379; *Leelanau County Board of Road Commissioners* v. *Bunek,* 344 Mich 605, 612; *Bain* v. *Fry,* 352 Mich 299, 305. There must be, then, use for the statutory period sufficient to constitute a dedication. But, also, there must be an acceptance by the public authorities with the way taken and maintained as other highways. *Chapman* v. *City of Sault Ste. Marie,* 146 Mich 23; *Leelanau County Board of Road Commissioners* v. *Bunek, supra; Dryfoos* v. *Township of Maple Grove,* 363 Mich 252.

Testimony showed that the road in dispute has existed since before 1900, in almost the exact location as it does today. There was a relocation of a small portion of the road in 1942, pursuant to the Stephanoff agreement, as mentioned above. This was entirely paid for by the road commission. There was testimony that the road had been used by the public for many more than 10 consecutive years and that this use was open, notorious, and exclusive. Various witnesses, who have lived in the area up to 50 years, testified that they used the road, and saw many others do the same. One member of plaintiff Indian Club testified that nobody was ever prevented from using the road, and that the members assumed "the people had a right—that we had to provide a right of access to the people in the Little Manistee plat." Another witness testified that his father put a gate across the road to restrain cattle and padlocked it but when a delegation from Little Manistee came down and told his dad that he just couldn't do that and "This is a public road; you can't shut it off," the gate was left unlocked.

Testimony also established that the county road commission and its predecessor worked on the road. The county engineer testified that he surveyed a portion of the road in 1942, for the commission

so that they could relocate a portion. There was testimony that the culverts were installed by order of the public authorities. Employees of the road commission testified that they had performed work on the road at various times over the years. The years in which work was performed by public authorities were listed as follows: 1941, 1943 or 1945, 1947 and 1948, 1949, 1953 and 1954, 1955, 1960.

In *Pulleyblank* v. *Mason County Road Commission,* 350 Mich 223, 227, quoting *Crosby* v. *City of Greenville,* 183 Mich 452, 460 we said:

" 'It is not essential that every part of the highway, in length or width, should be worked and traveled in order to show the intention of the public to accept the entire highway.' "

It was further stated in the *Pulleyblank Case* (p 229):

"The plaintiffs object that the examples of repair and upkeep testified to are sporadic, in effect that the instances given do not come, consecutively, year after year. Such testimony is not necessary. Work on county roads reflects not only the state of the municipal treasury, but is adjusted also to the needs of local traffic and local inhabitants. It is clear that the work done, whatever it was, kept the road in a reasonably passable condition."

The testimony in this case indicated that the road was always passable, except after the winter snows.

Trial Judge Rupert B. Stephens, after watching a motion picture of the road, inspecting it personally in the company of counsel, and listening to the testimony, found for the defendant road commission. In his extensive opinion, he states:

"The testimony preponderates that formerly the road was of considerable importance. During the early 1900's, it was the only road from the south leading to the village of Irons. Little Manistee

was also a regular railroad station where trains stopped daily, discharging and boarding passengers. Resort owners in the northern portion of the county continuously used the road for transporting these passengers to and from their places of business. It was also used by farmers for transporting produce and by lumber men for hauling logs to the railroad station. With the passage of years and the improvement of highways, Little Manistee first became a 'flag stop' and more recently was completely abandoned, the tracks having been removed within the past few years. The road continues to be used extensively, however, not only by members of the Indian Club and cottage owners but by the general public as well. The testimony also preponderates, that throughout the many years of its existence (with 1 exception to be mentioned later), the road was used by the general public without objection, and, by reputation, was considered by all to be a public road. * * *

"The proofs also preponderate that public works and funds were expended on the road both before and since the passage of the so-called McNitt act.[3] There was undisputed testimony by Mr. Everett Wicks that culverts were installed by the township between 1906 and 1910. And, that other work was done at the order of the township supervisor. Since the passage of the act and the assumption of jurisdiction by the defendant, considerably more work was done. Mr. Ray Lum testified that he saw county trucks at work on the road in the early 1930's. There was also testimony of ditching, brushing-out and making fills. In 1942, the defendant caused the north portion of the road * * * to be surveyed and relocated. Jahon Avery testified that between 1943 and 1954, as an employee of defendant, he fixed 3 low spots in the road, cut brush,

[3] PA 1931, No 130 (CL 1948, §§ 247.1–247.13, Stat Ann § 9.141–9.153), which was repealed by PA 1951, No 51. See similar and other provisions, currently in CLS 1956, § 247.652 *et seq.*, as amended (Stat Ann 1958 Rev § 9.1097[2] *et seq.*).—REPORTER.

made fills and installed several 12-inch culverts. There was testimony that during 1947–1948 some 8 yards of gravel was hauled by defendant's employees and a new grade made at the railroad crossing. At this time, the signs at the crossing were taken to Baldwin for repair and were later reinstalled. William Squires testified that as an employee of the defendant commission, he filled mud holes during the years 1953 and 1954. The road was graded by the defendant during June of 1959, and it was regraded during the summer of 1960. * * *

"In the instant case, in considering whether or not the use by the public was open, notorious and hostile, it must be remembered that, during the early 1900's, Little Manistee was a public railway station. The testimony reveals that for many years (until the general improvements in the highway system) plaintiffs and their predecessors in title, as well as others of the general public, regularly and consistently used the railroad and the station not only as a means of transportation to Little Manistee, but also to other resorts and business places in the area. Such passengers were called for and returned to the station by the residents of that part of the county and the road in question was, of course, used for such purpose. The road is not a mere abandoned logging road, although the evidence discloses that logs were hauled over it to the station for shipment. Despite this extensive traffic, no objection was ever made by the plaintiffs, or their predecessors in title, to this use."

The evidence shows that a public road has been established by user in accord with the statute as construed by this Court. For this reason the decision of the trial court is affirmed.

No costs, a public question being involved.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

ROLL *v.* CITY OF TROY.

1. MUNICIPAL CORPORATIONS—REASONABLENESS OF ZONING ORDINANCES.

   Determination of the reasonableness of a municipal zoning ordinance must be made in the light of the facts presented in each case.

2. SAME—REASONABLENESS OF ZONING ORDINANCE—DEPRECIATION IN VALUE.

   Mere depreciation in value by itself is not enough in testing a zoning classification in a municipal ordinance to hold it unreasonable.

3. SAME—COMPREHENSIVE ZONING PLANS.

   Comprehensive municipal zoning plans, like all others, must meet the test of reasonableness.

4. SAME—ZONING ORDINANCES—MINIMUM LOT SIZE.

   Finding of trial court that municipal zoning ordinance providing for a minimum area of 30,000 square feet per lot in parcel plaintiffs sought to subdivide was unconstitutional under present conditions, because it was unnecessary to have such a large minimum area *held*, proper.

5. SAME—ZONING—LEGISLATIVE FUNCTION—PROPOSED ORDINANCES.

   Zoning is a legislative function, hence, provision of trial court's decree empowering plaintiffs to subdivide their property in accordance with zoning ordinance which they proposed was unauthorized, the court having no duty, right, or obligation to undertake to pass upon the reasonableness of proposed zoning that is not yet the subject of an ordinance.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Zoning §§ 21, 22.
[3] 58 Am Jur, Zoning §§ 21, 22, 27.
[4] 58 Am Jur, Zoning § 52.
[5] 58 Am Jur, Zoning §§ 259–261.
[6] 14 Am Jur, Costs §§ 10, 14.

6. COSTS—NEITHER PARTY PREVAILING ENTIRELY ON APPEAL.

No costs are allowed in suit to declare zoning ordinance unconstitutional as applied to plaintiffs' property, where neither party has prevailed entirely on appeal.

SOURIS, J., dissenting.

Appeal from Oakland; Beer (William John), J. Submitted June 13, 1962. (Calendar No. 49, Docket No. 49,372.) Decided April 9, 1963.

Bill by Orville J. Roll, Cecilia J. Roll, Miner Roll and Helen Roll, prosecuted only by latter 2 plaintiffs, against the City of Troy, a municipal corporation, to declare zoning ordinance void as to their property and to compel approval of proposed subdivision plat. Decree for plaintiffs. Defendant appeals. Modified and affirmed.

Maurice A. Merritt, for plaintiffs.

Stanley E. Burke, for defendant.

SMITH, J. In 1958, plaintiffs purchased land in defendant city desiring to subdivide the property into residential lots. At the time of the purchase the city had in force and effect a comprehensive zoning ordinance which would, when applied to the subject land, restrict the lots to a minimum of 30,000 square feet in area. Each lot was to be not less than 150 feet in width and not less than 200 feet in depth. The plaintiffs wanted to subdivide their property into lots of over 100 feet in width, with an average depth of 150 feet, each lot thus containing about 15,000 square feet.

The request for rezoning was denied and this cause was instituted. Plaintiffs were granted a decree on the pleadings and the pretrial procedure. Motion for rehearing was denied. On appeal we determined the trial court had erred and remanded

it to the trial court for the taking of proofs.* Upon completion, the trial court decreed:

"that section 14 of Ordinance No 23 of the city of Troy, Oakland county, Michigan, insofar as it pertains to the property of the plaintiffs as hereinafter described, is an unwarranted and illegal extension of the police power of the city and is unreasonable and void, and * * *

"that the plaintiffs shall be, and they are hereby, authorized and empowered to use the said property for a residential subdivision in accordance with the proposed plat attached to plaintiffs' bill of complaint and there marked exhibit A; provided, however, that the plaintiffs shall, at all times, comply with all other valid existing ordinances of the city of Troy and with the statutes of the State of Michigan applicable to the platting and use of said land."

This same zoning ordinance, and section, but a different classification, was before the Court in the recent case of *Christine Building Company* v. *City of Troy,* 367 Mich 508. Many of the facts in that case and the questions posed are identical to the ones in the case at bar, and to the extent that they are identical, they are controlled by the decision in *Christine.* It must be noted that the Court is cognizant that 1 of the basic rules for testing the reasonableness of a zoning ordinance provides that the determination must be made in the light of the facts presented in each case. "Each zoning case must be determined upon its own facts and circumstances." *Moreland* v. *Armstrong,* 297 Mich 32, 36; *Senefsky* v. *City of Huntington Woods,* 307 Mich 728, 737 (149 ALR 1433).

Other principles to be employed reviewing the constitutionality of zoning ordinances have been set out in detail in *Christine* and cases cited therein and we see no need for repeating them now.

* *Roll* v. *City of Troy,* 361 Mich 540.—REPORTER.

Plaintiffs contend that the zoning restriction of 30,000 square feet minimum as applied to their proposed platted subdivision "is *unreasonable* as it bears no substantial relationship to present public health, safety, morals or general welfare, and is confiscatory and discriminatory." In support of their claim, plaintiffs produced witnesses who testified in substance that the proper protection of health, welfare, and safety does not require compliance with the 30,000 square foot minimum. Without quoting specific testimony, these witnesses, who were experienced in the developing and marketing of subdivisions, and of appraising land and buildings, claim that substantially smaller lots would be ample to satisfy proper requirements as to health, sanitation, safety, and welfare. They testified further that there would be no harm or damage to the surrounding area by building on 15,000 square foot lots; that there would be no detrimental effect in the overall zoning plan of the entire city; that the change to 15,000 square feet minimum would bring the property in question in line with property immediately adjacent to the east and to the south; and that other property surrounding the plaintiffs' did not come up to the present minimum zoning requirements. Proofs also showed that other property close to that of plaintiffs had been rezoned from a minimum size area of 30,000 square feet to 15,000 square feet. Testimony tended to show that the plaintiffs' property today, as presently zoned, was not worth the amount paid for it, and that this zoning requirement would make it economically unsound to develop the property. It is true that "mere depreciation in value by itself is not enough. The test is whether the zoning classification is *unreasonable*." (Emphasis supplied.) *Moreland* v. *Armstrong, supra,* 36; *City of Howell* v. *Kaal,* 341 Mich 585, 590.

To support their position that the ordinance was a valid exercise of legislative power, the city asserts the following:

"A. The mere disparity in value of property resulting from the adoption of a zoning ordinance is insufficient to establish that such ordinance is *unreasonable,* especially where the owner of the property admittedly paid an excessive price for said property in anticipation of a change in zoning that would increase the value of the property.

"B. The present zoning, as applied to the subject parcel, tends to preserve the established character of the neighborhood, stabilizes the value of property therein and promotes the general welfare.

"C. The minimum lot size requirement of 30,000 square feet, as applied to the subject parcel, constitutes an integral part of the comprehensive zoning plan of the city of Troy and therefore bears a real substantial relation to the public health, safety and general welfare.

"D. Comprehensive zoning plan of the city of Troy, as applied to the subject parcel, promotes the orderly development of the city and safeguards the city's economic structure.

"E. Present zoning of the subject parcel will create the maximum density of population that can be serviced by available sanitary sewers."

Nothing in the majority opinion in *Christine* should be construed as indicating that this Court is insensitive to the need for comprehensive municipal zoning plans, but these, like all others, must meet the test of reasonableness.

With regard to the available sewage disposal system, defendant's witness, a civil engineer, stated that, at the present, there was sufficient sewer capacity to meet the needs of the plat proposed by plaintiffs but that if present zoning were not maintained, overloading of sewer facilities might occur at some later date. (The sewage system was the same Ever-

green interceptor discussed in *Christine,* capable of serving 21,300 people in 6,000 housing units. At the time of trial there was a small fraction of the anticipated population, and "Roughly a thousand units".)

The trial judge found that "the plaintiffs have overcome the presumption favoring the city of Troy, and that the plaintiffs by a fair preponderance of the evidence and proofs have clearly established there is no real need for this zoning and * * * the plaintiffs have clearly proven that under the present conditions it is unconstitutional."

We are in accord with the finding of the trial judge and conclude that the section of the ordinance as applied to plaintiffs' property is unconstitutional.

One other question remains to be considered: "Where the court has decided that a provision of the municipal zoning ordinance covering the zoning of a minimum lot size is unreasonably large and therefore void, does it then have the right to assume the role of a municipal legislator and impose upon the subject parcel a smaller lot size?"

As can be seen from the decree of the trial judge hereinabove set out, plaintiffs were empowered to use their property in accordance with the proposed plat, therefore the minimum size was established at 15,000 square feet.

This Court agreed with the trial judge in *Christine* 515, 516, that he had no legal duty, right, or obligation to undertake to pass upon the reasonableness of proposed zoning that is not yet the subject of an ordinance. Recognizing that zoning is a legislative function we affirm the principle that courts cannot write zoning laws. The trial court's decree is modified by striking therefrom that portion authorizing and empowering plaintiffs to use the property as proposed in the plat. In all other respects the decree is affirmed. No costs, neither party having prevailed entirely.

CARR, C. J., and DETHMERS, KELLY, BLACK, and KAVANAGH, JJ., concurred with SMITH, J.

SOURIS, J. (*dissenting*). Plaintiffs purchased the land involved in this litigation knowing it was zoned for single family residence use and that lots were required to have a minimum area of 30,000 square feet. Prior to their purchase of the land, plaintiffs submitted to defendant city for its approval a proposed subdivision plan, which plan divided the land into residential lots containing a minimum of 15,000 square feet. Notwithstanding the city's refusal to approve their plan, plaintiffs nonetheless purchased the land hoping, indeed speculating, that the property would be rezoned.

Defendant's comprehensive zoning ordinance which is involved in this case was before the Court last September in *Christine Building Company* v. *City of Troy,* 367 Mich 508. In that case Mr. Justice KELLY and I joined former Justice ADAMS in protesting this Court's refusal to acknowledge the right of a city to make long-term comprehensive plans for its present and future development, as seems clearly authorized by sections 6 and 7 of PA 1931, No 285, as amended (CL 1948, §§ 125.36, 125.37 [Stat Ann 1958 Rev §§ 5.2996, 5.2997]). We said, in dissent, in *Christine,* at pp 524–526:

"If the present zoning must be altered by a holding that it is unreasonable, then a point of attack upon the city has been established whereby any subdivider will be able to abrogate the city's residential zoning program except as to an absolute minimum lot size. A cancerous situation will result which will permit almost any city plan to be destroyed piecemeal without any examination or consideration of the over-all city plan, even though the reasonableness of such plan has been virtually conceded by the failure of the plaintiffs to present any

testimony in opposition thereto. See *Brae Burn, Inc.*, v. *City of Bloomfield Hills*, 350 Mich 425, 436.

"The criteria used by the city for lot size within various areas of the city has been the general character of the neighborhood, the facilities available, or to be made available. The criteria contended for by the plaintiffs is the absolute minimum in terms of sanitation, salability and profitability, regardless of whether or not there is a resulting depreciation in the neighborhood and in adjacent properties, and regardless as to whether or not there are any problems created in terms of traffic hazards, school congestion, inadequate water supply, or otherwise. If problems develop in these areas, this is no concern of plaintiffs. If more schools are needed, or more sewers, or more roads, they *can* be built even though as a financial matter they may be completely unfeasible. This will be a proper concern not for these plaintiffs, who will long since have 'developed' the properties, but for the purchasing homeowners who have been left holding the tax bag.

"Whether or not the city of Troy has developed a reasonable plan for that city, or the plan is faulty, is not the question here at issue. The undisputed facts are that the city under expert, professional engineers has planned its future as best it could, in the light of present knowledge, full well realizing that such a plan may have to be altered and that it may not succeed as now envisioned. With a population of 19,000, Troy made plans for a city of 134,000. All economic groups are afforded an opportunity to share in the growth and the life of the city. Under these circumstances, it cannot be said that the city has gone beyond the powers and authority conferred upon it by the legislature of this State under the city planning act and the city zoning act.

"Support for the views herein expressed can be found in the cited statutes and in the recent cases of *Northwood Properties Co.* v. *Royal Oak City Inspector*, 325 Mich 419; *Scholnick* v. *City of Bloomfield Hills*, 350 Mich 187; and *Brae Burn, Inc.*, v.

City of Bloomfield Hills, supra. The critical question is whether or not a municipality may make plans for its future as an organic whole. Or is any such planning subject to destruction because a property viewed separately, even though it is an integral part of that whole, would create no immediate hazard to health and welfare if developed with minimum lot sizes. In my opinion, the general welfare would best be served by orderly planning and zoning by the body corporate. Restrictions as to lot size are no more outside the bounds of local legislative discretion than the zoning of one area for factories to the exclusion of a residential use. *Lamb* v. *City of Monroe,* 358 Mich 136."

The Christine Building Company, on majority vote of this Court, succeeded in establishing a "point of attack" upon the city's comprehensive zoning ordinance. The Rolls today seek to extend the attack on proofs demonstrating only that they paid more for their property than they should have, present zoning limitations considered.

I would reverse this decree and call a halt to invocation of this Court's power to "sit as a super-zoning commission." *Brae Burn, Inc.,* v. *City of Bloomfield Hills,* 350 Mich 425, 430, 431.

BLACK, J. (*concurring*). I agree with the majority opinion, noting specially that the minimally zoned lot size (30,000 square feet of area per lot) is not currently defended on ground that the municipal purpose is—in whole or in part—that of promoting disposition of sanitary sewage on the homeowner's lot by means of a septic tank or tanks and properly installed tile fields leading therefrom; a purpose manifestly requiring much larger residential lots.

Such a purpose, if supported by due proof, might insulate a like ordinance from judicial criticism. I simply allude to it the better to limit the intended

scope of our present determination that Troy's ordinance, scrutinized in the light of all briefed and submitted issues, must fall as in the *Christine Case*.

O'HARA, J., took no part in the decision of this case.

WOLFORD *v.* WOLFORD.

1. DISMISSAL AND NONSUIT—PLEADING—HEARING—CONSENT—STIPULATION.

   Decree of divorce was properly entered in suit for divorce notwithstanding plaintiff's counsel had orally advised trial court of plaintiff's desire not to proceed after court had announced his decision, where answer and cross-bill, answer thereto, and reply to such answer had been filed, and hearing had been held, but no consent by defendant, stipulation, or order of court permitting discontinuance had been filed (Court Rule No 38 [1945]).

2. DIVORCE—EXTREME CRUELTY—PLEADING—EVIDENCE—DIVISION OF PROPERTY—ALIMONY—JURISDICTION AS TO CHILDREN.

   Decree entered in husband's suit for divorce on ground of extreme cruelty *held*, fully justified by evidence adduced, and not to have been entered on the grounds of public policy, division of property not being inequitable whereby defendant wife was allowed real estate on which she was conducting a business, rights of plaintiff were recognized with reference to carrying on work in which he was engaged, defendant was granted $2,500 in lieu of alimony, and jurisdiction expressly reserved to make orders in the future with reference to the care, maintenance, and support of the 5 minor children.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation §§ 380–384.
Right of plaintiff, or of defendant, who has filed counterclaim or cross complaint, in action for divorce, separation, or annulment, to a voluntary dismissal or nonsuit. 138 ALR2d 1100.
[2] 17 Am Jur, Divorce and Separation §§ 46–87, 679.

Appeal from Cheboygan; Fenlon (Edward H.), J. Submitted April 2, 1963. (Calendar No. 13, Docket No. 48,730.) Decided May 9, 1963.

Bill by Barton Wolford against Joan Wolford for divorce on grounds of extreme and repeated cruelty, with cross-bill on similar grounds. Subsequent to hearing and opinion granting plaintiff divorce and denying defendant relief, plaintiff expressed desire not to proceed. Decree, submitted by defendant, entered. From order denying rehearing, plaintiff appeals. Affirmed.

Harry W. Lower, for plaintiff.

Isackson & Beaudry, for defendant.

CARR, C. J. Plaintiff herein, by bill of complaint filed January 13, 1961, sought a decree of divorce from the defendant, alleging as grounds for his cause of action acts of extreme and repeated cruelty on her part. The pleading averred that for some time defendant wife had been carrying on an association with a married man, referred to as Mr. X, such association involving continual communication by means of telephone and letters, and various meetings by prearrangement. Defendant filed answer denying the material averments of the plaintiff's pleading, and also a cross-bill seeking affirmative relief by way of a divorce decree and alleging conduct on the husband's part claimed to constitute extreme and repeated cruelty. Answer to such cross-bill was filed on behalf of plaintiff, to which the defendant filed reply.

Testimony with reference to charges and countercharges of the respective parties was taken on the hearing before the circuit judge. At the conclusion thereof the judge announced that a decree would

be granted to the plaintiff, that the cross-bill filed by defendant would be dismissed, and suggested to counsel for the parties that they endeavor to agree on a property settlement. Apparently there was some negotiation between the parties pursuant to the suggestion of the court, and a decree was submitted to the court by counsel for defendant and cross-plaintiff. At that time counsel for plaintiff orally stated in open court that he was not in position to approve the decree as drawn for the reason that his client had advised him that he did not desire a divorce.

The circuit judge hearing the matter approved the proposed decree, and it was duly signed and filed. According to its provisions the divorce was granted to the plaintiff on the grounds alleged by him in his bill of complaint, and custody of 5 minor children was awarded to the defendant and cross-plaintiff, the court specifically retaining jurisdiction with reference to their care, custody, and support, until they respectively reached the age of 21 years, for the purpose of entering such further orders as might be deemed necessary. Plaintiff was granted rights of visitation at all reasonable times and places. No provision for alimony was made, nor for the making of payments for support of the minor children.

The decree divided the property of the parties, specifically giving to plaintiff certain described real estate, including the family home, and tools and appliances used in a septic tank business. Defendant and cross-plaintiff was awarded a cottage that had belonged to the parties, together with the furnishings therein, and business property in Mackinaw City on which she was engaged in conducting a gift shop, together with personal assets used in connection with said business. It was further decreed that plaintiff should pay to defendant, in lieu of ali-

mony, the sum of $2,500. Provision was made for an attorney fee for counsel for defendant, and the decree was made effective upon the entry thereof in the office of the clerk of the court.

Plaintiff's motion for rehearing was denied, and he has appealed claiming that the circuit judge was in error in signing the decree submitted and causing it to be entered after being informed that plaintiff did not then want a divorce. As above indicated, the information as to plaintiff's changed attitude in the proceeding was given to the court orally by plaintiff's counsel. No claim is made that there was any consent to a dismissal of the case on the part of defendant and cross-plaintiff, nor that motion supported by affidavit was filed seeking such action. It is further claimed on behalf of appellant that the property settlement as set forth in the decree was inequitable and that the court was in error in not requiring that a fund, or property, be set aside for the purpose of insuring the support of the minor children. On behalf of defendant and appellee it is argued that the trial court acted properly in causing the decree to be entered, that the provisions thereof were fair to both parties, and that the trial court was not in error in denying plaintiff's motion for a rehearing.

At the time of the proceedings in circuit court Rule No 38 of the Michigan Court Rules of 1945 was in effect. Section 1 thereof is applicable in the consideration of the principal question raised on this appeal. It read as follows:

"The plaintiff may at any time, before answer filed, and on the payment of costs, discontinue his suit by notice of discontinuance filed in the cause and giving notice thereof to the defendant or his attorney. Thereafter he may discontinue, on the same terms, only (1) upon filing a stipulation to that effect signed by the defendant, or his attorney,

or (2) on the order of the court or judge made on special motion in which the grounds for such discontinuance shall be set forth and which shall be supported by affidavit. After a recoupment, set-off or cross bill has been pleaded by a defendant no discontinuance against such defendant may be had except by consent."

The interpretation and application of the section above quoted was considered in *Shields* v. *Shields,* 319 Mich 316, a divorce case. The plaintiff therein filed suit for separate maintenance. Subsequently, and on stipulation of the parties, the court permitted the bill of complaint to be amended in such manner as to request relief by way of a decree for an absolute divorce. After the completion of the proofs the judge hearing the matter made findings of fact and determined that plaintiff was entitled to such decree. Plaintiff was not satisfied with the property settlement that the court indicated should be made and requested leave to strike from the record the stipulation that had been made allowing her to amend the bill as originally filed. A partial rehearing with reference to the settlement was granted, but leave to amend by reinstating the prayer of the original bill for separate maintenance was denied. Plaintiff appealed from the decree of divorce filed. This Court determined that under Court Rule No 38, § 1, the ruling of the court was correct, and the decree was affirmed. In this connection it was said (p 322):

"Plaintiff in the case at bar could not without defendant's consent withdraw her suit for divorce and resubstitute a suit for separation after the filing of answer and cross bill. The court was without error under the circumstances of this case in denying her motion. Plaintiff's said motion was an attempt to evade our present Court Rule No 38, § 1 (1945)."

In *Unjian* v. *Unjian,* 344 Mich 423, a similar question was involved. There the plaintiff filed suit for divorce, defendant answering the bill of complaint. Following the taking of proofs the circuit judge hearing the matter announced that a decree would enter in favor of the plaintiff. Plaintiff then requested that her bill of complaint be dismissed, but the trial court refused to comply on the ground that the request came too late. Referring to *Coon* v. *Coon,* 163 Mich 644, and *Eisenbach* v. *Eisenbach,* 176 Mich 354 (Ann Cas 1917A, 1197) it was pointed out in the opinion of this Court that said cases had been decided before pertinent amendments to Court Rule No 38. On the authority of *Goodspeed* v. *Goodspeed,* 300 Mich 371; *Ratcliffe* v. *Ratcliffe,* 308 Mich 488; and *Hornbeck* v. *Hornbeck,* 316 Mich 208, it was held that the circuit court was right in denying plaintiff's attempt to discontinue the case after the filing of defendant's answer. As in the case at bar, the procedure specified by the language above quoted from section 1 of the rule was not followed. A like conclusion was reached in *Labadie* v. *Labadie,* 347 Mich 592. In view of the specific language of Court Rule No 38, and in accordance with the prior decisions of this Court interpreting it, the court in the instant case properly refused to act on the information furnished to him as to plaintiff's changed attitude with reference to his desire for a divorce, and was correct in entering a decree in accordance with the findings.

Under the testimony in the case we do not think that the decree of the circuit court should be set aside or modified. The evidence introduced on the hearing fully justified the granting of a divorce to plaintiff. While the court in his findings referred to the unhappy situation existing with reference to the attitude of the parties to the case, it may not be said that such decree was entered on the grounds of public

policy. Neither does it appear that the division of the property that the parties had acquired was inequitable. Defendant was allowed the real estate on which she was conducting a gift shop, thus leaving her in position to continue in that business. The rights of plaintiff were likewise recognized with reference to the carrying on of the work in which he was engaged. Defendant was granted $2,500 in lieu of alimony, and the court, as would appear proper under the circumstances disclosed by the record before us, expressly reserved jurisdiction to make orders in the future with reference to the care, maintenance, and support of the minor children, if conditions so required. We cannot say that we would have determined the matters at issue differently had we been in the place of the circuit judge.

The decree entered in circuit court is affirmed. Appellee may have costs.

DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred with CARR, C. J.

BLACK, J. (*concurring*). I concur in affirmance. In divorce proceedings, most certainly when they involve the rights and the future of minor children, the specific nature of the decree to be entered becomes the ultimate responsibility of the court regardless of belated as well as original prayers and appeals for relief. So long as no statute is violated by the decree, and so long as the provisions thereof are consistent with the established principles of equity, dissatisfaction of a party with the decreed property settlement does not call for appellate meddlement. Neither does such dissatisfaction justify holding that the vexed party—the party who voluntarily engaged the jurisdiction to obtain an absolute divorce—may change his mind at close of proofs and say he does not want a divorce. It is for the

court, and the court only, to say whether such a decree shall be entered on the completed record.

All here agree that the matters at real issue doubtless would have been determined likewise had we been seated in the place of the hearing chancellor. In these circumstances affirmance is in order.

LEWIS *v.* GENESEE COUNTY.

1. COUNTIES—MEDICAL CARE FACILITIES—AGENCIES OF STATE.

   Counties and their departments of social welfare function as agencies of the State in establishing and operating medical care facilities to provide general relief, hospitalization, and infirmary care other than hospitalization, to poor or unfortunate persons under State statute creating State department of social welfare and prescribing its powers and duties with respect to county departments of social welfare (CL 1948, § 400.1 *et seq.*).

2. HOSPITALS—COUNTY MEDICAL CARE FACILITY—STATE AGENCY—IMMUNITY FROM LIABILITY FOR NEGLIGENCE.

   Defendant county and defendant county board of social welfare were immune from liability for the negligent acts of their agents, servants, and employees in performance of functions involved in caring for plaintiff, a patient at hospital which had been established and was being operated pursuant to statute conferring supervisory power upon State social welfare commission, since defendants were functioning as State agencies (CL 1948, § 400.1 *et seq.*, as amended).

Appeal from Genesee; Parker (Donn D.), J. Submitted April 3, 1963. (Calendar No. 22, Docket No. 50,113.) Decided May 9, 1963.

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Counties § 3.

[2] 14 Am Jur, Counties §§ 48–50; 49 Am Jur, States, Territories, and Dependencies § 78.

Case by Emma Lewis against County of Genesee and Genesee County Board of Social Welfare, both bodies corporate, for personal injuries sustained while a patient at Walter Winchester Hospital. Case dismissed on motion. Plaintiff appeals. Affirmed.

Howard C. Fischer, for plaintiff.

Moll, Desenberg, Purdy, Glover & Bayer and *John G. David,* for defendants.

CARR, C. J. Plaintiff brought this action in the circuit court of Genesee county to recover damages for injuries claimed to have been sustained by her. The declaration filed alleged that the defendants were bodies corporate and that pursuant to State statute they had established and operated a medical facility within said county known as the Walter Winchester Hospital. Plaintiff further alleged that during the month of December, 1961, she was a resident patient in said facility and that as a result of negligence on the part of defendants' agents, servants, and employees, she fell, sustaining the injuries for which she sought to recover damages.

On behalf of defendants a motion to dismiss the suit was filed, asserting that they were immune from liability for the claimed negligent acts of their employees. Following a hearing before the circuit judge the motion to dismiss was granted, the circuit judge concluding that it was well founded under decisions of this Court. Attention was also called to the fact that the declaration filed contained no allegation that plaintiff's claim had been presented to either the board of supervisors of the county or to the county board of social welfare. Cited in this connection was article 8, § 9, of the State Constitution (1908) and CL 1948, § 46.71 (Stat Ann 1961 Rev

§ 5.521). From the order entered granting the motion plaintiff has appealed.

The defendant county board of social welfare was created under and pursuant to the social welfare act of the State, PA 1939, No 280.* As amended, said act is entitled:

"An act to protect the welfare of the people of this State; to provide general relief, hospitalization, and infirmary care other than hospitalization, to poor or unfortunate persons; to provide for compliance by this State with the provisions of the social security act; to provide protection, welfare and assistance to aged persons, dependent children, the blind, and the permanently and totally disabled; to create a State department of social welfare; to prescribe the powers and duties of said department; to provide for the interstate and intercounty transfer of dependents; to create county, district and city departments of social welfare; to create within the county departments, bureaus of social aid and certain other bureaus, divisions and offices thereunder; to prescribe the powers and duties of said departments, bureaus and officers; to provide for appeals in certain cases; to prescribe the powers and duties of the State department of social welfare with respect to county, district and city departments of social welfare; and to prescribe penalties for the violation of the provisions of this act."

The provisions of the statute are in accord with the general purpose as expressed in the title. Obviously it was the intention of the legislature to cover the field of public welfare in the interest of the people of the State, to adopt safeguards to insure the carrying out of the objectives sought to be attained, and to vest in certain agencies specific powers and duties essential to the successful operation of the general plan as outlined. The State social

* CL 1948, § 400.1 *et seq.*, as amended (Stat Ann 1960 Rev and Stat Ann 1961 Cum Supp § 16.401 *et seq.*).

welfare commission was created and invested with general supervisory control with reference to the functioning of other agencies charged with carrying out the legislative requirements.

As indicated in the title above quoted, the overall plan involved the creation of county, district, and city departments of social welfare. The defendant county board of social welfare came into existence accordingly, 1 of the 3 members thereof being appointed by the State welfare commission and 2 by the county board of supervisors.* Defendants herein in the performance of the powers and duties vested in them are subject to the provisions of the State statute. Without discussing such provisions in detail, we conclude that in the instant case the claim of said defendants that they were acting, with reference to the matters here involved, as agencies of the State is in accord with the act of the legislature.

Of particular significance are the provisions of the statue relating to the establishment in each county of a medical facility, the plans for which are required to be approved by the State commission.† The latter commission is vested with express authority to approve and certify the plans, and also to adopt reasonable rules with reference to the operation of the facility when established. The enforcement of orders so made is authorized by appropriate court action. The claim of the defendants that, with reference to matters relating to the functions performed under the State welfare law, they have acted solely as State agencies is well founded.

The holding of the circuit judge that defendants are immune from liability for the negligent acts of

* See CL 1948, §§ 400.45, 400.46 (Stat Ann 1960 Rev §§ 16.445, 16.446).—REPORTER.

† CL 1948, § 400.58, as amended by PA 1957, No 170 (Stat Ann 1960 Rev § 16.458).—REPORTER.

their agents and employees in the instant case is in accord with decisions of this Court in a number of cases, among which may be cited: *Maffei* v. *Berrien County,* 293 Mich 92; *McDowell* v. *State Highway Commissioner,* 365 Mich 268; *Sayers* v. *School District No. 1, Fractional,* 366 Mich 217; and *Stevens* v. *City of St. Clair Shores,* 366 Mich 341. It clearly appearing that the defendants in the performance of the functions involved in the instant case were acting as State agencies, they were entitled to claim immunity from liability based on alleged negligence of employees. It is unnecessary to discuss other possible issues in the case.

The order from which the appeal has been taken is affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, and O'HARA, JJ., concurred with CARR, C. J.

SOURIS, J. (*concurring*). In *McDowell* v. *State Highway Commissioner,* 365 Mich 268, a majority of the present members of this Court limited the scope of the controlling opinion which I signed in *Williams* v. *City of Detroit,* 364 Mich 231. I expressed my views thereon in *Sayers* v. *School District No. 1, Fractional,* 366 Mich 217, 221–225. Subject to the views I expressed in *Sayers,* I concur reluctantly in today's decision.

SMITH, J., concurred with SOURIS, J.

EASLEY *v.* MORTENSEN.

1. CONTRACTS—CONSIDERATION—PROMISE—REPRESENTATION.
   Statement, made before plaintiffs executed contract to purchase a house and gave defendant realtors an exclusive listing agreement as to hotel subject to a first mortgage and on which plaintiffs gave a second mortgage as security for down payment on house, that plaintiffs should not worry about foreclosure of the first mortgage as they would have a year in which to redeem and defendants would have the hotel sold by that time, *held*, not to constitute an express promise by defendants to do anything supported by a consideration, but only a representation and expression of defendants' belief they would be able to sell the hotel within 1 year.

2. SAME—PAST CONSIDERATION.
   The purchase of a house by plaintiffs and the giving of an exclusive listing agreement of a mortgaged hotel property to defendant realtors constituted but past consideration and was insufficient to support defendants' alleged promises thereafter made that they would raise the money to pay off the mortgage after foreclosure proceedings had been commenced.

3. SAME—CONSIDERATION—FORECLOSURE OF MORTGAGE.
   The placing of a copy of foreclosure notice of first mortgage on hotel in the hands of defendant realtors who had taken a second mortgage to vendors of house sold to plaintiffs as security for down payment thereon when they also gave defendants the exclusive listing agreement for sale of the hotel property did not constitute consideration for such past acts by plaintiffs, since it constituted no control over the right or power of plaintiffs to redeem.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 55 Am Jur, Vendor and Purchaser §§ 23–26.
[5, 6] 53 Am Jur, Trial §§ 371–381.
Direction of verdict on opening statement of counsel. 129 ALR 557.

4. SAME—CONSIDERATION—SELF-IMPOSED INACTION.

The self-imposed inaction of plaintiff mortgagors in not attempting to raise money from other sources to redeem mortgage on hotel property did not constitute a consideration for defendant realtors' unfulfilled promises to raise the money for such purpose, such latter promises being mere gratuities.

5. TRIAL—OPENING STATEMENT—DIRECTED VERDICT.

A trial court may grant a defendant's motion for directed verdict at the conclusion of plaintiffs' opening statement, where that statement shows that the plaintiffs have no cause of action or right to recover.

6. SAME — CONTRACTS — CONSIDERATION — OPENING STATEMENT — DIRECTED VERDICT.

Plaintiffs' cause of action on alleged contract with defendant realtors was properly dismissed at the close of plaintiffs' opening statement, where plaintiffs failed to show a valid consideration for defendants' alleged promises.

Appeal from Muskegon; Fox (Noel P.), J. Submitted January 11, 1963. (Calendar No. 32, Docket No. 49,816.) Decided May 9, 1963.

Action by Peter M. Easley and Sarah P. Easley against R. G. Mortensen and Steve Sieradzki for breach of contract to protect hotel property from mortgage foreclosure. Cause dismissed on motion. Plaintiff appeals. Affirmed.

Lidke & Sanford, for plaintiffs.

Poppen, Street & Sorensen (*Harold M. Street,* of counsel), for defendants.

DETHMERS, J. This is a suit for breach of contract. At the conclusion of plaintiffs' opening statement to the jury the court granted defendants' motion to dismiss on the ground that plaintiffs' declaration and opening statement failed to state a cause of action. Plaintiffs did not seek to amend or add to

either when or after the motion was made. They appeal.

In their brief plaintiffs say:

"Plaintiffs' central contention is that they listed their mortgaged hotel for sale with defendant realtors, and that defendants promised, *over and above the listing agreement,* to prevent *in any event* mortgage foreclosure loss of the hotel—a promise supported by 3 different considerations."

If plaintiffs had been permitted to go to trial and had succeeded in proving the allegations of their declaration and the assertions of their counsel in his opening statement which were germane to the making and breach of an alleged contract and resulting damages, their case would have consisted of the following:

On October 31, 1958, plaintiffs were the owners of a hotel subject to a first mortgage, and defendants were realtors. On that date defendants had a house listed for sale and plaintiffs signed an offer to purchase it on condition that their hotel be sold first. On November 26, 1958, plaintiffs entered into a land contract for the purchase of the house, and executed a second mortgage on the hotel as security for the promissory note given as the down payment specified in the contract on the house purchase. This mortgage was given to defendants for delivery to the house vendors, named as mortgagees therein. In November of 1958 plaintiffs signed a listing agreement, renewed December 8, 1958, giving defendants exclusive right to sell the hotel. On the latter date the holder of the first mortgage on the hotel posted notice of foreclosure thereof, which notice plaintiffs delivered to defendants on the next day. On March 16, 1959, foreclosure sale was had under the first mortgage and the mortgagee bid in the hotel for the amount of his mortgage, setting in motion the

running of the 1-year period for redemption, to expire March 16, 1960. On March 15, 1960, plaintiffs sold the hotel for enough to cover the 2 mortgages on the hotel, totaling $5,288 in amount, which the purchaser assumed, plus $2,250 cash, which plaintiffs received. This made a total of $7,538 realized by plaintiffs from the sale of the hotel worth $18,000. For the difference plaintiffs sued defendants on the basis of the alleged contract between them, claimed by plaintiffs to have come into being as follows: On October 31, 1958, defendants told plaintiffs not to worry about the first mortgage, that if it were foreclosed they would have a year to redeem and by then defendants would have the hotel sold and the mortgage paid. On December 9, 1958, some time after plaintiffs had entered into the contract to purchase the house and after they had given defendants a listing on their hotel for its sale, defendants told plaintiffs not to worry about the first mortgage and that they would not let the mortgagee into the premises or let it go to him because they now had a second mortgage on the hotel. During the 1-year redemption period defendants repeatedly expressed certainty that they would sell the hotel and told plaintiffs not to worry about the mortgage because defendants now had too much money in the place to let the first mortgagee have it. Long after the house purchase contract had been executed and after defendants' listing agreement on the hotel had expired, at a time about 2 months before the end of the 1-year redemption period on the first mortgage foreclosure, defendants stated to plaintiffs that each of defendants, respectively, would raise his half of the amount necessary to redeem. Later, on March 8, 1960, one defendant expressed optimism about a prospective purchaser for the hotel, but said that, if the deal fell through, he would borrow money from his mother to pay off the first mortgage. On March 11th, with

only 4 days left to redeem, 1 of defendants reassured plaintiffs and led them to believe he would obtain the necessary money to redeem. The plaintiffs alleged that these statements of defendants caused plaintiffs not to seek money from other sources to redeem or pay the first mortgage. On March 15th the defendants told plaintiffs they were unable to raise the money or prevent the foreclosure from becoming final.

The trial court apparently decided the matter on the ground of lack of consideration to support defendants' alleged promises. Plaintiffs say the consideration was threefold, (1) plaintiffs' purchase of the house listed with defendants, (2) control of redemption given to defendants to protect their second mortgage interest by plaintiffs' placing in defendants' hands the notice of foreclosure posted on the premises, and (3) detriment incurred by plaintiffs by being lulled into a false sense of security, dissuading them from going elsewhere to obtain money for purpose of redeeming or paying off the mortgage indebtedness and causing them not to list the hotel for sale with another realtor after defendants' listing agreement had expired.

The only statement which plaintiffs charge defendants with having made in this connection prior to plaintiffs' entering into the contract to purchase the house on November 26, 1958, or prior to giving defendants the hotel listing agreement in November and renewing it on December 8, 1958, was that made on October 31, 1958, to the effect that plaintiffs should not worry about foreclosure because plaintiffs would have a year in which to redeem and defendants would have the hotel sold by that time. This constituted no express promise by defendants to do anything supported by a consideration either in the shape of the purchase of the house or the giving of the listing agreement, but at most amounted only to a

representation and expression of defendants' belief that they would be able to sell the hotel within 1 year. All of the later statements and so-called promises which plaintiffs ascribe to defendants were made after the contract to purchase the house had been executed and the listing had been given and had expired. If these could have served as consideration for the promises, they were, at the time the promises were alleged to have been made, past consideration which could not support the claimed promises or contract. *Shirey* v. *Camden,* 314 Mich 128; *Lister* v. *Sakwinski,* 206 Mich 121; *Rhoades* v. *Seidel,* 139 Mich 608 (18 Am Neg Rep 135).

The placing of the copy of foreclosure notice in defendants' hands gave them nothing, certainly no control over the right or power of plaintiffs to redeem. This amounted to no consideration.

The fact that plaintiffs did not attempt to raise money from other sources for redemption purposes is not alleged to have been at the defendants' request nor do plaintiffs say that they promised defendants to refrain from doing so. Their self-imposed inaction was no consideration for any promises made by defendants. Under plaintiffs' own theory defendants' alleged promises were not given in exchange for anything, but were mere gratuities.

In *Vida* v. *Miller Allied Industries, Inc.,* 347 Mich 257, 264, this Court quoted with approval the quotation in *Bean* v. *State Land Office Board,* 335 Mich 165, 176, taken from 53 Am Jur, Trial, § 373, pp 303, 304, as follows:

"'"It is a well-established general rule, followed by the majority of the courts of this country, including the courts of the United States, that the trial court may usually direct a verdict for the defendant upon the opening statement of the plaintiffs' counsel, where that statement shows that the plaintiff has no cause of action or right to recover. The rule is

founded on the theory that the time of the court and the jury would be wasted, since the result, if the evidence were introduced, would necessarily be the same; that it would be an idle waste of time to hear evidence which could not benefit the party offering it.' "

Affirmed. Costs to defendants.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

REININK *v.* VAN LOOZENOORD.

1. PLEADING—FRAUD.
   A pleading which fails to allege facts and circumstances constituting the claimed fraud amounts to no more than pleading a conclusion and is not sufficient to entitle the party so pleading to a hearing on the claim of fraud.

2. FRAUD—EVIDENCE—RELIANCE ON MISREPRESENTATION.
   Defendants in suit for specific performance of a land contract who claimed defense of fraud failed to substantiate their claim, where the testimony failed to show they had relied upon the alleged misrepresentation as to amount of discount involved in an FHA loan.

3. SPECIFIC PERFORMANCE—MUTUALITY OF OBLIGATION.
   The fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Fraud and Deceit § 244.
[2] 23 Am Jur, Fraud and Deceit §§ 141–144.
[3] 49 Am Jur, Specific Performance §§ 34–39.
[4] 49 Am Jur, Specific Performance § 92.
[5] 49 Am Jur, Specific Performance § 174.
Specific performance: compensation or damages awarded purchaser for delay in conveyance of land. 74 ALR2d 1204.

other party, the rule of mutuality being satisfied if there be mutuality of obligation.

4. SAME—LAND CONTRACT—PAYMENT OF PURCHASE PRICE.
Plaintiff purchaser under a contract for the purchase of land *held*, entitled to decree of specific performance conditioned upon securing an FHA loan and payment of purchase price as provided in the contract, where plaintiff had complied with the terms of the contract insofar as he could without vendors' co-operation in the matter of securing a loan.

5. EQUITY—SPECIFIC PERFORMANCE—DAMAGES.
A court of equity which has jurisdiction of a case for the purpose of considering the matter of specific performance, has jurisdiction to grant complete relief, including an award of damages for the vendors' failure to perform.

Appeal from Kent; Hoffius (Stuart), J. Submitted February 6, 1963. (Calendar No. 49, Docket No. 49,563.) Decided May 9, 1963.

Bill by Ronald Jay Reinink against Eugene E. Van Loozenoord, Jane Van Loozenoord, Robert G. Poterack and Joyce M. Klukowski for specific performance of land contract, and to set aside deed and award damages. Bill dismissed. Plaintiff appeals. Reversed and remanded.

Allaben & Massie (*Keith A. Vander Weyden*, of counsel), for plaintiff.

DETHMERS, J. This is a suit for specific performance of a written agreement for the sale of land. From decree denying such relief and dismissing the bill of complaint, plaintiff appeals.

Plaintiff is purchaser under his claimed contract with the owners, defendants Van Loozenoord. Defendants Poterack and Klukowski, now defendants Poterack by reason of their marriage since commencement of this suit, claim to be purchasers under another agreement which all defendants say was

made between them. Pursuant to the latter agreement, the Van Loozenoords have conveyed the property, by deed, to the Poteracks.

The only defense raised by the Van Loozenoords in their answer and at pretrial to this suit on the contract with plaintiff was that it was procured by fraud. In neither the answer nor the pretrial statement are facts and circumstances constituting the claimed fraud set forth.

"The bill avers that plaintiff has evidence that defendants conspired to defraud plaintiff by not using the $5,100 for the purpose contemplated by the contract but for their own use. It fails to allege facts and circumstances constituting the claimed fraud and conspiracy. This amounts to no more than pleading a conclusion. It is not sufficient to entitle plaintiff to a hearing on the claim of fraud and conspiracy. *McMahon* v. *Rooney,* 93 Mich 390; *Schwab* v. *Mabley,* 47 Mich 572." *Ashton Sales, Inc.,* v. *Ashton,* 344 Mich 300, 302.

The trial court erred, accordingly, in overruling plaintiff's objection, at the outset of trial, to the introduction of any testimony going to the question of fraud. Such testimony on the subject as defendants thereafter did offer fell short of establishing fraud on plaintiff's part. The trial judge stated, in his opinion, that he found no fraud. We agree. As for a claimed misrepresentation to Van Loozenoords by the realtor trying to close the deal between them and plaintiff that a Federal housing administration approved loan to plaintiff for purchase money would involve a 2% discount when, in reality, it would have been 3%, Mr. Van Loozenoord testified that he did not believe the statement when it was made because he and his wife had already learned from another realtor that it would be more. It was incumbent on them to prove their reliance upon the misrepresentation, if one was made. *Columbus Pipe*

& Equipment Co. v. *Sefansky*, 352 Mich 539. His testimony was to the contrary.

While defendants did not plead it, the trial judge's denial of specific performance appears, from his opinion, to have been predicated upon a finding that the contract was not mutually enforceable, because plaintiff's written offer to purchase the property for a specific price, accepted in writing by the Van Loozenoords, was conditioned on plaintiff's ability to obtain an FHA approved loan for part of the purchase money.

Undisputed proofs show that plaintiff paid the realtor who was handling the deal between him and the Van Loozenoords $500 as an earnest money deposit, that plaintiff applied to an insurance company for the requisite loan, paid it an application fee, made an FHA application and paid a fee therewith, and sold some of his stock to raise the money necessary for the down payment. An employee in the loan division of the insurance company testified that he considered plaintiff a good risk, that he would have recommended the loan to FHA and to his company, and that the standards of his company for the loan were met. A realtor testified that he had frequently dealt with said insurance company employee and that loans the latter had recommended always had been approved by FHA. Plaintiff's application for the loan was not processed beyond the initial stages because he was informed that the Van Loozenoords would not go through with the deal. At trial there was testimony that the loan was still available to plaintiff on the property. He testified that he was willing and ready to proceed therewith.

In considering whether a contract for the sale of land may be decreed to be specifically enforced, a distinction should be made between mutuality of remedy and mutuality of obligation. The early view was that specific performance would not be available

to one party unless that remedy was also available to the other party. 49 Am Jur, Specific Performance, § 35. In *Reo Motor Car Co.* v. *Young,* 209 Mich 578, that rule was rejected by this Court as presently having little force.

The modern view on mutuality of remedy is set out in 49 Am Jur, Specific Performance, § 35, as follows:

"According to the reasoning of modern authorities, the fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the other party. * * * Following this view it has been held that the rule of mutuality is satisfied if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation. It is where the element of mutual obligation is lacking that equity will refuse to decree specific performance on the ground of want of mutuality of remedy. Thus, specific performance will not be granted where the complainant may at his option refuse to carry it out. But the mere fact that remedy by way of specific performance is not available to one party is not of itself sufficient to justify refusal of a decree."

2 Restatement of the Law of Contracts, § 372, pp 677, 678, states:

"(1) The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party."

Here there was a very considerable performance by plaintiff; he did all he could, without the needed cooperation by Van Loozenoords, to obtain the loan and meet the conditions and terms of the contract. The proofs are that he would have succeeded in procuring the loan and would have paid the full purchase price upon completion of the deal by the Van Loozenoords if the latter had signed papers as required by FHA. A decree for specific performance by them,

conditioned on plaintiff's securing the loan and paying the purchase price to those defendants, would have protected the latter and granted to each of the parties that to which they were entitled and upon which they had agreed under the contract. Such decree ought to have been entered. While the annotation at 5 ALR2d 287 cites holdings to the contrary, several others are cited in support. See *Gottlaub* v. *Cohen,* 139 NJ Eq 323 (51 A2d 254); *Nyder* v. *Champlin,* 401 Ill 317 (81 NE2d 923, 5 ALR2d 282); and *Langley* v. *Norris,* 141 Tex 405 (173 SW2d 454, 148 ALR 555).

In *Franko* v. *Olszewski,* 316 Mich 485, the parties entered into a written agreement for the sale of real estate, personal property and liquor licenses. It provided that if license transfers were not approved by the liquor control commission the agreement would be considered null and void and the deposit money would be returned. When plaintiff purchasers tendered full payment and demanded performance, defendants refused. Defendants had notified the commission that they had changed their minds about selling and did not want the application for license transfer to be granted. The nub of the decision in that case is to be found in syllabus 3, as follows:

"Specific performance of a contract for the sale of land, personalty thereon and for transfer of licenses for the sale of beer, wine or spirits for consumption on or off the premises will not be refused merely because the court cannot control the discretion of the liquor control commission in the matter of transferring the licenses, especially where contract merely required vendor to make application to the commission for transfers (PA 1933 [Ex Sess], No 8, § 17, as amended by PA 1937, No 281*)."

* See, currently, CL 1948, § 436.17, as amended (Stat Ann 1957 Rev and Stat Ann 1961 Cum Supp § 18.988).—REPORTER.

We think plaintiff was entitled to specific performance here, conditioned upon his payment of the purchase price as above stated.

Whether a valid contract was entered into between the 2 sets of defendants need not be determined here. The proofs show that, if so, it occurred subsequent to the creation of a valid and enforceable contract between plaintiff and the Van Loozenoords.

Plaintiff says that he was caused loss and damage by reason of Van Loozenoords' failure to perform. Having jurisdiction of the case to consider the matter of specific performance, the court could have taken jurisdiction to grant complete relief, including an award of damages. *Frank* v. *Coyle,* 310 Mich 14. It should have done so.

Decree reversed, with costs to plaintiff. The cause is remanded for determination of plaintiff's damages and entry of decree in accord herewith.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

BEACHLAWN BUILDING CORPORATION *v.* CITY OF ST. CLAIR SHORES.

1. LICENSES—BUILDING PERMITS—EXCESSIVE FEES.
   Amendments to ordinances and fees charged thereunder for building permits were invalid, where the revenue derived therefrom was in excess of the cost of issuing the license and regulating the business to which it applied.

2. SAME—EXCESSIVE FEES—INVOLUNTARY PAYMENT.
   Payments of excessive permit fees to a public officer must have been made involuntarily in order to be recoverable.

3. SAME—STATUTES—PAYMENT OF PROPERTY TAXES UNDER PROTEST.
   The statute relative to payment of taxes or special assessments on personal or real property under protest, in writing, and for suit, within 30 days, to recover the same has no application to the recovery of excessive building permit fees (CL 1948, § 211.53).

4. SAME—BUILDING PERMITS—CONSTRUCTION BUSINESS—EXCESSIVE FEES—PAYMENT—COMPULSION.
   Corporation engaged in the building construction business which could not safely proceed to build houses without securing building permits from defendant city under its valid ordinance was compelled to pay excessive fees under invalid amendments to the ordinance which had increased the fees for the permits in order to continue in its business, hence, such payments may not be said to have been made voluntarily, especially, where plaintiff had made reasonable, albeit futile, efforts to make payments under protest.

REFERENCES FOR POINTS IN HEADNOTES

[1] 33 Am Jur, Licenses §§ 41–46.
[2, 3, 4, 6] 33 Am Jur, Licenses §§ 88, 89.
When may payment of tax or assessments be regarded as involuntary or made under duress. 84 ALR 294.
[5] 17A Am Jur, Duress and Undue Influence § 2.
[7] 5 Am Jur 2d, Appeal and Error §§ 963–965; 39 Am Jur, New Trial § 26 *et seq.*

5. WORDS AND PHRASES—DURESS.
   Duress exists when one by the unlawful act of another is induced to perform some act under circumstances which deprive him of the exercise of free will.

6. LICENSES—INVOLUNTARY PAYMENT OF EXCESSIVE FEES.
   Payment of fees for building permits, invalid because in excess of cost of issuing the license and regulating the business of building construction, matters peculiarly within knowledge of defendant city, *held,* involuntary so far as excess is concerned.

7. APPEAL AND ERROR—REMAND—EXCESSIVE BUILDING PERMIT FEES.
   Plaintiff would not be entitled to a directed verdict for the amount of building permit fees that were in excess of what might be lawfully charged, where the ascertainment of the amount of excess payment would involve the Supreme Court's invasion of the province of the trier of the facts upon reversal of judgment for defendant, hence, case is remanded for new trial for such determination.

Appeal from Macomb; Noe (Alton H.), J. Submitted February 7, 1963. (Calendar No. 57, Docket No. 49,417.) Decided May 9, 1963.

Action by Beachlawn Building Corporation, a Michigan corporation, against the City of St. Clair Shores, a municipal corporation, to recover excessive fees paid for building permits under invalid ordinances. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded.

Schuur & Keating, (*Patrick J. Keating,* of counsel), for plaintiff.

John H. Yoe, for defendant.

DETHMERS, J. Plaintiff was engaged in the business of constructing residences in defendant city from 1954 through 1959. A city ordinance required a builder to obtain a building permit and to pay a fee therefor before commencement of construction of a house. Plaintiff had been complying with those requirements.

In October of 1954 and again in July of 1956 the ordinance was amended, both times to increase the fees for building permits. In *Merrelli* v. *City of St. Clair Shores,* 355 Mich 575, this Court held the amendments and charge of fees thereunder to be invalid because the revenue derived therefrom was in excess of the cost of issuing the license and regulating the business to which it applied.

Plaintiff obtained its building permits through an agent. He would submit the building plans to defendant's building department for approval. Later he would be advised by defendant's employees as to the amount of the fee, based on their estimate of the building cost, pay the fee, and receive the permit. Plaintiff then would reimburse him for the amount of the fee.

When the agent of plaintiff, after the first increase in fees became effective, sought a permit 1 of defendant's clerks informed him of the increase. The agent protested. Thereafter he tendered a check for the amount, based on defendant's building cost estimate, which would have been due under the former ordinance requirement. This was refused by defendant's employee. Next, the agent tendered a check for the increased amount and sought to pay under protest, but he was informed by defendant's employee that there was no provision for such payment and that a check marked as paid under protest would be refused. The agent then paid the full amount and received the permit. The same procedure occurred the second time the fees were increased. The agent testified that he followed that course repeatedly on other occasions, although not every time, when he obtained permits during the 4–1/2 year period here involved. He did not file written protests.

This suit is to recover the excess in payments made by plaintiff to defendant as fees for such permits during the period involved. There is no dispute be-

tween the parties that to be recoverable the payments must have been made involuntarily. *Thompson* v. *City of Detroit,* 114 Mich 502. Finding that plaintiff paid the excess voluntarily, the court directed a verdict for defendant. Plaintiff appeals.

The question is whether plaintiff's payments were voluntary or under compulsion or duress so as to be involuntary.

CL 1948, § 211.53 (Stat Ann 1960 Rev § 7.97), provides for payment of taxes or special assessments on personal or real property under protest, in writing, and for suit, within 30 days, to recover same. It has no application to permit fees. As in *Thompson,* so here we may say that the question must be determined on general principles rather than any reliance upon statute. We hold that under the facts in this case, as above noted, plaintiff did everything he reasonably could be required to do to effectuate a payment under protest, which, in effect, defendant declined to permit.

Defendant's reliance for determination of the voluntariness of plaintiff's payments rests in large measure upon *Baldwin* v. *Village of Chesaning,* 188 Mich 17 (Ann Cas 1918B, 512). This Court there affirmed, by reason of its equal division, the trial court's direction of verdict for defendant village. In that case, plaintiff, a saloonkeeper, after selling his business, sued to recover $1,000 representing the $500 fee he had paid each of 2 years under an invalid ordinance for a saloonkeeper's license. The nature of the invalidity does not expressly appear, but in the 4-justice affirming opinion it is said that the case is governed by *Betts* v. *Village of Reading,* 93 Mich 77. In the latter, plaintiff's payments of saloon license fees were made under a void ordinance which provided for issuance of liquor sales licenses prohibited by the village charter. The Court held that plaintiff was not ignorant of the law or his rights

under it and, therefore, it could not be said that he paid under duress, distinguishing that case, in that respect, from *Cribbs* v. *Sowle,* 87 Mich 340 (24 Am St Rep 166). So, too, in *City of Detroit* v. *Martin,* 34 Mich 170 (22 Am Rep 512), in which plaintiff real property owner sued to recover payment under protest of a tax totally void on its face, this Court held that plaintiff's knowledge of the facts and presumably of the law rendered the payment voluntary and unrecoverable. It was also said that if the invalidity of the tax were such that a tax sale thereon would not constitute a cloud on the title, payment of the tax must be held voluntary and even payment under protest would not render it involuntary. This was discredited and held to be dictum in *Thompson* v. *City of Detroit, supra.* These cases, other than *Thompson,* do not apply to this case in which the invalidity of the amount of the fees, because disproportionate to the cost of issuing the license and regulating the business to which it applied, did not appear on its face but could be determined with finality only on the basis of knowledge of those costs to defendant, which was within defendant's knowledge but not that of plaintiff. Furthermore, in *Baldwin* and *Betts* the plaintiffs were operating their businesses and might have continued to do so without paying the unlawfully exacted charge because no valid supporting ordinance existed. Here defendant had a valid building permit ordinance antedating its 1954 and 1956 amendments. Plaintiff could not have proceeded safely to build houses without permits from defendant. This distinction has direct bearing on the question of compulsion or duress or voluntariness of payment, since plaintiff could only pay what defendant demanded or give up its business. For annotation on this general subject, with some holdings one way and some the other as to voluntariness of payment of an invalid

charge in order to obtain privilege of doing business, see 80 ALR2d 1040.

The payments are not rendered voluntary by reason of the fact that plaintiff might have sought redress in the courts. *Thompson* v. *City of Detroit, supra.*

In *Hackley* v. *Headley,* 45 Mich 569, 574, this Court said:

"Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will."

In *Detroit* v. *Martin, supra,* 174, the following is stated:

"There is no doubt but that where the parties do not stand upon equal terms, as * * * where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to * * * in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."

We think that under the facts in this case plaintiff's payments were involuntary, made under the compulsion or duress of being denied the right to continue its business unless it paid the unlawful exactions.

In point is the following from syllabus 2 in *Pingree* v. *Mutual Gas Co.,* 107 Mich 156:

"Where an ordinance provides that a gas company shall not charge consumers more than an average of the rates charged in certain cities, payment of a charge in excess of such rate is not voluntary, where made in ignorance of the fact that it is excessive, even though the consumer be negligent in not ascertaining the fact."

To the same effect is *City of Saginaw* v. *Consumers Power Co.*, 304 Mich 491. In the instant case the facts touching the costs involved which would afford the basis for a valid charge of fees were within defendant's knowledge. They were not known to plaintiff. The payments of the excess were, therefore, not voluntary.

Plaintiff seeks reversal and an order requiring the trial court to direct a verdict in an amount certain, being the amount that testimony for plaintiff indicated was the difference between the excessive fees plaintiff paid during the period in question and the amount which it would have paid under the ordinance before its amendment. The latter would involve our invasion of the province of the trier of the facts in determining the amount to which plaintiff is entitled. That we decline to do.

Reversed and remanded for new trial in accord herewith. Costs to plaintiff.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

SHINABARGER *v.* PHILLIPS.

1. ASSAULT AND BATTERY—TORT OF AGENT—AUTHORITY—QUESTION FOR JURY—EVIDENCE.

   Evidence, presented in action for assault and battery against father and son, *held*, sufficient to present as a question of fact for jury consideration whether or not the son who inflicted injuries was acting as an employee of the father at the time and whether the wilful tort was within the scope of the agency.

2. SAME—TORT OF AGENT—LIABILITY OF PRINCIPAL—GREAT WEIGHT OF EVIDENCE.

   Verdict for plaintiff in action against defendant owner of gasoline station for injuries inflicted by assault of such defendant's son *held*, not against the great weight of the evidence on question of whether the son was an employee of such defendant and, if so, acting within the scope of his employment when he beat plaintiff, where it appears plaintiff knew of the father and son relationship, had seen the son at the station functioning as an employee, and altercation arose incident to son's attempted charge for use of station tools.

3. PRINCIPAL AND AGENT—IMPLIED AGENCY.

   An implied agency must be based upon facts and facts for which the principal is responsible; and upon a natural and reasonable, but not a strained, construction of those facts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 6 Am Jur 2d, Assault and Battery §§ 132, 136.
[2] 6 Am Jur 2d, Assault and Battery § 204 *et seq.*
[3] 3 Am Jur 2d, Agency §§ 18, 19.
[4] 3 Am Jur 2d, Agency §§ 261, 267.
[5, 6] 3 Am Jur 2d, Agency §§ 21, 354, 359, 360.
[7] 6 Am Jur 2d, Assault and Battery § 208.
[8] 26 Am Jur, Hospitals and Asylums § 6.
Admissibility of hospital chart or other hospital record. 120 ALR 1124.
[9] 6 Am Jur 2d, Assault and Battery §§ 181, 183, 184.

4. SAME—LIABILITY OF PRINCIPAL FOR TORT OF AGENT.
A principal may be liable for the tortious acts of an agent if done while acting within the apparent scope of authority.

5. SAME—EVIDENCE—DECLARATION OF AGENT.
Agency cannot be established by the declaration of the supposed agent alone, but it is not necessarily reversible error to receive evidence of such declaration, where there are other attending facts and circumstances from which an inference of agency may be drawn, the question being one for the jury.

6. SAME—EVIDENCE OF AGENT'S AUTHORITY—DECLARATION OF AGENT.
Admission in evidence as to son's declaration that he was boss of gasoline station when his father was not in town *held,* not prejudicial error on father's appeal in action by plaintiff customer against the father and son for injuries received in assault by latter, in view of other facts and circumstances supporting a finding of agency on the part of the son.

7. APPEAL AND ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.
Admission of testimony that defendant father had not filed with the county clerk a certificate showing him to be the one doing business under the assumed name here employed *held,* not shown to have prejudiced his defense in action by plaintiff customer for injuries received when assaulted by such defendant's son then present at the station and who is shown to have had apparent authority to act as such defendant's agent.

8. EVIDENCE—RECORD MADE IN REGULAR COURSE OF BUSINESS—HOSPITAL RECORD.
Hospital record of plaintiff's treatment and diagnosis which showed he had suffered a concussion, made and kept in the regular course of business, was admissible in action against gasoline station owner and his son for injuries received by assault of latter at the station and was not prejudicial to the appellant owner even though the diagnosis had been made by a physician who was not called as a witness, where the content was supported by the testimony of another doctor.

9. DAMAGES—FUTURE PAIN AND SUFFERING—EVIDENCE—CONCUSSION.
Jury's consideration of future pain and suffering by plaintiff, in action for injuries received when assaulted by defendant gasoline station owner's son at the station, *held,* to have sufficient evidentiary support by plaintiff's testimony that hitherto he had been in good health but that at the trial, 1-1/2 years after the assault, he still suffered pain and a flick of the nerves

in his nose and a doctor testified that plaintiff was still coming to him for treatment.

Appeal from Genesee; McGregor (Louis D.), J. Submitted March 5, 1963. (Calendar No. 66, Docket No. 49,765.) Decided May 9, 1963.

Case by Glen Shinabarger against Jack Phillips and Charles Phillips for injuries suffered in assault and battery. Verdict and judgment for plaintiff. Defendant Jack Phillips appeals. Affirmed.

McAra & Palmer (*Robert P. Keil* and *Richard C. Fruit,* of counsel), for plaintiff.

Marshall, O'Brien & Fischer (*John P. O'Brien,* of counsel), for defendant Jack Phillips.

DETHMERS, J. Plaintiff sued for damages resulting from a beating inflicted upon him by defendant Charles Phillips on the gasoline station premises of the latter's father, defendant Jack Phillips. A jury returned a $3,000 verdict for plaintiff against both defendants. From judgment entered on that verdict the father, defendant Jack Phillips, appeals. The son, defendant Charles Phillips, has not appealed.

Appellant says that the main issue on this appeal is whether the defendant son was an employee of defendant father on the night in question and, if so, acting within the scope of his employment when he beat plaintiff.

As developed by the pleadings and the proofs on which appellant relies, the facts are as follows. The father owned and operated the gasoline station, but, on the occasion here involved, was away on a trip. He left the station in charge of 2 employees named Campbell and Ritter. The son was not and never

had been an employee of the father. At the time, he was an employee of a contractor in a nearby city. Ritter was in charge of the station that night. The business at the station was selling gasoline, oil, et cetera, but not renting out tools. Tools sometimes were loaned to others at the station, but no charge was ever made therefor. The son testified at trial that he was not working for his father and had no authority from his father to rent tools to others or to charge for the use thereof. On the night in question plaintiff borrowed tools from Ritter to fix the belt of an automobile of friends of his who were stopped there. He returned the tools to Ritter. The son then appeared on the scene and plaintiff made a statement to him which irritated him. The son then told Ritter that he was going to charge plaintiff 50¢ for use of the tools. Ritter told him not to do so. The son, nevertheless, did demand 50¢ from plaintiff for rental of the tools. Over defendants' objections testimony went in to show that plaintiff then wanted to call the father about it, but the son told him that he was boss while his father was out of town. An altercation followed in which plaintiff received the injuries because of which this suit was brought. The father denied that the son was acting for him or had any authority from him so to do. Plaintiff testified that on previous occasions he had seen the son in the station and been waited on by him, both for gasoline and for service; that he had seen both the father and the son wait on customers, and had been at the station when only the son was present. The father admitted, in testimony, that the son had on occasions waited on customers in the station as his other 3 sons also had done.

Defendant father made motions for directed verdict on the ground that no agency between him and his son was shown and the further ground that, if shown, the assault by the son was a wilful

tort not shown to have been committed within the scope of such agency. To denial of the motions appellant assigns error. He urges that there was insufficient evidence on the points to go to a jury or to support its verdict for plaintiff.

We hold that there was sufficient evidence thereon to go to a jury and that we are not in accord with appellant's position, if it be such, that the verdict is against the great weight of the evidence.

Plaintiff relies on implied agency, citing *Weller* v. *Speet,* 275 Mich 655. While implied agency was not found to exist in that case, a test therefor was expressed in the opinion to the effect that implied authority must rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar. Quoted with approval therein (p 659) is the following from 2 CJ, Agency, § 32, p 436:

"An implied agency must be based upon facts, and facts for which the principal is responsible; and upon a natural and reasonable, but not a strained, construction of those facts."

We think that, superimposed upon the plaintiff's knowledge of the father and son relationship between defendants, the fact that he had seen the son wait on customers at the service station in the presence of his father afforded a reasonable basis for an implied agency and was sufficient to allow a reasonable inference by the jury that such agency existed. In addition to that, from the son's attempt to make plaintiff pay for use of the father's tools, which could properly be viewed as being in furtherance of the father's business, a reasonable inference could also be drawn that it was within the scope of that apparent employment. At least, the jury might well conclude that the son acted within the apparent scope of his authority. It follows that appellant

was not entitled to a directed verdict, that a jury question was presented, and that the verdict was not against the great weight of the evidence.

An employer may be liable even for the tortious acts of an employee if done while acting within the scope of the employment. See *Guipe* v. *Jones,* 320 Mich 1, 5, in which this Court said:

"As authority for the proposition that an employer is liable for injuries resulting from an assault inflicted by an employee while acting within the scope of his employment, see: *Canton* v. *Grinnell,* 138 Mich 590; *Zart* v. *Singer Sewing Machine Co.,* 162 Mich 387; *Moffit* v. *White Sewing Machine Co.,* 214 Mich 496."

In *Anderson* v. *Schust Co.,* 262 Mich 236, a suit for damages resulting from negligent driving of defendant's motor vehicle by its employee, this Court said:

"As between the master and servant, the master is liable only when the servant acts within the actual scope of his authority, but as between defendant and third persons injured by the acts of the servant, defendant may be liable when the servant is acting within the apparent scope of his authority."

Appellant claims error in the court's admitting into evidence plaintiff's testimony that, on the occasion in question, the son had said he was the boss when the father was out of town. Appellant is correct in his contention that agency cannot be established by the declaration of the supposed agent alone. *Mitchell* v. *Western Fire Insurance Co.,* 272 Mich 204. Even so, when testimony as to such declarations does not stand alone but attending facts and circumstances are shown from which an inference of agency may be drawn, the question is one for the jury. *Douglas* v. *Insurance Company of North America,* 215 Mich 529. Such is the situation at bar. Appellant cites no case in support of his

claim of error in admitting the testimony concerning the son's statement that he was boss in his father's absence. Under the facts in the case supporting a finding of agency, prejudicial error cannot be said to have occurred in admitting the testimony to which appellant objected.

As for the claim of error in admission of testimony that the father had not filed with the county clerk a certificate showing him to be the one doing business under the assumed name here employed, appellant fails to show how that could have prejudiced his defense in this case.

There was no error in instructions to the jury that:

(a) The principal is liable for the acts of an agent when performed in an endeavor to promote the principal's business "within the scope of actual or apparent authority conferred upon him for that purpose."

(b) "And in this case you have a right to consider the family relationship and the custom of children working at their father's gas station as bearing on the question of employment of Charles Phillips for his father."

Appellant contends it was error to admit hospital records, made and kept in the regular course of business, concerning plaintiff's treatment and the diagnosis which showed that he had suffered a concussion. CL 1948, § 617.53 (Stat Ann 1962 Rev § 27.902), in effect when this case was tried, made the records admissible in evidence. See *Harrison* v. *Lorenz,* 303 Mich 382; *Valenti* v. *Mayer,* 301 Mich 551; *Harvey* v. *Silber,* 300 Mich 510; and *Gile* v. *Hudmutt,* 279 Mich 358. The fact that one of the records contained a diagnosis by a physician not called as a witness does not render the record inadmissible. It was supported in its content by the

testimony of another doctor. No prejudice to appellant occurred in this respect.

It was not error for the court to charge the jury on future pain and suffering merely because there was no medical testimony that future pain and suffering would occur. Appellant cites, in this connection, *McDuffie* v. *Root,* 300 Mich 286. There this Court upheld submission to the jury of the question of future pain and suffering on the strength of testimony that plaintiff never had suffered headaches before the accident but they began soon thereafter and still continued. In the instant case, plaintiff testified that at time of trial, 1-1/2 years after the son had assaulted him, he still was suffering pain, that before he had been in good health and had not suffered from said pain and a flick of the nerves in his nose which now afflicted him. A doctor testified that plaintiff was still coming to him for treatment. This constituted a sufficient evidentiary basis for jury consideration of future pain and suffering.

Affirmed. Costs to plaintiff.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

TOMCHAK *v.* HANDRICKS.

SAYLES *v.* SAME.

1. TENANCY IN COMMON—MARRIAGE TO COTENANT.
   A man who marries 1 of several cotenants of real property does not, by such marriage, become a cotenant.

2. SAME—PARTNERSHIP OF COTENANT AND HUSBAND.
   A partnership was not a cotenant of premises, where the partnership consisted of a husband and wife who operated a tavern business on premises owned as cotenants by her and her daughters by a previous marriage.

3. SAME—COTENANT AS GUARDIAN OF MINOR COTENANTS—LIABILITY FOR RENT.
   A mother, who with her minor daughters were cotenant owners of premises on which was operated a tavern business by the mother and her second husband as a partnership, was an exception, as guardian of her daughters, to the rule that 1 cotenant, in possession of premises owned by them, cannot be held liable to the other cotenant for rent.

4. GUARDIAN AND WARD—FIDUCIARY.
   The guardian of a ward occupies a fiduciary relationship to the ward.

5. ACCOUNTING—PLEADING—EVIDENCE.
   Husband's claim, as appellant of himself and former wife, defendants in suit for accounting brought by daughters of the wife by a former husband, cotenants with the wife owning the premises on which the husband and wife had conducted a tavern business, that there should be allowed a credit to him for funds expended by himself and wife, during their marriage

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REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Cotenancy §§ 11, 20.
[2] 14 Am Jur, Cotenancy § 3.
[3, 5] 14 Am Jur, Cotenancy § 33.
Accountability of cotenants for rents and profits or use and occupation. 51 ALR2d 388.
[4] 25 Am Jur, Guardian and Ward § 205 *et seq.*

and living together as a family with plaintiffs, for the latter's support and education is disallowed, where he had filed no cross-bill, sought no such relief in his answers to plaintiffs' bills of complaint, and offered no proofs concerning such expenditure.

Appeal from Calhoun; Coleman (Creighton R.), J. Submitted March 6, 1963. (Calendar Nos. 75, 76, Docket Nos. 49,898, 49,899.) Decided May 9, 1963.

Bill by Elaine Tomchak against Catherine Tomchak Handricks and John Handricks to determine fair rental value of cotenancy property, for accounting and injunctive relief. Similar action by Elizabeth Sayles. Causes consolidated on trial and for appeal. Decree for plaintiffs. Defendant John Handricks appeals. Affirmed.

Hatch & Sculthorp, for plaintiffs.

James R. Golden and *Noble O. Moore,* for defendant John Handricks.

DETHMERS, J. The cases of the 2 plaintiffs were combined for trial and appeal here. They are daughters of defendant Catherine. Her first husband, plaintiffs' father, died leaving a business property used as a tavern for the sale of liquor. He left a 2/9 interest in the real estate to each of his 2 minor daughters, respectively, the plaintiffs herein, and a 5/9 interest to their mother, defendant Catherine.

While plaintiffs were still minors their mother married defendant John Handricks. For years thereafter the 4 parties lived together as 1 family. Plaintiffs were supported and educated out of funds the defendants made in the tavern, which the court found was jointly operated by defendants as a partnership, in the building in question. Catherine was

the duly appointed guardian of the then minor plaintiffs. She did not inventory their real-estate interests in the guardianship proceedings. No rent was paid by defendants or the partnership for use of the building.

Ultimately a divorce occurred between defendants. Plaintiffs then brought these suits for an accounting, injunctive relief and for a decree for their respective 2/9 share, each, in the fair rental value of the property during the period defendants operated the tavern therein. From decree for plaintiffs, defendant John Handricks appeals.

Appellant's first contention is that he was not liable to plaintiffs for rent because each cotenant is entitled to occupy and use the whole estate and 1 cotenant may not recover rent from the other for use of the premises in the absence of an express agreement to pay it. Cited for this are *Everts* v. *Beach,* 31 Mich 136 (18 Am Rep 169); *Wilmarth* v. *Palmer,* 34 Mich 347; *Owings* v. *Owings,* 150 Mich 609; and *Zwergel* v. *Zwergel,* 224 Mich 31. Appellant's difficulty in this connection is that there is nothing to show that he was a cotenant or had any such interest in the real estate. His marriage to 1 of the cotenants did not make him one. Furthermore, the evidence supports the court's finding that the business was operated by the 2 defendants as a copartnership. The copartnership was not a cotenant with plaintiffs. The mother was their cotenant, but she has taken no appeal. Furthermore, as guardian of her daughters she bore a fiduciary relationship to them, which could give rise to an exception to the rule that 1 cotenant, in possession of the premises owned by them, cannot be held liable to the other cotenant for rent. See annotation in 51 ALR2d 388, in which, at page 440, it is said:

"Evidently a cotenant who is in charge of the premises in a fiduciary capacity may become liable for rental value."

Appellant claims error in the trial court's failure, in determining rent due from him to plaintiffs, to credit him for funds expended by defendants, during their marriage and living together as a family with plaintiffs, for the support and education of plaintiffs. Appellant filed no cross-bills and sought no such relief in his answers to plaintiffs' bills of complaint. At trial he offered no proofs concerning such expenditure. He cannot now claim error in that respect.

Affirmed. Costs to plaintiffs.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PEOPLE v. CASTELLI.

1. CRIMINAL LAW—WARRANT—FAILURE TO BRING ACCUSED TO MAGISTRATE FORTHWITH—JURISDICTION.

   Denial of motion to quash information because defendant had not been taken forthwith before the magistrate who had issued the warrant was not error, as the statute requiring that such action be taken forthwith does not command the officer to do so nor cause the court to lose jurisdiction because the officer has not acted forthwith, and defendant's conduct which resulted in his incarceration in jail in another county for another crime was a barrier to compliance with the statute (CL 1948, § 766.3).

2. SAME—SPEEDY TRIAL.

   One accused of crime is entitled to a speedy trial (Const 1908, art 2, § 19).

3. SAME—SPEEDY TRIAL—TIME.

   A *speedy trial,* as the term is used in the Constitution according one accused of crime the right to a speedy trial, means such reasonable time under all the attendant circumstances as will give the people an opportunity to present its case in court (Const 1908, art 2, § 19).

4. SAME—SPEEDY TRIAL—DISCRETION OF COURT.

   What constitutes a speedy trial in a criminal prosecution for crime depends upon the circumstances of the case, much being left to the discretion of the trial court (Const 1908, art 2, § 19).

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur, Indictment and Information §§ 138–143.
[2–4] 14 Am Jur, Criminal Law §§ 134–138.
[5, 6] 14 Am Jur, Criminal Law §§ 134–138.
Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense. 118 ALR 1037.
[7] 14 Am Jur, Criminal Law § 214 *et seq.*
[8] 20 Am Jur, Evidence § 309 *et seq.*
[9, 10] 58 Am Jur, Witnesses § 3.

5. SAME—SPEEDY TRIAL—RECORD.

Defendant in prosecution for unarmed robbery *held,* not to have been denied a speedy trial, where record shows that warrant therefor was issued November 3, 1960, and sent to sheriff in another county where defendant was then in jail for a narcotics charge, return made by such sheriff on March 21, 1961, defendant was in the State prison, complaining witness was then ill, defendant was brought to county seat on August 25, 1961, for examination, informed against August 31, 1961, and brought to trial November 3, 1961 (Const 1908, art 2, § 19; PA 1957, No 177).

6. SAME—PUBLIC POLICY—SPEEDY TRIAL—IMPRISONMENT FOR ANOTHER CRIME—COMMENCEMENT OF PROCEEDINGS.

Public policy, as expressed by the legislature with respect to the meaning of a speedy trial of one serving a prison sentence upon conviction of some other crime, calls for bringing to trial within 180 days after the department of corrections shall notify the appropriate prosecuting attorney of the accused's imprisonment and a request for final disposition of the information, the statutory requirement being satisfied by the taking of good faith action to start the proceedings in motion (Const 1908, art 2, § 19; PA 1957, No 177).

7. SAME—IMPRISONMENT FOR ANOTHER CRIME—JURISDICTION.

Jurisdiction to try defendant on charge of unarmed robbery was not lost, where defendant had been delivered to State prison on sentence for a narcotics charge on March 3, 1961, and proceedings on the robbery charge were commenced on August 25, 1961 (PA 1957, No 177).

8. SAME—IDENTIFICATION OF ROBBER—EVIDENCE—SHOWUPS.

Error which may have been injected into prosecution for unarmed robbery by reason of prosecution's questioning of a police officer at the trial concerning pictures he had shown the complaining witness for purposes of identifying her assailant together with the testimony that defendant was identified in the showup at a county jail, because such testimony improperly injected into the minds of the jurors that defendant had been arrested before and perhaps had a criminal record *held,* obviated by defense counsel's opening statement wherein he told the jurors the police had shown the complaining witness pictures, including 1 of defendant which she identified as being a picture of the robber and that she had testified about it at the examination.

9. SAME—RES GESTAE WITNESS—EXCUSE FOR FAILURE TO PRODUCE.
The failure of the people to call a *res gestae* witness in a prosecution for crime is properly excused, where officers made a diligent search for him but were unable to locate him.

10. SAME—IDENTITY OF ROBBER—FAILURE TO INDORSE NAME OF WITNESS.
It was reversible error for the people in prosecution for unarmed robbery to fail to indorse on information the name of a witness who was known to police and who saw a man running where 3 other witnesses testified they had seen him but who gave police officers a different description than the unindorsed witness, inasmuch as identity of the robber was a major issue in the case and the testimony of such unindorsed witness would not have been merely cumulative.

Appeal from Oakland; Holland (H. Russel), J. Submitted March 8, 1963. (Calendar No. 89, Docket No. 50,069.) Decided May 9, 1963.

Rudolph Castelli was convicted of robbery unarmed. Reversed and new trial granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George F. Taylor,* Prosecuting Attorney, *Robert L. Templin,* Assistant Prosecuting Attorney, for the people.

Norman L. Zemke and *Monis Schuster,* for defendant.

DETHMERS, J. On September 9, 1960, a woman, who is the complaining witness in this case, went into a bank in Oakland county, withdrew $6,000 in cash, had it put into a white bag, and walked out of the bank toward her automobile parked nearby. A man came up to her, told her to keep quiet, grabbed for the bag with the money in it, knocked her down, seized the bag and ran off with it.

On October 24, 1960, defendant was arrested by Detroit police on a Wayne county narcotics charge

and confined in the Wayne county jail until February 28, 1961. On the latter date he was sentenced in the recorder's court of Detroit to serve 1 to 5 years after having entered a plea of guilty to the narcotics charge. On March 3, 1961, he was delivered to State prison to serve said sentence.

On November 2, 1960, as the result of identifications made by the complaining witness from photographs and showups in the Wayne county jail, a warrant was issued in this case in Oakland county charging defendant with the unarmed robbery. On November 3, 1960, the warrant was sent to the Wayne county sheriff in whose custody defendant then was. On March 21, 1961, the Wayne sheriff returned the Oakland county warrant to authorities there, advising that defendant now was in State prison under sentence on the Wayne county narcotics charge. In April and May of 1961 the Oakland authorities sought to contact the complaining witness in this case for the purpose of arranging to proceed with a preliminary examination herein. They learned that she was ill, first in a hospital and then at home. On August 25, 1961, on a writ of habeas corpus, defendant was brought to Oakland county and the examination in this case was held on August 30, 1961. Defendant was bound over to circuit court for trial and an information was filed in that court on August 31, 1961. On October 19, 1961, defendant moved to quash the information and discharge him for the reason that (1) he had been denied a speedy trial and (2) because, upon issuance of the warrant, he had not been taken forthwith before the magistrate as provided in CL 1948, § 766.3 (Stat Ann 1954 Rev § 28.921), and, finally, (3) because the court had lost jurisdiction to try him in that there had not been compliance with the requirements of PA 1957, No 177 (CL 1948, § 780.131 *et seq.* [Stat Ann 1961 Cum Supp § 28.969(1) *et seq.*]), that a prison inmate

shall be brought to trial, on a pending criminal charge other than that for which he is imprisoned, within 180 days after the department of corrections shall notify the prosecuting attorney of the appropriate county of the fact of the inmate's imprisonment in State prison and request final disposition of the information. The motion was denied. On November 3, 1961, defendant was brought to trial. At the conclusion of the people's proofs, defendant moved for a directed verdict on the ground that he had been denied the opportunity to confront and cross-examine all of the *res gestae* witnesses, known to the authorities to be such before trial, as a result of the prosecution's failure to indorse their names on the information and produce them as witnesses at trial. This motion was denied. On November 6th a jury returned a verdict of guilty of robbery unarmed, and defendant thereafter was sentenced to serve a prison term.

Defendant appeals here, seeking reversal on the 4 grounds urged for the 2 motions as above noted and the additional one that prejudicial error was committed by introduction of evidence that defendant had a previous criminal record.

CL 1948, § 766.3 (Stat Ann 1954 Rev § 28.921), requires the magistrate, under proper circumstances, to issue a warrant commanding the officer to take the accused forthwith and bring him before the magistrate. The statute does not command the officer to do so. It does not provide that jurisdiction is lost by the officer's failure to do so. In the instant case, defendant indulged conduct which placed a considerable barrier in the way of the officer's doing so by getting himself incarcerated in another county. There is no authority for a holding, on this basis, for reversal, quashing the information, complaint and warrant and dismissing defendant. We decline so to hold. Defendant cites *People* v. *Hamilton,* 359

Mich 410, in this connection. It has no application to this case in which defendant was in jail in another county on another charge when the warrant herein was issued. Neither is there here involved the main question presented in *Hamilton,* namely, admissibility of a confession.

An accused is entitled to a speedy trial. Michigan Constitution of 1908, art 2, § 19. Discussion of what constitutes a speedy trial as thus guaranteed may be found in *Hicks* v. *Judge of Recorder's Court of Detroit,* 236 Mich 689, and *People* v. *Den Uyl,* 320 Mich 477. In *Hicks* it was said:

"In view of this constitutional provision it becomes necessary to inquire what a speedy trial means. We apprehend it means such reasonable time under all the attendant circumstances as will give the people an opportunity to present its case in court. 16 CJ, Criminal Law § 793 *et seq.,* p 439 *et seq.* A speedy trial does not mean that the defendant is entitled to have his trial commence immediately after being bound over to the trial court. What would be a reasonable time in 1 case would be perhaps unreasonable in another. The question might be affected by the gravity of the offense, the number of witnesses involved, the terms of court, and many other circumstances. Owing to this, much must necessarily be left to the discretion of the trial court. The trial court must exercise its best judgment upon such applications, keeping in mind, however, the defendant's constitutional rights."

Defendant was not incarcerated, during the delay, on this charge, but in another county, and ultimately in State prison, on another. Soon after his conviction and imprisonment in the other case, the complaining witness in this case was ill for a time in the hospital and at home. Her testimony was essential to the people's case. The people were entitled to

such reasonable time as would give the prosecution an opportunity to present its case in court.

The right to a speedy trial of one imprisoned under sentence or conviction of another crime in another court must be viewed in the light of the provisions of PA 1957, No 177 (CL 1948, § 780.131 *et seq.* [Stat Ann 1961 Cum Supp § 28.969(1) *et seq.*]). This expresses the legislative policy, or public policy established by the legislature, as to the meaning of the constitutionally guaranteed right to speedy trial of one serving a prison sentence upon conviction of some other crime. It calls for bringing to trial within 180 days after the department of corrections shall notify the appropriate prosecuting attorney of the accused's imprisonment and a request for final disposition of the information. When this statute has been complied with, the right to a speedy trial has been observed. In *People* v. *Hendershot,* 357 Mich 300, this Court held that the statutory requirement that the accused "shall be brought to trial" within 180 days does not require actual trial within that time, but only the taking of good faith action to start the proceedings in motion. In this case the department of corrections never did notify the prosecuting attorney of Oakland county of defendant's imprisonment or request disposition of the information. However, inasmuch as defendant was not delivered to the department and to State prison until March 3, 1961, no duty could have reposed on the department to do so before that date. 180 days thereafter had not yet expired when, on August 25, 1961, the Oakland county prosecuting attorney commenced proceedings, under the *Hendershot* holding, by habeas corpus to bring defendant before the magistrate for examination. Jurisdiction to try defendant, accordingly, was not lost and he is not entitled to discharge on the ground just considered.

Defendant claims reversible error in the prosecu-

tion's questioning of a police officer at the trial concerning pictures he had shown the complaining witness for purposes of identifying her assailant. One was of defendant. The pictures were produced in the sight of the jury. Defendant's picture had the date of his arrest noted thereon. The date was cut from the picture before it was allowed in evidence and shown to the jury. Defendant says that this, and testimony that defendant was identified in a showup in the Wayne county jail, improperly injected into the minds of the jurors that defendant had been arrested before and perhaps had a criminal record. He at no time took the witness stand. Such error as might have been injected into the case in this manner is obviated by the fact that defendant's counsel, in his opening statement made to the jury before the people had adduced any of their proofs, opened the door to this subject by telling the jurors that the police had shown the complaining witness some pictures, including one of defendant which she had identified as being a picture of the robber, and that she had testified about it at the examination.

Finally, we come to defendant's claim of error and the right to new trial because of the people's failure to indorse on the information the names of 2 so-called *res gestae* witnesses and to call them as witnesses. As to one, the failure was properly excused, as the trial court held, by a showing that the officers had made a diligent search for him and were unable to locate him. As to the other witness, a different situation is presented. The further pertinent facts with respect thereto are as follows: The complaining witness testified concerning the robbery, described the robber and told about his running from the scene and the way he went. Another witness saw the robbery and the robber fleeing from the scene and testified thereto. A third witness, while in her home across the street, heard the victim

scream, ran out to her front porch from where she saw the man running. All 3, in their testimony, described the robber and the course of his flight. They corroborated each other in description of the robber and where he ran. According to a police report, read into the record by defendant's attorney in the absence of the jury, another woman sitting in a car nearby told police officers that at that time and place she, too, saw a man running where the others testified that they had seen him. Her description of the man differed from that of the 3 witnesses who testified. She was not called as witness by the people nor was her name indorsed on the information. The first that defendant or his counsel heard of her was at trial. The court stated that it did not appear from the police report that the witness had been able to get a good view or more than a fleeting glimpse of the running man or that she would be able to identify him and that, hence, it did not feel that the trial should be delayed so that she could be brought in to testify because it did not appear that her testimony would be helpful to either party. Inasmuch as identity of the robber was a major issue in the case, the testimony of every witness who could describe him was of utmost importance. If, as the police report indicates, the description by one not called as a witness would be in conflict with that of those who did testify, defendant was entitled to the benefit thereof before the jury. Her testimony would not have been merely cumulative. Failure to indorse this woman's name on the information and to produce her at trial was reversible error. *People* v. *Blazenzitz,* 212 Mich 675.

Reversed and new trial granted.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PEOPLE *v.* FRANCE.

CRIMINAL LAW—OFFENSE COGNIZABLE BY JUSTICE OF THE PEACE—PERSONAL KNOWLEDGE OF COMPLAINANT—SWORN COMPLAINT.

On review of order granting motion to quash a sworn criminal complaint, purporting to charge as a matter of the personal knowledge of complainant that defendant had committed an offense cognizable by a justice of the peace, attacked on the ground that the complainant did not have personal knowledge of the facts charged but had signed it on information and belief, complaint and warrant are reinstated, where record fails to show the complaint to have been insufficient.

Appeal from Wayne; Kaufman (Nathan J.), J. Submitted January 9, 1963. (Calendar No. 15, Docket No. 49,610.) Decided May 9, 1963.

Donald Edward France was charged, in a complaint taken before a justice of the peace, with reckless driving. Case adjourned after partial trial. On certiorari to circuit court complaint and warrant quashed. The people of the City of Riverview appeal. Reversed and remanded for reinstatement of complaint and warrant and for trial before justice of the peace.

Donald C. Neitzel, City Attorney for Riverview, for plaintiff.

Carl L. Rhoads and *Kenneth D. Harrison,* for defendant.

REFERENCES FOR POINTS IN HEADNOTE

14 Am Jur, Criminal Law § 245; 31 Am Jur, Justices of the Peace § 66.

DETHMERS, J. The question is whether a sworn criminal complaint, purporting to charge as a matter of personal knowledge of complainant that defendant committed an offense cognizable by a justice of the peace, may be attacked on the ground that the complainant did not have personal knowledge of the facts charged but, in fact and contrary to the face of the complaint, signed it on information and belief. Plaintiff appeals from a circuit court holding, on certiorari, in the affirmative and dismissal of the complaint and warrant accordingly.

Plaintiff cites the following, *inter alia: People* v. *Lynch,* 29 Mich 274, in which this Court held that a criminal complaint, in form charging as of complainant's personal knowledge the commission of a crime, was amply sufficient to give the justice of the peace jurisdiction to issue the warrant and examine the prisoner, not to be defeated by a subsequent contrary showing; *People* v. *Hare,* 57 Mich 505, with similar holding; *People* v. *Haas,* 79 Mich 449, in which it was held that the complaint, being regular on its face to show complainant as charging the offense of his own knowledge, conferred jurisdiction on the justice which could not later be destroyed by a showing to the contrary. *People* v. *Czckay,* 218 Mich 660, to the same effect; *People* v. *Mosley,* 338 Mich 559, holding that the positive sworn statements, as of personal knowledge, of the complainant, confer jurisdiction on the justice, and that a subsequent showing that the complaint actually was made only on information and belief, cannot avoid the warrant; and the recent case, *People* v. *Davis,* 343 Mich 348, holding that when the complaint on its face proceeds from the personal knowledge of the complainant, it confers jurisdiction on the justice to issue the warrant which cannot later be impeached for complainant's lack of such personal knowledge.

Of the above authorities defendant says that they

all involve felonies or circuit court misdemeanors and hence are not applicable to the instant case which is cognizable by a justice of the peace. Defendant stresses that in a case not cognizable by a justice of the peace an opportunity is afforded for a preliminary examination where objections to defects in proceedings may be raised, but that here no such opportunity exists and therefore a different rule should obtain as to impeachability of a warrant and proceedings on the grounds here asserted. In none of the above cited cases, however, has the availability of a preliminary examination been held or said to be a factor in this Court's decisions holding that complaints which show on their face complainant's personal knowledge of the facts charged confer jurisdiction on the justice to issue a warrant which is not subject to subsequent attack by showing complainant's lack of that personal knowledge.

People v. *Schottey,* 66 Mich 708, is a case, as here, cognizable by a justice of the peace. It holds contrary to defendant's position. There defendant was charged in a complaint, to which complainant swore positively and not as on information and belief, with an offense on which he was tried in the police court of Grand Rapids and convicted. He appealed to circuit court, where he first made a motion to dismiss because the complaint was not actually made on complainant's personal knowledge although, on its face, it appeared to be. The motion was denied, and, on trial in circuit, he was convicted again. He appealed to this Court. In affirming the conviction, this Court said of the complaint and its averments:

"This averment is such as would be made by an eyewitness, and could only be properly made by one having knowledge. It was therefore enough, if true, to sustain a prosecution, and the police justice had a right to act upon it as true. Had it indicated that complainant had no personal knowledge, some fur-

ther examination ought to have been had before issuing a warrant. But this complainant swore to positive facts which he or anyone else might have known, and, so swearing, assumed to know. The fault of a complaining witness in not adhering to the truth cannot avoid a warrant, so as to prevent jurisdiction from attaching. * * *

"The jurisdiction having once attached, and the case being regularly at issue for trial, there was nothing left to do but try it on the merits, and it could not be dismissed or otherwise put out of court."

It is true, as defendant urges, that *Schottey* is distinguishable from the case at bar in that there defendant did not raise his objection to the complaint and warrant in justice or police court but waited until he was in circuit court, on appeal, while here the objection was raised in justice court. Of that distinction, raised in like fashion in *Potter* v. *Barry Circuit Judge,* 156 Mich 183, 185, this Court, in speaking of the *Schottey Case,* said:

"It is true that in this case the question was raised in the circuit court, and does not appear to have been raised before the magistrate; but, if it is a jurisdictional question, it can hardly be said to have been waived by anything that occurred in justice's court. We do not understand the case to turn upon that question. It was held that jurisdiction attached, and, if jurisdiction attached for the issuing of the warrant, it could not be impeached any more successfully in justice's court than in the circuit court. Again, in *People* v. *Haas,* 79 Mich 449, the case of *People* v. *Lynch* was commented on and followed. The case of *People* v. *Heffron,* 53 Mich 527, is distinguishable, for the reason that the complaint in that case on its face showed that the affidavit was not made upon the personal knowledge of the affiant."

Note is taken of the last above comment of this Court in *Potter,* that *People* v. *Heffron,* 53 Mich 527, is distinguishable because the complaint showed on

its face that it was made on the information and belief of the complainant. In *Potter* this Court also held, as in the others above, that when the complaint is regular on its face, showing it to be made on complainant's personal knowledge, it is not subject to impeachment on a showing that it actually was made only on information and belief.

The circuit court was in error. Reversed and remanded for reinstatement of the complaint and warrant and remand to justice court for trial thereon.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

O'HARA, J. (*concurring*). We deem it necessary to record a reservation in our concurrence with the conclusion reached by Mr. Justice DETHMERS.

By reason of the incompleteness of our record we believe it impossible to pass on the issue decided by the trial court, and urged in support of that decision by the appellee. A skimpy record tells us only that a motion to dismiss the complaint was timely made, *i.e.,* at the first opportunity *after a witness was sworn.* Someone named Myrtle Gravier, unidentified except as a witness on the part of the people testified to her name and address. Immediately thereupon counsel made his apparent oral motion. This ploy, we assume, was intended as insurance against retrial by reason of prior jeopardy.

We have no information as to the basis upon which the trial court made its finding that the complaint was issued on other than the statutory requirement that the justice "examine the complainant on oath and witnesses produced by him, * * * and if it shall appear that such offense has been committed, the justice shall issue his warrant." (CL 1948, § 774.4, as amended by PA 1958, No 136 [Stat Ann 1961 Cum Supp § 28.1195].)

We subscribe in a general way to the statement by the trial court that "it is not fair to make something legal by doing it illegally,"—and under a proper record we might well want to re-examine some existing precedent.

However, we may not on review assume to have been done, that which is only alleged to have been done in conclusionary terms, when such action forms the whole basis of the challenge to the validity of the proceedings.

For want of any of record information establishing the insufficiency of the complaint, we concur with Justice DETHMERS.

BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred with O'HARA, J.

SCHROT *v.* GARNETT.

1. EQUITY—JURISDICTION—ADEQUACY OF REMEDY AT LAW.
   A right being shown which otherwise might appeal to equity's concurrent jurisdiction, and the legal remedy being established as inadequate, is by itself a sufficient invocation of equity jurisdiction.

2. SAME—EQUITABLE LIEN—ADEQUACY OF REMEDY AT LAW.
   All well-pleaded allegations of bill to establish an equitable lien on defendant's home property, including inadequacy of legal remedy, having been admitted by defendant by his failure to answer or move, entitled plaintiff to decree in his favor, where

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REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Equity § 100 *et seq.*
[2] 33 Am Jur, Liens § 45.
[3, 4] 33 Am Jur, Liens § 18 *et seq.*

the equities were all in favor of plaintiff and the rights of no other creditor of defendant have been disclosed or affected.

3. SAME—EQUITABLE LIEN.

Equity from the relations of the parties may declare an equitable lien out of considerations of right and justice, and where the plaintiff has shown that, in good conscience, he is entitled to the lien claimed.

4. SAME—EQUITABLE LIEN—ATTORNEY AND CLIENT.

An equitable lien on real estate, the home property of defendant, is properly imposed in the absence of a written contract between plaintiff, an attorney, and defendant, his client, where the intent to give identifiable security for sums expended and attorney fees, is clear and the plaintiff has dealt in reliance upon such intent, such being established by having been taken as confessed by defendant.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted April 4, 1963. (Calendar No. 34, Docket No. 49,820.) Decided May 9, 1963.

Bill by Leo S. Schrot against George A. Garnett to establish and enforce an equitable lien on real property for money advanced and services rendered. Bill dismissed. Plaintiff appeals. Reversed and remanded for entry of decree.

Maurice D. Sharai, for plaintiff.

BLACK, J. To get his urgently supplicating client out of jail, the plaintiff attorney agreed with the client to pay certain of the latter's child support arrearages in the sum of $250. The agreement was made on strength of the client's promise to execute in favor of the attorney a mortgage of the client's home premises in the sum of $350. The amount of the mortgage, per agreement, was to be made up of the payment plus a counsel fee of $100.

The attorney paid the arrearages as agreed. The client, however, having been released from custody, refused to execute the agreed form of mortgage upon

tender thereof to him for signature. To secure payment of the stipulated sum the attorney thereupon filed this bill to impress an equitable lien upon the defendant client's home premises. The bill duly alleged all facts requisite to equity jurisdiction, including total inadequacy of a remedy at law against defendant. The bill was duly taken as confessed upon entry of defendant's default; whereupon the trial chancellor dismissed the bill *sua sponte*. Plaintiff has appealed.

It was the judicial view below that plaintiff's remedy at law was adequate, a view with which we disagree. A right being shown which otherwise might appeal to equity's concurrent jurisdiction, and the legal remedy being established as inadequate, is by itself a sufficient invocation of such jurisdiction. For dependable discussion and clear exposition of this principle, see chapter 2, 1 Pomeroy's Equity Jurisprudence (5th ed), § 216 *et seq.*, pp 366–391, headed "Inadequacy of Legal Remedies," and 19 Am Jur, Equity, § 111, p 116.

Upon *de novo* consideration it is ruled that plaintiff should have a decree in accord with the prayer of his bill. By failing to answer or move defendant has admitted all well-pleaded allegations of the bill, including inadequacy of legal remedy, and so the only question is whether by the principles of equity plaintiff is entitled to the lien he seeks. The equities being all 1 way, and the rights of no other creditor of defendant being disclosedly involved or affected, the judicial answer should be affirmative. In *Kachman* v. *Sago,* 331 Mich 662, 667, this Court quoted the following from *Cheff* v. *Haan,* 269 Mich 593, 598, 599:

"Equity from the relations of the parties may declare an equitable lien out of considerations of right and justice based upon the fundamental principles of equity jurisprudence";

and later, in *Steggall* v. *Steggall,* 274 Mich 402, 405, went on to say:

"We indicated in *Cheff* v. *Haan,* 269 Mich 593, 599, some of the conditions upon which a court of equity will create a lien upon real estate in the absence of a written contract, saying:

" 'In all cases the person seeking to establish the lien must show that in equity, in good conscience, he is entitled to the lien claimed.' "

The quoted rules were announced first in *Kelly* v. *Kelly,* 54 Mich 30, 47 (followed particularly as well as generally in *Van Camp* v. *Van Camp,* 291 Mich 688, 696). They apply "in the absence of a written contract" where the intent to give identifiable security is clear and the complainant has dealt in reliance upon such intent. Plaintiff's bill makes the required clear showing, it having been taken as confessed by defendant.

Reversed and remanded for entry of decree in accord herewith. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PEOPLE *v.* CHEEVER.

1. JUSTICES OF THE PEACE—DUE PROCESS—JURY TRIAL—FEE COMPENSATION.

   Defendant, charged with illegally parking a motor vehicle under a city ordinance *held*, not denied due process of law by reason of having been denied a fair trial because tried in a court of a justice of the peace whose compensation for official duties was derived from fees including a fee of 60 cents for commitment or mittimus, 60 cents for certificate of conviction, and $2 for making and filing return on appeal, where trial was had before a jury which convicted him, the jury in such court being the judge of both the law and the facts (US Const, Am 14; Mich Const 1908, art 2, § 16; CLS 1956, § 775.2, as amended by PA 1960, No 49).

2. SAME—JURY TRIAL—COMPENSATION.

   The method of remuneration of a justice of the peace in a criminal case can have no direct bearing upon the fairness of a trial by jury in such court as the jury in such court is the judge of both the law and the facts (US Const, Am 14; Mich Const 1908, art 2, § 16).

Appeal from Allegan; Smith (Raymond L.), J. Submitted October 5, 1963. (Calendar No. 82, Docket No. 49,526.) Decided May 9, 1963.

Dwight M. Cheever was convicted of illegally parking his automobile in violation of an ordinance of the city of Otsego. Affirmed.

Morris, Culver & Rooney (*William H. Culver*, of counsel), for city of Otsego.

Dwight M. Cheever, in propria persona.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 31 Am Jur, Justices of the Peace § 33 (Supp).

KAVANAGH, J. Defendant was charged with illegally parking a motor vehicle under the ordinances of the city of Otsego. The criminal warrant was issued by a duly elected justice of the peace of the city of Otsego, Allegan county, Michigan. On his appearance, the defendant stood mute, and a plea of not guilty was entered in his behalf.

Defendant filed a written motion to dismiss the complaint and warrant for the reason that defendant's right to a fair and impartial trial before a disinterested court, as guaranteed by article 2, § 16, of the Constitution of the State of Michigan (1908) and the Fourteenth Amendment to the Constitution of the United States, will be denied him if he is tried before a justice of the peace who is compensated by a fee for each of certain official acts. Defendant's motion was denied.

The case was tried by a 6-man jury. The jury returned a verdict of "guilty as charged."

Defendant appealed by way of certiorari to the circuit court for the county of Allegan. Following argument and submission of briefs, the trial court entered a written opinion sustaining the conviction.

Defendant is here on leave granted raising 2 questions, which are consolidated for the purpose of this decision as follows:

Was defendant's right to a fair and impartial trial before a disinterested court, which right is guaranteed to him by article 2, § 16 of the Constitution of the State of Michigan (1908) and the Fourteenth Amendment to the Constitution of the United States, denied him by being tried before a justice of the peace who is compensated by a fee for each of certain official acts?

It is defendant's contention that due process of law requires essential fairness and justice in judicial proceedings; that in its procedural aspect due process requires the hearing must be before a fair,

impartial, and competent tribunal; that under CLS 1956, § 775.2, as amended by PA 1960, No 49 (Stat Ann 1961 Cum Supp § 28.1239), justices of the peace are paid on a fee basis for each of certain acts performed in connection with criminal cases; and that among the specific fees authorized are: "for commitment or mittimus, 60 cents; * * * for certificate of conviction to file with the clerk, 60 cents; for making and filing return on appeal * * * $2."

Defendant claims that the so-called "fee system" of paying our justices of the peace deprives that court of the independence of thought and mind so necessary to the fair judicial process. He further claims that the "fee system" creates a climate of unfairness and lends itself to temptation by the court to favor the complainant or plaintiff in order to direct business in its direction.

The trial court concluded that the personal interest of the justice court was at most an indirect one and stated it would not interfere with a system that had survived for such a length of time unless convinced the system was so inherently evil as to preclude justice even from honest men.

We conclude the "fee system" does not create such a direct, personal, substantial, or pecuniary interest that it can be said in every case the defendant would be deprived of a fair and impartial trial and his rights under the State and Federal Constitutions.

We note that the remuneration of the justice of the peace or the method of paying him in this criminal case could have had no direct bearing upon the fairness of the trial. He was tried by a jury. Juries in justice courts are the judge of both the law and the facts; therefore, whatever the result might be in a hypothetical case, in the instant case defendant was not deprived of a fair trial as guaranteed him by the State and Federal Constitutions.

The authorities cited by defendant for the judicial abolition of justice of the peace courts are instances where the personal interest of the court was so direct that it was held the judicial process was tainted. We do not find this to be true in the case before us.

Under the new State Constitution effective January 1, 1964, the question before us will not again arise.

Affirmed.

CARR, C. J., and DETHMERS, KELLY, and BLACK, JJ., concurred with KAVANAGH, J.

BLACK, J. (*concurring*). I concur. Defendant's duly demanded trial by jury has rendered moot the serious constitutional question he would have this Court decide.* As Justice KAVANAGH has written, justice court juries are judges of legal issues as well as factual issues. On this record it cannot be said that defendant was denied his constitutionally protected right to a fair and impartial trial. The so-called "fee system" is not shown as having infected the jurors, or as having entered the juryroom as an influence upon their deliberations.

SOURIS and SMITH, JJ., concurred with BLACK, J.

O'HARA, J., took no part in the decision of this case.

* See *Tumey* v. *Ohio*, 273 US 510 (47 S Ct 437, 71 L ed 749, 50 ALR 1243) and discussion thereof in *Lookholder* v. *State Highway Commissioner*, 354 Mich 28, 32.

SMITH v. LAWRENCE BAKING COMPANY.

1. WORKMEN'S COMPENSATION—INJURY NOT DUE TO SINGLE EVENT—LAST EMPLOYER.

   The occupational disease portion of the workmen's compensation act requires that compensation for disability thereunder be recovered 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, the *time of injury* being elsewhere defined in case the injury is not attributable to a single event as the last day of work in the employment in which the employee was last subjected to the characteristic and peculiar conditions resulting in disability from being able to earn full wages at that work (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9).

2. COURTS—STARE DECISIS—CONSTRUCTION OF STATUTES.

   Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right, but 1 decision construing an act does not approach the dignity of a well settled interpretation.

3. WORKMEN'S COMPENSATION—OUT-OF-STATE EMPLOYERS—JURISDICTION.

   The Michigan workmen's compensation act may not be said to apply to employers outside of this State over whom this State has no jurisdiction.

4. SAME—BAKERY EMPLOYEE—BACK INJURY—LIABILITY OF LAST MICHIGAN EMPLOYER.

   Liability for injury plaintiff incurred while operating bread-wrapping and bun-wrapping machines for defendant bakeries in which activity there was continuous, uninterrupted, and ex-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Workmen's Compensation §§ 81, 246.
[2] 14 Am Jur, Courts § 66.
[3] 58 Am Jur, Workmen's Compensation § 36.
[5] 58 Am Jur, Workmen's Compensation § 543.

cessive turning, twisting, and bending of back that ultimately resulted in disability from continuing in such work is imposed upon the last bakery employer in this State, where there is ample testimony to support the finding of disablement and that the Michigan employers had notice of plaintiff's injury (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9).

5. COSTS—WORKMEN'S COMPENSATION—BRIEFS.

Costs are awarded to both plaintiff and defendant-appellant, where liability for workmen's compensation was imposed by the workmen's compensation appeal board solely upon the next to last Michigan employer of plaintiff, whom the board found primarily responsible for the disability, and Supreme Court imposes liability upon the last Michigan employer, there having been 2 other employers out of the State, all parties having filed briefs (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9).

CARR, C. J., and DETHMERS and KELLY, JJ., dissenting.

Appeal from Workmen's Compensation Appeal Board. Submitted December 7, 1962. (Calendar No. 125, Docket No. 49,833.) Decided May 9, 1963.

Harold G. Smith filed his claim against Lawrence Baking Company, employer, Employers Mutual Liability Company, insurer, Gauss Baking Company, employer, and Auto-Owners Insurance Company, insurer, for workman's compensation because of personal injury or disablement from occupational disease causing deterioration and damage to his back. Award to plaintiff with determination that claim be paid by defendants Lawrence Baking Company and its insurance carrier, who appeal. Reversed in part with direction that order enter imposing liability on Gauss Baking Company and its insurance carrier.

Sinas, Dramis, Brake & Werbelow (*Lee C. Dramis,* of counsel), for plaintiff.

George E. Ganos (*Travis, Warren & Nayer* and *Harry M. Nayer,* of counsel), for defendants Law-

rence Baking Company and Employers Mutual Liability Company.

Warner, Hart & Warner, for defendants Gauss Baking Company and Auto-Owners Insurance Company.

KAVANAGH, J. Defendants Lawrence Baking Company and Employers Mutual Liability Company appeal from an award of compensation benefits to plaintiff made by the workmen's compensation appeal board which modified and affirmed an award granted by the hearing referee.

Plaintiff was employed by Lawrence Baking Company in Lansing on May 13, 1955. His job as a bread wrapper involved continuous twisting, turning, and bending. While employed by Lawrence Baking Company plaintiff worked 12 hours a day operating both bread-wrapping and bun-wrapping machines.

Some 6 months prior to June 19, 1957, plaintiff's back began bothering him. On June 19, 1957, the pain was such that he requested the bakery owner, Mr. Jeffries, to allow him a day off. Mr. Jeffries referred him to a chiropractor. Treatment by the chiropractor did not alleviate the trouble, but plaintiff continued to work. He subsequently lost time from work because of the back trouble.

Lawrence Baking Company was sold to defendant-appellee Gauss Baking Company in November, 1957. Plaintiff continued to work on a bread-wrapping machine for Gauss. After numerous requests by plaintiff he was switched to a dough-divider machine in the fall of 1958. This job did not require bending over, and his back trouble let up. Plaintiff left Gauss Baking Company on July 30, 1959.

In August of 1959 plaintiff went to work for the Kroger Baking Company at St. Louis, Missouri, as a wrapper machine set-up man. Plaintiff was re-

quired to move various machines, which were on rollers, by pushing them. His back began to bother him again and as a result he left this job after 2 months.

In October, 1959, plaintiff went to work for Myers Baking Company at Jonesboro, Arkansas, operating a bread-wrapping machine. This work was identical to the work he had done at Gauss and Lawrence. His back continued to cause pain. After he had worked at Myers about 3 weeks, he tripped over an air hose and fell against a table and onto the floor. In falling against the table he struck the lower portion of his rib cage towards the back on the edge of the table. When he started to get up he noticed he had pain extending from his hip to his knee. His employer sent him to a Dr. Molesky, who told him to take a week or 2 off work. Because his back was bothering him and because of the poor wages he was receiving in Arkansas, he wired his mother for money and returned to Lansing. He made no claim for workmen's compensation in Arkansas against Myers Baking Company because he could not afford to remain there and because he "didn't understand the legal technicalities."

Following his return to Lansing, plaintiff consulted several doctors, including Dr. William Meade. Dr. Meade did a myelogram, diagnosed a ruptured disc and subsequently operated, removing the disc. Shortly thereafter, because of instability of the spine, a fusion for stabilization was performed by Dr. W. O. Badgley. In this operation a bone graft and a plate were fused to plaintiff's lumbosacral spine.

Plaintiff's compensation claim alleged personal injury or disablement from occupational disease in the alternative; and, in regard to each, specified back trouble brought on by the use his back had been put to while at Lawrence Baking Company and Gauss

Baking Company. The referee found that plaintiff received a personal injury arising out of and in the course of his employment with Lawrence on November 1, 1957, and with Gauss on December 30, 1958. The November 1, 1957, date was the last day plaintiff worked for Lawrence and December 30, 1958, was the date Gauss switched him to the dough-divider machine. The referee also found that plaintiff suffered a disability due to causes and conditions characteristic of and peculiar to the employment with both Gauss and Lawrence. He ordered that the exposure be shared by the 2 employers on the basis of Lawrence and its insurance carrier paying 2/3 and Gauss and its insurance carrier paying 1/3.

On appeal to the workmen's compensation appeal board, the board, in a unanimous opinion, found that the work for Lawrence Baking Company constituted the primary and principal cause of plaintiff's symptoms and subsequent disability and modified the referee's award so as to place the entire burden of compensation upon Lawrence. The board's findings with respect to the nature and time of injury are summarized as follows:

"The regular work which plaintiff performed for Lawrence during the period from May 13, 1955, to November 1, 1957, was very rigorous and strenuous in nature. It required constant and continuous bending, turning and twisting without interruption for prolonged periods day after day. This work involved a hazard of back injury far greater than that encountered in employment in general. Plaintiff's back symptoms first appeared some 3 to 6 months prior to June 19, 1957. Medical treatment then provided by the employer failed to alleviate the distressing condition. The work for Lawrence constituted the primary and principal cause of plaintiff's symptoms and subsequent disability. Plaintiff has unquestionably been totally disabled since November 1, 1959.

"It is true that plaintiff operated a bread-wrapping machine for Gauss from November 1, 1957, to December 30, 1958. However, this was a different type machine and this work was not a significantly contributing factor in connection with plaintiff's back injury and disability.

"It appears that the actual disc herniation may have occurred at the time of the accident in Arkansas. But the degeneration which made the ultimate rupture inevitable took place much earlier during the course of plaintiff's employment by Lawrence. The 'accusing finger' is pointed at the continuous, uninterrupted, and excessive turning, twisting, and bending which took place during that period of employment."

The board's use of the term "accusing finger" is a reference to the testimony of Dr. Badgley in answer to the following questions:

"*Q.* Are you able to formulate an opinion as to whether or not repeated twisting and bending in which he (plaintiff) engaged to the extent related while working at Lawrence and Gauss Baking Company, played a part in causing the condition of the ruptured disc which was operated by Dr. Meade?

"*A.* Yes, I have an opinion.

"*Q.* Would you state that opinion please?

"*A.* In about 3 parts. First of all, that was a tremendous amount of twisting and bending which as I have testified on other occasions is a matter of fraying a rope or a cable. The fact that it was fraying or beginning to produce the symptoms for which he was treated and later, he ruptured his disc which as I gather from your remarks, was a blow in the back, not a fall. He fell back against a table and the table hit his back. I would assume that the degeneration of the annulus fibrosis occurred while he was on this excessive twisting and bending job and the final rupture was inevitable due to the weakness of the annulus. To make it short, I would point the

accusing finger at the excessive twisting and bending during that period of time."

The litigants in this suit do not dispute the finding of the referee and appeal board, that plaintiff has suffered a personal injury and is disabled within the meaning of the act. Who should pay forms the basis of the present controversy. The answer to this question does not depend on whether plaintiff's employment with Lawrence or Gauss or Kroger or Myers constituted the primary and principal cause of his symptoms and disability. 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 be the last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death." (CLS 1956, § 412.1 [Stat Ann 1960 Rev § 17.151].)

* 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.

Part 7, § 1, of the act provides:

"Whenever used in this act:

"(a) The word 'disability' means the state of being disabled from earning full wages at the work in which the employee was last subjected to the conditions resulting in disability; * * *

"(c) The term 'personal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment." (CL 1948, § 417.1 [Stat Ann 1960 Rev § 17.220].)

Part 7, § 2, of the act reads:

"The disablement of an employee resulting from such disease or disability shall be treated as the happening of a personal injury within the meaning of this act and the procedure and practice provided in this act shall apply to all proceedings under this part, except where specifically otherwise provided herein." (CL 1948, § 417.2 [Stat Ann 1960 Rev § 17.221].)

The work in which plaintiff "was last subjected to the conditions resulting in disability" and from which he is "disabled from earning full wages" is the work incident to operating bread- and/or bun-wrapping machines, namely, the turning, twisting, bending and other body movements required in such employment.

There is no question but that the disability "is due to causes and conditions which are characteristic of and peculiar to the business of the employer"—the bakery business—and arose "out of and in the course of the employment."

From the findings of the appeal board it appears that the date of the injury was fixed as November 1, 1957, the last day plaintiff worked for Lawrence Baking Company. The referee found that plaintiff also sustained a personal injury on December 30,

1958, the last day he operated a bread-wrapping machine for Gauss Baking Company.

In construing the intent of the legislature as expressed in part 7, § 9, of the statute, this Court in *Wagner* v. *LaSalle Foundry Co.*, 345 Mich 185, reversed a finding of the compensation commission that the term "employer" means "Michigan employer" and the term "employer who last employed" means "Michigan employer who last employed." The Court stated (p 197):

"From an examination of the various sections of the act, as above referred to, this Court comes to the conclusion that the legislature intended that the commission would have jurisdiction and should exercise jurisdiction in a case of this nature under part 7, § 9, upon the last employer, provided, that such last employer was a Michigan employer; and where, as in this case, the last employer was an employer without the State of Michigan, said commission lacked jurisdiction to make an award."

We do not lightly overrule settled decisions construing any section of a standing statute. Had the *Wagner Case* represented unanimous views of the Court, we might hesitate resolving to overrule that case since, as Justice Brandeis said so pointedly in *Burnet* v. *Coronado Oil & Gas Co.*, 285 US 393, 406 (52 S Ct 443, 76 L ed 815):

"*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."

Wagner's dissent, however, simply postponed a final interpretive decision. And even if *Wagner's* majority view had been rendered as unanimous, we would not necessarily be bound thereby since "one decision construing an act does not approach the dignity of a well settled interpretation." See *White*

v. *Winchester Country Club,* 315 US 32, 40 (62 S Ct 425, 86 L ed 619), quoting and following *United States* v. *Raynor,* 302 US 540, 552 (58 S Ct 353, 82 L ed 413).

For the reasons stated by Justice TALBOT SMITH in his dissenting opinion in *Wagner* v. *LaSalle Foundry Co., supra,* we conclude the majority opinion in *Wagner* was in error in reading into part 7, § 9, of the workmen's compensation act the words, "provided, that such last employer was a Michigan employer." The act under consideration is a Michigan act. It deals with Michigan workmen and Michigan working conditions and Michigan problems. Clearly, the legislature did not have in mind employers outside the State over whom it would have no jurisdiction.

The majority opinion in *Wagner* v. *LaSalle Foundry Co., supra,* is hereby reversed, and part 7, § 9, of the workmen's compensation act is interpreted to read as the legislature intended—"The total compensation due shall be recoverable from the Michigan 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 applying part 7, § 9, to the instant case, the Michigan employer who last employed the plaintiff in the employment to the nature of which the disease was due, and in which it was contracted, was Gauss Baking Company. Likewise, part 2, § 1, of the act must be read 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 be the last day of work in the *Michigan* employment in which the employee was last subjected to the conditions resulting in disability or death."

Therefore, the date of injury in this case was December 30, 1958, the last day plaintiff operated a bread-wrapping machine for Gauss Baking Company.

An examination of the record discloses ample medical testimony to support the finding of disablement. There can be no question that the employers had notice of plaintiff's injury.

The order of the appeal board dated November 1, 1961, is reversed insofar as it provides for compensation to be paid by Lawrence Baking Company and fixes the date of injury as November 1, 1957. An order shall enter imposing all liability for weekly benefits and medical, surgical, and hospital care solely upon Gauss Baking Company and its insurance carrier.

Costs to plaintiff and defendant-appellant Lawrence Baking Company.

BLACK, SOURIS, and SMITH, JJ., concurred with KAVANAGH, J.

DETHMERS, J. (*dissenting*). Under the holding of this Court in *Wagner* v. *LaSalle Foundry Co.*, 345 Mich 185, neither set of defendants herein is liable to plaintiff. The order of the appeal board should be reversed. An order should enter denying compensation.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

O'HARA, J., took no part in the decision of this case.

MANNAUSA *v.* MANNAUSA.

1. DEEDS—JOINT TENANCY—PARENT AND CHILD.

   Circumstances concerning deed to defendant and his mother, as joint tenants with right of survivorship, are deemed controlling in suit by special administrator to set aside conveyances by which defendant and his wife acquired title, rather than straw-man conveyance some 8 years later to a third person and by latter to defendant brother and his defendant wife which may have been obtained from deceased through undue influence.

2. SAME—PARENT AND CHILD—PRESUMPTIONS—UNDUE INFLUENCE—FIDUCIARIES.

   A rebuttable presumption of undue influence is indulged in cases involving conveyances from parent to child only where a fiduciary relation is found to exist.

3. WORDS AND PHRASES—FIDUCIARIES.

   A fiduciary relationship arises only when there is a reposing of faith, confidence, and trust and the placing of reliance by one upon the judgment and advice of another.

4. DEEDS—PARENT AND CHILD—CONSIDERATION.

   A parent may convey property to a child without any consideration.

5. SAME—MENTAL COMPETENCY—CONSIDERATION—FIDUCIARIES—UNDUE INFLUENCE—OPPORTUNITY.

   Deeds of property to defendant and his late mother, as joint tenants with right of survivorship, are declared valid, where,

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REFERENCES FOR POINTS IN HEADNOTES

[2] 16 Am Jur, Deeds § 393.
[3] 23 Am Jur, Fraud and Deceit § 14 note; 16 Am Jur, Deeds § 40.
[4] 16 Am Jur, Deeds § 61.
[5] 16 Am Jur, Deeds § 85.
[7] 5 Am Jur 2d, Appeal and Error § 828.
[8] 1 Am Jur 2d, Accounts and Accounting § 62.
[9] 5 Am Jur 2d, Appeal and Error § 698.
[10] 14 Am Jur, Costs §§ 10, 11.

although the defendant was then living with his mother and contributed none of the consideration, it appears she was then mentally competent, did not repose any confidence or trust in him or rely upon his judgment, conducted other real-estate transactions, maintained her separate bank account, collected rents, and, generally, managed her own affairs, and plaintiff, special administrator of mother's estate, has failed to show defendant then obtained an interest in the property through fraud, coercion, or undue influence, wrongdoing not being inferred from mere opportunity.

6. ACCOUNTING—DOWN PAYMENT ON PROPERTY CONVEYED TO DEFENDANTS.

Conclusion of trial court in suit to set aside deeds and for an accounting *held,* to support finding of trial court that down payment for property conveyed to defendants, husband and wife, had come from funds of deceased, the husband's mother for whose estate plaintiff was special administrator, hence, order that, in effect, required defendant to account therefor is affirmed.

7. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—RECORD.

The Supreme Court hears chancery cases *de novo,* but will not ordinarily substitute its judgment for that of the trial court on questions as to which the testimony was in sharp conflict, unless a reading of the entire record convinces the Supreme Court that it would have reached another result had it occupied the position of the trial court.

8. ACCOUNTING—BURDEN OF PROOF—EVIDENCE—CARE AND SUPPORT OF MOTHER BY SON.

Testimony of defendant son and his wife in suit by special administrator of his mother's estate for accounting *held,* not to have sustained their burden of proof as to their claim that he had supported her for a greater part of the last 19-year period of her life.

9. APPEAL AND ERROR—QUESTIONS REVIEWABLE—BRIEFS.

Provision of decree in suit by special administrator of estate of mother of defendant husband, requiring latter to make repayment of sum of $300, which is neither briefed nor discussed by defendant, is not passed upon by the Supreme Court.

10. COSTS—FAILURE OF EITHER PARTY TO PREVAIL IN FULL.

No costs are allowed in suit for accounting brought by special administrator of a woman's estate against her son and the latter's wife, where neither party has prevailed in full.

Appeal from Wayne; Cash (Paul R.), J., presiding. Submitted March 5, 1963. (Calendar No. 60, Docket No. 49,878.) Decided May 9, 1963. Rehearing granted in part July 17, 1963.

Bill by Florence Mannausa, by Earl Mannausa, her guardian, against William Mannausa and Clara Mannausa to set aside deeds and for accounting. Case continued by special administrator. Decree for plaintiff. Defendants appeal. Reversed in part, permitting two deeds to stand and charging defendants with certain sums against distributive share of decedent's estate, and remanding for entry of decree.

Kirby L. Wilson, Jr., and *Kirby L. Wilson, III*, for plaintiff.

Gussin, Weinstein & Kroll (*William J. Weinstein*, of counsel), for defendants.

KAVANAGH, J. Plaintiff, as guardian of the estate of his mother, Florence Mannausa, filed a bill of complaint in December, 1959, seeking cancellation of defendant's interests in certain parcels of real estate and a return of moneys allegedly obtained through the fraud of defendants and in breach of their fiduciary relationship with plaintiff's ward. Defendants, William Mannausa and his wife Clara, are the son and daughter-in-law of Florence Mannausa.

Florence Mannausa was adjudged to be mentally incompetent on April 23, 1959. She was subsequently committed to the Wayne county general hospital at Eloise, and died there in January, 1960, prior to the trial of this cause. Plaintiff thereupon obtained permission from the probate court to continue these proceedings as special administrator of the estate.

The transactions in dispute are as follows:

(1) A conveyance in 1945 of real estate and a dwelling commonly known as 4221 High street,

Ecorse, to Florence Mannausa and William Mannausa, as joint tenants with the right of survivorship.

(2) A conveyance in 1950 of property at 13 Ruth street, Ecorse, to Florence Mannausa and William Mannausa, as joint tenants with the right of survivorship.

(3) A conveyance of the Ruth street property in March, 1958, to Gladys Green who, 1 month later, conveyed the property to the defendants.

(4) The payment by defendants in 1953 of $2,000 as the down payment on property at 14 Alexander street, River Rouge.

(5) A 1959 withdrawal of $900 by deceased from her bank account, which sum she allegedly gave to defendant William Mannausa; $600 of this sum was subsequently returned.

The decree of the trial court canceled defendants' interests in the High street and Ruth street properties; vested the Alexander street property in defendants free and clear of any claim by the estate of Florence Mannausa; ordered defendant William Mannausa to pay the estate $300, the unreturned portion of the $900 withdrawn in 1959; and denied William's claim for support of his mother.

A. High street and Ruth street properties.

In an opinion denying defendants' motion for new trial, the trial court ruled that a fiduciary relationship existed between deceased and William Mannausa during the period within which the disputed transactions took place. The court further ruled that William's inclusion as a joint tenant on the deeds to these 2 parcels was obtained fraudulently in breach of his fiduciary duty.

For the purposes of this *de novo* review we deem it unnecessary to judge the correctness of the trial court's findings relative to the 1958 "straw-man"

conveyances of the Ruth street property. Even if the record supports the court's conclusion that defendants obtained the signature of deceased through undue influence, the 1950 deed remains to control the rights of the parties. Therefore, we have examined with care the evidence surrounding the 1950 deed to the Ruth street property and circumstances attendant to the 1945 deed to the High street property.

In cases involving conveyances from parent to child there is a rebuttable presumption of undue influence only where a fiduciary relationship is found to exist. *Scheibner* v. *Scheibner,* 220 Mich 115. A fiduciary relationship arises "only when there is a reposing of faith, confidence, and trust and the placing of reliance by one upon the judgment and advice of another." *In re Jennings' Estate,* 335 Mich 241, 244.

From our review of the record we are unable to conclude William occupied the position of a fiduciary *at the time of the 1945 and 1950 conveyances.* While William resided with the deceased continuously until 1953, when he was 39 years old, the evidence is undisputed that from 1941 through 1953 deceased maintained her separate bank account, paid her bills, engaged in at least 4 other real-estate transactions, collected rents from her property, and, in general, managed her own affairs. Deceased twice sold the High street property on land contract, the second time in 1952 after the first land contract had been foreclosed. On neither occasion did she consult William, her cotenant, nor obtain his consent. She collected all payments on these land contracts.

The record fails to disclose any evidence of a repose of faith, confidence, trust, and reliance by deceased upon the judgment and advice of William during this period. Nor is there any evidence that deceased was mentally incompetent. The only evidence of mental incompetency prior to the 1959 ad-

judication concerned events that took place in 1958.

It was therefore incumbent upon plaintiff to show the 1945 and 1950 conveyances were obtained through fraud, coercion, or undue influence. This he failed to do. The record is barren of any evidence of such wrongdoing. Plaintiff's presentation at the trial appears to have been based solely on the allegation that Willliam did not contribute any of the consideration for the conveyances to deceased and himself as joint tenants. Even if we concede plaintiff met the burden of proof on this point, it would not form a basis for cancellation of William's interest absent a further showing of fraud, coercion, or undue influence. For a parent may convey property to a child without any consideration. *Wroblewski* v. *Wroblewski,* 329 Mich 61.

At most the record indicates William had the opportunity to exercise undue influence, fraud, or coercion with respect to these conveyances. But such wrongdoing cannot be inferred from mere opportunity. *Powell* v. *Pennock,* 198 Mich 573; *In re Jennings' Estate, supra.*

We, therefore, conclude the trial court erred in canceling William Mannausa's interests in the Ruth street and High street properties under the 1945 and 1950 deeds.

B. Alexander street property.

In dispute relative to this property was the source of the $2,000 down payment. Plaintiff relied on a statement in William's handwriting indicating the $2,000 was a disbursement from his mother's funds. William maintained the money was his and that he prepared the statement using plaintiff's figures in an effort to persuade plaintiff he was in error. The trial court ruled the money came from deceased's funds. Such conclusion was supported by the evidence, and we find no error.

However, the court decreed this property to be free of any claim by the estate. The apparent basis for this result was the following testimony of plaintiff in response to questions posed by the court:

"*The Court:* Anyhow, when you get everything paid off, you expect to have the 3 pieces of property back, High, Ruth, and Alexander, and the $500, approximately, that is down in the River Rouge bank, and is there anything else?

"*A.* Now, we have—my brother, I believe, mentioned it is in the record, I think it shows it here, a loan to my sister of $3,500, that was on a note.

"*The Court:* To Lyda?

"*A.* Yes, and $3,500, originally.

"*The Court:* What is it now?

"*A.* It is $2,800.

"*The Court:* It was $3,500, and it is now $2,800?

"*A.* She's been paying $50 a month until I asked her not to make any more payments.

"*The Court:* She doesn't deny she owes it?

"*A.* She gave me a receipt in acknowledgment.

"*The Court:* $50 payments, where do they go?

"*A.* She hasn't been making these payments. She's been looking after my sister for a year, and we didn't feel she should make those payments.

"*The Court:* How much of a credit do you expect to give her on this $2,800 that is now due?

"*A.* Well, just to, like, further temper this, and I think since it is just my brother and I—my other brother is deceased.

"*The Court:* Just the 2 brothers of you?

"*A.* Yes, and the other family are willing to accept whatever settlement we arrange which is fair and equitable to all. We feel we would forsake the $2,800. We would forsake the $2,000 on the Alexander street property and cancel that entirely out, as one offsetting the other.

"*The Court:* In other words, she owes $2,800 on the loan?

"*A.* Yes.

"*The Court:* And what about the 14 Alexander street?

"*A.* That is $2,000, so we would consider that both wiped out off the record.

"*The Court:* $2,000 she owes you?

"*A.* She owes my mother, yes.

"*The Court:* What about this Alexander property, how does that cancel out?

"*A.* If we were going to cancel what Lyda's obligation is, we should rightfully cancel William's obligation, too."

Lyda LaComb, the sister referred to in the quoted testimony, was not a party to this suit. Plaintiff's theory for an equitable distribution of the estate had no rightful place as a basis for the court's decree in this suit for an accounting. The $2,000 utilized by defendants as the down payment on the Alexander street property is a debt owed the estate and is properly chargeable against William Mannausa's distributive share of the personal estate. See *Marvin* v. *Bowlby,* 142 Mich 245 (4 LRA NS 189, 113 Am St Rep 574, 7 Ann Cas 559).

C. Defendants' claim for support of deceased.

The testimony relative to William's claim that he supported his mother for a greater part of the period from 1941 until her death was in sharp conflict. While the Supreme Court hears chancery cases *de novo,* where the testimony is in conflict this Court will not ordinarily substitute its judgment for that of the trial court unless a reading of the entire record convinces us we would have reached another result had we occupied the position of the trial court. A reading of the record in this case does not convince us that defendants sustained the burden of proof of their claim for support of the deceased. *Ventro* v. *Ventro,* 364 Mich 591.

Appellants do not brief or discuss the provision of the decree with reference to repayment of the $300. Therefore, we do not pass on the question.

Reversed in part. The case is remanded for entry of a decree in accordance with this decision. No costs, neither party having prevailed in full.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

WINDHAM *v.* MORRIS.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—QUESTION OF FACT.

   The Supreme Court does not, on *de novo* review of a chancery case, reverse a determination of disputed facts unless convinced from a reading of the entire record that it would have reached a different conclusion had it occupied the position of the trial court.

2. FRAUD — RESCISSION — RELIANCE ON MISREPRESENTATIONS — EVIDENCE.

   Plaintiff purchasers of defendant's house and lot *held,* not entitled to rescission or abatement on land contract because of alleged fraud, where record shows they had placed no reliance upon claimed fraudulent representations in an appraisal that had been made of the premises in connection with other proceedings.

3. SAME—OPINION STATEMENTS—COST OF REPAIRS.

   Plaintiffs in suit for rescission of land contract for the purchase of a house and lot *held,* to have failed to sustain their burden

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 822.
[2] 55 Am Jur, Vendor and Purchaser §§ 593, 595.
[3] 55 Am Jur, Vendor and Purchaser § 68.
[4] 12 Am Jur, Contracts §§ 126, 143.
[5] 5 Am Jur 2d, Appeal and Error § 1010.

of proof as to falsity of alleged statement of defendant as to estimated cost of repairs which if made would have been, at best, opinion statements which are not generally considered a proper basis for fraud.

4. CONTRACTS—RESCISSION—MUTUAL MISTAKE—FRAUD.
Rescission of a contract will not lie except for mutual mistake or unilateral mistake induced by fraud.

5. COSTS—BRIEF.
No costs are allowed in affirmance of decree, where appellees did not file a brief.

Appeal from Genesee; McGregor (Louis D.), J. Submitted April 2, 1963. (Calendar No. 6, Docket No. 49,523.) Decided May 9, 1963. Rehearing denied July 17, 1963.

Bill by William Hayden Windham and Marie Elaine Windham against Ray H. Morris, Elmer Carnes, Donald R. Stephenson, and Beatrice L. Stephenson to rescind land contract. Bill dismissed. Plaintiffs appeal. Affirmed.

Leon A. S. Seidel and *Richard C. Fruit,* for plaintiffs.

William H. Windham, in propria persona, on application for rehearing.

KAVANAGH, J. Plaintiffs, husband and wife, land contract purchasers, filed their bill of complaint in the Genesee county circuit court in August, 1959, against defendant vendors, real-estate salesman and broker. They alleged fraud on the part of all defendants in inducing them to purchase certain real estate. In the alternative, they alleged mistake and sought rescission of their contract or an abatement of the purchase price.

Defendants Stephenson listed the property for sale with defendant Morris, a licensed real-estate broker. Defendant Carnes, a licensed real-estate

salesman, worked part time for defendant Morris.

Plaintiff husband learned of the house through a fellow employee. He then approached defendant Carnes, who worked at the same factory, and inquired about the house, its location and price. He arranged with Carnes for an inspection of the house at 4 p.m. Some hours prior to keeping the appointment, plaintiffs went to the premises for a preliminary inspection. Defendant Donald Stephenson was at the premises. He allowed plaintiffs to inspect the house unaccompanied by him. As plaintiffs were leaving they told Stephenson they thought they would buy the house.

Plaintiffs kept the appointment with defendant Carnes and inspected the house. Carnes purchased a flashlight when plaintiffs evidenced a desire to make a more detailed inspection. Plaintiff husband used the flashlight to inspect the basement and attic unaccompanied by Carnes.

Plaintiffs claim that Carnes told them an appraisal had been used and approved in defendant Donald Stephenson's divorce case. Carnes denied making this statement. In any event, plaintiffs were shown a copy of the appraisal made by a Mr. Haines, a real-estate broker, on August 14, 1957, placing a value of $6,600 on the premises. This appraisal listed the condition of various parts or portions of the building, stated the estimated age as 35 years and the replacement cost including the land at $20,000. Plaintiff husband claimed that Carnes told them that for an expenditure of $2,000 they would have a $10,000 to $12,000 piece of property. Plaintiff wife claimed that Carnes' figures were $10,000 to $14,000. Carnes admitted using the $2,000 figure, but claims he said if plaintiffs put $2,000 in the house they would have quite a livable house. He testified at the trial that such discussion concerned repairs to the house, not rebuilding or altering it.

On October 5, 1957, plaintiffs purchased the property on land contract for $6,500 with a payment of $500 down and the balance on terms. Immediately thereafter plaintiffs commenced alterations and reconditioning, converting the premises into a 2-family residence. The work included installation of a second complete bath, new sets of cupboards, new oil furnace, new wiring, fixtures and additional outlets, considerable replastering and drywall construction, and other improvements, for which plaintiffs expended approximately $6,000 for materials and their own labor.

In July, 1958, plaintiffs learned of the terms of the divorce decree by which defendant Donald Stephenson was awarded the house at a value of $4,500. They also learned that Stephenson had testified in the divorce case that the property had a value of $4,500.

In September, 1958, the plaintiffs requested defendant sellers to discount the contract. Defendants refused to do so. In August, 1959, plaintiffs filed their bill of complaint.

Following a trial in which there was considerable testimony as to the condition of the house at time of purchase, the condition of the house at time of trial, the additions, alterations and repairs, and testimony as to the age of the house, the trial court concluded the defects were discernible upon inspection and were apparently seen by plaintiffs before execution of the land contract. The court concluded the evidence failed to disclose actionable fraud or fraudulent misrepresentations or reliance upon the alleged misrepresentations and dismissed plaintiffs' bill of complaint.

On appeal the question is: Does a review of the record disclose plaintiffs are entitled to the relief prayed for?

Plaintiffs contend the statements in the appraisal as to age, value and condition of the property, and the alleged statements of defendant Carnes as to cost of repairs were fraudulent.

With reference to the question as to whether or not the value and condition of the property was misrepresented, the trial court found on a determination of disputed facts that they were not misrepresented. While we try these chancery cases *de novo,* we do not reverse a determination of disputed facts unless we are convinced from a reading of the entire record we would have reached a different conclusion had we occupied the position of the trial court. *Gertz* v. *Fontecchio,* 331 Mich 165.

A necessary element of proof in a case such as this is that the fraudulent statements, if made, were relied upon by plaintiffs to their detriment. The trial court held—and we think the record supports its position—that there is no evidence the plaintiffs relied on the representations in the appraisal as to age, value and condition of the property. Plaintiffs examined the premises alone and stated to defendant Donald Stephenson as they were leaving that they thought they would purchase the property. There is no evidence the appraisal was an inducing factor in plaintiffs' decision to purchase. And it was not until 1 year later, when plaintiffs learned Donald Stephenson had placed a value of $4,500 on the property in his divorce suit, that plaintiffs' attitude changed from one of pride to dissatisfaction. Since there was no reliance upon the claimed fraudulent representations in the appraisal, plaintiffs are not entitled to relief. *Columbus Pipe and Equipment Co.* v. *Sefansky,* 352 Mich 539; *A & A Asphalt Paving Co.* v. *Pontiac Speedway, Inc.,* 363 Mich 634.

The only remaining representation claimed to have been fraudulent is the alleged statement of defendant Carnes that the cost of the repairs would not exceed

$2,000. We do not have any evidence in the record as to the actual amount of the repairs. The evidence involves extensive alterations and improvements establishing a 2-family dwelling from which income could be derived. Plaintiffs have, therefore, not sustained the burden of proof as to the falsity of such representation even if it had been made. If such a statement were made, clearly it would fall in the category of opinion and within the general rule that fraud cannot be predicated on opinion statements. *Mieske* v. *Harmony Electric Co.,* 278 Mich 61.

Plaintiffs ask for alternative relief based upon mistake. Generally, rescission of a contract will not lie except for mutual mistake or unilateral mistake induced by fraud. *Trembert* v. *Mott,* 271 Mich 683 (38 NCCA 283). Clearly there was not a mutual mistake, and we have previously found there was no fraud.

The decree of the trial court is affirmed. No costs, appellees not having filed a brief.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

DOOLEY *v.* CITY OF DETROIT.

POINDEXTER *v.* SAME.

1. TAXATION—CONSTITUTIONAL LAW—INCOME TAX.
   The Constitution authorizes specific, as well as ad valorem taxes, but does not otherwise explicitly authorize the legislature or cities to impose income taxes, nor does it designate any specific taxes included in its general grant (Const 1908, art 10, §§ 3, 4).

2. SAME—INCOME TAXES.
   Generally, income taxes are excises, not property taxes.

3. SAME—COMPARISON OF INCIDENCE OF TAXATION ON INCOME AND PROPERTY.
   The incidence of a tax on income differs from that of a tax on property as neither is dependent upon the possession by the taxpayer of the subject of the other, since the taxpayer's income may be taxed, although he owns no property, and his property may be taxed, although it produces no income; income being taxed but once, and the same property recurrently.

4. SAME—GOVERNMENTAL BENEFITS—TAX ON INCOME AND PROPERTY.
   The tax on income and the tax on property are predicated upon different governmental benefits; protection offered to the property in one state not being extended to the receipt and enjoyment of income from it in another.

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur, Income Taxes § 18; 51 Am Jur, Taxation § 72.
[2] 27 Am Jur, Income Taxes §§ 2, 16.
[5, 9, 15] 27 Am Jur, Income Taxes § 3.
[6, 7] 51 Am Jur, Taxation §§ 33–37.
[8] 27 Am Jur, Income Taxes §§ 2, 19.
[10] 37 Am Jur, Municipal Corporations § 102 *et seq.*
[11, 12, 14, 16] 38 Am Jur, Municipal Corporations § 381 *et seq.*
[13] 50 Am Jur, Statutes § 217 *et seq.*
[17] 27 Am Jur, Income Taxes § 20.
[18] 27 Am Jur, Income Taxes § 189 *et seq.*

5. SAME—HOME-RULE CITY—INCOME TAX.

The income tax levied by home-rule city "on all salaries, bonuses, wages, commissions, dividends, interest, net profits from rentals, capital gains less capital losses, and other income of residents of the city; * * * and on the income of nonresidents of the city * * * on salaries, bonuses, wages, and other compensation for work done in the city, * * * services rendered in the city, * * * and on the net profits from rentals received from property located in the city, * * * and capital gains less capital losses from the sale of real and tangible personal property located in the city; * * * and on the net profits from all businesses, professions, or other activities conducted in the city * * * by residents of the city; * * * and on the net profits from all businesses, professions, or other activities conducted in the city * * * by nonresidents; and on the net profits earned by all corporations as a result of work done, services rendered, and other business conducted in the city" *held*, an excise tax authorized by the home-rule act (Const 1908, art 10, §§ 3, 4; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Ordinance No 694–F, ch No 84).

6. SAME—EXCISE.

An excise tax is any tax which is neither a poll tax nor a property tax and embraces every form of burden not laid directly upon persons or property.

7. SAME—EXCISE.

An excise is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.

8. SAME—INCOME RENTALS.

An income tax is not a tax upon property even as to the taxation of income from rentals of real property.

9. SAME—CITY INCOME TAX—MUNICIPAL SERVICES AND PROTECTION.

Home-rule city income tax upon residents' total income and upon income earned or received by a nonresident in the city or from property located there fairly reflects the extent to which municipal services and protection are enjoyed by the taxpayer (CL 1948, § 117.4i, as amended by PA 1957, No 131).

10. MUNICIPAL CORPORATIONS—HOME RULE—CONSTITUTIONAL LAW.

The home-rule provisions of the Constitution consigned broad general powers of government and almost exclusive rights in the conduct of their affairs to those units of government likely to be best informed of local needs and best able to satisfy them, subject to overriding legislative restraint to secure con-

servative action on the part of those responsible for the conduct of such affairs (Const 1908, art 8, §§ 20–25; CL 1948, § 117.4j).

11. SAME—HOME-RULE CITIES—TAXATION.

Home-rule cities do not possess plenary powers and may not, absent legislative grant, assume powers not essential to local self-government, but such restriction does not require that every power exercised by a city, such as the imposition of a new tax, be specifically delegated by legislative grant where there is delegated the power to impose taxes of a designated generic kind (CL 1948, § 117.4i, as amended by PA 1957, No 131).

12. SAME—CONSTITUTIONAL LAW—STATUTES—TAXATION—EXCISES—INCOME TAXES.

The legislative grant of power to a home-rule city to collect excises empowered such cities to seek municipal revenues by whatever excises the municipalities chose, such as an income tax, subject to the legislature's constitutionally ordained duty to limit their rate of taxation for municipal purposes (Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12 [m]; Detroit Ordinance No 694–F, ch No 84).

13. STATUTES—CONSTRUCTION—SUPREME COURT.

The local construction by a home-rule city of provisions of the home-rule city act does not preclude the Supreme Court from giving a different construction (CLS 1956, § 117.3, subd [g], as amended by PA 1960, No 14; CL 1948, § 117.4a).

14. TAXATION—HOME-RULE CITIES—AD VALOREM LIMITATION.

Provision of home-rule city act limiting rate of taxation in such city to 2% of the assessed value of the real and personal property in the city is a limitation which applies only to ad valorem taxes (Const 1908, art 8, § 20; CLS 1956, § 117.3, subd [g], as amended by PA 1960, No 14).

15. SAME—HOME-RULE CITY—INCOME TAX—ABSENCE OF LEGISLATIVE LIMITATION.

Provision of the Constitution that "the legislature shall provide by a general law for the incorporation of cities, and * * * shall limit their rate of taxation for municipal purposes" does not confine the legislature's imposition of limitations on home-rule cities' power to tax to ad valorem taxes, but the absence of legislative limitations upon a city's imposition of an excise does not invalidate an income tax imposed by a home-rule city

(Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12 [m]; Detroit Ordinance No 694–F, ch No 84).

16. SAME—HOME-RULE CITY—AD VALOREM TAXES.

Home-rule city act provision "that the subjects of taxation for municipal purposes shall be the same as for State, county and school purposes under the general law" is construed as applicable only to ad valorem taxes on property (CLS 1956, § 117.3, subd [f], as amended by PA 1960, No 14).

17. SAME—DUE PROCESS—INCOME—RESIDENTS.

A governmental unit, such as a home-rule city, which has the power to impose an income tax is not limited in taxation of the income of its residents to income from sources within the unit's borders by due process provisions of the State and Federal Constitutions (US Const, Am 14; Mich Const 1908, art 2, § 16; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12 [m]; Detroit Ordinance No 694–F, ch No 84).

18. SAME—DUE PROCESS—INCOME—NONRESIDENTS.

Due process provisions of the State and Federal Constitutions were not violated by home-rule city by reason of its taxation of the income of nonresidents from local sources (US Const, Am 14; Mich Const 1908, art 2, § 16; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12 [m]; Detroit Ordinance No 694–F, ch No 84).

19. COSTS—HOME-RULE CITY—INCOME TAX.

No costs are allowed in class suits by residents and nonresidents of home-rule city to declare invalid the city's ordinance imposing an income tax upon residents from whatever source and upon nonresidents from income having a local source (Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12 [m]; Detroit Ordinance No 694–F, ch No 84).

Appeal from Wayne; Fitzgerald (Neal), J. Submitted February 6, 1963. (Calendar Nos. 53, 54, Docket Nos. 49,973, 49,954.) Decided May 9, 1963.

Bill by John F. Dooley and 18 other prospective taxpayers, as a class action, against the City of Detroit, a municipal corporation, to declare illegal

and unconstitutional the city's income tax ordinance and to enjoin enforcement and collection against individuals who are not residents of the city but who receive salaries or remuneration for services therein. Harvey W. Moelke and 12 outlying and neighboring municipal corporations intervened as parties plaintiff.

Similar class action by Thomas L. Poindexter and Sophia D. Poindexter, residents and taxpayers within the City of Detroit, against Jerome P. Cavanagh, Mayor, and other city officials, with amendment adding City of Detroit as defendant.

Actions consolidated for hearing and on appeal. Decrees for defendants, dismissing both bills. Plaintiffs appeal. Affirmed.

Richard D. Dunn and *Thomas C. Mayer* (*Platt & Platt, John H. Yoe,* and *Thomas P. Casey,* of counsel), for plaintiffs Dooley and others.

Thomas L. Poindexter, in propria persona (*Myer Miller, Ralph H. McIntyre, David I. Berris* and *Morris H. Berris,* of counsel), for plaintiff Poindexter and others.

Robert Reese, Corporation Counsel, *John H. Witherspoon, Edward M. Welch, Robert D. McClear,* and *John D. O'Hair,* Assistant Corporation Counsel, for defendants.

SOURIS, J. By today's decision we uphold the validity of Detroit's income tax ordinance.[1] The only

[1] Ordinance No 694–F, chapter No 84, adopted April 26, 1962. Its title fairly describes its scope:

"An ordinance imposing a specific income tax for general revenue purposes as an excise, on all salaries, bonuses, wages, commissions, dividends, interest, net profits from rentals, capital gains less capi-

other city in Michigan which previously had attempted to raise revenues for municipal purposes by taxing incomes was Saginaw, whose submission to electors of a proposal authorizing an income tax was declared invalid by this Court in 1952 in *House* v. *City of Saginaw,* 334 Mich 241, for failure of compliance with procedural requirements. The issues presented to us in this appeal are, therefore, issues of first impression.

In 1962, by ordinance adopted by its city council and approved by its mayor, Detroit imposed for municipal purposes a net income tax, at the rate of 1%, upon income earned and income received by residents and nonresidents of the city, such taxable income of nonresidents being limited, however, to income earned from work done, services rendered, or other business activities conducted in the city and to income received from sale or rental of real and tangible personal property located in the city. Before the ordinance could be implemented, 2 suits for declaratory and injunctive relief were instituted, 1 by residents and the other by affected nonresidents of the city. Both suits were class actions and other members of the respective classes were accorded opportunity to intervene. The suits were consolidated for hearing below, and later were ordered

tal losses, and other income of residents of the city of Detroit; and on the income of nonresidents of the city of Detroit from salaries, bonuses, wages, and other compensation for work done in the city of Detroit, services rendered in the city of Detroit, and on the net profits from rentals received from property located in the city of Detroit, and capital gains less capital losses from the sale of real and tangible personal property located in the city of Detroit; and on the net profits from all businesses, professions, or other activities conducted in the city of Detroit by residents of the city of Detroit; and on the net profits from all businesses, professions, or other activities conducted in the city of Detroit by nonresidents; and on the net profits earned by all corporations as a result of work done, services rendered, and other business conducted in the city of Detroit; requiring the filing of returns; providing for the administration, collection, enforcement, and withholding of said tax; establishing a board of review; and prescribing penalties for the violation of its provisions."

submitted together for appellate purposes. They were submitted to the chancellor upon stipulations of facts and comprehensive briefs, the chancellor ultimately upholding the validity of the tax and denying the injunctive relief sought. The tax has been collected by the city since July 1, 1962.

Plaintiffs' attacks upon the validity of the income tax ordinance are on 3 principal fronts. First, they contend that cities have not been granted necessary legislative authority to levy income taxes. Second, assuming that cities have been granted such authority, plaintiffs claim Detroit's income tax ordinance violates existing statutory tax rate limitations and restrictions claimed by them to be applicable to municipal income taxes as well as to ad valorem taxes on property. Finally, plaintiffs claim that the income tax ordinance denies them due process of law as guaranteed by our State and Federal Constitutions.

1. The Constitution of 1908 authorizes specific, as well as ad valorem taxes, article 10, §§ 3 and 4, but apart from such authorization, it does not explicitly authorize the legislature or cities to impose income taxes, nor does it designate any other specific taxes included in its general grant. For its statutory authority to impose its income tax, the city relies upon section 4i of the home-rule cities act, PA 1909, No 279, as amended (CL 1948, § 117.4i, subd [1], as amended by PA 1957, No 131 [Stat Ann 1961 Cum Supp §5.2082, subd (1)]). It reads, in its entirety:

"Each city may in its charter provide:

"(1) For laying and collecting rents, tolls and excises."

Pursuant thereto, Detroit's charter, title 3, chapter 1, § 12(m), delegates to its common council author-

ity "to provide for the laying and collecting of rents, tolls, and excises."[2]

Plaintiffs do not claim that the legislature exceeded its powers under article 10, §§ 3 and 4 by permitting cities in section 4i of the home-rule cities act to lay and collect excises. Instead, they claim that income taxes are not excises and, in the alternative, that even if such taxes properly may be classified as excises, a far more detailed legislative grant of express authority to tax incomes is required before a city can claim the right to do so.

It is our conclusion that Detroit's income tax is an excise and that the statutory authority relied upon to support its levy is legally sufficient. There was a time in the recent history of this nation when respected authorities insisted that income is property, at least for some purposes, and that a tax upon net income is thereby a property tax subject to at least some of the constitutional limitations imposed upon such taxes. See *Pollock* v. *Farmers' Loan & Trust Company* (1895), 158 US 601 (15 S Ct 912, 39 L ed 1108); see, also, E. Blythe Stason, "The Fifteen Mill Tax Amendment Limitation," 31 Mich L Rev 371, 379 (1933). However, contrary views were early expressed, as Dean Stason acknowledged in his article. *Ludlow-Saylor Wire Co.* v. *Wollbrinck* (1918), 275 Mo 339 (205 SW 196); *Hattiesburg Grocery Company* v. *Robertson* (1921), 126 Miss 655 (89 So 369, 25 ALR 755); *Sims* v. *Ahrens* (1925), 167 Ark 557 (271 SW 720); and *Featherstone* v. *Norman* (1930), 170 Ga 370 (153 SE 58, 70 ALR 449). Today, however, it is generally said that income taxes are excises and not property taxes. See 16 McQuillin, Municipal Corporations (3d ed), § 44.193; Brown, "The Nature of the Income Tax," 17 Minn L Rev 127; and *Hale* v.

[2] Detroit, Municipal Code, 1954, charter section, p 24.—REPORTER.

Iowa State Board of Assessment and Review (1937), 302 US 95 (58 S Ct 102, 82 L ed 72). Mr. Justice Cardozo, in the *Hale Case,* 104, 105, noted that "many, perhaps most, courts hold that a net income tax is to be classified as an excise." He also took occasion, at p 107, to repeat the supreme court's earlier clarification of the *Pollock* decision by referring to and quoting from *Brushaber* v. *Union Pacific R. Co.* (1916), 240 US 1 (36 S Ct 236, 60 L ed 493, LRA 1917D, 414, Ann Cas 1917B, 713):

"In line with that conception of the *Pollock Case* is *Brushaber* v. *Union P. R. Co. supra,* where the court pointed out (240 US at pp 16, 17), that 'the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property,' but that to the contrary such taxes were enforceable as excises except to the extent that violence might thus be done to the spirit and intent of the rule governing apportionment."

Significantly, Justice Cardozo, at pp 106, 107, also referred to *New York, ex rel. Cohn,* v. *Graves* (1937), 300 US 308 (57 S Ct 466, 81 L ed 666, 108 ALR 721), decided at the term preceding decision in *Hale.* In *Cohn,* where it was claimed New York's income tax as applied to a resident's income from rents of land and interest on bonds was in substance and effect a tax on property, Mr. Justice Stone wrote for the Court, at p 314, that:

"Neither analysis of the 2 types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although

it produces no income. The 2 taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another."

More recent decisions from other jurisdictions in which courts have characterized income taxes as excises are: *Reynolds Metal Co.* v. *Martin* (1937), 269 Ky 378 (107 SW2d 251); *Vilas* v. *Iowa State Board of Assessment and Review* (1937), 223 Iowa 604 (273 NW 338); *Monteith Brothers Co.* v. *Department of Treasury of Indiana* (1939), 215 Ind 428 (19 NE2d 1010); *Forrester* v. *Culpepper* (1942), 194 Ga 744 (22 SE2d 595); *Herman* v. *Mayor and City Council of Baltimore* (1947), 189 Md 191 (55 A2d 491, 173 ALR 1310); *Carter Carburetor Corp.* v. *City of St. Louis* (1947), 356 Mo 646 (203 SW2d 438); *Gross Income Tax Division* v. *Bartlett* (1950), 228 Ind 505 (93 NE2d 174), appeal dismissed, 340 US 924 (71 S Ct 499, 95 L ed 667); *Canary* v. *Oklahoma Tax Commission* (Okla 1956), 295 P2d 281; *California Company* v. *State of Colorado* (1959), 141 Colo 288 (348 P2d 382); and *Central Lincoln People's Utility District* v. *Stewart* (1960), 221 Or 398 (351 P2d 694).

In this State we have never before reached the ultimate question whether an income tax is an excise. In *House* v. *City of Saginaw, supra,* as noted above, our decision was based upon a procedural flaw in submission to the people of a proposal to amend the city's charter to provide for a city income tax and, therefore, it was unnecessary even to consider the nature of the tax proposed. However, in at least

1 decision of this Court we determined that a tax on income, the Federal income tax, was not a tax on property. In *Park Building Co.* v. *George P. Yost Fur Co.,* 208 Mich 349, a lessee covenanted to pay all of lessor's taxes upon the leased "premises," "all buildings and improvements thereon," "the leasehold estate" and "the reversionary estate." The lessor claimed the covenant required lessee to pay all Federal income taxes assessed against the lessor on account of rentals received under the lease. The Court carefully considered the nature of the Federal income tax with reference to its impact upon rentals received by the lessor and concluded that it was a personal tax against him, in no sense a property tax upon the leased premises or the estate named in the covenant. We did not characterize the tax as an excise, but concluded only that it was not a property tax. Our opinion was relied upon in *Young* v. *Illinois Athletic Club,* 310 Ill 75, 82 (141 NE 369, 30 ALR 985), a case presenting essentially the same issue for determination, to support its holding, at pp 80, 81, that:

"An income tax is not similar to other forms of taxation, since it is not imposed upon property or business but upon the proceeds arising therefrom. Black on Income and Other Federal Taxes, § 1. An income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."

We, in turn, cited and quoted with approval the last sentence of the foregoing quotation from *Young* v. *Illinois Athletic Club* in *Shivel* v. *Kent County Treasurer,* 295 Mich 10, 19. This Court has never adopted the contrary view, presently held by a diminishing minority of the courts in this country, that taxes upon income are property taxes.

Our decision today,—that not only are such taxes on income not taxes on property, but that they are

excises,—is based not alone upon the impressive weight of authority from other jurisdictions, but also upon the persuasive reasoning of the courts which have preceded us in reaching this conclusion. Examination of many of the generally accepted definitions of excises, including our own, convinces us that the correct classification of Detroit's income tax is as an excise.

Excises have been variously defined, sometimes in very general language and sometimes in language more specific. In 51 Am Jur, Taxation, § 24, it is said that:

"Taxes fall naturally into 3 classes, namely, capitation or poll taxes, taxes on property, and excises. In general, it may be said that all taxes fall into one or the other of the foregoing classes, any exaction which is clearly not a poll tax or a property tax being an excise."

And at section 33, it is said:

"In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property. The affirmative definitions of excise or excise tax found in the later decisions exhibit some variety in phraseology."

See, also, 16 McQuillin, Municipal Corporations (3d ed), § 44.190.

Our own decisions offer some assistance. For instance, in a line of decisions determining the nature of our corporate franchise tax,[3] beginning with *Union Steam Pump Sales Co.* v. *Secretary of State,* 216 Mich 261, and including *In re Truscon Steel Co.,* 246 Mich 174; *In re Detroit Properties Corp.,* 254 Mich 523; *Udylite Corp.* v. *Corporation & Securities*

[3] PA 1921, No 85, as amended, CL 1948 and CLS 1956, § 450.301 *et seq.*, as amended (Stat Ann 1961 Cum Supp § 21.201 *et seq.*).

Commission, 319 Mich 1; and *Chicago, Duluth & Georgian Bay Transit Co.* v. *Corporation & Securities Commission,* 319 Mich 14, we held that the corporate franchise tax was an excise tax on the franchise to do business as a corporation within the State. In support, we relied, first in *Union Steam Pump* (p 264) and in the other cases cited, upon the broad definition of an excise, which we accepted, found in 26 RCL, Taxation, § 209, at p 236:

"An excise is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege."

We have noted our own prior decision, *Park Building Co.* v. *George P. Yost Fur Co., supra,* in which we concluded, from an analysis of the Federal income tax, that a tax on income was not a tax upon property even as to the taxation of income from rentals of real property. The incidence of Detroit's income tax is essentially the same as the Federal tax, both being taxes upon net income from the performance of labor or the rendition of services and from the use of capital, including income from the sale or rental of real and tangible personal property. We see no valid basis for concluding that the municipal income tax, any more than the Federal income tax, is a tax on property. See *Brushaber* v. *Union Pacific R. Co., supra, New York, ex rel. Cohn,* v. *Graves, supra;* and *Hale* v. *Iowa State Board of Assessment and Review, supra.* Having so concluded, and there being no rational basis to claim that the tax we consider is a capitation tax or poll tax, by such process of elimination we can conclude that the tax we consider must, therefore, be an excise. 51 Am Jur, Taxation, §§ 24 and 33, quoted *supra.*

But, we would prefer to rest our conclusion upon our own definition of the term "excise," adopted from Ruling Case Law, *supra.* What Detroit has done

is to charge part of the cost of municipal government to residents who earn income from whatever source and to those who earn or receive income in Detroit or from real or tangible personal property located in Detroit. Put another way, Detroit imposes its excise upon residents and those who earn or receive such income in or from Detroit for the privilege of enjoying the municipal services it performs for them and the protection it provides to them and their property. Furthermore, it is not unreasonable to assume that a resident's total income and the amount of income earned or received by a nonresident in Detroit or from Detroit property, the basis upon which the amount of tax due is determined, fairly reflects the extent to which municipal services and protection are enjoyed by the taxpayer.

Having determined that Detroit's income tax is not a tax upon property, but is, instead, an excise, we turn now to consideration of plaintiffs' claim that, even so, the legislative grant to home-rule cities to lay and collect excises is not sufficiently specific to authorize such income tax.

By our Constitution of 1908 cities and villages were given a substantially more important role in the governmental life of our State than previously they had played. Until 1908, municipal corporations exercised only such powers as were expressly granted to them by the legislature in very much the same manner that the powers of private corporations were limited. Article 15, Constitution of 1850. But new concepts of local government, concepts of "home rule," were incorporated in the Constitution of 1908, whereby very broad, general powers of government were consigned to those units of government likely to be best informed of local needs and best able to satisfy them,—subject, it is true, to overriding legislative restraint "to secure conservative action on the part of those to become responsible for the future

conduct of such affairs." Address to the People, Constitution of 1908.[4]

These concepts were embodied, in part, in sections 20 and 21 of article 8 of the then new Constitution:

"Sec. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such

[4] The constitutional delegates of 1908 carefully spelled out in detail the radical change of which we speak. The following is a more complete extract from their Address:

"The foregoing provisions [sections 20 through 25 of article 8] * * * herein contained are designed to meet the modern conditions affecting municipal affairs; to authorize through appropriate legislation that which has heretofore been denominated 'home rule.'

"These provisions constitute a marked advance from the present constitutional provisions relating to cities and villages by doing away with the principle of classification and with special charters, granted and subject to amendment only by the State legislature. The purpose is to invest the legislature with power to enact into law such broad general principles relative to organization and administration as are or may be common to all cities and all villages, each city being left to frame, adopt and amend those charter provisions which have reference to its local concerns. The most prominent reasons offered for this change are that each municipality is the best judge of its local needs and the best able to provide for its local necessities; that inasmuch as special charters and their amendments are now of local origin, the State legislature will become much more efficient and its terms much shorter if the labor of passing upon the great mass of detail incident to municipal affairs is taken from that body and given into the hand of the people primarily interested.

"Under these provisions, cities and villages, as under the present Constitution, will remain subject to the Constitution and all the general laws of the State.

"The transfer of the powers of legislation from the State legislature to the people of the municipalities or their representatives necessitated the imposition of certain checks and prohibitions designed to secure conservative action on the part of those to become responsible for the future conduct of such affairs. So far as these checks and prohibitions have formerly been in the hands of the common councils, relating to franchises and the acquiring of public utilities, they are now made subject to the vote of 3/5 of the electors of the municipalities. The power to limit the rate of taxation and restrict the power of borrowing money and contracting debts is left to the legislature, as in the present Constitution, where it may be subject to such changes as may be made necessary by changing conditions. The right conferred to establish certain essential institutions involving public health and safety and to acquire the public utilities named, is conceived to be in line with the general privileges of home rule and one placing within the hands of municipalities, under the restrictions named, certain powers for potential competition with such corporations as from the very nature of the service required of them are monopolies."

general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State."

In *Village of Kingsford* v. *Cudlip,* 258 Mich 144, a case involving the annexation of territory to a village, this Court, at p 148, measured the scope of these constitutional provisions by reference to their purpose thus:

"The purpose of these and other provisions which follow undoubtedly was to secure to cities and villages a greater degree of home rule than they formerly possessed. The provision for a general law for their incorporation was intended to confer upon them almost exclusive rights in the conduct of their affairs, not in conflict with the Constitution or general laws applicable thereto."

This statement acknowledged judicially the general policy underlying the home-rule philosophy implicit in the considered sections of our present Constitution. That general policy was likewise acknowledged legislatively by PA 1909, No 279, § 4, subd (s). See, currently, CL 1948, § 117.4j (Stat Ann 1949 Rev § 5.2083), the third subdivision of which permitted each city to provide by its charter:

"(3) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated

or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the Constitution and general laws of this State."

See, also, *Conroy* v. *City of Battle Creek,* 314 Mich 210; *City of Pontiac* v. *Ducharme,* 278 Mich 474; *City Commission of Jackson* v. *Hirschman,* 253 Mich 596; and *Gallup* v. *City of Saginaw,* 170 Mich 195. The point here made is that under our Constitution and our home-rule cities act, cities may exercise substantially greater powers essential to local self-government than they previously were allowed to exercise. That such powers are not without limit is, of course, conceded. Thus, cities may not, absent express legislative grant, exercise rate-making powers over public utilities,— powers not essential, or directly related to, the operations of local government. *City of Kalamazoo* v. *Titus,* 208 Mich 252, cited to us by plaintiffs. But, plaintiffs' reliance upon *City of Kalamazoo* v. *Titus* to support their suggestion, by analogy, that even today home-rule cities are limited exclusively to only those taxes expressly delegated by the Constitution or legislature is misplaced. That case properly stands for the proposition that home-rule cities do not possess plenary powers and may not, absent legislative grant, assume powers not essential to local self-government. It marks properly the outer boundaries of municipal powers, but it does not require, as plaintiffs suggest, that every power exercised by a city, such as the imposition of a new tax, be specifically delegated by legislative grant where there is delegated the power to impose taxes of a designated generic kind.

As we have seen, the legislature acting within the scope of its unquestioned power, authorized home-rule cities to lay and collect excises. Consistent with

the whole purpose of the home-rule cities act and the constitutional provisions pursuant to which it was enacted, the authority granted was in broad general terms, each city being left free to determine for itself what excises would best meet its local needs. The legislative choice of such a generic term seems clearly intended to grant cities full authority to seek municipal revenues by whatever excises the fertile minds of municipal officers fairly could devise, subject always, of course, to the legislature's constitutionally ordained duty to "limit their rate of taxation for municipal purposes" (article 8, § 20, Constitution of 1908).

Plaintiffs cite cases from other jurisdictions, in which municipal income taxes have been invalidated, in support of their claim that more explicit constitutional or legislative authority is required than is present in our Constitution and statutes. *Carter Carburetor Corporation* v. *City of St. Louis* (1947), 356 Mo 646 (203 SW2d 438), cited *supra,* and *City and County of Denver* v. *Sweet* (1958), 138 Colo 41 (329 P2d 441). Both the Missouri and Colorado constitutions, while granting cities a substantial measure of home rule, limited their taxing powers to only those granted them by their respective legislatures.[5] Absent grant of authority to cities to impose the municipal income taxes challenged in the cited cases, the courts struck down the taxes as beyond municipal powers. As we have noted earlier in this opinion, Michigan's legislature has granted home-rule cities the taxing power St. Louis and Denver were found to lack. This fact difference sufficiently distinguishes the Missouri and Colorado cases from our own. Other cases, in which municipal

[5] In *City and County of Denver* v. *Sweet,* decision was based upon a constitutional provision which the Colorado court interpreted to mean that only the legislature could levy income taxes and that such power could not be delegated by it.

income taxes were upheld, are cited by plaintiffs to demonstrate the constitutional and legislative detail they claim is necessary to support such taxes. *City of Louisville* v. *Sebree* (1948), 308 Ky 420 (214 SW2d 248); *Angell* v. *City of Toledo* (1950), 153 Ohio St 179 (91 NE2d 250); *Breitinger* v. *City of Philadelphia* (1950), 363 Pa 512 (70 A2d 640); and *Walters* v. *City of St. Louis* (1953), 364 Mo 56 (259 SW2d 377), affirmed (1954), 347 US 231 (74 S Ct 505, 98 L ed 660). It is perhaps sufficient to observe that substantial differences exist between our Constitution and statutes and the constitutions and statutes of the States from which plaintiff cites cases and that the "specificity" of their provisions does not, even logically, suggest that all States must indulge the same "specificity" in granting home-rule cities taxation powers. It may be noted, however, that in 1 of the cases so cited by plaintiffs, *Angell* v. *City of Toledo,* a municipal income tax was upheld absent *any* legislative authority therefor, but based only upon very broad constitutional grant of powers of local self-government not unlike our own. Article 8, § 21, Constitution of 1908, quoted above, and CL 1948, § 117.4j (Stat Ann 1949 Rev § 5.2083), also quoted above. See article 7, § 21, Constitution of 1963 for constitutional grant of municipal tax power effective January 1, 1964.

For the foregoing reasons we conclude that Detroit's income tax is an excise and that it is within the power of the city to impose such excise, the legislature having authorized home-rule cities to lay and collect excises.

2. We now turn to plaintiffs' claim that when Detroit's income tax revenues are added to the revenues from its ad valorem tax on property, its aggregate tax revenues exceed 2% of the assessed value of real and personal property in the city in alleged violation of section 3, subd (g), of the home-rule

cities act, CLS 1956, § 117.3, as amended by PA 1960, No 14 (Stat Ann 1961 Cum Supp § 5.2073). The parties stipulated that the revenue from the challenged tax when added to the revenue from the ad valorem tax to be imposed by the city for the 1962–1963 fiscal year (excluding the levy for debt services), would result in aggregate revenues in excess of the stated limit.

Article 8, § 20, of the Constitution of 1908 provides:

"The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts."

Section 3, subd (g), of the home-rule cities act provides:

"Each city charter shall provide: * * *

"(g) For annually laying and collecting taxes in a sum not to exceed 2 per centum of the assessed value of all real and personal property in the city: Provided, That unless and until such charter shall provide for a different tax rate limitation, the governing body of every city is hereby authorized to levy and collect taxes for municipal purposes in a sum up to and including 1 per centum of the assessed value of all real and personal property in the city, subject to the provisions of section 1a of chapter 7 of Act No 202 of the Public Acts of 1943, as amended."[6]

It is the city's position, upheld by the chancellor, that the pertinent portions of both the constitutional and the statutory provisions quoted pertain only to ad valorem taxes on property and that other munic-

[6] Reference is to CLS 1956, § 137.1a (Stat Ann 1958 Rev § 5.3188 [45a]).—REPORTER.

ipal tax revenues are not limited thereby. It claims that limitations upon the rate of taxation are generally held to apply only to property taxes as distinguished from excises or licenses, citing 1 Cooley on Taxation (4th ed), § 168, p 366, and 51 Am Jur, Taxation, § 140. Plaintiffs, on the other hand, point to the unqualified constitutional mandate to the legislature that it limit the rate of taxation by cities and urge us to construe the legislative language as a limitation upon a city's *aggregate* tax revenues from whatever tax source, the *measure* of such limitation being 2% of the assessed value of property in the city. They cite us to section 4-a of the act, CL 1948, § 117.4a (Stat Ann 1949 Rev § 5.2074), which limits the net bonded indebtedness of a city to 10% of the assessed value of all the real and personal property in the city, and to various provisions of Detroit's charter which plaintiffs claim demonstrate the city's own acceptance of the construction of the legislative language they urge upon us. It may be conceded, if only for the purpose of argument, that Detroit has in the past regarded the statute as an all-inclusive limitation upon its aggregate tax revenues, but such local construction of a statutory provision does not preclude our giving it a different construction. Likewise, while section 4-a of the act lends some support to plaintiffs' contention,—insofar as it appears that its reference to the assessed value of property in the city is as a measure by which net bonded indebtedness is limited,—it is not so clear that similar usage of those words in section 3, subd (g) requires our finding that it limits the city's aggregate tax revenues.

It is not at all inappropriate for the legislature to limit the bonded indebtedness of cities by reference to the assessed value of the real and personal property within their boundaries, just as it may have limited such indebtedness by reference to population

or, indeed, by a legislatively predetermined fixed maximum amount. Assessed value of property is a readily available standard, and an appropriate one to the extent it measures a city's capacity to repay bonded debt, for use as a limitation upon bonded indebtedness. On the other hand, assessed value of all of a city's property, whether productive of income or not, whether used or not, bears little or no relation to its residents' capacity to pay income taxes or any other excise, to say nothing of the taxpaying capacity of nonresidents a city properly may reach for such excise taxation. By the very nature of excises, the measure of which depends upon factors other than value, it is not reasonable to assume that a statutory limitation upon the rate of excise taxation would be tied to the assessed value of property. In fact, it is difficult to conceive of any single limitation which would apply rationally to all excises, there being so many with such varying characteristics. It is even more difficult, if not impossible, to conceive of a single limitation rationally applicable both to excise and to ad valorem taxes. Several courts from other jurisdictions have reached essentially the same conclusion in construing comparable statutory or constitutional limitations upon tax rates. See *Phoenix Assurance Co. of London* v. *Fire Department of City of Montgomery* (1898), 117 Ala 631 (23 So 843, 42 LRA 468),[7] and *State, ex rel. City of Fargo,* v. *Wetz* (1918), 40 ND 299 (168 NW 835, 5 ALR 731), cited to us by defendant city.

We have thus far considered only the applicability of the specific limitation of section 3, subd (g), of the home-rule cities act to excises and have concluded that such limitation applies only to ad valorem taxa-

[7] For the provisions of the Alabama constitution, comparable to the statutory limitation of section 3, subd (g), of our home-rule cities act, reference must be made, as it was in the *Phoenix* case, to *Hare* v. *Kennerly* (1888), 83 Ala 608, 612 (3 So 683).

tion. Although not essential to his decision, the chancellor found that article 8, § 20, Constitution of 1908, quoted above, likewise applies only to ad valorem taxation. We disagree. The constitutional language is unqualified by anything which would suggest such a restrictive construction. It requires the legislature by general law to limit cities' rate of taxation for municipal purposes. Absent any reference to suggest restriction of this mandate only to the rate of ad valorem taxation, it is our opinion that it requires the legislature to impose limitations upon the rates of all taxes levied by cities. To read this constitutional provision as did the chancellor, absent other provisions limiting or requiring the limitation of other than ad valorem municipal taxes, would permit cities to tax other than property without limit except that of municipal self-restraint. Such result would defeat the purpose of the constitutional provision as reflected in the 1908 constitutional convention delegates' Address to the People, quoted earlier at greater length in the margin:

"The transfer of the powers of legislation from the State legislature to the people of the municipalities or their representatives necessitated the imposition of certain checks and prohibitions designed to secure conservative action on the part of those to become responsible for the future conduct of such affairs. * * * The power to limit the rate of taxation and restrict the power of borrowing money and contracting debts is left to the legislature, as in the present constitution, where it may be subject to such changes as may be made necessary by changing conditions."

We observe in passing that article 7, § 21, of the Constitution of 1963, not yet effective, provides:

"The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxa-

tion for municipal purposes, and restrict the powers of cities and villages to borrow money and contract debts. Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this Constitution or by law."

The second sentence is expressly applicable only to ad valorem taxes on property, the rate of which the legislature is required to limit. However, by the last sentence other taxes cities and villages are empowered by the new Constitution to levy are subject to limitations and prohibitions imposed by the legislature as well as by the Constitution itself.

Failure of the legislature to comply fully with the provisions of present article 8, § 20, to the extent there is no legislative limit upon the right of cities to impose excises, does not invalidate Detroit's income tax. Legislative limitations may be imposed at any time. Constitutionally ordained powers of home-rule cities cannot be allowed to be wholly thwarted by failure of the legislature to comply with its own duty to impose limitations upon such powers by general law.

Somewhat related to the foregoing contention of plaintiffs is their claim that section 3, subd (f), of the home-rule cities act, CLS 1956, § 117.3, as amended by PA 1960, No 14 (Stat Ann 1961 Cum Supp § 5.2073), which provides:

"That the subjects of taxation for municipal purposes shall be the same as for State, county and school purposes under the general law,"

bars municipal income taxes because income is not the subject of taxation for State, county, and school purposes.

As we have noted above, the 1908 Constitution and the home-rule cities act adopted in obedience thereto, granted broad powers to cities, including the widest

possible range of taxing powers, subject only to such limitations as the legislature by general law chose to impose. Having so concluded, it makes no sense to say that by another section of the same act, section 3, subd (f), the legislature intended to prohibit all municipal taxes except such as the State, counties, and school districts are authorized to impose. It is our opinion that, like the next succeeding subsection, section 3, subd (g), discussed above, section 3, subd (f), applies only to ad valorem taxes on property and is designed to provide a unitary system of taxation and exemption from taxation of property throughout the State by all taxing units of government. It is not insignificant to us that section 3, subd (f), and section 3, subd (g), are and, since their rearrangement by the amendment of PA 1929, No 126, have been linked together in the same statutory section. Both, in our opinion, apply only to ad valorem taxes on property.

3. Plaintiffs' final attack upon Detroit's income tax ordinance is based upon the bare assertion that it violates their due process rights guaranteed by the State and Federal Constitutions. Article 2, § 16, Constitution of 1908 and Fourteenth Amendment to the United States Constitution. Their claim seems to be that the city may not tax its residents' activities which occur beyond its boundaries, nor may it tax nonresidents of the city for working or otherwise carrying on commercial activities within the city in the exercise of rights the city cannot prohibit. The claim misconceives the nature of the tax. As we have noted above, Detroit imposes its excise upon residents and others who earn or receive income in Detroit or from real or tangible personal property located in Detroit, for the privilege of enjoying the municipal services the city performs for them and the protection it provides to them and their property. We have also noted that the income basis for the

tax reasonably may be assumed to reflect fairly the extent to which such municipal services and protection are enjoyed by the taxpayer.

Other courts have considered the claims suggested by plaintiffs and have rejected them where, as here, the tax bears some relation to the services, protection and other privileges provided by the taxing unit and enjoyed by the taxpayer. The power to reach a citizen's income earned beyond the borders of the United States has been recognized in the Federal government in *Cook* v. *Tait* (1924), 265 US 47 (44 S Ct 444, 68 L ed 895). The State's power to reach a resident's income from sources beyond its borders was affirmed in *Lawrence* v. *State Tax Commission of Mississippi* (1932), 286 US 276 (52 S Ct 556, 76 L ed 1102, 87 ALR 374). No reason has been suggested to us for denying such power to cities. See *City of Springfield* v. *Kurtz* (1951), Ohio Court of Appeals, Clark County, 65 Abs 593 (104 NE2d 64).

As to nonresidents, see *Shaffer* v. *Carter* (1920), 252 US 37 (40 S Ct 221, 64 L ed 445), and *Travis* v. *Yale & Towne Manfg. Company* (1920), 252 US 60 (40 S Ct 228, 64 L ed 460), where States were recognized to have the power to tax nondiscriminatorily a nonresident's income earned within the taxing State, and *Angell* v. *City of Toledo, supra,* where the court concluded that a city could tax such nonresident's income from local sources. See, also, *Kiker* v. *City of Philadelphia* (1943), 346 Pa 624 (31 A2d 289). And see our own recent discussion of the due process guarantees, with reference to the constitutional applicability of Michigan's business activities tax to foreign corporations engaged in interstate commerce in Michigan. *Armco Steel Corporation* v. *Department of Revenue,* 359 Mich 430, 450.

We are not persuaded that plaintiffs have been deprived of any due process rights guaranteed by

either our State Constitution or the Federal Constitution.

Affirmed. No costs, there being presented public questions involving construction of an ordinance, statutes, and the Constitution.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

KUYKENDALL *v.* KUYKENDALL.

1. ACCOUNTING—JOINT ACCOUNTS—FRAUD—EVIDENCE.
   Evidence presented in suit for accounting, brought by plaintiff, daughter-in-law of defendant, after the death of her husband, to recover proceeds of account owned jointly by her husband and his father with rights of survivorship, *held*, to support trial court's denial of relief on the ground that there was no basis for finding that defendant had perpetrated a fraud upon her, where the evidence shows defendant had exhibited the account book to plaintiff and her husband at various times, that defendant had deposited checks plaintiff had given him in an account jointly owned by herself and her husband, and that testamentary efforts on the part of her husband indicated the deposits had been made in compliance with the husband's wishes and of his own money.

2. COSTS—BRIEF.
   No costs are allowed in suit for accounting upon affirmance of decree, where appellee has not filed a brief.

Appeal from Jackson; Simpson (John), J. Submitted April 3, 1963. (Calendar No. 19, Docket No. 49,702.) Decided May 9, 1963.

REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur 2d, Accounts and Accounting § 55.
[2] 5 Am Jur 2d, Appeal and Error § 1010.

Bill by Irene Kuykendall against Morgan Kuykendall for accounting of money deposited in joint account. Bill dismissed. Plaintiff appeals. Affirmed.

Kevin J. Daly, for plaintiff.

PER CURIAM. Plaintiff instituted suit in equity against her father-in-law to recover the proceeds from a savings and loan association account which, during her husband's lifetime, was owned jointly by her husband and defendant. Plaintiff claims that she and her husband each gave defendant sums of money for deposit by him to their bank and savings and loan association accounts, this long standing arrangement having been made because both plaintiff and her husband were employed during regular bank hours and thus were unable to handle such financial affairs themselves. Plaintiff claims that it was her understanding that the deposits made by defendant were made in deposit accounts owned jointly by her and her husband, but that after her husband's death in 1960 she discovered that most of the deposits had been made to an account owned jointly by her husband and his father, the defendant. She seeks recovery of the proceeds from that account on the theory that defendant and her deceased husband perpetrated a fraud upon her.

The chancellor found no evidence of fraud by defendant or any other grounds upon which plaintiff properly could claim entitlement to the the disputed funds. We have reviewed this record in its entirety and reach the same conclusion reached by the chancellor.

At best, plaintiff proved only that she was unaware that her husband had opened a deposit account in his own name and in his father's name with rights of survivorship. There was no evidence from which

even an inference could be drawn that the defendant deposited to that account any money given to him by plaintiff; but, on the contrary, the evidence supports the defendant's contention that, in accordance with instructions all parties concerned understood, when plaintiff gave him money for deposit he deposited it in her account which she owned jointly with her husband and that when plaintiff's husband gave defendant money for deposit he deposited it in the husband's account owned jointly with defendant.

The chancellor concluded that plaintiff knew of the arrangement and that the deposit books had been shown to the plaintiff and her husband by the defendant from time to time as deposits were made and interest recorded. On *de novo* review, we find no basis for concluding to the contrary.

An instrument allegedly the last will and testament of plaintiff's decedent husband was introduced in evidence by the plaintiff. Among other things, it discloses that at the time of its execution, decedent made reference to the disputed account and described it as a joint account with his father, adding that upon his death the balance in the account "should probably go to him without the necessity of probating." The lawyer who drafted this instrument testified for the plaintiff that he had not been shown the account book when he prepared the will and that he believed it desirable to refer to the account in the will in the event decedent's description of the account was inaccurate. Accordingly, after the language above quoted, the testamentary instrument also provided that if for any reason it became necessary to include the proceeds of the account in the decedent's estate, the proceeds should be divided equally between decedent's wife and his father, if the father survived.

The evidence offered by plaintiff herself concerning the testamentary efforts of her husband indicate

to us that the deposits made by the defendant to the disputed account were made in compliance with the husband's wishes. Absent any showing that plaintiff's funds were deposited in the disputed account by defendant, against plaintiff's wishes and contrary to her instructions to defendant, there is no basis in law for the equitable relief she prays.

Affirmed. No costs, defendant not having filed a brief.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

KOURI *v.* FASSONE.

1. FRAUD—CONSTRUCTIVE FRAUD.
   Constructive fraud in the execution of instruments is inferred from the conditions and relations of the immediate parties to the transaction.

2. DEEDS—FIDUCIARIES—MENTAL COMPETENCY—UNDUE INFLUENCE.
   Invalidity of a conveyance of property to a grantee who stands in a fiduciary relation to the grantor is merely presumed, whereas if there be no such relation existing the party seeking to prove invalidity must show incompetency of, or undue influence upon, the grantor.

3. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW.
   The Supreme Court considers an administrator's suit to set aside assignments and conveyances of real estate and for an accounting by a *de novo* review on the record presented.

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur, Fraud and Deceit §§ 4, 14.
[2] 16 Am Jur, Deeds § 40.
[3] 5 Am Jur 2d, Appeal and Error § 822.
[4] 16 Am Jur, Deeds §§ 375, 402.
[5–7] 16 Am Jur, Deeds §§ 38, 39.

4. DEEDS—FIDUCIARIES—PRESUMPTIONS—BURDEN OF PROOF—EVIDENCE.

Defendant daughter with whom mother lived during her serious, prolonged, and final illness and who occupied a fiduciary relationship with the deceased *held,* to have sustained her burden of proof to overcome presumption of invalidity of the assignments and conveyances of property made to defendant while the mother was being cared for by defendant.

5. SAME—MENTAL COMPETENCY—WEAK MINDEDNESS.

Mere weak mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat a conveyance.

6. SAME—UNDUE INFLUENCE.

The ultimate question to be determined on the issue of exertion of undue influence in the execution of a conveyance is whether the disposition by the grantor was voluntary and in the search of undue influence the court looks at the whole spectrum of circumstances, not at 1 facet.

7. SAME—UNDUE INFLUENCE—KINDNESS.

Influence earned by kindness and care for the grantor of property then suffering a prolonged illness, while administering to the grantor's wants or contributing to her comfort, cannot be said to be undue.

Appeal from Wayne; Piggins (Edward S.), J. Submitted April 5, 1962. (Calendar No. 27, Docket No. 49,259.) Decided May 9, 1963.

Bill by Thomas A. Kouri, as administrator of the estate of Catherine Kouri, deceased, and as guardian of Lucille Kouri, a mentally incompetent person, against Dorothy M. Fassone to set aside assignments and conveyances of real estate and for accounting. Bill dismissed. Plaintiff appeals. Affirmed.

Kelly, Oster & Brennan (Craigen J. Oster, of counsel), for plaintiff.

John L. Potter, for defendant.

SMITH, J.

Parties to the Action

This is an action by brother against sister to set aside conveyances of the mother allegedly made to the sister. Suit was instituted shortly after the death of the mother. Plaintiff brother brings suit in his capacity as administrator with the will annexed of his mother's estate, and also as guardian of another sister who is mentally incompetent. Catherine M. Kouri, the deceased mother, made a will in 1952, leaving the property to her mentally incompetent daughter, Lucille. In 1959, however, apparently she conveyed her interest in the same property (2 parcels) to defendant daughter in whose home decedent resided during her terminal illness. After trial, the circuit court judge entered a decree dismissing plaintiff's bill of complaint. From this decree, appeal is taken.

Plaintiff's Proofs

During the period of her terminal illness, from August 1958, approximately to the date of her death, March 18, 1960, decedent lived with defendant daughter. The conveyances in question were executed on May 6, 1959, at the home of defendant. The conveyances consisted of an assignment of deceased vendee's interest in a land contract, and also the assignment of deceased's interest as vendor in a land contract, accompanied by a quitclaim deed. Present at the home, were mother and daughter, 2 attorneys, and a notary. One of deceased's sons happened by but did not remain long and took no part in the transaction. Notice of assignments was not immediately given by defendant, but interested parties were advised by November, 1959. Defendant, Dorothy Fassone, never openly asserted ownership of the property during her mother's lifetime. Allegedly, she told plaintiff, in a conversation after the convey-

ances, that she did not have control of the property. It was apparently known by members of the immediate family that decedent had made her will in 1952, leaving the property in question to the mentally incompetent daughter. Defendant is said to have assured members of the family that the mentally retarded daughter would receive both properties under the will. At the funeral home, another sister overheard a conversation between defendant and a real-estate agent. This prompted an investigation by plaintiff brother who discovered that defendant had listed the property in February, 1960, approximately a month before the mother's death. Plaintiff claims that when he was shown the listing agreement at the real-estate office he saw a notation on it as follows: "If anyone asks who owns this property, tell them Catherine Kouri." The real-estate broker was brought to the hearing under subpoena *duces tecum* but claims that he could not find the listing agreement and could not remember whether such a notation appeared on it. Defendant, however, did introduce her copy of the listing agreement, but it bore no such notation.

While it is clear that defendant never tried to prevent other members of the family from visiting decedent in her home, it is evident that she was anxious, at least, for some of the visitors, not to have a private visit with Mrs. Kouri, especially about the mentally retarded daughter. The parish priest was effectively prevented from discussing living conditions of Lucille, the mentally retarded daughter. He made 3 trips to defendant's home without success. He testified that his reason for making the visits was because Lucille had complained to him about her living conditions in the home. Defendant's reported expression on this incident is that she thought any discussion of Lucille might upset her mother.

Plaintiff also presented testimony as to the general physical and mental condition of deceased during her terminal illness. Prior to the illness, she had suffered at least 3 heart attacks, and although there was a peculiar absence of medical testimony about her condition, it was said that she suffered a "paralyzing stroke" as her last illness. It is not denied that she wept on occasion and that she was unable to take care of her personal needs due to paralysis. Plaintiff's proof showed, at least, that she had occasional lapses of memory, although it must be said that the testimony of witnesses on both sides tends to show that deceased conversed freely with all visitors.

Defendant's Proofs

On the date of the conveyances in question, May 6, 1959, Mr. Potter, now counsel for defendant, was accompanied by Mr. Connolly, his office associate, to defendant's home. A secretary was taken along also to act as notary. Mr. Connolly has no interest in this case. His purpose in accompanying Mr. Potter was to ascertain if decedent were competent to engage in the transaction. He testified that he questioned decedent at some length and found "that she knew what her property was and who was going to get it and the reasons for giving it to her daughter." His opinion was that based upon the answers given he felt that she had "sufficient mental capacity." In the conversation, deceased mentioned her mentally retarded daughter. The record does not disclose that there was any discussion about the will previously made and what effect the conveyances would have upon the property disposition made in the will. Mr. Connolly did, however, ask deceased if she understood that by signing the documents she no longer would have control of the property. He indicated

that her answer exhibited a clear understanding of this point.

Other witnesses testified that deceased stated in April, 1959, that she was going "to sell" at least 1 of the properties to defendant because defendant had always taken care of her. Another witness testified that just 2 days after the conveyances she was informed by the deceased that she had "turned over" the house to defendant. Both witnesses thought deceased was of sound mind. Of like import is the testimony of several other witnesses. One of these characterized deceased as "sane, sound and stable." Another said "Her mind was perfect, she knew what she was doing."

It was shown that defendant handled all of her mother's finances, including collecting moneys from the property and paying bills. The net income of deceased was estimated at $84 per month. Defendant's husband testified that the money was used to pay hospital bills, medicines, doctors, and to maintain 1 of the properties, that is, the 1 being purchased on land contract. There was testimony that deceased had medical and hospitalization insurance. Premiums were paid by decedent's children. There is testimony also that occasionally the children of deceased provided some small assistance to the mother over the course of her various illnesses. It is clear, however, that defendant provided the chief care after each serious illness, including the terminal illness.

Trial Court's Ruling

The trial judge in an opinion from the bench summed up the case in this manner:

"The court sees in this case 4 principal issues: First, where is the burden of proof? Second, were these instruments executed by the deceased? Third, if they were executed by the deceased, were they so

executed under undue influence or duress sufficient to legally nullify them, and/or fourth, if they were executed by the deceased, was she so mentally incompetent at the time of the execution as to invalidate the conveyances in question?"

The trial judge found that there was a fiduciary relationship between deceased and the defendant and that "the burden of proving the fairness of the transaction and the absence of fraud or undue influence rests upon the person seeking to uphold the conveyances in this case—in this case the defendant." After weighing the testimony of a handwriting expert against 1 of the actual witnesses to the conveyances, together with confirming testimony, the trial judge found that deceased did execute the conveyances in question. Next in his opinion he discussed the question of undue influence. As to this, he said:

"Scrutinizing this record as carefully as possible, even analyzing it in favor of the plaintiff as much as possible, giving the greatest weight to the plaintiff's side, taking in consideration all the testimony, this court cannot honestly conclude that there is any showing of any undue influence; and to the contrary, this court must conclude that the defendant has sustained the burden of showing an absence of undue influence, which is what the law requires him [*sic*] to do, under these circumstances."

As to mental incompetency, the trial judge said:

"It must appear affirmatively that the grantor was laboring under such a degree of mental infirmity as to make her incapable of understanding the nature of her act, and if she is capable of understanding in a reasonable and rational manner the nature and character of the transaction which she here in this case engaged in, then she is competent to do the act or to perform the act which she performed."

He then reviewed the testimony of some of the witnesses tending to show rationality on the part of the

deceased, and concluded that the deceased was mentally competent.

Argument on Appeal

Plaintiff advances a variety of reasons for reversal here on appeal. He claims that in view of the presumptive invalidity of the transaction by reason of the confidential relationship, the court should have scrutinized more carefully the transaction in light of all the circumstances surrounding it; he claims that these circumstances strengthen the presumption of fraud and undue influence. Specifically, he refers to the secrecy of the transaction, the mental and physical weakness of the deceased, the lack of competent and independent advice, and what he calls the incongruity of the transaction by which the deceased allegedly completely reversed the lifetime concern for the welfare of the mentally retarded daughter. Plaintiff claims also that defendant's failure to testify creates an additional inference. He further claims that the failure of the defendant to call the notary to the transaction creates an additional inference that her testimony would have been unfavorable. Among other things, he argues also that the consideration for the transfer of the conveyances was grossly inadequate. *Defendant retorts* that plaintiff failed to prove undue influence or mental incompetency; further, that it was affirmatively proved by defendant that the conveyances were legally executed.

Decision

The principles lie within that branch of equity jurisprudence in which constructive fraud is inferred from the conditions and relations of the immediate parties to the transactions. This encompasses 2 distinct classes of cases, neither of which, however, is exclusive of the other. We quote 3

Pomeroy, Equity Jurisprudence (5th ed), § 943, p 748, in this regard:

"The whole subject is therefore separated into 2 branches: 1. Transactions void or voidable with persons totally or partially incapacitated; 2. Transactions presumptively invalid between persons in fiduciary relations."

In note 6 at the bottom of the page already cited, the author makes this comment as to the 2 classes of cases. There are "2 distinct classes of cases, which are governed by quite different rules, namely, those in which, from the relations of the parties, invalidity is merely presumed, and the burden of proof is cast upon the one benefited to overcome such presumption by showing good faith; and those in which the voidable character is inferred as a conclusion of fact, without any presumption from the partial incapacity of one party, or the overmastering influence exerted by the other. In the latter class, if the evidence of the incapacity or unlawful influence is satisfactory, the voidable character of the transaction results as a necessary conclusion; there is no mere presumption to overcome."

We are mindful that we review this case *de novo*. It is not contested on appeal that defendant was in a fiduciary relationship with deceased. The burden of proof was therefore on defendant to overcome the presumption of invalidity. This assumes, of course, that deceased did execute the conveyances to defendant. We think the testimony was more than adequate to sustain the trial judge in this finding. Now, as to whether defendant met the presumption of invalidity, we think it most significant that on each occasion when deceased had a serious health problem she turned to her daughter, the defendant. Her terminal illness lasted from August, 1958, to March, 1960, during which time defendant had the under-

standably difficult task of nursing an invalid mother. Others may have claimed their willingness, but on each occasion of serious illness it was defendant who actually performed. Help received from other members of the family was incidental. It is reasonable to infer that deceased may have wished to reward this kind of diligence and loyalty.

It is significant to note also, that the time and manner of execution suggest deceased gave the matter mature consideration. It was in May, 1959, approximately 7 months after the onset of the last illness that the conveyances were executed. The testimony seems clear that this was during the period of her highest recuperation. There is testimony also that approximately 1 month before the conveyances the deceased discussed the matter with a friend. Deceased told her friend that defendant had taken care of her for quite a number of years, that therefore, she thought she would "sell" the house to defendant. This friend advised her merely to see an attorney. Shortly after the transaction had been completed, she told another friend that she had turned the property over to defendant. It is also significant that between the time of the conveyances and the time of her death there is no expression of a contrary wish, according to the record.

We think defendant successfully met the presumption of invalidity by the presentation of these objective facts. Objective facts have a militancy all their own. Defendant has sustained the burden of proof in overcoming the presumption. So far, we have been careful not to discuss the claims of mental incapacity and undue influence. This is a test which defendant is yet to meet.

If there is satisfactory evidence of mental incapacity or unlawful influence, the transaction is voidable as a conclusion of fact. We have already related the testimony coming both from defendant's

witnesses and also some of plaintiff's witnesses that deceased was able to engage in normal conversation, that she appeared to be "rational", that she appeared to be "sound and stable" and so on. Admittedly, the proofs are not perfect on this point: she cried at times, and occasionally her mind would wander. There were domestic scenes, not entirely unnatural, which might have been explained better. However, the dominant impression gathered from the testimony of all witnesses who had contact with the deceased during the period of her terminal illness was that she was laboring under no such incapacity as to make the transactions voidable. Mere weak mindedness whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat a conveyance. *Reagan* v. *Murray,* 176 Mich 231; *Wroblewski* v. *Wroblewski,* 329 Mich 61, 66.

As to undue influence, it is not possible to formulate a single definition embracing all forms of undue influence. The law is settled that we view each case largely upon its own circumstances. Particularly in search of undue influence, we look at the whole spectrum of circumstances, not at 1 facet. The ultimate question is whether the disposition was voluntary. We are not unmindful that defendant was in a strong and perhaps dominant position with her mother, but there is no evidence to indicate that the strong position of the daughter in any way influenced the disposition of the property. The testimony as to defendant's conduct, while unsatisfactory in some particulars, is not the kind from which we may properly infer undue influence. Influence earned by kindness and care, while administering to a person's wants or contributing to his comfort, cannot be said

to be undue. *Mackall* v. *Mackall,* 135 US 167 (10 S Ct 705, 34 L ed 84).

The decree dismissing plaintiff's bill of complaint is affirmed. Costs to appellee.

KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred with SMITH, J.

CARR, C. J., and DETHMERS, J. concurred in result.

O'HARA, J., took no part in the decision of this case.

SPRINGER *v.* AUTO AIR INDUSTRIES.

WORKMEN'S COMPENSATION—MEDICAL BILLS—PAYMENT DIRECTLY TO EMPLOYEE.

Workmen's compensation benefits for medical bills must be paid directly to the employee.

Appeal from Workmen's Compensation Appeal Board. Submitted December 5, 1962. (Calendar No. 93, Docket No. 49,840.) Decided May 9, 1963.

Richard K. Springer presented his claim against Auto Air Industries, employer, and State Accident Fund, insurer, for compensation and allowance of medical expense. Award to plaintiff. Defendants appeal. Affirmed.

Rapaport, Siegrist & Miatech, for plaintiff.

Richard J. Anderson, for defendants.

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Workmen's Compensation § 327 *et seq.*

PER CURIAM. Leave to appeal was granted before we decided *Boyer* v. *Service Distributors, Inc.*, 366 Mich 319, and *McDaniel* v. *Campbell, Wyant & Cannon Foundry*, 367 Mich 356. In these 2 cases, we held, among other things, that the statute provides that workmen's compensation benefits be paid directly to the employee. We declined to enlarge upon this statutory requisite.

In the instant case, defendants seek to reverse a workmen's compensation appeal board order requiring defendants to reimburse plaintiff directly for certain medical bills. From the record, it appears that plaintiff has been adjudicated a bankrupt. Apparently, some of the medical bills were listed and discharged. Plaintiff denies that all medical obligations have been discharged. Defendants would have us remand this case for "additional proceedings." What course these "proceedings" are to take is not clear. Numerous collateral issues would doubtlessly be raised. Again, we decline to enlarge upon the clear statutory provisions. This case is obviously controlled by the holdings in *Boyer* and in *McDaniel, supra.*

Affirmed, with costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

DOYLE *v.* CITY OF DEARBORN.

1. MUNICIPAL CORPORATIONS—HOME-RULE CITY CHARTERS—OFFICERS.
   It is mandatory that a home-rule city charter shall provide for the qualifications, duties, and compensation of its officers (CL 1948, § 117.3[d], as amended by PA 1960, No 14).

2. STATES—LEGISLATURE—QUALIFICATIONS FOR MEMBERSHIP.
   The only valid limitations upon qualifications for membership in the State legislature are those imposed by State law.

3. MUNICIPAL CORPORATIONS—OFFICERS—QUALIFICATIONS.
   Qualifications, as the term is used in statute setting forth required provisions of a home-rule city charter, is used in a generic sense and includes qualifications to be elected to office and also qualifications to hold the office (CL 1948, § 117.3[d], as amended by PA 1960, No 14).

4. SAME—COUNCILMAN—QUALIFICATIONS—STATE SENATOR.
   Plaintiff, a State senator, concededly qualified to be elected to office of city councilman, was not qualified to serve as councilman without first having resigned his office as a member of the State legislature, where city charter provision declared it to be contrary to public policy for an elective city official to be employed by or hold office in, and paid wages or salary by, any other unit of government raising its operating budget in whole or in part by public taxation (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19).

5. SAME—HOME-RULE CITIES—CHARTERS—QUALIFICATIONS OF OFFICERS—PUBLIC POLICY.
   It is within the express authority of the home-rule city act and consonant with general public policy for a city charter to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations § 102 *et seq.*, § 222 *et seq.*
[2] 49 Am Jur, States, Territories, and Dependencies § 34.
[3] 37 Am Jur, Municipal Corporations § 230.
[4–8] 37 Am Jur, Municipal Corporations § 238.
Effect of election to or acceptance of one office by incumbent of another where both cannot be held by same person. 100 ALR 1162.

impose a restriction upon a person holding an elective office in the city that the incumbent not hold office in another governmental unit raising its operating budget in whole or in part by taxation (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19).

6. SAME—HOME-RULE CITY COUNCILMAN—STATE LEGISLATOR—QUALIFICATIONS OF OFFICERS—OPTION.

A State legislator who has been elected to office of home-rule city councilman in city whose charter restricted such officers from holding office in any other governmental unit raising its operating budget in whole or in part by taxation, had the option of resigning from the legislature or refusing the oath as councilman (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19).

7. SAME—HOME-RULE CITY CHARTER—OFFICERS—COMMON LAW.

A home-rule city charter may prohibit a person from holding 2 offices which the common law might not declare incompatible (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19).

8. SAME—HOME-RULE CITIES—COUNCILMAN—STATE SENATOR—FORFEITURE OF SALARY.

Summary judgment for defendant city was properly granted in action by former State senator to recover salary as city councilman during period when he was also a State legislator, where city charter automatically vacated his office as councilman if he were also an officer in a governmental unit deriving its operating budget in whole or in part from taxation, notwithstanding he had served as councilman without his privilege to do so having been challenged, since his right to salary had been automatically forfeited (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19).

Appeal from Wayne; Wise (John M.), J. Submitted December 5, 1962. (Calendar No. 101, Docket No. 49,749.) Decided May 9, 1963.

Action by Patrick J. Doyle against the City of Dearborn, a municipal corporation, for salary as councilman. Summary judgment for defendant. Plaintiff appeals. Affirmed.

Dee Edwards, for plaintiff.

Ralph B. Guy, Jr., Corporation Counsel, and *Harry C. Tatigian,* Assistant Corporation Counsel, for defendant.

SMITH, J. Plaintiff was a member of the State legislature from 1945 through 1962, serving in both the house and senate. Both positions paid a salary and expenses. While a member of the State senate, he was elected councilman of the city of Dearborn, taking the oath of office on November 22, 1955. He resigned from the council September 10, 1957. No salary was paid him as councilman, although the Dearborn city charter provided for an annual salary of $2,000. On September 21, 1961, he filed his declaration in assumpsit, claiming the city of Dearborn had refused and neglected to pay his salary as required by the city charter.* Defendant city admits that plaintiff was elected to the office of councilman, but denies he is entitled to salary. Defendant claims that plaintiff was ineligible to enter upon duties as councilman because the city charter expressly prohibits anyone from holding elective office under the charter who occupies, at the time, any other public office except member of the Wayne county board of supervisors (to which the city is entitled to certain seats).

Defendant is a municipal corporation organized under the home-rule cities statute, PA 1909, No 279, which statute, upon constitutional mandate, grants broad powers to municipal corporations organized

* Section 5.3. "Each member of the council shall receive, as remuneration for his service to the city, the sum of $2,000 per annum. Such salaries shall be payable monthly and, except as otherwise provided in this charter, shall constitute the only salary or remuneration which may be paid for services performed by members of the council for the discharge of any official duty for or on behalf of the city during their term of office."

thereunder. It is mandatory under CL 1948, § 117.3 (d), as amended by PA 1960, No 14 (Stat Ann 1961 Cum Supp § 5.2073[d]), that each city charter provide for, among other things, "the qualifications, duties and compensation of its officers." The city charter of Dearborn specifies that it is unlawful for any elective official to hold any position on another public payroll. The applicable section reads as follows:

"Sec. 4.19. Anything in this charter to the contrary notwithstanding, it is hereby declared to be not in the best interests of the city and contrary to public policy for any elective official of the city to be employed by or hold office in and paid wages or salary by any other unit of government which raises its operating budget in whole or in part by public taxation. It is, therefore, hereby declared to be unlawful for any such official to hold such office or be thus employed, and any person who holds such office or is so employed is hereby declared to be ineligible to hold or continue to hold an elective office in the city government, and the right of such person to serve in such elective city office shall be automatically forfeited; provided, however, the foregoing provisions shall not apply to the terms of office of incumbent city officials expiring in the year 1954, and shall not apply to any city official who is an ex officio member of the Wayne county board of supervisors."

The obvious and essential question is whether plaintiff is entitled to a salary in view of the language of the charter. Plaintiff claims on appeal that the charter provisions are no defense to his action because, in effect, the charter imposes restrictions on membership in the State legislature and that, in this regard, the State Constitution pre-empts the field.

It hardly need be said that the only valid limitations upon qualifications for membership in the State

legislature are those imposed by State law. However home-rule cities are mandated to establish in their charters the qualifications of its officers. The word "qualifications" as used in the statute is used in the generic sense and includes qualifications to be elected to office and also qualifications to hold the office, sometimes referred to as eligibility. Defendant city concedes that plaintiff was qualified to be elected to the office of councilman but denies that he was qualified to serve without first having resigned his office as a member of the State legislature. With this we agree. We think it is within the express authority of the home-rule act to impose such a restriction in the city charter. The restriction is not upon a person becoming a member of the State legislature but upon becoming city councilman. A person such as plaintiff, serving in the legislature at the time of his election to the council had an option, either to resign from the legislature and qualify as councilman, or to refuse the oath as councilman and stay in the legislature. As to the public policy considerations, manifest in the charter, 2 citations are of general import in this connection. In Mechem, Public Offices and Officers, bk 2, ch 4, § 427, p 271, the statement is made:

"From motives of public policy, it is frequently provided in the State constitutions and statutes that a person shall not at the same time hold an office of trust or profit both under the State and under the Federal government; that persons holding judicial offices shall not at the same time hold other offices of trust or profit; that a person shall not at the same time hold 2 offices of trust or profit, and the like.

"These provisions often cover substantially the same ground as the common-law prohibition against incompatible offices; but they also, in many cases, go further than that and arbitrarily prohibit the

holding of 2 offices which the common law might not declare incompatible."

The author concludes in section 431, page 275, that:

"*A fortiori,* where the charter of a city prohibits an alderman from holding any other office, and provides that by his election to and acceptance of another, his office as alderman shall immediately become vacant, an alderman who is elected to congress and accepts the office *ipso facto* vacates his office of alderman." See *People, ex rel. Kelly,* v. *Common Council of Brooklyn,* 77 NY 503 (33 Am Rep 659).

In a later exposition on the subject, 42 Am Jur, Public Officers, § 58, p 926, the following appears:

"Since a public office is a public agency or trust created for the benefit and in the interests of the people, the holder of such an office is subject to such regulations and conditions as the law may impose. He cannot, therefore, complain of any restrictions which public policy may dictate on his holding of more than 1 office. The common law recognizes certain limitations on double office holding, and there are provisions in the constitutions and statutes of the various States declaring or extending the common-law rule. Their manifest purpose is to prevent multiple office holding so that offices and places of public trust will not accumulate in a single person."

In this case, the charter provision is in line with the general public policy. Not offending either the State Constitution or the home-rule statute, necessarily, we conclude therefore that the charter restrictions are valid. By express provision of the charter, any elective official of the city of Dearborn holding office in and paid wages or salary by any other unit of government which raises its operating budget, in whole or in part, by public taxation automatically forfeits his right to serve as an elective official of the city of Dearborn. By its terms, the disqualification occurs by operation of law.

Regrettably, no one challenged the privilege of plaintiff to serve on the council while he was colorably a member. This, however, in no way negates the effect of the will of the electors validly to adopt such a provision in the charter. The same charter upon which plaintiff now expressly relies to create the claimed obligation negates any possibility of recovery through its automatic forfeiture provisions. We conclude therefore that the order granting summary judgment to defendant should be affirmed. Costs to defendant.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

PEOPLE *v.* BEASLEY.

1. CRIMINAL LAW—MISDEMEANORS—FELONIES—EVIDENCE.
   Evidence presented upon trial of appellant woman for misdemeanor of resorting to a room for immoral purposes and of appellant man on charge of frequenting and attending a house of prostitution *held*, to have amounted in law to the felony of conspiracy to commit the misdemeanor for which conspiracy defendants were later tried and convicted (CL 1948, § 768.4).

2. SAME—FELONIES—MISDEMEANORS—PUNISHMENT.
   A felony in this State is distinguishable from a misdemeanor as a grade of crime only by reason of the place and severity of punishment.

REFERENCES FOR POINTS IN HEADNOTES

[1] 11 Am Jur, Conspiracy § 3.
[2] 14 Am Jur, Criminal Law § 13.
[3] 11 Am Jur, Conspiracy §§ 2, 3.

3. CONSPIRACY—COMMON LAW—STATUTES.

Conspiracy to do an unlawful act was an indictable offense at common law and was a misdemeanor only, but under the penal code it is a felony (CLS 1956, § 750.505; CL 1948, § 761.1).

4. SAME—EVIDENCE IN TRIAL OF MISDEMEANOR AMOUNTING IN LAW TO A FELONY.

The statute providing that "if, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not by reason thereof, be entitled to an acquittal of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts," unless court takes case from jury and directs indictment for felony, does not preclude prosecution for felony because trial was not of the *same* misdemeanor, but only where *the facts given in evidence amount in law* to a felony (CL 1948, § 768.4).

Appeal from Genesee; McGregor (Louis D.), J. Submitted January 9, 1963. (Calendar No. 13, Docket No. 49,439.) Decided May 9, 1963.

Hayward Beasley and Hattie Beasley, following trial on misdemeanor in municipal court, were convicted in circuit court on charge of conspiracy to violate the vice laws. Reversed.

Walter P. Kuta, Prosecuting Attorney, and *Edward P. Joseph,* Assistant Prosecuting Attorney, for the people.

Milton R. Henry, for defendants.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Donald T. Kane,* Assistant Attorney General, filing brief on request of Court, recommending reversal.

O'HARA, J. Hayward and Hattie Beasley, whose relationship with one another is not clear from the record, were tried in the municipal court of Flint

on separate misdemeanor charges, under Flint city ordinances. Hayward, charged with "frequenting or attending a house of prostitution," was acquitted. Hattie, charged with "resorting to a room for immoral purposes," was convicted. The trials were held on March 17, 1961.

On May 2 and 3, 1961, both were tried in the Genesee circuit court on an information charging:

"That Hattie Mae Beasley and Hayward Beasley, heretofore, to-wit: on or about the 25th day of January, in the year 1961, at the city of Flint, in said Genesee county, did feloniously and unlawfully conspire, confederate, combine, and agree together, with each other to violate sections 448, 449, and 450 of * * * [PA 1925, No 231] as amended,* the same being provisions of the Michigan criminal code, prohibiting the soliciting and accosting for immoral purposes, the admitting to a place for the purpose of prostitution, and the aiding and abetting in * * * admitting to a place for the purpose of prostitution."

Admittedly, the arrests for both the misdemeanors and the conspiracy-felony rose out of the events of the night of January 25, 1961, in the city of Flint. Fairly stated they are: Defendants cruising the streets of Flint with Hayward driving and Hattie in the front seat with him, caught the attention of another motorist by Hattie waving to him. He turned his car into a vacant parking lot and the defendants followed him. Hattie came over to his car and inquired as to his disposition toward some recreational activities which require relative privacy. He was so disposed. The price was agreed upon and Hattie told him to "follow the Chrysler" which Hayward was driving and in which she had been riding.

* PA 1925, No 231, as amended, has been repealed and superseded by PA 1931, No 328, with sections as indicated in the information as filed. See CL 1948, §§ 750.448–750.450 (Stat Ann 1954 Rev §§ 28.703–28.705).

Their common destination was a dwelling place which Hayward and Hattie had previously rented under the somewhat unimaginative assumed names of "Mr. and Mrs. Smith." It may reasonably be inferred from the testimony that the premises were rented as the locale for the activities previously mentioned.

Unbeknown to defendants and despite their carefully executed evasive action on the route to the rendezvous, 2 detectives from the Flint police department vice squad, 1 of whom testified he had known Hattie and Hayward for a year—apparently in his, the detective's, professional capacity—were in close pursuit, having witnessed the events hereinbefore described. Before the transaction could be concluded, or even initiated, the officer presented himself at the door, arrested and escorted all the participants to headquarters where the misdemeanor charges were preferred. After the complaints were made for the misdemeanors, the detective-sergeant in charge of the case had some further conversation with the defendants. Thereafter he consulted with the prosecuting attorney and the conspiracy warrant was authorized.

As the record comes to this Court therefore, the defendants were both tried in municipal court for the misdemeanors and the conspiracy-felony in circuit court. Because of the gravity of the issue presented, we asked for an additional brief from the attorney general on the applicability and effect of CL 1948, § 768.4 (Stat Ann 1954 Rev § 28.1027). This matter was first enacted as PA 1855, No 77, § 4. It was repealed by PA 1927, No 175, and re-enacted therein as chapter 8, § 4, and later reference thereto will be made.

In consequence of the conviction on the conspiracy charge, defendant Hayward Beasley was sentenced to from 4 years and 11 months to 5 years (the maximum) and Hattie Beasley from 2 to 5 years.

By motion timely made in advance of trial defense, counsel objected to prosecution for the felony by reason of the applicability of the statute which we here set forth:*

"Sec. 4. If, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not by reason thereof, be entitled to an acquittal of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which the trial shall be had, shall discharge the jury from giving any verdict upon such trial, and shall direct such person to be indicted for felony."

Though defendants' diligent counsel has assigned manifold error including but not limited to the admissibility of statements of defendants tending to prove the conspiracy before the *corpus delicti* of the crime was established, we believe decision is controlled by the statute above set forth.

The record sustains the defendants' contention that the facts given in evidence upon the trial of the misdemeanor amounted in law to a felony. That felony was conspiracy to commit the misdemeanors specified in the information. A felony in this State is distinguishable from a misdemeanor as a grade of crime only by reason of the place and severity of punishment. *People* v. *Causley,* 299 Mich 340.

At common law, conspiracy to do an unlawful act was an indictable offense. *People* v. *Causley, supra.* Our legislature has not changed this rule. While at the common law, the crime of conspiracy was a misdemeanor only, under our penal and criminal codes it is a felony. This is by reason of the operation of CLS 1956, § 750.505 (Stat Ann 1954 Rev § 28.773), providing as follows:

* CL 1948, § 768.4 (Stat Ann 1954 Rev § 28.1027).

"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this State, shall be guilty of a felony, punishable by imprisonment in the State prison not more than 5 years or by a fine of not more than $10,000, or both in the discretion of the court."

Since no provision is expressly made for punishment of the unrepudiated common-law offense of conspiracy to do any unlawful act, conviction therefor is punishable as this section provides. This penalty provision makes the offense a felony under the definition in the code of criminal procedure (CL 1948, § 761.1 [Stat Ann 1954 Rev § 28.843]):

"The term 'felony' when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in State prison."

Defendants therefore find themselves in the situation familiar to every first year criminal law student, and illustrated usually by the example—"to spit on the sidewalk 10 days or $10—to conspire to spit on the sidewalk 5 years."

It may not be untoward at this point to commend to our co-equal legislative branch the examination of this anomaly. For there has happened in this case what was prophetically urged might happen by defense counsel (pp 351, 352) in *Causley, supra,* 20 years ago:

"Defendant fears that, unless we somehow decide that section 505* of the penal code does not mean what it says when it defines as felonies all offenses indictable at common law for the punishment of which no provision is expressly made by any statute of this State, in the future, some overzealous prosecutor will prosecute 2 or more persons for conspiring

* Quoted *supra.*—REPORTER.

to commit some very petty misdemeanor, and some unrestrained trial judge will then proceed to impose the maximum sentence which section 505 permits. While we do not share his apprehension, we are not unmindful of the possibility which defendant suggests. His argument may well appeal to the legislature."

We need not comment on whether the argument "appeals" to the legislature but we should, we believe, again call attention to the problem.

We arrive therefore at the issue to which the attorney general addressed himself through the solicitor general at our request. How does CL 1948, § 768.4 (Stat Ann 1954 Rev § 28.1027), hereinbefore set out, apply to the instant case? His brief contains the following counter-statement of questions involved:

"May a person be convicted or acquitted of a misdemeanor and thereafter be tried and convicted of conspiracy to commit a misdemeanor where substantially the same evidence is introduced in both trials?

"The trial court answered 'Yes.'

"The attorney general contends the answer should be 'No.'"

We are constrained to agree with the attorney general.

We believe, however, that the helpful brief of the attorney general contains a contradiction premise. On page 2 it is postulated "a person may not be convicted or acquitted of a misdemeanor and thereafter tried and convicted of conspiracy to commit the same misdemeanor where substantially the same evidence is introduced in both trials."

Strictly speaking, defendants were not convicted or acquitted of the *same* misdemeanor, conspiracy to commit which was the subject of their later felony-prosecution. There is no doubt the subject matter

of the Flint city ordinances under which they were respectively convicted and acquitted, and the misdemeanors specified in the felony information, dealt with the same basic offenses. Hence, the proofs of the one were in substance the proofs of the other. The same witnesses—save a Mrs. Hartfield who rented them the involved premises—testified in both trials, as the detective-sergeant who made the arrest conceded on cross-examination:

"*Q.* Officer Peek, you are a police officer with the city of Flint, aren't you?

"*A.* Yes, sir.

"*Q.* You are the same Officer Peek who testified in the trial of Hattie Beasley and Hayward Beasley in the municipal court for the city of Flint for allegedly being disorderly persons by resorting to a room for immoral purposes, and by occupying and using a room for immoral purposes? Aren't you the same officer?

"*A.* Yes, I am.

"*Q.* You testified to exactly the same facts in that proceedings which you are testifying to here, which you are now testifying to here, is that right?

"*A.* Will you repeat that question?

"*Q.* Your testimony here is a repetition of—substantially a repetition of the same testimony that you gave before?

"*A.* It is substantially the same, sir."

It is to be noted that the controlling section of the statute does not, as the solicitor general does, mention the *same* misdemeanor. It recites:

"If, upon the trial * * * for *a* misdemeanor, the *facts given in evidence amount in law to a felony,* * * * no person tried for *such* misdemeanor shall * * * be afterwards prosecuted for felony on the same facts." CL 1948, § 768.4 (Stat Ann 1954 Rev § 28.1027).

In the trial of defendants in the municipal court of Flint for the misdemeanors, the facts given in evidence were almost identical with those given in evidence in the circuit court felony prosecution. It cannot seriously be contended that the testimony of Mrs. Hartfield that she rented defendants a room under an assumed name, standing alone, proved the conspiracy. If the facts other than this testimony proved a conspiracy in the circuit court, it is an inescapable conclusion that they "amounted in law to a felony" when they were "given in evidence" in the municipal court.

For whatever grave future implications the wording of the statute may have for our criminal jurisprudence, the words are a clear legislative mandate "no person shall be liable to be afterwards prosecuted for felony on the same facts."

Clearly the defendants' conviction must be set aside and their discharge ordered.

It may well be that the statute originally passed at a time when common-law conspiracy was a *misdemeanor,* was directed at the then troublesome question of merger of the lesser offense in the greater, where the same act at common law constituted both a felony and a misdemeanor (see 1 Brill, Cyclopedia of Criminal Law, § 16). Since that time the penalty section of our criminal code has made the common-law offense a felony. Therefore, the situation presented to the Court in *People* v. *Arnold,* 46 Mich 268, cannot now arise since the common-law conspiracy at that time was a misdemeanor and the question was its merger in the felony shown to have been presented, namely, obtaining the sum of $50 by false pretenses.

As observed by Justice COOLEY in *Arnold, supra* (p 275):

"When therefore the prosecution showed the commission of a felony, the case was presented which

the statute contemplates, and when the judge permitted the case to go to the jury, he determined finally the question now made."

We are not unmindful of the potentially undesirable results possible by reason of some inept prosecution or an unaware magistrate, where conviction of a grossly inadequate misdemeanor charge could operate as a bar to prosecution for a felony when the "facts given in evidence amount in law to a felony."

The correction of this situation, if it is to be made, must be by legislative action, and to this also our coordinate legislative branch may wish to give timely attention.

In the case at bar, the conviction in the circuit court is reversed and set aside.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

SMITH, J., took no part in the decision of this case.

PEOPLE v. CARR.

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE—BINDING OVER FOR TRIAL.

   The condition to holding one to trial for the commission of an alleged crime is that the testimony taken before the examining magistrate shall be such as justifies him in concluding that the crime charged has been committed, and that there is probable cause to believe the accused is the guilty party.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 14 Am Jur, Criminal Law §§ 246, 248.
[3] 47 Am Jur, Searches and Seizures §§ 8, 53.
[4] 47 Am Jur, Searches and Seizures §§ 18, 52.

2. SAME—PRELIMINARY EXAMINATION—BREAKING AND ENTERING—PROBABLE CAUSE—EVIDENCE—BINDING OVER FOR TRIAL.

Evidence from identifying witnesses, presented at preliminary examination of defendant, accused of breaking and entering with intent to commit larceny therein, *held*, sufficient to meet the test of probable cause, hence, where the commission of the offense was adequately established, he was properly bound over for trial in the circuit court.

3. SAME—INCARCERATION IN JAIL—CIVIL RIGHTS—SEARCHES AND SEIZURES.

One who is imprisoned in a county jail for an unrelated misdemeanor to accusation for breaking and entering a store with intent to commit a larceny therein is not, by reason of such incarceration, stripped of all his civil rights and constitutional safeguards against unreasonable search and seizure (Const 1908, art 2, § 10, as amended in 1952).

4. SEARCHES AND SEIZURES—WITHOUT WARRANT—AUTOMOBILE IN POSSESSION OF SHERIFF WHILE ACCUSED IN JAIL—EVIDENCE.

Evidence obtained by police officer as result of search, without a warrant, of defendant's car then in possession of the sheriff while defendant was lodged in jail on a charge unrelated to accusation of breaking and entering a store with intent to commit a larceny therein and without cause, probable or otherwise related to such latter crime, *held*, an unreasonable search and seizure and admission thereof over timely objection constituted reversible error, where the verdict of the jury might well have been different without it.

5. APPEAL AND ERROR—QUESTIONS REVIEWABLE—SEARCHES AND SEIZURES—NEW TRIAL.

The holding in a case that it was reversible error to admit, over timely motion to quash and objection, evidence which had been illegally seized, and the granting of a new trial, rendered it unnecessary to determine whether or not a decision of the supreme court of the United States holding such evidence constitutionally inadmissible should apply so as to require a new trial (Const 1908, art 2, § 10, as amended in 1952).

Appeal from Sanilac; Bach (Arthur M.), J. Submitted March 5, 1963. (Calendar No. 62, Docket No. 49,769.) Decided May 9, 1963.

Alan B. Carr was convicted of breaking and entering in the nighttime. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Allen E. Keyes,* Prosecuting Attorney, for the people.

Stanley Berriman (*Joseph S. Linden,* of counsel), for defendant.

O'HARA, J. Defendant was convicted of breaking and entering a State liquor store with intent to commit larceny therein. He assigns error on 6 grounds:

(1) Denial of a motion to quash and to suppress evidence unlawfully seized;

(2) Denial of a motion for a directed verdict of not guilty;

(3) and (4) Errors in the admission of the testimony of an alleged insane witness, and failure of the trial court to instruct adequately on the weight to be given thereto;

(5) Errors in the admission of alleged prejudicial testimony;

(6) A general allegation of error in refusing to grant a new trial by reason of the holding of the United States supreme court in *Mapp* v. *Ohio,* 367 US 643 (81 S Ct 1684, 6 L ed 2d 1081, 84 ALR2d 933).

The following factual background is necessary to an understanding of the legal issues presented. Defendant was arrested for operating his automobile with a defective taillight in the city of Howell, Livingston county. The car was found to contain a quantity of stolen property. The circumstances of that search and seizure of the car are not before us for review. Defendant had pleaded guilty to the possession of stolen property and was serving a 30-

day sentence in the Livingston county jail when the questions presented in this case arose. During the time of his confinement defendant's car, under circumstances unclear in the record, was stored in a jail parking lot. Presumably, at least, the sheriff was its custodian.

While in jail, defendant was interviewed by a State police officer regarding possible complicity in the larceny of liquor from a State store in Sanilac county. Defendant was completely noncommital and incommunicative. The State trooper without process of any kind or the permission of defendant searched his car and removed therefrom, among other things, a monkey wrench. He also took the car to Sanilac, made tests, compared tire casts previously made, and took for analysis paint scrapings from the car and the jaws of the monkey wrench. Later these scrapings were compared with samples from the window bars of the looted store. The investigating officer later signed a complaint. Defendant was served with the warrant while still in jail. On examination, he was bound over to circuit court and after trial and conviction by a jury was sentenced to not less than 10 nor more than 15 years.

The first question presented is the sufficiency of the evidence adduced at the examination to warrant binding the defendant over for trial in the circuit court. The test, upon preliminary examination, is properly stated in *People* v. *Gerndt,* 244 Mich 622, 630:

"The only requirement, as a condition to holding one to trial for the commission of an alleged crime, is that the testimony taken before the examining magistrate shall be such as justifies him in concluding that the crime charged has been committed, and that there is probable cause to believe the accused is the guilty party." (Syllabus 1.)

A careful reading of the transcript of the preliminary examination establishes that without regard to the paint samples alleged to have been found in the jaws of the monkey wrench and the other evidence acquired by the search and seizure of the defendant's car, there was sufficient testimony from the identifying witnesses to meet the test of probable cause. The commission of the offense, including the inferential testimony of the time of the breaking was adequately established. Defendant was properly bound over for trial in the circuit court.

Upon arraignment in circuit court, defense counsel renewed the objections made at the examination and made continuing objection to the evidence procured by the search of his car while he was serving his misdemeanor sentence in the county jail.

It could not be seriously urged that the search and seizure made by the officers without defendant's consent or without a search warrant could not, nor likely would not, even have been attempted, had defendant been at liberty and his automobile been parked on his own premises. Defendant was not stripped of his civil rights and his constitutional safeguards merely because he was serving a sentence in the county jail for an unrelated misdemeanor. It would be a dangerous rule of law and an invitation to circumvent the constitutional guaranty against unreasonable search and seizure were the citizen convicted of a misdemeanor and in jail, possibly in default of payment of a fine, to be stripped of all his civil liberties.

Carefully it must be noted that we here do not impinge upon the right of the officer to search and to seize without a search warrant under circumstances where he has probable cause to believe a felony was committed (*People* v. *Gonzales,* 349 Mich 572). Nor are officers inhibited from search after valid arrest

designed to reach instruments calculated to effect escape from custody. *People* v. *Gonzales,* 356 Mich 247, 256.

Neither does this holding limit the power of the police to search one lawfully arrested, for articles that may be used in evidence to prove the charge on which the prisoner has been arrested (*People* v. *Harris,* 300 Mich 463.)

Here the State police officer questioned defendant in the Howell jail on March 4th. He learned nothing that would in any way connect defendant with the later charged felony. So far as we can determine, it was immediately after this interview that the trooper searched defendant's car and obtained the wrench, later introduced in evidence. If the officer's investigation led him to the conclusion that the defendant was involved in the larceny, a proper showing to a magistrate affording a record for later review of the determination of probable cause was obtainable. (See *People* v. *Knopka,* 220 Mich 540.)

Here a search of the defendant's possession—his automobile was made without a search warrant, without cause, probable or otherwise related to the alleged crime, without any basis other than possibly understandable suspicion. Such search and seizure was made in patent violation of the State Constitution of 1908, art 2, § 10.* The fruits of that search, timely objected to by defense counsel, were inadmissible on the trial.

Without this evidence the verdict of the jury might well have been different. For the reasons herein set forth the conviction is reversed and set aside and the case remanded to the circuit court for a new trial. In view of our holding under the State Constitution, neither the question of the applicability of *Mapp* v.

* As amended at general election, November 4, 1952. See PA 1953, p 438.—REPORTER.

Ohio, supra, nor the other allegations of error need be discussed.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred.

PANTER *v.* SOBESKY.

1. APPEAL AND ERROR—REMAND—CONSOLIDATION—DECLARATION OF RIGHTS—EQUITY—ACCOUNTING.

   Order dismissing bill for declaration of rights under employment contract against former employer of individual plaintiff is reversed and cause remanded with directions to consider advisability of consolidation of case with suit for equitable relief, accounting, and a money judgment under the same contract.

2. COSTS—RECORD.

   No costs are allowed upon reversal in view of the record presented on appeal.

Appeal from Wayne; Moynihan, Jr. (Joseph A.), J. Submitted April 4, 1963. (Calendar No. 30, Docket No. 50,125.) Decided May 9, 1963.

Bill by Harold Panter and Panter Company, a Michigan corporation, against John Sobesky, Office Products, Inc., a Michigan corporation, and others for declaration of rights under employment contract and for injunctive relief. Bill dismissed on motion. Plaintiff appeals. Reversed and remanded.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 962.
[2] 5 Am Jur 2d, Appeal and Error § 1011.

Joseph A. Gillis and *Davidow & Davidow* (*Larry S. Davidow,* of counsel), for plaintiffs.

Harty, Austin & Jones (*Paul W. Harty,* of counsel), for defendants.

PER CURIAM. The question here presented is one of procedure and not one of determination of merit.

Plaintiff Harold Panter was employed by defendant Office Products, Inc., between May 8, 1955, and March 12, 1962. The employment was under an express contract in the nature of a letter of undertaking and acceptance. Its relevant provision here is the undertaking by the employee to assign to the employer without additional compensation "all ideas, discoveries, inventions and improvements, patentable or not, which, while I am so employed, and during 1 year after such employment terminates, are made, conceived or reduced to practice by me." There is a further general provision inhibiting the employee from divulging or appropriating "to my own use * * * any * * * confidential information obtained * * * during such employment." Within the year specified, specifically May 17, 1962, counsel for defendant employer wrote to plaintiff in tenor that plaintiff Panter and his corporate employer, Panter Company, were believed to be undertaking manufacture of label holders in violation of defendant Office Products' patents, and calling attention to what counsel considered were plaintiff Panter's obligations to Office Products, Inc., under the agreement above mentioned.

On July 24, 1962, Mr. Panter and his corporate employer, Panter Company, filed a bill of complaint in the Wayne circuit court setting forth most of the above facts and alleging in addition that defendants were interfering with and damaging plaintiffs' business activities. In relatively conclusionary terms,

the bill averred imminent irreparable harm to plaintiffs, sought a preliminary injunction against continuing harassment by defendants, and in the relief paragraphs requested that "the contract of the employment agreement between the individual plaintiff, Harold Panter, and the defendants be construed and his rights be declared under the statutes and public policy of the State of Michigan."

Appellants' brief recites that "a temporary restraining order was issued and upon a hearing on the order to show cause, the temporary restraining order was dissolved and the temporary injunction denied." This order was apparently issued on July 24, 1962, contemporaneously with the filing of the bill of complaint. On August 6, 1962, the circuit judge "dismissed" the temporary restraining order, and denied plaintiffs' prayer for a temporary injunction.

The list of calendar entries shows the following:

"1962

"July	24.	Bill of complaint filed; summons issued.
"July	24.	Order to show cause signed filed (N. Fitzgerald).
"July	26.	Summons returned served filed.
"July	30.	Order to show cause why restraining order should not issue heard and dismissed; court sheet, Judge Moynihan.
"Aug.	6.	Order dismissing temporary restraining order and denying temporary injunction signed filed (Moynihan).
"Aug.	14.	Amended proof of service filed.
"Aug.	14.	Order of default filed.
"Aug.	18.	Answer to bill of complaint filed.
"Aug.	18.	Motion to dismiss and affidavit filed.
"Aug.	18.	Motion to set aside default filed.
"Aug.	27.	Motion to dismiss as to Chas. C. Smith Co., Inc., dismissed at request of moving party; court sheet, Judge Moynihan.

"Aug. 27. Amended answer to bill of complaint filed.
"Sept. 1. Amended sworn answer to bill of complaint filed.
"Sept. 12. Order setting aside default signed filed (Moynihan).
"Sept. 21. Notice of hearing and motion to dismiss and affidavit filed.
"Oct. 3. Motion brief filed.
"Oct. 5. Motion brief filed.
"Oct. 5. Motion to dismiss heard and granted; court sheet, Judge Moynihan.
"Oct. 15. Order granting motion to dismiss signed, filed (Moynihan).
"Oct. 16. Appearance of Davidow & Davidow as attorneys of counsel for plaintiffs filed.
"Oct. 19. Claim of appeal filed ($5 fee paid).
"Oct. 19. Notice of appeal filed.
"Nov. 28. Proceedings (Vol I) filed."

All the pleadings that are included in appellants' appendix are the bill of complaint with exhibits, the amended sworn answer, and the motion to dismiss. Judge Moynihan's order of October 15, 1962, dismissing the cause without costs and *with prejudice* is the next judicial action mentioned. No reference by appellant is made to the entry of a default, a motion to set it aside, and an order so doing. Judge Moynihan's order, with the words "with prejudice" is accompanied by no opinion, and no explanation of its apparent finality without hearing on the merits of the bill first filed.

Appellants do not favor us with anything similar to the explanatory paragraph on page 2 of appellees' brief, which recites without documentation:

"At the time the trial court heard the motion to dismiss, the court had before it a motion to dismiss the bill of complaint of defendants being Wayne chancery number 625–997 which bill of complaint had not been answered and at the same time the trial

court denied appellants' motion to dismiss appellees' bill of complaint." (Appellants' case is 624–841.)

Looking behind the list of calendar entries, the protests of clean hands or the lack thereof, it seems clear what happened. The court had before it at the same time, 2 motions to dismiss 2 separate bills of complaint, 1 of which sought construction of a contract by declaratory relief, the other sought actual equitable relief, accounting, and a money judgment under the same contract. The chancellor apparently determined that all the issues could best be adjudicated in the second suit. It is possible, too, he was inviting writer's cramp with the volume of orders presented up to that time in both cases and he summarily dismissed the first filed bill with prejudice.

With the caseload before this Court in matters which have vital concern of general application, we are not kindly disposed to refereeing sprinting contests between legal couriers laden with orders to show cause, dismissals thereof, orders of default and orders setting them aside, which culminate in an unexplained order of dismissal by the trial judge "with prejudice" of a bill on which no hearing has been had.

The order granting defendants' motion to dismiss is vacated and set aside and the cause is remanded with directions to enter an order denying said motion. On remand, the court is directed to consider the advisability of consolidation for hearing and determination Wayne chancery actions No 624–841 and No 625–997. In view of the record here presented, no costs are allowed.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PEOPLE *v.* HUNTER.

1. TRIAL—REQUEST TO CHARGE—INSTRUCTIONS.

   A request to charge becomes the instruction of the court when given and should not be given to the jury as emanating from either party to the case, either criminal or civil.

2. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

   An instruction in prosecution for murder in the first degree that plea of self-defense was not available to appellant if a second male defendant were not present *held*, prejudicial, where the presence or absence of such other defendant was not of pivotal importance to appellant's plea of self-defense because of alleged attack upon him by the victim with a pistol in his hand (CL 1948, § 750.316).

3. WITNESSES—CREDIBILITY—CORROBORATION.

   A jury which finds that a witness has deliberately testified falsely on a material point in the case may properly disregard the entire testimony of that witness except such testimony as it believed worthy of belief or which may have been corroborated by other reliable witnesses.

4. HOMICIDE—INSTRUCTION—WITNESSES—CREDIBILITY.

   Instruction that if jury did not believe appellant's testimony that a male codefendant was not present at time of alleged assault upon victim by defendant, that jury could not believe the balance of appellant's testimony under any circumstances *held*, prejudicial in prosecution for murder (CL 1948, § 750.316).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 538.
[2] 26 Am Jur, Homicide § 548.
[3] 58 Am Jur, Witnesses § 872.
Modern view as to propriety and correctness of instructions referable to maxim *"falsus in uno, falsus in omnibus."* 4 ALR2d 1077.
[4] 26 Am Jur, Homicide §§ 520, 521.
[5] 53 Am Jur, Trial § 899.

5. TRIAL—JURY'S CONSIDERATION OF EVIDENCE—ARGUMENT TO JURY—INSTRUCTIONS.

Due process of law in the jury trial of a case requires that the trial court's preliminary admonition as to jurors' conduct during the course of what is expected to be a protracted trial be that they not discuss the evidence among themselves until all of the evidence has been introduced, the arguments to the jury made, and the jury charged by the court, since to permit the jurors to have previous discussion of the evidence among themselves would lead to effecting a shift in the burden of proof and a failure upon the part of individual jurors to weigh the evidence or argument fairly.

Appeal from Recorder's Court of Detroit; Gillis (Joseph A.), J. Submitted February 5, 1963. (Calendar No. 45, Docket No. 49,771.) Decided May 9, 1963.

Ralph Ray Hunter was convicted of murder in the first degree. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, and *Samuel J. Torina,* Assistant Prosecuting Attorney, for the people.

Grossman, Hyman & Grossman (*Carl Levin,* of counsel), for defendant.

Amicus Curiae:

Rolland R. O'Hare and *Erwin Ellmann* (*Fay A. O'Hare,* of counsel), for American Civil Liberties Union of Michigan.

SOURIS, J. Defendant appeals from his jury conviction of murder in the first degree. His principal claim of reversible error is that the trial judge's charge to the jury improperly deprived him of jury consideration of his defense of self-defense.

Defendant Hunter was tried together with a male codefendant, James Sacchetti, and defendant Evelyn Lari, Hunter's girl friend, for the murder of Elmer Jones. Hunter claimed at the trial that he killed Jones in self-defense when Jones aimed a revolver at him during the course of an altercation while he and Miss Lari were visiting Jones in his home. Miss Lari, although a codefendant, testified at the trial that defendant Sacchetti was also present at the time of Jones' murder. The pertinent details of the testimonial record made at the trial are fairly summarized in that portion of the trial judge's charge to the jury in which he sets forth Hunter's theory of the case:

"Defendant Hunter, upon going to the room, found that the defendant Lari had not checked out, * * * that she said she would be good, that she asked why couldn't they be like they used to be and have the same parties like they used to have; that he weakened and told her very well, they would have 1 more night, spend 1 more night together and then she would leave and go out of his life forever; that he was going to go to a nearby drinking establishment, but she said she wanted to go to the east side to talk to a friend; that they drove out to Ashland avenue to the home of Mr. Jones around 12 o'clock; that Jones came to the door in his night clothing, saw who they were, returned to his bedroom, put on trousers and hugged and greeted Evelyn; that Jones and Evelyn Lari had some conversation, that defendant Lari then introduced him under his right name, that he tried to be friendly with Jones and started to shake hands, but Jones suddenly became unfriendly, repulsed him, and stated, 'You are the man who is taking my little girl from me,' or words to that effect; that defendant Hunter said he did not want her, that he was bringing her back and suggested they be friendly; that Jones and the defendant Lari went into his bedroom; that he would have left except defendant Lari

said she wished to return with him and told him to wait a minute; that after waiting a few minutes he told them to hurry up; that after a lapse of several minutes he heard defendant Lari say the words, 'not now', or in substance, that he entered the bedroom and found the deceased Jones committing an act of perversion upon the defendant Lari, that he became incensed and grabbed Jones and tossed him in the corner; that the room was dimly lit, but that Jones came after him again and a fight ensued; then, for the first time he noticed the deceased Jones had a Luger pistol in his hand; that he attempted to pacify him; that Jones stated that he took his girl once and would never take her again; that he would not leave the room alive, or words to that effect; that he warned the defendant Lari not to disturb Jones, and told him not to shoot, that he told him that he could have the girl; and that, realizing then he was going to be killed, that his life was in danger, that he attempted to grab the gun from Jones; that a struggle ensued, that Jones was strong and put up great resistance, that he had to bang his head against the bulkhead, or wall; and finally succeeded in breaking Jones' grip upon the gun after he had shifted from the right to the left hand; that he picked [the] gun up, took the clip out, and later Jones attacked him again and grabbed him by his privates; that it then became necessary for him to take the gun and strike Jones over the head and then to choke him into unconsciousness; that he subsequently tied him up with neckties and after he was tied up noticed the ring on Jones' finger, and because he was mad at Jones or 'as a gesture', as he put it, he took the ring and he also kept the gun; that [he] attempted to wash the blood stains from his clothing and because of the blood on his trousers and shirt he removed them and put on the trousers and clothing belonging to Jones; that he and Evelyn then left and walked to Jefferson avenue, took a cab back to the hotel; * * * that Jones was hostile to him because of Hunter's having taken his girl; that Jones assaulted him; that the

only recourse left to him was to strike Jones and protect himself; that he was fearful of death or great bodily harm; that all his acts were in self-defense; and therefore he is not guilty of the charge.

"That is the theory of the defendant Hunter, as I understand it. I have gone over it fast * * * but I think all [the details] have been mentioned."

Having fairly stated defendant Hunter's theory of the case, as well as the theories of his codefendants and the prosecution, the trial judge then properly instructed the jury on the legal requirements of the defense of self-defense. At the conclusion of what may be described as an excellent formal charge to the jury, the judge then undertook to read to the jury certain of the requests to charge made by the parties, many of which were repetitious, and otherwise thoroughly covered in the court's formal charge. Included among the charges requested by the prosecution which the trial judge unfortunately gave to the jury is the following:

"The prosecuting attorney has given me some requests to charge, members of the jury.

"I charge you that self-defense is defensive and not an offensive act, and must not exceed bounds of mere defense and prevention. Acts constituting self-defense by accused, depend primarily on his own conduct and secondarily upon decedent's conduct.

"I will give you request No. 1, members of the jury: In justification of the offense here charged against him, the respondent Hunter has interposed a plea of self-defense and under certain circumstances that is a good defense. In order to give any consideration to Hunter's plea of self-defense it will first be necessary for you to conclude that Sacchetti was not at the scene on the fatal night of the assault upon Jones, because if you disbelieve Hunter's and Sacchetti's testimony that Sacchetti was not in the home of the deceased at the time Hunter assaulted

Jones, then Hunter's plea of self-defense fails and you have no right to consider it. Hunter's plea of self-defense is based upon the theory that Mrs. Lari alone visited Mr. Jones on the fatal evening. That Jones first assaulted Hunter and that the affray was between Jones and Hunter only, and that Sacchetti was not there. The defense is based upon Sacchetti's absence from the scene. So, if you give credence to Mrs. Lari's testimony that Sacchetti was with Hunter and her and that all 3 were at the home of the deceased on that fatal evening, then you must totally disregard Hunter's plea of self-defense. On the other hand, if you disbelieve Mrs. Lari's testimony and believe Hunter's and Sacchetti's testimony on this point, then you are entitled to give Hunter's plea of self-defense consideration. To recapitulate, if you believe Hunter's and Sacchetti's testimony on the point of Sacchetti's absence from the home of Jones on the fatal night, then you may consider Hunter's plea of self-defense. On the other hand, if you disbelieve Hunter's and Sacchetti's testimony on this point and believe Mrs. Lari's testimony that Sacchetti was there on that fatal evening, you are hereby instructed to totally disregard Hunter's plea of self-defense."

We cannot read the immediately preceding charge requested by the prosecution as other than prejudically erroneous.* In that single instruction, given to the jury immediately before it retired to deliberate upon its verdict, the jury was told that if it believed defendant Lari's testimony that Sacchetti was present at the time of the murder, the jury could not give any consideration to defendant

* We note, in passing, the trial judge's labeling of the requested instructions given to the jury as emanating from the prosecutor. We have had occasion recently to indicate our disapproval of this improper practice in civil cases. See *Reetz* v. *Rigg*, 367 Mich 35, relying upon *Newton* v. *Consolidated Construction Co.*, 184 Mich 63. It is no less improper in criminal cases. When requested instructions are adopted by the court, they are the court's instructions,—not requested instructions.

Hunter's defense of self-defense,—not that it need not find, under such circumstances, that Hunter acted in self-defense, but that it *could not* properly find that his actions were in his own self-defense. Contrary to the trial judge's belief, as expressed by him in his opinion denying motion for new trial, Sacchetti's presence or absence was not of pivotal importance to Hunter's plea of self-defense. According to Hunter's theory of the case, even as stated to the jury by the trial judge himself, Hunter was placed in mortal fear for his life when Jones attacked Hunter with a Luger pistol in his hand. Even had Sacchetti been present at that time, we are not prepared to say that as a matter of law the jury could not have found that Hunter acted in self-defense. It was for the jury to determine to what extent the Luger equalized the combat between 72-year-old Jones and 25-year-old Hunter aided or unaided by the presence of Sacchetti.

Another interesting aspect of the trial judge's challenged instruction is the violence it does to our commonly used instruction to juries on the issue of witnesses' credibility. As a matter of fact, the trial judge quite properly instructed the jury in this case that if it found that a witness had testified falsely, and deliberately so, on a material point in the case, it could disregard the entire testimony of that witness except such testimony that it believed worthy of belief or which may have been corroborated by other reliable witnesses. See *People* v. *Jones,* 336 Mich 617, 628, quoting with approval from *People* v. *Paremba,* 240 Mich 489. By the challenged instruction, however, the judge told the jury in effect that if it did not believe Hunter's testimony that Sacchetti was not present at the scene of the crime, the jury could not believe the balance of Hunter's testimony under any circumstances.

While the erroneous instruction discussed above is sufficiently prejudicial in our view to require reversal and remand, we deem it appropriate to comment on 1 other aspect of this case. At the commencement of the trial the trial judge gave to the jury general instructions with reference to their conduct during the course of what was expected to be a protracted trial. In the course of doing so he said the following:

"I might say, in discussing that, members of the jury, the proper way, as you go along, you may discuss among yourselves testimony and so forth, but do not arrive at a verdict, do not attempt to arrive at a verdict."

It seems to us clear beyond any doubt that jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made, and the jury charged by the court but that, rather, juries should be directed by the court not to do so until ready to deliberate upon their verdict at the conclusion of the trial. This matter has been fully and carefully considered by the circuit court of appeals for the eighth circuit in *Winebrenner* v. *United States,* 147 F2d 322. We quote therefrom, with approval (pp 327–329):

"Whether guilty or innocent, appellants were entitled under the Fifth and Sixth Amendments to the Constitution to a fair trial to an impartial jury. Here the court not only declined to admonish the jury that they should not discuss the case among themselves, nor form nor express an opinion as to the guilt or innocence of the defendant until the case had finally been submitted to them, but the jury was in effect advised that the jurors might discuss the case among themselves if careful not to make up their minds finally and definitely about it. Again the court said:

" 'The result that is sought to be accomplished is that you not discuss the case before you to such an extent that you form definite fixed ideas *that would prevent you from changing after you had heard all of the evidence in the case.*'

"Jurors are chosen from every conceivable walk in life. The butcher, the baker, the merchant, the taxi driver, the day laborer, the farmer, the mechanic, the accountant, the barber, the hotel clerk, the cobbler, and the gas station attendant may make up the jury in a criminal case, but however it may be composed it must be borne in mind that the jurors are unschooled and inexperienced as to their duties in a criminal case, and they are not instructed as to those duties until all the evidence has been received, except as the court may in his admonition give them advice on their functions and how they are to be performed, and particularly as to how they should demean themselves; hence, the importance of this admonition. Without admonition their course is uncharted. Thus, it is not until the final submission of the case that the jurors are told that a defendant is under the law presumed to be innocent and not guilty and that that presumption attends him throughout the trial, so that it is incumbent upon the government to prove the guilt of the defendant beyond a reasonable doubt. These instructions are deemed of vital importance as fixing the standards to be followed by the jury in determining the guilt or innocence of a defendant. If, however, the jurors may discuss the case among themselves, either in groups of less than the entire jury, or with the entire jury, they are giving premature consideration to the evidence. By due process of law is meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by

them, and neither have they heard the arguments of counsel. * * *

"Under the court's admonition the jurors were warranted as a result of discussion among themselves, either in small groups or large ones, to form opinions so long as such opinions were not so absolutely fixed that they would 'prevent you from changing after you had heard all of the evidence in the case.' Such an opinion of necessity could result from a discussion of only a part of the evidence, the evidence not having all been submitted. Such an opinion once formed could only be removed, if at all, by evidence. This in effect shifted the burden of proof and placed upon the defendants the burden of changing by evidence the opinion thus formed. A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which he had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence. Chief Justice Marshall in the notable trial of *United States* v. *Aaron Burr* (CC Va) 25 Fed Cas, No 14,692g, speaking on the qualifications of a juror who may have heard the testimony at a former trial, said (p 50):

" 'Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.'

"In the instant case, under the court's admonition, the juror may well have formed and expressed to

his fellow jurors an opinion. The same thought is expressed by Circuit Judge Love in *Pool* v. *Chicago B. & Q. R. Co.* (CC Iowa), 6 F 844, 850, where it is said:

" 'There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat.

" 'Now, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature.'

"In *Patton* v. *United States,* 281 US 276, 312, 313 (50 S Ct 253, 263, 74 L ed 854, 70 ALR 263); speaking of the obligation of the trial court to preserve the right of the accused to trial by jury, the supreme court speaking through Mr. Justice Sutherland, said that such duty 'is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.'

"The solicitude of courts that jurors remain open minded to a consideration of the entire case, rather than opinionated and impervious to fair debate and decision, is demonstrated by instructions to them after prolonged deadlock, which urge each juror 'to get into his mind what his colleagues have to say before arriving at his final decision and then be guided by his own judgment.' *United States* v. *McGuire* (CCA 2), 64 F2d 485; *Boehm* v. *United States* (CCA 8), 123 F2d 791. * * *

"Defendants were entitled to have their case considered by all the jurors as a jury. Here, without

instructions as to the law, without hearing all the testimony, and without hearing argument of counsel, they were authorized to divide themselves into separate groups and distinct deliberative bodies. So general is the rule that jurors should not discuss a case prior to its submission to them, that it has been enacted into statute in practically all the States of the Union. Of course, the local State statute can have no bearing on the question of procedure in a criminal case tried in Federal court, but the fact that such statutes have so generally been adopted is significant as indicating the generally accepted principle that it is improper for jurors to discuss a case prior to its submission to them. The State statutes are but codification of the common-law practice that has prevailed as a part of our jurisprudence for more than a century and a half. Thus, in *Shippy* v. *Peninsula Rapid Transit Co.*, 197 Cal 290, 294 (240 P 785, 787), that court said:

"'It is the long-established right of both of the parties thereto to have an opportunity to argue the cause and to have the jury after such argument instructed by the judge of the court as to the law of the case; and it was equally the duty of the jury under the admonition of the court not to form or express an opinion with respect to the merits of either the facts or the law of the case until the case should be finally submitted to them.'

"And the district court of appeal of California in *Smith* v. *Brown,* 102 Cal App 477, 484 (283 P 132, 134), said:

"'It is of course improper for jurors to discuss a case prior to its submission to them.'

"Diligent counsel for the government have not been able to call to our attention any precedent which in principle sustains the admonition as given in this case, and our research has discovered none."

Reversed and remanded for new trial.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

STRAITS TRANSIT, INC., *v.* UNION TERMINAL PIERS.

1. MONOPOLIES—PLEADING—ACTION.

   A cause of action under the State antimonopoly statute is sufficiently set forth in well-pleaded allegations that a combination is made and entered into either for the purpose of establishing and maintaining a monopoly or that a combination is made and entered into for the purpose and with the intent of attempting to establish and maintain a monopoly (CL 1948, § 445.762).

2. SAME—PLEADING—ELIMINATION OF COMPETITOR FERRY SERVICE.

   Bill of complaint which alleged there were 2 companies engaged in the passenger ferry service between an island and the same 2 points on the mainland and that one seeks to create a monopoly by eliminating the other from competition and establishing a monopoly, including an averment of offer by 1 of the defendants to purchase the entire assets of plaintiff corporation, *held,* to have adequately stated a cause of action under the State antimonopoly statute (CL 1948, § 445.762).

3. PLEADING—MOTION TO DISMISS—ALLEGATIONS ASSUMED TRUE.

   All well-pleaded allegations in a pleading are assumed to be true in determining whether or not to grant a motion to dismiss.

4. MONOPOLIES—PURPOSE AND INTENT OF COMBINATION—TENDENCY TO CREATE A MONOPOLY.

   The gravamen of bill of complaint that had been filed under the State antimonopoly statute is the purpose together with the intent of the combination and not whether in fact a tendency to create a monopoly was alleged (CL 1948, § 445.762).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 36 Am Jur, Monopolies, Combinations, and Restraints of Trade § 211.

[3] 41 Am Jur, Pleading § 332.

[4] 36 Am Jur, Monopolies, Combinations, and Restraints of Trade § 9.

[5, 6] 13 Am Jur, Corporations §§ 333–336.

Validity of restrictions on alienation or transfer of corporate stock. 65 ALR 1159, 61 ALR2d 1318.

Construction and effect of section 15 of uniform stock transfer act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate. 29 ALR2d 901.

5. CORPORATIONS—TRANSFER OF STOCK—RESTRICTIONS—STATEMENT ON CERTIFICATE.

A restriction upon the transfer of stock of a corporation imposed by a bylaw of the corporation or in an agreement among the shareholders but not stated upon the certificate is unenforceable against the purchaser of the stock even though he has knowledge of the restriction (CL 1948, § 441.15).

6. SAME—TRANSFER OF STOCK—RESTRICTIONS—STATUTES.

Case involving restrictions upon transfer of corporate stock, affected by statutory regulation, is determined in accordance with the statute presently effective rather than in accord with statute already enacted but effective at a time later than decision is rendered (CL 1948, § 441.15; PA 1962, No 174, § 8204).

Appeal from Mackinac; Baldwin (George S.), J., presiding. Submitted June 6, 1962. (Calendar No. 11, Docket No. 49,431.) Decided May 9, 1963.

Bill and amended bill by Straits Transit, Incorporated, a Michigan corporation, and certain of its shareholders, against Union Terminal Piers, Arnold Transit Lines, both Michigan corporations, Hugh Rudolph, various other officers and shareholders of defendant corporations, and against Jack Wood and Frank Proctor, shareholders in plaintiff corporation, to enjoin transfer of stock in plaintiff corporation, to rescind transfer thereof by defendants Wood and Proctor, to enforce agreement to sell corporate stock to plaintiffs, and for damages. Amended bill dismissed on motion. Plaintiffs appeal. Reversed and remanded for further proceedings.

Hathaway, Hathaway, Rogan & Hathaway (*James A. Hathaway,* of counsel), for plaintiffs.

Brown & Brown (*John S. Clark,* of counsel), for defendants.

Prentiss M. Brown, Jr., for defendants and *in propria persona.*

SMITH, J.

Parties to the Action

On defendants' motion to dismiss for failure to state a cause of action, plaintiffs' amended bill of complaint was dismissed by the lower court before trial. Plaintiffs are as follows: Straits Transit is engaged in ferryboat service across the Straits of Mackinac between Mackinaw City and St. Ignace and Mackinac Island; the other plaintiffs are shareholders in Straits Transit. Defendants are as follows: Arnold Transit is engaged in ferryboat service across the Straits of Mackinac, between Mackinaw City and St. Ignace and Mackinac Island; Union Terminal Piers owns the real property upon which Arnold Transit operates; defendants Jack Wood and Patricia Wood, his wife, and Frank Proctor and Eleanor Proctor, his wife, are shareholders in plaintiff corporation, Straits Transit. The other defendants are officers and/or shareholders in Arnold Transit and Union Terminal Piers.

Pleadings

Plaintiffs' amended bill of complaint was filed February 27, 1961. It alleges, among other things, that defendants Jack and Patricia Wood and Frank and Eleanor Proctor, as shareholders, were parties to an agreement dated February 7, 1959, restricting transfer of stock. The shareholders' agreement apparently is set forth in full in the body of the bill of complaint. The agreement provides that no shareholder can sell or dispose of stock in any manner without the prior written consent of all of the other shareholders, or, in the absence of such written consent, without first giving the shareholders at least 90 days written notice by registered mail of the intention to dispose of shares. Such notice constitutes an option available to any shareholder to purchase

such shares, and the option must be exercised within the 90-day period of notice. The purchase price is stipulated to be that price obtainable on the open market, but not less than book value. One of the bylaws of plaintiff corporation also provides for an option to purchase by the shareholders in the event 1 shareholder should decide to sell or in any manner dispose of his shares. Under the bylaw, requirements as to notice and price are similar to those contained in the agreement. As a fact of some importance, it is conceded that the certificates of stock bear no indorsements of the restrictions contained in the agreement and the bylaw.

The bill of complaint contains additional allegations, in substance, as follows:

1. That defendant Rudolph on behalf of defendants Arnold Transit and Union Terminal Piers made an offer in September, 1960, to purchase shares of defendants Wood and Proctor in plaintiff Straits Transit.

2. That of the authorized capital stock of 300,000 shares, 34,000 shares are issued and outstanding; of this amount, defendants Proctor own 4,000 shares and defendants Wood own 2,000 shares.

3. Plaintiffs, within the time specified in the agreement, offered to purchase shares of the Woods and Proctors and did make a tender of the fair market value of said shares in the amount of $8,600. Said defendants refused the offer and returned the tender.

4. That in contravention of the shareholders' agreement and the bylaw, defendants Wood and Proctor transferred and delivered to the other defendants all of their shares in plaintiff corporation.

5. Plaintiff Straits Transit and defendant Arnold Transit are the only regularly scheduled passenger ferry service companies operating between the points mentioned above and that they are "in direct and free competition one with the other."

6. That defendants have combined, conspired and agreed among themselves to purchase the stock "for

the purpose of obtaining control of plaintiff corporation, in order to create and carry out restrictions and prevent and eliminate competition from the business of passenger ferry service to and from Mackinac Island."

7. The offer to purchase is part of a scheme to prevent and eliminate competition in the ferry service to and from Mackinac Island.

8. That the offer to purchase is also part of a "plan, scheme and conspiracy" to harass plaintiff corporation in the carrying on of the business of passenger ferry service.

9. It is alleged that the facts above recited appear in part in a letter expressly incorporated by reference into the bill of complaint. The letter from defendant Rudolph to defendant Frank Proctor begins as follows: "I have been authorized to make you an offer in writing which offer will be to every other shareholder of the Straits Transit Company who desires to accept the following proposition." The letter offers to buy 2,000 Proctor shares for $4,300. It also refers to an "offer heretofore made" to purchase the entire assets of Straits Transit for the sum of $279,400. The letter further provides that 1 of the considerations for the offer was that Proctor was to agree to institute any legal action et cetera, with expenses of same to be borne by defendant Rudolph.

10. It is further alleged "That said combination, conspiracy and agreement of the defendants aforesaid was made and entered into for the purpose and with the intent of establishing and maintaining a monopoly in the business of passenger ferry service to and from Mackinac Island", and that as such is void under CL 1948, § 445.762 (Stat Ann § 28.62).

Defendants filed a motion to dismiss the amended bill of complaint on March 15, 1961. It was claimed that the amended bill did not state a cause of action; that the sale and purchase of the stock was in no way prohibited by law; that the purchase of said stock

would not give defendants control over Straits Transit; that the purchase of 1 competing company by another competing company, even if accomplished, would not establish a monopoly nor violate the statute.

Decision of the Trial Court

The trial court entered an order dismissing the amended bill of complaint. In a separate opinion, reasons for the dismissal were outlined. The trial court found that 3 questions were presented on the motion to dismiss: "1. Was there in fact a tendency to create a monopoly by this transfer? 2. Would such monopoly be contrary to law? 3. Would the restrictive agreement and restrictive bylaw invalidate the sales from Woods and Proctors to Rudolph?"

As to the first question, the trial court found that the situation alleged "does not in any sense show a monopoly or restraint of trade as a matter of fact." The opinion states that although there are 2 competing lines of service to Mackinac Island, it does not appear factually from the allegations that other competing lines are prevented from being established by the activities of defendants. The trial court held that the effect of buying a 1/9 interest could not as a matter of fact restrain trade or establish a monopoly.

The trial court held further that even if the activities of defendants incidentally established a monopoly, such would not constitute an illegal restraint of trade because no illegal means were employed. As to the third question, the trial court, in reliance upon *Sorrick* v. *Consolidated Telephone Company of Springport,* 340 Mich 463, held that the restrictions on the disposal of stock were not enforceable against defendants because the restrictions were not indorsed upon the stock certificates. The trial court concluded that no cause of action was

alleged either under the antimonopoly statute or under the shareholders agreement.

Statement of Questions

Plaintiffs make the following contentions on appeal: 1. Even though restrictions are not indorsed upon stock certificates, that where a transferee has actual notice of the restrictions the transfer is subject to rescission. 2. Plaintiffs contend that where the purpose and intent of a scheme is to obtain control in order to institute restrictions and eliminate competition, that the purchase of shares pursuant to this purpose is void under CL 1948, § 445.762 (Stat Ann § 28.62). 3. Plaintiffs contend also that the trial court erred by failing to decide on motion to dismiss that the purchase of shares of stock, as alleged, did constitute an attempt to establish a monopoly. 4. Plaintiffs also complain that the trial court erred in finding that the amended bill of complaint fails to state a cause of action. 5. They also claim that under the agreement and bylaw, giving them first option to purchase the shares of a retiring shareholder, they are entitled to specific performance.

On the other hand, defendants claim that the sale of stock was valid; that the ownership of 1/9 of the shares does not give defendants control of plaintiff corporation, and that even if it did result in a monopoly, such monopoly would not be barred by law.

Decision

We are unable to agree with the learned trial judge that plaintiffs' amended bill of complaint failed to state a cause of action. The amended bill is based, among other things, upon section 2 of PA 1905, No 329 (CL 1948, § 445.762 [Stat Ann § 28.62]):

"Sec. 2. All combinations of persons, copartnerships, or corporations made and entered into for the *purpose and with the intent* of establishing and maintaining *or of attempting to establish and maintain a monopoly* of any trade, pursuit, advocation, profession or business, are hereby declared to be against public policy and illegal and void." (Emphasis supplied.)

Under this section it is sufficient to set forth in well-pleaded allegations that a combination is made and entered into either for the purpose and with the intent of establishing and maintaining a monopoly or that a combination is made and entered into for the purpose and with the intent of attempting to establish and maintain a monopoly in order properly to state a cause of action. Obviously, it is not required to allege that an actual monopoly will result from the combination. In effect, plaintiffs allege that there are 2 companies engaged in passenger ferry service, and that one seeks to create a monopoly by eliminating the other from competition. It is alleged that a combination was entered into between defendants Proctor and Wood on the one hand and the remaining defendants on the other, the purpose and intent of which is to establish a monopoly. Further, plaintiffs show in the amended bill the alleged letter offer of defendant Rudolph to defendant Proctor for the purchase of his shares, which letter also contains reference to an alleged offer to purchase the entire assets of Straits Transit. Assuming all well-pleaded allegations to be true, we think the amended bill of complaint adequately states a cause of action under the statute. As to whether there exists a combination, and if so, whether its purpose and intent are forbidden by the statute are among the several questions of fact to be determined on trial. See *Peoples Savings Bank* v. *Stoddard,* 351 Mich 342, 357.

We cannot agree with the trial court that the question of whether in fact a tendency to create a monopoly was alleged is a proper issue. The statute suggests no such issue, nor do we find any in the sparse case law construing it. We are also constrained to disagree with the trial court in its holding that if activities of defendants incidentally established a monopoly as a matter of fact "this would not be an illegal restraint of trade because no illegal means are employed by reason of contractual restraint or any other illegal devices." We are aware that some such test has been used in certain actions arising under Federal law. However, the gravamen of the complaint based on the Michigan statute, quoted above, is the purpose together with the intent of the combination.

The trial court summarized its opinion as follows: "the plaintiffs have not stated a cause of action, either under the restraint of trade statute or under the restrictive agreements." We have already ruled that a cause of action was stated under the monopoly section of the so-called restraint of trade statute. The next question is whether plaintiffs are entitled to equitable relief with respect to the option provision of the shareholders agreement and the bylaw. It is conceded that defendants had knowledge of the restriction and it is also clear that the restriction was not indorsed upon the stock certificates of plaintiff corporation. The trial judge found the restrictions unenforceable, based upon the *Sorrick Case* cited above, and also upon the case of *Costello* v. *Farrell,* 234 Minn 453 (48 NW2d 557, 29 ALR2d 890). In the *Sorrick Case,* plaintiff who was a corporate officer with knowledge of the restrictions purchased a number of shares in excess of the permissible amount. Plaintiff instituted suit to require the corporation to transfer the stock on its books. We held with plaintiff and required the transfer to

be made in spite of the fact plaintiff had personal knowledge of the restrictions. We said in *Sorrick* at page 469:

"In the instant case those who organized the defendant corporation could have specifically stated the limitations, they now seek to enforce, in their articles of association which, when filed, would have been notice to the world of such restriction. At the same time they could have written limitations in the body of their stock certificate which again would have provided ample notice to all purchasers thereof. We are not unmindful that plaintiff Sorrick already had such notice, but, nevertheless, we are of the opinion that we should not write into the law a limitation on stock transfers contrary to the well-accepted understanding of the method of creating such limitations, as is expressed by the legislature in the various provisions of the uniform stock transfer act and the Michigan general corporation act, as hereinbefore quoted."

The appropriate section of the uniform stock transfer act reads as follows:

"There shall be no lien in favor of such corporation upon the shares represented by a certificate issued by such corporation and *there shall be no restriction upon the transfer of shares so represented by virtue of any bylaw of such corporation, or otherwise* (emphasis supplied), unless the right of the corporation to such lien or the restriction is stated upon the certificate." CL 1948, § 441.15 (Stat Ann § 19.345).

Under the statute, and the recent (1954) *Sorrick Case,* interpreting it, the trial court was correct in holding that plaintiffs did not allege an enforceable case insofar as it was based upon the restrictive agreement of the shareholders. See, also, *Weber* v. *Lane,* 315 Mich 678, and 29 ALR2d 901. We are aware that under the uniform commercial code to

become effective in this State January 1, 1964, a change appears in the offing. PA 1962, No 174, § 8204 (CL 1948, § 440.8204 [Stat Ann Uniform Commercial Code Supp § 19.8204]). However much we may be impressed with the change to be made in this rule by uniform statute, we are called upon now only to state the law applicable to the instant case.

The order dismissing plaintiff's bill of complaint is set aside and the cause is remanded for further proceedings consistent with this opinion. Costs to plaintiffs.

CARR, C. J., and KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred with SMITH, J.

DETHMERS, J., concurred in the result.

O'HARA, J., took no part in the decision of this case.

MacKENZIE *v.* FRITZINGER.

1. APPEAL AND ERROR—ACCOUNTING—DE NOVO REVIEW.
   A decree in a suit for accounting is reviewed *de novo* on appeal to the Supreme Court.

2. ACCOUNTING—PAROL FAMILY TRUST—EVIDENCE.
   Record in accounting suit by son of deceased and his first wife against widow, deceased's second wife, *held*, to have established that no parol family trust had been created by the father while his first wife was still living, as claimed by plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 703.
[2, 3] 1 Am Jur 2d, Accounts and Accounting § 44 *et seq.*
[4–6] 54 Am Jur, Trusts § 225 *et seq.*

3. Same — Antenuptial Agreement — Voluntary Transfers of Property.

Transfers of bulk of $450,000 estate from deceased to joint account of deceased and defendant, deceased's second wife, some 34 years his junior at time of their marriage when he was 73, *held,* to have been voluntary, devoid of either fraud, coercion, or undue influence in suit for accounting by plaintiff, a son of deceased by his first wife, irrespective of whether or not there had been an antenuptial agreement as claimed by plaintiff.

4. Principal and Agent—Constructive Trust—Fiduciaries.

A confidential or fiduciary relationship ordinarily exists between principal and agent, within the meaning of the rule as to the raising of a constructive trust in the case of breach of such relationship.

5. Trusts—Constructive Trust—Fiduciary.

Equity will raise a constructive trust and compel a fiduciary, who has gained something for himself which in equity and good conscience he should not be permitted to keep, to turn it over to the person equitably entitled to it, or to otherwise execute the trust as the court may direct.

6. Same—Constructive Trust—Evidence.

Preponderance of evidence presented in suit for accounting against second wife of deceased *held,* to support establishment of constructive trust as to funds defendant had been given but had placed in her own account without authority from her late husband.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted June 8, 1962. (Calendar No. 28, Docket No. 48,988.) Decided May 9, 1963.

Bill by Evan Francis MacKenzie against Grace M. Fritzinger and Frank W. Fritzinger for accounting of property and funds obtained by defendant Grace M. Fritzinger while the wife of Alexander MacKenzie, now deceased. Bill dismissed as to defendant Frank W. Fritzinger. Decree for plaintiff directing that certain corporate stocks, and cash derived from dividends therefrom, be turned over to an administrator *de bonis non,* with will annexed, of

the estate of Alexander MacKenzie, deceased. Defendant Grace M. Fritzinger appeals. Plaintiff cross-appeals asking that decree be modified to include delivery of additional securities and property. Affirmed.

William G. Comb and *Walter M. Nelson,* for plaintiff.

Thomas G. Kavanagh, for defendants.

SMITH, J.

Parties to the action

The argument is over property accumulated in the name of Alexander MacKenzie, Sr., during his lifetime. He died May 12, 1951. Plaintiff, Evan Francis MacKenzie, is a surviving son. Defendant, Grace M. Fritzinger, was married to the deceased from December 12, 1939, until his death in 1951. Grace M. Fritzinger was the second wife of deceased. His first wife, Hattie, who was mother of the plaintiff, died in 1933. Defendant, Frank W. Fritzinger, is the present husband of Grace M. Fritzinger.

Statement of the case

The money and property involved are of the approximate value of $450,000. This substantial accumulation started from a modest stake. For the sum of $3,800 cash, deceased purchased 40 acres at the southwest corner of what is now known as Southfield and Eight Mile roads in the city of Detroit. It was then one of the farming sections of Wayne county. The deceased moved his wife and 2 sons onto the tract where they engaged in farming and cattle raising. In 1925, the 40 acres were sold to real-estate developers, Dyer and Griffin, for the sum of $240,000,

with $44,000 as down payment. Before the developers became delinquent in their account with the deceased, they had paid approximately $120,000 of the total purchase price. During this time the tract was subdivided by the developers. Defendant Grace M. Fritzinger, a business course graduate, worked in the real-estate office of Dyer and Griffin, where she met Alexander MacKenzie, Sr., the deceased.

Several years after the death of Hattie MacKenzie, Grace began keeping company with the elder MacKenzie, culminating in marriage in 1939. However, before the marriage they were sufficiently well acquainted to take several long trips together. While horseback riding with defendant Grace in November, 1939, MacKenzie was severely injured when he apparently fell from a horse. Towards the end of November he had revoked a prior will leaving his entire estate to his 2 sons. A new will was executed bequeathing the residue of his estate "in equal shares unto my fiancee, Grace M. Hessel, and unto my sons, Evan F. MacKenzie and Alexander F. MacKenzie, one-third (1/3rd) to each." A copy of said will was shown to defendant Grace before the marriage in early December. During this period, between the time of the injury and the marriage, MacKenzie, Sr., executed a deed making Grace a joint tenant with him in 8 lots, including thereon the brick house in which he made his home. Apparently, he also promised her 400 shares of Phelps Dodge stock which she admitted she later received. At the time of the marriage, she was 39 and he was 73.

After the marriage on December 12, 1939, Grace Hessel MacKenzie, now Fritzinger, assumed actual management of the business affairs of the elder MacKenzie. Apparently under his general direction, she managed his dealings in banking and securities, which already had become extensive. Before marriage, Grace Fritzinger had acquired a separate

estate of approximately $15,000. The amount of property transferred during the marriage from the sole ownership of MacKenzie to the joint ownership of both husband and wife approximates $418,000 in value. During the marriage, Grace Fritzinger set up separate bank accounts and also purchased securities in her own name totaling more than $47,000.

Plaintiff sought to establish by parol a family trust agreement, allegedly established in 1923, by the declaration of the father in the presence of the mother and 2 sons. All parties to the alleged agreement, including plaintiff's brother, are now dead (except plaintiff, of course). Plaintiff also claimed that the alleged trust was modified by an antenuptial agreement, which agreement he argues was evidenced by a new "fiancee" will, the transfer of certain lots including the home, and a promise to transfer 400 shares of Phelps Dodge stock. Defendants contend that there was no such trust or agreement.

The trial court decreed that defendant Grace Fritzinger was a "trustee of property, securities and funds placed in her own name during her marriage to Alexander MacKenzie, Sr., without any proof that the same were given to her by him." The property was ordered turned over to the administrator of the estate of Alexander MacKenzie, Sr. The court gave its reasons in an opinion and a supplemental opinion.

It is apparent from reading the 2 opinions that the trial court did not make any specific finding as to the alleged family trust agreement. By inference the court felt that no such family trust was created. However, the court found that there was an antenuptial agreement, and that as a result of it Grace Fritzinger was to receive the house and lots, the shares of Phelps Dodge stock, and a 1/3 interest in the estate. The court held that even though there may have been an antenuptial agreement, the parties

would have a right to change their minds after the marriage, and if this were done, without the presence of fraud, coercion, or undue influence, then the court would not interfere. It found that there was no proof that signatures of the elder MacKenzie on numerous transfers of stock and property were invalid, or that any fraud or duress had been practiced upon him. Further, the court found that Grace Fritzinger was the agent of her husband and that as such she took money and placed it to her own credit when rightly it should have gone into joint holdings.

Decision

A. Was there a family trust agreement?

In viewing the entire record *de novo,* it is our opinion that the trial court achieved the right result. In the first place, we find that under the facts and circumstances presented here no family agreement or trust was ever executed. Out of a plethora of testimony vividly portraying the MacKenzie family, its likes and dislikes, its hopes and fears, its pride, passion, and cunning, some things are clear. Of the elder MacKenzie: he was tough of body and mind; he seemed always to know what he wanted, and acted decisively to bring it about. He was familiar with the language and tools of the business world. From all the facts and circumstances it seems unlikely that he intended to create a trust. It seems more likely that he had a system of values, which he revised periodically; for example, after the death of his first wife, he made a will leaving his property to his 2 sons. Later, when Grace Fritzinger came into his life, he revised his intended disposition by making a new will.

The "fiancee" will, as plaintiff calls it, showed his intention, at that time, to divide his estate between

his 2 sons and intended wife, 1/3 each. He apparently knew that a will is ambulatory, because as the years went on he made other dispositions of property. For 1 thing, he deeded a number of valuable lots to his son, Alexander F. MacKenzie, Jr., now deceased. There is also a showing that at 1 time he diffidently suggested doing the same for plaintiff in order to placate his concern over changes in property disposition. The record otherwise also supports the conclusion, herein drawn, that the elder MacKenzie created no family trust of his property.

B. Re: The antenuptial or "pre-nuptial" agreement

The trial court found that an antenuptial agreement was made between the elder MacKenzie and his then intended wife, Grace Hessel. As already mentioned, the trial court rested its finding mainly upon the transactions between the parties within the month prior to the marriage. Plaintiff claims that these transactions evidence a modification of what he calls the "family trust agreement." We have already found that there was no such agreement. It is not crucial to this decision, however, to determine whether or not an antenuptial agreement was in fact made. The results are the same, because whatever may have been the understanding between the parties it was grossly modified during their marriage. What is more, there is no claim of failure by Grace Fritzinger to carry out her end of the agreement, if any. What were her obligations under the so-called "pre-nuptial" agreement are not clear. There is no claim that she was to forfeit dower rights nor any other interest in the MacKenzie properties. The individual transactions constituting the alleged antenuptial agreement, that is to say, the transfer of the home and lots, the making of a

new will, and the promise and subsequent transfer of 400 shares of Phelps Dodge stock are not attacked here. We find no reason to question the power of the elder MacKenzie so to dispose of his property. Further, we agree with the trial court that there is no proof that the elder MacKenzie was not competent to execute the numerous documents resettling the bulk of his estate upon Grace MacKenzie, now Fritzinger. Also, we concur in the trial court's finding that there is no proof of fraud, insofar as it pertains to the transfer of the bulk of the estate over the 11 years of married life from sole to joint ownership. The transfers appear to have been made voluntarily, devoid of either fraud, coercion, or undue influence.

C. Finding as to constructive trust

Finally, we are brought to the holding of the trial court that the property diverted to accounts in her own name during her marriage were in violation of the agency relationship defendant, Grace Fritzinger, bore to her deceased husband and that a constructive trust should be imposed upon same. In 22 Michigan Law and Practice, Trusts, § 53, p 570, the law is summed up as follows:

"A confidential or fiduciary relationship ordinarily exists between principal and agent, within the meaning of the rule as to the raising of a constructive trust in the case of a breach of such relationship. Accordingly, where a person occupies a fiduciary relationship as agent for another, and thereby gains something for himself which in equity and good conscience he should not be permitted to keep, equity will raise a constructive trust and compel him to turn it over to the person equitably entitled to it, or to otherwise execute the trust as the court may direct." Citing, *Burton* v. *Burton,* 332 Mich 326; *Mackey* v. *Baker,* 327 Mich 57; *Stephenson* v. *Golden,* 279 Mich

493 and 710; *Wales* v. *Newbould,* 9 Mich 45; and *Moor* v. *Mandlebaum,* 8 Mich 433.

Although the burden of proof is on the person seeking to establish a constructive trust, a preponderance of proof is all that is necessary to establish it. The evidence shows conclusively that the elder MacKenzie undertook to provide handsomely for his wife, Grace, by transferring large amounts of property (estimated: $418,000) from his sole name to their joint ownership. The testimony of Grace Fritzinger about the origin of her separate purchases is much less than satisfactory, as the trial court notes vigorously. The trial court said: "Her own testimony was that Mr. MacKenzie gave her no money to put in her own account." We cannot say that defendant Grace Fritzinger rebutted the presumption of invalidity arising out of the fiduciary relationship. On the contrary, the proofs preponderate in the other direction. We conclude therefore that the decree should be affirmed.

Affirmed, with costs to plaintiff-appellee and cross-appellant.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

CITY OF ISHPEMING *v.* PUBLIC SERVICE COMMISSION.

1. ELECTRICITY—FRANCHISES—UNIFORM RATE FOR 10-COUNTY AREA.

   Uniform rate for supplying electricity to 10-county area in which plaintiff city was located, as established by order of public service commission met requirement of 1888 franchise for such purpose, granted by city, that "the charge for such electricity shall not exceed the average charge made for the same where supplied within a radius of 100 miles of this city" (CL 1948, § 460.557).

2. SAME — CONTRACTS — FRANCHISES — ORDINANCES — CHARTERS — PUBLIC SERVICE COMMISSION — RATES.

   Contract rights of plaintiff city relative to rates for supplying electricity to city or to its inhabitants, made between the city and the present supplier's predecessor, in settlement of certain differences, maintaining the status quo as to rates for a 3-year period, and containing a provision that neither party was waiving any of their respective claims or rights concerning the franchise rights of the utility to serve the city; a later contract for 5-year period also now expired between plaintiff and defendant relative to supplying electricity for street lighting purposes; charters and ordinances adopted by the city, neither of which franchises, charters, or ordinances require negotiation of rates between the city and the supplier, *held*, not to have prevented the defendant public service commission from

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REFERENCES FOR POINTS IN HEADNOTES

[1, 12] 43 Am Jur, Public Utilities and Services § 100 *et seq.*
[2, 5, 6] 43 Am Jur, Public Utilities and Services § 201 *et seq.*
[3, 4] 43 Am Jur, Public Utilities and Services §§ 171–177.
Discrimination in the operation of a municipal utility. 50 ALR 126.
[7] 2 Am Jur 2d, Administrative Law § 384.
[8] 43 Am Jur, Public Utilities and Services §§ 185–191, 226.
[9] 43 Am Jur, Public Utilities and Services § 222.

[10, 11] 43 Am Jur, Public Utilities and Services § 225 *et seq.*
[13] 14 Am Jur, Costs § 91.

presently exercising its authority to fix and prescribe uniform rates and charges for utility services rendered by the defendant supplier over 10-county area, including appellant city (CL 1948, § 460.557).

3. SAME—DISCRIMINATION IN RATES—PUBLIC SERVICE COMMISSION.

The public service commission has a right and duty to eliminate discrimination in rates charged consumers of electricity by supplier thereof for like contemporaneous service rendered under similar circumstances and conditions (CL 1948, § 460.557).

4. SAME—ELIMINATION OF DISCRIMINATION.

A proceeding whereby the public service commission ultimately issued an order requiring the supplier of electricity in a 10-county area to charge rates that were uniform throughout the area in which the service was now rendered on an integrated basis but, for historical reasons 4 different and disparate rate schedules had theretofore been in effect, constituted a situation requiring the commission to eliminate discrimination as it was required to do under controlling statute (CL 1948, § 460.557).

5. SAME—WHOLESALE BASIS—UNIFORM RATES OVER 10-COUNTY AREA.

The public service commission was justified and properly exercised its jurisdiction in allowing defendant supplier of electricity opportunity to work out particular problems peculiar to purchaser of the service on a wholesale basis when establishing uniform rates on an area basis in 10-county area served by such defendant, with the understanding that the commission would take such action, ultimately, as was necessary to protect the public interests and the respective rights of the parties, especially where the severance resulted in a reduction of the revenues of the supplier (CL 1948, § 460.557).

6. SAME—FINDINGS OF PUBLIC SERVICE COMMISSION—EVIDENCE—UNIFORM RATES.

Competent evidence adduced at hearing before the public service commission supported its findings that 4 separate service areas of defendant supplier of electricity are interconnected and operated as 1 integrated system with more dependable service; that appellant city, whose rates were increased when rates throughout 10-county area were made uniform, was not entitled to a continuation of existing rate disparities, now that it was a part of the integrated system; that uniform rates throughout the system are in the public interest so that customers throughout the area will be charged the same rates for like service rendered under similar circumstances and conditions; and that the net operating income resulting in a rate

of return of 6.36% was not in excess of the amount required by the supplier to maintain its financial standing and capital-raising ability at satisfactory levels, and that such rate was a fair rate to the consuming public (CL 1948, § 460.557).

7. ADMINISTRATIVE LAW—FORMAL INTRODUCTION OF EVIDENCE.

Formal introduction of evidence upon which an administrative decision is based is not necessary where all the parties know that such evidence has been received by the administrative authority.

8. ELECTRICITY—RATES—EVIDENCE—JUDICIAL NOTICE OF REPORTS ON FILE.

Claim by appellant city that public service commission was not legally authorized to take judicial notice of information contained in reports by supplier of electricity in commission's file but not offered in evidence at hearing in proceeding to establish uniform rates throughout 10-county area, including appellant city, where appellant had full and adequate opportunities to investigate the data and information contained in such reports, made no objections to the commission staff's conclusions and testimony based thereon, never claimed reports were untrue or unreliable or had been misinterpreted or that appellant had been prejudiced *held*, without merit on judicial review of order made (CL 1948, § 460.557).

9. PUBLIC SERVICE COMMISSIONS—ORDERS—BURDEN OF SHOWING INVALIDITY.

Party who complains of an order of the public service commission has the burden of proof to show by clear and satisfactory evidence that the order is unlawful or unreasonable, as the case may be (CL 1948, §§ 460.4, 460.54; CLS 1956, § 462.26).

10. APPEAL AND ERROR—PUBLIC SERVICE COMMISSIONS—ISSUE OF FACT—EVIDENCE.

The Supreme Court will not substitute its judgment for that of the public service commission on issues of fact, where the commission's findings are supported by competent evidence.

11. SAME—STATUTES—DISCRETION OF COMMISSION—SUPREME COURT.

It must clearly appear that there was a failure of the public service commission to follow some mandatory provision of a pertinent statute or that the commission was guilty of an abuse of discretion in the exercise of its judgment before the Supreme Court will supplant the decision and order of the commission with an order of the Supreme Court.

12. ELECTRICITY—UNIFORM RATES FOR INTEGRATED AREA—INCREASE OF RATES FOR APPELLANT CITY.

The legislative mandate that in fixing rates to be charged by supplier of electricity the public service commission "shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price" *held,* to have been fully met by the commission at hearing which resulted in an order making uniform the rates to be charged after integration of 4 separate areas into 1 system which provided more dependable service for an area consisting of 10 counties, and which increased the rates charged in appellant city (CL 1948, § 460.557).

13. COSTS—PUBLIC QUESTION—UNIFORM RATES FOR ELECTRIC SERVICE IN INTEGRATED AREA.

No costs are allowed on appeal by plaintiff city from decree of circuit court upholding public service commission's order making uniform the rates charged consumers of electricity in 10-county area in which theretofore there had been 4 separate rate schedules for 4 areas now integrated into 1 system, a public question being involved (CL 1948, § 460.557).

Appeal from Ingham; Coash (Louis E.), J. Submitted December 7, 1962. (Calendar No. 123, Docket No. 49,823.) Decided May 9, 1963.

Bill by the City of Ishpeming and the City of Munising, both municipal corporations, against the Michigan Public Service Commission, with the Upper Penninsula Power Company, a Michigan corporation, added as party defendant, to vacate or set aside commission's orders establishing uniform rates for service in an integrated area. Orders determined valid. Plaintiff City of Ishpeming appeals. Affirmed.

Albert W. Hooper, for plaintiff City of Ishpeming.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *Benjamin F. Gibson* and *Hugh B. Anderson,* Assistant Attorneys General, for defendant commission.

Snyder, Loomis & Ewert (*Plummer Snyder, George W. Loomis,* and *Rodger T. Ederer,* of counsel), for defendant Upper Penninsula Power Company.

KELLY, J. The Upper Peninsula Power Company (hereinafter referred to as the company) renders a similar service with a common facility to an integrated area consisting of the counties of Alger, Baraga, Delta, Houghton, Keweenaw, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.

The public service commission (hereinafter referred to as the commission), on March 18, 1960, requested that the company eliminate the 4 separate rate schedules being charged for similar service in the area and develop an area uniform rate.

The company complied with the commission's request and filed an application with the commission for approval of a uniform rate it had developed, which resulted in reducing the company's 1959 earnings by $12,000.

On July 27, 1961, the commission entered an order creating a uniform rate for the area which increased the rate in Ishpeming and Munising, and these 2 cities appealed the order to the Ingham county circuit court. From a decree upholding the commission's order, the city of Ishpeming appeals. Munising did not appeal.

The city of Ishpeming appeals, claiming the court erred (1) in approving the rates governing the sale of electric energy within the city of Ishpeming as the commission lacked jurisdiction because of franchises, contracts, or ordinances, establishing the rates; (2) in holding that the commission did not violate the provisions of CL 1948, § 460.557 (Stat Ann § 22.157), in establishing the rate upon uniformity; (3) in holding that in establishing uniform rates the commission could take judicial notice of

official reports filed with the commission by the company and made available to the city of Ishpeming; (4) in holding that the matter of instituting and conducting the hearing did not violate due process.

1. Appellant claims the commission could not legally establish rates for Ishpeming because of the Higgins and the Cliffs Power & Light Company franchises; the street lighting, and the March 7, 1945, contracts; the 1948 ordinance; and the provisions of the city charter.

The city granted H. C. Higgins a franchise in 1888, which did not contain a provision requiring the grantee to negotiate with the city as to rates, the sole provision in this franchise pertaining to rates being found in section 8, which reads in part that "the charge for such electricity shall not exceed the average charge made for the same where supplied within a radius of 100 miles of this city."

The rate established by the commission meets this requirement of section 8 of the Higgins franchise.

The city entered into a contract March 7, 1945, with Michigan Gas & Electric Company (appellee's predecessor), which contract, after stating that certain differences had arisen between the company and the city over rates and the city had commenced proceedings before the Michigan Public Service Commission seeking an adjustment of the rates, established residential and commercial light rates, with the provision:

"During the period of 3 years from and after the dismissal of the presently pending proceedings as herein agreed, the city will not instigate or prosecute or take any steps or proceedings looking toward a further readjustment of the company's rates for electricity, heat, light or power either to the city or to its inhabitants, and the company is hereby released from any obligation to reduce its street lighting rate

under article 8 of the contract between the company and the city dated July 14, 1943."

This 1945 contract concluded with a provision that neither the city nor the utility was waiving any of their respective claims or rights concerning the franchise rights of the utility to serve within the city.

The city, by a 1948 ordinance, authorized the company's predecessor (Cliffs Power & Light Company) and "its successors and assigns" the right to use the streets for the construction and maintenance of electric transmission lines. The ordinance did not regulate rates, and section 3 of this ordinance reads in part as follows:

"If the Cliffs Power & Light Company, its successors or assigns, shall at any time undertake to supply the consumers of said city with electricity for light or other purposes, it shall be under such rules and regulations as the city council shall from time to time prescribe under the authority granted by section 12.3 and 12.4 of the charter of the city of Ishpeming."

The company acquired distribution properties from Michigan Gas & Electric Company in 1953, and commenced rendering electric service to the city.

December 17, 1957, the city and the company entered into a 5-year "Street Lighting Contract" whereby the city agreed that it would take from the company during the 5-year period all electric energy which it shall require for lighting all streets within the municipal limits, and the commission's August 13, 1961, order recognized its lack of jurisdiction in regard to the rates established in this street lighting contract.

The city offered in evidence before the commission the city charter adopted on December 7, 1943, and the city charter adopted on June 15, 1960. Both of

these charters, in regard to franchises, contained similar provisions, as follows:

"All franchises heretofore granted by the city of Ishpeming and now in operation shall continue until the expiration of such franchises. All irrevocable public utility franchises and all renewals, extensions and amendments thereof shall be granted only by ordinance. No such ordinance shall be adopted before 30 days after application therefor has been filed with the city council, nor until a full public hearing has been held thereon. No exclusive franchise shall ever be granted and no franchise shall be granted for a longer term than 30 years. No franchise shall be transferable, directly or indirectly, except with the approval of the city council expressed by ordinance."

Appellant cites *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company,* 325 Mich 501 (81 PUR NS 589), as authority sustaining its contention that the authority of the commission could not be invoked until good faith attempts had been made to reach an agreement between the company and the city as to rates and proof that said negotiations resulted in failure.

The pertinent section of the Mt. Pleasant franchise reads (p 507):

" 'Sec. 7. Alteration of rates. The rates specified in this franchise shall remain in force throughout the term of this franchise, subject to the following provisions: At the end of 3 years and at any time thereafter from and after the date of this franchise, said rates with the mutual consent of said grantee, successors and assigns, and the city commission of the city of Mount Pleasant, Michigan, or its successors, may be reviewed, altered and changed.

" 'In the event that said grantee, its successors and assigns, and the city commission of Mount Pleasant, Michigan, or its successors cannot agree to an altered or changed rate, then either

party, namely said grantee, its successors or assigns or the city of Mount Pleasant, Michigan, acting by its duly authorized representatives, may apply to the Michigan public utilities commission (to whom jurisdiction to fix and alter gas rates in said city is hereby granted and conferred) to fix and establish rates in which case the rates so fixed, if just and reasonable, shall prevail.'"

In the present case neither the Higgins nor Cliffs franchise contains any provision requiring negotiations such as existed in the basic language of the Mt. Pleasant franchise.

There is no provision in the charters, the contracts, or the ordinances, that prevented the commission in the present case from exercising its statutory jurisdiction and authority to fix and prescribe rates and charges for utility services rendered by the company for the city of Ishpeming.

2. Appellant contends that the commission erred "in establishing a rate based upon uniformity and not upon the elements to be considered in the statute," being PA 1909, No 106, §7, as amended (CL 1948, § 460.557 [Stat Ann § 22.157]).

March 18, 1960, the chairman of the commission notified the president of the company as follows:

"The commission's attention has recently been called to a disparity that exists in your rates for electric service.

"Your filed rates are presently contained in schedules of rates, M.P.S.C. Nos. 1, 2, 3, and 4. The commission is aware that schedules M.P.S.C. Nos. 2, 3, and 4 contain historical rates previously authorized for certain other electric companies, the properties of which have been acquired by Upper Peninsula Power Company.

"It is our understanding that all of your service areas except the Iron Range Division are now operated on an integrated basis and there no longer

appears to be good reason for maintaining separate rate schedules representing historical rates.

"Please take immediate steps to inaugurate a study leading to the adoption of uniform rates to be effective in the integrated service areas."

That the commission had a right and duty to eliminate discrimination is evidenced by the statutory provision (PA 1909, No 106, § 7, as amended) which states:

"No consumer shall at any time be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions."

The commission submits "that the matter before the commission was 'a discrimination case,' " stating: "The commission in the proceedings before it was not concerned with the reasonableness of the rates in this sense, but, rather, as to whether as they now exist are unduly discriminatory and preferential to certain consumers of the same class."

In support of its claim that the commission failed to meet the statutory requirements, appellant states:

"It certainly does not seem possible that the commission can, either on its own motion or on complaint of any party, increase or decrease rates for electrical energy that were never in truth or fact ever established by the public service commission at any hearing where the cost of service was involved. There was testimony to the effect that the Upper Peninsula Power Company did, after acquiring the Cliffs Power & Light Company and the Michigan Gas & Electric Company, make certain improvements to the system in the area and such improvements were necessary to bring the system up to standard and alleviate the shortage of electrical energy, but even with this testimony it had no effect on the determination of rates because the rates were pro-

posed simply on the basis that such rates would produce for the company the same amount of revenue that it received in the year 1959. There is no place in the statute that even indicates that a rate can be determined solely for the purpose of accomplishing a certain year's income and any rate determined as proposed by the power company certainly violates the statutory provisions. * * *

"The statute, CL 1948, § 460.557 (Stat Ann § 22.157), establishes the unit for contiguous communities and no place in the statute is there any provision or requirement for a uniform rate throughout the whole system other than that no one shall be charged a different rate for service under like and similar circumstances, and this means that the commission has to investigate the circumstances under which the power is produced and distributed. * * *

"The commission did not have before it all of the elements required to be taken into consideration as set forth in CL 1948, § 460.557 (Stat Ann § 22.157)."

CL 1948, § 460.557, provides, in part:

"In determining the proper price, the commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity, including cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day when used and the quantity used each month: Provided, however, That the commission shall in no case have power to change or alter the price fixed in or regulated by or under any franchise heretofore or hereafter granted by any city, village or township: Provided further, Where identical or substantially identical rates prevail or are established, or shall hereafter be established in 2 or more contiguous municipalities or communities served or whose inhabitants are served by the same

person, firm or corporation, the territory so served and to be served shall be treated as a unit for the purpose of fixing rates and no such rate or rates shall be changed with respect to 1 or more of such municipalities or communities so as to establish any difference of rate within the territory so served, unless and until it shall be shown that the continuance of such identical or substantially identical rate or rates will work substantial hardship to some municipality or person, firm or corporation affected thereby. The prices, rates and charges of every electric utility shall be just and reasonable and no consumer shall at any time be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions, and if any electric utility doing business within this State shall directly or indirectly by any special rate, rebate, draw-back or other device, charge, demand, collect or receive from any person or persons, copartnership or corporation, a greater or less compensation for any service rendered, furnished or performed, than it charges, demands, collects or receives from any other person, or persons, copartnership or corporation, for rendering, furnishing or performing for him or them a like contemporaneous service, such electric utility shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The year 1959 was the first full year of an operating integrated service area, and this year constitutes the period the commission used in determining the uniform rate. The company filed reports of operations for the year 1959 with the commission, which reports complied with the provisions of PA 1909, No 106, § 6, as amended (CL 1948, § 460.556 [Stat Ann § 22.156]), authorizing the commission to require electric utilities to file "a verified report upon such form and giving such information as will enable the commission to better discharge the duties im-

posed upon it." These 1959 reports were on the same form as the reports the company filed with the Federal power commission.

Public hearings were held before the commission on September 20, 1960, October 17, 18, and 19, 1960, and June 21 and 22, 1961.

The company's original proposal included a change in rate for electric power supplies to REAs (Cooperative Rural Electrification Associations) that rendered electric service to certain rural areas.

Two REAs intervened and the commission granted petitions to be separated and severed from the proceedings after the company and the REAs had advised the commission that they thought they could work out the particular problems peculiar to the company rendering wholesale service to REAs.

At the conclusion of hearings, the commission issued an opinion, and we quote from that opinion as follows:

"5. The calendar year 1959 was the first full year of operations of the integrated service areas as one integrated system of the company. The following table sets forth the commission staff's analysis of the company's integrated system results of operations for 1959 under existing rates and charges:

"Operating revenues		$6,020,600
Operating expenses	$3,592,700	
Depreciation and amortization	609,500	
Taxes	638,000	
Operating revenue deductions		$4,840,200
Net operating income		$1,180,400
Average net plant plus working capital	$18,539,100	
Rate of return	6.36%	

"From the foregoing it can be seen that according to commission staff calculations the net operating income for the period was $1,180,400, resulting in a rate of return of 6.36% on the average rate base (including the company's net plant investment and an allowance for working capital) of $18,539,100. The net operating income was not in excess of the amount required by the company to maintain its financial standing and capital-raising ability at satisfactory levels. Accordingly, from the standpoint of the company's customers, such net operating income was just and reasonable.

"6. The proposed uniform rates have been designed to produce essentially the same amount of revenues by classes of customers as was realized by the company during the 12-month period ending December 31, 1959. Naturally, this could not be accomplished to the exact dollar and cent, and consequently, on an overall basis the proposed uniform rates, based on 1959 operations, would have produced for the company some $12,000 to $13,000 less gross annual revenues than the company actually earned during this period. This amount is a recomputation of the approximate $5,000 reduction in annual revenues, testified to and indicated in exhibits and results from the severance from this case of determination of proper rates, rules and regulations governing electric service by the company to rural electric cooperatives, as provided in our order of April 13, 1961. Accordingly, in light of our findings in paragraph 5, the net operating income which would have been produced by the company under the uniform rates likewise would not have been in excess of the amount required by the company to maintain its financial standing and capital-raising ability at satisfactory levels. Upon the basis of all the evidence before us, and giving due weight to all lawful elements properly to be considered, the proposed uniform rates are just, reasonable, and will not produce any excess earnings.

"7. Evidence submitted in this case and the records and files of the commission establish conclusively that the 4 former separate service areas of the company are now physically interconnected and the company operates these interconnected facilities as an integrated system. Electric energy enters this system from the several generating plants and purchased power connections operated by the company and flows through the system to satisfy the service requirements of all customers connected to this integrated system.

"The proposed uniform rates are in the public interest and should be approved by the commission so that the company's customers throughout its integrated system will be charged the same rates or charges for like contemporaneous services rendered under similar circumstances and conditions. The record in this matter contains no evidence to justify the continuation of historical rates presently in effect with their resulting disparities and rate differentials. There is no evidence in the record that any community or municipality served by the company's integrated system is served under facts, circumstances or conditions to justify the continuation of existing rate disparities or differentials. All customers in the integrated service areas of the company are served from a physically interconnected service electric system; and a dependable supply of electric energy has been made available throughout this integrated system because of the strategic location of generating capacity, resulting in the availability of service to many customers from more than 1 direction as a protection against outages from natural hazards. The consolidation of the 4 former separate service areas into 1 integrated system has resulted in the rendering by the company of more adequate and dependable electric service.

"There is no fact, circumstance or competent evidence in this case to support the contention of the cities of Ishpeming or Munising or any other municipality in the company's integrated service areas

that it is not in fact a part of the company's integrated system; and the integrated service areas of the company as shown on exhibit Q do in fact constitute an integrated system operated as such by the company."

The record discloses that the appellant was fully advised of the fact the commission intended to make a finding based in the main upon the 1959 monthly and annual reports of the company, and that appellant had ample opportunity to examine and study these reports is disclosed by the concluding testimony of appellant's public utility consultant, Dr. John Bauer, who, upon cross-examination, said:

"*Q.* One further question, Dr. Bauer. You do know, do you not, that the company's 1959 annual report on FPC form No. 1 was in fact turned over to the city of Ishpeming around the early part of April, 1961?

"*A.* I don't know when it was turned over. I had, however, for my survey, that copy of the report, and I went through the copy of the report and the 1960 report.

"*Q.* And the 1960 report?

"*A.* I went through both of them."

Dr. Bauer is a public utility consultant associated with Public Administration Service, of Chicago, and he had, during the years 1944 and 1945, made a study of gas and electric rates for Ishpeming, Munising, and Negaunee when Cliffs Power & Light Company and the Michigan Gas & Electric Company (defendant company's predecessors) were furnishing service, and in that regard he testified that in making his report he worked in the commission's office and obtained data from the company, but he did not appear at the hearing.

Testifying in regard to the present hearing, he stated that the city gave him the exhibits that were used by the commission in making its determination;

that he made a study of these exhibits, but that he could not determine a just and reasonable rate because the reports failed to set forth the cost of transmitting electric power to Ishpeming and other localities in the area.

Dr. Bauer stated that the contemplated area was one of the most unusual—in fact, an area such as he had never come in contact with before, because within the area there were 3 incorporated cities, namely: Ishpeming, with a population of 8,857; Hancock, with 5,022; and Munising, with 4,228; and incorporated villages, such as Ahmeek, with a population of 265; Calumet, 1,139; Copper City, 293; Houghton, 3,393; Lake Linden, 1,318; Larium, 3,058; and Ontonagon, 2,358, "a total of 11 cities, 11 incorporated places," and, in addition, "there are 79 unincorporated places that are furnished distribution."

An analysis of Dr. Bauer's testimony leads to the conclusion that his objections were directed toward the so-called integrated area because not only of the variance between cities, villages, and other units receiving power, but the proposed area was artificially conceived, stating, "Now, take those long transmission lines between the eastern territory and the western territory. There is apparently vacant territory or areas in between. Those areas are simply interconnected. They are not integrated, no."

An examination of his testimony also discloses that he objected to the contemplated integrated area because the commission failed to give proper consideration to the historical background, stating, "I think you can't ignore the historic developments and take 1 community that has historically had lower rates than another community with historically higher rates and they are all brought in here and ignore the historic background completely."

Dr. Bauer admitted that he was not in a position to make any recommendations as to rates for various

communities; that he had not traveled in much of any of the Upper Peninsula, and he answered the question: "Have you made any study of the conditions of service and the rendering of electric service by the company within any of those communities?" by stating, "The answer is no."

Dr. Bauer in no way challenges the integrity of the annual or monthly reports of the company, and there is no testimony offered by him in regard to the cost of producing electric power, or the returns that were received for producing same.

Dr. Bauer was appellant's only witness who offered testimony in regard to the annual or monthly reports, as appellant's other witnesses dealt with facts surrounding the ordinances, franchises, contracts, et cetera.

Dr. Bauer's opinion was not shared by John H. Warden (president of the company), as is disclosed by the following cross-examination of Mr. Warden:

"*Q.* Now, in arriving at these uniform rates that you have proposed, Mr. Warden, have any factors been taken into consideration as to the differences of the areas one from another?

"*A.* There is no difference in the areas, as far as I know of.

"*Q.* Can you say, then, that if you have a production plant with a transmission line of 100 miles, it would be no different than a production plant with a transmission line of 50 miles?

"*A.* No, not necessarily.

"*Q.* There would be no difference there at all?

"*A.* No. You serve the whole area. If you have production plants at both ends of the system, anything that goes in between there, I'd say no difference in them at all.

"*Q.* If 1 of the areas is lying on the outside, or the perimeter of the integrated system, wouldn't that make a difference?

"*A.* Not necessarily, no.

"*Q.* Wouldn't you take into account factors such as additional cost of transmission lines or different costs of maintenance, or what other factors that you might have?

"*A.* According to the uniform rates, you should take into consideration on an integrated system the cost in the whole area. They are all taken in. You take the power that comes into a pool. You do not know where it goes, how it is served.

"*Q.* But then isn't that grounds for discrimination, if you are going to have 1 unit being served, like I say, on the outside, the perimeter, is going to pay the same amount as the unit that is right next to the production plant?

"*A.* No; that is common practice. I say you can't say every mile you should charge something. You have to have some basis of rates for uniformity. You can't take every customer. If you did, you would have to take every customer and say a rate for every customer based on the miles of transmission, distribution and everything else."

There is no merit to appellant's claim that the severance of REAs prejudiced appellant in such a manner as to destroy the rate as a uniform rate.

The commission was justified in allowing REAs and the company an opportunity to work out the particular problems peculiar to the company rendering of this service with the understanding that the commission would take such action, ultimately, as was necessary to protect the public interests and the respective rights of the parties.

The company did not profit by the severance, because, as noted above, the final order of the commission resulted in a reduction of company revenues by $12,000, and if the severance had not been granted the reduction would have been only $7,000. This was a proper exercise of the commission's jurisdiction with respect to a special contract involving wholesale of electric power.

There was competent evidence to support the commission's findings, as follows:

(1) That the 4 separate service areas of the company are physically interconnected and are operated as an integrated area and the consolidation of the 4 former separate areas into 1 integrated system has resulted in the rendering of a more dependable electric service;

(2) There is no evidence in the record that appellant is entitled to a continuation of existing rate disparities or differentials, or that appellant is not part of the company's integrated system;

(3) The uniform rates are in the public interest and are approved by the commission so the customers throughout the area will be charged the same rates for like service rendered under similar circumstances and conditions;

(4) The net operating income resulting in a rate of return of 6.36% was not in excess of the amount required by the company to maintain its financial standing and capital-raising ability at satisfactory levels, and this rate constituted a fair rate to the consuming public.

3. Appellant contends that the Michigan Public Service Commission was not legally "authorized to take judicial notice of information contained in its file but not offered in evidence at the hearing being conducted."

Appellant claims that nothing can be treated as evidence which is not introduced as such, and that material and data were improperly relied upon by the commission which were not introduced at the hearing, and, contending this is reversible error, cites in support of such argument *Dation* v. *Ford Motor Co.*, 314 Mich 152 (19 NCCA NS 158), and *L. A. Darling Company* v. *Water Resources Commission*, 341 Mich 654.

The *Dation Case* involved the constitutionality of a provision of the workmen's compensation law which empowered a medical commission to make conclusive findings as to the condition of employees alleged to be suffering from occupational disease. In finding that such provision was unconstitutional, our Court stated (pp 167, 168):

"No record is directed to be kept by the medical commission; and only the conclusion reached is required to be submitted to the department of labor and industry. Neither employee nor employer is afforded an opportunity before the medical commission to explain or rebut the showing on which the conclusion is based. Evidence not made a part of the record cannot be reviewed by the court for the purpose of determining whether an order based thereon has requisite support. There is no requirement with reference to notice and the right to a fair hearing is not safeguarded. Such rights are, however, guaranteed by both State and Federal Constitutions."

In the *Darling Case* we were concerned with an appeal from a statutory hearing before the water resources commission. The record in that case established that no witnesses were sworn, no exhibits were identified, and that the material and data relied upon by the commission in making its final order were not introduced by the commission, and no findings of fact were made by the commission. Under those conditions our Court held that the proceedings before the water resources commission had been a violation of procedural due process.

There is no similarity between *Dation* and *Darling* and our present case.

42 Am Jur, 1962 Cum Supp, Public Administrative Law, p 55, contains the following:

"Formal introduction of evidence upon which an administrative decision is based is not necessary

where all the parties know that such evidence has been received by the administrative authority."

The record sustains the following statement of the company:

"The record in this case is clear that the appellant well knew the official reports of the company were studied and relied upon by the commission and its staff; appellant had full and adequate opportunities to investigate the data and information contained in such reports; appellant made no objections to commission staff conclusions and testimony based upon such official reports; appellant has never claimed the information contained in said reports is untrue or unreliable or that such information has been in any manner misinterpreted; and there is no claim of resulting prejudice from the commission and its staff relying upon the facts and information contained in said reports. Appellant merely says the commission had no legal right to take judicial notice of these official reports and acted arbitrarily and unlawfully in so doing."

We find that the appellant was in no way prejudiced by the failure to make a formal introduction of the exhibits, and conclude there is no merit to appellant's contention that the decision of the commission was erroneous and should be set aside because of said fact.

4. Appellant claims the court erred in holding that the matter of instituting and conducting the hearing did not violate due process.

The statutory provisions (PA 1909, No 300, § 26, as amended [CLS 1956, § 462.26 (Stat Ann 1961 Cum Supp § 22.45)])* provides as follows:

"In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the

* See CL 1948, §§ 460.4, 460.54 (Stat Ann §§ 22.13[4], 22.4).—REPORTER.

commission complained of is unlawful or unreasonable, as the case may be."

This Court has made it clear that we will not substitute our judgment for that of the commission on issues of fact where the commission's findings are supported by competent evidence, and it must be shown that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment, before we supplant the decision and order of the commission with a decision and order of this Court. See *J. E. Bejin Cartage Company* v. *Public Service Commission,* 352 Mich 139; *Giaras* v. *Public Service Commission,* 301 Mich 262; *Grand Rapids & Indiana R. Co.* v. *Michigan Railroad Commission,* 188 Mich 108 (PUR1915F, 805).

We agree with the following statement of the attorney general in his brief on behalf of appellee commission:

"The plaintiff has not seriously contended that the commission has no jurisdiction to remove discrimination—neither has there been a serious contention that discrimination should be allowed to exist unchecked. The plaintiff has merely questioned the means by which the commission acted to end the discrimination, saying that the commission must consider the elements normally considered in a traditional 'rate case.' However, there was sufficient evidence presented for the commission to determine the reasonableness of the uniform rates and the resulting earnings of the company."

The legislature did not define a formula or an exact procedure, but commanded that "in determining the proper price, the commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity." (CL 1948, § 460.557 [Stat Ann § 22.157].)

This legislative mandate was fully met by the commission.

The decree of the circuit court for Ingham county is affirmed. No costs, a public question being involved.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, JJ., concurred with KELLY, J.

SMITH, J., concurred in result.

O'HARA, J., took no part in the decision of this case.

BICKELL *v.* FLINT CIVIL SERVICE COMMISSION.

1. MUNICIPAL CORPORATIONS—CIVIL SERVICE—LAYOFF FOR ECONOMY REASONS—ABOLITION OF POSITION—SENIORITY ON RECALL.

   A layoff of city employees for economy reasons does not effect an abolition of the jobs within the meaning of city charter provision that in the event of abolition of a position the employee shall be given employment in the next lower position in the department but that if separated from service for economy reasons he should be given an indefinite leave of absence without compensation and recalled to active service when the first opening occurs according to his seniority at the time when the vacancy existed (Flint City Charter, § 245).

2. SAME—CIVIL SERVICE—REINSTATEMENT—MANDAMUS—BURDEN OF PROOF—EVIDENCE.

   Whether or not positions of plaintiff civil service employees of defendant city were abolished or they were given indefinite leaves of absence without compensation but with certain recall rights under city charter was a question of fact upon which

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 37 Am Jur, Municipal Corporations § 227.
10 Am Jur, Civil Service § 12.

plaintiffs had the burden of proof in their mandamus proceeding to compel reinstatement on the payroll, a burden which has not been sustained according to record presented (Flint City Charter, § 245).

Appeal from Genesee; Baker (John W.), J. Submitted April 3, 1963. (Calendar No. 23, Docket No. 49,383.) Decided June 3, 1963.

Mandamus by Richard Bickell and 25 other employees of street construction division, Flint public works department, against Civil Service Commission of the City of Flint, its members, the city manager and the director of the public works department to compel their reinstatement on the payroll. Thirty-seven other employees of the public works department intervened as parties defendant. Writ denied. Plaintiffs appeal. Affirmed.

Andrew J. Transue, for plaintiffs.

William J. Kane, City Attorney, and *Wade D. Withey,* Assistant City Attorney, for defendants.

CARR, C. J. On November 21, 1960, plaintiffs were employees of the department of public works of the city of Flint, in its street construction division No. 15. There was then no money available to the city to carry on a street construction program. Accordingly, for economy reasons, plaintiffs were laid off and separated from the active service and payroll of the city.

This mandamus action was brought to compel defendant city civil service commission to reinstate plaintiffs in their positions and to their seniority rights and pay them the back wages which they would have earned had they not been laid off. From denial of the writ in the lower court plaintiffs appeal here.

Section 245 of the city charter contains the language controlling plaintiffs' rights and is presented for interpretation in this case. It reads as follows:

"When an employee's position is abolished, he shall be given employment in the next lower position in the department and juniors in the department be demoted accordingly, provided however, that if any employee, through economy reasons, shall be forced from the active service of the city, he shall be given an indefinite leave of absence without compensation and he shall be recalled to active service when the first opening occurs in the department according to his seniority at the time when the vacancy existed."

In the conclusion of plaintiffs' reply brief this statement appears:

"In plaintiffs' and appellants' original brief, and in this brief, it is the contention that when there is a layoff for economy reasons, jobs are abolished. This is the issue."

Plaintiffs say that laying them off on November 21, 1960, amounted to abolishing their jobs and that that action brought into play the first part of the above charter quotation, entitling them, on the basis of their seniority, to be given the next lower positions in the department by demoting their juniors in seniority holding such positions. It is conceded that this course was not followed.

Defendants say, on the contrary, that it is the proviso clause in the charter quotation which applies. If defendants' contention is correct, then, under that clause, plaintiffs, through economy reasons were forced from active city service, given an indefinite leave of absence without compensation, and became entitled to be recalled to active service when future openings should occur in the department according to their seniority. As defendants

point out, while the proviso clause calls for recalling to active service according to seniority, no such requirement is made as to the manner or order of layoffs for economy reasons.

This case is not brought under the proviso clause, to compel the recall to active duty of plaintiffs when openings occur in accord with their seniority rights. Whether that has occurred is, in consequence, not a question before us on this appeal. The only question is whether plaintiffs' separation from the city's service and payroll was invalid and violative of their rights in the first place, as constituting the abolishment of their jobs without according them the right to "bump" those having less seniority, as provided for in the above language of the charter.

Decisions, largely from other States, holding certain layoffs to have constituted abolishments of jobs within the meaning of the different language of the statutes, charters or ordinances there involved, are not controlling of the issue here. Plaintiffs are not correct in their stated position that "when there is a layoff for economy reasons, jobs are abolished." To so hold would render the proviso clause meaningless and of no effect. The charter language makes provision for 2 alternatives. One or the other occurred. Did defendants abolish plaintiffs' jobs or give them indefinite leaves of absence without compensation but with certain recall rights? That presents a question of fact. Plaintiffs say one thing, defendants the opposite. The burden of proof is on the plaintiffs. They have presented no proofs in the shape of official records or testimony to show that their jobs were abolished. While defendants, upon whom the burden of proof in this matter does not repose, made no masterful showing or adducing of proofs to support their contention in this factual dispute, there is some evidence indicating that only the granting of leaves of absence occurred here.

The city's personnel director testified that there had been no action by either the civil service commission or the city commission to abolish the jobs of plaintiffs. Under that state of the proofs, or lack of them, the plaintiffs were not entitled to prevail and the trial court properly denied the relief sought.

Affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

HOAG *v.* FENTON.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.

The Supreme Court must accept the view of the testimony most favorable to plaintiff in review of a directed verdict against him.

2. AUTOMOBILES—THROUGH HIGHWAY—INTERSECTION—CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence was for jury, where plaintiff, fourth in line of eastbound cars on 2-lane, through highway near intersection, who sought to pass at speed of 27 miles an hour in north lane as first of the cars indicated intention to turn right and others slowed down to 10 to 15 miles an hour, when confronted with defendant's southbound car from intersecting road which plaintiff had observed for some 400 feet to the west approaching at 5 miles an hour but failed to stop

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 886.

[2, 4] 8 Am Jur 2d, Automobiles and Highway Traffic § 1013.

[3, 4] 7, 8 Am Jur 2d, Automobiles and Highway Traffic §§ 188, 720, 721.

Driving automobile at speed which prevents stopping within range of vision or negligence. 97 ALR 546.

[5] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 359, 360.

as required, turned right some 70 feet from plaintiff and struck plaintiff's car after latter had accelerated to 32 miles an hour in an effort to avoid collision by veering slightly to the right as permitted by other eastbound cars after plaintiff had determined there was less likelihood of collision by so doing than in remaining in northbound lane and stopping within what had been his previously assured clear distance ahead, but where now a head-on collision was imminent (CLS 1956, § 257.627, as amended by PA 1959, No 76).

3. SAME—SPEED—ASSURED CLEAR DISTANCE AHEAD—UNEXPECTED INVASION OF SAFETY DISTANCE.

A motorist who has been driving so as to be able to stop within what had been his assured clear distance ahead is not in violation of such rule where such clear distance is suddenly and unexpectedly invaded by another vehicle coming from the side at a time and place such that the first driver cannot avoid a collision with it (CLS 1956, § 257.627, as amended by PA 1959, No 76).

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT—SPEED—ASSURED CLEAR DISTANCE—INTERFERENCE.

The matter of the negligence of a motorist, who is driving at a speed such that he is able to stop within the assured clear distance ahead but for intersection of his lane of travel or line of vision at some intermediate point by another vehicle or other moving object, is a question for the trier of the facts (CLS 1956, § 257.627, as amended by PA 1959, No 76).

5. NEGLIGENCE—EMERGENCY.

One who suddenly finds himself in peril without time to consider the best means to avoid impending danger is not guilty of negligence if he fails to adopt what subsequently may appear to have been the better method, unless the emergency is brought about by his own negligence.

Appeal from Oakland; Dondero (Stanton G.), J. Submitted April 2, 1963. (Calendar No. 14, Docket No. 49,714.) Decided June 3, 1963.

Case by Ralph W. Hoag against Herman H. Fenton for personal injuries sustained in automobile collision September 24, 1960. Directed verdict and

judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

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

Feikens, Dice, Sweeney & Sullivan (*John Feikens,* of counsel), for defendant.

DETHMERS, J. Plaintiff appeals from directed verdict of no cause for action in his suit for damages resulting from the collision between automobiles owned and operated by him and by defendant, respectively. We think judgment below for defendant should be reversed and new trial granted.

Plaintiff was traveling east on a paved, 2-lane, through highway, approaching its intersection with a north and south gravel road. Defendant was traveling south on the gravel road, approaching the intersection from the north. He was required, as indicated by stop sign, to stop before entering upon the paved highway. There is testimony that he made such stop and also that he did not. He undertook to make a right turn toward the west, from which plaintiff was coming. While defendant was in the process of making that turn the collision occurred.

Plaintiff's further version of the facts, based on the view of the testimony most favorable to him, which we must accept in review of the directed verdict against him, follows: He was going about 20 to 25 miles per hour, following 3 other automobiles; the first of the 3 gave a signal for a right turn, and the 3 slowed down to 10 to 15 miles per hour; when plaintiff was about 200 feet west of the intersection, the first of the 3 cars ahead of him started to turn right, south, onto the intersecting gravel road; plaintiff, while still 400 feet west of the intersection, had already observed defendant's automobile at a point

50 to 100 feet north of the intersection, traveling south at about 5 miles per hour, and he continued to keep an eye on it as well as on the 3 cars ahead of him; when the first car ahead started to turn right, or south, plaintiff drove left, onto the north half of the pavement, intending to pass the cars ahead of him, defendant's car then being from 30 to 50 feet north of the intersection; plaintiff continued to observe it as it approached the intersection. Plaintiff testified that as defendant's car got to the intersection it paused but did not make a complete stop; then it started to come around the corner toward plaintiff; plaintiff's car was then alongside the second of the 3 cars which had been ahead of him and he was about 70 feet west of defendant's car; plaintiff then was traveling at about 27 miles per hour; he thought of putting on his brakes and started to do so, but testified that he was too close and afraid that defendant would pick up speed coming around the corner and they would hit head on; the car to his right pulled over onto the south shoulder and plaintiff drove over near that car and decided to accelerate and try to clear defendant's car before it would come out onto the paved highway all the way; he did accelerate to about 32 miles per hour; as plaintiff reached the intersection defendant's left front wheel had come to a point about 8 feet out on the pavement in the intersection and its right front wheel was just coming onto the pavement; the left front fender of defendant's turning car struck the left side of plaintiff's car at about its front door.

Defendant emphasizes testimony, not the most favorable to plaintiff, elicited from him on cross-examination, that when he first saw defendant starting to come around the corner plaintiff was still 70 feet west therefrom, going at 27 miles per hour, and that, at that time, he became "suspicious" that an accident might happen, that at 27 miles per hour

a car could be stopped in 40 feet after brake application, and that he could have stopped within the 70 feet before reaching the intersection. Defendant also introduced into evidence a secretary of State's manual stating that an automobile traveling at 25 miles per hour can be stopped in 67 feet, consisting of 39 feet braking distance and a reaction distance of 28 feet. On this basis defendant says that, for failure to stop within that distance, plaintiff was guilty of contributory negligence as a matter of law. It is to be noted, however, in viewing the testimony in the light most favorable to plaintiff, that he did not continue to adhere to his testimony, into which he had been artfully lead on cross-examination, that he could have stopped in such distance but, instead, he later expressed doubt about it and testified, further, that, in taking into account the advancing of defendant's car toward plaintiff, he feared that even such stopping by him might not prevent an accident which he thought, on the spur of the moment, would happen if he did not accelerate and try to squeeze past defendant's car while it was still in the process of turning into the intersection. Whatever, under the view most favorable to plaintiff, his own admissions on the witness stand in this connection may lack as support for defendant's theory in this connection, the latter apparently believes is supplied by the language from the manual.

Defendant stresses plaintiff's alleged violation of what defendant terms the assured-clear-distance-ahead rule, provided by statute (CLS 1956, § 257.627, as amended by PA 1959, No 76 [Stat Ann 1960 Rev § 9.2327]), rendering plaintiff, so defendant says, guilty of contributory negligence as a matter of law. Cited by defendant in this connection are *Cole* v. *Barber,* 353 Mich 427, and *Winslow* v. *Veterans of Foreign Wars National Home,* 328 Mich 488. Even though defendant professes to find comfort in some

of the language of the opinions in the cited cases, the decisions therein are of no assistance to him. They do not hold that which defendant must establish in order to prevail on this appeal, namely, that the question of the contributory negligence of one situated as plaintiff was in the instant case, is one of law and not of fact. In *Cole* this Court held it error for the court below to have held plaintiff guilty of contributory negligence as a matter of law in striking defendant's truck which suddenly came from one side and drove in front of plaintiff. Discussing the matter of whether plaintiff drove at a speed such as to be able to stop within the assured clear distance ahead, this Court held that a question of fact had been presented. This was partly because of uncertainty as to whether defendant's crossing occurred beyond or within plaintiff's so-called assured clear distance ahead. In the case at bar, either such question of fact also exists, under the view of the evidence most favorable to plaintiff, and the directed verdict was improper, or, if not, then plaintiff was able so to stop within the 70 feet and noncompliance with the so-called assured clear distance ahead rule is not involved here, as we shall later discuss. In *Winslow,* also presenting an assured clear distance ahead problem, this Court held plaintiff's alleged contributory negligence in that connection presented a question of fact, not law.

In the instant case, when defendant started to enter the through highway 70 feet distant from plaintiff, either plaintiff was not able to stop within that distance or he was. If not, the situation was one governed by such cases as *Cole* v. *Barber, supra,* and *Barner* v. *Kish,* 341 Mich 501, holding that a driver is not in violation of the assured-clear-distance-ahead rule nor guilty of negligence as a matter of law, if he has been driving so as to be able to stop within the assured clear distance ahead but that

assured clear distance ahead is suddenly and unexpectedly invaded by another vehicle coming from one side at a time and place such that the first driver cannot avoid a collision with it. As said in *Cole* (p 431):

"The assured-clear-distance-ahead rule says, in essence, that a driver shall not operate his vehicle so fast that he cannot bring it to a complete stop within that distance ahead of him in which he can clearly perceive any object that might appear in his path. If a motorist drives faster than his perception and braking ability safely permit him to do, and an accident results because of it, he is negligent as a matter of law. *Conversely, a motorist is not necessarily negligent as a matter of law if another vehicle or other moving object suddenly intersects his lane of travel or line of vision at some intermediate point within his assured clear distance ahead. In such a case his negligence or lack of it are properly questions of fact for the jury to determine.* (*Meehl* v. *Barr Transfer Co.*, 296 Mich 697; *Barner* v. *Kish*, 341 Mich 501.)" (Italics supplied.)

So even if plaintiff, after defendant turned, had not been able to stop in the 70-foot distance before reaching the intersection, the directed verdict here would be in error. On the other hand, if plaintiff was able to stop within those 70 feet when defendant started entering the intersection, as defendant seems to contend here, then the matter of plaintiff's claimed violation of the statute requiring him to drive at a speed not greater than would permit him to stop within the assured clear distance ahead would not be involved in this case because he would have been driving, as the statute required, at a speed such that he could have stopped within the assured clear distance ahead. That assured clear distance ahead, from naught appearing in the record to the contrary, apparently had extended well beyond the intersec-

tion. Even defendant does not say that as plaintiff proceeded at 27 miles per hour on the left side of the pavement in an effort to pass the 3 cars traveling at from 10 to 15 miles per hour ahead of him and as he saw defendant approach the corner at 5 miles per hour and anticipated, as he had a right to expect, that defendant would stop at the stop sign, that plaintiff then had been driving at a speed greater than would permit him to stop within that assured clear distance ahead in violation of the statute. Did defendant's sudden, unlawful entering of the intersection ahead of plaintiff change that? Not at all insofar as plaintiff's driving up to that instant is concerned. Accordingly, defendant's citation of *Graham* v. *United Trucking Service, Inc.*, 327 Mich 694, holding one operating a vehicle in violation of a statute to be guilty of negligence as a matter of law, is inapt here. Plaintiff had not violated the statute as a matter of law up to that time.

What about plaintiff's conduct from that point on, after defendant unlawfully entered the intersection? The question is whether plaintiff was guilty of contributory negligence as a matter of law in deciding and acting in accord with that decision, made 70 feet from the intersection, that a collision would more likely be avoided by accelerating and attempting to squeeze by defendant's car before it got all the way into the intersection than by attempting to stop in front of defendant's oncoming car. We think that the question of plaintiff's contributory negligence in making such decision and acting on it was one of fact for the jury, not to be determined by the judge as a matter of law. Here plaintiff was traveling at a permissible rate of speed, he was undertaking to pass 3 cars ahead of him as he had a right to do, he had been watching defendant's car approaching for some distance, at a rate of about 5 miles per hour, and while plaintiff was on the left, or north,

half of the pavement, in the act of passing, he saw defendant either stop or pause and then suddenly turn into the intersection just 70 feet ahead of him. The situation then confronting plaintiff was not of his own making or the result of wrongdoing or negligence on his part. He quickly formed a judgment and acted on it. The statute above discussed does not require stopping within the assured clear distance ahead but, rather, driving at a speed not greater than will permit the driver to do so. According to defendant's own theory, with that statutory requirement plaintiff was complying. Though able to stop, he decided it was better not to do so. In point, from *Schow* v. *Paugh,* 350 Mich 304, 308, is the following:

"We have stated that one who suddenly finds himself in peril without time to consider the best means to avoid impending danger is not guilty of negligence if he fails to adopt what subsequently may appear to have been the better method, unless the emergency is brought about by his own negligence."

Reversed and remanded for new trial. Costs to plaintiff.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

GORDON v. VILLAGE OF WAYNE.

1. MUNICIPAL CORPORATIONS—APPROVAL OF PLAT—FENCE ADJOINING SCHOOL PROPERTY—CONTRACTS.

   Plaintiff plattors who had constructed a 5′ fence to set off their property from abutting school lands *held*, not entitled to recover the cost thereof from defendant village, where record shows plaintiffs had never asked the FHA to waive requirement for a fence and that fence was constructed 1′ higher than that called for by agreement between plaintiffs and the village incident to approval of plat (CL 1948, § 560.1 *et seq.*, as amended).

2. SAME—APPROVAL OF PLAT—CONTRIBUTION TO PARK FUND.

   Requirement of contract, entered into between plattors of land and village authorities relative to approval of plats, that plaintiffs make a contribution into a so-called park fund, *held*, to have been tantamount to compulsion, there being no statutory authority to require either the donation of land or monetary equivalent, hence plaintiffs are entitled to recovery of such contribution in action of assumpsit (CL 1948, § 560.1 *et seq.*, as amended).

3. SAME—APPROVAL OF PLATS—COST OF INSPECTION OF IMPROVEMENTS.

   Sums expended by plaintiff plattors for cost of inspection by defendant village of improvements, required to be made before plats of land were approved, *held*, recoverable in action of assumpsit, since the obligation of inspection was that of the village and furnished no consideration for such payments (CL 1948, § 560.1 *et seq.*, as amended).

4. COSTS—APPROVAL OF PLATS—FAILURE OF EITHER PARTY TO PREVAIL IN FULL.

   No costs are awarded on appeal in plattors' action of assumpsit against village to recover sums paid under contract executed

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REFERENCES FOR POINTS IN HEADNOTES

[1] 22 Am Jur, Fences § 1 *et seq.*
[2] 39 Am Jur, Parks, Squares, and Playgrounds §§ 5–11.
[3] 27 Am Jur, Improvements § 31 *et seq.*
[4] 14 Am Jur, Costs §§ 10, 11.

incident to approval of subdivision plats, where neither party has fully prevailed (CL 1948, § 560.1 *et seq.*, as amended).

Appeal from Wayne; Vander Wal (John H.), J., presiding. Submitted April 2, 1963. (Calendar No. 4, Docket No. 49,345.) Decided June 3, 1963.

Assumpsit by Harold H. Gordon, Marion T. Gordon, Louis P. Begin, and Gita Begin against the Village of Wayne, now the City of Wayne, a municipal corporation, for recovery of sums demanded prior to approval of plat. Judgment for defendant. Plaintiffs appeal. Reversed in part and affirmed in part.

Arthur J. Cole, for plaintiffs.

Russel W. Schmidt, for defendant.

KELLY, J. Plaintiffs instituted this action in assumpsit in the Wayne county circuit court to recover from defendant the sum of $6,105.30 for damages arising out of a contract entered into between the parties, dated October 17, 1955.

Plaintiffs were owners of 2 parcels of land located in the village of Wayne. (The village of Wayne is now the city of Wayne.) The combined parcels contained 20 acres and plaintiffs subdivided the property into 2 subdivisions. Plaintiffs assert the village of Wayne would not approve their proposed plats unless plaintiffs complied with the following demands, which were made a part of the October, 1955, agreement:

(a) The payment of $3,193.80 into a so-called park fund;

(b) The payment of $917.50 to the city for inspection charges in the installation of water and sewer lines and street paving;

(c) The payment of $1,994 for installation of a fence to set off plaintiffs' property from abutting school lands.

The above amounts total $6,105.30, which plaintiffs contend were wrongfully demanded by the village.

Plaintiffs further contend that after the preliminary plats were approved it was necessary to obtain the approval of the plats from the village council; that the village manager advised them that the plats would not be approved unless land was donated for park purposes; that the village manager suggested that plaintiffs and the village enter into a contract before approval was granted; that the foregoing requirements were objectionable to plaintiffs, but they ultimately signed the contract.

Defendant contends the agreement entered into with plaintiffs contemplated improvements, such as construction of water lines, sewers, sidewalks, et cetera, on the plat, including engineering charges; that the foregoing charges, with the exception of the engineering charges, were required either by State law or local ordinance; that the engineering (inspection) charges were made rather than make plaintiffs provide their own engineer; that the Federal Housing Administration required that plaintiffs fence off their land from abutting school property, and that plaintiffs voluntarily complied with the above requirements; and, that there was no compulsion or duress exerted on the plaintiffs as a result of the contract between the parties.

The trial court, sitting without a jury, found no cause for action, and judgment for defendant was entered.

The record does not sustain plaintiffs' contention that the fence was erected directly as a result of plaintiffs' contract with the village and we agree

with the following portion of the trial court's opinion:

"Concerning the fence, the testimony is clear that the plaintiffs never asked the FHA to waive their requirement for a fence and that a 5-foot fence was constructed in accordance with the FHA requirement and not erected because of the agreement between the parties because that called for a 4-foot fence. Therefore nothing is allowed for the fence."

The contract provided:

"4. The payment on the signing of these presents, receipt of which is hereby acknowledged, to the village of Wayne, of the sum of $3,193.80 for the park fund, this being in lieu of setting aside a portion of the property included in said plats for park purposes, there being a village park paid for by the village within the close vicinity. * * *

"12. The village engineering department shall supply an engineering inspector on paving, storm and sanitary sewer and water line installation at the price of $100 per full week of inspection to be paid by the owners to the village within 10 days after date of periodic bills and statements submitted to owners therefor."

In *Ridgemont Development Co.* v. *City of East Detroit,* 358 Mich 387, we held that there was no authority for a municipality to require that lots be conveyed to a city for park purposes in order for the owners to gain approval of the plats.

To require such a conveyance prior to approval of the plats is tantamount to compulsion since there is no statutory, or other authority to do so. In the instant controversy the parties were subject to the provisions of PA 1929, No 172 (CL 1948, § 560.1 *et seq.,* as amended [Stat Ann 1953 Rev and Stat Ann 1957 Cum Supp § 26.431 *et seq.*]), in the preparation and approval of the plats.

Under the above plat statute there was no authority to impose or require that plaintiffs comply with the demand made by the village of Wayne that property, or its monetary equivalent, be donated for park purposes. Plaintiff Harold H. Gordon testified that plaintiffs were induced to believe that unless a donation was made for park purposes, approval of the plats would not be granted by the Wayne village council, and defendant's manager, Wallace Arrowsmith, also testified that it was a policy of the village to require land for park purposes in new developments.

The record sustains the conclusion that the demand by the village for land, or its monetary equivalent, for park purposes is within the general rule of *Ridgemont, supra,* wherein such requirement is regarded as a compulsion upon the owners, not authorized by the statute.

We, therefore, hold that in complying with such demand plaintiffs acted under compulsion and are entitled to recovery of that amount.

Payment to the village for inspection of installation of improvements was neither authorized by the plat statute nor by local ordinance. Sums expended by plaintiffs in this respect are recoverable since the municipality was charging plaintiffs for what the village was obligated to perform, and, therefore, no consideration existed as to the inspection payments.

Defendant's contention that the moneys were paid by the Valley Construction Company and that plaintiffs are not the real parties in interest is without merit, since the record is clear that Valley Construction Company is owned and controlled by plaintiffs. The defendant is not subject to further suit by Valley Construction Company regarding the instant controversy.

The judgment of the lower court is reversed in part and affirmed in part, and the case remanded for

entry of judgment in conformity with this opinion. Neither party having fully prevailed, no costs are allowed.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

CHATHAM SUPER MARKETS, INC., *v.* AJAX ASPHALT PAVING, INC.

1. CONTRACTS—MODIFICATION—NOVATION.
   A written contract may be rescinded or may be modified either in writing or orally or a new contract may be entered into between the parties.

2. SAME—PLEADING—MOTION TO DISMISS.
   A motion to dismiss an amended declaration in an action for breach of a contract should be tested solely by and from the 4 corners of such declaration.

3. SAME—THIRD-PARTY BENEFICIARY—PLEADING—MOTION TO DISMISS.
   Averment in plaintiff owner's declaration in action for loss under agreement between general contractor for erection of a supermarket and defendant subcontractor that latter was obligated directly to plaintiff to perform paving work according to architect's specifications and that plaintiff was a third-party creditor beneficiary of defendant's undertakings, promises, guarantees, and warranties under the third-party beneficiary statute *held*, sufficient to state a cause of action as against motion to dismiss, whether or not the statute was applicable being determined as a question upon trial (CL 1948, § 691.541 *et seq.*).

REFERENCES FOR POINTS IN HEADNOTES
[1] 12 Am Jur, Contracts § 427 *et seq.*
[2–6] 41 Am Jur, Pleading §§ 330–334.

4. PLEADING—MOTION TO DISMISS—AFFIDAVITS.
   A rule-provided motion to dismiss a declaration for failure to state a cause of action cannot be tested by factual affidavit of support, or factual affidavit in opposition, or both, in view of court rule requirement that pleading shall not state matters of evidence (GCR 1963, 111.9).

5. SAME—MOTION TO DISMISS.
   All facts that are well pleaded must be taken as true for the purposes of a motion to dismiss the pleading before trial.

6. SAME—MOTION TO DISMISS—CAUSE OF ACTION—JUDGMENT.
   A cause of action, as the term is used in motion to dismiss for failure to state a cause of action, means the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant and is not to be confused with the plaintiff's right to judgment, the latter being dependent upon the proof offered in support of the asserted case and upon what defenses can be established against the cause of action asserted.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted April 2, 1963. (Calendar No. 5, Docket No. 49,905.) Decided June 3, 1963.

Action by Chatham Super Markets, Inc., a Michigan corporation, against Ajax Asphalt Paving, Inc., a Michigan corporation, for breach of contract made by defendant as subcontractor. Cause dismissed on motion. Plaintiff appeals. Reversed and remanded.

Bizer & Sommers, for plaintiff.

Arthur I. Gould (*Louis Rosenzweig,* of counsel), for defendant.

BLACK, J. Plaintiff contracted in writing with the Shefman Construction Company "to erect a supermarket building and make parking improvements" on plaintiff's then vacant land in East Detroit. The covenants included one for construction and paving, by Shefman according to detailed plans and speci-

fications, of a large parking area adjacent to the building. Shefman subcontracted the parking area pavement job to defendant. The subbase and paving done by defendant turned out to be wholly defective with result that plaintiff was compelled to reconstruct and repave at a cost of $16,770.

Plaintiff sued the defendant subcontractor for the loss, alleging among other things:

"27. That under the contract between Shefman and the defendant, the defendant agreed and undertook to be obligated directly to plaintiff to duly perform all of the work for the blacktop paving in accordance with the plans and specifications prepared by Louis G. Redstone, an architect, Job No. 1518, and to relieve and discharge Shefman from its (Shefman's) contractual duty to plaintiff to do said blacktop paving work, et cetera. * * *

"29. That plaintiff is a third-party creditor beneficiary of defendant's undertakings and promises, guarantees, and warranties by virtue of the provisions of PA 1937, No 296 (CL 1948, § 691.541 *et seq.* [Stat Ann 1953 Rev § 26.1231 *et seq.*])."*

Defendant countered by motion to dismiss, claiming that plaintiff's declaration as amended failed to state a cause for the reason "That there is no privity of contract between the plaintiff and the defendant." To its motion to dismiss defendant attached an affidavit of the president of the defendant corporation averring "personal knowledge of all of the facts stated herein; that he was the person who conducted the negotiations with Shefman Construction Company, * * * and that the only contract, written or oral entered into between the defendant and the Shefman Construction Company is the [one] dated May 21, 1956, a copy of which is herewith attached and made a part of this affidavit."

* These seem to have been the critical allegations. See presently quoted discussion between court and counsel.

The motion to dismiss provoked several hearings, during which the following colloquy occurred:

"*The Court:* How can the plaintiff in this case allege the specific provisions of an oral contract between the general contractor and the defendant here?

"It seems to me that all the plaintiff has done here is to provide allegations to shore up the deficiencies previously pointed out by the court's opinion, when it dismissed the original declaration filed herein.

"*Mr. Sommers:* We propose to prove this by testimony of Shefman himself.

"*The Court:* Does he have an affidavit, by any chance, attached to this?

"*Mr. Sommers:* No, he doesn't, Your Honor.

"*The Court:* Have you taken his deposition?

"*Mr. Sommers:* We haven't had a chance to. That is what I have been arguing. We should be given a chance to do that. * * *

"*The Court:* Let me put it to you in this way. Is there anything in here indicating that this is Shefman's understanding of what was being done?

"*Mr. Sommers:* Yes, paragraph 15 of our latest declaration.

"*The Court:* What I mean is this. There is no affidavit, for example, from Mr. Shefman.

"*Mr. Sommers:* This doesn't have to be a sworn pleading, your Honor.

"*The Court:* Well, here, by leave of the court, you have been permitted to file after the court decided the motion. You have been permitted to file a second amended declaration to see if you could come up with facts to suggest to this court that there is some merit in your position, that if there were a trial you could produce testimony proving the allegations which you have made here orally and in writing. * * *

"We have actually 3 declarations here, plus a lot of intervening conversation and representations,

and the court has, for example, looked at the only writing that I know of, and apparently that you know that exists between the general contractor Shefman and the defendant in this case. And the language of that short, brief letter is anything but what is represented here in your declaration."

Defendant's motion was ultimately granted and plaintiff has appealed. The briefs present an interesting discussion of the interpretation and application of the third-party beneficiary statute (CL 1948, § 691.541 *et seq.* [Stat Ann 1953 Rev § 26.1231 *et seq.*]); a discussion which may or may not prove decisive when the essential facts are established (a) by deposition or depositions as suggested by plaintiff's counsel (see colloquy above) or, (b) by motion or motions for summary judgment under GCR 1963, 117, or (c) trial of the cause on complete pleading by the parties.

The right of motion to dismiss, assigning no cause alleged, seems surely as having been misapprehended and misapplied here. That the movant has attached to its motion the mentioned affidavit is presently immaterial. When the case is tried, or when the factual issue made by such affidavit is presented on motion for summary judgment, that will be the occasion for proof if any countering what the affiant has alleged. That too will be the occasion for proof if any that the original writing was validly modified, or even novated, by subsequent oral or written agreement of the parties thereto or, perchance, by subsequent oral or written agreement of the present litigant parties. Building and construction contracts notoriously bring about subsequent alterations, modifications, and novations as the work progresses. The courts are regularly called upon to settle factual disputes which arise from mutual undertakings, real or otherwise, which are said to have come to express or implied agreement

after signature of the master contract and commencement of work thereunder. As said recently by Judge Goodrich (*Frommeyer* v. *L. & R. Construction Co.* [CCA 3], 261 F2d 879, 882 [69 ALR2d 1040]):

"No one doubts that a contract, even a written contract, may be rescinded or may be modified subsequently. Such modifications may be in writing or oral. The district court was cited to cases, which have been brought to our attention also, in which a contractor, or subcontractor, confronting new and unexpected situations has been found to have made a new contract with the promisee on terms more favorable to himself. *E.g., Swartz* v. *Lieberman* (1948), 323 Mass 109 (80 NE2d 5, 12 ALR2d 75); Annotation 12 ALR2d 78 (1950)."*

The foregoing observations are intentionally designed as demonstrative reasons why, on this motion to dismiss, the trial judge should have tested the motion solely by and from the 4 corners of the plaintiff's amended declaration, and that he should not have essayed as he did a purely colloquial trial of the sole issue so far made thereby.

In the present posture of the case we abstain from determination of the question whether plaintiff may employ the cited statute. That question should be presented after due pleading, and then either upon trial or by motion for summary judgment. Plaintiff's declaration may indeed be subject to test for certainty and definiteness under GCR 1963, 115 (see former Court Rule [1945] No 17, §§ 7 and 9†), but that question has not as yet come before the trial court. Just so long as pleaders are told *not* to state matters of evidence (see former Court Rule [1945] No 17, § 2, and GCR 1963, 111.9), the motion to dis-

* This is the general Michigan rule. See *Jacob* v. *Cummings*, 213 Mich 373.

† As amended. See 335 Mich lxii.—REPORTER.

miss assigning no cause alleged should be discouraged in favor of pleading and trial or, at least, pleading and motion for summary judgment. In the latter instance the showing is required by the rule to be in full detail and always at risk of having the affiant or affiants called for searching cross-examination. And it is better for the sake of dependable precedent that the facts be established with clarity before an appellate court undertakes to decide whether the plaintiff in like instance of factual uncertainty is or is not on sound legal ground. To quote Cardozo again (from *Ruediger* v. *Klink*, 346 Mich 357 at 371):

"More and more, we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light."

In their understandable zeal to establish promptly the asserted rights of clients, lawyers are occasionally prone to forget that all worthy substantive law depends upon facts of evidentiary certainty, and that the quicksand of uncertain facts is the principal cause of bad precedent and the painful task of distinguishing cases which, sometimes, are not distinguishable. Here we do not know, nor does the trial judge know, what evidentiary facts plaintiff had or has available to support quoted paragraphs 27 and 29 of its declaration. Neither does either court know what responsive or other permissible pleadings may bring forth in the way of issues triable generally or upon motion. Until such are before the circuit court, plaintiff's declaration must be held sufficient as against defendant's said motion.

To conclude: It may not be amiss to repeat what was said in *Davis* v. *Kramer Bros. Freight Lines, Inc.*, 361 Mich 371, nor to say again that the rule-provided motion to dismiss for failure to state a cause of action cannot be tested by factual affidavit of support, or factual affidavit in opposition, or both. The attacked pleading furnishes the assayer's sole cupel. To quote *Davis* at 376, 377:

"Upon the motion to dismiss for failure to state a cause of action, all facts well-pleaded must be taken as true for the purposes of the motion. Here the declaration properly alleged the making of a contract, its breach, and damages flowing therefrom. If the facts were as plaintiffs alleged (and for the purposes of this motion we must assume that they are), plaintiffs clearly have a cause of action.

"A caveat: 'cause of action' is a tricky expression. It is not susceptible of a single, all-inclusive definition since its meaning depends upon the context in which it is used. In our context (for purpose of a motion to dismiss for failure to state a cause of action) it means merely the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant. The plaintiff's statement of a cause of action must not be confused with his right to judgment. Whether judgment will ever result will depend upon the proof plaintiff offers in support of the cause he asserts and upon what defenses can be established against the cause of action asserted."

Reversed and remanded for entry of order denying motion to dismiss. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

TODD *v.* SIMONIS.

1. APPEAL AND ERROR—DISAGREEMENT OF JURY—JUDGMENT FOR DEFENDANT—EVIDENCE.

   The Supreme Court views the evidence in the light most favorable to plaintiffs, where judgments were entered for defendants on their motion therefor following disagreement of the jury (CL 1948, § 691.701).

2. AUTOMOBILES—BICYCLES—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

   Recovery for injuries to minor bicyclist, inflicted in collision with defendants' car at a street intersection, would be barred as a matter of law if all reasonable men would agree that the minor was guilty of contributory negligence.

3. SAME—BICYCLES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

   Minor eastbound bicyclist *held,* not guilty of contributory negligence as a matter of law in colliding with defendants' northbound car at open street intersection, where evidence shows he had glanced southward before entering intersection and had not been able to see the car for 195 feet, it being within the jury's province to determine the car was not within the range of the bicyclist's vision and had traversed the distance from a point beyond his range of vision to the point of impact more quickly than would have been possible unless the car had been driven at an excessive speed, hence, judgment entered for defendants after disagreemnt of jury, on ground of contributory negligence of bicyclist was error (CL 1948, § 691.701).

Appeal from Macomb; Noe (Alton H.), J. Submitted April 4, 1963. (Calendar Nos. 27, 28, Docket Nos. 49,364, 49,365.) Decided June 3, 1963.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 885–887.

[2, 3] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 549–551.

Reciprocal duties of driver of automobile and bicyclist or motorcyclist. 172 ALR 736.

Case by Donald Todd, a minor, by Mildred Todd, next friend, against Phyllis Marie Simonis and Clarence Simonis for personal injuries sustained in collision of automobile and motor bike. Derivative suit by Harold Todd for medical expense. Cases consolidated for trial and on appeal. Following disagreement of jury, directed verdict rendered and judgments entered for defendants. Plaintiffs appeal. Reversed and remanded.

Robert W. Moss, for plaintiffs.

William J. Eggenberger, for defendants.

SOURIS, J. A jury was unable to agree upon verdicts in these consolidated negligence cases.[1] Thereupon, defendants moved for judgments, pursuant to our recently repealed (PA 1961, No 236) jury disagreement statute (CL 1948, § 691.701 [Stat Ann § 27.1471]), and judgments for defendants were entered by the trial judge supported by a written opinion in which he found plaintiff Donald Todd contributorily negligent as a matter of law. On appeal from such judgments we do not consider whether they conform with or do violence to the clear or overwhelming weight of the evidence, as we would upon review of decision upon a motion for new trial; instead, our task is the same one we face upon review of decisions on motions for directed verdict or for judgment *non obstante veredicto* (*McCullough* v. *Ward Trucking Company,* 368 Mich 108, 113). In the context of the case at bar, we

[1] There are 2 cases. The first is brought to recover for injuries to Donald Todd, a 14-year-old minor, resulting from a collision at an open residential intersection between Donald Todd riding eastward on a motor bike and defendant Phyllis Simonis driving northward in an automobile owned by her husband, the other defendant. The second case is brought to recover expenses incurred and to be incurred for medical repair of Donald Todd's injuries.

must determine, upon view of the evidence in the light most favorable to plaintiffs, whether all reasonable men would agree that plaintiff Donald Todd was guilty of contributory negligence. Only if all reasonable men would so agree, would the trial judge be entitled to rule as a matter of law that Donald Todd was guilty of contributory negligence and, thereby, barred from recovery against defendants.

The standard by which such motions are judged, at trial and appellate judicial levels, has been reaffirmed frequently in recent years. See *McCullough* v. *Ward Trucking Company, supra,* 110–113; *Barnebee* v. *Spence Brothers,* 367 Mich 46; *Normand* v. *Thomas Theatre Corporation,* 349 Mich 50; *Davis* v. *New York Central R. Company,* 348 Mich 262; and *Kaminski* v. *Grand Trunk Western R. Company,* 347 Mich 417. Each of the cited cases rests firmly upon the sound foundation of *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99.

In the case at bar, application of this standard compels our reversal of defendants' judgments and remand for new trial. The trial judge's conclusion that Donald Todd was contributorily negligent rests upon fact findings that Donald "glanced" only once[2] in the direction from which defendants' car was approaching, that he failed "to see what was there to be seen" and that "any second observation * * * would certainly have disclosed the presence of the defendant." This last finding of fact, in turn, rests upon the judge's discount of testimony by 1 disinterested witness from which it could be inferred that Mrs. Simonis was exceeding the 25 miles per hour speed limit and upon his disregard of other

[2] On favorable view, Donald Todd testified that while traveling 5 miles per hour he looked southward when he was "just about opposite" a street sign about 20 feet west of the western edge of the north-south intersecting road and from that point could and did see 195 feet southward, beyond which point parked cars obstructed his view.

evidence of her own statement made at the scene to a police officer that she was traveling approximately 30 miles per hour. A jury would have been entitled to believe such evidence and to conclude therefrom (1) that the Simonis car was not in fact within Donald Todd's range of vision when he made timely observation southward,[3] and (2) that it covered the distance from a point beyond Donald Todd's range of vision to the point of impact more quickly than he was entitled reasonably to expect any lawfully driven vehicle from such point because the Simonis car was traveling at excessive speed. Thus viewing this testimonial record, and mindful that at least some members of the jury could not agree that it proved contributory negligence as a matter of fact, we cannot conclude, as did the trial judge, that Donald Todd was guilty of contributory negligence as a matter of law. This record recalls Justice COOLEY's often quoted lesson found in *Detroit & Milwaukee R. Co.* v. *Van Steinburg, supra,* 120–123, recently quoted by us in *Davis* v. *New York Central Railroad Company, supra,* 268–270, reference to which is recommended whenever like motions are presented for trial court decision.

Reversed and remanded. Costs to appellants.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

[3] Such possible conclusion, properly within the province of a jury to make on the testimonial record we review, distinguishes this case of Todd from our holdings in *Kowalski* v. *Malone,* 326 Mich 254; *Brenner* v. *Dykstra,* 289 Mich 301; and *Nelson* v. *Linderman,* 288 Mich 186, relied upon by defendants. In those 3 cases, the Court (professing to take the favorable view) concluded that the facts as claimed in plaintiffs' own testimony were manifestly incredible and compelled finding plaintiffs contributorily negligent.

SHARON *v.* SPALDING SCHOOL DISTRICT.

1. SCHOOLS AND SCHOOL DISTRICTS—CONTRACT WITH SUPERINTENDENT.
School board's contract with superintendent whereby latter was employed for 5-year term at an increase of $200 per year over previous 3-year contract which yet had 1 year to run *held,* to have been executed by the board within the limits of reasonableness and good faith.

2. SAME—CONTRACT WITH SUPERINTENDENT—ADDENDUM—MEETING OF BOARD.
Proposed addendum to contract with superintendent, had no effect in law, where the addendum was not executed by the school board at a meeting thereof (CL 1948, § 355.1).

3. SAME—CONTRACT WITH SUPERINTENDENT—BREACH BY BOARD.
Contract with plaintiff superintendent for 5-year term, duly executed by school board at a meeting, which had been executed a year before end of term of previous contract, and which abrogated same, *held,* a complete contract that fully covered the entire subject matter between the parties, hence, school board was liable for its breach by not permitting him to serve after lapse of 1 year under the 5-year contract (CL 1948, § 355.1).

Appeal from Menominee; Wright (Robert R.), J., presiding. Submitted October 2, 1962. (Calendar No. 10, Docket No. 48,688.) Decided June 3, 1963.

Assumpsit by William J. Sharon against Spalding Township School District No. 1 for salary under breached employment contract. Judgment for plaintiff. Defendant appeals. Affirmed.

Strom & Hoehn, for plaintiff.

Doyle & Doyle and *McGinn & Fitzharris,* for defendant.

SMITH, J. As former superintendent of schools for the defendant district, plaintiff brought this

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 47 Am Jur, Schools §§ 48–55.

action for breach of a 5-year employment contract.* Plaintiff began his duties as superintendent in 1946. In 1951 he entered into a 3-year contract which was to terminate July 1, 1954. At a meeting May 1, 1953, especially called to pass upon "the hiring of teachers for the ensuing year", the school board voted to re-engage plaintiff for a 5-year term, although he still had 1 year to run on his old contract. A regular meeting of the school board was held on June 4, 1953. At this meeting the new 5-year contract was executed by a majority of the members of the school board on the one hand, and plaintiff on the other. The new 5-year contract was virtually the same as the old 3-year contract except in 2 particulars: first, it was to commence July 1, 1953, and continue to July 1, 1958; second, it provided for an increase in the annual salary of the superintendent from $5,400 a year to $5,600 a year. A separate exhibit showed that an attempt was made to amend the new 5-year contract by adding a clause providing that in the event of breach of the agreement by the school district the superintendent would be entitled to full compensation to July 1, 1958, termination date of the contract. Although the addendum purportedly was signed June 4, 1953, it was admitted by all who took part that it was signed, in fact, at some later date, and not on June 4th. The evidence shows that this addendum was never presented at a school board meeting.

On July 13, 1953, a school board election was held and 2 of the board members who voted for and signed the new 5-year contract were defeated. At the August 6, 1953, meeting of the school board, by majority vote, the board resolved that it would

* The statute has since been amended to limit the term of a superintendent in such case to not more than 3 years. PA 1955, No 269, § 66, as amended by PA 1958, No 110 (CL 1948, § 340.66 [Stat Ann 1959 Rev § 15.3066]).

follow the old 3-year contract and ignore the new 5-year contract as being "null and void."

Having elected to follow the old 1951–1954 contract, the board resolved at its April 27, 1954, meeting to terminate the services of plaintiff on July 1, 1954. Although plaintiff duly tendered his services after the July 1st date, he was not permitted to serve. For 2 years thereafter he was unable to obtain employment, but thereafter secured a position as superintendent in another school distict. This action was brought to recover the loss of salary sustained during the 2 years of unemployment. The case was tried to the court without a jury and the trial judge found in favor of plaintiff.

Appellant school district contends that there was no new 5-year contract because plaintiff never accepted the precise offer of defendant, as shown, it says, by the proposed addendum which was signed some time after the execution of what has been referred to as the "new 5-year contract." Appellant also claims that the trial court erred in finding that the alleged contract was made within the limits of reasonableness and in good faith; also that the court erred in finding that the powers of the board in engaging the superintendent under the new contract were exercised with "reasonable necessity."

Appellant also claims that the trial court erred because it did not recognize and apply the law as stated in *Davis* v. *Public Schools of Escanaba,* 175 Mich 105. Admittedly that case arose out of a similar fact situation. It was an action by a deposed school superintendent for breach of contract. Having served only briefly in a new 1-year contract, the superintendent entered into a new 3-year contract with the board. Shortly afterwards 2 retiring members of the board were replaced by new members. The newly constituted board terminated the services of the superintendent. A directed verdict for de-

fendant board was reversed by this Court. We held that whether the school board was acting in good faith and whether tenure and salary were reasonable were questions for the jury. Mr. Justice OSTRANDER, writing for a unanimous Court, said (p 118):

"I am of opinion that the limits, and only limits, to the exercise of the power of the board to employ a superintendent of schools are those fixed by reasonableness and good faith."

In the instant case the trial judge found explicitly that term and salary were reasonable and that the board members acted in good faith. The contention that the trial judge did not apply the principles in the *Davis Case* is not well founded.

We are not able to agree with the contention of the school district that the proposed addendum to the new 5-year contract had effect in law. The record discloses that although the new contract was voted upon in the May 1, 1953, meeting, and executed by all parties in the June 4, 1953, meeting, the proposed addendum, which was undeniably executed at a later date, was never adopted according to the requirements of the statute.

The applicable statute at that time was CL 1948, § 355.1 (Stat Ann 1953 Rev § 15.437):

"All business which the district board or board of education is authorized to perform shall be done at a meeting of said board and no act shall be valid unless voted at a meeting of the board by an affirmative vote of a majority thereof and a proper record made of such vote."

It is also clear that the new 5-year contract was an abrogation of the old 3-year contract. It was a complete contract and fully covered the entire subject matter between the parties. *Kintz* v. *Galvin,* 219 Mich 48, 52.

The judgment of the trial court is affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

PATZER *v.* BOWERMAN-HALIFAX FUNERAL HOME.

1. AUTOMOBILES—CONSTRUCTION OF STATUTES—ASSURED CLEAR DISTANCE AHEAD.

   The statutory rule of motoring conduct that a driver must so drive as to be able to stop within the assured clear distance ahead has its antecedents in the common law, but is now a rule that must be reasonably construed (CLS 1956, § 257.627, as amended by PA 1957, No 190).

2. STATUTES—ORDINANCES—CONSTRUCTION—EMERGENCY.

   Statutes and ordinances apparently expressing a universally obligatory rule of conduct may properly be construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment.

3. AUTOMOBILES—DUE CARE—STATUTES—ASSURED CLEAR DISTANCE AHEAD.

   Requisite vigilance required of a motorist on blizzard-swept highway demands that he continue on, fast enough to minimize danger of collision from the rear and slow enough to minimize the danger of collision with what may loom ahead, the variable and jury-determinable rule of due care making it impossible always to obey the letter of the statutory assured-clear-distance-ahead rule (CLS 1956, § 257.627, as amended by PA 1957, No 190).

REFERENCES FOR POINTS IN HEADNOTES

[1] 7, 8 Am Jur 2d, Automobiles and Highway Traffic §§ 188, 720, 721.
[2] 50 Am Jur, Statutes § 217 *et seq.*
[5] 38 Am Jur, Negligence § 29.
[6] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 905, 932.
[7] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 1012–1017.

4. APPEAL AND ERROR—VERDICT FOR DEFENDANT—EVIDENCE—REAR-END COLLISION.

Defendants' evidence that plaintiffs' car was stopped on the blizzard-swept highway must be accepted as true in action arising from rear-end collision by defendants' ambulance, where verdict was returned for defendants though their evidence was in conflict with plaintiffs' on that issue (CLS 1956, § 257.627, as amended by PA 1957, No 190).

5. NEGLIGENCE—ORDINARY CARE.

Ordinary care is not what one does, considered of itself and apart from all other considerations, but what he does as related to the circumstances under which he acts, and it is in consideration of these circumstances that the test is to be applied.

6. AUTOMOBILES—REAR-END COLLISION—REBUTTABLE PRESUMPTION OF NEGLIGENCE.

The driver of an overtaking car which collides with the rear end of a preceding car is presumed to be guilty of negligence but such statutory presumption is rebuttable (CLS 1956, § 257.402).

7. SAME — AMBULANCE — REAR-END COLLISION — VISIBILITY — NEGLIGENCE — QUESTION FOR JURY — INSTRUCTION — EVIDENCE.

Whether or not defendant's ambulance driver was guilty of negligence in colliding with rear end of plaintiffs' car on blizzard-swept, lakeshore highway in March *held*, properly left as a question for jury under instruction given and evidence presented showing the ambulance was being driven at speed of 20 to 25 miles an hour in response to an emergency call but with visibility ahead extremely limited (CLS 1956, § 257.402; § 257.627, as amended by PA 1957, No 190).

Appeal from Alger; Baldwin (George S.), J. Submitted April 3, 1963. (Calendar Nos. 17, 18, Docket Nos. 49,244, 49,245.) Decided June 3, 1963.

Case by Shirley Patzer against Bowerman-Halifax Funeral Home and Milton Bowerman for personal injuries sustained in rear-end collision of motor vehicles on snow-blown highway March 21, 1959. Derivative suit by Perry Patzer and General Accident Fire & Life Assurance Corporation, Ltd., a foreign corporation, for medical expense and property damage. Cases consolidated for trial and on

appeal. Verdict and judgments for defendants. Plaintiffs appeal. Affirmed.

Albert Lopatin and *Harry T. Ward, Jr.*, for plaintiffs.

Arthur A. Neiman, for defendants.

BLACK, J. These consolidated suits for negligence bring to consideration anew the assured-clear-distance rule of motoring conduct. The rule is a creature of statute (PA 1927, No 318, title 3, § 5; CLS 1956, § 257.627, as amended by PA 1957, No 190 [Stat Ann 1957 Cum Supp § 9.2327]). The antecedents thereof lie with the common law (see cases cited in *Lett* v. *Summerfield & Hecht,* 239 Mich 699 at 702). Its application to variant evidentiary circumstances, once visibly to the rigid,[1] has by force of inexorably developing traffic conditions been modified in recent years to one of "reasonable construction." Witness *Nass* v. *Mossner,* 363 Mich 128, and *Dismukes* v. *Michigan Express, Inc.,* 368 Mich 197, 204, the latter quoting Mr. Justice TALBOT SMITH as follows:

"The statute (assured clear distance) must be reasonably construed. A literal reading thereof would compel us to say that in every case of collision the statute has been violated by the mere fact of collision alone. The driver has either been going too fast, or, if driving at a reasonable speed, has permitted his attention to wander and thus has not perceived the obstruction in time to stop. Such literal interpretation would make the driver an insurer against any collision in which he might become involved. We cannot assume that the legislature intended such a result. The situations under

[1] "But we do not think the rule should be weakened by engrafting exceptions on it or modifying it. Its observance bespeaks the safety of human life and limb and of property. Had it been observed on the night in question, this unfortunate accident would not have happened." *Lett* v. *Summerfield & Hecht, supra,* at 703.

which collisions occur are infinite in complexity and variety, and, to accomplish justice in particular cases, we have been forced to create a number of exceptions to the statutory edict." (From *Sun Oil Co.* v. *Seamon,* 349 Mich 387, 411, 412.)

This last is in accord with Restatement's comment "c" under title A, "Function of Legislature", 2 Restatement, Torts, § 286, p 752:

"Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment." 2 Restatement, Torts, p 754.

The *Nass* and *Dismukes Cases,* to which *Rytkonen* v. *City of Wakefield,* 364 Mich 86, and *Tacie* v. *White Motor Co.*, 368 Mich 521, should be added, definitely bring the assured-clear-distance rule to qualification by the test of due or ordinary care, exercised in the light of the "attending conditions." See *Nass* at 132, *Dismukes* at 205, and *Tacie* at 529. Such "attending conditions" play an important part in application of the rule to these cases of Patzer.

Plaintiffs moved at close of proofs for peremptory instruction that the defendant driver had been shown guilty of causal negligence. They relied and now rely upon the statutory presumption of negligence arising from a rear-end collision (CLS 1956, § 257.402 [Stat Ann 1960 Rev § 9.2102]) and upon the assured-clear-distance rule above. The motion was denied and the cases were submitted to the jury. From a verdict and judgment for defendants, plaintiffs appeal.

The case portrays what few except residents of Michigan's northern peninsula know from experience; that winter transforms what is said to be America's most scenic and naturally attractive waterfront drive—M-28 skirting Lake Superior between Munising and Marquette—into a place of constant danger for the motorist who does not know that, when Hiawatha's "big sea water" manufactures its own blizzard, the safest way to get through the exposed stretches of the way is to wait for and then "follow the plow" with its high-borne rotating yellow flasher light.

The facts are both extreme and unusual. That our current view thereof must be with due favor to the defendants is of no great importance since there is but little dispute with respect to the weather conditions and causative events. One only of the important facts stands in serious testimonial dispute; whether the Patzer car was stopped, or was proceeding ahead, as defendants' ambulance approached from the rear. That issue must, for present purposes, be resolved as the defendant driver and his assistant testified; that the Patzer car was stopped at the time on the banked and narrowed roadway.

The "attending conditions" were such—this again is said on favorable view and is not to be taken as standard jury instruction—as to require motoring due care fitted to such conditions rather than to ordinary motoring conditions as contemplated by the assured-clear-distance statute. The plaintiff driver and the defendant driver, one after the other, entered into the first of several tempest-swept, snow-banked, and substantially visionless passageways of M-28 that afternoon in March of 1959. One probably did not know that, when Superior blows by her winter wont directly across the highway where it skirts Murray Bay and Au Train Bay, the weatherwise local motorist usually stays in or heads for

less exposed ways. Once he enters such exposed ways, constant risk is his passenger until he emerges at some safe place to stop or turn inland. To stop for want of driving vision or other reason is to invite a collision from the rear. To get out of one's car, the passageway being narrow and the area being a lonely one in winter, is to court personal injury or worse. Requisite vigilance demands that the motorist continue on, fast enough to minimize the danger of collision from the rear and slow enough to minimize the danger of collision with what may loom ahead. In the tone of Restatement, it isn't possible at all times to obey the letter of the enactment requiring an assured clear distance ahead, and still obey the variable and jury-determinable requirement of due care.

The investigating and locally experienced State police officer described these weather conditions, relating them to the afternoon of the collision, as "very hazardous." The trial judge, in his opinion denying motion for new trial, tells about the "notorious reputation" of M-28 where it skirts Lake Superior in Alger county.[2] The assigned county snowplow driver, making steady effort to keep the way between Munising and Christmas (a post office on M-28 some 5 miles west northwest of Munising) clear to pavement width, made "twelve passes or plows through this area" between noon of the accident day and occurrence of the accident at 3:30 p.m. This work left a 6-foot high bank of snow over which the wind from the lake blew more and more swirling snow into the narrowed way. Such is the factual setting of

[2] Quoting Judge Baldwin:
"This stretch of road has a notorious reputation as a bad portion of the highway when there is snow and there is a north or northwest wind blowing, because the wind blows off the lake picking up snow and blowing it across the road, hiding the road and making visibility at a minimum. On the day in question, this stretch of road was bad."

these appeals by plaintiffs, the bearers of the burden of proof,[3] for ruling that the trial judge should have instructed liability of defendants as a matter of law.

Plaintiffs Perry Patzer and Shirley Patzer, husband and wife, left their Detroit home March 21, 1959, at 5 o'clock in the morning, bound for Marquette. They reached Munising about 3 in the afternoon. Proceeding westward from Munising on M-28, they reached the first of the exposed portions to which reference has been made. According to Mr. and Mrs. Patzer, their car was immediately slowed down and the lights thereof were turned on. As the car proceeded on, as they claim, or after it had been stopped as defendants claim, it was struck violently from the rear by defendants' westbound ambulance, of which more later. Mr. and Mrs. Patzer had driven, in Judge Baldwin's words, about "1/2 mile into the swirl of snow."

Not long after plaintiffs left Munising the defendant ambulance driver received a call, from the State police post at Munising, to effect that "there was a bad accident at Au Train, a fellow was lying in the snow and bleeding, and to get out there as fast as I can." Au Train is some 6 miles west of Christmas on M-28. The driver and his assistant left Munising immediately in response to the call, having first turned on the rotating red flasher signal and the regular lights of the ambulance, and thereafter having engaged the siren of the ambulance at its continuous highest pitch. When the defendant driver approached the exposed portion of the roadway he slowed his speed to "about 20 or 25 miles per hour." Proceeding thus, and with visibility ahead almost nil, he and his assistant did not see plaintiffs' car ahead until sight and the ensuing collision were almost instantaneous.

[3] See Professor Sunderland's paper, "Directing a Verdict for the Party Having the Burden of Proof", 11 Mich L Rev 198.

The foregoing review foretells conclusion that the question of negligence as charged against defendants was properly for jury consideration and determination. That the driver of the ambulance did not have an assured clear distance ahead when he approached and struck the Patzer car must be taken for granted. That his conduct amounted to actionable negligence, the weather having altered and affected—this is on favorable view of course—customary safety measures, cannot be judge-declared on review of plaintiff's said motion. We hold instead that the circumstances were such that the triers of fact had a right to find, but perforce were not obliged to find, that the ambulance driver proceeded through the swirl according to the ever circumstantially variable standard of due care. The question is controlled as it usually is by the circumstances of whatever action or inaction the accuser would have branded as negligence.

"It is not what one does, considered of itself and apart from all other considerations, which is to be judged in determining whether there has been an exercise of ordinary care. It is to what he does as related to the circumstances under which he acts that the test is to be applied." *Brebner* v. *Sidney Hill Health System, Inc.,* 269 Mich 541, 544; rule followed in *Flynn* v. *Kramer,* 271 Mich 500, 505; *Warwick* v. *Blackney,* 272 Mich 231, 237; *Davis* v *New York Central R. Co.,* 348 Mich 262, 268; *Normand* v. *Thomas Theatre Corp.,* 349 Mich 50, 57, 58.

As for the mentioned statutory presumption of negligence, it is sufficient to say that the trial judge read the statute to the members of the jury and instructed that they should determine whether the presumption had been overcome. His instruction was:

"On the face of it, the defendant is guilty of negligence in striking the Patzer car. If you find, however, he was driving at a moderate speed and keeping a proper lookout, and because of the conditions over which he had no control and which were not foreseeable, such as a sudden blowing of the wind that hid from view the car ahead of him which suddenly slowed down, a thing that could not have been reasonably expected, then there is a situation in which you should apply common sense and judgment in determining whether or not, under all of the circumstances, the presumption of negligence should stand or whether or not it has been rebutted. That is the issue in this case."

In the absence of request for more specific instruction (see extended discussion in *Garrigan* v. *LaSalle Coca-Cola Co.*, 362 Mich 262), we find no reason for disagreement with the method employed for jury determination of whether the presumption and its prima facie effect had been overcome by testimony. That the question was one for jury determination seems clear. See authorities considered in *Garrigan,* including the *Gillett, Cebulak,* and *Krisher Cases,*[4] cited in *Garrigan* at page 264. That the jury found that the presumption had been overcome, and that it—the presumption—did actually "disappear" in the juryroom, seems equally clear.

In view of what has been said, there is no occasion for considering whether the defendant ambulance driver, while on the testified emergency mission with visual and audible warning devices in operation, was exempt to any legal extent from obeying the assured-clear-distance rule. See generally recent annotation, "Liability for personal injury or

[4] *Gillett* v. *Michigan United Traction Co.*, 205 Mich 410; *Cebulak* v. *Lewis*, 320 Mich 710 (5 ALR2d 186); *Krisher* v. *Duff*, 331 Mich 699.—REPORTER.

property damage from operation of ambulance," 84 ALR2d 121.

Judgment affirmed. Costs to defendants.

CARR, C. J., and DETHMERS, KELLY, SOURIS, SMITH, and O'HARA, JJ., concurred with BLACK, J.

KAVANAGH, J., concurred in result.

BORINSTEIN *v.* RAYCON LAND COMPANY.

MORTGAGES—USURY—CORPORATIONS—WAIVER OF DEFICIENCY.

Mortgage, executed by defendant corporation, which provided for interest at the rate of 2% per month *held*, not subject to defense of usury in foreclosure proceedings, where trial judge found as a matter of fact that defendant was not organized by its incorporators as a dummy corporation at the request of the lenders but for the incorporators' own purposes, the plaintiff having waived any right to hold defendant indorsers, the incorporators, for possible deficiency (CL 1948, § 450.78, as amended by PA 1957, No 116).

Appeal from Washtenaw; Breakey, Jr. (James R.), J. Submitted May 8, 1963. (Calendar No. 51, Docket No. 49,745.) Decided June 3, 1963.

Bill by Al S. Borinstein against Raycon Land Co., a Michigan corporation, Fred Gattegno, and others, to foreclose a mortgage. Decree for plaintiff. Defendant Gattegno appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTE

37 Am Jur, Mortgages §§ 576–590.
55 Am Jur, Usury § 162.

Schon & Wise (*Jack Schon,* of counsel), for plaintiff.

Morton H. Collins, for defendant Gattegno.

BLACK, J. Defendant-appellant Fred Gattegno, originally 1 of the freeholders of mortgaged real estate situated in Washtenaw county's Ypsilanti township, appeals from a decree of foreclosure entered after contested hearing of his pleaded allegation that the amount claimed due by the plaintiff mortgagee is tainted by and reducible on account of usury.

The mortgage was executed April 23, 1959, by Raycon Land Company, a Michigan corporation, immediate grantee of all then holders of record title including appellant, as mortgagor, to Harry Z. Brown and plaintiff Al S. Borinstein, as mortgagees. The secured sum was $220,000. The mortgage and mortgage note called for payment of the secured sum "on or before April 23, 1960," with "interest at the rate of 2% per month." Substantial payments upon the mortgage and mortgage note were made. Mr. Brown in the meantime assigned his interest therein to plaintiff Borinstein. The hearing chancellor decreed that the amount due on foreclosure was $67,861.71. Appellant says, on strength of his allegation of usury, that the amount should be reduced to $13,330.09. Such is the substance of the briefed issue on appeal.

The pointed question is whether Raycon Land Company was organized as a dummy corporate mortgagor in order that a usurious loan be made* in fact to the negotiating individuals, that is, titleholders Fred Gattegno, Jack Gattegno, and Raymond G. Conway. If so, and as claimed by appel-

* See CL 1948, § 450.78, as amended by PA 1957, No 116 (Stat Ann 1961 Cum Supp § 21.78).—REPORTER.

lant, the testimonial record would plainly call for application of the rules and Biblical principles found in *Wilcox* v. *Moore,* 354 Mich 499. But the hearing chancellor, reviewing carefully the testimonial record, found the other way on strength of proof we agree was quite decisive. After having observed:

"The question is whether the loan was to the 3 individuals, Fred Gattegno, Jack Gattegno, and Raymond G. Conway or to the corporation. The answer is that the loan was not intended either by the lenders or the borrower to be to the 3 individuals. The matter is a question of fact";

and after having quoted at length from the apparently forthright testimony of Mr. Conway (one of the negotiators of the loan and one of the above identified titleholders); Judge Breakey ruled:

"This is not the case of a hard pressed individual or group being forced by a borrower to set up a dummy corporation for the 1 loan as in *Wilcox* v. *Moore,* 354 Mich 499, cited and relied upon by defendant, Fred Gattegno. Here was a group of men who for some years to *avoid personal liability* and *for tax purposes* had some 30 corporations used indiscriminately in shuffling funds both in borrowing and spending who set up another corporation, Raycon Land Company, for their own purposes, and used it along with their *other* corporations for their *own purposes,* as they had done in previous borrowing transactions with plaintiff and Brown. These defendants were rather adroit operators in their field,—at least for a while. It was not to protect such as defendants that the usury statute was intended to be applied. These defendants for years had the benefits of the protection and the use of the framework of their corporations. The corporate purpose throughout was for their own protection and purpose, and it is only Fred Gattegno and their attorney, Marvin Reider, who seriously claim the

loan was a personal loan. Jack Gattegno has not spoken and is defaulted; Conway says it was not a personal loan.

"The court finds the corporation was the borrower, that the Gattegnos and Conway, at the time the loan was made were not personally to receive the proceeds and did not receive the proceeds except as they were interested as stockholders in numerous corporations which were recipients of the proceeds of the loan." (Emphasis is that of Judge Breakey.)

The final determinant of the case is, perforce, found in the right answer to the stated question of fact. That question was resolved below against appellant. For wearisomely repeated reasons found in our reports, there appears no cogent ground for disagreement with such resolution. The loan was actually made to the mortgagor corporation, and that corporation was preponderantly shown as having been the direct and actual disburser of nearly all of the proceeds to another land developing corporation, Macway Home Builders; a corporation the 2 Gattegnos and Mr. Conway had formed and controlled.

The only personal connection of the Gattegnos and Conway with the loan was that they indorsed the mortgage note. That however makes no pertinent difference. See the majority opinion of *Pardee* v. *Fetter,* 345 Mich 548, in array with the fact that plaintiff has expressly waived—below and here—any right he may have possessed to hold the indorsers liable for possible deficiency.

Decree affirmed. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PETERS v. BROOKS.

1. ACCOUNTING—BILL OF SALE—ACCORD AND SATISFACTION—LIENS.
Finding of trial court in suit for accounting as to proceeds of sale of chattels hitherto used in automobile sales agency in which the parties had at one time been partners before plaintiffs sold their interest to defendant, that bill of sale had been given to defendant to enable him to liquidate the business rather than as an accord and satisfaction to resolve his claim that he had been defrauded by sale of the business to him at a grossly inflated price *held,* supported by record presented and justified court's imposition of lien on proceeds of auction sale.

2. FRAUD—SETTING ASIDE OPTION TO PURCHASE LAND.
Trial court's order setting aside option to purchase land which had been given to defendant on his representation that he had a purchaser who would pay the agreed price and no more, a material representation that was relied upon by plaintiffs, *held,* proper, where such representation was false.

Appeal from Manistee; Stephens (Rupert B.), J. Submitted March 5, 1963. (Calendar No. 61, Docket No. 49,711.) Decided June 3, 1963.

Bill by Laban W. Peters and Elsie Peters against Del Brooks for accounting and to set aside option to purchase real estate. Decree for plaintiffs. Defendant appeals. Affirmed.

John W. Claire, for plaintiffs.

Shivel, Phelps, Linsey & Strain (*Leland D. Phelps,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur 2d, Accounts and Accounting § 1 *et seq.*
[2] 24 Am Jur, Fraud and Deceit § 189 *et seq.*

SOURIS, J. In 1953 plaintiffs sold their 1/2 interest in an automobile agency to defendant with whom they had been partners in Manistee and soon thereafter they retired to Florida. For the purchase price they took defendant's promissory notes secured by a chattel mortgage on the business equipment, fixtures and inventory. They also leased the land on which the business was operated to defendant. Defendant made regular payments to plaintiffs in Florida for several years, the payments being allocated first to rent and then to interest and principal due on the promissory notes. From 1958, no payments on principal and only sporadic payments on interest were made. In 1961 plaintiffs gave defendant a bill of sale of the mortgaged chattels and also an option to purchase the realty on which the business was conducted. Pursuant to plan, about which plaintiffs had been informed, defendant sold the chattels at auction but, contrary to plaintiffs' alleged expectations, he refused to pay them the proceeds of sale to apply upon the balance due on his obligations to them.

Thereupon, plaintiffs instituted suit in chancery for an accounting of the sale proceeds, rescission of the option and other relief. Plaintiffs claimed that the bill of sale had been given as an accommodation to defendant in order to permit him more easily to liquidate the business, their understanding being that the sale proceeds would be applied to reduce his obligation to them. They also claimed that the option on the land was given defendant on his misrepresentation that he had a purchaser for their land willing to pay them $17,500 whereas in truth defendant intended to purchase the property for his own account and for subsequent resale at a higher price. It was defendant's claim in defense that plaintiffs had defrauded him in selling him their interest in the business at a grossly inflated price; that after

defendant finally confronted plaintiffs with his complaints regarding the purchase price he claimed was fraudulently excessive, an accord and satisfaction was reached by the parties as evidenced by the bill of sale; and that the land option ran to him personally, not as agent for plaintiffs or anyone else and that, in any event, he was ready and willing to pay plaintiffs the full $17,500 for which they had agreed to sell the land.

The chancellor made a full testimonial record in this case and filed a comprehensive opinion setting forth his findings and conclusions. He ruled there was no basis for defendant's assertions that he had been defrauded by plaintiffs and that the bill of sale evidenced an accord and satisfaction of his obligations to plaintiffs. He ruled, on the contrary, that defendant induced plaintiffs to give him the bill of sale with the agreement that the proceeds of the sale made possible thereby would be paid them on the balance due on his obligations to them. Apparently, the sale proceeds were still intact, for the chancellor imposed a lien upon the proceeds to be applied to defendant's indebtedness. With reference to the option, the chancellor noted that plaintiffs were elderly people unable to return to Manistee from Florida to look after their own affairs and that, because of their friendly relationship with defendant, they relied upon his misrepresentations of business conditions and land values in Manistee in agreeing to sell their property. He also concluded that letters from plaintiffs to defendant and other evidence supported their claim that defendant procured the option by purporting to act as their agent in selling their property for them to "the gas company" for $17,500. The chancellor set aside the option.

We have reviewed this record with care and are not persuaded the chancellor erred. The parties

treated this appeal as involving only questions of fact, and we agree. The proofs do not preponderate in favor of defendant's claim that the bill of sale was given to resolve a dispute between the parties regarding the original purchase price for plaintiffs' interest in the dealership and we find quite plausible the chancellor's conclusion that the bill of sale was given to accommodate defendant's sale of the business chattels. The chancellor's imposition of a lien on the sale proceeds to effectuate the agreement he found between the parties was well within the scope of powers available in equity to sustain a just claim. *Hess* v. *Haas,* 230 Mich 646, 652, cited in *Foster* v. *Ypsilanti Savings Bank,* 299 Mich 258, 268. Likewise, we find no basis for reversing the chancellor's order setting aside the option. The proofs disclose that defendant falsely represented to plaintiffs that a third-party purchaser was willing to pay $17,500 for their property, but no more; that the representation was material, particularly in view of defendant's having conditioned plaintiffs' belief that business was bad in Manistee and that land values were declining; and that plaintiffs relied to their detriment upon defendant's material misrepresentations induced by their friendship with defendant and because of plaintiffs' advancing years and their relative immobility. See cases collected in *Irwin* v. *Carlton,* 369 Mich 92.

Affirmed. Costs to plaintiffs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

BANTA *v.* SERBAN.

1. DISMISSAL AND NONSUIT—NONAPPEARANCE OF PLAINTIFF OR COUNSEL WHEN CASE CALLED FOR TRIAL.
   A trial court has power to dismiss an action upon the unexcused absence of plaintiff and his counsel when the case is called for trial.

2. SAME—NOTICE OF TRIAL—CONTINUANCE—NONAPPEARANCE.
   It was not error for trial court to dismiss action when case was called, where plaintiff's counsel had ample notice of the impending trial, had failed to move for a continuance, and neither plaintiff nor his counsel were present when case was called.

3. APPEAL AND ERROR—APPENDIX—RECORD.
   Undated affidavit in appellant's appendix could not be considered on appeal, where it was not a part of the original record on appeal from the trial court.

4. DISMISSAL AND NONSUIT—REINSTATEMENT—DISCRETION OF COURT—RECORD.
   The trial judge did not abuse his discretion in refusing to set aside order of dismissal that had been entered when neither plaintiff nor his counsel were present as case had been called for trial and record on motion for reinstatement offered no proof to excuse or explain such absences.

Appeal from Genesee; Parker (Donn D.), J. Submitted April 2, 1963. (Calendar No. 7, Docket No. 49,257.) Decided June 3, 1963.

Case by Harry Banta against Steve Serban for personal injuries. Action dismissed upon failure of plaintiff to appear at trial date. From denial of motion to reinstate case, plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4] 17 Am Jur, Dismissal, Discontinuance, and Nonsuit § 1 *et seq.*

John T. Vojdik (*Richard C. Fruit,* of counsel), for plaintiff.

Ransom & Fazenbaker (*Robert B. Norgren,* of counsel), for defendant.

SOURIS, J. Plaintiff's declaration alleged a cause of action for negligent injury. Following a pretrial conference, the case was placed on the term docket for trial and, in due course, it was called for trial in March of 1961. Neither plaintiff nor his counsel being in court when the case was called for trial, the trial judge dismissed it. Plaintiff's subsequent motion for reinstatement, supported by his counsel's affidavit, was denied after hearing.

We have recognized the inherent power of a court to control the movement of cases on its docket by a variety of sanctions including dismissal, discontinuance, or involuntary nonsuit even when requests for continuances are timely made and, lacking persuasive merit, are denied. *Stevens* v. *N. Z. Graves Corp.,* 210 Mich 585; *Goldstein* v. *Goldstein,* 259 Mich 300; *Reed* v. *Burton Abstract & Title Company,* 344 Mich 375; and *Andrews* v. *Roberts,* 366 Mich 620. It necessarily follows that a trial court has power to dismiss an action upon the unexcused absence of plaintiff and his counsel when the case is called for trial.

At the subsequent hearing on plaintiff's motion for reinstatement, the trial judge commented that when it was discovered that plaintiff and his counsel were not present when the case was called for trial, he called counsel's office and was advised by a secretary that she was uncertain where counsel was, but believed he was then in Lansing.[1] Under the circum-

[1] Plaintiff's appendix contains an undated "affidavit" suggesting that the information obtained from the secretary was misunderstood and that plaintiff's counsel was in fact at the secretary of State's

stances disclosed by this record, plaintiff's counsel having had ample notice of the impending trial and having failed to move for continuance, the trial court did not err in dismissing the action.

Nor do we believe the record made on plaintiff's motion for reinstatement would justify our reversal of the trial judge's refusal to set aside the dismissal and reinstate the cause. The motion, prepared as an affidavit by counsel, refers to prior failures to comply with the pretrial order (including plaintiff's failure to answer affirmative defenses pleaded by defendant), settlement efforts between counsel, and difficulties encountered in communication between nonresident plaintiff and his counsel. However, nothing contained in the affidavit explains plaintiff's or counsel's absence from court on the trial date, for which absences the case was dismissed, nor was there an offer of proof at the hearing on the motion for reinstatement to excuse or explain their absences.

Very few cases have been presented to this Court for review of dismissals for failure of plaintiffs to respond to trial calls, and perhaps the infrequency of such appeals would justify our conclusion that such dismissals rarely occur. That they should rarely occur is obvious, but it is equally obvious to us that trial judges must be empowered to invoke such drastic sanction if judicial control of trial dockets is to be retained.[2] When continuances are timely sought, normally they should be granted, but only upon showing of meritorious cause. When parties fail to appear for trial, after due notice to counsel, as was in fact given in this case, trial judges should

office in Flint. The affidavit is not part of the original record from the trial court and, thus, could not be considered on appeal even if its contents disclosed sufficient justification for the failure of plaintiff and his counsel to appear for trial.

[2] The problem and its solution are not unique to State courts. See *Esteva* v. *House of Seagram, Inc.* (CCA 7), 314 F2d 827.

order dismissal, enter default judgment or grant other appropriate relief subject,[3] of course, to subsequent vacation in the event such absence is proved unavoidable or otherwise excusable and justice so requires. There being a complete failure of such showing in the case at bar, we cannot say the trial judge abused his discretion by failing to set aside his order of dismissal.

Affirmed. Costs to defendant.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

[3] For express authorization by court rule, since January 1, 1963, see GCR 1963, 504.2 and 520.1.

TIFFANY *v.* TIFFANY.

1. DIVORCE—DE NOVO REVIEW—SUPREME COURT.

The Supreme Court does not reverse the determination of the trial court on *de novo* review of a divorce case unless convinced that a different conclusion would have been reached had the Supreme Court been in the position of the trial court.

2. SAME—EXTREME CRUELTY—EVIDENCE.

Extreme cruelty, such as to endanger the mental or physical health of either spouse, *held*, not to have been shown in wife's suit for divorce, contested by the husband, although they have had some heated arguments over family financial affairs, hence dismissal of bill was proper (CL 1948, § 552.7).

Appeal from Wayne; Fitzgerald (Neal), J. Submitted November 8, 1962. (Calendar No. 58, Docket No. 49,900.) Decided June 3, 1963.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 868.
[2] 17 Am Jur, Divorce and Separation, § 437

Bill by Elsie M. Tiffany against Amasa E. Tiffany for divorce on grounds of extreme and repeated cruelty. Bill dismissed. Plaintiff appeals. Affirmed.

Piggins, Balmer, Grigsby, Skillman & Erickson, for plaintiff.

Frank N. MacLean and *Philip A. Gillis,* for defendant.

SMITH, J. The parties to this divorce action were married in 1942. They have a son who was born in 1951. The testimony tends to show that the parties have engaged in heated argument, usually over the husband's management of family financial affairs. The wife has complained bitterly about a number of defendant's decisions. These complaints have triggered violent arguments between the parties. Despite the disagreements about money, the acquisition of property during the marriage has been comparatively substantial. On at least 2 occasions defendant was provoked into slapping plaintiff. On a third occasion, plaintiff apparently hid their joint income tax return and refused to give it up, although requested. This led to an argument, and when plaintiff retreated to a bedroom where the tax return apparently was hidden, she was pursued by defendant. She attempted to bar the door and, in forcing the door open, defendant injured plaintiff's knee, he says accidentally. Defendant husband does not want a divorce and therefore contests plaintiff's bill. The trial judge dismissed the bill of complaint. We affirm.

On review *de novo,* we do not reverse unless convinced that we must have reached a different conclusion had we occupied the position of the trial

court. *Keenan* v. *Keenan,* 361 Mich 123; *Chubb* v. *Chubb,* 297 Mich 501. This Court said in *Williams* v. *Williams,* 351 Mich 210:

"What we have here is bickering, shortness of temper, and vexatious conduct. Aggravation there has been, but not cruelty. The bonds of matrimony are not to be thus lightly cast aside. There is at stake, for our society as a whole, too much of the public welfare, too much of the public morals, in the preservation of family ties, to permit the spouses to come and go as tempers wax and wane. * * * Cruelty we have, indeed, made a ground for divorce since the year 1844 (PA 1844, No 60, § 2, p 74), but the cruelty we demand is more than display of temper, more than exasperating habits of conduct or expression. We must get into the realm of the evil and the wicked, of brutality, of malignancy, of indignities endangering mental or physical health. None of this do we here find."

We do not find in this case that extreme cruelty has been shown within the meaning of the statute. CL 1948, § 552.7 (Stat Ann 1957 Rev § 25.87), and prior decisions of this Court.

Affirmed, no costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

O'HARA, J., took no part in the decision of this case.

SILLER *v.* LAITILA.

1. AUTOMOBILES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Decision of circuit judge in nonjury case arising out of collision between southbound car driven by plaintiff's decedent and defendant's northbound car on Christmas eve that defendant's negligence was the proximate cause of the decedent's injuries and death and that latter had not been guilty of contributory negligence, based upon evidence adduced and not upon presumption of due care on part of decedent *held*, not contrary to the preponderance of the evidence in record containing evidence that debris was all in southbound lane, that defendant's car had crossed the double yellow line and struck decedent's car at an angle, that defendant had partaken of intoxicating liquor in the afternoon, and that for some reason he was inattentive to possible traffic hazards.

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

The Supreme Court does not reverse the determination of the trial court in a nonjury action of tort, where the evidence is conflicting unless the testimony clearly preponderates against the judgment rendered.

Appeal from Houghton; Brennan (Leo J.), J. Submitted April 16, 1963. (Calendar No. 36, Docket No. 49,438.) Decided June 3, 1963.

Case by Angela S. Siller, executrix of the estate of Michael C. Siller, deceased, against Carl Laitila for damages arising from the death of her husband

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REFERENCES FOR POINTS IN HEADNOTES

[1] 7, 8, Am Jur 2d, Automobiles and Highway Traffic §§ 369–379, 891 *et seq.*

[2] 5 Am Jur 2d, Appeal and Error §§ 839–845.

in an automobile collision. Judgment for plaintiff. Defendant appeals. Affirmed.

Richard J. O'Brien and *Joseph M. Donnelly,* for plaintiff.

Charles M. Humphrey, Jr., and *Lawrence F. Weis,* for defendant.

CARR, C. J. This case has resulted from an automobile accident occurring on M-26 in Houghton county at approximately 7:30 in the evening of December 24, 1957. At the time plaintiff's decedent was driving a 1953 Chrysler automobile in a southerly direction on said highway between the city of Houghton and the village of South Range. Defendant Laitila was operating a 1956 Ford car in a northerly direction on M-26. At a point approximately 1 mile north of said village the 2 cars met on a curve in a collision that resulted in the death of Michael Siller. Following the accident defendant's automobile was facing in a westerly direction across the center line of the highway, which was marked by dual yellow lines. The Siller car was on the west side of the road, and plaintiff's decedent was lying on the right side thereof with his feet on the running board. The injuries received by him resulted in his death.

Plaintiff brought suit for damages, claiming that the collision between the automobiles resulted from negligence on the part of defendant in that he drove his car across the center line of the road and upon the left hand side thereof, thereby causing the collision. Plaintiff further asserted in her declaration that defendant failed to make proper observations as to the approaching Siller car and to drive his automobile in a reasonably careful and prudent

manner. Defendant by answer denied all allegations of negligence on his part, and by way of affirmative defense asserted that the accident occurred as a result of negligence on the part of plaintiff's decedent.

The case was tried before the circuit judge without a jury. After listening to the proofs of the parties the judge filed an opinion holding that defendant was guilty of negligence as charged against him, and that such negligence was the sole proximate cause of the accident and of the death of plaintiff's decedent. Judgment in the sum of $10,000 in plaintiff's favor was entered in accordance with the findings of the court. Defendant's motion for a new trial was denied and he has appealed, asserting that the trial court was in error in finding him guilty of negligence constituting a proximate cause of the accident, and in further finding that plaintiff's decedent was not guilty of contributory negligence. It is further claimed by appellant that the trial judge applied the presumption of due care on the part of deceased in determining the issues in the case, and that the weight of the evidence preponderated against the factual findings.

The testimony offered by the witnesses on the trial was somewhat conflicting. On behalf of plaintiff it was shown that the debris resulting from the collision was on the west side of the center line of the road, in approximately the middle of the lane for southbound traffic. Testimony was also offered with reference to the damage done to the automobiles as a result of the collision, the testimony, as it is claimed, tending to support the plaintiff's theory that defendant's Ford had crossed the center line and struck the Siller car at an angle. There was also proof that prior to the point of impact at least the Siller car was operated on its own side of the highway.

Testifying in his own behalf defendant Laitila insisted that he was driving at the time of the occurrence in question in his proper lane of traffic. In some respects, however, his testimony lacked clarity, and indicated either a lack of proper observations immediately preceding the collision, or perhaps a failure to remember exactly what occurred. In the course of his examination he was asked the following questions, and gave the answers indicated:

"*Q.* Do you recall putting on your brakes at all after you came up to that curve and before the collision?

"*A.* Well, like I say, when I first came around the corner and noticed the other automobile coming about half a block away, that's when I applied my brakes, and then, like I say, I wasn't paying too much attention to the other car and when I realized there was going to be an accident, or the possibility of one, it was too late. * * *

"*Q.* Do you recall, Mr. Laitila, what part of your car and what part of the Siller car collided?

"*A.* No, I don't. * * *

"*Q.* At the time of the impact do you remember whether or not the Siller headlights were coming at you or went behind you?

"*A.* I don't recall."

Testimony was introduced to show that during the afternoon, and shortly preceding the accident, defendant had partaken of intoxicating liquor. He denied that he was intoxicated at the time the accident occurred, and there is no direct proof that he was in that condition. However, his admitted failure to pay reasonable attention to an automobile approaching him on a curve suggests that for some reason he was inattentive to possible traffic hazards. It is of some significance that no claim was made by him that his insistence that he was on his proper side of the road was based on an actual observation

of the dual yellow lines marking the center of M-26. He further indicated that a portion of the road on which he was driving was covered with ice or snow, or both, and that he could not determine where the edge of the blacktop pavement was located.

After discussing the testimony in the case the trial judge concluded that:

"The defendant has failed to meet the burden of proof by a preponderance of evidence establishing any act whatsoever of contributory negligence by Michael Siller, decedent. * * *

"It is the opinion of the court under the facts and circumstances shown and described in the testimony that the plaintiff has met the burden of proof by a preponderance of evidence showing that defendant was negligent, and that his negligence was the proximate cause of Michael Siller's injuries and death."

It thus appears that the decision of the circuit judge was based on his conclusions drawn from the proofs introduced before him. He had an opportunity to see and hear each witness and to evaluate the testimony thereof. While, as counsel for defendant mentions, he made reference to the presumption of due care on decedent's part, it does not appear that in the decision of the case such presumption was weighed against positive proofs. In cases of this character in which the judge is the trier of the facts this Court does not reverse unless the testimony clearly preponderates against the judgment rendered. *Karpp* v. *Royer,* 362 Mich 64; *Lynes* v. *J. R. Heineman and Sons, Inc.,* 363 Mich 276. Such principle is applicable in the present case.

The judgment from which the appeal has been taken is affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PEOPLE *v.* REEDER.

CRIMINAL LAW—DRIVING AUTOMOBILE UNDER INFLUENCE OF LIQUOR—REFUSAL TO SUBMIT TO BLOOD TEST—EVIDENCE.

Prejudicial error was committed in the trial of defendant on charge of driving a car while under the influence of intoxicating liquor, where the assistant prosecuting attorney asked the police officer if defendant had been advised as to his rights as to the taking of a blood test, and was advised such advice was given, where no blood test was administered and statute provides that the refusal of any person to submit to any such test shall not be admissible in any such criminal prosecution, notwithstanding defendant's later explanation that he declined such test unless a physician of his own choosing administered the test, a right accorded him by statute, the statutory direction that refusal not be admitted being absolute and was not waived (PA 1949, No 300, § 625a, as added by PA 1960, No 148).

Appeal from Oakland; Ziem (Frederick C.), J. Submitted April 7, 1963. (Calendar No. 37, Docket No. 49,818.) Decided June 3, 1963.

Vernell H. Reeder was convicted of driving an automobile while under the influence of intoxicating liquor. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George F. Taylor,* Prosecuting Attorney, and *Robert L. Templin,* Assistant Prosecuting Attorney, for the people.

Allen C. Ingle, for defendant.

REFERENCES FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic §§ 115, 330–334.

CARR, C. J. Appellant was tried in the circuit court of Oakland county on a charge of operating an automobile while under the influence of intoxicating liquor in violation of section 625[1] of the Michigan motor vehicle code.[2] The jury returned a verdict of guilty as charged and an order was entered requiring the payment of a fine of $75 and costs of $50, with probation for 1 year. Motion for a new trial was denied. On leave granted defendant has appealed to this Court claiming that prejudicial error was committed in the course of the circuit court proceeding.

The question at issue involves the interpretation of section 625a of the motor vehicle code which was added to the statute by PA 1960, No 148 (CL 1948, § 257.625a, Stat Ann 1961 Cum Supp § 9.2325[1]). Said section provided that in criminal prosecutions involving the driving of a motor vehicle on a public highway while under the influence of intoxicating liquor a defendant who gives his written consent to a blood test for the purpose of determining alcoholic content should be given such test in accordance with the procedure specified. Subdivisions (3) and (4) thereof read as follows:

"(3) A person charged with driving a vehicle while under the influence of intoxicating liquor shall be permitted to have a licensed physician or registered nurse, under the supervision of a physician of his own choosing, administer a chemical test as provided in this section within a reasonable time after his detention, and the results of such test shall be admissible if offered by the defendant and shall be considered with other competent evidence in determining the innocence or guilt of the defendant. Any

[1] CLS 1956, § 257.625, as amended by PA 1958, No 113 (Stat Ann 1960 Rev § 9.2325).

[2] PA 1949, No 300, as amended (CLS 1956, § 257.1 *et seq.*, as amended [Stat Ann 1960 Rev and Stat Ann 1961 Cum Supp § 9.1801 *et seq.*]).

person charged with driving a vehicle while under the influence of intoxicating liquor shall have the right to demand that the test provided for in this section must be given him, provided facilities are reasonably available to administer such test, and the results of such test shall be admissible if offered by the defendant and shall be considered with other competent evidence in determining the innocence or guilt of the defendant. The defendant shall be advised of his right to the test provided for in this subsection.

"(4) The refusal on the part of any person to submit to any such test shall not be admissible in any criminal prosecution relating to driving a vehicle while under the influence of intoxicating liquor."

The statute requires that a defendant charged with driving an automobile on a public highway while intoxicated shall be informed of his rights with reference to the taking of the blood test. During the trial in the instant case the assistant prosecuting attorney, in the course of his examination of a witness, asked the following question, and received the answer quoted:

"*Q.* Did you at any time advise him of his rights as to taking a blood test, Sergeant?

"*A.* Yes, right after he was in the police car."

Following such question and answer, counsel for defendant interposed an objection on the ground that the testimony was not admissible. Thereupon the jury was excused from the courtroom and the objection raised was discussed by the trial judge and counsel. At the conclusion of the colloquy the judge announced that there should be no further mention of the blood test during the trial unless the defense desired to put in proof before the jury as to the occurrence. The jury was then recalled.

Counsel for defendant elected to pursue the matter further and interrogated the witness on cross-

examination as to what had transpired. Defendant, likewise, testified as to his version of the occurrence and as to his reasons for not submitting to a blood test, claiming in substance that he wanted a physician of his own choosing to administer such test. The testimony indicates that the police officers declined to call a physician for the purpose suggested by defendant, claiming, however, that defendant was in substance informed that he had the right to make a telephone call if he wished to do so. Defendant was also informed that a physician was available to give the test. Apparently there was no further action with reference to the matter, and the test was not administered.

In substance, it is claimed on behalf of appellant that the reference to the matter of a blood test might have led the members of the jury to believe, no evidence of such a test being offered, that appellant had refused to take it. It is suggested, in other words, that the reference to the test under the circumstances was tantamount to informing the jury that the taking of the test had been refused by defendant, and, hence, that the requirement of the statute that evidence of such refusal should not be admissible was violated. It is quite possible that such may have been the result. It was not incumbent on the prosecution to make an affirmative showing that the statutory requirement with reference to informing a defendant in a case of this character of his right to have a blood test taken had been observed. The statute does not require such proof, and its introduction where no evidence of a test is submitted to the jury hearing the case may well be prejudicial error. We think that such was the situation in the instant case.

The attempt on the part of counsel for defendant to explain to the jury the reason for defendant not having taken the test may not be said to constitute

a waiver of the error that had been committed. Appellant was entitled to the benefit of the provision of the statute, enacted for his protection, to the effect that refusal to take the test should not be admissible against him. The direction of the statute in such respect is absolute.

Further discussion of the question at issue is not required. We conclude that prejudicial error occurred and the conviction of which appellant complains must be set aside. The case is remanded to the circuit court for such further proceedings as may be found expedient.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

THEATRE CONTROL CORPORATION *v.* CITY OF DETROIT.

1. APPEAL AND ERROR—QUESTIONS DETERMINABLE—DISCRIMINATION—DUE PROCESS.

   Determination by Supreme Court on former hearing of suit to enjoin collection of demand charge for supply of water to users of air-conditioning equipment of the nonrecirculating type that such charge was unreasonable and arbitrary rendered it unnecessary to determine whether the additional charge was discriminatory by reason of the failure to impose the additional charge upon other seasonal users of water, since the charge made deprived plaintiffs of property without due process of law.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 43 Am Jur, Public Utilities and Service § 81 *et seq.*
[5] 14 Am Jur, Costs § 5 *et seq.*

2. MUNICIPAL CORPORATIONS—AIR-CONDITIONING EQUIPMENT—DEMAND—WATER RATES—DISCONTINUANCE OF SERVICE—VOLUNTARINESS OF PAYMENT.

Payments of demand charges for supply of water to users of air-conditioning equipment of the nonrecirculating type were not voluntary, where discontinuance of service was a method available to the defendant city, as supplier of the water, in the event of nonpayment of rates charged and was exercised as a matter of policy.

3. SAME—PAYMENT UNDER PROTEST—DISCONTINUANCE OF SERVICE.

Payment under protest is not a condition precedent to recovery, where payment of demand charges to users of city water for air-conditioning equipment of the nonrecirculating type had not been made voluntarily as the service might have been discontinued in the absence of compliance with the demand.

4. SAME—PAYMENT UNDER PROTEST—TAX STATUTES.

The statutory provision requiring payment of taxes and special assessments, under protest in writing, signed by the taxpayer and specifying the grounds of the protest is not applicable to demand charges for supplying water to users of air-conditioning equipment of the nonrecirculating type, since such charges are neither taxes nor assessments but a charge for furnishing of a utility service, hence, where plaintiff payers of such charges had commenced proceedings to enjoin collection of such charges and had unequivocally indicated their position, they were entitled to recover such charges (CL 1948, § 211.53).

5. COSTS—PUBLIC QUESTIONS—DEMAND CHARGES FOR WATER USERS IN CERTAIN AIR-CONDITIONING EQUIPMENT.

No costs are allowed on appeal in suit to recover demand charges made to users of water for air-conditioning equipment of the nonrecirculating type, in view of the nature of the questions involved.

Appeal from Wayne; Bowles (George E.), J. Submitted May 8, 1963. (Calendar No. 46, Docket Nos. 48,840, 50,178.) Decided June 3, 1963.

Bill by Theatre Control Corporation, a Michigan corporation, Saul Korman, doing business as Apollo Theatre, Westown Theatre Corporation, and Hillier Kilbride Company, Michigan corporations, in

their own behalf and in behalf of all other members of a class similarly situated, against the City of Detroit, a municipal corporation, the Board of Water Commissioners of the City of Detroit, its individual members, and the general manager of the Detroit department of water supply, to declare void additional charges imposed for use of air-conditioning equipment units which do not recirculate water, to enjoin assessment of such charges and to secure accounting for and repayment of such charges already collected. ACF-Wrigley Stores, Inc., a Delaware corporation, Davidson Brothers, Inc., a Michigan corporation, and Local 575, International Brotherhood of Bridge, Structural and Steel Workers of America, AFL-CIO, intervened as parties plaintiff. Decision, 365 Mich 432, rendered holding charges void. On remand, order entered directing defendants to pay to the clerk of the court for subsequent disposition such charges collected. Defendants appeal. Affirmed.

William Henry Gallagher, David Newman, and *Reymont Paul,* for plaintiffs.

Honigman, Miller, Schwartz & Cohn (*John Sklar,* of counsel), for intervening plaintiffs Allied Supermarkets, Inc. (formerly ACF-Wrigley Stores, Inc.), and Davidson Bros., Inc.

Donald J. Prebenda, for intervening plaintiff Local 575, International Brotherhood of Bridge, Structural and Steel Workers of America, AFL-CIO.

Robert Reese, Corporation Counsel, and *Vance G. Ingalls,* Assistant Corporation Counsel, for defendants.

CARR, C. J. This litigation has resulted from the action of the board of water commissioners of defendant city, taken on May 7, 1956, seeking to impose an annual "demand charge" for users of water furnished by the city system to parties operating air-conditioning equipment which did not recirculate the water. Such payment was in addition to the charge for water actually used and was based on equipment capacity. The added amount for the year 1957 was fixed at $1.50 per ton of capacity, increasing to $7.50 per ton in 1961. It was applicable upon all such equipment used for "human or animal comfort." It was further provided that bills for the annual payment should be rendered on or about May 1st of each year.

Plaintiffs, being within the class subjected to the added annual charge, brought suit, by bill of complaint filed April 4, 1957, to enjoin the collection of the assessment of such charges and to secure an accounting for, and repayment of, amounts collected. It will be noted that the suit was commenced in advance of the date on which the first payments were due under the action of the board of water commissioners here involved. Issue was duly joined by defendants, and following a hearing in circuit court a decree was entered denying the relief sought and dismissing the bill of complaint. On appeal this Court (*Theatre Control Corporation* v. *City of Detroit,* 365 Mich 432) reversed the decree and remanded the case for further proceedings in accordance with the opinion rendered. A petition by defendants for a rehearing was denied.* Following the remand plaintiffs sought in circuit court an order for the return of the additional charges that they had paid in connection with the operation of their

* Certiorari was denied by the supreme court of the United States, 371 US 887 (83 S Ct 184, 9 L ed 2d 121).—REPORTER.

air-conditioning equipment pursuant to the action of the board of water commissioners. Such order was entered, requiring the repayment of the demand charges in question, and defendants have appealed therefrom claiming that the trial judge was in error in his decision.

On behalf of appellants it is insisted that plaintiffs were not entitled to the relief granted because of failure to establish by competent proof that the added charges for the use of water rendered the rate excessive as compared with the cost of the service. It is the theory of appellants that the rule applied in the case of rates held to be discriminatory as against users of the service should be here followed. Obviously the claim involves the assumption that the decision of this Court, above cited, was based on a finding of such character. However, a reading of the opinion indicates that such was not the situation. The following language in the opinion (p 438) indicates concisely the theory on which the decision was based:

"Plaintiffs argue forcefully that exemption of water-wasting refrigeration equipment used for commercial or industrial processing, and failure to impose the additional annual demand charge upon other seasonal users of water, renders the attempted classification discriminatory and, therefore, denies them equal protection of the laws. In our disposition of this case, however, we need not consider this issue, for it is our conclusion that the additional annual demand charge was unreasonable and arbitrary and, therefore, deprived plaintiffs of property without due process of law."

This Court concluded that, on the record before it, there was no proper basis for the added charges imposed on plaintiffs and that, in consequence, the municipal action involved was "unreasonable and arbitrary" and operated to deprive plaintiffs of their

property "without due process of law." It is significant in this regard that the case was remanded for further proceedings.

Defendants further contend that recovery should be denied plaintiffs on the ground that the charges in question were paid voluntarily. It is not disputed that failure to pay the charges demanded might have resulted in the discontinuance of the service. In other words, in order to protect themselves in their right to continue in the business in which they were engaged plaintiffs had no alternative other than to comply with the demands. The record before us indicates that discontinuance of service was a method available to the board of water commissioners in the event of nonpayment of rates charges and was exercised as a matter of policy. Under the circumstances it may not be said that such payments were voluntary. The situation is analogous in this respect to that presented in *City of Saginaw* v. *Consumers Power Co.*, 304 Mich 491. It was there held that excess rates charged for the furnishing of gas by a public utility were not voluntarily paid because of the fact that service might have been discontinued in the absence of compliance with the demand.

It was further held in the above case that payment under protest was not a condition precedent to a recovery. We think the same rule is applicable in the case at bar. Attention has been called to the provisions of CL 1948, § 211.53 (Stat Ann 1960 Rev § 7.97), with reference to the payment of taxes and special assessments, under protest in writing, signed by the taxpayer, specifying the grounds of the protest. In the instant case, however, we are not dealing with a tax, or a special assessment levied on the basis of benefits received, but with a charge made for the furnishing of a utility service. The statutory provision is not applicable. Furthermore, it appears from a stipulation appearing in the record

that some of the plaintiffs, at least, did make formal protest, and the claim generally is advanced that, inasmuch as the suit was started before the first payment of the "demand charge" was due, such fact operated to indicate unequivocally the position of the plaintiffs. However, the basic question here is whether the charges found by this Court to have been arbitrary and unreasonable were paid under compulsion amounting to duress. As above indicated, plaintiffs could from a practical standpoint pursue no course other than to pay the added charge and await a determination of their rights by final disposition of the case.

The decision of this Court in *Beachlawn Building Corporation* v. *City of St. Clair Shores,* 370 Mich 128, is in point here. It was there held, citing *City of Saginaw* v. *Consumers Power Co., supra,* and other prior decisions of this Court, that plaintiff was entitled to maintain an action to recover fees paid by it for building permits under an ordinance which this Court in *Merrelli* v. *City of St. Clair Shores,* 355 Mich 575, had held invalid. What was there said may well be applied to the situation in the case now before us.

Other contentions raised on behalf of appellants have been considered and found to be without substantial merit. The order from which the appeal has been taken is affirmed. In view of the nature of the questions involved, no costs are allowed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

KAMINSKI *v.* WAYNE COUNTY ROAD COMMISSIONERS.

EVIDENCE—PHOTOGRAPHS—REAL REPRESENTATION OF ACTUAL CONDITIONS—NIGHTTIME COLLISION WITH STREET SWEEPER.

Posed photographic reproduction of operation of defendant's mechanized street sweeper, taken over 2 years after nighttime collision had occurred in which minor plaintiff was injured, *held*, prejudicial and reversible error, where the composite effect of the photographic reconstruction operation with the same sweeper, the same operator, photographed in motion, the reference by defense counsel in his jury argument to the absence of dust in the pictures, the court's requirement that jury find presence of dust would have created an unreasonable hazard, when viewed from the impact of the stark blazing lights of the sweeper dominating the scene in the photographs, must have created a wrong impression in the minds of the jurors that the photographs were a representation of what the motorist saw as he approached the point of impact, especially in the absence of precautionary or limiting instructions that the exhibits were not the usual reasonable representation of the actual conditions.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted March 6, 1963. (Calendar No. 73, Docket No. 49,794.) Decided June 3, 1963.

Case by Sophia Kaminski, next friend of Darlene Kaminski, against Board of Wayne County Road Commissioners for personal injuries sustained by minor in collision of automobile with street sweeper. Verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

REFERENCES FOR POINTS IN HEADNOTES

20 Am Jur, Evidence § 735.

Admissibility of posed photograph based on recollection of position of persons or movable objects. 19 ALR2d 877.

Davidson, Gotshall & Kelly (*John J. Beach,* of counsel), for plaintiff.

Cary, BeGole & Martin (*George H. Cary,* of counsel), for defendant.

O'HARA, J. Darlene Kaminski, a child 8 years old at the time of the happening of the events here involved, was grievously and permanently injured in a collision of 2 vehicles on Grand River avenue in the township of Wayne, Wayne county.

Darlene was a passenger in an automobile owned and operated by her father. It collided with a motor driven street sweeping machine owned and operated by the Wayne county road commission. The collision occurred at about 12:30 a.m. on April 15, 1959.

Grand River avenue at the place of collision runs northwest-southeast. It is a boulevard with the lanes of travel separated by a 75-foot strip of grass. There are 4 lanes for northwest traffic. In the record for purposes of clarity and convenience, they are designated lanes 1, 2, 3, and 4 from a northwesterly bound driver's left. The westernmost lane nearest the grass strip is then lane 1, the next easterly thereof lane 2, the next easterly lane 3, and the one closest to the east curb, sometimes used for parking, is lane number 4.

At the place in question, near Wakendon, an intersecting street, the speed limit is 45 miles per hour. Darlene's father was traveling 40 miles per hour, or thereabouts, in lane number 2. Darlene was in the front seat with him. She had requested that she be allowed to accompany him to his church league bowling league, a privilege her younger brother had been granted the week before. On a promise to do her home work after school and take a nap before the 9 p.m. starting time for her father's team, she

was allowed to go. It was on the return trip at the time previously specified the collision occurred.

Contemporaneously with Mr. Kaminski's use of Grand River avenue that night, the Wayne county road commission was performing its statutorily imposed duty of maintaining the highway also designated as US-16. Through its agent and employee, it was operating a large mechanized street sweeping machine; its overall width some 9 feet. Mr. Kaminski's automobile struck the street sweeper, occasioning thereby to Darlene, the injuries previously mentioned. Sophia, Darlene's mother was appointed her next friend and in that capacity brought action against the board of Wayne county road commissioners, which owned and operated the street sweeper.

In her declaration, the next friend alleged that the sweeper was negligently operated in particulars specified as subparagraphs (a) through (g) of paragraph 5. Subparagraphs (b) and (g) are purely conclusionary; subparagraph (a) charges a failure to equip with safety and warning devices; (c) alleges failure of observation of the "conditions of the road and of vehicles about the site of its operation"; (d) complains that the sweeper and its attendant created a "hazardous and unsafe road condition"; (e) asserts that defendant allowed improperly trained personnel to operate the sweeper; (f) is a restatement of (a) substituting "equipment" for "devices."

On these somewhat general allegations issue was joined by answer denying them categorically and by alleging that defendant equipped the device with adequate and proper warning devices and that the operator was in the exercise of due care.

The pretrial statement frames the issue as "largely factual" and particularizes the alleged negligence as the operation of the sweeper in a manner that

"obscured the vision of approaching vehicles (drivers?)."

A factual question was created by the following testimony which really contains the solidly joined issue of negligence.

A witness for plaintiff who passed the sweeper shortly before the accident testified as follows:

"All of a sudden through this haze-like affair, I noticed a glow of light, rather high, and I was no more than maybe, oh, 2 car lengths, roughly 2 car lengths, from this, and I immediately pulled to the right into the next lane to avoid this, this object. I didn't know what it was at that time. When I got beside it, I noticed that it was a sweeper, and when I got in front of it *then* I could see on the front there were lights, and I knew for sure *then* that it was a sweeper." (Emphasis supplied.)

There follows additional testimony which identifies the haze as dust, "just a mass of dust" and testimony that the subpoenaed witness, Miss Wolfe, had to swerve her car "very sharply" to avoid a collision.

Charles A. Quigley, another witness not only to the operation of the sweeper at the time and place involved but to the accident itself, thus testified:

"*Q.* Now will you tell the jury how much, if any, dust there was in the vicinity of this sweeping device at the time this happened, if you recall?

"*A.* I think the best way to answer that is that there was not enough dust to obscure my vision or view of this red beacon light. How much dust I don't know."

Clearly then with the background of the pretrial statement, the declaration, the testimony of the operator as to the watering device provided on the machine to allay dust, and Mr. Quigley's admission on cross-examination that he had previously de-

scribed in a deposition, road sweepers as "creating a hell of a lot of dust" the hard core issue was: Did the road sweeper in question create enough dust so that the lighting equipment carried, would not adequately warn other motorists of its presence and operation on the highway?

The jury apparently answered "no" for its verdict was no cause of action. Or at least if its answer was "yes" then it determined that such inadequacy, if any, was not a proximate cause of Darlene's injuries.

Here then rises the meritorious issue on appeal. In preparation for the defense of this action, defendants at night, in June of 1961 and in October of 1961 (the accident happening on April 15, 1959), took photographs, both colored and black and white, together with motion pictures at the scene. The same sweeper was placed at a point fixed by witnesses as some 200 feet and 50 feet back from the point of impact. The same operator was placed on the machine, and almost incredibly except in television trials, the same witness, Mr. Quigley, who witnessed the accident came by and stopped while the pictures were being taken. He testified on cross-examination:

"*A.* I had a curiosity as to what was going on; it looked so similar to the original scene.

"*Q.* In other words, it was taking place at Wakendon?

"*A.* Yes.

"*Q.* But there is no question in your mind that back in the early morning hours of April 15, 1959, there was considerable dust from this equipment?

"*A.* Yes.

"*Q.* When they *re-enacted* this thing on October 3, 1961, did you see any dust?

"*A.* Oh, no. * * *

"*Q.* When you saw this being *re-enacted* in June of 1961, this vehicle had a yellow oscillating light?

"*A.* Yes, sir.

"*Q.* Back in 1959, the beacon or the oscillating light that you saw was red, is that your recollection?

"*A.* Yes, sir." (Emphasis supplied.)

Two of the photographs of the scene, with the sweeper in place and the operator at the controls, then were offered as exhibits 16 and 17. Over 20 pages of preparatory testimony is devoted to identifying and explaining them. The photographer testified that exhibit 17 was taken at 200 feet with the sweeper stationary and exhibit 16 while it was in movement. When the qualifying direct examination and the disqualifying cross were completed, plaintiff's counsel addressed the Court:

"*Mr. Gotshall:* Your Honor, I am going to object to these photographs. In the first place, I don't know what they are intended to show. We have photographs of the *actual equipment that was involved.*" (Emphasis supplied.)

In his address to the jury, defense counsel said:

"So we have given you pictures, movies, the pictures of *the operation* of this machine at 200 feet * * * small pictures, and at 50 feet *in operation, and if dust was available it should* show in the operation there." (Emphasis supplied.)

The court in his charge to the jury pointed out:

"That any condition of dust resulting from *the operation of the sweeper involved in this accident must have created an unreasonable hazard or danger* (to sustain recovery)."

Since the whole thrust of plaintiff's case was the allegation of negligent creation of a dust hazard coupled with lighting inadequate to forewarn other users of the street of the presence, identity, and

operation of the machine, and since exhibits 16 and 17 had been referred to as a "re-enactment" as they were taken at night under conditions as they presumably existed the night of the accident, we consider in legal essence the "posed photograph rule," and the conditions of admissibility of such reconstructed photographs based upon the hypotheses of witnesses' memories for the simulation.

20 Am Jur, Evidence, § 735, p 613 observes:

"There is a decided conflict of authority as to whether or not photographs of an attempted reproduction of the scene of a crime or accident as recalled by witnesses, showing posed persons, dummies, and movable objects, are admissible to illustrate the contention of the party offering them as to the relative positions of such persons and movable objects so represented at the time and place of the crime or accident involved in the litigation under consideration. Many courts look with disfavor upon the admission of such photographs. Objection to the admission of posed photographs based on recollection as to the position of moving objects is, however, by no means universal. Such photographs have, in a number of cases, been held admissible where a proper foundation therefor has been laid by preliminary testimony showing that the objects and situations portrayed are faithfully represented as to position."

The subject is annotated extensively in 27 ALR 913–920, incident to the holding in *Nunnelley's Administrator* v. *Muth,* 195 Ky 352 (242 SW 622). 19 ALR2d 877 extends the annotation to include more recent cases. At page 879, the general holdings are thus explained:

"It has often been stated that although photographs are admissible to accurately show conditions existing at the time in question, the contrary is true when the photographs attempt to show more than

this, with persons in various assumed positions, and things in various assumed situations, in order to illustrate the hypothetical claims and contentions of the parties. It is evident that this 'hypothesis' exclusionary rule, insofar as it contrasts a hypothetical with an actual situation, is close akin to, if not a mere phase of, the 'accuracy' test."

See, also, case notes 14 NCCA NS 401 *et seq.*, supplementing 1 NCCA NS 633.

The only Michigan case contained in the ALR annotation is *Harrison* v. *Green,* 157 Mich 690, listed as supporting the admissibility. The later ALR annotation includes no Michigan authority. *Harrison* is not controlling of the issue here nor does it purport to be. It is authority for what was there decided, the position of plaintiff in relation to the machine at the time of the injury and the position of 2 witnesses to the accident. Further the court pointed out:

"Plaintiff on cross-examination was shown this photograph, and testified that it correctly represented the interior of the room and the situation of the machine. He then pointed out on the photograph where he stood and where the boys stood." *Harrison, supra,* 694.

The picture in no wise purported to represent how the machine operated, nor did it purport to portray a hypothetical theory of one party as distinguished from an actual situation—a static condition agreed upon as a fair representation by the parties.

Unfortunately here there is no response by defense counsel, or comment or specific ruling by the court on plaintiff's counsel's objection:

"In the first place, I don't know what they are intended to show."

Neither do we. However, in further objection, counsel continued:

"*So if this is offered for the purpose of showing the condition that existed on April 14 or 15, 1961* [1959?], *it is highly objectionable,* * * * and also in conjunction with Mr. Quigley's testimony, he testified that when he was there at the scene the conditions were entirely different between 1959 and 1961.

"*The Court:* I think those objections go to the weight. I will receive exhibits 16 and 17." (Italics supplied.)

However, the composite effect of the photographic reconstruction operation with same sweeper, the same operator, photographed in motion, the reference by defense counsel in his jury argument to the absence of dust in the pictures, the court's requirement that the jury find the presence of dust that "would have created an unreasonable hazard"—all these when viewed from the impact of the stark blazing lights of the sweeper dominating the scene in the photographs could not fail to have created in the minds of the jurors the impression that exhibits 16 and 17 were a representation of what the minor's driver-father saw as he approached the point of impact the night of the collision. This all the more so by reason of the absence of any precautionary or limiting instruction by the court that the exhibits were not the usual "reasonable representation" of the actual conditions. That the posed photographic reproduction was not agreed upon and not mutually accepted as fairly representative of what the minor's driver was confronted with, is amply established by the following testimony:

"*By Mr. Gotshall:*

"*Q.* When were these taken?

"*A.* June 27, 1961.

"*Q.* Did you make an examination of the scene before?

"*A.* We drove by there, yes.

"*Q.* Did you go down and check to see how much dirt was on the side of the road?

"*A.* No, I did not.

"*Q.* Did you yourself make any investigation of the dirt conditions that existed on April 14 and April 15, 1959?

"*A.* No, I did not. * * *

"*Q.* Did you make an investigation along Grand River avenue and U. S. Highway 16 as to what establishments were open on the particular night of April 14 and 15, 1961 [1959?], as to background light?

"*A.* No, I did not.

"*Q.* Do you know how many buildings have since been built in that general area since April 14 or 15, 1959, and the present date?

"*A.* No, I don't.

"*Q.* Do you know how many lights were along the borders of U. S. Highway 16, that would be on the right side if you are going northwest, with reference to neon signs or anything else?

"*A.* As to the difference from the time of the accident?

"*Q.* Yes.

"*A.* No, I do not. * * *

"*Q.* There were some of this film taken with flood lights?

"*A.* Yes, 30 feet. * * *

"*Q.* Did you conduct an investigation to find out what the wind direction was on the night of April 14th and early morning hours of April 15th and the wind direction on June 27, 1961?

"*A.* No, I did not. * * *

(Two photographs were marked defendant's exhibits Nos. 16 and 17.)"

That the able trial judge may have had some misgivings as to their admissibility is suggested in his comment in denying plaintiff's motion for a new trial:

"The Court wants to comment on 2 further things in denying the motion for a new trial. In this case

the jury was out approximately 20 minutes before it returned a verdict of no cause for action. These photographs were introduced at least 2 days prior to the time of the deliberation of the jury. At no time did the jury ask to see the photographs in their jury room. The court, I think, can properly assume from that that the jury did not deem these pictures controlling.

"Second, the court points out that even if there were error here in the admissibility and the act having been done, at no time was Mr. Kaminski put back on the stand to make any denial that these photographs were not similar to the conditions existing the night of the accident. The court feels first that there was a proper foundation laid for the introduction of the pictures; that the objection here does not go to the admissibility but rather to weight and, therefore, feels that it was not error to receive them; but rather states that even if it was error to receive them, the error was not prejudicial error in this case."

We cannot agree that the court could properly assume that the jury did not deem these pictures controlling. Nor do we feel that it was obligatory (though it might well have been desirable from plaintiff's standpoint) to recall Mr. Kaminski to deny the similarity of the re-enacted conditions to those existing on the night of the accident. This was elicited by the cross-examination heretofore set out.

Under any interpretation of the "accuracy rule" relating to the admissibility of photographs, posed or otherwise, the exhibits did not meet the admissibility test of reasonable representation. Their admission was error and we cannot say that such error was not prejudicial. To do so would be to speculate on the weight of evidence, reserved to the trier of the facts.

Regrettably perhaps, because the trial was long and expensive, we must reverse for the error specified.

The order denying the motion for a new trial is vacated and the case remanded with directions to enter an order granting a new trial. Costs to the plaintiff.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred.

LEO *v.* ATLAS INDUSTRIES, INC.

1. COURTS—JURISDICTION—REINSTATEMENT FROM NO-PROGRESS CALENDAR—DISMISSAL OF ACTION.

   The failure of the trial court to dismiss action upon the fourth application for reinstatement after case had been placed on the no-progress calendar, did not oust the court of jurisdiction to try the case, the pertinent statute provision that when the plaintiff fails to try a case within the time allowed upon reinstatement the court shall dismiss the action being directory and not self-executing (CL 1948, §§ 618.2, 618.3).

2. COSTS—CONSTRUCTION OF STATUTES.

   No costs are allowed plaintiff-appellee on affirmance of judgment on appeal of defendant after judgment had been taken against him following fourth reinstatement of case from no-progress calendar, where a matter of statutory construction is involved (CL 1948, §§ 618.2, 618.3).

Appeal from Macomb; Noe (Alton H.), J. Submitted October 3, 1962. (Calendar No. 18, Docket No. 49,083.) Decided June 3, 1963.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 5–7.
17 Am Jur, Dismissal, Discontinuance, and Nonsuit § 1 *et seq.*
[2] 14 Am Jur, Costs §§ 21–24, 91 *et seq.*

Action by August Leo, doing business as Leo's Construction Co., against Atlas Industries, Inc., a Michigan corporation, for sums owing for work and labor on construction of building. Cause stricken from no-progress calendar and reinstated on active call upon several occasions. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank E. Jeannette (*John J. Goetz,* of counsel), for plaintiff.

Kahn & Kahn (*Kenneth Kahn,* of counsel) and *Dickinson, Wright, McKean & Cudlip* (*Glenn D. Curtis,* of counsel), for defendant.

SMITH, J. This case was filed in 1950, and issue was joined that year. Through 1957 the case was removed from the no-progress calendar 4 times. After the fourth reinstatement, a pretrial conference was held November 5, 1958. On the judge's pretrial worksheet, the following notation was made: "Immediate trial—this month. Must be tried this year." On the circuit court work schedule sheet, a similar notation was made at the instance of the pretrial judge. The matter was not tried that year, 1958. In April, 1959, a deposition was taken and filed. For want of progress during the next 1-year period, the case was again placed on the no-progress calendar, and on application of plaintiff was again reinstated. The matter was tried to the court in August, 1960, and resulted in judgment for plaintiff.

The sole question presented on appeal by defendant is as follows: "Was jurisdiction of the court lost for failure to try this case after 8 years, within the additional time specified by the court?"

Defendant relies upon that portion of the judicature act having to do with the dismissal of cases

for no progress, CL 1948, §§ 618.2, 618.3 (Stat Ann §§ 27.982, 27.983):

"Sec. 2. All causes in which no action has been taken or progress made for more than 1 year unless by reason of the business of the court the same shall not have been reached, shall be placed upon said calendar separate and apart from all other causes, under the following heading: 'Causes in which no progress has been made for more than 1 year;' and on the first day of each term, any cause appearing under this heading shall be dismissed by the court for want of prosecution, but without prejudice, at the cost of the party by whom it was brought into court, unless cause be then and there shown to the contrary.

"Sec. 3. If further time for the trial of such issue be allowed by the court, and the plaintiff shall neglect to try the same within the time so allowed, the court shall dismiss the action as above provided."

Pointedly, we take note of the fact defendant claims not that the court was without jurisdiction over the persons and subject matter originally. Defendant's contention is that the trial court lost jurisdiction over the subject matter because the case was not tried during 1958, as noted on the worksheets aforementioned. Assuming, without deciding, that the judge's notes on said worksheets constituted an order setting date for trial, it does not follow that the directory provision of the statute is self-executing. We hold that the failure of the court to dismiss the case as provided in the statute did not oust the court of jurisdiction. This opinion is not to be construed in any way as sanctioning the inexcusable delay in disposing of the case, irrespective of where the fault lies. The divestiture of jurisdiction, however, is a serious matter and cannot be done except under clear mandate of law.

Affirmed. No costs allowed, a matter of statutory construction being involved.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, and SOURIS, JJ., concurred with SMITH, J.

BLACK, J. (*concurring*). I concur in affirmance.

It is true that the case should have been dismissed, under the statute (CL 1948, § 618.3 [Stat Ann § 27.983]), no later than expiration of another term after the "must be tried this year" notation was made by the circuit judge. But that omission did not then or thereafter annul the concededly existent jurisdiction over parties and subject matter. As Mr. Justice WIEST piquantly observed of another like statute (a directive by the legislature that the court do or decide within a certain specified time):

"The statute [CL 1915, § 12585 (CL 1948, § 618.13 [Stat Ann § 27.993])] expresses a commendable ideal and spends its whole force in the utterance thereof. It does not punish litigants for delay excusable or inexcusable by the judge and does not and could not provide departure of judicial power from the judge. It is a legislative intimation of a promptness most desirable, entitled to respect as such, but in no sense a mandate regulating rights and remedies." (*Stepanian* v. *Moskovitz,* 232 Mich 630, 639.)

Justice WIEST gave as his reason that "spurs can only be applied by a rider and the legislature does not occupy the judicial saddle." I concur, too, with that specially worthy epigram.

O'HARA, J., took no part in the decision of this case.

JUNE TERM, 1963.

WILSON *v.* SAGINAW CIRCUIT JUDGE.
CHAFFEE *v.* STENGER.

1. DISCOVERY—SCOPE OF EXAMINATION.

The subject matter of an order for discovery is limited to any matter not privileged but admissible under the rules of evidence governing trials, which is relevant to the subject matter of claim or defense involved in the pending action (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

2. SAME—STATEMENTS AND REPORTS OF WITNESSES OBTAINED BY INSURERS.

Statements and reports of witnesses and parties to action, procured by the defendants' insurance companies are properly the subject of an order for discovery, since, if they are called to testify at the trial, the contents of their prior extrajudicial statements and reports can be used for their possible impeachment by the opposite party (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

3. SAME—ADMISSIBILITY OF EVIDENCE.

The requirement of admissibility of evidence of which discovery is sought is satisfied if the matter sought to be discovered is admissible by any party and is not limited to matters admissible in evidence by the party seeking discovery (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 17 Am Jur, Discovery and Inspection § 1 *et seq.*
[2, 6, 7] 17 Am Jur, Discovery and Inspection § 28.
Statement of parties or witnesses as subject of pretrial or other disclosure, production, or inspection. 73 ALR2d 12.
Privilege of communications or reports between liability or indemnity insurer and insured. 22 ALR2d 659.
[5] 17 Am Jur, Discovery and Inspection § 70 *et seq.*
5 Am Jur 2d, Appeal and Error §§ 684–701.
[8] 17 Am Jur, Discovery and Inspection § 16.
Privilege of communications or reports between liability or indemnity insurer and insured. 22 ALR2d 659.

4. SAME—OBJECTIVE OF PRETRIAL DISCOVERY—ADMISSIBILITY OF EVIDENCE.

The ultimate objective of pretrial discovery is to make available to all parties in advance of trial all relevant facts which might be admitted in evidence at trial (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

5. SAME—BRIEFS.

Information outside the record relating to matter sought to be discovered may not properly be included in a party's brief (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

6. SAME—ATTORNEY-CLIENT RELATION—REPORT OF LOSS.

Defendant's statement to his insurer and proof of loss to his insurance carrier, sought to be discovered by plaintiff in action for injuries received in explosion and fire on defendant's premises, *held,* not barred from discovery by reason of alleged attorney-client relation in the absence of testimony as to when the report of loss was made, when and by whom defense counsel was retained, the relationship between defendant's counsel and his insurance company, including the degree of control each exercised over the activities of the other, or any other proofs pertinent to the claimed agency; and there being no showing that the work product of an attorney for a party needed protection (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

7. SAME—STATEMENTS AND REPORTS OF WITNESSES AND PARTIES OBTAINED BY INSURER.

Orders for discovery of statements and reports of witnesses and parties procured by the insured party's insurance carrier, not having been shown to have been obtained by defendant's attorney, *held,* to have been properly entered, where defendants have failed to show good cause for denying the requested discovery as it was their burden to do (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

Per CARR, C.J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and SMITH, JJ.

8. ATTORNEY AND CLIENT—PROFESSIONAL PRIVILEGE—DISCOVERY—ADMISSIBILITY IN EVIDENCE.

A liberal interpretation of the common-law right of professional privilege between attorney and client is followed in this State in that the privilege is not confined to communications made for the purpose of obtaining advice but extends to communications made to the attorney in the course of any professional

employment and relating to the subject of the employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other, hence, such communications may not be disclosed through the use of discovery procedure as they would be privileged (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

9. SAME—WORK PRODUCT—DISCOVERY.

The privileged work product of an attorney that is not subject to discovery procedures is that part of the preparatory file he has obtained personally, not vicariously, in the performance of his personal-to-client duty in the preparation of a case (Court Rule No 35, § 6[a], [b] [1945], as added and amended).

Per CARR, C.J., and BLACK, KAVANAGH, SOURIS, and SMITH, JJ.

Mandamus by Leo A. Wilson against Hon. Fred J. Borchard, Saginaw County Circuit Judge, to compel him to vacate order for discovery of statements made by principals and witnesses in 5 personal injury cases arising from automobile collision and instituted under the civil damage provision of the liquor control act. Submitted June 5, 1962. (Docket No. 49,559.) Writ denied June 6, 1963.

Appeal from Saginaw; Borchard (Fred J.), J. Submitted January 9, 1963. (Calendar No. 19, Docket No. 49,687.) Decided June 6, 1963.

Case by William Chaffee against William Stenger, doing business as Bill's Junction Garage, for personal injuries sustained in explosion and fire on defendant's premises. Plaintiff asked discovery of defendant's report of loss and of statements made by parties and witnesses. On order for such discovery, defendant appeals. Affirmed.

Roger J. Oeming, for plaintiff Wilson.

Peter F. Cicinelli and *Eugene D. Mossner* for defendant Saginaw Circuit Judge.

Amicus Curiae: Fred Roland Allaben, in mandamus action, asking clarification of rules pertaining to discovery.

van Benschoten & van Benschoten, for plaintiff Chaffee.

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

SOURIS, J. These cases[1] require our determination whether statements and reports of witnesses and parties procured by an insured party's insurance carrier were subject to discovery under the provisions of our former Court Rule No 35, § 6 (a) (1945).[2] Since January 1, 1963, discovery such as was sought and ordered in these cases has been subject to the provisions of our new court rules, specifically GCR 1963, 302.2, 306.2, and 310.

It is quite apparent that the controversies presented to us in these cases arose as a result of our recent decision in *Kalamazoo Yellow Cab Company* v. *Kalamazoo Circuit Judge,* 363 Mich 384, in which

[1] Wilson *v.* Saginaw Circuit Judge is an action in mandamus by a defendant in a negligence action against the trial judge to vacate a pretrial order of discovery. The record, as distinguished from the arguments of counsel, discloses that only 3 prospective trial witnesses' written statements given to Wilson's insurer are involved in the dispute between the parties to the negligence action. The discovery order here challenged requires production of all statements given by defendant or other witnesses to defendant's insurance carrier. In Chaffee *v.* Stenger, an appeal in the nature of mandamus, the discovery order sought to be vacated requires defendant to produce statements of certain designated prospective witnesses, including both plaintiff and defendant, and the defendant's report of loss to his insurance carrier. As in Wilson, the record (par 4[e] of the application for leave to appeal) discloses that the statements and report were procured by defendant's insurance carrier.

Pending our disposition of the Wilson Case, we have stayed proceedings below in several other cases in which the same issues are involved.

[2] As added in 1952 and amended. See 334 Mich xl and 352 Mich xvii.—REPORTER.

we held that a written automobile accident report given to the taxicab company by its driver was subject to discovery under Court Rule No 35, § 6, but only for possible use at trial to impeach the driver if called as a witness (the only purpose for which its discovery was requested) unless subsequently shown to be otherwise admissible. In the *Kalamazoo Case,* as in *Berney* v. *Volk,* 341 Mich 647, 649, 650, and *Sovereign* v. *Hart,* 363 Mich 32, 37, we clearly construed Court Rule No 35, § 6 (a), to be subject to the limitations of section 6 (b).[3] See, also, *Tomlinson* v. *Tomlinson,* 338 Mich 274, 278, and *Christie* v. *Board of Regents of University of Michigan,* 364 Mich 202, at 230 (dissenting opinion). The issue was presented in the *Kalamazoo Case* by the taxicab company's claim in the trial court and before this Court that its driver's accident report was not subject to discovery because it was not "admissible under the rules of evidence governing trials" as required by section 6 (b). In the cases before us now, the same claim is repeated, but in addition it is also

[3] "Sec. 6. (a) In any civil action the court may at any time permit any party by order of the court to compel the production, examination or inspection of any books, documents or other tangible things and to take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The time, place and scope of the examination shall be fixed in the order authorizing the taking of the deposition. The attendance of witnesses may be compelled by the use of subpoena and the deposition of a person confined in prison may be taken only by leave of the court on such terms as the court prescribes.

"(b) The order of the court for pretrial depositions and discovery, unless for good cause otherwise shown, shall permit the examination of the deponent regarding any matter, not privileged and admissible under the rules of evidence governing trials, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of relevant facts. The court may require parties to claim or waive physician-patient and hospital-patient privilege in fixing the scope of the examination and a claim of privilege at the pretrial hearing excludes such testimony if offered later in the trial."

claimed that the reports and statements should be immune from discovery by application of the attorney-client privilege (also recognized as a basis for exclusion from discovery by section 6 [b]) to information obtained by insurers for use by attorneys in defending their insureds against claims and by public policy against discovery of an attorney's "work product."

Setting aside for the moment the questions of privilege and "work product" policy, and considering first the claim that the documents ordered discovered in these cases were inadmissible in evidence within the meaning of section 6 (b), we see no valid basis for distinguishing the prospective witnesses' and parties' statements and reports procured by defendants' insurance companies and the adjudicated admissibility of the driver's accident report in the *Kalamazoo Case*. In the event the prospective witnesses or the parties are called to testify at trial, the contents of their prior extrajudicial statements and reports can be used for their possible impeachment by the opposite party and, consequently, they are not barred from discovery under section 6 (a) by the admissibility requirement of section 6 (b). Plaintiff Chaffee's statement procured by defendant Stenger's insurer may not, of course, be used by him for his own impeachment, but the admissibility qualification of section 6 (b) is without the further express or implied limitation that it must be admissible upon the offer of the party seeking its discovery. In other words, the requirement of admissibility is met if the matter sought to be discovered is admissible by any party. That this conclusion accords with the contemplated use of our discovery procedures under Court Rule No 35, § 6, was indicated by the author of Honigman's Michigan Court Rules Annotated, 1959 Pocket Part, pp 77, 78:

"Whereas discovery was formerly the rare exception, the new provision makes discovery the rule rather than the exception. This basic change should serve to remold the concept of trial work. It means that there no longer need be any surprises which confront an attorney at the time of trial. It means that each side can have available to it before going into trial practically all of the testimony that is to be used by the opposite side.

"With each side knowing what the other side will be able to show at the trial, there is increased opportunity for a more realistic determination on the part of attorneys and their clients as to the advisability of settlement."

It is consistent also with fundamental principles implicit in all statutory and rule provisions for liberal discovery. In *Hickman* v. *Taylor* (1947), 329 US 495 (67 S Ct 385, 91 L ed 451), the United States supreme court expressed the objective to be served by pretrial discovery as follows, at p 507:

"We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries."

The boundaries of Michigan's discovery procedure are more limited than those of the Federal procedures considered in *Hickman* v. *Taylor,* there being

no admissibility requirement in the Federal rules[4] such as there is in ours, for example. But whatever the differences, the ultimate objective of pretrial discovery is to make available to all parties in advance of trial all relevant facts which might be admitted in evidence at trial. To so narrowly read the admissibility requirement of section 6 (b) that it would permit discovery only of those matters admissible in evidence by the party seeking discovery would too frequently thwart a litigant's proper inquiry before trial of "the facts underlying his opponent's case."

In further support of the effort to bar discovery of the documents, it is argued that Stenger's statement and report of loss to his insurance company should be treated as confidential communications from a client to his attorney to be conveyed to the attorney through the insurance company as an intermediary or agent, and thus privileged (within the meaning of section 6 [b]) from discovery. Upon careful examination of the record of the Chaffee case, we find that no proofs were offered in the trial court, by affidavit or otherwise, to show when defendant's report of loss was made (although defendant's counsel improperly included in his brief on appeal information outside the record relating to this matter); when and by whom defense counsel was retained; the relationship between defendant's counsel and his insurance company, including the degree of control each exercised over the activities of the other; or any other proofs pertinent to the claimed agency. Absent such proofs, we cannot find, on this record, that defendant Stenger's statement and report of loss to his insurance company were

[4] See 28 USCA, Federal Rules of Civil Procedure, Rules 26–37, particularly Rule 26(b) and (d), Rule 30(b) and (d), Rule 31(d), Rule 33 and Rule 34.—REPORTER.

barred from discovery as privileged communications or otherwise.

It is not claimed that the statements of prospective witnesses other than parties procured by the insurance companies are within the scope of the insureds' privileged communications with their attorneys, nor could such claim be made. Instead, it is claimed that the bar against their discovery is raised because they represent the attorneys' "work product" procured by their agents, the insurance companies. Even if we were to assume that the policy which bars an attorney's work product from an opposing litigant's inquiry extends to data assembled for the attorney by his agents, these appellants are not entitled to urge this claim in these cases. As we have already noted, the record in the Stenger case does not even permit our determination of the nature of the relationship between defendant's counsel and his insurance company. The record in Wilson discloses employment of defense counsel by the insurer, not the defendant; that statements were taken by insurance agents even before employment of counsel; and that the insurance company determined which statements to disclose to its trial counsel and which to withhold even from him. Nothing in that record, any more than in Stenger's permits our finding that counsel engaged the services of insurance agents to assemble for him his "work product." The judicial policy which protects an attorney's work product from discovery by his adversary, considered at length in *Hickman* v. *Taylor, supra,* may not be invoked in the circumstances of these cases to justify exclusion from discovery of witnesses' statements obtained, not by counsel personally or even at his request and under his direct supervision, but rather by the agents of an insurance carrier acting so independently of counsel that the

insurer even withheld from counsel subsequent notice that such statements had been taken.

We conclude that neither the attorney-client privilege nor the public policy underlying exclusion of an attorney's work product is applicable to bar disclosure before trial in these cases of the witnesses' statements, Stenger's statement, or his report of loss. Defendants below having failed to show good cause otherwise for denying the requested discovery, as it was their burden to do in accordance with section 6 (b), we hold that the orders for discovery were properly entered and that defendants below are not entitled to their vacation by order of this Court. Accordingly, the order to show cause in the Wilson case is dismissed and the order from which appeal was taken in the Chaffee case is affirmed. The prevailing parties may tax their costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SMITH, JJ., concurred with SOURIS, J.

BLACK, J. (*concurring*). The thoroughly bandied decision of *Hickman* v. *Taylor,* 329 US 495 (67 S Ct 385, 91 L ed 451), decided in 1947, has spawned a curious congeries of judicial confusion.[1] Discovery in the text of today's issue has become an uncertain variable of provincial discretion, differing according to views of judges among the Federal circuits and Federal districts, and differing undeniably in the respective circuits of our State. The reason, as I see it, is that no court of ultimate authority has as yet defined with precision the "work product of the lawyer," and has then declared the extent to which—if at all—the traditional privacy of that product may be invaded by discovery proceedings.[2]

[1] See Buell Doelle, "Weapons of Discovery", 42 MSBJ No 4 (April 1963), 18, 23, 24.

[2] Consider, as a related aside, the Topsy-grown practice by which disclosure of the identity of witnesses the lawyer and his client may

Hickman does not, of course, control the authority of this Court to declare and apply the common law of Michigan or to provide the discovery procedures of Michigan courts of record. It does, by way of the Court's conclusion, point up the controversial nature of the issue which has come to us from the Saginaw circuit. That conclusion provides our overture (*Hickman* at 513, 514):

"We fully appreciate the widespread controversy among the members of the legal profession over the problem raised by this case. It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. * * * When Rule 26[3] and the other discovery rules were adopted, this court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result."

Hickman and *Kalamazoo Yellow Cab Company* v. *Kalamazoo Circuit Judge,* 363 Mich 384, are cited and relied upon by all present counsel. Neither fits directly the specific issue Justice SOURIS has stated in the first sentence of his opinion. In *Hickman* the supreme court was asked to expose for the claimant-petitioner certain written statements (of witnesses) attorney Fortenbaugh, "as counsel and agent for defendants" (tug owners and railroad), had obtained "in the course of preparation for possible litigation." In the *Kalamazoo Cab Case* this Court dealt exclusively with pretrial discovery of a written accident report *made to the defendant employer by its* charged-with-negligence *employee.* An order for

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or may not call to the stand is—by some judges—penalty-compelled at pretrial. This indeed, unless resisted, prys into the attorney's strategy as well as his "mental impressions" and "legal theories."

[3] 28 USCA, Federal Rules of Civil Procedure, Rule 26.—REPORTER.

discovery thereof, upon reasons given in our opinion, was upheld. Here we deal with a plaintiff's claimed right to discovery of written statements and reports, by witnesses and parties, which legal strangers to the pending suit have obtained. Such strangers are the liability insurers of the respective defendants.

In the *Kalamazoo Cab Case* the party obtaining and possessing that which the plaintiff discovered was the sued defendant.[4] In the *Hickman Case* the party who had obtained and possessed what the claimant did not discover made up the professional part of the privileged relationship. In the present cases nothing privileged by an attorney-client relation is sought, by discovery. Once that is clear, no problem remains. The circuit judge, not impeded by the rule of privilege, was clothed with discretion to order that counsel for the insurers should produce the statements and reports such insurers had obtained prior to the engagement or involvement of such counsel and prior to their appearance for the sued defendants.

By *People* v. *Pratt,* 133 Mich 125 (67 LRA 923), followed in *Lindsay* v. *Lipson,* 367 Mich 1, 5, this Court is committed to "a somewhat liberal interpretation" of the common-law right of professional privilege when the necessary relationship exists. We said, in the *Pratt Case* at 129:

"The privilege is not confined to communications made for the purpose of obtaining advice. It extends to 'communications made to an attorney in the course of any professional employment, relating to the subject of the employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other.' "

[4] That, too, was the situation in *La Croix* v. *Grand Trunk W. R. Co.,* 368 Mich 321.

Pratt's "liberal" rule defies discovery of the lawyer's "work product." There remains only the task of definition of such product; the product which does not of course include any or all of the interpretive or triable, and hence discoverable, subject matter of the litigation; such as the questioned deed or contractual documents, the allegedly mislabeled pills or the allegedly defective king pin the pharmaceutical or automotive defendant has manufactured and marketed, or any like tangible constituting such subject matter or essential part thereof.

Without intending to relate the case or its thrust to the parties in interest before us, I deem it well to repeat at the juncture what was said of the attorney-client relationship in *Hightower* v. *Detroit Edison Co.,* 262 Mich 1, 9, 10 (86 ALR 509):

"The rights and duties arising out of the relationship of attorney and client are not measured by the yardstick of commercial or trade transactions. The relation is purely personal. The lawyer owes to his client undivided allegiance. There is no place in the relationship for its establishment by a middleman having an interest in the *res* or control of the procedure. The fact it is so established or initiated makes the attorney so far the agent of the middleman as to charge him with knowledge of all arrangements under which the middleman assumes to act. * * *

"As long as the attorney owes, or deems he owes, to the middleman any duty connected with the plaintiff's case so that he cannot extend undivided allegiance to the client, he remains agent of the middleman. If appellant, *bona fide,* had established with Mrs. Powell the relationship of attorney and client, wholly divorced from Donohue, the case would be different. But he did not. He considered Donohue as well as plaintiff his client in the case."

Consider now the true attorney and client relationship as that relationship has been known throughout development of the common law, and assume for illustration that the client is a newly sued defendant. He picks and engages his lawyer to represent him, and to undertake the defense according to due methods of practice and preparation. The attorney duly assumes such work. In the diligent course thereof, he interviews and obtains written statements of persons who may be callable as witnesses and some who, upon investigation, may not. The statements of the latter, negatively attesting that they did not see, hear, or otherwise acquire admissible knowledge, are taken by the attorney to guard the client against possible lapses or changes of memory by the statement-givers. The attorney obtains and carefully preserves for admissibility copies of documents, photographs, and, probably, bits or items of documentary or physical proof which, if aided by testified identification and relation to the presented issue or issues, may become admissible to support the defense or overcome the plaintiff's thrust. He briefs and records the substantive and procedural legal aspects of the case, interviews and engages the aid of expert witnesses, and prepares for his own ready use a chronology of memoranda of discovered facts and of their indicatively admissible and timable employment in court. In short, he prepares his client's case according to the developing needs thereof, and maintains in the preparatory file he has made the very tools by which his personal-to-client duty is performed. That file is the privileged "work product of the lawyer." It is not the "work product" of a vicariously liable insurer whose relation to its sued insured is contractual rather than professionally personal.

I would define that product with foregoing severity, the better to guard and protect historic privacy of the relationship it exemplifies. The attorney and his client have the exclusive right to decide at what stage if at all they are to bring forth such product or portions thereof during the *trial;* the *trial* as it was and supposedly is known to the common law; the *trial* that is (in a case properly triable to a jury) preserved as a right by the Constitution. See COOLEY, J., in *Swart* v. *Kimball,* 43 Mich 443, 448; quoted in *Romero* v. *King,* 368 Mich 45, 50, holding the maintained right of jury trial is "the right as it existed before; the right to a trial by jury as it had become known to the previous jurisprudence of the State." That there may in extreme circumstances be some exception to this is presently immaterial, since the exception will probably prove out as being one of the exceptions the common law has always known.

It is clear that some of the concededly valuable *dicta* written in *Hickman* is Michigan-acceptable, and that some is not. See GCR 1963, 306.2. Pointed indeed is the observation of the supreme court (*Hickman* at 511) that, if the work product of the lawyer should be made "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." Trial counsel of experience would probably rather memorize and then personally destroy each fresh sheet of the product—as Stonewall Jackson did with each order from Lee—than carry the risk of having an opponent pry through, to any extent by judicial order, their diligently prepared files. Like the prohibition laws, orders to produce parts of such personally assembled product are, if issued, bound to be difficult of enforcement.

The foregoing is submitted to the profession in effort to draw that solid line where the judicial dis-

cretion provided by GCR 1963, 306.2 comes to an end and absolute privilege begins. There is no other way to protect the professional relationship from dilution and ultimate dissolution in the turbulent sea of judicial discretion. A caveat: To be sure, with the new rules now in effect, the attorney who takes a written statement from some party or witness, and fails then to deliver the statement-giver a copy thereof, probably waives for himself and his client the privilege otherwise enjoyed. That, however, is the apparent extent to which the new rules attempt to modify the professional privilege. Such extent is quite far enough.[5]

The foregoing convictions recorded, I agree with Justice SOURIS' disposition of both cases and with his holding that the statements and reports the respective insurers have obtained are discretionarily discoverable as against their plea of professional privilege. Since those statements and reports were not obtained by counsel, they are not discovery-immune on ground of professional privilege. And it is hardly necessary to add that a possibly related situation is not before us. I refer to the one where the counsel engaged to defend—by the liability insurer—has himself obtained the sought-to-be-discovered statements and reports.

CARR, C. J., and KAVANAGH, SOURIS, and SMITH, JJ., concurred with BLACK, J.

O'HARA, J., took no part in the decision of this case.

[5] GCR 1963, 306.2 probably, one of these days, will have to be amended to provide for the fortuity of loss of the delivered copy by the statement-giver, or of refusal by the statement-giver to disclose it.

WENTZEL *v.* HUTCHISON.

1. STIPULATIONS—PRETRIAL CONFERENCE.
   An agreement or stipulation between the parties that is made at the pretrial conference is binding upon the trial court, unless it is modified at or before trial, or to prevent an injustice.

2. APPEAL AND ERROR—ACCOUNTING—DE NOVO HEARING.
   The Supreme Court hears an accounting suit *de novo*, since it is a chancery proceeding.

3. ACCOUNTING—HOTEL MANAGERS.
   Decree for defendant hotel owners is ordered entered in suit against them by plaintiffs who had undertaken to manage and operate the business under an oral contract whereby plaintiffs were to receive 60% of the net profits, where trial court found neither party entitled to items for depreciation, that meals chargeable to expense of operation did not include meals for plaintiffs' son, and correct computation pursuant to trial court's findings shows a small overpayment to plaintiffs.

Appeal from Marquette; Rushton (Carroll C.)J. Submitted April 4, 1963. (Calendar No. 26, Docket No. 49,437.) Decided June 6, 1963.

Assumpsit by Adrian Wentzel and Beatrice Wentzel against Ira B. Hutchison and Margaret Hutchison for sums due on contract to manage resort lodge. Case heard as an accounting. Defendant Margaret Hutchison dismissed as party defendant. Decree

REFERENCES FOR POINTS IN HEADNOTES

[1] 50 Am Jur, Stipulations § 9.
[2] 1 Am Jur 2d, Accounts and Accounting § 64.
[3] 1 Am Jur 2d, Accounts and Accounting § 63.

for plaintiffs. Defendant Ira B. Hutchison appeals. Reversed and remanded.

DeFant & Bridges (*Michael F. DeFant,* of counsel), for plaintiffs.

Baldwin & Kendricks, for defendant.

KAVANAGH, J. Plaintiffs instituted a law action to recover sums allegedly due them under the terms of an oral contract with defendants Ira B. Hutchison and Margaret Hutchison, husband and wife.

On motion of defendants the case was transferred to the chancery side of the court for accounting to determine if plaintiffs were entitled to the amounts sought. Margaret Hutchison was dismissed as a party defendant.

In February of 1956 defendant and his wife purchased the Big Bay Lodge, a hotel located at Big Bay, Michigan. In March of that year the defendant and his wife entered into an oral agreement with plaintiffs, whereby plaintiffs were to manage and operate the business in consideration of a 60% share in the net profits. Plaintiffs commenced managing the business in April, 1956, and continued until May 8, 1959.

At the pretrial conference the parties agreed to certain items on the balance sheet covering the period of plaintiffs' employment. Four items were disputed and became the framed issues at trial. They were as follows:

(1) $3,861 under income. Defendant claims plaintiffs should be charged for the cost of their meals while living at the hotel. Plaintiffs alleged it was part of the agreement that their meals were to be furnished free.

(2) $4,626.66 under costs and expenses. Defendant claimed he paid this amount as operating ex-

penses. Plaintiffs alleged this figure represented capital expenditures.

(3) $10,867.71 under costs and expenses. Defendant claimed the parties had agreed to take into account depreciation of equipment and supplies in determining net profit. Plaintiffs denied this element was part of the contract.

(4) $1,150 under costs and expenses. Plaintiffs requested this amount as depreciation on their truck and washing machine.

Under defendant's theory, considering these 4 items, a net loss of $3,361.79 resulted. Under plaintiffs' theory, the operation resulted in a net profit in excess of $7,000.

The trial court concluded as follows:

"It is the finding of the court, with respect to the accounting between the parties; that neither party is entitled to the several amounts claimed by way of depreciation; namely, the claim of the defendants that they are entitled to a depreciation item of $10,867.71 and the claim of the plaintiffs that they are entitled to depreciation in the amount of $1,150; that the total of these 2 items amounts to $12,017.71 and the difference between income and expenses is thereby increased to that amount, subject to deduction of claim lost by the defendants, in the amount of $3,361.79.

"It is the further finding of the court, that for the purposes of arriving at an accounting, it does accept the claimed loss of the defendants, however it does not believe that this figure truly represents the loss in the operation of the hotel after 3 years of operation; that after deduction of claimed net loss there remains a net income of $8,655.92 and under the 60–40 arrangement between the parties, the plaintiffs should have received, and are entitled to, $5,193.55, however, the plaintiffs have already received, in cash drawings, the amount of $2,396, and it is the further finding of the court that they should

be charged 1/3 of the meals received by the plaintiffs and their son, which would amount to $1,287.

"It is the finding of the court therefore, that against the net income of $5,193.55, to which the plaintiffs were entitled, they already received the sum of $3,861, and they are entitled to a further return of $1,510.55."

On appeal, defendant raises 2 questions:

(1) Did the court err in finding a net profit?

(2) Did the court err in disallowing defendant's and plaintiffs' claimed depreciation in computing net profits?

The pretrial agreement and stipulation binds the court, unless modified at or before trial, or to prevent an injustice. The trial court in following the stipulation erred in arriving at the net profit owed plaintiffs by failing to recognize that in allowing only 1/3 of the cost of the meals, the income statement of plaintiffs should have been reduced by $2,574, which would result in a reduction of net profit. The proper computation of the findings of the lower court would result as follows:

1. The adjusted gross income figure upon the elimination of 2/3 of the cost of the meals is $39,-415.19.

2. The expense statement after removing the depreciation items is $33,333.27;

3. The difference, then, between income and expense is a net income of $6,081.92;

4. Under the 60–40 agreement, plaintiffs would be entitled to 60% of $6,081.92 or $3,649.15;

5. In subtracting the plaintiffs' cash drawings of $2,396 and 1/3 of the cost of plaintiffs' meals of $1,287—a total of $3,683—from plaintiffs' share of the profits, an overpayment of $33.85 results.

This Court, in a chancery accounting suit, hears the matter *de novo*. *Crooker* v. *Crooker,* 340 Mich 250. We have so examined the record. We have

correctly reduced the finding of the lower court as to the net profit, which necessitates the entry of a decree in favor of defendant of no cause for action.

It is not necessary to review the other questions discussed in the briefs of appellant and appellees, since we conclude that a correct computation of the net profit results in an overpayment to plaintiff. If we were to change the ruling of the lower court as to the depreciation matters, we would find an increase of this overpayment. The case was not tried on the theory of fair compensation for the labor of plaintiffs. The pretrial stipulation and order precluded such a theory.

The decree of the lower court is reversed and the case is remanded to the trial court for entry of a decree in favor of defendant of no cause for action. Defendant shall have costs.

CARR, C. J., and KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

DETHMERS, J., took no part in the decision of this case.

FREDERICK *v.* CITY OF DETROIT.

1. CARRIERS—BUS PASSENGERS—STANDARD OF CARE—INSTRUCTIONS.
   Instruction in bus passenger's action against defendant city, as common carrier, for injuries sustained due, as she claimed, to worn rubber flooring and accumulation of dirt thereon and omission to provide a railing for the support of passengers alighting from its bus to the street, that a common carrier owed "a higher degree of care to its passengers than a person ordinarily owes to another person"; that due care means that amount of care a reasonably prudent person would exercise under the circumstances then and there existing, that "it is more difficult for a common carrier to measure up to the standard of due care than it is for an ordinary person" because of the nature of the business; that a common carrier owes due care just like everybody else but has a harder time reaching that standard than the ordinary person does; that they are not insurers and that it was for the jury to determine whether there was a failure to use that amount of care that a reasonably prudent person would use under the circumstances, that a common carrier, a reasonable common carrier, would and should use *held,* a substantially correct statement of the applicable law.

2. SAME—PASSENGERS—NEGLIGENCE.
   The conduct of a common carrier of passengers is tested by the common law of negligence standard of reasonable care appropriate to the circumstances of the case, a standard of negligence which allows the fact finder to determine that some factual circumstances reasonably require greater or lesser diligence than do other circumstances in order to constitute reasonable or due care.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 10 Am Jur, Carriers §§ 1667, 1668.
[2] 10 Am Jur, Carriers § 1245 *et seq.*
[3] 38 Am Jur, Negligence § 29.
[5] 53 Am Jur, Trial § 156 *et seq.*
38 Am Jur, Negligence § 344 *et seq.*
[6] 53 Am Jur, Trial, § 293 *et seq.*

3. NEGLIGENCE—COMMON-LAW STANDARD OF CARE.

The common-law standard of reasonable care is constant although it may require an infinite variety of precautions, or acts of care, depending upon the circumstances, and it is primarily a question of fact as to just what precautions were appropriate to the danger apparent in the case at hand.

4. CARRIERS—PASSENGERS—STANDARD OF CARE—INSTRUCTIONS.

A trial judge's description in charge to the jury of the standard of duty of a common carrier of passengers in terms of high, higher, or highest, care or the like, impinges upon the function of the jury as finder of fact.

5. COURTS—DEFINITION OF DUTY.

It is the court's function to determine as a matter of law whether the relation of the parties gives rise to a duty and to define it.

6. SAME—OPINIONS—REASONS FOR GRANTING OR DENYING CERTAIN MOTIONS.

A trial judge is required to make a concise statement of his reasons for granting or denying motions for new trial, amendment of judgment, and for judgment notwithstanding the verdict (Court Rule No 47, § 3 [1945]; GCR 1963, 527.7).

Appeal from Wayne; Fitzgerald (Neal), J. Submitted March 6, 1963. (Calendar No. 70, Docket No. 49,446.) Decided June 6, 1963.

Case by Rose Frederick against City of Detroit, Department of Street Railways, for personal injuries sustained in fall while alighting from bus. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Francis J. McDonald and *Francis J. Markey,* for plaintiff.

Leo A. Sullivan and *Ralph L. Hayes,* for defendant.

SOURIS, J. Plaintiff seeks reversal of an adverse jury verdict and denial of her subsequent motion

for new trial on the ground that the trial judge instructed the jury improperly on the degree of care owed by a common carrier to its passengers. The case went to the jury on plaintiff's theory that defendant negligently permitted the rubber flooring of its bus to become worn and dirt to accumulate thereon and that it negligently omitted to provide a railing for the support of passengers alighting from its bus to the street. It was her claim that while leaving the bus she slipped on the worn, dirty flooring and, absent a railing which she could grasp for support, fell to the ground and suffered injuries.

The language of the instruction challenged by plaintiff is as follows:

"Now, I will say this to you at this point; that the D.S.R. is not liable unless they were negligent. They are not an insurer. They are a common carrier. A common carrier has, in the vernacular, a higher degree,—owes a higher degree of care to its passengers than a person ordinarily owes to another person. Now, that definition is open to question; because the actual definition reads that they have the duty,—anyone has the duty to exercise due care. That is the general test of negligence. Do you exercise due care? And, what do you mean by 'due care'? Due care means that amount of care that a reasonably prudent person would exercise under the circumstances then and there existing. But where the common carriers come into a different category, as it were, is the fact that it is more difficult for a common carrier to measure up to the standard of due care than it is for an ordinary person. The reason for that greater difficulty is precisely because he is a common carrier; he is carrying people for hire; and that makes him something less than an insurer, but someone who should exercise more care, in order to come up to the standard of due care, than an ordinary person. So, the Supreme Court in this State has sometimes referred,

—and I personally believe erroneously,—to the fact that the common carrier owes a higher degree of care. I think that that is ultimately what it amounts to, but I think that is a very inaccurate way of stating it. They owe due care just like everybody else, but they have a harder time reaching that standard than the ordinary person does; which I think is the correct way to put it. They are not insurers. Everybody that travels on a bus cannot travel with the assurance that if he gets hurt, the bus company is bound to pay for his injuries, or the city is bound to pay for his injuries. If they were insurers, they would have to; but they are not. However, they do have that high standard to meet, that all public carriers have. They have to measure up to the test of due care owed by a bus company. If this lady slipped due to her own fault, the D.S.R. is not liable. If they are to be liable, you must find that the D.S.R. did something that they should not have done; or they failed to do something that they should have done. That is the only way the D.S.R. can be found liable in this case. Now, either they had the handrails there, or they didn't; they should have had them there, and they didn't have them there; there was something on the floor, and it shouldn't have been there; or they should have removed it, and they didn't; or there was a slippery mat that was worn and dangerous, or there wasn't. Now, you are the people that must determine those issues. * * *

"What is negligence? I will define it. Negligence is the failure to use that amount of care that a reasonably prudent person would use under the circumstances. That is the standard by which the D.S.R. liability must be measured in this case. You must ask yourselves, did the D.S.R. use the usual amount of care in this case that a common carrier, a reasonable common carrier, would and should use. That is the standard you go by when you are determining liability."

Citing *DeJager* v. *Andringa,* 241 Mich 474; *Durfey* v. *Milligan,* 265 Mich 97; *Trent* v. *Pontiac Transportation Co., Inc.,* 281 Mich 586 (2 NCCA NS 485); and *Bordner* v. *McKernan,* 294 Mich 411, plaintiff contends the trial judge erred in not clearly and concisely instructing the jury that she was owed a high degree of care, not just ordinary care, from the D.S.R. She claims that the instruction given, for all practical purposes, advised the jury that common carriers owe their passengers the same degree of care and diligence that others owe one another in the pursuit of their daily affairs. Without denying that the instruction can be read to impose upon carriers only a duty of due care as plaintiff contends, defendant maintains that it can, and should, be read as requiring no less than "a high degree of care," claimed by defendant to be a correct statement of its duty, by its reference to the greater difficulty a common carrier has in measuring up to a standard of due care than does an ordinary person and by its statement that a common carrier, because it carries people for hire, should exercise more care than an ordinary person. I agree with plaintiff that the instruction imposes upon defendant only the duty of due care, but that, in my view, is a correct statement of the law of this State, some of our prior opinions to the contrary notwithstanding and further notwithstanding the defendant's apparent reluctance to urge upon us such interpretation of the law more favorable to it than that which it uncritically assumes to be the law.

We have recently expressed disapproval of contributory negligence instructions which expressly, or by fair inference, bar recovery by plaintiffs because of their own "slight negligence." *Iwrey* v. *Fowler,* 367 Mich 311; *Clark* v. *Grand Trunk Western R. Co.,* 367 Mich 396; and *Mack* v. *Precast Indus-*

tries, Inc., 369 Mich 439. In those cases it was correctly conceded that the law imposed upon the plaintiffs no duty burden greater than ordinary or due care to avoid negligent injury to themselves and, hence, instructions which seemingly inferred the plaintiffs were barred from recovery for slight negligence or, put another way, for failure to exercise great care, were held erroneous. In this case of Frederick, however, while the parties assume that the law imposes upon the defendant a duty more stringent than due care,—a duty to exercise a high degree of care, or the highest degree of care, for the safety of its fare-paying passengers,—the law correctly stated requires no more than due care and, therefore, had the challenged instruction imposed a duty burden greater than due care, we would be obliged to strike it down consistent with our holdings in *Iwrey, Clark,* and *Mack.*

Each of the last 3 cases relied upon by plaintiff, *Durfey* v. *Milligan, Trent* v. *Pontiac Transportation Co., Inc.,* and *Bordner* v. *McKernan,* all cited above, relies upon the first of plaintiff's cited cases, *DeJager* v. *Andringa,* for the stated rule of law that a common carrier has the duty to exercise a high degree of care for the protection of passengers. *DeJager,* in turn, relies upon *King* v. *Neller,* 228 Mich 15, for the same proposition but, qualifies it (as do *Trent* and *Bordner*) by explaining that such duty to exercise a high degree of care means care proportionate to the "nature and risk of the undertaking in view of the nature of the means of conveyance employed," quoting 10 CJ, Carriers, § 1295, p 855. In further elaboration and quoting again from the cited text authority, the Court in *DeJager* explained that negligence in that context is "simply the failure to use the amount of care, skill, and diligence required by the nature of the undertaking and the circumstances of the case." By its qualifi-

cation and explanation of the term "high degree of care," the Court disclosed that it was testing defendant bus operator's conduct by the classic common law of negligence standard of reasonable care *appropriate to the circumstances of the case,* a standard of negligence which allows the fact finder to determine that some factual circumstances reasonably require greater or lesser diligence than do other circumstances in order to constitute reasonable or due care. Viewed in this light, there can be no quarrel with *DeJager's* statement of the law as theretofore it had been authoritatively pronounced, as we shall soon note, although (it must be conceded) it has been frequently misapplied, as it was in *Durfey.*

A fact of consequence not to be overlooked is that in neither *DeJager, Durfey, Trent,* nor *Bordner* did this Court approve a jury instruction that a common carrier's negligence is to be determined by a standard different from that of reasonable care. In *DeJager* and *Trent,* the Court reviewed granted motions for directed verdict; in *Durfey,* it reviewed a case tried to the court without a jury; and in *Bordner,* it tested a jury's verdict against a great weight challenge. What the Court said in the procedural context of those appeals may not be adopted uncritically for purposes of jury instruction. And perhaps therein lies the reason for the confusion which undeniably exists in our reported decisions involving consideration of the duty burden borne by common carriers of passengers for hire. What an appellate court says in determining on review whether a trial record discloses factual compliance with the duty of reasonable care appropriately may be cast in terms of positive, comparative, or even superlative degrees, for then its task, as fact reviewer or determiner of fact sufficiency, is to apply the standard of reasonable care to the factual circumstances disclosed by the record,—circumstances

which, because of the relation between the parties, because the instrument of harm is in the exclusive control of 1 party, or because the risk of physical harm is patently present, may reasonably require acts of great, greater, or greatest diligence to meet the standard of care reasonable under such circumstances whereas other factual circumstances might reasonably require lesser acts of diligence. But its language thus used should not be, as it has been and is sought here to be, taken as a pronouncement of a different, more exacting, standard of care required of carriers nor should such appellate judicial language be considered appropriate for use in instructing juries. See 32 ALR 1190. The common-law standard of reasonable care is constant although it "may require an infinite variety of precautions, or acts of care, depending upon the circumstances, and * * * it is primarily for the jury to say just what precautions were appropriate to the danger apparent in the case at hand." 2 Harper and James, The Law of Torts, § 16.13. *Christoff* v. *Noto,* 327 Mich 514, also cited by plaintiff, demonstrates the error of thus uncritically adopting appellate court language for purposes of jury instruction. Likewise, see *King* v. *Neller, supra,* cited in *DeJager,* where the trial judge's charge fairly instructed the jury, but where this Court itself perverted its meaning in affirming a jury verdict based upon it.

That the standard of care imposed in this State upon common carriers of passengers is the common-law standard of due care was authoritatively announced for a unanimous Court almost 90 years ago by Mr. Justice CAMPBELL, speaking for himself and Chief Justice GRAVES and Justices COOLEY and CHRISTIANCY, in *Michigan Central R. Co.* v. *Coleman,* 28 Mich 440 (4 Am Neg Cas 1). In reversing a jury verdict against a railroad for its negligence in starting its train before a passenger could get

securely on board, the Court condemned the jury instruction reflected in the following passage taken from the Court's opinion (p 449):

"The jury were told that carriers of passengers are 'legally bound to exert the utmost care and skill in conveying their passengers, and are responsible for the slightest negligence or want of skillfulness whether in themselves or their servants.' 'That the law is, that common carriers of passengers are bound to the utmost care and skill in the performance of their duty. That the degree of responsibility to which carriers of passengers are subjected is not ordinary care, which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect. It is the danger to the public which may proceed even from slight faults, unskillfulness or negligence of passenger carriers or their servants, and the helplessness in which passengers by their conveyances are, which make this duty of extraordinary care a legal one.'"

Justice CAMPBELL'S analysis of the instruction follows (pp 449, 450):

"The language used would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is neither more nor less than a failure of duty. All railroad companies are held to the duty of being prudent railroad companies, and bound to conduct their business with such precautions as prudence has usually found necessary. As compared with the care needed in business involving no possible human risk, the care to be used may be properly enough called extraordinary, but as compared with each other all such companies have the same duty."

Earlier in the opinion Justice CAMPBELL had said that the care required in any business must be proportioned to its nature and risks, noting that railroading involves great risks and, therefore, requires

great caution. But the railroader's required caution which may be extraordinary when "compared with the care needed in a business involving no possible human risk," is no greater than that of a railroad company of ordinary care. As I read Justice CAMPBELL'S opinion it means to me that, absent statutory standards to the contrary, a carrier of passengers is obliged to use due care, but that the actions which conform with or violate that standard of due care will vary according to the circumstances in which care is required to be exercised and will depend *upon jury determination* of what the reasonably prudent person in similar circumstances would consider reasonably necessary for the safety of passengers. When trial judges describe the *standard of duty* in terms of "high care," "higher care," "highest care" or the like, they impinge upon the jury's function as finder of fact.

Unfortunately, about 40 years after *Coleman,* this Court, concerned with the then current "complexity of speed, appliances, and instrumentalities used in railroading," said that it could see no good reason not to declare that carriers of passengers are bound to exercise "the highest degree of care," as had declared other courts, not identified otherwise than as of "equally high character." *Marshall* v. *Wabash R. Co.,* 184 Mich 593, 604. The sweeping change in our common law apparently intended to be made in *Marshall* was not further explained and was completely unnecessary to decision. The fact is that the instruction challenged in *Marshall,* although first requiring of defendant railroad a "high degree of care and caution" such as "the most prudent, careful and cautious" railroader would use, later was corrected by the following language (p 603):

" 'You are further instructed that this defendant was not an insurer of the absolute safety of plaintiff

as a passenger upon its train, but that it was only the duty of defendant company, when carrying plaintiff as 1 of its passengers on the train in question, to use and exercise through its officers * * * that degree and measure of care, prudence, and caution in constructing, repairing, and maintaining its road, ties, * * * and the running of its trains thereon, which a prudent, careful, and cautious person engaged in the same kind of business would have exercised under the same or similar circumstances and conditions.'"

Whatever undisclosed reason this Court had in 1915 for imposing an extraordinary duty of care upon carriers of passengers, our reports disclose that the rule announced has not been universally followed (see *Bogart* v. *City of Detroit,* 252 Mich 534; *Longfellow* v. *City of Detroit,* 302 Mich 542; *Routhier* v. *City of Detroit,* 338 Mich 449 [40 ALR 2d 1114]; and *Mitcham* v. *City of Detroit,* 355 Mich 182) and, when followed, it has been generally qualified and explained, as was *DeJager, supra,* so that in practical effect the standard of care judicially applied was the standard of due care which permits the fact finder to take into account variations in diligence the circumstances of each case may require of a reasonably prudent man (see *King, DeJager, Trent, Bordner,* all cited *supra; Bury* v. *Detroit United Railway,* 198 Mich 447, and *Wells* v. *Flint Trolley Coach, Inc.,* 352 Mich 35).

Having indicated my reluctance to accede to the unreasoned judicial declaration of *Marshall's* case, I would reaffirm the precepts of *Michigan Central R. Co.* v. *Coleman, supra,* which endure in many of our sister States whose courts have carefully examined the carrier's liability at the common law and have resisted the now discredited theory that de-

grees of care or of negligence are recognized by the common law in such cases.*

We have seen that Michigan, in the *Coleman* case, chose originally the traditional common-law duty of due care for determining the liability of carriers to their fare-paying passengers. That choice was followed consistently until *Marshall* v. *Wabash R. Co.*, attempted abruptly to impose a radically more stringent duty upon carriers. *Marshall's* rule since has been modified effectively by judicial addition of qualifications allowing consideration of factual circumstances for determination of what specific acts of diligence and precaution reasonably are required. For all practical purposes, we are again applying the rule of *Michigan Central R. Co.* v. *Coleman*,—the classic common law of due care, measured by the care of a reasonably prudent carrier,—while sometimes saying, in addition, that due care for passenger carriers reasonably requires greater diligence than is reasonably required from others. It is time we candidly acknowledge that cases inconsistent with *Michigan Central R. Co.* v. *Coleman* have been overruled.

It may be said that formal reaffirmation of the rule announced in *Coleman* is largely academic if we have, in fact, effectively modified *Marshall* v. *Wabash R. Co.* However, what we do, as well as what we say, in this area of the law has significance to the delicate relation between judge and jury for,

* It is true that all other courts are not in agreement on the standard of liability of a common carrier to its passengers. Commentators and judges have written exhaustively on the subject, and on the more generalized, but directly related, topic of the common law's recognition or nonrecognition of degrees of care or of negligence. See Green, "High Care and Gross Negligence," 23 Ill L Rev 4; Elliott, "Degrees of Negligence," 6 So Cal L Rev 91; 2 Harper and James, The Law of Torts, chapter 16, "The Nature of Negligence: Degrees of Care," § 16.13 *et seq.* For annotations of cases dealing with the liability of carriers to their passengers, see 96 ALR 727, supplementing prior annotations; 117 ALR 522; 126 ALR 461; 9 ALR2d 938; and 74 ALR 2d 1336.

as the Indiana supreme court noted in *Union Traction Company of Indiana* v. *Berry* (1919), 188 Ind 514 (121 NE 655, 124 NE 737, 32 ALR 1171), and as mentioned above, jury instructions that a carrier owes its passengers high care, higher care, highest care or the like, constitute an invasion of the fact finding province of the jury. This is a matter of grave concern to this Court, as should be evident from our recent judicial history (see, particularly *Bishop* v. *New York Central R. Co.*, 348 Mich 345). Its importance to our traditional concepts of trial by jury merits our emphasizing the basis of what is written today.

It is the court's function to determine as a matter of law whether the relation of the parties gives rise to a duty and to define it. In Michigan gross negligence differs from ordinary negligence not merely in quantum, but in the very nature of the acts and omissions and the state of mind of the party charged with gross negligence (*Wieczorek* v. *Merskin*, 308 Mich 145, and *Peyton* v. *Delnay*, 348 Mich 238) and, notwithstanding our rule of *Marshall's* case, we have since stated we recognize no degrees of negligence (*Finkler* v. *Zimmer*, 258 Mich 336, and *Grabowski* v. *Seyler*, 261 Mich 473). Accordingly, when a duty arises as a matter of law between a carrier and its passengers, it is the common-law duty of due care and it may be defined simply as the duty to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier. It then becomes the function of the jury to determine from the evidence what action, if any, should have been taken or omitted in order to measure up to the standard of a reasonably prudent carrier in the same circumstances. By instructing the jury that high care or the highest care is required of carriers, a court impinges upon the jury's obligation to determine the carrier's compliance with its duty of due

care by consideration of the proofs of what a reasonably prudent carrier would have done in the circumstances disclosed by the evidence. It is for the jury to decide as a matter of fact, and not for the court to decide as a matter of law, whether a reasonably prudent carrier in similar circumstances would exercise greater or lesser diligence in performance of its duty of due care owed to passengers than would a reasonably prudent person engaged in other pursuits not involving the risks inherent in a common carrier's business.

We may return now to the jury instruction challenged by plaintiff in this appeal and quoted in the forepart of this opinion. It is evident that the trial judge recognized the incongruity of our prior decisions and yet felt compelled to utilize the language of "high care" approved in some of them. Having done so he sought to explain to the jury that the duty owed by the defendant was ordinary care measured by that which "a reasonable common carrier" would use under the circumstances but that, because of the nature of a common carrier's operations, the care which would be considered ordinary care or due care for "a reasonable common carrier" might be greater than that expected from "an ordinary person" in the exercise of ordinary care. It goes without saying that the language used lacks the clarity to be desired in jury instructions. However, upon close analysis it fairly conveyed to the jury its obligation to determine whether defendant's actions constituted due care and its right, in making that factual determination, to find that a reasonably prudent common carrier in like circumstances would have exercised greater diligence than would a reasonably prudent person in the pursuit of affairs unlike those of a common carrier. Notwithstanding the understandable difficulties the trial judge experienced in explaining our own prior erroneous rul-

ings, the instruction was a substantially correct statement of the law of the case.

Absent from this record is an opinion by the trial judge in denial of plaintiff's motion for new trial, as then required by Court Rule No 47, § 3 (1945). We note, in passing, that this Court values the assistance frequently received from such opinions and undoubtedly would have benefited from the views of the learned trial judge in this case. We also note that our new court rules, GCR 1963, 527.7, likewise require a concise statement by the trial judge of his reasons for granting or denying motions for new trial and, as well, for granting or denying motions for amendment of judgment and for judgment notwithstanding the verdict.

Affirmed. Costs to defendant.

KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred with SOURIS, J.

CARR, C. J., and DETHMERS, J., concurred in result.

MICHIGAN TOWING ASSOCIATION, INC., *v.* CITY OF DETROIT.

1. CARRIERS—COMMON CARRIERS—MUNICIPAL CORPORATIONS—ORDINANCES.

   A common carrier who holds a certificate of necessity from the public service commission is, nevertheless, subject to ordinances enacted by the municipalities in the exercise of their right of reasonable control of their streets (Const 1908, art 8, § 28; CL 1948, § 475.1 *et seq.*, as amended; Detroit Ordinance No 348-F).

2. MUNICIPAL CORPORATIONS—ORDINANCES—EXPRESSWAYS—TOWING DISABLED VEHICLES.

   Home-rule city ordinance prohibiting the towing of vehicles on expressways within the city from 6 to 9 a.m. and from 3 to 7 p.m. except towing of vehicles disabled on the expressway to nearest exit ramp *held,* not invalid as being outside the power of the city to enact, especially where the State has not intervened nor made known any objection to the ordinance in question (Const 1908, art 8, § 28; Detroit Ordinance No 348-F).

3. SAME—CONSTITUTIONAL LAW—CONTROL OVER STREETS.

   The reasonable control of streets accorded to home-rule cities under the Constitution does not give them exclusive control, the reasonableness of such control not being within the final determination of the city in all cases, but determinable in some instances in accordance with the legislature's interpretation, if it can be approved by the court, but such reasonable

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 9 Am Jur, Carriers § 40 *et seq.*
37 Am Jur, Municipal Corporations § 314.
[2, 3, 6–8] 37 Am Jur, Municipal Corporations § 314.
[5, 10] 25 Am Jur, Highways § 163 *et seq.*
[9, 11] 37 Am Jur, Municipal Corporations § 178.
[12, 13] 37 Am Jur, Municipal Corporations § 155 *et seq.*
[14] 37 Am Jur, Municipal Corporations §§ 187–193.
[15] 14 Am Jur, Costs § 91.

control may not be taken from them by the courts, by individuals, by administrative bodies, or by the legislature (Const 1908, art 8, § 28; Detroit Ordinance No 348-F).

4. SAME—CONTROL OF STREETS—COMMON CARRIERS.

The streets of a city belong to the public, and for ordinary use and general transportation and traffic they are free and common to all, and any control sought to be exercised over them by the city must be such as will not defeat or seriously interfere with their enjoyment, but common carriers have no right to such use for private gain without the consent of the city (CL 1948, § 475.1 *et seq.*, as amended).

5. SAME—DISTINCTION BETWEEN USE OF STREETS BY PUBLIC AND FOR BUSINESS USE.

The distinction between the use of streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental, and while, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld.

6. CONSTITUTIONAL LAW—LEGISLATURE—MUNICIPAL CORPORATIONS—EXPRESSWAYS—STATUTES.

The legislature may not deprive a municipality of the right to reasonable control over its streets, even expressways within its limits, and, to the extent that a statute does so, it is invalid (Const 1908, art 8, § 28).

7. SAME—CONTROL OF STREETS.

City authorities may control, within reason, the use of their streets for any purposes whatsoever not inconsistent with the State law (Const 1908, art 8, § 28).

8. MUNICIPAL CORPORATIONS—ORDINANCES—EXPRESSWAYS—TOWED VEHICLES.

The reasonable control of streets accorded municipalities by the Constitution empowers a home-rule city to protect drivers of vehicles by the enactment of an ordinance prohibiting the towing of vehicles on expressways during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing of vehicles disabled on the expressway to the nearest exit ramp, thereby eliminating a distraction and diminishing the danger of accidents (Const 1908, art 8, § 28; Detroit Ordinance No 348-F).

9. SAME—ORDINANCES—BURDEN OF PROOF.

One claiming an ordinance is arbitrary, unreasonable, or discriminatory has the burden of so showing.

10. CONSTITUTIONAL LAW—COURTS—MUNICIPAL CORPORATIONS—CONTROL OF STREETS.

The Supreme Court will not ordinarily substitute its judgment for that of a home-rule city as to the reasonable control of its streets (Const 1908, art 8, § 28; Detroit Ordinance No 348-F).

11. MUNICIPAL CORPORATIONS—ORDINANCES—EXPRESSWAYS—TOWING DISABLED VEHICLES DURING RUSH HOURS.

Plaintiff association of tow truck owners seeking to have declared invalid home-rule city's ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing vehicles disabled on the expressways to nearest exit ramp, *held,* not to have sustained their burden of proof that the ordinance was invalid, since they may yet drive their tow trucks thereon without towing vehicles at any time, mere inconvenience and additional cost of operation being insufficient to sustain allegation of discrimination or arbitrary hindrance and prevention from engaging in a lawful business (Detroit Ordinance No 348-F).

12. CONSTITUTIONAL LAW—COURTS—MUNICIPAL CORPORATIONS—EXPRESSWAYS—PUBLIC SAFETY.

Record in suit by association of tow truck owners to have declared invalid home-rule city ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing vehicles disabled on the expressway to nearest exit ramp *held,* not to justify Supreme Court in substituting its judgment for that of the city as to necessity for such traffic regulation for the safety and convenience of the general public (Detroit Ordinance No 348-F).

13. MUNICIPAL CORPORATIONS—ORDINANCES—CONSTRUCTION.

An ordinance that is subject to differing interpretations will be so construed as to result in the ordinance being held constitutional, where that is a permissible interpretation.

14. SAME — ORDINANCES — EXPRESSWAYS — TOWING DISABLED VEHICLES.

Home-rule city ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m., except towing vehicles disabled on the expressway to nearest exit ramp is construed as to permit towing of disabled vehicles entering the expressway from end-connecting highways at city limits to nearest exit

ramp without being in violation of the ordinance (Detroit Ordinance No 348-F).

15. COSTS—PUBLIC QUESTION—HOME-RULE CITY ORDINANCE—TOWING DISABLED VEHICLES ON EXPRESSWAYS DURING RUSH HOURS.

No costs are allowed in suit to declare invalid home-rule city ordinance which prohibited towing of disabled vehicles on expressways during period of rush hour traffic, a public question being involved (Const 1908, art 8, § 28; CL 1948, § 475.1 *et seq.*, as amended; Detroit Ordinance No 348-F).

Appeal from Wayne; McCree, Jr. (Wade H.), J. Submitted March 8, 1963. (Calendar No. 90, Docket No. 49,547.) Decided July 17, 1963. Rehearing denied September 4, 1963.

Bill by Michigan Towing Association, Inc., a nonprofit corporation, its members, and Walter J. Kraft, Jr., doing business as Kraft Towing Service, against the City of Detroit, a home-rule city, its mayor and police department, to declare void, and enjoin enforcement of, an ordinance prohibiting the towing of vehicles on an expressway during certain hours of congested traffic. Decree for plaintiffs. Defendants appeal. Reversed and bill dismissed.

William B. Elmer (*Mihelich, Elmer & Dank,* of counsel), for plaintiffs.

Robert Reese, Corporation Counsel, and *Robert D. McClear,* Assistant Corporation Counsel, for defendants.

KELLY, J. Plaintiffs filed a bill of complaint against the city of Detroit, its mayor and police department, on June 9, 1960, alleging that on November 25, 1958, the common council adopted an ordinance providing:

"No disabled motor vehicle shall be towed on any expressway between the hours of 6 a.m. and 9 a.m.

or between the hours of 3 p.m. and 7 p.m., except that any vehicle disabled on an expressway during such hours may be towed to the nearest exit ramp and thence to the surface streets." (Ordinance No 348-F.)

Plaintiffs further alleged that defendants "have attempted to enforce and threaten to attempt to enforce said ordinance"; "that said ordinance unjustly and arbitrarily discriminates against plaintiffs and other persons and corporations providing towing services for disabled vehicles" and "that said ordinance unjustly, arbitrarily and purposelessly hinders and prevents plaintiffs from engaging in a lawful and useful business"; and requested the court to restrain and enjoin defendants from enforcing said ordinance.

Following trial, the Wayne county circuit judge rendered an opinion finding that:

"The evidence is undisputed and I find that prohibition of use of the expressways between the hours of 6 a.m. and 9 a.m. and between the hours of 3 p.m. and 7 p.m., a total of 7 hours, imposes a substantial burden upon plaintiffs by materially increasing the cost of their operation and by substantially increasing the length of time necessary for them to traverse the city by using streets other than the limited access expressways. * * *

"The ordinance is therefore invalid as being outside the power of the city to enact. It is also invalid because on the record as made it bears no reasonable relationship to traffic safety or to promoting the free flow of traffic within the city. An injunction may issue as prayed."

Plaintiff's witnesses are leaders in the towing business in the Detroit area, rendering service for individuals, insurance companies, and commercial accounts and 5 of them are Michigan Towing Association members. They emphasized that their equip-

ment was of the best, making it possible for them to stop without swerving and with the same dispatch as a passenger car; that they had not been involved in expressway accidents, and that they had received certificates from the Michigan public service commission.

Plaintiffs' witnesses drew a sharp line of distinction between their experience and their equipment and ability to tow safely and that of other operators among the 500 who are engaged in towing in the metropolitan area.

Mr. Fobar, president of Michigan Towing Association, testified:

"*Q.* * * * Isn't this what you asked the council to do, to let the ordinance be effective against every tow truck except the 5 people in the city of Detroit that belonged to your association?

"*A.* No, I wouldn't say it that way, sir. I would say it this way, that if the city of Detroit, and I can appreciate their thoughts along the use of the expressways by some of these towing vehicles, especially like what is used by junk yards, they are nothing but a hazard on the street regardless of whether they use the expressways or not to my way of thinking, I wouldn't even own a piece of equipment like that, that I can appreciate the city wanting to keep them off because they are definitely a hazard, but we feel that we shouldn't be penalized for that sort of thing, in suggesting that the ordinance, as far as we are concerned would be okay if we were permitted to use it, just the certificated carriers, not only in Detroit, but in the State you have to come through the city of Detroit, they also have the—should have the right to operate. They already have the right from the State which they shouldn't be restricted."

Walter J. Kraft, Jr., testified that he had been in the towing business since 1945, and during that

period has transported, by towing, over 65,000 vehicles. He further testified:

"*Q.* In your use of the expressway, either empty or with a vehicle, a disabled vehicle, have you seen other wreckers towing vehicles?

"*A.* Yes, I have.

"*Q.* In your opinion, are they a hazard to traffic?

"*A.* They are.

"*Q.* In your opinion, is the ordinance as to them a good ordinance?

"*A.* For the people that don't know how to tow a car safely, through ignorance, I would say the ordinance is wonderful."

Plaintiffs' witnesses admitted that the ordinance did not prevent them from operating their towing businesses, but stated that it created an inconvenience. The president of the association, Mr. Fobar, said:

"Yes, it does, it takes longer. For instance, if we are crossing town there can be a variation there from anywheres from a half hour to an hour; and, naturally, that makes quite a bit more cost to me, to my driver, by my drivers, and so forth, on top—and besides that, it eliminates the being able to take care of that many more calls because of the time involved in a day's period, without going into overtime and so forth. * * *

"It (the ordinance) is an inconvenience. I mean, it takes a lot longer. * * *

"*Q.* Well, then, I understand your principal complaint is that it is inconvenient because it takes more time?

"*A.* More time; naturally, it is more cost."

Defendants established the very important part the 23 miles of State trunk-line expressways within the city of Detroit played in the vast Michigan expressway system by proving that:

1. At the time the suit was heard there were 23.3 miles of expressway in the city of Detroit with an average of 476,123 vehicles daily load, and with an annual 806 million vehicle miles;

2. The designed capacity for these expressways was 1,500 vehicles per lane per hour, but during the 6 a.m. to 9 a.m. period and the 3 p.m. to 7 p.m. period, at times, traffic density increased to 2,144 vehicles per lane per hour;

3. During 1960 there were 2,793 expressway accidents, 1,390 of which occurred during 6 a.m. to 9 a.m. and 3 p.m. to 7 p.m. in contrast to the 1,403 occurring during the other 17 hours of the day;

4. 78% of the expressway accidents were rear-end collisions, in contrast to surface streets where rear-end collisions accounted for only 45% of the total accidents.

Mr. LeRoy, traffic control engineer in charge of the control division, which division superintends the operation and regulation of traffic, testified that he recommended the adoption of the ordinance because of the "very high density flow" during rush hours, when the moving of disabled vehicles, "particularly those visibly disabled," on the expressways created "gawking or rubbernecking on the part of other vehicles or other drivers * * * tended to slow up, resulting in congestion, rear-end accidents and things of that sort"; that he recommended a 24-hour prohibition be adopted at first, but, after conference with the Michigan Towing Association, it was changed to the present 7-hour restriction; that the restriction was "felt necessary under those conditions where the utmost attention to driving was required."

Mr. Polkinghorn, third deputy commissioner and director of traffic, testified:

"One of the big problems in police control, one of the big problems that we have is supervising the activity of drivers on the expressway, is to eliminate any type of distraction that might present itself there. * * *

"Our traffic has increased on the expressway about 30% so today we are practically 90% overloaded, I believe, as far as the volume is concerned.

"Then this, then, in the interest of public safety, part of the responsibility of my position with the city of Detroit, is to try to eliminate those things and those acts or those types of distracting activity in order to ensure the safer, expedient transportation.

"So, I say that this, at 25 to 30 miles an hour, and this at 50 to 55 miles an hour, or maybe even 40 miles an hour in rush hour, because we don't go as fast during rush hour because of the increased volumes, it is the opinion of the police department that the elimination of any distracting situation is part of our job and this is what we try to do in supporting the petition of the streets and traffic, and I think we were a joint petition in asking that the tow trucks not be allowed to drive through 24 hours a day.

"I stood at the common council, I requested a 24-hour prohibition of trucks going all the way through the city of Detroit, that is, starting from the westerly limits and going to the easterly limits, or any part thereof.

"Now, during that council session, represented, I believe, by you, sir, the towing industry representatives said that they would like to at least be able to haul at night and during the base period of the day. We made this concession over my objection. I still think they should be—and it is my opinion—they should be prohibited 24 hours a day, and I think that being prohibited from operation of this type during rush hours is a fair proposition, in our opinion."

Mr. Weimer, of the Detroit police department, testified that he is in charge of 34 patrolmen who patrol the expressways; that he also travels and patrols the expressways, and said:

"*Q.* And have you seen accidents occur on the highways?
"*A.* I have. * * *
"*Q.* What did you see the people, the drivers of vehicles in the other lane, doing?
"*A.* Look at the damaged vehicle that was on the shoulder and the police car or tow vehicle.
"*Q.* Then what happened?
"*A.* Several times it causes slow downs which resulted in several rear-end accidents in the opposite traffic.
"*Q.* In the opposite lanes?
"*A.* That's right."

Appellants state:

"In this State, the legislature by PA 1933, No 254, as amended (CL 1948 and CLS 1956, § 475.1, *et seq.*, as amended [Stat Ann and Stat Ann 1961 Cum Supp § 22.531 *et seq.*]) has conferred upon the Michigan public service commission the power and authority to 'restrict the use of highways by motor vehicles operated by motor carriers to those required by the convenience of the general public.'[1] The trial court came to the conclusion that by this act the State has pre-empted the field as to the use of highways by common carriers. In coming to this conclusion, the trial court drew an analogy between the case at bar and *Allen* v. *State Highway Commissioner,* 338 Mich 407. The *Allen Case* declared the right of the highway commissioner to prohibit parking on a State trunk-line highway. It is our position that the trial court erred in coming to this conclusion and entirely overlooked the decisions of the Court which specifically hold that a common

[1] See CL 1948, § 475.2, as amended by PA 1957, No 173 (Stat Ann 1961 Cum Supp § 22.532).—REPORTER.

carrier who holds a certificate of necessity from the public service commission is, nevertheless, subject to ordinances enacted by the municipalities in the exercise of their right of reasonable control of their streets."

We agree with appellants' statement and disagree with the trial court's statement that, "The ordinance is * * * invalid as being outside the power of the city to enact."

The unusual type of case presented in *Allen* v. *State Highway Commissioner,* 338 Mich 407, is stated at the outset of the opinion as follows (p 410):

"This suit involves a difference between the State authorities and the city government of East Lansing cooperating with owners of lands abutting on US-16, over the control of the trunk-line road through East Lansing, so far as concerns parking of vehicles along the north half of US 16 in East Lansing."

No such dispute arises in this present appeal. The State has not intervened nor made known any objection to the ordinance in question.

In the *Allen Case,* after a joint investigation of US-16 in the city of East Lansing, as provided by the statute, the highway commissioner and the commissioner of the Michigan State police signed and issued a no-parking order on certain parts of the State trunk line within East Lansing. This order conflicted with a city ordinance allowing 1-hour parking in front of the places of business of plaintiffs, and plaintiffs complained because their businesses suffered by reason of the termination of the 1-hour parking privilege.

Plaintiffs' bill to enjoin the State highway commissioner resulted in a decree for plaintiffs and, in reversing, we called attention to the State's evidence to the effect that the daily traffic of 14,000 vehicles called for a 4-lane highway, but because (p 415)

"we are trying to put 14,000 vehicles every day through a very meager 2 lanes," a hazardous condition existed, and to meet the congestion the no-parking order was necessary. We held:

"The reasonable control of streets reserved to cities under the Constitution does not give them exclusive control, preventing the State from assuming any control over State trunk-line highways running through cities.

"The 'reasonableness' of a city's control of its streets is not within the final determination of the city in all cases, but may be determined in accordance with the legislature's interpretation in some instances, provided such interpretation can be approved by the court." (Syllabi 2 and 3.)

The fact that present plaintiffs were common carriers and under the control of the public service commission did not make them immune from city legislation. We so held in *Highway Motorbus Co.* v. *City of Lansing,* 238 Mich 146, where the plaintiffs sought to enjoin the enforcement of an ordinance to license and regulate the operation of interurban and suburban motor buses within the limits of the city of Lansing. We also so held in *Red Star Motor Drivers' Ass'n.* v. *City of Detroit,* 244 Mich 480, where in sustaining a Detroit ordinance regulating jitneys doing an intrastate and interstate business, we said (p 497):

"It is said that this ordinance is in conflict with PA 1923, No 209,[2] and that it deprives the Michigan public utilities commission of jurisdiction over these common carriers, but in *Red Star Motor Drivers' Ass'n* v. *Michigan Public Utilities Commission,* 235 Mich 85 (PUR 1926 E, 411), this Court, at the suit of one of these plaintiffs, held that act not applicable to plaintiff, and in *Highway Motorbus Co.* v. *City of*

[2] Provisions of this act are now in the motor carrier act, cited *supra.*—REPORTER.

Lansing, 238 Mich 146, it was urged that the carriers were under the control of the commission, hence immune from city legislation. We sustained the constitutional right of the city to reasonable control of its streets and said (p 148):

" 'Such reasonable control may not be taken from them by the courts, by individuals, by administrative bodies or by the legislature itself.' "

In *Lincoln Park Coach Co.* v. *City of Detroit,* 295 Mich 189, we upheld a Detroit common council resolution fixing routes upon which plaintiff, an intercity bus company, could operate.

Appellants conclude their brief with the following:

"The defendants urge this Court to find that this ordinance is a valid exercise of the reasonable control of streets vested in the city by the Constitution and that this ordinance does not conflict with any State statute or that if it does conflict with the provisions of section 726[3] of the Michigan vehicle code, those parts of this section which would take all control of streets from the city are unconstitutional and void. We urge the Court to find that this is a regulation and not a prohibition and we urge the Court to find that these common carriers have no right in the streets or highways, but have only a privilege which may be prohibited or regulated.

"In view of the fact that there are at present 2 expressways within the city of Detroit and a third (Walter P. Chrysler) under construction and several other expressways in the planning stage, it is of vital importance that the city of Detroit be told the extent of their authority and power to regulate traffic on these expressways for the safety and convenience of the general public. The tremendous number of vehicles traveling at high rates of speed over expressways creates a peculiar and distinct traffic hazard within the city of Detroit. It is only to minimize the hazard and dangers to the traveling

[3] CLS 1956, § 257.726 (Stat Ann 1960 Rev § 9.7426).—REPORTER.

public that this ordinance was adopted. The city of Detroit is proud of its traffic safety record and has and intends to do, within its powers, all things necessary for the protection of human life and property."

Appellees join with appellants' request and state:

"In closing we respectfully join with the request of appellant city of Detroit as stated in the conclusion of its brief that because of the tremendous growth in the construction of expressways that it is of vital importance that the city of Detroit as well as the users of such expressways be told the extent of the authority of the city to regulate traffic on these expressways. We submit that in the interest of safety and in the interest of uniformity of traffic regulations that the Court will find, as did the trial court, that the ordinance in question is invalid."

The Constitution of 1908, art 8, § 28, establishes: "The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and township," and, also provides that: "No person, partnership, association or corporation * * * shall * * * transact a local business therein without first obtaining a franchise therefor from such city, village or township."

We have recognized the distinction between use of streets by public and common carriers and in *Melconian* v. *City of Grand Rapids,* 218 Mich 397, we held:

"The streets of a city belong to the public, and for ordinary use and general transportation and traffic they are free and common to all, and any control sought to be exercised over them by the city must be such as will not defeat or seriously interfere with their enjoyment, but common carriers have no right

to such use for private gain without the consent of the city.

"The distinction between the use of streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental, and while, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld." (Syllabi 1 and 2.)

In *City of Dearborn* v. *Sugden & Sivier, Inc.*, 343 Mich 257, we held:

"The legislature may not deprive a municipality of the right to reasonable control over its streets, *even State trunk lines within its limits,* and, to the extent that a statute does so, it is invalid. (Emphasis supplied.)

"City authorities may control, within reason, the use of their streets for any purposes whatsoever not inconsistent with the State law." (Syllabi 1 and 2.)

This Court has recognized, as far back as 1915 (*People* v. *McGraw,* 184 Mich 233, 238) that "the congested condition of traffic on many of the streets of the city of Detroit is a matter of common knowledge, and these conditions make it absolutely necessary, for the protection of pedestrians and the drivers of vehicles, to enact rules and regulations peculiarly adapted to the conditions there found, and to enact ordinances to diminish the danger, and *the words 'reasonable control' of section 28 give the power to meet such conditions.*" (Emphasis supplied.)

The present ordinance was recommended by the city officials chargeable with the duty "to diminish the danger" they concluded was caused by "gawking" and the distraction caused by the towing of disabled motor vehicles on the expressways. The ordinance

was passed by the common council after holding hearings, which plaintiffs attended.

No one challenges the ability or integrity of these officials. No one imputes to the mayor, the Detroit police department, or the common council, any improper motive or any other purpose than to reduce accidents upon the expressways.

We have said in the past (*Allen* v. *State Highway Commissioner, supra*) and we repeat in this opinion, that one claiming an ordinance is arbitrary, unreasonable, or discriminatory has the burden of so showing, and, also, that this Court will not ordinarily substitute its judgment for that of the city as to the control of the streets.

Plaintiffs have failed to meet the burden of proof. Plaintiffs can drive their tow trucks over the expressways 24 hours a day. All of the city streets, with the exception of the expressways, are available to plaintiffs during the "7 rush hours" when disabled cars cannot be towed on the expressways. Plaintiffs' proof that the ordinance caused "inconvenience" and additional cost of operation does not sustain their declaration that defendants discriminated against them and that the "ordinance unjustly, arbitrarily, and purposelessly hinders and prevents plaintiffs from engaging in a lawful and useful business."

After due study and survey defendants determined the ordinance was necessary as a traffic regulation for the safety and convenience of the general public. There is nothing in the record presented to this Court that would justify substituting our judgment for that of the city in this respect.

Plaintiffs' contention that a truck towing a disabled vehicle entering the city of Detroit from the west on the Edsel Ford expressway during the proscribed hours would be in violation of the ordinance, is without merit. A reasonable interpreta-

tion of the ordinance is that a person entering the city of Detroit on an expressway while towing a disabled vehicle be permitted to proceed to the first exit.

The exception provided in the ordinance reads:

"Except that any vehicle disabled on an expressway during such hours may be towed to the nearest exit ramp and thence to the surface streets."

This Court has held that where a legislative enactment is subject to differing interpretations, that which would result in the act being held constitutional should be followed. See *State Bar of Michigan* v. *City of Lansing,* 361 Mich 185.

We agree with appellants that a reasonable interpretation of this ordinance would permit vehicles entering the city of Detroit on the Edsel Ford expressway to proceed to the first exit (which presently is the Livernois exit) without being in violation of the ordinance.

The decree heretofore entered is set aside and plaintiffs' bill of complaint is dismissed. No costs, a public question being involved.

CARR, C. J., and DETHMERS, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred with KELLY, J.

KAVANAGH, J., concurred in result.

STARR *v.* LAPPLEY.

1. GIFTS—INTENT—BURDEN OF PROOF.
   Evidence presented in suit by 85-year-old plaintiff to set aside transfers of his interests in the estates of his 2 recently deceased bachelor brothers, together with a probate form of waiver of notice and consent, which he had given to a surviving brother and children of another deceased brother *held,* not to sustain burden of proof on plaintiff's contention that he did not intend or desire to give all of his interest in the estates to defendants but that he knew he was making such transfers and wanted and desired to do so.

2. SAME—INTENT—TIME.
   Whether or not a transferor of property intended to make a gift is determined as of the time the transfer was made rather than what he may have subsequently desired.

Appeal from Kent; Hoffius (Stuart), J. Submitted April 2, 1963. (Calendar No. 2, Docket No. 49,525.) Decided July 17, 1963.

Bill by John J. Lappley against Henry B. Lappley, Audley C. Lappley, and Beulah D. Frakes to set aside deed and bill of sale conveying interests in estates of his deceased brothers. Bill dismissed. Plaintiff appeals, with case continued in the name of John G. Starr, administrator of his estate. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Gifts § 115.
[2] 24 Am Jur, Gifts § 21.

Cornelius Wiarda, for plaintiff.

Thomas D. Anderson, Sr., for defendants.

KELLY, J. The bachelor brothers, William and Fred Lappley, were burned to death on March 29, 1958, at the farm where they lived.

They left no wills and their heirs were their brothers John (plaintiff) and Henry (defendant) and 2 children of their deceased brother George, defendants Audley C. Lappley and Beulah D. Frakes.

June 28, 1958, John Lappley (85 years old) executed 3 documents: (1) a quitclaim of all his interests in the real estate of his post-deceased brothers, granting 1/2 interest to his brother Henry and a 1/4 interest to each of the 2 children of his deceased brother George; (2) a bill of sale granting to defendants all his right, title and interest as heir-at-law of his 2 deceased brothers in the rest and residue of each of their estates; and (3) a probate form of waiver of notice and consent.

Administrators for the estates of William and Fred Lappley were discharged and vouchers filed on April 3, 1959.

In April, 1959, plaintiff instituted suit and on May 5, 1959, filed an amended bill of complaint seeking to cancel the deed and the bill of sale he had executed the previous June and, also, asked that the court decree the waiver he had signed be declared of no force and effect, alleging he had been defrauded by the defendants' misrepresentations that the estates were so small that after paying funeral expenses and claims there would be nothing left and that he signed the deed, receiving only $2 therefor, because of the fact he was informed such signature would save time, effort and expense, and that he

did not mean nor intend any gift of any part of his share in the estates.

Defendants answered denying fraud and alleging domination and control of John Lappley by a Mrs. Zuidema in whose home plaintiff had been living since he sold his farm in 1956, stating "that the claims of the plaintiff are in fact the claims of the person [Mrs. Zuidema] who has acquired other assets of the plaintiff."

Plaintiff filed an amended reply denying "that any other person is interested in this matter and denies that the claims of the plaintiff are in fact the claims of any other person."

At the conclusion of proofs the trial court denied plaintiff relief holding that plaintiff had failed to sustain the burden of proof.

In May, 1961, plaintiff was and had been for 2 years living in Florida, residing there with Mr. and Mrs. Zuidema. His deposition was taken at this time and place. This deposition, plus the documentary evidence of the register of deeds and the probate register, was the only evidence introduced to sustain plaintiff's burden of proof.

In this deposition plaintiff repeatedly, on direct examination, testified he did not read the documents before signing; that the documents were not read to him; that he didn't really understand what the papers were; that he did not know he was signing a deed, a bill of sale, or a waiver; that Mr. Armstrong gave him $2, saying Henry and Audley wanted him to sign the papers; that they said it would save them a lot of trips if he would sign the papers, and "would help them from driving down to my aunt's (at Grand Rapids)." His deposition further read:

"*Q.* Why would it be to your aunt?

"*A.* Well, I couldn't tell you. Because I made my home there, and she took care of me, and anything

—when I wanted to go in anywhere, she would come and take me, help me get papers out for the farm and stuff, so what could I do? I was there alone, homeless. I'll tell you it was many a day, boys, I cried, alone, I didn't know— * * *

"*Q.* Then, did you sign those papers?

"*A.* Yes. * * *

"*Q.* Did you know what those papers were?

"*A.* No.

"*Q.* Was there any talk about what the papers were?

"*A.* No. * * *

"*Q.* Aside from this talk that it would help them so they wouldn't have to go to Grand Rapids so often, was there anything else said about them?

"*A.* No.

"*Q.* You knew they related to your brothers', your dead brothers' estates, didn't you?

"*A.* Well, some thinks I did and some thinks I didn't. * * *

"*Q.* After you returned home from visiting Audley and Henry did you have occasion to talk about that with anybody?

"*A.* No.

"*Q.* Did you tell anybody about what you did?

"*A.* No, I didn't know anybody there. * * * They were all strangers to me. * * * The neighbors. * * * In town. * * *

"*Q.* You didn't talk to any neighbors about it?

"*A.* No.

"*Q.* But how about Henry and Jeannette?

"*A.* Well, we didn't talk about it much. We said we would wait and see what you was going to do. * * * Near as I could find out, I told them, I said to them, I says, go ahead, I am done; I can't do nothing more for you. You know what I mean? * * *

"*Q.* What were you thinking of or what did you mean by that?

"*A.* Well, I got so nervous, I told you I got so nervous, that I could fly almost some of these days;

so I told my aunt, I got to quit thinking about these things or one day I'll go crazy.

"*Q.* I see.

"*A.* But she kept worrying me to death.

"*Q.* So there was nothing done about going back to Henry or Audley or Beulah?

"*A.* No, not a thing."

The 3 defendants testified in their behalf and also called to the witness stand 6 other witnesses.

Defendant Audley Lappley (plaintiff's nephew) testified that he was residing in Florida, was a bachelor 51 years of age, and in June visited his uncle (defendant Henry B. Lappley) at his home, and while there his uncle decided he wanted to visit his brother John in Grand Rapids and that he drove with him to the Zuidemas' home in Grand Rapids where John was residing; that they did not intend to invite John to return with them, but in the course of the conversation the suggestion was made and John decided to return; that John remained at his brother Henry's home for a period of about 2 weeks, but that after he was there about 3 or 4 days, he (witness) said, "Well, Uncle John said that he wanted to sign off all rights of the property and personal property and real estate and if we had the papers, he would sign them all. * * * He said that he had all he wanted; that he had plenty to keep him, more than enough to keep him and that he didn't need it and he wanted it to go to us"; that after the attorney had prepared the papers and before going to Mr. Armstrong's farm to have the deed signed and notarized, his uncle John had him drive him to Silver Lake to visit John's friend, Mrs. Kerwin; that after John had introduced Mrs. Kerwin to his Uncle Henry and himself, he "told her he was going to sign off all the property rights," and "she said, 'Uncle John, do you know what you are doing? Is that what you want to do?' He said,

'Yes, that is what I want to do. I have all that I want and I have all I need' "; that he knew his deceased uncles owned their farms but did not know the extent of their estates, and he stated, "There is no reason he (John) shouldn't know and I am sure he did. The uncles were close together. They would know whether each other owned their own farm"; that it was Uncle John's idea that they go to the Armstrong farm because "Uncle John knew Armstrong. He had dealings with him in real estate and he knew the man and he wanted to go to him."

Mrs. Kerwin testified that John Lappley lived for 15 years across the road from her farm and that he stopped to visit on his way to Armstrong's farm and, after introducing her to his brother and nephew, he stated:

" 'They are taking me around for a ride. Isn't it nice? I am staying with them for a couple of weeks.'

"And I said, 'That is lovely, John. Where are you going?'

"He said, 'Oh, around to different places. I am on my way over to Mr. Armstrong now.' * * *

"And we talked on different subjects and he said, 'You heard about my brothers dying, didn't you?'

"And I said, 'Yes, and you have my sympathy, John.'

"He said, 'I want to go over and see Armstrong. I got some papers here that I want to talk about. It is something that I would like to make right. You know, I want to see that my brothers are taken care of.' "

It is evident from the trial court's opinion that he was impressed by the testimony of Mr. and Mrs. Armstrong and this Court shares his judgment in that regard. Mr. Armstrong had never met defendants Henry and Audley Lappley previous to the occasion when the deed was signed. Mr. Armstrong

testified that after talking about his brothers' deaths John said that "he was signing his estate over to his brother, nephew and niece. He asked me what I thought about it. I told him that I didn't figure it was any of my business and it was a family affair and I asked him what he thought about it and he said, 'Well, I figure I got money enough to take care of me.'" Further, that he read the deed over to John Lappley, word for word, and then asked him if he knew he was "'signing away all the share of your estate'" and he answered, "'Yes'"; that he wanted to keep it in his own family and "he said, 'I have got money enough to take care of me for the rest of my life.'" Mr. Armstrong testified that he also read over and explained to Mr. Lappley, word for word, the bill of sale and the probate court waiver.

Mrs. Armstrong corroborated her husband's testimony.

Defendant Beulah D. Frakes testified that the Saturday after her uncle signed the deed he visited her at the lake and informed her he had "'signed off the estate,'" and warned her "'Watch it, you may have trouble,'" and said, "'I will tell you, I got all I need to take care of me. I got at least $30,000 and that is all I need to take care of me.'"

Defendant Henry B. Lappley gave the following testimony concerning plaintiff's signing of his interest in the estates:

"*Q.* And then after he came to your house, it has been brought out here that you and Audley took him down to Mr. Armstrong's. Now, will you tell us what led up to the taking him down to Mr. Armstrong?

"*A.* Well, I was sitting on the back porch 1 morning and he came around and went around and looked at the roses and he said, 'Henry, I want to sign off.'

"I said, 'John, do you want to sign off?'

"He said, 'Yes, I do. I want to see that you and Beulah and Audley get that money.'

"He said that he would give Jeannette over $30,000 and he said that they ought to be able to take care of him for that.

"*Q.* Was anything said between you and he relative to the value of the 2 brothers' estates?

"*A.* He asked me what the farm was worth. I said, 'John, you sold your own farm and you know more about that than I do, what the farm is worth.' "

Floyd Demond was called as a witness for the defense. He testified he had known plaintiff for approximately 20 years and after plaintiff had sold his farm at Silver Lake he had a discussion with him in regard to the sale and said, "Well, he told me that he sold it for $18,000 and I said, 'Well, John, how are you going to invest this money?' And he said, 'Jeannette put it in the church and then I wouldn't have to pay taxes on it.' * * * I suppose she said to buy church bonds or anything." He further related a conversation he had with plaintiff in regard to business affairs just before plaintiff left to go back to Florida, at which time plaintiff said: " 'I have got all I need to take care of me the rest of my life as far as that is concerned. I signed off. I don't want to be bothered with it. I got enough to keep me all my life anyway. * * * I don't want it. I don't want to be bothered with it. The others need it worse than I do.' " And when asked who he meant by "the others" the witness answered, "His niece and nephew."

Floyd Demond's wife also testified that she had a conversation with plaintiff in regard to his deceased brothers' property between the time of the brothers' deaths and the time plaintiff left for Florida, and stated: "Well, he said that his brothers left some property and that he would sign it off, because he said it was too much and he didn't want to have

anything to do with it and he wanted to leave it in the family."

The main question presented for decision, both on the trial court level, and in this Court, is whether the record sustains plaintiff's contention as disclosed by the following question and answer:

"*Q.* Did you mean to give Audley and Beulah and Henry your dead brothers' estates?
"*A.* No."

Plaintiff's deposition in its entirety is far from satisfactory and his statement that he did not intend to give his shares to Audley, Beulah, and Henry stands on the record uncorroborated.

As against plaintiff's statement, we have the testimony of Mr. and Mrs. Armstrong, testimony that is clear and unequivocal, not contradicted and not explained in any way by appellant. Plaintiff selected Mr. Armstrong to witness and notarize the execution of the quitclaim deed, the bill of sale, and the waiver, and Armstrong had never even met defendants before they accompanied plaintiff to his farm. Mr. Armstrong read *every word* of the 3 instruments to plaintiff.

Add to the Armstrong testimony the unimpeached and unexplained testimony of the disinterested witnesses, plus the testimony of the 3 defendants, and this Court concludes that not only did plaintiff fail to sustain his contention that he did not intend or desire to give all of his interest in the estates to defendants, but, to the contrary, defendants established the fact that plaintiff knew he was making such a transfer and wanted and desired to do so.

Plaintiff testified that defendants informed him there would not be much of anything remaining in the estates after paying funeral bills and expenses, and appellant claims that this testimony, plus the fact defendants did not inform plaintiff as to the

extent of the personal estates, constituted misrepresentation and fraud entitling plaintiff to recover from defendants the sum of $27,075.26, with interest at 5% from and after April 3, 1959.

Defendant Beulah D. Frakes testified as follows:

"*Q.* Did you see John before he signed this deed and bill of sale that are exhibits here?

"*A.* No.

"*Q.* You didn't see him until afterward?

"*A.* I saw him afterwards, yes. He came over on a Saturday, the following Saturday. He came to the lake.

"*Q.* Did he say anything to you about it?

"*A.* Yes, he did. I had company that weekend, my husband's brother and family was there and we were sitting alone out on the porch and he says to me, he says, 'Beulah, I have signed off the estate. I understand they are going to appoint you as administratrix.'

"And he said, 'I signed off the estate, Beulah. Watch it, you may have trouble.'

"I don't know what he meant by that, but that is what he said and he asked me if I had any idea of the value of this estate and I says, 'Well, not exactly. You know what the farms are worth as much as I do.'

"I also said, 'We will have to have them appraised because I don't know what the value of the land is around there and we would have to have that done.'

"And I said, 'As far as stocks and bonds I am only estimating it, but I judged they were worth approximately $20,000 apiece, in stocks and bonds.'

"And he said, 'Well, they always was very conservative and never went any place.'

"He says, 'I will tell you, I got all I need to take care of me. I got at least $30,000 and that is all I need to take care of me.'

"*Q.* This conversation took place after he had signed the deed and the bill of sale?

"*A.* That's right.

"*Q.* You didn't talk to him at all about it before that?
"*A.* No.
"*Q.* Now, have you seen or visited with John Lappley since this suit was started?
"*A.* No."

Plaintiff did not claim in his deposition that he signed the papers because he was led to believe his brothers left estates barely sufficient to pay burial expenses, but, to the contrary, he testified that he did not know what he was doing or signing and did not intend to transfer at any time any part of his rights to defendants.

The record does not disclose that plaintiff was concerned with the extent or size of his brothers' estates. The record justifies a conclusion that plaintiff, who was the oldest of the brothers and 85 years of age at the time of execution of the instruments, felt that he had all the money he needed for the rest of his life and desired that his share in the estates go to his brother and the 2 children of his deceased brother, and that he was not misled by the failure of his brother or nephew to advise him as to the personal estates of his deceased brothers.

The record discloses that at the time plaintiff signed the deed, the bill of sale and waiver, he appeared in full control of his faculties and witness Armstrong was questioned in this regard as follows:

"*Q.* Now, wasn't John nervous?
"*A.* I didn't think he acted very nervous to me.
"*Q.* Wasn't he upset?
"*A.* I wouldn't think he was."

An examination of the deposition taken 3 years later, when plaintiff was 88 years old, discloses that these 3 years had taken their toll, resulting in a deposition that justified the trial court to state in his opinion that:

"At the time he did it is the time that we have to look at it—not what does he want today, but what did he want on that day and what was his intent. * * * I am of the opinion that the plaintiff has not carried the burden in order to set aside a deed, the bill of sale, the waiver of notice and consent which was executed."

Affirmed. Costs to appellees.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

DRAPER *v.* SWITOUS.

1. NEGLIGENCE—LANDOWNERS—LICENSEES.

A landowner is bound to use ordinary care to prevent injury, arising from active negligence, to a licensee of whose presence he is aware or, in the exercise of ordinary care, he should be aware.

2. SAME—LANDOWNER'S DUTY TO LICENSEES.

Members of the public who go across a landowner's premises on a commonly-traveled way or with his knowledge and acquiescence are not trespassers, but licensees and the landowner has a greater duty of care than he would to licensees or trespassers generally.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 38 Am Jur, Negligence §§ 104–108.
[3] 38 Am Jur, Negligence §§ 168, 348, 372.
[4] 15 Am Jur, Damages §§ 214–216, 234.
Excessiveness of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950). 16 ALR2d 3.
Adequacy of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950). 16 ALR2d 393.
[5] 15 Am Jur, Damages §§ 205, 231.

3. SAME—ICE-COVERED PREMISES—CONTRIBUTORY NEGLIGENCE—NONJURY CASE—EVIDENCE.

Trial court's finding in nonjury case that pedestrian whose path on sidewalk was blocked by car waiting to be serviced at defendant's service station and car wash and who fell on ice which had accumulated on 3" slope from sidewalk to entrance of car wash was not guilty of contributory negligence in proceeding over defendant's property rather than around street end of car and that defendant was guilty of active negligence in creating the condition of thick ice near the opening of his wash rack, *held,* justified by record made in pedestrian's action for injuries sustained in fall on ice.

4. DAMAGES—ARM INJURY—PAIN AND SUFFERING.

Judgment for $1,250 to plaintiff in nonjury action for injuries to arm sustained in fall on ice on defendant's premises *held,* not grossly inadequate, where out-of-pocket losses were $849.63, and $400.37 was allowed for pain and suffering.

5. SAME—ADEQUACY OF AWARD.

The Supreme Court does not reverse the trier of fact as to the amount a plaintiff is permitted to recover where the amount is determined, as a matter of law, not to be inadequate.

Appeal from Superior Court of Grand Rapids; Vander Ploeg (Claude), J. Submitted April 4, 1963. (Calendar No. 33, Docket No. 49,463.) Decided July 17, 1963.

Case by Edith Draper against Anthony Switous for personal injuries sustained in fall on ice on defendant's premises. Judgment for plaintiff. Defendant appeals. Plaintiff cross-appeals claiming judgment inadequate. Affirmed.

White, Smitter & Zimmerman, for plaintiff.

Mitts, Smith & Haughey (*A. B. Smith, Jr.,* of counsel), for defendant.

KELLY, J. Plaintiff instituted suit in the superior court of Grand Rapids to recover damages for per-

sonal injuries sustained as a result of a fall on defendant's service station driveway.

About 6:45 a.m., January 9, 1959, plaintiff, Edith Draper, was walking to her place of employment at the Grand Rapids St. Mary's Hospital, in the company of 2 friends, when the accident occurred.

Defendant owns and operates a service station and car wash, located at the southwest corner of the intersection of Pleasant street and Division avenue, in Grand Rapids. The driveway which leads to the car wash faces Pleasant street and slopes upward from the sidewalk to the entrance, which is elevated approximately 3 inches over the level of the walk.

Plaintiff and her companions approached the service station and observed the operating lights of the station, indicating the service station was open. An automobile was parked across and blocked the sidewalk in front of the car wash. Plaintiff was on defendant's property and attempting to go around the front of the car that blocked the walk when she fell on a patch of ice approximately 2–1/2 to 6 inches thick, thereby injuring her arm.

Defendant testified he was unaware of plaintiff's presence on or near his property; that he knew nothing about the accident until later that evening; that he did not see an automobile parked across the sidewalk, and denied seeing ice on the entrance walk at any time on the day of the accident. On cross-examination defendant admitted that pedestrians have used his property as a short cut for years and, also, admitted that from past experience cars waiting to be washed parked across the sidewalk creating a condition that required the public to either walk on his property or in the street to pass.

The case was tried before the court without a jury and at the conclusion of proofs the trial court entered judgment for plaintiff in the amount of $1,250.

After an owner of land is aware of the presence of a trespasser or licensee, or, in the exercise of ordinary care, he should have known of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence. *Morrison* v. *Carpenter,* 179 Mich 207 (Ann Cas 1915D, 319); *Schmidt* v. *Michigan Coal & Mining Co.,* 159 Mich 308.

Members of the public in going across defendant's premises with defendant's knowledge and acquiescence were not trespassers, but licensees. See *Morrison* v. *Carpenter, supra.*

In *Polston* v. *S. S. Kresge Co.,* 324 Mich 575, we held that members of the public in using a 10-foot strip as a public sidewalk in front of defendant's leased premises, with the land possessor's knowledge, were not trespassers but licensees, and further stated (pp 580, 581):

"An examination of *Morrison* v. *Carpenter, supra; Habina* v. *Twin City General Electric Co.,* 150 Mich 41 (13 LRA NS 1126); *Douglas* v. *Bergland,* 216 Mich 380 (20 ALR 197); and *Hargreaves* v. *Deacon,* 25 Mich 1, *supra,* discloses that in considering the duty owed by the owner of premises to licensees, let alone trespassers, 'a different rule applies to the license to use a way or path which has been openly and notoriously held out to the public for use from a license to go upon premises generally' (*Douglas* v. *Bergland, supra*). *A logical basis for distinction is that a greater duty should rest upon the owner of premises to anticipate and look out for the presence of licensees on a commonly-travelled way or path than of licensees or trespassers on the premises generally.*" (Emphasis supplied.)

The record sustains the trial court's finding that:

"The defendant was guilty of active negligence in creating the condition of thick ice near the opening of his wash rack. I find that a reasonable explana-

tion for the existence of this patch of thick ice was that water flowed out of defendant's wash rack and froze on the ground near the entrance to the rack. The court also finds that the defendant, in opening and closing the wash rack door, would let the heat from the inside of his building outside, and this would probably melt any accumulations of snow around the edges of the door to the wash rack, which snow and water would freeze overnight, thus causing the thick patch of ice on which plaintiff fell. The plaintiff's sister testified that later in the day in question, she went to the defendant and explained the accident. That defendant then went to a nearby building, and got salt; and put it on the ice patch.

"The court finds that plaintiff was not guilty of contributory negligence in that she walked the way that looked the safest to her at the time, and she acted as a reasonably prudent person would in walking around the front end of the parked car."

Plaintiff has filed a cross-appeal contending the judgment was grossly inadequate. The trial judge found plaintiff's out-of-pocket losses amounted to $849.63. The court entered judgment for $1,250, including $400.37 for pain and suffering. While it appears that plaintiff has some limitation in movement of her arm as a result of the fracture she sustained, we cannot say, after a complete review of the record, that the amount of the judgment was unfair or that it would shock the judicial conscience. We do not reverse the trier of fact as to the amount permitted plaintiff to recover since we decide, as a matter of law, such amount is not inadequate. See *Teller* v. *George,* 361 Mich 118, and cases cited therein.

The judgment of the trial court is affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

FREED v. SIMON.

1. NEGLIGENCE—EVIDENCE OF PRIOR ACCIDENTS.

Evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, is held to the duty of exercising such care as would a reasonably prudent person having such notice or knowledge.

2. SAME—REJECTION OF EVIDENCE OF PRIOR ACCIDENT—OWNER'S KNOWLEDGE OF DEFECTIVE CATTLE TRAILER.

The rejection of testimony of witnesses of prior fall of another party through the same hole in the floor of a cattle trailer as plaintiff fell through and received injuries for which he sought recovery *held,* reversible error, where there is evidence that the hole was covered by the owner but that the covering lasted only a short time.

Appeal from Gratiot; Cash (Paul R.), J. Submitted April 2, 1963. (Calendar No. 8, Docket No. 49,778.) Decided July 17, 1963.

Case by Kenneth Freed against Leo Simon, doing business as Alma Iron and Metal Company, for personal injuries sustained in fall through defective floor of trailer. Verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 38 Am Jur, Negligence §§ 313, 314.

Mitts, Smith & Haughey (*Sherman H. Cone,* of counsel), for plaintiff.

Cartwright, Walker & Stenglein (*Harvey D. Walker,* of counsel), for defendant.

PER CURIAM. Plaintiff-appellant's stated question No. 1 has been duly accepted by defendant-appellee. See section 1 of former Court Rule No 68 (1945), now GCR 1963, 814.1. Our decision is that such stated question should be answered in the affirmative and that the appealed judgment for defendant-appellee must be reversed for prejudicial rejection of admissible testimony.

The question sufficiently indicates the nature of the case, plaintiff's proffer of rejected testimony, and the trial judge's ruling thereon. It reads:

"In an action to recover damages for injuries received as a result of a fall through a hole in a trailer floor, is evidence of a prior fall by another party through the same hole and evidence of the prior condition of the floor admissible to prove the existence and nature of the hole, knowledge on the part of the owner, and negligence, where there is evidence that the hole was covered by the owner, but that the covering lasted only a short period of time?"

We need only add these facts: The hole as alleged was in the floor of a "converted cattle trailer." The trailer was furnished by defendant for use by plaintiff's employer and the latter's employees. The case factually is therefore much akin to *Erickson* v. *Soyars,* 356 Mich 64.

That our pertinent decisions once were in conflict is a fact of judicial history. That the Court ultimately came to grips with the situation appears from due examination of *Branch* v. *Klatt,* 173 Mich 31, 34, 35, and *Sullivan* v. *Detroit & W. Ferry Co.,* 255

Mich 575, 578, 579. We accept these cases as settling the question and reaffirm the holding thereof, that "evidence of prior accidents has always been admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident," and that "the rule now seems to be established that evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, is held to a higher degree of care by reason of his notice of such dangerous condition than he otherwise would be."* See citation of the *Branch* and *Sullivan Cases* in support of the annotator's conclusion (70 ALR2d 167, 172, 174, annotating the "Admissibility, on issue of defendant's negligence in respect of condition of place where plaintiff was injured, of evidence of prior accidents or injuries at same place"):

"Subject to the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues, the courts have generally recognized that evidence of the occurrence of a prior similar accident at the same place as the accident in suit has some tendency to establish a dangerous or defective condition at the place in ques-

* In view of recent criticism of expressions as in the final quoted phrase (see *Frederick* v. *City of Detroit*, 370 Mich 425), we amend the quotation so that it read as follows:

"The rule now seems to be established that evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, *is held to the duty of exercising such care as would a reasonably prudent person having such notice or knowledge.*"

tion and may be admitted for this purpose, in actions where the dangerous condition of the place in question is at issue."

Under the foregoing rule the rejected testimony of witnesses Martinez, Morgan, George Nisonger, and Robert Nisonger should have been formally received in evidence and left to jury consideration. Rejection thereof constituted reversible error. The judgment of the circuit court is therefore reversed and the case is remanded for new trial. Costs to plaintiff.

KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

CARR, C. J., and DETHMERS, J., concurred in result.

CRUZ *v.* CITY OF SAGINAW.

1. EVIDENCE—OPINION TESTIMONY.

The opinion testimony of witness, who had had 7 years of experience in constructing and repairing asphalt pavements, that hole in pavement at crosswalk on defendant city's street near a city's parking lot had existed from 3 to 6 months, where it was testified to by others as having been 3" deep and about 36" in circumference *held,* admissible for such persuasive worth as might be given it by the trial court as trier of the facts, as it did constitute some proof that the city should, in the exercise of ordinary care, have discovered and remedied the defect prior to the occasion of plaintiff's injury (CLS 1956, § 242.1).

2. HIGHWAYS AND STREETS—DURATION OF DEFECT—QUESTION OF FACT.

Generally, the question whether a street defect, otherwise actionable against the municipality, has existed a sufficient length

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REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur, Evidence § 763 *et seq.*
[2, 3] 25 Am Jur, Highways § 589.

of time and under such circumstances that the municipality is deemed to have had notice is a question of fact, and not a question of law (CLS 1956, § 242.1).

3. SAME—DEFECT IN STREET—PROXIMATE CAUSE—EVIDENCE.

Evidence presented in plaintiff's nonjury action against city for injuries alleged to have been received by reason of hole in pavement of city street at crosswalk near city's parking lot *held*, sufficient to support determination of trial court for plaintiff on issue of prior notice of the existence of the hole as one of fact and that plaintiff's injuries were due thereto and not to other causes as claimed by defendant (CLS 1956, § 242.1).

Appeal from Saginaw; O'Neill (James E.), J. Submitted May 7, 1963. (Calendar No. 40, Docket No. 49,623.) Decided July 17, 1963.

Case by Guillermo Cruz against the City of Saginaw for personal injuries sustained in fall caused by defective street pavement. Judgment for plaintiff. Defendant appeals. Affirmed.

John W. Piggott and *Lyle M. McCormick* (*Peter F. Cicinelli* and *Eugene D. Mossner,* of counsel), for plaintiff.

W. Vincent Nash, City Attorney (*Kerr & Stroebel,* of counsel), for defendant.

PER CURIAM. Plaintiff sued the defendant city for injuries sustained November 7, 1959, when he allegedly tripped and fell upon encountering a hole in the asphalt pavement of 1 of the city streets, opposite 1 of the city's parking lots, at a regular pedestrian crossing. The case was tried to the court. At close of plaintiff's proofs defendant moved for judgment in its favor alleging:

1. Defendant did not have notice, either actual or constructive, of the existence of the alleged defect.

2. The notice of claim, required prior to suit, did not, although timely given, describe sufficiently the alleged defect.

3. The aforesaid notice of claim gave the location of the alleged defect as "Jane" street when, in fact, no such street existed. ("Janes" street was the correct name.)

The motion was denied. Judgment ultimately entered for plaintiff. The city has appealed.

Aside from appellant's contention that the circuit court's judgment is contrary to the clear weight of the proof, the principal question raised is that the trial court erred in permitting expert witness Lile Barnes, who testified to some 7 years' experience in constructing and repairing asphalt pavements, to answer the following hypothetical question:

"Assuming, Mr. Barnes, that the testimony in this case has shown that on November 7, 1959, a hole existed in an asphalt street, which was approximately 36 inches in circumference, or as 1 of the witnesses has described it, about the size of this book, generally speaking, referring to 64 American Law Reports, 2d, which we described yesterday, and the hole has also been described by other witnesses as being about 14 inches long and approximately 3 inches in depth, 1 of the witnesses describing it as to depth as being about the size from the top of the back of one's shoe to the bottom of the heel, and assuming that this hole, as has been described by the witnesses, is approximately in the middle of the right-hand lane of this street, and that this asphalt pavement, we are talking about, had a solid brick base beneath it, and further assuming that this hole, as has been described, was of the same condition, the same size and depth 2 days after November 7, 1959, and assuming that it was the same, in the same condition 2 weeks after November 7, 1959, and further assuming that this hole was in the same condition 7 weeks after November 7, 1959, do you have an opinion, based on

your experience in the asphalt business, as to how long a defect, such as I have described to you here, may have existed in this asphalt pavement prior to November 7, 1959?

The answer of the witness, received over objection, was:

"*A.* Well, it could probably have started a long time ago, you see, because that's the way they do.
"*Q.* When you say 'a long time ago,' what do you mean by that?
"*A.* Well, maybe 6 months, maybe 3 months, something like that."

It is conceded that the witness had never examined the alleged hole or defect. It is conceded on the other hand that the facts incorporated in the hypothetical question had been testified to previously by fact witnesses. Finally, the record shows no proof that the defendant city had actual or constructive notice of the alleged hole or defect, prior to plaintiff's injury, excepting as may be inferred from the foregoing answer of witness Barnes, and excepting as may have been inferable from the size of the hole and its adjacency to the city parking lot, where city employees were shown as having been on duty at certain times.

With respect to the admissibility of witness Barnes' quoted answer, the closest precedent cited or found seems to be *Hyman* v. *Great Atlantic & Pacific Tea Co.*, 359 Mo 1097 (225 SW2d 734). There the same issue, actual or constructive knowledge by defendant of a defect in the tiled floor of its store, was tried to judgment. Plaintiff submitted the testimony of an architect, one Jones. Mr. Jones, having testified to his qualifications and to having examined the tile flooring some "11 months after the casualty" gave as his opinion that the defective condition "had existed for 2 years or more." The defendant, appeal-

ing, insisted that Jones' opinion was founded on mere assumption or surmise, and urged the admission thereof as reversible error. The court answered thus (pp 1101, 1102):

"But we think the witness Jones showed he had sufficient experience and acquaintance with the phenomena involved to testify as an expert. 20 Am Jur, Evidence, § 783, p 656. And while he conceded he needed 'leeway' in stating how long the condition of disintegration he found had existed, that did not mean his opinion was valueless. He was experienced and stated his belief after physical inspection as to the causes of it—insufficient cement in the mortar and lack of expansion strips, the first of which undoubtedly would make the condition permanent. And he estimated all of it had existed for a minimum of a year to a maximum of two years and a half. This was not a mere guess. What doctor can state with certainty how long some certain illnesses of a patient will continue and how they will eventuate? And what lawyer can do the same with respect to a lawsuit? It must be remembered also that the respondent's husband testified he made an examination of the vestibule about a week after the casualty and even then found 5 or 6 patches of tile missing at the edge of the floor. We think Jones qualified as an expert, and that his opinion was not based on speculation and conjecture."

We accept such reasoning with observation that the opinion given by Mr. Barnes, like the opinion given by the architect in the Missouri Case, was admissible only for such persuasive worth as might be given it by the trier of facts, and that it did constitute some proof that the defendant city should, in the exercise of ordinary care, have discovered and remedied the defect prior to the occasion of plaintiff's injury.*

* See CLS 1956, § 242.1 (Stat Ann 1958 Rev § 9.591).—REPORTER.

Generally, the question whether a street defect, otherwise actionable against the municipality, "has existed a sufficient length of time and under such circumstances that the municipality is deemed to have had notice is a question of fact, and not a question of law." *Hendershott* v. *City of Grand Rapids,* 142 Mich 140, 143; followed in *Torma* v. *Montgomery Ward & Co.,* 336 Mich 468, 487. The opinion of witness Barnes, the size and nature of the hole in the pavement, the proximity thereof to the municipal parking lot and city employees occasionally working there, call fairly for conclusion that the issue of prior notice of the existence of the hole was—under *Hendershott's* stated rule—one of fact and that the trial judge had a right to determine it as he did. Such conclusion finds support in *Goldsmith* v. *Cody,* 351 Mich 380, citing to the point *Siegel* v. *Detroit City Ice & Fuel Co.,* 324 Mich 205, and *Yarington* v. *Huck,* 218 Mich 100; also in *Hulett* v. *Great A. & P. Tea Co.,* 299 Mich 59.

The question of clear weight of the proof has been examined with care. For appellant it is urged that overwhelming proof establishes incredibility of plaintiff's testimony; that such proof establishes conclusively that plaintiff's concededly serious injury was sustained in personal altercation outside a nearby auditorium, and that plaintiff was actually "kicked" violently by an assailant. We can only say that the trial judge heard the proof and was best able to judge the presented issue of credibility, and that we are not persuaded of reversible error in such regard.

Affirmed. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

GLASS *v.* STATE HIGHWAY COMMISSIONER.

1. CONSTITUTIONAL LAW—DUE PROCESS—EMINENT DOMAIN—HEARING ON NECESSITY—HIGHWAY DEPARTMENT EMPLOYEE—INTERESTED PARTY.

   Refusal of employee of State highway commissioner to disqualify himself from conducting hearing on necessity for the taking of property for State highway purposes operated to deprive property owners of due process, since such employee was an interested person to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, and the situation required the calling in of a circuit court commissioner (US Const, Am 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CL 1948, §§ 213.174, 213.174a).

2. SAME—DUE PROCESS—FAIR TRIAL.

   A fair trial in a fair tribunal is a basic requirement of due process (US Const, Am 14; Mich Const 1908, art 2, § 16).

3. COSTS—EMINENT DOMAIN—HEARING ON NECESSITY—DISQUALIFIED EMPLOYEE.

   No costs are allowed on appeal by property owners in proceeding to condemn their land for State highway purposes, where employee of State highway commissioner declined to disqualify himself from conducting hearing on necessity notwithstanding his interest in the outcome of the case (US Const, Am 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CL 1948, §§ 213.174, 213.174a).

Appeal from Wayne; Kaufman (Nathan J.), J. Submitted June 4, 1963. (Calendar No. 8, Docket No. 50,090.) Decided July 17, 1963.

Certiorari by William Glass and Josephine Glass against John C. Mackie, State Highway Commis-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Eminent Domain §§ 331, 334.
[2] 12 Am Jur, Constitutional Law § 567 *et seq.*
[3] 18 Am Jur, Eminent Domain §§ 378, 379.

sioner, to review determination of necessity for taking property for highway purposes. On motion writ quashed. Plaintiffs appeal. Reversed and remanded.

Robert E. Childs, for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Louis J. Caruso* and *John M. Roche,* Assistant Attorneys General, for defendant.

BLACK, J. Two presently effective and unamended sections of the Constitution of 1908, and 2 sections of PA 1925, No 352, as amended, are brought to scrutiny upon invocation of the constitutionally guaranteed right of due process. Copied below, the 4 will introduce the ensuing opinion.

"Sec. 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." Const 1908, art 13, § 1.

"Sec. 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than 3 commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties." Const 1908, art 13, § 2.

"Sec. 4. Whenever the board or commissioner shall be unable to agree with any person interested

in any such property for the purchase thereof, or whenever such person shall be unknown or a non-resident of the county, or a minor or an insane or incompetent person, the board or commissioner may make a written determination of the necessity of the particular highway construction, improvement, landscaping or maintenance project for which such property is desired, the necessity for taking the particular property described, and the damages which, in the opinion of the board or the commissioner, should be paid as compensation for the taking of each parcel of such property. Such determination shall also describe the property desired and shall give the name of each person interested therein, so far as known to the commissioner or commissioners making the determination. The declaration of the board or commissioner that he or it has made a good faith effort and has been unable to agree with the owner, or owners, for the purchase of such property and his or its determination of the necessity of the project and of taking the particular property described therefor, if received in evidence at the necessity hearing provided in this section, shall not thereafter be questioned: Provided, That no such determination shall be made except after a hearing, of which written notice shall be given of the time and place for such hearing to all persons interested so far as known in the property desired, at least 7 days before the time of hearing, such notice to be served as hereinafter provided in section 29 of this act. CL 1948, § 213.174 (Stat Ann 1958 Rev § 8.174).*

"Sec. 4a. In the event the board or commissioner shall for any reason be disqualified to hear and determine the matter of necessity, as provided in this act, such matter of necessity only shall be heard by a circuit court commissioner of the county in which the property sought to be condemned is located

* This section 4 was amended, in presently immaterial respect, by PA 1962, No 22.

or by a circuit court commissioner acting in such county, as provided by law, and in case any disqualification shall be alleged against any board or commissioner before or during such hearing on necessity, such board or commissioner if they deem such allegation well-founded, may call upon a circuit court commissioner, qualified as hereinbefore provided, to hear the matter and make the determination herein prescribed, and on the day set for hearing a continuance for such purpose to a day certain, may be had if necessary. Upon the day fixed by the notice or the day certain set by such continuance, or upon such other date as said matter may be continued to, such circuit court commissioner shall hear the issue of necessity involved. Any determination on the matter of necessity made hereunder by a circuit court commissioner shall have the same force and effect and shall be filed with and acted upon by the board or commissioner in the same manner and be subject to all the provisions of this act, as are determinations made by such board or commissioner." CL 1948, § 213.174a (Stat Ann 1958 Rev § 8.175).

Promptly upon institution of this proceeding the appellant landowners demanded that Special Deputy Highway Commissioner Hart disqualify himself, as an interested "person," from hearing and determining the necessity of taking their property for highway purposes. Such demand was planted, of course, upon the right to due process as guaranteed by like provisions of the Federal and State Constitutions. See Const 1908, art 2, § 16, and United States Constitution, Am 4. The demand was overruled.

It is agreed that, "at the time of the necessity hearing, Mr. Hart was an employee of the State highway department in charge of the condemnation and closing section of the State highway department, having the title of, 'Chief, Condemnation Closing'."

The hearing proceeded. Special Deputy Hart recommended a finding of necessity, whereupon a

determination was made by the State highway commissioner that necessity for the taking of appellants' property for highway purposes had been shown. Appellants thereupon sued out circuit court certiorari to review the constitutional question posed by their demand. The writ was quashed below on motion of the attorney general. Appellants are here on application and grant of leave. The reviewable question is posed by stipulation of the parties:

"Does due process require that an employee on the payroll of the State highway department disqualify himself from conducting and presiding at the hearing on necessity when such action is requested prior to the hearing by counsel for the land owners?"

What was written in *Lookholder* v. *State Highway Commissioner,* 354 Mich 28—at 32 and 33—has foreshadowed an affirmative answer. Mr. Hart was an interested "person"; interested to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, a part of which planning was the taking of appellants' property. The case presents another instance of that which Alexander Hamilton had in mind when he wrote the quotation found in *O'Donoghue* v. *United States,* 289 US 516 at 531 (53 S Ct 740, 77 L ed 1356):

"In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"*

Upon such premise it is ruled that Mr. Hart's refusal to disqualify himself operated to deprive appellants of the process that was due them. Decision is controlled by *Tumey* v. *Ohio,* 273 US 510 (47 S Ct 437, 71 L ed 749, 50 ALR 1243), and *In re Murchison,* 349 US 133 (75 S Ct 623, 99 L ed 942),

* The italics are in the original Federalist papers. *O'Donoghue* at 531.

followed in *Lookholder, supra.* The supreme court said, in *Murchison* (at 136):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 US 510, 532, 47 S Ct 437, 71 L ed 749, 758, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 US 11, 14, 75 S Ct 11, 99 L ed 11."

Such reasoning applies equally to Michigan's assurance of due process. The right is no less forceful when a man's property rather than his liberty is threatened. Our judgment, then, is that Mr. Hart had "an interest in the outcome" of this proceeding. That was sufficient on timely demand to call for his disqualification as a presiding and deciding commissioner, and for the calling in of a circuit court commissioner under foregoing section 4a. Indeed, section 4a provides a ready means for avoidance even of the "appearance" of injustice. *Offutt* and *Murchison* make such avoidance both judicially and constitutionally desirable.

Reversed and remanded for entry of order upholding appellants' demand for disqualification. No costs.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

JAIKINS *v.* JAIKINS.

1. DIVORCE—SUPREME COURT—DE NOVO HEARING.
   A divorce case is an equity case that is heard *de novo* and while the Supreme Court gives due consideration to the findings of the trial judge, it is the duty of the Supreme Court to weigh the evidence and reach an independent conclusion.

2. SAME—EXTREME CRUELTY.
   A divorce may be granted on the ground of extreme cruelty but the grievances whether they be physical or mental must be of a sufficiently aggravated nature to justify a decree (CL 1948, §§ 552.7, 552.8).

3. SAME—EXTREME CRUELTY—COMPARATIVE GUILT.
   Divorce on the ground of extreme cruelty is awarded plaintiff husband notwithstanding he may not have been blameless, where in applying the rule of compared fault his comparative guilt is outweighed by that of the wife (CL 1948, §§ 552.7, 552.8).

4. SAME—EXTREME CRUELTY—MENTAL IRRESPONSIBILITY.
   Mental irresponsibility is not a defense to suit for divorce on the ground of extreme cruelty if the defendant wife was capable of comprehending and understanding the wrong she was committing (CL 1948, §§ 552.7, 552.8).

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 868.
[2–5] 17 Am Jur, Divorce and Separation § 189.
[6] 17A Am Jur, Divorce and Separation § 810 *et seq.*
[7] 17 Am Jur, Divorce and Separation §§ 629–652.

5. SAME—EXTREME CRUELTY—CRUELTY TO CHILDREN.
The failure of parental due care of children coupled with some proof of mistreatment of them is evidence of statutory extreme cruelty justifying decree of divorce (CL 1948, §§ 552.7, 552.8).

6. SAME—CUSTODY OF CHILDREN—VISITATION—ADDITIONAL JUDGES.
Cause is remanded to circuit court for determination by trial judge who is authorized to request other judges of same circuit to sit with him when determining matters of custody of children and visitation rights of defendant mother, where Supreme Court granted husband divorce on ground of extreme cruelty.

7. SAME—COSTS.
Costs and fees on appeal are left to trial judge, where Supreme Court has granted decree of divorce to plaintiff husband on ground of extreme cruelty and cause is remanded to circuit court for determination of custody and mother's right of visitation.

Appeal from Oakland; Beer (William John), J. Submitted June 5, 1963. (Calendar No. 18, Docket No. 49,764.) Decided June 13, 1963. Opinion filed July 17, 1963.

Bill by James W. Jaikins, Jr., against Marian E. Jaikins for divorce on ground of extreme and repeated cruelty. Cross-bill asking similar relief. Divorce denied to either party, with decree providing for custody and visitation of children pending further proceedings. Plaintiff appeals. Defendant cross-appeals.

Reversed and remanded for entry of decree of divorce to plaintiff and for further proceedings in respect to custody and welfare of children.

Forsythe & Beasley (*William R. Beasley,* of counsel), for plaintiff.

David C. Pence, for defendant.

PER CURIAM. Of the bitter and irreconcilable testimony given in this tragic divorce case, the least set forth in our reports the better for the minor children of the parties, particularly when they have grown to read and comprehend. Their interests surely are primary.

At conclusion of a grimly contested 9-day hearing the trial judge denied a divorce to both parties on bill and cross-bill. Both appeal. Each insists that he or she should have a decree as prayed. The trial judge filed no findings of fact with respect to the issues presented by bill and cross-bill and contented himself with summary ruling set forth in the appendix hereof. Thus, hearing the case to arrive at the required "independent conclusion,"[1] we are left to weigh credibility and find facts as best an appellate court can from comparatively lifeless printed words.

Urgent questions of child custody and visitation being foremost in the order of judicial concern, and this Court having decided after extended conference that a cause for divorce had been made out by the plaintiff husband, the following order was issued under date of June 13, 1963:

"Ordered that the decree entered in this cause on March 5, 1962, insofar as same adjudges denial of a divorce to plaintiff according to the prayer of his bill, be and the same is hereby reversed.

"Ordered further that this cause be and is remanded to the Oakland county circuit court for entry of a decree granting plaintiff an absolute divorce, and for further proceedings consistent with this order and such new decree, including prompt hearing

[1] "This being an equity case we hear it *de novo*. *Bankers Trust Company* v. *Bradfield*, 324 Mich 116. While we give due consideration to the findings of the trial judge, nonetheless it is our duty to weigh the evidence and reach an independent conclusion. *Hawthorne* v. *Dunn*, 210 Mich 176, 179." (*Hitchman* v. *Township of Oakland*, 329 Mich 331, 335, 336; followed in *Prudential Ins. Co.* v. *Cusick*, 369 Mich 269, 284.)

of all pending issues pertaining to custody and welfare of the minor children.

"Aside from providing for a decree of divorce as directed above, the prime purpose of this order is that of restoring to the circuit court immediate jurisdiction over all unsettled matters including such as have been presented by pleadings filed since the original record was certified to this Court.

"The final 2 sentences of the opinion of *Vial* v. *Vial,* 369 Mich 534, 538, are repeated and adopted for application to this case on remand. The Court's opinion on review, now in the course of preparation, is due for release on the date of the Court's next conference."

The first question, decided as above by our order of June 13th, was whether either party had made out a cause for divorce.

This Court said, in *Fansler* v. *Fansler,* 344 Mich 569, 579, and we repeat for the case at hand, that:

"CL 1948, §§ 552.7, 552.8 (Stat Ann §§ 25.87, 25.88), provide that a divorce may be granted on the ground of extreme cruelty, but does not define extreme cruelty. In *Brookhouse* v. *Brookhouse,* 286 Mich 151, this Court said that grievances, to justify a decree, may be mental or physical, if they are of a sufficiently aggravated nature."

The Court has said further, in *Hall* v. *Hall,* 172 Mich 210, 213 (cited in *Fansler, supra* at 579), that " 'Extreme cruelty' is an exceedingly elastic term", and that "Those acts, or that conduct and language, which in some walks of life would pass as the ordinary incidents of the marital relation, might constitute, in other social phases, the very refinement of cruelty."

Unaided as we are by findings and conclusions disclosing what testimony to believe and what to disbelieve, it appears from print by reasonable preponderance that the defendant wife was guilty of

some of the acts of cruelty testified to by the plaintiff husband and his witnesses and, in particular, that she did not on regular occasion treat the infant children and care personally for them as a mother should. That such may have been due to temporary or intermittent mental disturbance is possible, yet, as in *Vial* v. *Vial,* 369 Mich 534, it is factually concludable that the mother's mental troubles were not of such nature as to render her incapable of comprehension and understanding of what she did in the way of acts and attitudes toward the children and her husband.[2] This is not to say that the plaintiff husband was blameless. It is to say that he appears to have been a good father, and that his comparative guilt as husband is outweighed by that of the wife. Here we apply the rule of compared fault, found in *Boter* v. *Boter,* 338 Mich 187, and cases cited therein.

We are not unaware that a distantly seated appellate court should approach these findings with caution and full understanding of the fact that little children are quite a care, especially for their mother during the diaper years. Yet that court is not relieved from responsibility for tending well to the primary duty of judicial guardianship of small children, nor is it relieved from holding when it should that failure of parental due care of such children, coupled with some proof of mistreatment of them, is of itself evidence of statutory cruelty. The record before us indicatively suggests that such is the case and that the trial judge so far has awarded primary custody of the children to the father, rather than to the mother, on that account.

[2] "Mental irresponsibility is not available as a defense to cruelty if the defendant was capable of comprehending and understanding the wrong he was committing. 9 RCL, Divorce and Separation, p 334, § 113." *Fansler* v. *Fansler, supra,* at 579. See same rule, *Gardner* v. *Gardner,* 239 Mich 306, 309.

We have found, and now record such finding, that the proof of unmarital attitude and unwifely action on the part of the defendant wife, combined with the proof of want of care and mistreatment by her of the children as fairly disclosed, constitutes a case of statutory cruelty and that a decree of divorce should have been entered below on the plaintiff's bill. To be explicit for the purpose of precedent, the Court adopts the rule that mistreatment of children, if the other parent as here is guiltless thereof, constitutes some evidence of cruelty by the guilty party which justifies a divorce. For elaboration, see annotation, "Mistreatment of children as grounds for divorce," 82 ALR2d 1361.

The second question highlights the difficulty of consideration of custodial controversies by a court which has not even seen the witnesses and those whose independent advices are vitally needed, such as the friend of court and his aides.

The trial judge was commendably concerned about the rights and well-being of the minor children. One, Mary Ann Margaret, was born in 1955. The other, James W. Jaikins III, was born in 1956. Prior to full hearing below, and ultimately by the appealed decree, custody was awarded to the plaintiff father. The decree reads:

"(b) That in the interests and welfare of the minor children, the court having determined and requested that defendant, Marian E. Jaikins, undergo psychiatric examination and evaluation, and she having failed and neglected to undergo such psychiatric examination and evaluation, the rights of visitation of defendant, Marian E. Jaikins, with the minor children, Mary Ann Jaikins and James W. Jaikins, III, be, and the same hereby is, limited to the premises of the father where the children now live, and such visitations shall be made on Tuesday and Friday of each week between the hours of 2

o'clock p.m. and 5 o'clock p.m., and then with sufficient surveillance and supervision; that in the event of any dispute concerning the nature of this surveillance and supervision, the friend of the court may act as an arbiter thereof, subject only to the review thereof by this court in the case of any dissatisfaction with the arbiter's ruling."[3]

During oral argument both counsel advised that the defendant wife, upon allegation of intervening and favorable new circumstances, has applied recently for transfer of custody to her. Her petition, duly answered by the plaintiff husband, pends before Judge Beer; hence our determination to restore immediate jurisdiction to his court in order that such new issue may be determined promptly with one polar rule in mind, the prima-facie right of the mother under the statute, qualified only by what upon searching proof and judicial meditation is best for 2 beset and bewildered youngsters. Their lives and environmental upbringing are due, as matters now appear, for control more or less permanently by not 1 but expectably many judicial orders. Such orders should be right, and they can be made right only by the exercise of extraordinary judicial care.[4]

No ground has been shown for criticism of any of the trial judge's past and current orders pertaining to custody and visitation. On that score we conclude he has done well with what, usually, becomes the most difficult of all judicial tasks. The case is remanded, per foregoing order, accompanied only by advices that the trial judge may, in his discretion, request the sitting with him of 1 or 2 additional judges of the sixth circuit to determine future ques-

[3] A modifying order was entered July 9, 1962. The order retains custody in favor of the father, subject only to right of the mother to take the children from the father's home on limited occasions.

[4] For latest enunciation in a like case, see *Ostergren* v. *Ostergren*, 368 Mich 408.

tions of custody and visitation, all in the interest of satisfying the parties, if satisfaction is possible, that judges who see and hear are better equipped to decide custodial and best interest questions than are judges of appellate courts.

The foregoing opinion records our decision of June 13th with reasons for such decision. The question of costs and fees on appeal is left to the trial judge, as in *Vial* v. *Vial,* 369 Mich 534.

DETHMERS, KELLY, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

CARR, C. J., concurred in result.

BLACK, J., took no part in the decision of this case.

APPENDIX

(Quotation from "Ruling of the Court", made from the bench November 27, 1961)

"From all the proofs, the circumstances of this case are such that it will not be discreet and proper to grant divorce on either the bill of complaint or the cross-bill of complaint.

"The complete contradictions in the testimony have made it difficult to determine the facts. Neither party in my opinion has proven a cause of action for divorce by a fair preponderance of the evidence. Further, on the record before me, they have each contributed to their marital difficulties.

"There are indications Mrs. Jaikins may not be well mentally. This is not cause for a divorce. The marriage contract under the laws of this State is for life, in sickness and health, for better or worse, unless statutory extreme cruelty is proven by a fair preponderance of the evidence.

"Divorce is denied to each party. The bill and the cross-bill are dismissed."

AUTO OWNERS INSURANCE COMPANY *v.* ZELLER.

INSURANCE—COVERAGE OF ADDITIONAL AUTOMOBILES.

Car involved in accident causing injuries for which plaintiff recovered judgment against principal defendant *held,* covered by *additional automobile* clause of policy on another car insured with garnishee defendant where accident occurred less than 30 days after car involved in accident had been acquired and policy provided for coverage of additional automobile acquired by the insured if notice be given insurer within 30 days of delivery, although car traded in for the additional car had not been insured with the garnishee defendant (CLS 1956, § 500.3006).

Appeal from Ottawa; Smith (Raymond L.), J. Submitted June 6, 1963. (Calendar No. 28, Docket No. 50,105.) Decided July 17, 1963.

Case by Auto Owners Insurance Company and Edward Bochenek against Kenneth Zeller, with subsequent garnishment proceedings against Detroit Automobile Inter-Insurance Exchange. From a judgment against it, garnishee defendant appeals. Affirmed.

Scholten & Fant (*Harvey L. Scholten,* of counsel), for plaintiffs.

Engle & Engel (*Albert J. Engel, Jr.,* of counsel), for garnishee defendant.

REFERENCES FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobile Insurance §§ 100–102.

Construction and application of automatic insurance clause or substitution provision of automobile liability or indemnity policy. 34 ALR2d 936.

PER CURIAM. June 23, 1959, the garnishee as insurer issued to the principal defendant and his wife, as co-owners, its standard policy insuring their Mercury automobile. The policy provided extended liability coverage for an "additional automobile," defining such "additional automobile":

"(g) 'additional automobile' means an additional automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, *provided the Exchange insures all automobiles of such named insured on the date ownership is acquired* and provided notice is given the Exchange within 30 days of the date of its delivery to the named insured and such named insured agrees to pay any premium or adjustment of premium applicable with respect to such automobile";

July 5, 1959, the principal defendant was involved in an automotive collision with plaintiff Bochenek's automobile. The principal defendant was operating at the time, as sole owner, a 1949 Plymouth. Subsequently plaintiff and his insurance carrier sued the principal defendant in the Ottawa circuit, for negligence causal of such collision, and recovered judgment against the principal defendant in the sum of $1,380.75.

The question, whether the coverage extended to the 1949 Plymouth as an "additional automobile," arose upon issuance of garnishment under the statute (CLS 1956, § 500.3006 [Stat Ann 1957 Rev § 24.13006]). The issue was tried to the court upon a stipulated statement of facts. The circuit judge ruled that the 1949 Plymouth was an "additional automobile" and that the principal defendant was therefore entitled to the protection of such extended coverage. Judgment thereupon entered for plaintiffs against the garnishee-insurer. The issue is here on appeal taken by the latter.

The garnishee relies upon the underscored proviso. It claims in the light of presently considered facts that the principal defendant did not "on the date" of acquisition of the 1949 Plymouth have "all automobiles of such named insured" covered by "the exchange." It is agreed, of course, that the policy as to the Mercury remained in full effect until the date of the mentioned collision.

The heart of the garnishee's argument depends upon the fact of record ownership, by the principal defendant's wife, of a 1952 Plymouth.* It is conceded that the insurer was given no notice, within above clause (g), of the fact of such ownership. By the same token, neither was any agreement made by the principal defendant, nor his wife, nor both, "to pay any premium or adjustment of premium applicable with respect to such [1952 Plymouth] automobile." Counsel for the garnishee proceed:

"Here, at the time the principal defendant and his wife insured their 1955 Mercury on June 23, 1959, they also owned a 1952 Plymouth, purchased by the husband with his funds but registered in the wife's name. No additional premium was ever paid on this automobile, nor was notice of its existence ever given to the insurer. With certainty more than 30 days had passed between the date of its acquisition and the date of the accident involving its replacement, and probably more than 30 days had passed before either the date of the trade or the date of issuance of the policy itself";

and then sum up their position by saying that "basically the Zellers were at all times a 2-car family."

We are unable to follow such argument. Neither was the trial judge. The controlling fact is that, whatever the insured or uninsured status of the 1952 Plymouth prior to the time it was traded in

* June 27, 1961 was the date of trade-in, of the 1952 Plymouth, for the 1949 Plymouth.

for the 1949 Plymouth, the principal defendant did not—and could not under any interpretation of the stipulation—own both at the same time. The instant title to the 1952 car passed to the dealer, title to the 1949 car passed to the principal defendant. He thereupon acquired "ownership" of the 1949 car within the purposes of clause (g) and automatically received—at least during the then commencing 30-day period—the extended coverage such clause provided for an "additional automobile." That additional automobile was the one he drove negligently to plaintiffs' damage.

Affirmed. Costs to plaintiffs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

HAAS *v.* KLAPATCH.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—RECORD.
The Supreme Court does not reverse chancery cases which it hears on appeal *de novo*, unless it finds from an examination of the entire record that it would have reached a different conclusion than was reached by the trial court.

2. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF—EVIDENCE.
Plaintiff, guardian of the estate of his mentally incompetent wife, in suit to reform a deed to include his wife's name as grantee therein along with that of the named grantee, her sister now deceased, which deed had been executed in 1954 and given pursuant to a 1928 land contract of which a copy

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 703.
[2] 45 Am Jur, Reformation of Instruments § 112.

identified the 2 sisters as "tenants by the entirety" *held,* not to have sustained his burden of proof, where wife had not sought any interest in the property for the 7 years after the deed was executed before she was declared incompetent and upkeep and taxes had not been paid for by the wife for last 22 years before deed was executed.

Appeal from Washtenaw; Smith (Richard G.), J., presiding. Submitted April 3, 1963. (Calendar No. 16, Docket No. 49,809.) Decided July 17, 1963.

Bill by Rudolph Haas, special guardian of the estate of Sarah M. Haas, against the estate of Myrtle Pearl Klapatch, deceased, Bernard George Klapatch, individually and as executor, and Bernice Sara Augustine to reform a deed. Bill dismissed. Plaintiff appeals. Affirmed.

Allan W. Grossman, for plaintiff.

Douglas K. Reading, for defendants.

KAVANAGH, J. Plaintiff, a special guardian, instituted suit in chancery in the Washtenaw county circuit court seeking to reform a warranty deed. The bill of complaint alleged that plaintiff's ward, his wife Sarah, was mistakenly omitted as grantee in the deed. Defendants answered denying that any mistake was made and alleging the deed was properly drawn, and affirmatively alleging the plaintiff was guilty of laches for failure to act for more than 3 years after knowledge the deed conveyed no interest to his ward.

The deed was executed on June 28, 1954, naming Myrtle P. Klapatch, Sarah's sister, now deceased, as sole grantee. The deed contained a clause indicating it was given pursuant to a certain land contract dated March 22, 1928.

On the trial of the cause the original contract was not offered in evidence, but a copy was accepted in evidence over the objections of defendants. This copy identifies the 2 sisters as "tenants by the entirety," but does not appear to have been signed by either sister.

The trial chancellor held that plaintiff had failed to "prove his case by a preponderance of the evidence." The case was thereupon dismissed. Plaintiff appeals.

On appeal, the parties do not agree upon the statement of the questions involved. We conclude they are 2 in number:

(1) Did plaintiff fail to prove by a preponderance of the evidence a contract entitling plaintiff to conveyance of any interest in the subject premises?

(2) Did the trial court err in refusing to reform the provisions of the deed to conform to the provisions of the land contract by adding the name of Sarah M. Haas as grantee thereunder?

While we hear chancery cases on appeal *de novo,* we do not reverse unless we find from an examination of the entire record that we would have reached a different conclusion than was reached by the trial court. *Stacey* v. *Mikolowski,* 367 Mich 550, 556, and cases therein cited. An examination of the record in this case does not lead us to such a conclusion. Plaintiff failed to introduce in evidence the executed original contract between the parties. He failed to show that if such a contract was actually entered into that his ward had an interest in the premises on June 28, 1954, the date of the execution of the warranty deed. Even if we concluded the contract admitted in evidence was an exact copy of the original, the testimony of the special guardian himself indicates there had been a change in circumstances in the relationship of his wife and her sister during the years from 1928 to 1954. He admitted his wife

advised him that the matter of her interest in this house, if any, was none of his business. He admits, with 1 possible exception of a $5 payment, that no portion of the upkeep or taxes had ever been paid by his wife from 1932 to 1954. The record discloses no interest was claimed by Sarah M. Haas from 1932 to 1954. She and her husband moved out of the house in 1932 because they could not get along with her sister and husband. The record does not disclose that Sarah M. Haas attempted to collect any rental from the sister and her husband during all these years.

In 1958 Rudolph Haas knew of the land contract and knew of the delivered and recorded deed in question. He called it to his wife's attention, who again informed him it was none of his business. He did nothing until after the death of Myrtle Pearl Klapatch in 1961 and after his wife had been declared a mentally incompetent person in November of 1961. From 1958 to 1961 his wife, who was presumably competent, knew of the deed and did nothing to indicate any interest in the property or to have the deed corrected.

The inference to be drawn from the action of plaintiff's ward from 1932 to 1961 would indicate she no longer had any interest in the property.

We think the trial judge was correct in his conclusion that plaintiff failed to carry the burden of proof as to the allegations in the bill of complaint.

We affirm the dismissal of the bill by the trial court. Defendants shall have costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

SYLVESTER *v.* GRABOWSKI.

1. APPEAL AND ERROR—MATTERS NOT PRESENTED TO TRIAL COURT.
   An unsworn statement by brother of defendant in paternity action may not be considered by the Supreme Court, where the statement had not been presented to the trial court.

2. NEW TRIAL—DISCRETION OF COURT.
   The denial of a new trial is affirmed in the absence of a showing on appeal that the trial court had abused its discretion in so doing.

3. SAME—HEARSAY AFFIDAVITS.
   Hearsay affidavits are not proper affidavits upon which to base an order for a new trial.

4. BASTARDS—NEW TRIAL—EVIDENCE.
   Motion for new trial in paternity action because of alleged newly-discovered evidence was properly denied, where defendant produced neither testimony nor affidavit of his brother to the effect that if called he would testify as to sexual relations with plaintiff.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted June 4, 1963. (Calendar No. 9, Docket No. 49,907.) Decided July 17, 1963. Rehearing denied September 4, 1963.

Paternity action by Sharon Sylvester against Theodore Grabowski resulted in order of filiation. Motion for new trial on basis of newly-discovered evidence denied. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 736.
[2] 5 Am Jur 2d, Appeal and Error §§ 850–852.
[3] 39 Am Jur, New Trial § 162.
[4] 39 Am Jur, New Trial § 156 *et seq.*; §§ 207–216.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Leo A. Farhat,* Prosecuting Attorney, *John Robert Dethmers,* Assistant Prosecuting Attorney, for the people.

John Wendell Bird, for defendant.

KAVANAGH, J. Defendant Theodore Grabowski was arrested under a complaint issued pursuant to the paternity act, PA 1956, No. 205.* The complaint accused him of an act with plaintiff, Sharon Sylvester, on or about September 15, 1960, which resulted in the birth of a child on June 19, 1961.

A jury trial commenced on April 23, 1962. After direct and cross-examination of a medical witness, the plaintiff testified. She stated that from the time she met defendant in July of 1959 until after she became pregnant, defendant was the only person with whom she had any sexual relations. At the conclusion of her direct testimony the defendant entered a change of plea and admitted paternity of the child. On April 27, 1962, an order of filiation was entered by the circuit court.

On May 11, 1962, defendant filed a motion for new trial alleging as a basis newly-discovered evidence. Defendant's motion recited that subsequent to the entry of the order of filiation he learned that his brother, Melvin Grabowski, had relations with the plaintiff on or about September 15, 1960, and subsequently on 15 other occasions. In his affidavit attached to the motion defendant alleged that his plea was entered upon his understanding that the plaintiff had not had relations with any other man until after she became pregnant; that his brother, Melvin Grabowski, would testify he had committed an act of

* CLS 1956, § 722.711 *et seq.* (Stat Ann 1957 Rev § 25.491 *et seq.*).—REPORTER.

coition with plaintiff on or about September 15, 1960; and that he (the defendant) had exercised prior to trial all reasonable diligence to discover and produce the material facts, including careful questioning of Melvin Grabowski.

At the hearing on the motion for new trial, 2 other affidavits were filed. One was an affidavit of George T. Warner which identified him as a polygraph examiner employed by the Greater Lansing Detective Agency. This affiant alleged that polygraph examinations had been administered to plaintiff and to Melvin Grabowski and the results thereof indicated they were lying when they denied having relations with each other. The affidavit further stated that Melvin Grabowski admitted lying when confronted with the results of the polygraph test.

In the second affidavit filed at the hearing plaintiff repeated the allegations of the original complaint and denied defendant's contentions. She further alleged that Melvin Grabowski told her on the day of the trial that he had been promised a new car to testify against her and had been threatened with confinement to a mental institution if he did not. Plaintiff alleged Melvin was a feeble-minded ward of his brother, George Grabowski.

At the hearing on the motion, Melvin Grabowski did not appear. Defense counsel argued that a subpoena had been issued and stated, "We did our best to have him here."

In ruling that defendant had failed to present any newly-discovered evidence the court stated, "You have said in these affidavits that somebody will say so and so, but I want to know what so and so is going to say before I say it is newly-discovered evidence. He may change his mind tomorrow." The court concluded there was not a showing of sufficient facts or circumstances to warrant a new trial.

At some later date an unsworn statement, purportedly signed by Melvin Grabowski and substantiating defendant's claims, was somehow made a part of the circuit court record of this case. This statement was not before the trial court and cannot be considered in our deliberations on this appeal.

We must affirm the decision below unless we can say the trial court abused its discretion in denying defendant's motion for new trial. *People* v. *Inman,* 315 Mich 456.

The only evidence proffered by defendant to support his motion was the hearsay affidavits of himself and Mr. Warner. The same situation confronted this Court in *Connor* v. *McRae,* 193 Mich 682. Denial of a motion for new trial was affirmed, the court concluding (pp 696, 697):

"It is a sufficient answer to the question of newly-discovered evidence to say that the affidavit of the proposed absent witness William J. Weston was not produced. As to what he would have testified to upon a new trial the court was not informed except by hearsay. The affidavit of Mr. Weston was not furnished in support of the motion, but merely the affidavits of the plaintiff and their counsel. They are hearsay, and were not proper affidavits on which to base an order for a new trial."

See, also, *Cutler* v. *Spens,* 191 Mich 603; *People* v. *Borowski,* 330 Mich 120.

Defendant's reliance upon *Cole* v. *Simpson,* 299 Mich 589, is without merit. There, the hearsay affidavit of defendant's attorney was supported by affidavits of persons having actual knowledge of the facts relied upon by the defendant as constituting newly-discovered evidence.

In this case it was incumbent upon the defendant to support his allegations with testimony or affidavit of Melvin Grabowski to the effect if called he would

so testify. Having failed to do either, we cannot say the court erred in denying his motion.

Affirmed. Costs to appellee.

CARR, C. J., and KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

DETHMERS, J., did not sit.

DONOVAN *v.* DONOVAN.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.

Allegations with respect to husband's extreme and repeated cruelty *held,* amply sustained by testimony of wife that defendant refused to cohabit for upwards of a year prior to filing of bill and with reference to lack of money for doctors, medicines, support of the children, and support of the wife despite an earning capacity sufficient to make adequate provision, and further supported by testimony of wife's sister.

2. SAME—TEMPORARY SUPPORT ORDER—EARNINGS AND INCOME.

Order for temporary support money during pendency of divorce proceedings, requiring defendant to pay $75 weekly for plaintiff and their 10-year-old child *held,* not to have been erroneous when defendant then had earnings and income of more than $670 per month.

3. SAME—VALUE OF ASSETS—EVIDENCE.

Claim of error by defendant husband in divorce proceedings that the trial court had arbitrarily fixed the value of defendant's

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REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation §§ 437–439.
[2–4] 17 Am Jur, Divorce and Separation § 612.
Earning capacity or prospective earnings of husband as basis of alimony. 139 ALR 207.
[5] 17 Am Jur, Divorce and Separation § 467.
[6] 17 Am Jur, Divorce and Separation §§ 644, 645.

stock at $3,500 rather than its true value of $2,000 *held*, without merit, where record shows such stock was valued at $2,000 and the additional $1,500 value was placed on a $2,000 note given by the corporation whose stock was involved and testimony showed note had been paid in full with interest.

4. SAME—SUPPORT OF WIFE AND CHILD—INCOME.
It was not an abuse of discretion for trial court to order defendant husband to pay $25 weekly for support of their minor daughter, a like sum for support of plaintiff and $10 a week upon balance of delinquent temporary alimony, where record shows defendant had a monthly income of $670.

5. SAME—CORRECTION OF DECREE.
Decree of divorce is ordered corrected to show it was not a *pro confesso* case, where the property matters were contested although the grounds for divorce were not contested.

6. SAME—COSTS—VIOLATION OF COURT RULES.
No costs are allowed appellee wife in suit for divorce, where neither appellant nor appellee have filed a proper appendix, and dismissal of the appeal would benefit the appellee who is primarily guilty of violating appellate rules (Court Rule No 67, § 2 [1945]; GCR 1963, 813.2).

Appeal from Cheboygan; Fenlon (Edward H.), J. Submitted June 6, 1963. (Calendar No. 29, Docket No. 49,566.) Decided July 17, 1963.

Bill by Sara Donovan against Lawrence Donovan for divorce on ground of extreme and repeated cruelty. Decree for plaintiff. Defendant appeals. Amended and affirmed.

Oswald T. McGinn, for plaintiff.

Lower & MacGregor, for defendant.

KAVANAGH, J. Defendant appeals from a decree of divorce entered by the Cheboygan county circuit court in favor of plaintiff wife. Plaintiff filed her bill of complaint on June 30, 1958, alleging the couple was married on February 17, 1931; that they

separated in May of 1957; that 3 children were born of the marriage, 2 of whom were adults; and that 1 daughter, age 10, remained at home.

Paragraph 5 of the bill of complaint reads as follows:

"That the said defendant, disregarding the solemnity of his marriage vow, has been guilty of extreme and repeated cruelty, some of the specific acts of which are as follows, to-wit:

"a. For the past 4 or 5 years, the defendant has for days at a time refused to speak to the plaintiff.

"b. In May of 1957, the defendant set up separate quarters in an upstairs room and upon entering the house retires immediately to his own quarters, refusing to speak to the plaintiff unless it be a matter of complaint for some fancied grievance.

"c. Although the defendant has an income in excess of $600 per month, he has informed the plaintiff that he will give her $20 per week for the support of herself and the minor child of the parties, and to operate and maintain the home, and that if she desired or needed clothing for herself or the minor child of the parties that she should seek employment."

The bill further alleged the parties had acquired a home in Cheboygan, free and clear; household furnishings; a lot on Hammond's Bay in Presque Isle county, Michigan; a 1956 Chevrolet car, free and clear; and in addition thereto the defendant has a substantial sum of money.

Plaintiff prayed that the marriage be dissolved; that she be given custody of the minor child; that she be awarded support and maintenance for herself and the minor child of the parties; and that an equitable property settlement be made.

Defendant answered alleging that during the married life of the parties, plaintiff had been a domineering wife, telling him how to conduct himself;

that it was difficult to carry on an agreeable conversation with plaintiff, and to prevent arguments he lived pretty much to himself. He further alleged that for the 3 years prior to their separation he earned $27,000 and turned all of it over to plaintiff, and believed she saved a substantial portion of it. Despite this fact, in the spring of 1957 he needed $200 to pay the balance due for Federal income taxes, and plaintiff refused to give him the money. He admitted that thereafter the parties became estranged to the extent they occupied separate rooms and lived separate lives. Defendant alleged that when plaintiff refused to give him the $200 to pay the income tax, he informed her he would give her $40 a week for her support and the support of the minor child of the parties, but would continue to pay utility bills and other expenses in and about the house; that plaintiff then refused to cook defendant's meals or take care of his laundry; that he then decreased plaintiff's allowance for herself and the minor child to $20 a week. Defendant further alleged that he had given his oldest son 4 years of college and the second son a 2-year college education and had always substantially performed his marital obligations, and that any differences between the parties had their foundation in plaintiff's desire to control all the financial affairs. Defendant asked that the plaintiff's bill for divorce be dismissed.

The trial court entered an order for temporary support providing that defendant shall pay to the clerk of the court on the first day of July, 1960, the sum of $75 and a like sum weekly thereafter during the pendency of the cause for the support and maintenance of plaintiff and the minor child of the parties. The case was tried in June of 1961.

On June 27, 1961, decree was entered in favor of plaintiff granting her a divorce from the bonds of matrimony and giving her custody of the minor

child. The decree provided that defendant pay to the clerk of the court $25 per week for the support and maintenance of the minor child and $25 per week for plaintiff's support and maintenance. The decree further provided the delinquent payments owing by defendant as of June 27, 1961, in the amount of $2,050, were reduced and settled for the sum of $1,300, payable $500 forthwith and the balance of $800 at the rate of $10 per week commencing June 27, 1961. Lastly, the decree contained a provision for a $400 attorney fee payable to plaintiff's attorney by the defendant. There were the usual insurance settlement provisions and property settlement provisions in the decree.

Following the entry of the decree, defendant made a motion for rehearing as to the approval of the decree by the court alleging the court erred: in the award of temporary support by basing it on defendant's earnings rather than on the amount necessary to support plaintiff and the minor child; in determining that plaintiff's alleged grounds for divorce were adequate; in fixing the value of certain stock; in the award of permanent support; in providing in the decree the bill of complaint was taken as confessed; in allowing plaintiff's counsel $400 attorney fees; and in not providing rights of reasonable visitation of the minor child.

The court granted the motion for rehearing in part, to determine the true value of the shares of stock owned by defendant in Straits Transit, Inc. At the conclusion of the partial rehearing on this matter, the court, treating defendant's motion as a motion to amend the original decree, denied the defendant such relief.

Defendant appeals raising the following questions:

(1) Are the grounds for divorce as charged sufficient to sustain the decree?

(2) Did the circuit judge commit error in awarding the sum of $75 as weekly support (temporary) for the plaintiff and minor child by basing his determination of amount on defendant's earnings and pension rather than on the needs of plaintiff and minor child and their accustomed station in life?

(3) In determining the property settlement, did the circuit judge commit error in arbitrarily fixing the value of defendant's stock in Straits Transit, Inc., at $3,500 rather than at its true value of $2,000?

(4) Did the circuit judge commit error and abuse his discretion in awarding to plaintiff and appellee in the decree, alimony and support money in the sum of $60 weekly despite the fact that the court was well aware that the monthly income of defendant and appellant was only $270 by pension?

(5) Did the circuit judge commit error in refusing to correct the patent mistake in the decree wherein same recites the bill of complaint was taken as confessed by defendant, the truth being that same was vigorously contested?

The appendix for defendant-appellant is woefully inadequate to determine any of the questions raised on appeal. Plaintiff-appellee has not seen fit to supplement it, so both are in violation of the appellate rules of this Court. Plaintiff's references in her brief are entirely to the transcript of the testimony.

The transcript discloses that the only witnesses called by plaintiff in support of the allegations in the bill of complaint were the plaintiff and her sister, Ruth M. Evans. No witnesses were called by defendant in support of the allegations in his answer to the bill of complaint except as to financial matters.

A careful reading of the transcript indicates that defendant waived his contest of the merits of whether a divorce should be granted at the conclusion of

plaintiff's proofs. A colloquy between the court, the defendant and counsel ended with this:

"*The Court:* All right. But, I don't want to preclude Mr. Donovan from taking the stand. But, I want it to go not to the merits of the cause, but rather to how the division should be made of the property, you see, and support money. If you are going to go in in support of your answer here, then it will go into the merits of whether a divorce should be granted, you see.

"*The Defendant:* I am willing to split the property 50-50.

"*The Court:* All right. You can talk to the friend of the court on that. I am sure we can work something out."

Plaintiff, testifying in support of the allegations in the bill of complaint, was asked the following questions and gave the following answers:

"*Q.* The bill of complaint gives the date of separation, when you people ceased cohabiting together as husband and wife, as on or about May of 1957.

"*A.* Yes. * * *

"*Q.* You make certain allegations relative to your husband's conduct toward you, Mrs. Donovan. Will you tell the court what it was that led you to the filing of this bill of complaint?

"*A.* Well, he goes on pouts and he don't talk to me for weeks and months at a time. Right now he hasn't talked to me since—well, it was the end of last July, and he goes in and out and you would think we were a piece of furniture."

There was additional testimony by plaintiff with reference to lack of money for doctors, medicines, support of the children and support of the wife, despite an earning capacity sufficient to adequately provide for these matters.

Plaintiff's sister gave the following testimony:

"*Q.* Describe to the court his (defendant's) conduct.

"*A.* Well, when we would go there and he always seemed pleasant enough with us, but he seemed to ignore his wife.

"*Q.* Was that true on many occasions?

"*A.* On many occasions."

She also testified: "I know he likes money, that is for sure. Money is his god, I guess."

A reading of the complete transcript leads us to the conclusion that the allegations with respect to extreme and repeated cruelty were amply supported by testimony including, but not limited to, the refusal to cohabit for a period in excess of a year prior to the filing of the bill of complaint.

Defendant's second question deals with the temporary order of $75 as weekly support money for the plaintiff and the minor child. Almost $800 of the amount covered by this order was forgiven in the final decree. There was testimony by plaintiff that $75 per week would be necessary to properly maintain herself and the child. The order was entered when defendant had earnings and income of more than $670 per month. No error was committed in entering this order.

The third claim of defendant is that the court erred in arbitrarily fixing the value of defendant's stock in Straits Transit, Inc., at $3,500 rather than at its true value of $2,000. The record discloses that the court did not fix the value of defendant's stock in Straits Transit, Inc., at $3,500 but rather fixed it at the sum of $2,000, which defendant admits is the true value of the stock. The additional $1,500 value was placed on a $2,000 note given by Straits Transit, Inc., to defendant for money loaned it by defendant. Defendant testified at the rehearing on July 28, 1961,

that this note was valueless. Charles LaHaie, an executive vice-president of Straits Transit, Inc., testified at a continuation of the rehearing on October 24, 1961, that the $2,000 note was repaid with interest on July 31, 1961, 3 days after the testimony of defendant at the former hearing. Defendant's argument with respect to the fixing of the value of his stock and the note of Straits Transit, Inc., has no merit.

In his fourth question, defendant claims the trial judge erred and abused his discretion in awarding to plaintiff alimony and support money in the sum of $60 weekly despite the fact the court was well aware the monthly income of defendant was only $270 by pension. In the first place, the decree did not provide $60 weekly as alimony and support money for the plaintiff. It provided $25 per week for the support and maintenance of the plaintiff and $25 per week for the support and maintenance of the minor child of the parties and $10 per week upon the balance of the delinquent temporary alimony. The record discloses that Lawrence Donovan testified on July 28, 1961, as follows under examination by his own attorney:

"*Q.* Are you employed by the Straits Transit, Mr. Donovan?

"*A.* Yes; I am.

"*Q.* You have received some wages during this spring and summer season?

"*A.* Since the 1st of July.

"*Q.* Since the 1st of July. How much have you received in wages?

"*A.* Well, there was 3 checks, I believe, of $82 and some cents to $84 and some cents per check. That $84 and some cents was the highest and $82 and some cents was the lowest."

Under cross-examination by plaintiff's attorney, defendant testified as follows:

"*Mr. McGinn* (attorney for plaintiff): That is 1 question I wanted to ask. Mr. Donovan, you are actually employed at the rate of $100 a week, and the checks that you received show your various deductions, is that right?

"*The Witness* (the defendant): That is right."

Admittedly, in addition thereto, he received $270 per month pension money. No abuse of discretion is evident from the full testimonial record.

The last error complained of by defendant deals with the trial court's refusal to correct a mistake in the decree that the bill was taken *pro confesso*. While it is true that the grounds for divorce were not contested, the property matters were contested. The decree should be amended to properly correct this error.

Otherwise, the decree of the lower court is affirmed.

Neither party has filed a proper appendix. The plaintiff-appellee particularly has violated the provisions of section 2 of former Court Rule No 67 (1945)* and GCR 1963, 813.2. Such an inadequate appendix would normally result in summary dismissal of the appeal. See *In re Schantz Estate*, 354 Mich 541, and cases therein cited. To dismiss the appeal in this case would benefit the plaintiff, who is primarily guilty of violating our appellate rules. Therefore, having been forced to use the transcript to prepare this opinion (it is to be noted there is only 1 transcript for 8 Justices), and in the absence of a proper appendix and a proper brief by plaintiff, no costs are allowed.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, SMITH, and O'HARA, JJ., concurred.

* See amendments, 347 Mich xxii and 355 Mich xiv.—REPORTER.

In re McCULLOUGH.

1. APPEAL AND ERROR—APPLICATION FOR DELAYED APPEAL FROM PROBATE COURT—STATUTES—COURT RULES.

   Order denying application for leave to take delayed appeal from probate court order denying divorced mother's petition for restoration of custody of children, which does not set forth any of the substance of the record and proceedings in the probate court, which does not show by affidavit or otherwise that there is merit in the attempted appeal, or that justice requires a revision of the case *held,* fatally defective on its face for failure to comply with pertinent statute and court rule (CL 1948, § 701.43; Court Rule No 75, §§ 2, 6, 7 [1945]).

2. MANDAMUS—DELAYED APPEAL FROM PROBATE COURT—DISCRETION OF CIRCUIT COURT.

   Mandamus in the Supreme Court is the proper remedy to review a circuit judge's exercise of his discretion in granting or denying of the right to take a delayed appeal from the probate court when he passes upon the showing made and any answer thereto.

3. APPEAL AND ERROR—LEAVE TO APPEAL—RECORD—QUESTIONS REVIEWABLE.

   Appeal is dismissed, where record contains nothing from which Supreme Court may judge what was done by a circuit judge after testimonial hearing on application for leave to take a delayed appeal from a probate court order and after testimonial hearing on motion for rehearing by successor circuit judge, record presents no reviewable question and leave to appeal should have first been obtained (Court Rule No 60, § 1 [b] [1945], as amended).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 17A Am Jur, Divorce and Separation § 817.
4 Am Jur 2d, Appeal and Error §§ 309, 313.
[2] 35 Am Jur, Mandamus § 304.

Appeal from Wayne; Canham (James N.), J. Submitted May 7, 1963. (Calendar No. 42, Docket No. 49,860.) Decided July 17, 1963.

In the matter of the petition of Jean B. McCullough for delayed appeal of probate order concerning custody of children. Delayed appeal denied. Petitioner appeals. Appeal dismissed.

Craig Thompson, for petitioner.

Samuel H. Olsen, Prosecuting Attorney, *Aloysius J. Suchy, George H. Cross,* and *Gary R. La Bret,* Assistant Prosecuting Attorneys, for Probate Court for the County of Wayne, Juvenile Division.

SOURIS, J. Appellant, a divorcee, is the mother of 3 minor children, presently of the ages of 11, 13, and 15 years. In January of 1956 the children were placed by appellant in a Salvation Army home. A petition was filed in 1958 in the juvenile division of the Wayne county probate court charging appellant with neglect of the children, and early in 1959 an order was entered after hearing making all 3 children temporary wards of the court. Later that year the youngest child was made a permanent ward of the court after hearing, but that order was subsequently set aside for procedural irregularities. In July of 1960 after another hearing the youngest child was again made a permanent ward of the court, thereby terminating appellant's parental rights to the child,[1] and the 2 older children were ordered continued as temporary wards of the court. There were other hearings in 1959 and 1960 on appellant's peti-

[1] Subject of course to the powers of rehearing and of supplemental orders chapter 12A, as last amended by PA 1959, No 184 (CL 1948 and CLS 1956, § 712A.1 *et seq.* [Stat Ann 1943 Rev and Stat Ann 1959 Cum Supp § 27.3178 (598.1) *et seq.*]) provides.

tion for restoration of custody, but in each instance relief was denied to her. Following denial of her petition for rehearing of the July, 1960, order, and having failed to take timely appeal therefrom to the circuit court,[2] appellant filed in the circuit court in May of 1961 an application for leave to take delayed appeal from such probate order.[3] Following a hearing thereon at which testimony apparently was taken, Judge McCree of the Wayne circuit denied leave to appeal and subsequently in December of 1961 Judge McCree's successor, Judge Canham, denied a motion for rehearing after taking additional testimony thereon. Appellant thereupon filed in this Court a claim of appeal in January of 1962.

The application for leave to take delayed appeal from the probate order does not set forth any of the "substance of the record and proceedings" in the probate court, as was then required by our Court Rule No 75, § 7 (1945), as amended (326 Mich xl), nor does it show "by affidavit or otherwise that there is merit" in the attempted appeal as provided by Court Rule No 75, § 6(d) (1945), as amended, or that "justice requires a revision of the case" as provided by CL 1948, § 701.43 (Stat Ann 1962 Rev § 27.3178 [43]). As a matter of fact, the allegations contained in the application filed in the circuit court relate only to appellant's claimed ability *then* to provide a suitable home for her children; there are no allegations denying that she had neglected her children nor even challenging the sufficiency of the evidence from which the probate judge made such finding. If these deficiencies were sought to be corrected by the testimony offered in circuit court and accepted by Judges McCree and Canham, we are not favored with

[2] Court Rule No 75, § 2 (1945), as amended (326 Mich xxxviii), and CL 1948, § 712A.22 (Stat Ann 1962 Rev § 27.3178[598.22]).

[3] Court Rule No 75, § 6 (1945), as amended (326 Mich xl), and CL 1948, § 701.43 (Stat Ann 1962 Rev § 27.3178[43]).

a transcript of such testimony from which we could review their determinations.

When our jurisdiction is invoked properly on appeal from a circuit judge's grant or denial of the right to take a delayed appeal from the probate court, the appeal before us is by mandamus to review the circuit judge's exercise of his judicial discretion in passing upon the showing made and any answer thereto. *Sanborn* v. *Circuit Judge,* 94 Mich 519; *Schmid* v. *Wayne Circuit Judge,* 298 Mich 499; and *In re Gillespie Estate,* 348 Mich 256. The application filed with the circuit court was fatally defective on its face for failure to comply with the mentioned requirements of the cited court rules and statute and for failure to allege even that the probate judge's challenged finding of neglect was erroneous. Had Judge McCree denied the application summarily, appellant would have had no basis for appeal. Instead, however, he took testimony, as did Judge Canham on rehearing, and still found no merit in the attempted appeal. Absent such testimony from this record, there is nothing before us from which we can judge what was done below. For this reason we conclude that the appeal must be dismissed.

We have examined carefully the entire record for a reviewable question and find none. Had appellee challenged the appellant's right to appeal by claim of right, we would have planted decision of dismissal upon appellant's failure to obtain from this Court leave to appeal as was required by former Court Rule No 60, § 1(b) (1945), as amended (364 Mich xiv) in all cases where the remedy of review is by mandamus.

Appeal dismissed. Costs may be taxed by appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SMITH, and O'HARA, JJ., concurred.

LEMAN *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. RAILROADS—AUTOMOBILES—GRADE CROSSING.
   Motorist *held,* to have had right-of-way at grade crossing of railroad in open flat country, where defendant's slowly-moving diesel engine was approaching on irregularly used spur track.

2. SAME—AUTOMOBILES—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE.
   Evidence presented in action by passenger of northbound automobile against railroad company for injuries sustained when injured at grade crossing in midafternoon in summer by slowly moving westbound diesel engine *held,* sufficient to sustain findings of jury that both the railroad and plaintiff's driver were guilty of causal negligence, there being no question of contributory negligence of the plaintiff passenger involved.

CARR, C.J., and DETHMERS and KELLY, JJ., dissenting.

Appeal from Macomb; Noe (Alton H.), J. Submitted April 2, 1963. (Calendar No. 15, Docket No. 49,168.) Decided July 17, 1963.

Case by Olive Leman against Grand Trunk Western Railroad Company, a Michigan corporation, for personal injuries sustained in grade crossing collision. Judgment for defendant *non obstante veredicto.* Plaintiff appeals. Reversed and remanded for entry of judgment on the verdict.

Starkey & Gentz (*William A. Gentz,* of counsel), for plaintiff.

Earl C. Opperthauser and *Matthews, Nank & Spier,* for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[2] 8 Am Jur 2d, Automobiles and Highway Traffic § 531.

KELLY, J. (*dissenting*). Plaintiff, a passenger in an automobile driven by her husband, suffered injury as the result of a collision between the automobile in which she was riding and a diesel switch engine (without cars attached) owned and operated by defendant railroad company.

Suits were instituted by both plaintiff wife and her husband, claiming defendant (1) negligently propelled the switch engine onto the highway knowing the operator "could not see oncoming traffic from the south"; (2) propelled "its diesel switch engine at a high, dangerous and unlawful rate of speed"; and (3) failed "to ring the engine bell or to sound the locomotive whistle."

A jury answered special questions presented by the court, finding that plaintiff's husband, the driver of the automobile, was guilty of negligence which was a proximate cause of the accident; that the railroad was not guilty of negligence in failing to give a reasonable warning of the train's approach, but defendant railroad was guilty of negligence in failing to make a reasonable observation of the automobile and that said negligence was a proximate cause of the accident.

The jury verdict of no cause of action for plaintiff's husband and a $7,000 verdict for plaintiff wife resulted in the court granting defendant's motion for judgment notwithstanding the verdict as to Olive Leman. Plaintiff wife appeals, but her husband does not.

The accident occurred June 29, 1956, about 2:15 p.m. on the Edsel Ford highway, a short distance east of Mt. Clemens, at a point where a spur track owned by the United States government connects Selfridge Field with defendant's main track line, and crosses the highway about 1,000 feet west of the gates of the field at a 90-degree angle.

The weather was clear and bright, the road was dry, and traffic was light.

Plaintiff's vehicle was proceeding north and the diesel engine was proceeding west.

Both plaintiff and her husband were drivers of automobiles and both were familiar with the crossing, as they testified they crossed it as much as twice a day for a number of years.

The claim in plaintiff's declaration that defendant propelled "its diesel switch engine at a high, dangerous and unlawful rate of speed" was completely repudiated by plaintiff-husband-driver's testimony that the engine "was hardly moving at all" as it approached the highway crossing, and plaintiff's statement that "I imagine if anybody could walk fast he could keep up with it."

Plaintiff's claim in her declaration that defendant negligently failed "to ring the engine bell or to sound the locomotive whistle" was eliminated from consideration by the testimony of 3 residents of the neighborhood who testified they heard the train bell ringing and the blasts from the train whistle, thus corroborating the train crew's testimony that from the time plaintiff's vehicle was from 600 to 800 feet from the crossing and defendant's switch engine 200 feet from the same crossing, the bell was ringing and the whistle sounding.

Three witnesses testified in re defendant's observation, or lack of observation, namely, plaintiff's husband, plaintiff, and defendant's engineer.

Plaintiff's husband testified that between Mt. Clemens and Joy road, which was about 600 feet from the railroad crossing, he was driving at about 65 miles per hour; that as he crossed Joy road boulevard he reduced the speed of his car to about 50 miles per hour; that when he was about 250 feet from the crossing he heard the train whistle and

he saw the train; that he applied his brakes but skidded into the rear end of the locomotive.

Plaintiff's husband intended to swing to the left of the train as the train was going so slowly, as is indicated by the following questions and answers:

"*Q.* And what would you say concerning the speed of that train when you first observed it?

"*A.* Well, it was hardly moving at all.

"*Mr. Nank* (defendant's attorney): Pardon?

"*A.* It wasn't hardly moving at all.

"*Q.* (By Mr. Gentz, continuing): Well, after having observed this, I believe you said, you threw your arm in front of your wife, and what else did you do, if anything?

"*A.* Well, I believe I did try to swing a little to the left on account of the train was going too slow, I thought maybe I could miss him, but I just about—

"*Q.* I see. What, if anything, did you do to attempt to stop your car?

"*A.* Put my brakes in."

Plaintiff testified she heard "one toot" and saw the train proceeding slowly 60 to 65 feet from the edge of the highway and that she could see a man in the window near the rear portion of the engine "looking right at us"; that that was the last thing she remembered.

Defendant's engineer was called under the statute.[1] He testified that when he came around a bend in the track and was 200 feet from the crossing, with his engine traveling about 10 miles per hour, he saw plaintiff's car approaching at about Joy boulevard, which would be 600 feet away; that plaintiff's car was at that time traveling about 60 miles per hour; that he immediately slowed his diesel down to 5 to 6 miles per hour and commenced blowing the whistle and continued blowing the whistle right up to the

[1] See CL 1948, § 617.66 (Stat Ann § 27.915).—REPORTER.

edge of the highway; that he observed plaintiff's driver slow his car to about 35 miles per hour and, concluding that he had his automobile under control and that all was clear, he (the engineer) proceeded to cross; that he was crossing and was over the center line when plaintiff's car struck the diesel near the rear end, near the cab, which would be left of the center line of the highway and plaintiff's car was in the southbound lane of traffic.

The sheriff testified that he measured the skid marks of plaintiff's car and they were 130 feet long.

Defendant's conductor and brakeman testified he was in the cab where he did not see the approaching car, but he corroborated the engineer's testimony in regard to the speed of the train, the blowing of the whistle, the ringing of the bell, and the position of the vehicles after the accident.

Appellant contends the evidence proved defendant's negligence because:

"Between the time Leman first applied his brakes (150 feet from the crossing) and when the train reached a point 10–15 feet from the edge of the pavement, the train employees had more than ample time to stop the engine.

"The obvious inference from the testimony is that Hoffman (engineer) paid no further attention to the Leman vehicle after it reached a point 150 feet south of the crossing.

"Certainly it must have appeared to a reasonably prudent train employee that 'Danger was imminent' somewhere between the time when Leman first started to skid and the collision itself.

"Had the last observation of Hoffman been something more than a glance he could not help but have seen that 'Danger was imminent and apparent', and at that point (15 feet from the edge of pavement) he had time to stop the train and avoid the accident; a careful review of the record seems to establish without doubt, that a serious question of fact of de-

fendant's negligence was raised by the testimony produced by the plaintiff. Certainly the minds of reasonable men might differ as to whether Hoffman's observations and conduct were reasonable under all the facts and circumstances surrounding the collision."

The fact that the operator of the diesel saw the automobile approaching and did not stop did not make him guilty of negligence, nor did the fact that he failed to gain complete control of the train when he observed the car approaching make him guilty of negligence.[2] The operator of the diesel was under no obligation to check or stop his train until there was something manifest that would indicate to him that the operator of the automobile was about to drive his automobile in front of the train, regardless of the imminent danger.[3] The operator of a train has no reason to slacken the speed of the train unless the danger is apparent; he has a right to assume that the operator of the automobile would stop, and it does not become negligence unless a reasonable man would have realized that the traveler would not, nor could not stop.[4]

Appellant quotes the following from 44 Am Jur, Railroads, § 509, p 749:

"Due care generally does not require the engineer to stop the train (when he sees an auto approaching the crossing), but he may act on the supposition that the traveler will stop before reaching the track. If, however, the traveler continues his course, the engineer must not rest upon this supposition so long as to allow his engine to reach the point where it will become impossible for him to control his train * * * in time to prevent injury to the traveler. When it is apparent, or when in the exercise of reasonable

[2] *Knickerbocker* v. *Detroit, G. H. & M. R. Co.*, 167 Mich 596, 604.
[3] *Tomes* v. *Detroit, T. & I. R. Co.*, 240 Mich 133.
[4] *Buchthal* v. *New York Central R. Co.*, 334 Mich 556.

diligence commensurate with the surroundings it should be apparent, to the company that a person on its track or about to get on its track is unaware of his danger or cannot get out of the way, it becomes the duty of the company to use such precautions, by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid injury to him."

The evidence does not justify a conclusion that the exercise of "reasonable diligence commensurate with the surroundings" should have made it apparent to defendant that it should have operated the diesel differently than it was operated during the brief period separating the time "when Leman first started to skid and the collision itself."

Appellant does not point out where "danger was imminent" but merely states, " 'Danger was imminent' somewhere between the time when Leman first started to skid and the collision itself."

We do not agree with appellant's theory that the operator of defendant's locomotive was guilty of negligence because "instead of watching the plaintiff's vehicle continuously, after his first observation," he discontinued observing the automobile.

The evidence justifies the conclusion that the automobile and diesel operators shared the belief that the diesel could cross the highway without collision with the automobile and that this belief continued until a time when it was impossible to avoid a collision.

Upon the facts presented the operator of the diesel could not have sensed danger until it was too late to avoid collision, and, hence, there was nothing to go to the jury. *Dalton* v. *Grand Trunk W. R. Co.*, 350 Mich 479.

Plaintiff failed to prove defendant's negligence. The court did not err in granting defendant's motion for judgment notwithstanding the verdict.

The judgment should be affirmed. Costs to defendant.

CARR, C. J., and DETHMERS, J., concurred with KELLY, J.

BLACK, J. Mr. Justice KELLY cites *Dalton* v. *Grand Trunk W. R. Co.*, 350 Mich 479, in support of his conclusion that "the operator of the diesel could not have sensed danger until it was too late to avoid collision." I reply, as did Mr. Justice CARR for the Court in *Sabo* v. *New York Central R. Co.*, 365 Mich 231, 234, that "The situation here is not analogous to that involved in *Dalton* v. *Grand Trunk W. R. Co.*, 350 Mich 479, to which counsel have called attention."

Indeed it is not. In *Dalton* the collision of the automobile with the train occurred at an essentially blind country road crossing of Grand Trunk's internationally operated main line tracks. The automobile was struck by one of the railroad's through passenger trains, speeding eastward from Durand, and the engineer obviously could not have stopped the train in time to avoid the Dalton disaster. In this case the crossing of a through trunk line highway, by defendant's irregularly used spur track, was in open flat country with view of motorist and engineer quite unobstructed. The so-called right-of-way became, on view necessarily favorable to plaintiff-appellant, the reverse of that which was shown in *Dalton*, and defendant's engineer seems to have acted initially upon such assumption. The extremely slow approach of the locomotive to the pavement of the expressway so indicates.* Finally, no train was involved in the collision of the Leman car with defendant's locomotive. The latter was

* Mr. Leman said the locomotive "was hardly moving at all." The engineer estimated its speed, immediately before impact, to be between 5 and 6 miles per hour.

proceeding with no cars attached, and it consisted of a single unit of diesel power.

Noting with emphasis that we review only the grant of a motion for judgment notwithstanding the jury's verdict for plaintiff-appellant, and making sure that we are understood as speaking in the exclusive text of favorable view, the undersigned agree fully with Justice KELLY's summation of what this record presents:

"The evidence justifies the conclusion that the automobile and diesel operators shared the belief that the diesel could cross the highway without collision with the automobile and that this belief continued until a time when it was impossible to avoid a collision."

Such shared belief did not, however, acquit either the engineer or the automobile driver as a matter of law. If it did, few intersectional collision cases would get before juries. Instead, that shared belief and its result should be likened to the not unknown game of bluffing the other motorist into grant of first passage; a game which does not work out so well when both bluffers continue until it is too late to avoid a collision. All of which recalls what has been before this Court many times since advent of the automobile; referring to those open country intersectional collision cases where each driver, perceiving well in advance the approach of the other, keeps on toward the ultimate point of tie with each erroneously expecting the other to pull up. See *e.g. Geeck* v. *Luckenbill,* 215 Mich 288, 293; *Smith* v. *Ormiston,* 242 Mich 600, 603; and *Grodi* v. *Mierow,* 244 Mich 511, 514, all repeating that:

"It seems incredible that a collision could have occurred without negligence on the part of both drivers."

Whether the engineer, as he moved the locomotive toward the pavement with timely knowledge that the Leman car was approaching—on that same pavement—at trunk line speed, should have stopped and accorded the car initial passage, was a question for the jury rather than the trial judge. In short, the proof fully justified the jury's implicit finding that each driver—one a motorist and the other an engineer—negligently, causally and mistakenly figured the other would stop and accord his vehicle the first right of passage. It follows that there was an ample sufficiency of evidence upon which the jury could find, as it did,* that the engineer and the automobile driver were causally negligent.

I would reverse and remand for entry of judgment upon the verdict of the jury, noting to avoid possible misunderstanding that no question of contributory negligence on the part of the appellant automobile passenger is or could be involved (*Yarabek* v. *Brown,* 357 Mich 120; *Spencer* v. *City of Midland,* 358 Mich 346). Appellant should have costs.

KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred with BLACK J.

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* The form of the special questions propounded for jury answer was not and is not now questioned. Here are the questions and the jury's answers:

"1. Was Henry Leman guilty of any negligence which was a proximate cause or contributed in any way to the accident?"
Jury's answer—"Yes."

"2. Was the railroad guilty of negligence in failing to give a reasonable warning of the train's approach?"
Jury's answer—"No."

"3. If your answer to question 2 above is yes, was such negligence a proximate cause of the accident?"
Jury's answer—"No."

"4. Was the railroad guilty of negligence in failing to make a reasonable observation of the Leman automobile?"
Jury's answer "Yes."

"5. If your answer to question 4 above is yes, was such negligence a proximate cause of the accident?"
Jury's answer "Yes."

BALCER *v.* LEONARD REFINERIES, INC.

HUSBAND AND WIFE—LOSS OF CONSORTIUM—WORKMEN'S COMPENSATION ACT.

Action by wife of employee, injured during and in the course of employment, by reason of alleged negligence of employer, for loss of consortium is ordered dismissed in view of exclusiveness of remedy for injuries to employees provided by the workmen's compensation act (CL 1948, § 411.4).

Appeal from Gratiot; Cash (Paul R.), J. Submitted February 5, 1963. (Calendar No. 46, Docket No. 49,649.) Decided July 17, 1963.

Case by Betty M. Balcer against Leonard Refineries, Inc., a Michigan corporation, and others, for loss of consortium as result of fire in refinery where husband was employed. Motion to dismiss by husband's employer, Leonard Refineries, Inc., denied. Defendant appeals. Reversed and remanded for entry of order dismissing cause as to Leonard Refineries.

Glassen, Parr, Rhead & McLean, for plaintiff.

Mitts, Smith & Haughey (*Sherman H. Cone,* of counsel) and *Fortino, Plaxton, Deatrick & Sheldon* (*Alfred J. Fortino,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTE

58 Am Jur, Workmen's Compensation § 58.

Workmen's Compensation Act as precluding common-law action by husband or wife of the injured employee. 104 ALR 346.

SMITH, J. Like *Moran* v. *Nafi Corporation,* 370 Mich 536, decided simultaneously, this case requires a determination of the question of whether the workmen's compensation act bars a wife from asserting against her husband's employer in a separate suit a claim for loss of consortium by reason of alleged negligence of the employer.

Plaintiff filed her declaration in 1961 against Leonard Refineries and others, alleging that on the 15th day of February, 1958, her husband, Robert Balcer, was employed by defendant and appellant, Leonard Refineries, and while so employed and working in the course of his employment was severely injured in an explosion and fire occurring on the premises of Leonard Refineries. It was alleged that Leonard Refineries was negligent in failing to construct, install, maintain and supervise, and operate, the tanks, pipes, valves, and gauges used in conjunction with the manufacture and storage of butane gasoline. She claimed damages by reason of her loss of consortium.

Leonard Refineries filed a motion to dismiss based upon (1), the failure of the declaration to state acts of negligence sufficient to constitute a cause of action; and (2), that plaintiff's cause of action for loss of consortium is barred by the workmen's compensation act. After hearing said motion, the trial judge held that plaintiff did state a cause of action and that her claim for loss of consortium was not barred by the workmen's compensation law. From his order denying defendant's motion to dismiss, we granted leave to appeal.

Determining as we do, that the workmen's compensation act provides the exclusive remedy against the employer, we do not come to the issue of whether the declaration sufficiently stated a cause of action in negligence. It is the opinion of the writer that we need go no further than the plain language of

the statute, supplemented by recent decision of this Court, to arrive at a proper disposition of this case.

Part 1, § 4, of the workmen's compensation law, CL 1948, § 411.4 (Stat Ann § 17.144), reads as follows:

"Where the conditions of liability under this act exist, the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer."

This Court said in the 1959 case of *Lahti* v. *Fosterling,* 357 Mich 578, at pp 584, 585, that:

"In dealing with the workmen's compensation act it is necessary occasionally to bring ourselves back to the original aims and purposes of the act in order to better understand the rights of the parties involved. * * *

"The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law."

It would be sufficient, by reference to the 2 citations above, to conclude that the workmen's compensation act provides the exclusive remedy in cases such as this where the conditions of liability exist. However, because this case, and its companion, are important precedent-setting cases in Michigan, it is desirable to add that the position taken here has impressive support.

Many inquiries into this problem begin by citing 2 Larson's, Workmen's Compensation, § 66.10, p 141:

"There are 3 general types of 'exclusive liability' clause which, for present purposes, must be carefully identified with the cases that depend upon them; from the narrowest to the broadest, they are as follows: the Massachusetts type, which only says that the employee, by coming within the act, waives *his* common-law rights; the California and Michigan* type, which say that the employer's liability shall be 'exclusive', or that he shall have 'no other liability whatsoever'; and the New York type, which carries this kind of statute 1 step further by specifying that the excluded actions include those by 'such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death.'"

The author's comment at section 66.20, p 144, is:

"Even without the additional precaution of a list of third persons barred, the sweeping language used in describing the employer's immunity seems to indicate a legislative intention which is accurately reflected in the majority rule."

Justice O'HARA, in his opinion in *Moran* v. *Nafi Corporation,* discusses *Smither & Company, Inc.,* v. *Coles,* 100 App DC 68 (242 F2d 220). An excellent summary of the position as to why compensation laws provide the exclusive remedy in such cases is contained in the opinion in the *Smither Case.* Herewith, it is quoted in part (p 70):

"We are not unmindful, to paraphrase Mr. Justice Frankfurter and Judge Learned Hand, that the literal words of a statute sometimes can be misleading, and that we do not stop but only begin with the words. Sometimes the words are such that the purposes of the statute and the entire statutory scheme must be taken into account. *The words must be read and interpreted as a part of the whole.* (Emphasis supplied.)

* Reference is to part 1, § 4, quoted *supra.*—REPORTER.

"The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, *recalls that the keystone was the exclusiveness of the remedy.* This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation." (Emphasis supplied.)

See, also, *Guse* v. *A. O. Smith Corp.,* 260 Wis 403 (51 NW2d 24).

Reversed with instructions that an order be entered granting the motion to dismiss made by Leonard Refineries, Inc.

No costs, a question of statutory construction being involved.

BLACK, KAVANAGH, and SOURIS, JJ., concurred with SMITH, J.

CARR, C. J. (*concurring*). For the reasons set forth in our opinion in *Moran* v. *Nafi Corporation,* 370 Mich 536, we concur in reversing the order of the circuit judge denying defendant's motion to dismiss.

DETHMERS, KELLY, and O'HARA, JJ., concurred with CARR, C. J.

MORAN *v.* NAFI CORPORATION.

HUSBAND AND WIFE—LOSS OF CONSORTIUM—WORKMEN'S COMPENSATION ACT.

Action by wife of employee, injured during and in the course of employment, by reason of alleged negligence of employer, for loss of consortium is ordered dismissed in view of exclusiveness of remedy for injuries to employees provided by the workmen's compensation act (CL 1948, § 411.4).

Appeal from Wayne; Gilmore (Horace W.), J. Submitted February 5, 1963. (Calendar No. 47, Docket No. 49,693.) Decided July 17, 1963.

Case by Lena C. Moran against Nafi Corporation, a Michigan corporation, for damages for loss of consortium of husband, injured while in the employ of defendant. Motion to dismiss denied. Defendant appeals. Reversed and remanded with instructions to grant motion to dismiss.

L. Edwin Wenger, for plaintiff.

Vandeveer, Haggerty, Doelle, Tonkin & Kerr (*Stanley E. Beattie* and *Thomas C. Mayer,* of counsel), for defendant.

O'HARA, J. On February 25, 1960, this Court in a 4-to-3 decision with 1 Justice not participating,

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REFERENCES FOR POINTS IN HEADNOTE

58 Am Jur, Workmen's Compensation § 58.

Workmen's Compensation Act as precluding common-law action by husband or wife of the injured employee. 104 ALR 346.

changed the law of our State in order to permit a wife to bring a separate action for loss of consortium. *Montgomery* v. *Stephan,* 359 Mich 33. Whatever our view now as to the correctness of the judicial pronouncement in *Montgomery* relating to the existence of the cause of action, it stands, at least for the present, as to the circuit bench of our State, the controlling law, and loss of consortium is actionable if properly asserted.

On April 21, 1961, plaintiff wife, in the instant case, filed her declaration and asserted her cause of action arising from, or at least permitted under, that decision.

However, important differences exist between this case and *Montgomery.* In *Montgomery,* plaintiff-wife sued a tortfeasor otherwise unrelated to her injured husband. Here plaintiff wife seeks damages for loss and invasion of consortium from her husband's employer against whom an award had been entered by the workmen's compensation commission for the husband, which award carried an additional $3 weekly benefit by reason of her dependency.

We do not regard the additional $3 benefit as controlling. If plaintiff has an action in her own right maintainable against her husband's employer, despite his receipt of compensation benefits, 3 additional dollars a week to him as a dependency[1] increment will not defeat it. The right of action we deal with here is hers and hers alone. The question is neither what he receives, nor for what he receives it. The real question is whether the Michigan workmen's compensation act is declarative only of the rights of the injured workman, or whether it was legislatively intended to limit the liability of the employer to the schedule of payments therein contained, and to bar action by any other person against him

[1] See CLS 1956, § 412.9 (Stat Ann 1960 Rev § 17.159).—REPORTER.

as the result of an injury to the employee, where the employee's right to compensation is determinable under the act.[2]

Defendant's motion to dismiss does not in this case raise the question of the sufficiency of the declaration in stating a cause of action for loss of consortium as that term is defined in *Montgomery*. For that reason we do not pass upon that issue here and leave it for decision in a case wherein it may be presented.

In this case, first, we must inquire whether any Michigan decision is squarely in point and controlling of the issue. Cases decided before February 25, 1960, cannot decide the question for the rather obvious reason that we deal with a right which was not recognized in this State prior to that date, and no case between the issuance date of *Montgomery* and the present has been cited, nor has our research revealed one which controls. We deal then with a case of first impression.

Since no Michigan case is controlling, our next step is to examine those cases in our jurisdiction which are applicable by analogy—those cases which deal with rights asserted by others than the injured employee for damages in a separate action, yet growing out the accidental injury to the employee. Again, none of the cases cited is precisely in point, and as before noted, for the reason that we deal with a previously unrecognized right. We have studied carefully the cases in this category cited and urged by appellant as indicative of legislative intent. They involve, it is true, separate (so-called) rights or causes of action. Yet in each Michigan case cited the cause of action is intertwined with the underlying concept of support and a loss thereof. As noted by our distinguished Chief Justice in his concurring

[2] See quotation of section, *post*.—REPORTER.

opinion, the case of *Wall* v. *Studebaker Corp.*, 219 Mich 434, is reflective of our settled view on the exclusivity-of-remedy question.

No analogous Michigan cases controlling, we turn to the Federal cases cited and those of sister States. *Fernandez* v. *Flint Board of Education* (CCA 6), 283 F2d 906, is subject to the same infirmity as some Michigan cases. In that case, the personal representative of the deceased sought to recover pecuniary damages already specifically included statutorily in the death benefit under our compensation act[3] and thus clearly constituted double recovery.

Other Federal cases, however, notably *Hitaffer* v. *Argonne Co., Inc.*, 87 App DC 57 (183 F2d 811, 23 ALR2d 1366), decided May 29, 1950, certiorari denied 340 US 852 (71 S Ct 80, 95 L ed 624), October 16, 1950, and *Smither & Company, Inc.*, v. *Coles*, 100 App DC 68 (242 F2d 220), decided February 21, 1957, certiorari denied 354 US 914 (77 S Ct 1299, 1 L ed 2d 1429), June 10, 1957, deal squarely with the problem before us.

Were *Hitaffer* still the law, appellee here could take comfort therefrom. Decided by 3 of the 9 judges of the United States court of appeals, District of Columbia Circuit, *Hitaffer* construed language of the longshoremen's compensation act (33 USCA § 905), the same being considerably more restrictive than comparable provisions of our own act:

"The liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee, *his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.*" (Emphasis supplied.)

[3] See CLS 1956, § 412.5 (Stat Ann 1960 Rev § 17.155).—REPORTER.

Yet *Hitaffer* permitted the wife to recover for loss of consortium against the employer.

But *Hitaffer* was short-lived. A brief 7 years later the question was again before the same court. See *Smither & Company, Inc.*, v. *Coles, supra.* This time the full 9-judge panel sat, *en banc.* The complexion of the Court had changed somewhat. Judge Clark, who wrote *Hitaffer* was deceased. Judges Miller and Fahy who had concurred, were still members. In a 6–3 decision *Hitaffer* was specifically overruled. Judge Miller changed his opinion; Judge Fahy, Chief Judge Edgerton, and Judge Bazelon joining, held for the rule announced in *Hitaffer.* Thus the latter case is no longer law and under the more exclusive longshoremen's act, the right of a wife to recover from husband's employer is not now recognized.[4]

Be it carefully noted that *Smither* does not pretend to challenge the right of a wife to damages for loss of consortium as a general or basic concept. Rather it challenges the assertability of that right against the employer where the Federal act above mentioned obtained. The language of the longshoremen's act, *supra,* fairly read, is much more exclusionary than ours, for congress thereunder clearly and unequivocally excluded actions by the wife or anyone else against the employer where the injury to the employee was covered by the act.

[4] "On this score, all that the plaintiffs have is *Hitaffer* v. *Argonne Co.* (1950), 87 US App DC 57 (183 F2d 811, 23 ALR2d 1366), cert denied 340 US 852 (71 S Ct 80, 95 L ed 624), which did hold that exclusive is really not exclusive. But *Hitaffer* while launched and afloat never really got underway. Within 5 years its architects rejected it as unsuitable (hence inapplicable) to transport a death case. [*Brown* v. *Curtin & Johnson, Inc.* (1955), 95 App DC 234 (221 F2d 106).] And it was not long until it was abandoned and reversed. And in its short life it never, on this point, attracted any support. On the contrary, every State and Federal case rejected it as unsound." *Thibodeaux* v. *J. Ray McDermott & Co., Inc.* (CCA 5), 276 F2d 42, at p 48.

Next, we must consider the assertion that if the husband's cause of action for loss of consortium is barred by our workmen's compensation act, so likewise is the wife's. We do not consider this postulate tenable. This assertion is based on the principle that where the party receiving the injury may not recover in tort, the one receiving an incidental or consequential injury may not recover. That rule is concerned with "derivative" injury in the sense that the derivee's action is barred because the principal's action is barred in tort for reasons of the insufficiency of the elements of the main tort action, not, as here, because the tort action was replaced by a recovery of scheduled payments for injury without proof of fault. We never reach the question of the maintainability of the principal's tort action in this case because he can't assert it. The infirmity is not in the elements of his cause of action, but because another recovery legislatively has been substituted for it. The asserted analogy does not apply, and we disturb no settled law in the field of consequential recovery so to hold.

Appellee contends that in the examination of the holdings from other jurisdictions, the classifications set out in 2 Larson, Workmen's Compensation Law, § 66.10, is at once accurate and helpful. We agree. These categories are first the "Massachusetts" type —the broadest where only the employee coming within the act waives his common-law rights against the employer. (Mass Gen L, ch 152.) The narrowest and most exclusionary is the "New York" group (as is also the longshoremen's act we have heretofore mentioned). This group, in explicit terms and name excludes personal representatives, wives, husbands, dependents, and everyone else. We believe Michigan rightly is included in a third grouping—the "California" type which makes the remedy under the workmen's compensation act "exclusive" but without

particular enumeration of those who may not maintain actions.

Nowhere in the cases cited to us nor in our research disclosed, do we find precedent for the assertability of the cause of action for loss of consortium against the husband's workmen's compensation covered employer under an act comparable to ours.

We are persuaded that in determining the question here presented, the general observation of the late, great liberal, Justice Brandeis in *Bradford Electric Light Co., Inc.,* v. *Clapper,* 286 US 145, 159 (52 S Ct 571, 576, 76 L ed 1026, 82 ALR 696) is helpful.

Though in *Bradford* the distinguished jurist was really discussing the question of whether the action there involved was properly brought in Vermont or New Hampshire, he capsulized the socio-legal philosophy that underlay the enactment of workmen's compensation laws generally, in the following incisive language:

"For the purpose of that act [the Vermont workmen's compensation act], *as of the workmen's compensation laws of most other States,* is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, *but also for employers a liability which is limited and determinate.*" (Emphasis supplied.)

We believe a fair appraisal of our act brings it within the purpose definition of Justice Brandeis. We believe the legislature intended, first, to produce a remedy for the injured workman in the nature of compensation. In the title of our act, only the word "compensation" appears where the award to the employee is limited.[5] The legislature, and we think

[5] PA 1912 (1st Ex Sess), No 10, as amended by PA 1937, No 61. "An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the disability or death * * *

significantly, in the final clause limiting the recovery against the employer, included the word "damages" in the following phraseology *"and restricting the right to compensation or damages in such cases to such as are provided by this act."*

Since the only award to the employee under the act is in the nature of compensation, the inclusion of "damages" in the restriction clause in the title would seem to indicate a legislative intent to permit recovery of damages only if the act so authorized.

Section 4[6] again adverts to this limitation. The section reads:

"Where the conditions of liability under this act exist, the right to the recovery of compensation benefits, as herein provided, shall be the *exclusive remedy* against the employer." (Emphasis supplied.)

Under the above section and the title of the act, as previously discussed, we believe any broadening of the base of recovery against the employer as a result of an industrial injury to include an action at law by any other person must, if it is to be authorized, be authorized by legislative action. We hold the legislative intent expressed in the act precludes the judicial construction contended for by plaintiff and adopted by the learned trial judge.

The order denying defendant's motion to dismiss is vacated and the case remanded to the circuit court with instructions to grant the motion to dismiss.

No costs, construction of a statute being involved.

BLACK, KAVANAGH, and SOURIS, JJ., concurred with O'HARA, J.

CARR, C. J. (*concurring*). While in the employ of the defendant corporation plaintiff's husband sus-

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and restricting the right to compensation or damages in such cases to such as are provided by this act."

[6] CL 1948, § 411.4 (Stat Ann 1960 Rev § 17.144).

tained a physical injury causing disability for which he received compensation under the provisions of the workmen's compensation law of the State.* Plaintiff brought the present suit for damages for alleged loss of consortium, basing her claim on the case of *Montgomery* v. *Stephan,* 359 Mich 33, affirmatively asserting in reply to defendant's motion to dismiss that she had been granted a right of action for damages by said decision, and that the provisions of the workmen's compensation act of the State did not operate to bar her suit. The circuit judge before whom the motion to dismiss was heard entered an order denying it, and on leave granted defendant has appealed.

Prior to *Montgomery* v. *Stephan,* which was a 4-to-3 decision, an action for damages for loss of consortium on behalf of either spouse had not been recognized in Michigan as existing by virtue of statute law, common law, or judicial decision. Such right was denied in *Blair* v. *Seitner Dry Goods Co.,* 184 Mich 304 (LRA 1915D, 524, Ann Cas 1916C, 882); *Harker* v. *Bushouse,* 254 Mich 187; and *Bugbee* v. *Fowle,* 277 Mich 485. That the weight of authority throughout the country is in accord with the previous holdings of this Court is not open to question. Under the common law a married woman could not maintain such an action in the English courts. That causes of action may be created by legislative authority, and may likewise be abolished, is not open to question, but such measure of authority is not within the proper scope of the functions of the judiciary.

In the dissenting opinion in *Montgomery* v. *Stephan* we set forth at some length our reasons for disagreeing with creating by Court action the cause for suit here involved. It is unnecessary to repeat

* PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.*, as amended [Stat Ann 1960 Rev and Stat Ann 1961 Cum Supp § 17.141 *et seq.*]).

what was there said. The question at issue should be given careful reconsideration. For the reasons there advanced plaintiff in the instant case was not entitled to maintain the action instituted by her in circuit court, and the circuit judge to whom the motion to dismiss was submitted should have so held.

We are in accord with the holding of Mr. Justice O'HARA that the rights granted by the workmen's compensation act to an employee who sustained an injury arising out of and in the course of his employment are exclusive. The provision of the title restricting the right to compensation or damages in such cases to such as are provided by the act is significant. Part 1, § 4 (CL 1948, § 411.4 [Stat Ann 1960 Rev § 17.144]), is in accord with the intent indicated by the title. Said section reads as follows:

"Where the conditions of liability under this act exist, the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer."

Permitting the maintenance of actions for damages in instances where the injured employee is entitled to, and has received, compensation under the statute would clearly be at variance with the express language as enacted by the legislature. Such an interpretation would mean that a dependent or other person claiming injury because of disability sustained by the employee might maintain suit to recover. No issue of such character was involved in *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich 8, as was pointed out by the Court in somewhat ambiguous language. The question was, however, squarely presented in *Wall* v. *Studebaker Corporation,* 219 Mich 434, in which the parent of a minor employee who received compensation for injuries sustained in his employment brought suit for loss of the son's wages to which the parent claimed he was entitled.

The Court quoted with approval part 1, § 4, of the statute as it then read, and stated (p 436):

"We think that the plain language of this statute clearly indicates that it was the intention of the legislature to abrogate the parent's right of action for loss of services of his minor child while employed under the compensation act."

The case was cited and followed in *Varga* v. *Detroit Edison Co.*, 240 Mich 593. In accord is the language of the court of appeals of the sixth circuit in *Fernandez* v. *Flint Board of Education*, 283 F2d 906. Of interest also are the opinions of the Illinois supreme court in *Wangler Boiler Co.* v. *Industrial Commission*, 287 Ill 118 (122 NE 366), and *Faber* v. *Industrial Commission*, 352 Ill 115 (185 NE 255), it appearing that the provisions of the Illinois statute are analogous to those of the Michigan act.

For the reasons indicated, we concur in the reversal of the order from which the appeal has been taken.

DETHMERS and KELLY, JJ., concurred with CARR, C. J.

SMITH, J. (*concurring*). I concur in the results for the reasons set forth in my opinion in *Balcer* v. *Leonard Refineries, Inc.*, 370 Mich 531.

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, *v.* WONDERLAND SHOPPING CENTER, INC.

1. INJUNCTION—DISTRIBUTION OF HANDBILLS—SHOPPING CENTER—EQUALLY DIVIDED COURT.

   Decree enjoining interference with distribution of handbills, promoting purchase of merchandise bearing union label, on entire property of shopping center is affirmed, where court is equally divided between reversal and affirmance of decree as modified to permit distribution of handbills on sidewalk adjacent to front entrance of a particular store (PA 1961, No 236, § 230).

2. COSTS — INJUNCTION — DISTRIBUTION OF HANDBILLS — SHOPPING CENTER.

   No costs are allowed on appeal in suit to enjoin interference with distribution of handbills at shopping center, per BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ.

Appeal from Wayne; Bohn (Theodore R.), J. Submitted February 7, 1963. (Calendar No. 56, Docket No. 49,813.) Decided July 17, 1963.

Bill by Amalgamated Clothing Workers of America, AFL–CIO, against Wonderland Shopping Center, Inc., a Michigan corporation, its officers and owners, to enjoin interference with distribution of handbills promoting purchasing of merchandise bearing union label. Decree for plaintiff. Defendants appeal. Affirmed under PA 1961, No 236, § 230 (assigned CL 1948, § 600.230 [Stat Ann 1962 Rev § 27A.230]).

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Courts § 81.
[2] 28 Am Jur, Injunctions §§ 299, 300.

Zwerdling, Miller, Klimist & Maurer (*A. L. Zwerdling,* of counsel), for plaintiff.

Milton M. Maddin, for defendants.

CARR, C. J. (*for reversal*). As appears from its amended bill of complaint in the case, filed January 18, 1962, plaintiff is an unincorporated association representing workers, among others, engaged in the manufacture and sale of men's clothing. It was alleged that it "has among its primary objectives promotion of purchase and sale of aforesaid articles of clothing which are entitled to display the union label owned by plaintiff." The corporate defendant is the operator of a shopping center in the city of Livonia, Wayne county, Michigan. In such center there are a number of stores operated under leases given by defendants who have alleged in their answer to the bill of complaint that the individual defendants in the case are the actual owners of the property and operate it as such. Between the leased stores and the public highway is a large parking area designed for use by patrons of said stores and others having business relations therewith. Within the shopping center are maintained malls by which access to the various places of business in the center can be reached.

Among the tenants in the shopping center is a corporation designated as "United Shirt Distributors, Inc." In connection with its promotional work, as set forth in its pleading, plaintiff sought, through a representative, a distribution of handbills adjacent to the entrance from the mall to said store. Attached to the bill of complaint was a handbill of the kind in question. It was printed in conspicuous type, and obviously designed to discourage the purchase of nonunion made clothing. Attention was directed to the claim that United Shirt Distributors, Inc., was

offering for sale clothing made by a manufacturing company employing other than union labor. The handbill urged refusal to purchase such clothing, and affirmatively sought the cooperation of prospective customers in demanding apparel bearing the Amalgamated Union label. Printed in large type were the inquiries: "Does your suit and shirt have a union label? If not, why not?" Printed in type of smaller size at the bottom of the handbill was a statement to the effect that it was not directed against employees of the store or the employees of another employer servicing the store.

An examination of the handbill in question indicates that the basic purpose thereof was to promote the sale of clothing bearing the union label, which plaintiff in its bill of complaint alleged that it owned, and, to the furtherance of such end, the prevention of the sale of wearing apparel not having such a label attached thereto. It is conceded that no labor dispute in the ordinary acceptance of the term is here involved. Plaintiff sought permission for the distribution of the handbills immediately outside the entrance to the United Shirt Distributors store, and on the mall designed for access to such place of business as well as to other stores in the shopping center. Such permission was refused, and thereupon plaintiff instituted the present suit seeking injunctive relief against interference in any way with the claimed right to conduct its promotional campaign in the manner indicated. In support of its position the constitutional guarantees with reference to freedom of speech are invoked.

It was the claim of defendants in the trial court that the shopping center was private property, and that the entrances to the building and the use of the passageways therein were not dedicated to the public for general use but were maintained for the purpose of allowing access to the places of business

of the various tenants within the shopping center, and for the accommodation of persons having or contemplating business therewith. Defendants further asserted that under the leases with said tenants they were obligated to protect the right of "quiet enjoyment" of the various places of business concerned, that interference in any form with the business of a tenant was prejudicial to the property rights of defendants, and that the asserted right of freedom of speech did not authorize plaintiff to conduct its promotional activities by the means and in the manner sought.

On application by the plaintiff the circuit judge granted a temporary injunction. Following the hearing the relief sought by plaintiff was granted. In the opinion filed emphasis was placed on the decision of the supreme court of the United States in *Marsh* v. *Alabama,* 326 US 501 (66 S Ct 276, 90 L ed 265), and the general conclusion was indicated that a distinction is to be drawn between a single store and a multiple shopping center, resting on the extent of the operation. The right of each storekeeper to prevent an unauthorized intrusion was recognized. It was held, however, that the property of defendants, because of its extent and purposes, had lost its identity as private property. Decree was entered in accordance with the opinion and defendants have appealed.

On the hearing of the case a representative of the plaintiff was called as a witness and testified that he had been employed for approximately 11 years in the label department and that his work involved the promoting of the union label. He stated further in his testimony that in such promotional work emphasis was placed on the purchase of clothing, and on various other merchandise as well, bearing the label. As a part of such procedure the public was urged to buy products with the label thereon, and to

refuse to buy articles of industry not produced by union labor. The witness further indicated that the particular handbill involved in the case was designed to further the purposes sought. He stated that he had surveyed the store of the United Shirt Distributors, Inc., and had determined as a result of such survey that clothing was being offered for sale therein that did not bear the Amalgamated label. The actual distribution of handbills was accomplished by a representative standing in proximity to the entrance to the store and passing out the printed exhibit to persons entering the place of business. It appears from the testimony of the witness in question that from $300,000 to $400,000 is expended annually throughout the country in the promotion of the union label and the sale of union-made goods.

Here, as in the circuit court, plaintiff relies on *Marsh* v. *Alabama, supra.* That decision involved a prosecution, brought under a State statute, for distributing religious literature on the premises of a suburb of Mobile, Alabama, known as Chickasaw. Said town was owned by the Gulf Shipbuilding Corporation. Property therein comprised residences, streets, a sewer system, a sewage disposal plant, and a so-called business block. It was emphasized in the majority opinion that, except as to ownership, Chickasaw had all the characteristics of an ordinary American town. The public generally used the company-owned streets and sidewalks, apparently without any question being raised as to the right to do so. The defendant in the case was convicted of a violation of the statute, the proofs indicating that, standing on a sidewalk near the post office maintained in the company town, she attempted to distribute literature of a religious nature. Appellant was advised that she could not distribute the literature without a permit being issued to her. She refused to desist from her venture and her arrest followed, the

resulting prosecution being under a provision of the State code declaring it to be a criminal offense to enter or remain on the premises of another after having been warned not to do so.

In reversing the conviction, such reversal being by a divided court, it was pointed out that under prior decisions neither a State nor a municipality could completely bar the distribution of religious or political literature on its streets, sidewalks, and public places, or make such right conditional on obtaining a permit. In reaching the conclusion indicated, it was said (pp 507–509):

"We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block. *Cf. Barney* v. *Keokuk,* 94 US 324, 340 (24 L ed 224). Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees, and a State statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

"Many people in the United States live in company-owned towns. These people, just as residents

of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen."

The factual situation involved in the case at bar is not analogous to that presented in *Marsh* v. *Alabama.* We are not concerned here with a company-owned town exercising and performing in practical effect the powers and functions of a municipal corporation. The defendant shopping center is not a town in any sense of the term. It performs no governmental functions so far as this record discloses. Its property, privately owned, is devoted to the carrying on of private businesses.

As before suggested, the means of access to such businesses as are conducted by the tenants therein have been provided for the use of those who desire for business reasons to visit the stores, shops, and other business places. In view of the apparent theory on which the decision of the majority of the court in *Marsh* was based, we are not in accord with the claim that the holding is controlling in the instant controversy. A like comment may be made with reference to *Tucker* v. *Texas,* 326 US 517 (66 S Ct 274, 90 L ed 274). It is significant to note that the dissenting opinion in *Tucker* was based on the theory that the record in the case showed a conviction for refusing to leave premises owned by the government of the United States and not shown to have been dedicated to general use by the public.

In *Martin* v. *City of Struthers,* 319 US 141 (63 S Ct 862, 87 L ed 1313), there was involved the valid-

ity of a municipal ordinance forbidding any person to ring doorbells or otherwise summon the occupants of any residence for the purpose of distributing handbills or circulars. The supreme court of the State of Ohio sustained the validity of the ordinance in a prosecution against one seeking to distribute literature of a religious nature, specifically leaflets advertising a religious meeting. In reversing the decision of the State court, it was said (pp 146–149):

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least 20 States, while similar statutes of narrower scope are on the books of at least 12 States more. We know of no State which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the

home-owner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home."

The majority opinion in the above case was written by Justice Black, who also spoke for the majority in *Marsh* and *Tucker*. The suggestion that a property owner may protect himself from annoyance by suitable notice that he does not wish to be disturbed or have his property invaded is particularly significant. In the case at bar the representatives of plaintiff were specifically informed that the distribution of handbills in the manner intended was forbidden. The question presented is whether the constitutional right of freedom of speech and of the press applies to a situation of this character and overrides the rights of property owners, also constitutionally protected, to control the use of such property.

The cases above cited were followed by *Breard* v. *Alexandria,* 341 US 622 (71 S Ct 920, 95 L ed 1233, 35 ALR2d 335). The municipal ordinance under which the prosecution in that case was brought declared it to be a nuisance, and as such a misdemeanor, for solicitors or transient vendors of merchandise to enter in and upon private residences within the city, unless requested or invited by the owners or occupants thereof, for the purpose of soliciting orders for goods or for selling same. It appeared from the record in the case that the defendant and others whom he employed were engaged in the business of soliciting magazine subscriptions. The

validity of such ordinance was sustained by a decision of the majority of the court, which affirmed the action of the supreme court of Louisiana. The decisions in *Marsh* and *Tucker,* above cited, were referred to in the majority opinion but were declared to be not applicable. The conclusion expressed in the controlling opinion appears to be summarized by the closing statement therein, as follows (pp 644, 645):

"Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance."

Prior decisions of the United States supreme court dealing with the question in issue here were discussed at some length in *Hall* v. *Commonwealth of Virginia,* 188 Va 72 (49 SE2d 369). Defendant in the case was prosecuted under a State statute declaring it to be a misdemeanor punishable by fine to go upon or remain upon the land or premises of another after having been forbidden to do so by the owner or other person lawfully in possession. The facts in the case indicated that the accused insisted on distributing religious literature in an apartment building occupied by between 200 and 300 persons and being 12 stories in height. Defendant Hall and others went into the building for the purpose of distributing religious tracts and to invite the occupants to attend a lecture scheduled to be delivered in a certain public park. Defendant was interrupted in his work and told to leave the building. Subse-

quently he again sought to distribute tracts and invitations to attend a public meeting, notwithstanding that he was denied the right to do so. The arrest and conviction followed. In upholding the conviction the Virginia court (p 77) cited with approval the statement of Mr. Justice Black in *Martin* v. *City of Struthers, supra,* that:

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least 20 States, while similar statutes of narrower scope are on the books of at least 12 States more."

The court further commented on the decisions in *Marsh* v. *Alabama* and *Tucker* v. *Texas, supra,* distinguishing them from the case under consideration on the basis of the facts involved.

In support of its conclusions the Virginia supreme court cited with approval the cases of *People* v. *Bohmke,* 287 NY 154 (38 NE2d 478), and *Watchtower Bible & Tract Society* v. *Metropolitan Life Ins. Co.,* 297 NY 339 (79 NE2d 433, 3 ALR2d 1423). In the latter case it appeared that the defendant insurance company owned in the borough of the Bronx, New York City, a residential community called "Parkchester" covering 129 acres and housing 12,000 family units. The buildings were from 7 to 12 stories in height. Two public highways ran through Parkchester, and there were numerous private streets, lanes, and parks, as well as shops, offices, and service stations operated by tenants. All of the apartments were occupied under leases from defendant. Regulations were prescribed with reference to the property, among which was a provision prohibiting canvassing, peddling and solicitation within the property without the consent of the manager of the development or the tenant of any apartment

notifying the manager that consent thereto was given. A religious group seeking to circulate its literature throughout the place was advised that approximately 30 of the tenants were willing to receive visitors distributing literature, but that the other tenants were not. Permission was given accordingly to visit such tenants as consented thereto, but was denied as to the other tenants. The religious sect in question sought to make the same use of the halls, elevators, and stairways, as had been attempted in the *Virginia Case,* and instituted a suit in equity for the purpose of obtaining an injunction against the Metropolitan Life Insurance Company from interfering in the contemplated door-to-door canvass within the apartment buildings. The relief sought was denied, and the regulations were declared valid. The New York court of appeals affirmed and in doing so rejected the claim of the plaintiff that the decisions in *Marsh* v. *Alabama* and *Tucker* v. *Texas, supra,* were controlling.

The decision of the supreme court of Illinois in *People* v. *Goduto,* 21 Ill 2d 605 (174 NE2d 385), decided April 26, 1961 (certiorari denied 368 US 927 [82 S Ct 361, 7 L ed 2d 190]), is also of interest in the consideration of the problem before us. In that case the defendants were tried and convicted under a statute declaring it to be an offense for anyone to enter upon the land of another and on being notified to depart therefrom by the owner or occupant refuse to comply. The defendants Goduto and Friedman were representatives of a labor union and entered upon the parking lot of Sears, Roebuck & Company for the purpose of distributing union leaflets and questionnaires to store employees. The superintendent of the store informed defendants that soliciting on the property without permission was not allowed, and requested that they leave. The defendants refused to do so, insisting that they had

a legal right to solicit on the property. Their arrest and prosecution followed.

On behalf of defendants in said case it was urged on the appeal of their conviction that under the national labor relations act there was a right of solicitation by non-employee union organizers on company property, and that interference with such activity was prohibited "when it can be shown that there is no reasonable alternative channel of communication with the employees or where a valid no-solicitation rule is being unfairly applied." In support of such statement the court (p 612) cited the decisions of the United States supreme court in *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 US 793 (65 S Ct 982, 89 L ed 1372, 157 ALR 1081); *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 US 105 (76 S Ct 679, 100 L ed 975); and *National Labor Relations Board* v. *United Steelworkers of America, CIO,* 357 US 357 (78 S Ct 1268, 2 L ed 2d 1383). It appearing that no effort had been made by defendants or their union to invoke the jurisdiction of the national labor relations board, the court concluded that it had jurisdiction to pass on the application of the trespass statute that defendants were charged with having violated. Apparently no claim was made that permission had been sought from Sears, Roebuck & Company to distribute union literature on the parking lot. As in the case at bar, defendants, on appeal, relied on *Marsh* v. *Alabama, supra.* With reference to the claim in this respect, the court said (pp 615, 616):

"Despite the fact that certain language in that opinion concerning the right to use private property for speech, press and assembly would appear to support defendants' contention when that language is not read in the light of the facts of the *Marsh Case,* we believe that the case 'goes no further than to say that the public has the same rights of discussion on

the sidewalks of company towns that it has on the sidewalks of municipalities.' (*National Labor Relations Board* v. *Stowe Spinning Co.*, 336 US 226, 242, [69 S Ct 541, 549, 93 L ed 638, 649] [dissenting opinion].) The present case does not involve a company town. It is recognized that freedom to solicit for union organization will, under certain circumstances, require an employer to allow the solicitor to approach employees on his property (*National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 US 105 [76 S Ct 679, 100 L ed 975]), but this freedom of solicitation is the result of a regulatory statute and not a constitutional right. See: *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 US 793 (65 S Ct 982, 89 L ed 1372, 157 ALR 1081).

"We hold that freedom of speech and press guaranteed to defendants by the First and Fourteenth Amendments to the Federal Constitution and by section 4 of article 2 of our Constitution did not give them the right to remain on the parking lot after they were ordered to leave.

"It is also argued that the people failed to prove that Sears had the right to exclude defendants from the property. It is admitted that Sears is the lessee of the property; that the property is used as a parking lot for customers and employees; and that defendants were not employees or prospective customers but were on the parking lot for the sole purpose of distributing leaflets. We believe that this is a sufficient showing of Sears' right to demand that the defendants leave the premises.

"Defendants also argue that unlawful entry is the gist of the crime and that their entry upon the parking lot was lawful. They were not charged with, or convicted of, unlawfully entering upon the land of another but were charged with and found guilty of unlawfully remaining upon the land of another after they had been ordered to move. The statute declares such conduct to be a misdemeanor."

In the instant case plaintiff is seeking the aid of equity to enable it to send its representatives upon the property of defendants, and upon other properties of like nature, in connection with the promotional campaign in which it is engaged. The cases cited in support of its position do not support a conclusion that the property of defendants, the shopping center in question here, is so dedicated to use by the public generally as to vest in plaintiff, or others, the right to make use thereof in connection with the promotion of interests sought to be advanced.

That we have before us a test case is obvious. The basic question at issue is whether a right of the character asserted here on behalf of plaintiff, and which the Court is asked to uphold, is within the scope of constitutional guarantees relating to freedom of speech and of the press. There is much force in the argument of defendants that if plaintiff is entitled to enforce by judicial aid its alleged right, other members of the public may do likewise for the purpose of advancing their particular interests. Conceivably the manufacturer of merchandise in competition with articles offered for sale to the public in any store located in defendants' property might claim the privilege of distributing handbills, through its employees, urging members of the public entering the store to refrain from the purchase of specific articles therein and to purchase elsewhere instead the goods advertised in such manner. That any such procedure would constitute material interference with the business of the particular store involved is obvious. It is equally apparent that solicitors in various lines of work might stand without the entrance to a store in the furtherance of their particular businesses.

As before noted, means of access to the shopping center of the defendants were designed for the use of members of the public seeking for proper reasons

to enter a place of business therein. There is no general invitation because of the nature of the property for others to use the premises for business purposes of their own not connected in any way with the shopping center or its occupants. The carrying on or solicitation of business by other than the tenants in question is obviously not consistent with inherent property rights in the exercise of which defendants are entitled to be protected.

On behalf of plaintiff it is urged that distribution by a single representative in proximity to the entrance to the store of United Shirt Distributors, Inc., does not constitute a material interference with the carrying on of business in the center. However, if plaintiff has the right asserted by it, it is apparent that the means of exercising that right might be increased and extended and that, as before suggested, others might assert the same right. A condition might well be created highly prejudicial to the purposes for which the shopping center was established, and materially interfering with the rights of the defendants and their lessees.

No question of racial discrimination is involved in the controversy, as in several of the cases cited on behalf of plaintiff; nor do we have here a labor dispute of any kind or nature. Rather, the question at issue involves the promotion of business activities. Under the situation presented we are impressed that plaintiff is not invested with the right or privilege claimed by it, that it is not entitled to invoke the constitutional guarantees on which it relies, and that it is not entitled to the equitable relief sought in the present suit.

The decree of the circuit court should be reversed, and the bill of complaint dismissed. Defendants may have costs.

DETHMERS and KELLY, JJ., concurred with CARR, C. J.

BLACK AND SMITH, JJ. (*for modification and affirmance*). The case, critically examined, presents this decisively clean question: Whether an associational right to inform can be barred because the right is sought to be exercised on privately-owned property which for specific purposes has been dedicated by the freeholder to public use.

If the union were handbilling on public property it would seem there could be no question as to its right to there inform the public of a situation considered inimical to the interests of its members. Indeed, defendants by their brief tacitly concede that peaceable distribution of plaintiff's handbills, were such done on a public sidewalk of a public street as commonly known, would of right receive constitutional sanction.

We proceed, then, upon this premise, a premise we think is confirmed by the *Marsh Case;*[1] that if it were not for the fact that the store of United Shirt Distributors, Inc., abuts on 1 side of the sidewalks of this privately owned shopping center, we would be required to find that the right upheld below is guaranteed, not only by the First and Fourteenth Amendments, but also by our even more broadly worded State Constitution.[2]

This brings us to the reviewed ruling that the public nature of the mall, the sidewalks, the acres of

[1] *Marsh* v. *Alabama,* 326 US 501 (66 S Ct 276, 90 L ed 265).—REPORTER.

[2] "Sec. 4. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Const 1908, art 2, § 4.

Our new Constitution is yet more liberal:

"Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, art 1, § 5.

parking sections and the other lease-designated "public areas" of Wonderland calls for application of constitutional principles announced in the *Marsh Case*. The findings:

"As noted, the defendant shopping center is located in the city of Livonia. It is a large shopping center, approximately 4 blocks square, consisting of 55 acres. Defendants lease to over 60 different tenants including a large store operated by Montgomery Ward & Co. A parking lot is maintained to park approximately 5,500 American-made automobiles. Joint advertising media are sponsored by the defendant for its lessees. On occasion it has estimated that over 60,000 people from Livonia and adjacent areas have visited the shopping center in a single day. Defendants, in order to attract trade, spend considerable money and effort in promoting the idea of the public coming onto the property and utilizing it. They have attempted to make it a community shopping area. * * *

"The facts in the case herein presented are similar to those in the *Marsh Case, supra*. The law contained therein is controlling. The defendants operate a shopping area which, although privately owned, is quasi-public, in nature. The very character of the large shopping center lends itself, essentially, to a public function. The area is 55 acres in size, and cuts off public streets that would normally be available for public use. There isn't anything to prevent people from driving through from one side of the shopping center to another. The shopping center is accessible and freely open to the public. Members of the public can either come in to shop, or merely walk around. No one requires a person to make a purchase. Every effort is made by the defendants to promote the center as a community center. The handbilling was carried on in what was described in the lease to the tenant as a public area.

"The change from the operation of a single store by a storekeeper to a large, complex, multiple

shopping center, alters the very nature of the operation from one of a purely private character to one of public or quasi-public character. The single storekeeper would still be entitled to prevent any unauthorized intrusion on his private property. The defendants, through this large development, in a highly urban area, no longer can claim the same rights to their property. The property of the defendants has lost its identity as private property."

The crux of the *Marsh Case* is that the company-owned town of Chickasaw, because of the extent and purpose of its invited and accepted public use, lost its original identity as wholly private property. As the Court pointed out in *Marsh* at page 508, "The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through." The Court said further, at page 507: "Whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."

First: Simply as an augmentive attestant of due applicability of the *Marsh Case,* we hold without hesitation that the corporate defendant has, by the very necessities and profitable advantages of its invitational and fully effective plan of doing business, made a special dedication, to general public use during regular shopping hours, of its self-designated "public area of the shopping center."[3] Such dedication is not of statutory nature. It arises from and

[3] Section 3 (VII) of the lease to United Shirt Distributors characterizes and designates the walkways in question by a special covenant reading:

"Tenant agrees to pay upon demand, in addition to the rental set forth in article 3 of this lease, a proportionate share of the cost of operating, lighting, cleaning, snow removal, line painting, policing and maintenance, [et cetera] * * * of all the public area of the shopping center. Tenant further agrees to pay a proportionate share of the cost of operating, lighting, cleaning, snow removal, line painting, policing and landscaping of the public areas."

is implied by operation of the common law, and will endure by the common law so long as the purposes of the center and Wonderland's present conduct of business thereon is continued. As said in the *Marsh Case* at 506, the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights as owner become circumscribed. To say thus is no more than utterance of that principle of the common law by which the dedication of property to specific public use is implied from the owner's act or actions and public acceptance thereof.

That Alabama decided, in the *Marsh Case,*[4] that by her law and the disclosed distinctive facts there had been no dedication of the sidewalk where the appellant was arrested, does not control our independent application to the current facts of a rule written long ago; a rule which applies to the unreserving action of the corporate defendant in setting up Wonderland and to the public acceptance of that defendant's invitation to park and shop at Wonderland with the convenience which motor shopping more and more urgently requires.

So far as reasonably industrious research discloses, the subject of common-law dedication and of rules determinative thereof arose first in the United States when *City of Cincinnati* v. *Lessee of White,* 31 US (6 Pet) 431 (8 L ed 452), and *New Orleans* v. *United States,* 35 US (10 Pet) 662 (9 L ed 573), came to judicial consideration. The principles found there and echoed later in *Baker* v. *Johnston,* 21 Mich 319,[5] and *Badeaux* v. *Ryerson,* 213 Mich 642, may be summarized properly as follows:

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[4] *Marsh* v. *State,* 32 Ala App 24 (21 S2d 558); certiorari denied 246 Ala 539 (21 S2d 564).

[5] "We think it must be assumed as the generally understood law at this day, and as law here, that there may be a dedication effectual against the land owner, without a statutory and formal conveyance to the county." *Baker* v. *Johnston* at 344.

Private property may, by unceremonious act and implication from act on the part of the landowner, and like act and implication from act on the part of the public, become subject to public easement by means of common-law dedication. The public right in such instance does not depend upon acceptance and use for any particular period of years. The fact of dedication and acceptance, and the extent of the dedicated use, must be determined from the intent of the dedicators and acceptors and the legal significations thereof. No particular form is necessary to such dedication. The fee does not pass. An easement does. There may be a public abandonment after acceptance, and reversion to the original owner, when the use for which the dedication was made becomes impossible of execution or where the object of the use fails. As said generally in *New Orleans* v. *United States, supra* at 712, 713:

"That property may be dedicated to public use, is a well established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation.

"The importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or of public business, which are found in all our towns, and especially in our populous cities.

"It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large.";

and later with greater detail when the *Badeaux Case, supra,* was decided (p 647):

"If the premises of plaintiffs' counsel were to be conceded, and if it were to be held that the title, or a fee of any kind in the land, passed by the dedication, then the conclusion reached by counsel would be warranted by the authorities cited. But it is very clear to us that the dedication here was what is termed a common-law dedication; and we agree with counsel for plaintiffs in the force of the numerous citations from 18 Corpus Juris under the title of 'Dedication'; that dedication may be distinguished from a grant, and that there need be no grantee *in esse* at the time of the dedication, to give it effect; that no particular form or ceremony is necessary to the validity of a common-law dedication; that while ordinarily some written instrument is required to transmit a right of real property, the law applicable to dedication is different, and no writing or conveyance is necessary to render a dedication effective; and that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced. But we think it is equally well established by the authorities that by a common-law dedication the fee does not pass, but only an easement."

The nature of the public right of use, promenade and concourse, in and about the "public areas" of a modern shopping center which has been set up and made attractively business-operable as here, is not particularly difficult of ascertainment and identity; there being no pertinently appreciable difference between these shopping centers and the historic public markets of earlier days. Wonderland is simply a modern public marketplace. Any handbiller, political leafleteer, ticket seller, hawker or speechmaker, utilizing the public walkways and malls thereof and being otherwise peaceable and law-abiding, can no more be indicted and tried as a trespasser, by and

at will of the holder of the naked fee of the place, than could his possibly more boisterous counterpart of yesteryear. One can imagine, for instance, what would happen should this corporate defendant exclude from the mall one of the mayor's (or governor's) literature-distributors prior to election day, or some hard working Old Newsboys and Goodfellows just before Christmas.

The only difference between the public market of earlier generations and the shopping center of today is that the same operation is now more "modern." The motor car and motor truck have replaced the buggy and dray and the sellers are fewer as they take in more cash. The purpose, though, and that is what counts as sellers display and exhort and buyers discuss and select, is "as old as civilization."[6] The public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder.

Second: Consideration of the inferences that are legally as well as permissibly derivable from Wonderland's enterprise suggests it is not without significance that, when Wonderland's planners conceived and made publicly operable this Chickasaw-like "business block," the constitutional precedent of the *Marsh Case* was knowledgeably before them.

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[6] "Markets are as old as civilization, and public market places have in many countries been identified with the most important events in their history. The purpose of markets has always been to secure to all persons the privileges and conveniences arising from a general concourse of buyers and sellers." CAMPBELL, J., writing for the Court in *Attorney General* v. *Detroit*, 71 Mich 92, 100, 101.

See Catlin's picturesque description of Detroit's first public marketplace, at the foot of Woodward avenue between Jefferson and the Detroit River ("The Story of Detroit," p 214; published 1923 by the Detroit News). True, the then "renters of stalls" are now the lessee storekeepers, and the parking lot has replaced the hitching rail. There is 1 big difference, of course. The "public whipping post" at one end of the market building (same page; illustrated opposite page), for "dead-beats, petty thieves, disorderly persons, wife-beaters, habitual brawlers and other minor offenders," is no more.

And nowhere in the briefs, or in the record made below, has suggestion been made that the corporate defendant or any lessee thereof tried (prior to public acceptance in any conceivable way, if there was such way) to reserve the presently claimed right to brand as *trespassers* some comers to the "public area" whenever the ideas such *trespassers* desired to communicate might be deemed distasteful to some and inimical to the business of others. If this appeal should be upheld, the handbiller upon such "public area" (not the premises of "householders" as in *Martin* v. *City of Struthers,* 319 US 141 [63 S Ct 862, 87 L ed 1313], or the premises of "private residences" as in *Breard* v. *Alexandria,* 341 US 622 [71 S Ct 920, 95 L ed 1233, 35 ALR2d 335]) is to be made a *trespasser* if his handbill is undesirable; undesirable not by law but by the arbitrary decision of the property owner who, for business purposes, has made of his freehold a much greater public "business block" than that considered in *Marsh.* The law of policed admission or exclusion is hence to be made by the owner's caprice; the owner who by the opinion of the Chief Justice would be left free to decide whether this or that exercise of constitutional rights is to be permitted on the sidewalks of his "public area."

The rule of whimsical trespass defendants would have us declare and apply is more than portentous. If by the device of private ownership a "business block" of 55 acres may lawfully be set up to selectively exclude the right of free speech on the public malls and sidewalks thereof, then why may not a 550-acre company-community be set up[7] and made

[7] With saloons and dancehalls, diners and restaurants, ice cream sociables and temperance meetings, theaters and night clubs, ballparks and golf courses, churches and Sunday schools, carnivals and tent shows, garages and stores, motels and boarding houses and, perchance, a school and college; all, of course, for acceptable and respectable conformists.

profitably operable with like right of discriminatory exclusion from the public areas of undesirable free speechers? Yes, indeed, let the privately owned shopping center of today expand to the privately owned community of tomorrow; the community where the lordship of freehold may determine, free from judicial intervention, what upon that freehold one may say or publish, what persons are deemed trespassers thereon and what ones are not, how generally one must act and how he must not until he departs therefrom; with all such determinations freed from constitutional inquiry on ground that the scene of offense or "trespass" is private property.

The Chief Justice has written, and we agree, that a test case is before us; a case which demonstrates again that the struggle for maintenance of constitutional rights will not end as new means and methods of commerce, business, transportation, communication, recreation and social life unfold as they have and will during this second half of the twentieth century.

Third: It is best that we consider and decide what is *not* involved, and what we are *not* determining, on *de novo* consideration of this appeal to equity.

The parties agree that no labor dispute or controversy arising under Federal or State statute, and no involvement of Federal or State decisions construing or applying any such statute, is before us.[8] The decree below so recites, and that portion of the decree is not opposed.

Plaintiff does not seek the right to distribute handbills anywhere in the building or buildings of the

[8] Defendant-appellants' brief:
"None of the defendants nor the shopping center nor the shopping center tenants nor the United Shirt Distributors, Inc., have any labor contract or labor relations with the plaintiff, nor is there any labor controversy involved in this litigation."
Plaintiff-appellee's brief:
"There is no labor dispute involved between the parties."

corporate defendant or in "the passageways therein." It seeks only to distribute handbills—"beside the front entrance of the United Shirt Store"—inoffensively and without disturbance on the sidewalk of the mall which the corporate defendant has provided for public shopping; the place, we repeat, the corporate defendant has designated as part of "the public area of the shopping center."

Excepting by the indirection of diverting customers to other stores in search for union-made goods, plaintiff by such handbilling would sell no goods, and certainly by no stretch of wordplay would it sell or attempt to sell competitive goods in the Wonderland Center. Rather, by selling or "educating" Wonderland shoppers to a fact as well as an idea conveyed by its handbill, plaintiff would discourage the purchase at 1 of the Wonderland stores of goods "nonunion made." Its purpose is informative and negative, albeit odious and repulsive depending on point of view. It constitutes no promotion on Wonderland's sidewalk of a competitive business.

Parenthetically, and since there seems to be an irresolvable conflict amongst our membership respecting the legal brand this Court should place upon the primary aim and purpose of plaintiff's handbill, the undersigned deem it advisable that a copy of such handbill appear of record. It appears at the margin. We find from it that such aim and purpose is to inform that "Imperial Clothing," sold by the United Shirt lessee, is "nonunion made." Others here view such aim and purpose as "the promotion of business activities." The handbill, made thus visible in our reports, speaks our side of the judicial debate.

The appealed decree, too broad now as to injunctive scope,[9] should be restricted to permit only what

[9] The decree as it stands permanently restrains and enjoins the defendant "from in any way interfering with, or threatening to



plaintiff has actually sought by its definitely exclusive proof, that is, the judicially protected right to distribute its handbills on the sidewalk adjacent to the front entrance of the United Shirt store. Such modification would effectively forestall dolefully

interfere with, handbilling and distribution of leaflets or handbills by plaintiff, its agents or representatives, on or about the premises of aforesaid Wonderland Shopping Center, Inc."

declared extensions of the effect of the decree as precedent. At the same time, it would make clear for all to see that this Court has confined the scope of such handbilling to the "public area" adjacent to such front entrance.

Modified thus, we would affirm the circuit court's decree without an award of costs.

KAVANAGH and SOURIS, JJ., concurred with BLACK and SMITH, JJ.

O'HARA, J. (*for reversal*). I concur in the result reached by the Chief Justice but I am impelled to write separately for the reason that I bottom my holding solely and exclusively on the proposition that the right of free speech is not here involved.

Freedom of speech is a constitutional safeguard against the growth of tyranny which has historically followed the suppression of the right to speak out on all subjects of man's intellectual inquiry. Secured earlier it would have protected Galileo against ecclesiastical tyranny, Voltaire from governmental tyranny. It permitted Robert Ingersol to stand on the public platform and invite the God he professed not to believe in to strike him dead. It secured to organized labor the right to publicize the existence of controversy between employer and employee by peaceful picketing. Its absence doomed Socrates to the hemlock and Copernicus to the posthumous publication of his astronomical observations. But the advocacy of buying 1 brand of shirt over another does not come within the orbit of freedom of speech. This is what the handbill reproduced in the joint opinion of Justices BLACK and SMITH does. Demand, it says, this label in your clothing and don't buy clothing carrying that one. If this be an exercise of free speech, will equity be called upon to decree to American motor car manufacturers the "associa-

tional right to inform" by handbilling customers and potential customers of retail dealers advising them that they should not buy foreign made automobiles? Will equitable aid be lent to domestic watchmakers in their competitive endeavors with their Swiss counterparts and permit "handbilling" of retail jewelers to their detriment?

The confusion of the right of free speech and competition between sponsors of 1 or another of competitive commodities was dealt with by Chief Justice Rosenberry speaking for a unanimous Wisconsin supreme court (*Jelke, post*). In that case a State agency—a fair marketing commission—had issued to the press the following statement:

"This commission has a list of every merchant in the State that sold oleomargarine last year. It will secure a list of every merchant proposing to sell oleomargarine in the future, and every farmer in Wisconsin will be notified through the press as to what merchants have a sufficient interest in the welfare of the farmer to refrain from selling oleomargarine in competition with butter * * * so that the farmers may know who their friends are."

The oleomargarine industry obtained an injunction (*Jelke,* p 654) restraining the "circulating * * * lists of the various dealers in oleomargarine, with the purpose of intimidating dealers therein *or endeavoring to hamper the distribution and/or sale of oleomargarine.*" (Emphasis supplied.)

The commission in its answer alleged that restraining of the circulation of the information was a denial of the right of free speech. The court held:

"It is claimed and strenuously argued here that the injunction constitutes an impairment of the defendant's right of free speech. This argument proceeds upon the theory that the right of free speech, for some reason not defined, rests upon a different

basis than other rights guaranteed to the citizen by the Constitution. While the right of free speech may in popular estimation be accorded a higher rank than other rights guaranteed to the citizen by the Constitution, in a legal and constitutional sense the right of free speech is of no greater dignity than the right to life, liberty, property, trial by jury, freedom of conscience, and other rights guaranteed to the citizen by the Constitution. Whether or not a particular act constitutes an exercise of the right guaranteed by the Constitution is, and under our system must always remain, a judicial question. It must be conceded that there may be limitations upon the right to speak. *State, ex rel. Olson,* v. *Guilford,* 174 Minn 457(219 NW 770, 58 ALR 607 at p 612 *et seq.*), and cases cited; *Near* v. *Minnesota, ex rel. Olson,* 283 US 697 (51 S Ct 625, 75 L ed 1357); *Gitlow* v. *New York,* 268 US 652 (45 S Ct 625, 69 L ed 1138).

"In *Northern Wis. Co-op Tobacco Pool* v. *Bekkedal,* 182 Wis 571 (197 NW 936) the defendants were enjoined from 'interfering in any manner with the contracts of plaintiff.' This included solicitation by the defendant of the members of the plaintiff pool to breach their contracts with the pool. This was a clear restraint upon the right to speak, but it did not occur to counsel on either side, to the trial court, or to this court that such restraint was a wrongful invasion of the right of free speech. One may not, under the cover of free speech, wrongfully do injury to the business of another." *John F. Jelke Co.* v. *Beck,* 208 Wis 650, 666, 667 (242 NW 576*).

There as here the proponent of 1 commodity, the product of an important segment of Wisconsin's economy, the dairy farmer sought to hamper the sale of a competitive manufactured product. Here an important segment of our economy, a labor union, seeks to hamper the sale of a competitively manufactured product. My sympathies in this battle may

* Reported in NW as *John F. Jelke Co.* v. *Hill.*—REPORTER.

well reside with those who have gained for organized labor its long overdue and well deserved economic gains, but I cannot in judicial conscience align equity with either competitor under the theory of the abridgment of freedom of speech.

I agree with the disposition of the case by the Chief Justice, but I agree with Justices BLACK and SMITH that no costs should be taxed.

MORRILL *v.* GALLAGHER.

1. TRIAL—VERDICT—FINDING OF FACT—ISSUES WITHDRAWN.

   A verdict must be based on finding of fact on issues presented to the jury and may not be considered as embracing a determination on issues withdrawn from consideration by the jury.

2. SAME—VERDICT—NEGLIGENCE—ASSAULT—WILFUL AND WANTON MISCONDUCT.

   Verdict for plaintiff in action presented by declaration which included (1) a count based on negligence, (2) a count based on assault and battery, and (3) a count based on wilful and wanton misconduct, must be based on a finding of fact that defendants were guilty of negligence, where the other 2 counts were withdrawn before the case was submitted to the jury.

3. GARNISHMENT—QUESTIONS REVIEWABLE—JURISDICTION OF COURT IN ORIGINAL ACTION—EXCLUSION IN INSURANCE POLICY.

   The issue of jurisdiction of the court which tried the original action against the principal defendant may not be raised by garnishee defendant in garnishment proceeding against insurer under a home owner's policy for injuries sustained by plaintiff when the principal defendant and another caused a firecracker to explode in room where plaintiff was working, and insurer withdrew appearance theretofore filed because policy allegedly excluded coverage.

4. SAME—QUESTIONS REVIEWABLE—JURISDICTION.

   Judgment against principal defendant in original action may not be said to be void in garnishment proceeding, where trial court had jurisdiction of such original action.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 1005.
[3, 4] 6 Am Jur 2d, Attachment and Garnishment §§ 13–18, 385, 568.
[5] 6 Am Jur 2d, Attachment and Garnishment §§ 376–380.
[6, 10] 6 Am Jur 2d, Attachment and Garnishment § 397.
[7] 6 Am Jur 2d, Attachment and Garnishment § 383.
[8, 9] 29A Am Jur, Insurance § 1340 *et seq.*

5. SAME — DEFENSES INTERPOSABLE — INSURANCE — EXCLUSIONS — WAIVER.

A garnishee defendant who has elected to rely on the exclusion provisions of home owner's insurance policy is not entitled to assert other grounds as a defense to its liability in garnishment, since it has waived such other defenses.

6. SAME—HOME OWNER'S INSURANCE POLICY—EXCLUSIONS.

Trial judge in garnishment proceeding on home owner's insurance policy properly limited defenses of insurer garnishee to issues presented by exclusion provisions of policy, where the insurer had timely notice of the action against insured and elected not to defend the action because the exclusion provisions of the policy were claimed to relieve it from liability thereunder.

7. SAME—HOME OWNER'S INSURANCE POLICY—EXCLUSIONS—BURDEN OF PROOF.

An insurer has the burden of proof of showing application of exclusion provisions in its home owner's insurance policy, where it asserts nonliability in garnishment proceeding.

8. INSURANCE — HOME OWNER'S POLICY — EXCLUSIONS — PRANKS — BUSINESS ACTIVITIES.

Act of insured, principal defendant, in causing a firecracker to explode in room where plaintiff was working, in committing such prank, *held,* not to have been excluded from coverage under home owner's insurance policy providing for exclusion from coverage of "business pursuits of an insured, other than activities therein which are ordinarily incident to nonbusiness pursuits", since such prank was obviously not done in connection with insured's business.

9. SAME — HOME OWNER'S POLICY — EXCLUSIONS — PRANKS — INTENTIONAL INJURY.

Prank whereby insured and another caused a firecracker to explode in room where plaintiff was working with intention of frightening him but not intending to injure him, *held,* not to have been excluded from coverage by home owner's policy under clause relieving insurer from liability as "to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured."

10. SAME—GARNISHMENT—HOME OWNER'S POLICY—WORKMEN'S COMPENSATION—PRANKS.

Home owner's policy provision excluding from coverage injuries or disease for which workmen's compensation benefits were

payable *held*, not to preclude recovery for injuries received by plaintiff as result of prank whereby insured and another caused a firecracker to explode in room in which plaintiff was working, where issue of whether the pranksters were fellow employees could have been litigated in original action which insurer garnishee elected not to defend, and such action resulted in a judgment which may not be said to be void.

Appeal from Ingham; Hughes (Sam Street), J. Submitted March 8, 1963. (Calendar No. 63, Docket No. 49,798.) Decided July 17, 1963.

Case by Gaylord Morrill against James Gallagher and Noah Canfield for personal injuries sustained in perpetration of a prank. Judgment for plaintiff. Garnishment proceedings against United States Fidelity & Guaranty Company, which had refused to defend relying on exclusion clause in its insurance policy. Judgment against garnishee defendant, from which it appeals. Affirmed.

Fraser, Trebilcock, Davis & Foster (*Eugene F. Townsend, Jr.*, of counsel), for plaintiff.

Parks, Church & Wyble (*F. Merrill Wyble*, of counsel), for garnishee defendant.

CARR, C. J. This case involves the interpretation of a policy of liability insurance, commonly known as a "home owner's policy", issued by the corporate defendant to defendant Gallagher and wife. The facts are not materially in dispute. On January 17, 1957, defendant Gallagher was sole stockholder and manager of 2 corporations carrying on separate businesses on the same premises. Said corporations are referred to as the Lansing Pfeiffer Distributing Company and the Novi Sales & Service. Plaintiff Morrill was an employee of the first named corporation.

On the date in question it appears that defendants Gallagher and Canfield having in their possession a firecracker referred to as a "cherry bomb" lighted it and threw it into a room in which plaintiff was working. This was done for the apparent purpose of frightening plaintiff but the result was more serious than anticipated, causing, as plaintiff claimed, serious impairment of his hearing and also a nervous disorder. In January, 1958, suit was brought against the defendants, the declaration filed alleging in the first count liability for ordinary negligence on the part of defendants Gallagher and Canfield. The second count was predicated on the theory of assault and battery, and the third charged wilful and wanton negligence.

The United States Fidelity & Guaranty Company was notified of the suit and caused an appearance to be entered on behalf of Gallagher. Subsequently this appearance was withdrawn. In a letter to Gallagher written by the insurer under date of May 8, 1958, it was stated by the superintendent of claims of said company that the withdrawal was due to the alleged fact that the policy did not afford Gallagher coverage because of the injury sustained by Morrill. Attention was directed to certain exclusions from liability provisions as set forth in the policy, which will be hereinafter quoted.

Following the withdrawal from the case of the attorneys retained by the insurer, Gallagher procured counsel to represent him. At the pretrial hearing of the case in August, 1958, counts 2 and 3 of the declaration were stricken. Shortly thereafter counsel for Gallagher moved for summary judgment, basing such motion, in part at least, on the provisions of the workmen's compensation act* of the State, and particularly on CLS 1956, § 413.15 (Stat

* PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.*, as amended [Stat Ann 1960 Rev § 17.141 *et seq.*]).

Ann 1960 Rev § 17.189). It may be noted in passing that said motion alleged that plaintiff at the time of his injury was an employee of the Lansing Pfeiffer Distributing Company and was engaged in performing his duties as such. It further set forth that defendant Gallagher was also an employee of said company and the sole stockholder therein. It did not, however, allege that defendant was at the time of the firecracker incident engaged in the business of the company. Following the filing of the motion for summary judgment plaintiff sought and obtained an order amending the declaration by restoring counts 2 and 3, previously withdrawn. The motion of defendant Gallagher was granted on December 9, 1958, and thereupon plaintiff appealed to this Court from the order of dismissal.

Under date of July 23, 1959, the parties to the case by their respective attorneys stipulated for a dismissal of the appeal to the Supreme Court by plaintiff Morrill, and for the entry of an order setting aside and vacating the order of dismissal as to defendant Gallagher. It was also stipulated that the motion for summary judgment might be stricken and the case placed on the jury calendar for trial during the fall term of 1959. An order was entered in accordance with the said stipulation and the case was subsequently brought on for trial before a jury at the September, 1959, term of the circuit court. At the conclusion of the proofs counsel for plaintiff moved that counts 2 and 3 be deleted from the declaration. There was no objection to said motion and it was granted. Accordingly the case was submitted to the jury under the first count which, as before noted, was based on the theory of negligence on the part of defendants Gallagher and Canfield. Verdict was returned in the sum of $35,000 and judgment was entered accordingly.

Garnishment proceedings were instituted against defendant United States Fidelity & Guaranty Company on the basis of the claim that it was indebted to Gallagher under the terms of the liability insurance policy. A disclosure was filed, in substance denying liability under specified exclusions contained in the contract. The exclusions so invoked read as follows:

"(a) to any business pursuits of an insured, other than activities therein which are ordinarily incident to nonbusiness pursuits, or to the rendering of any professional service or the omission thereof, except with respect to voluntary civilian defense activities; or to any act or omission in connection with premises, other than as defined, which are owned, rented or controlled by an insured;

"(b) * * *

"(c) to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured;

"(d) to bodily injury to or sickness, disease or death of (1) any employee of the insured while engaged in the employment of the insured, if benefits therefor are either payable or required to be provided under any workmen's compensation law; or (2) any residence employee of the insured while engaged in the employment of the insured if the insured has in effect on the date of the occurrence a policy providing workmen's compensation benefits for such employee."

The disclosure further relied on the claims advanced in counts 2 and 3 of the declaration and on the granting of defendant Gallagher's motion for summary judgment by way of dismissal of the suit against him, asserting in effect that the order of dismissal constituted an adjudication that plaintiff's remedy was under the workmen's compensation act. As before noted, the order granting the motion was subsequently set aside and counts 2 and 3 were de-

leted from the declaration before the case was submitted to the jury. The verdict returned must, in consequence, have been based on a finding of fact that the defendants were guilty of negligence, rather than on the basis of an assault and battery or wilful and wanton conduct.

Following the filing of the disclosure counsel for plaintiff moved to strike claims on behalf of garnishee defendant other than those based on the exclusion provisions of the insurance policy. Garnishee defendant moved to dismiss the case. Plaintiff's motion was granted, and defendant's motion was denied. In the order entered by the circuit judge it was directed:

"that the garnishee defendant defend the pending action on the basis of the 3 exclusions set forth in its letter to James P. Gallagher of May 8, 1958, and that the garnishee defendant may defend the pending action on the basis of alleged fraud and conspiracy as contained in its affidavit denying liability."

The controversy was submitted to the trial judge in accordance with the understanding of the parties and an opinion was subsequently filed in the case in which the conclusion was expressed that defendant had not sustained the burden of proof with reference to the exclusion clauses of the policy of insurance and that, in consequence, it was liable to the plaintiff on the theory on which the garnishment proceeding was based. Judgment was accordingly entered in the sum of $29,597.80, with costs. The said sum included the maximum liability under the policy, which was fixed at $25,000, together with interest and the court costs incurred in the case brought by plaintiff against the insured. From such judgment, garnishee defendant has appealed.

On behalf of appellant it is insisted that the court had no jurisdiction in the original action and that

it is entitled to raise such question in the garnishment proceeding. With such claim we are unable to agree. Whether Gallagher was in fact acting as an employee of the Lansing Pfeiffer Distributing Company at the time of the occurrence from which this litigation has resulted might have been litigated in the case instituted by plaintiff in the first instance. Had counsel whom appellant caused to enter appearance in that action remained in the case it may be assumed that the issue would have been fully tried. It was, in other words, a proper question for determination in plaintiff's original action. However, appellant left it to Gallagher and his counsel to handle the defense, apparently concluding that the exclusion provisions of the policy of insurance must necessarily be construed as barring liability on its part. It is significant that in notifying Gallagher of the reasons why the insurer would not defend the action for damages reliance was placed on the exclusion provisions hereinbefore quoted. It may not be said that the judgment rendered against Gallagher and Canfield was void. Appellant's claim in this respect is not well-founded.

Having elected to rely on the exclusion provisions of the contract of insurance appellant was not, and is not, entitled to assert other grounds as a defense to its liability in garnishment. In *Dickinson* v. *Homerich,* 248 Mich 634, which involved garnishment proceedings instituted for the collection of a default judgment, the garnishee defendant, which had issued an auto insurance policy to the principal defendant, refused to defend the case brought against the latter on the ground that the policy had lapsed. Apparently such was not the actual fact and the insurer undertook to defend the garnishment action on a number of other grounds. With reference thereto this Court said in its opinion (p 637):

"The defenses which the appellant sought to make based upon the failure of the insured to give written notice of the accident or to forward the summons when served upon him, or because of the claim that at the time of the accident the machine was being driven by an intoxicated person, were waived by the denial of any liability whatever at the time the insured sought to deliver the summons in this case to defendant's agent.

"The record shows that the insured sought to do this promptly. Mr. Chellis testified:

" 'When he came into my office with the summons, * * * I told him his policy had lapsed, that his policy was not in force. He acknowledged that he knew that it had lapsed. I told him his policy had been canceled, and he said he knew it.'

"Having thus based its nonliability solely upon the ground that the policy had lapsed, the circuit judge was right in holding that other defenses were waived by the insurance company. And such denial of liability constituted a waiver of other possible defenses notwithstanding the provision that the terms of the policy cannot be altered or waived except by written indorsement, et cetera. *Improved-Match Co.* v. *Michigan Mutual Fire Ins. Co.,* 122 Mich 256; 14 RCL p 1349."

The above decision was cited with approval in *Bowyer* v. *Professional Underwriters,* 269 Mich 87, 96. The holding is clearly consistent with the general rule stated in 29A Am Jur, Insurance, § 1497, p 606, as follows:

"As a general rule and in the absence of fraud and collusion, if a liability insurer who has a right to defend actions against the insured has timely notice of such an action and defends or elects not to defend, the judgment in such case is binding upon the insurer, as to issues which were or might have been litigated therein, when the insurer is later sued by the injured person. In several cases, it has been

held or stated that where an insurer conducts the defense of an action for personal injuries against the insured, it becomes bound by the judgment as to all matters at issue in such action even though it is not a formal party, so that it cannot subsequently deny that the claim was covered by its policy where the issue was settled adversely to it in the action for damages."

The trial judge was correct in his holding that the garnishee defendant could not challenge the validity of the judgment entered in the original action instituted by plaintiff, and that the defense should be limited to the issues indicated in the order above quoted. This brings us to the question whether the exclusion provisions of the policy should be interpreted as barring liability on the part of appellant. In relying on the exclusion clauses appellant assumed the burden of proof as to their application. In 29A Am Jur, Insurance, § 1854, p 918, it is said:

"If a risk is excepted by the terms of a policy which insures against other perils or hazards, loss from such a risk constitutes a defense which the insurer may urge, since it has not assumed that risk, and from this it follows, at least as a general rule, that an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss, or a part thereof, comes within the purview of the exception or limitation set up. In other words, the principle generally applied by the courts is that if proof is made of a loss apparently within a contract of insurance, the burden is upon the insurer to prove that the loss arose from a cause of loss which is excepted or for which it is not liable, or from a cause which limits its liability."

The holding of this Court in *Roddis Lumber & Veneer Company* v. *American Alliance Insurance Company,* 330 Mich 81, 88, is in accord with the general rule quoted. Exclusion (a) applies in terms to

"business pursuits of an insured, other than activities therein which are ordinarily incident to non-business pursuits." May it be said that in the perpetration of the act here in question Gallagher was engaged in any business pursuit? We think not. Clearly the act in question was not done in connection with any of Gallagher's regular duties on behalf of either of the corporations of which he was the general manager and sole stockholder. The attempted prank was not done in the course of business or for the purpose of expediting it.

Some emphasis is placed on exclusion (c) on the ground that in the instant case the firecracker was thrown intentionally. Unquestionably such was the case, but it will be noted that under the language of the excluding clause the *injury* must be caused "intentionally." There is nothing in this case to justify a conclusion that either Gallagher or Canfield intended to cause any physical harm to plaintiff. The language of the policy is binding on appellant, and if ambiguous it must be construed against appellant's claims in the instant controversy. It may not be interpreted as barring liability under the policy.

Neither may it be said on this record that exclusion (d) precludes recovery against the garnishee defendant. As before pointed out, the issue whether plaintiff and Gallagher were acting as fellow employees at the time of the occurrence in question might have been properly litigated in the original action which appellant refused to defend in accordance with its policy of insurance. It certainly cannot be said on this record that the judgment there rendered in favor of plaintiff was void. Whether the workmen's compensation law was applicable under the facts of the case could not rest properly on the basis of an assumption. Its determination required competent evidence. Insofar as exclusion (d) is concerned it

will be noted that it refers to an injury to an "employee of the insured." No claim is made in the instant case that plaintiff was an employee of Gallagher. Rather, it is appellant's theory that the 2 were fellow employees of the corporate employer.

We think that the trial judge correctly decided the issues presented in the case, and the judgment rendered is affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

PENNINGTON *v.* WHITING TUBULAR PRODUCTS, INC.

1. LABOR RELATIONS—COLLECTIVE BARGAINING CONTRACT—BREACH—ACTION IN STATE COURT—UNFAIR LABOR PRACTICES.

   A common-law action for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting interstate commerce may be maintained against the employer in a State court by an individual employee who is a member of such labor organization, even when the conduct constituting the breach of contract concededly is also an unfair labor practice within the jurisdiction of the national labor relations board.

2. SAME—UNION'S ABANDONMENT OF GRIEVANCE PROCEDURE—ACTION BY EMPLOYEES FOR BREACH OF COLLECTIVE BARGAINING CONTRACT—SENIORITY—QUESTIONS REVIEWABLE.

   Defendants' claim that failure of union to exhaust grievance remedies under collective bargaining contract precluded recovery in employees' action based on breach of seniority provision in recall of employees who have been laid off *held*, not tenable, since abandonment of grievance claim by union would not be binding on employees as third-party beneficiaries, especially where defendants' cross appeal does not raise the issue.

3. EVIDENCE—ASSIGNMENT OF RIGHTS OF ACTION—BREACH OF COLLECTIVE BARGAINING CONTRACT.

   Assignment of rights of action by former employees of defendant corporation was properly admitted in its entirety in evidence in action by the 3 assignees thereof in whose names the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Labor §§ 327–329.
[2] 31 Am Jur, Labor §§ 128, 129.
Right of individual employee to enforce collective labor agreement against employer. 18 ALR2d 352.
[3, 4] 20 Am Jur, Evidence § 245 *et seq.*
[5, 6] 31 Am Jur, Labor §§ 130–132.
[7] 39 Am Jur, New Trial §§ 4–12, 28.
[8] 14 Am Jur, Costs § 91 *et seq.*

action was brought to recover damages for breach of collective bargaining contract with respect to seniority in the recall of employees after a layoff, where there was testimony relative to its preparation, procurement of signatures thereto, and identification by individual plaintiffs of their signatures, indicating no part of the exhibit was spurious.

4. APPEAL AND ERROR—EXCLUSION OF TESTIMONY OF ATTORNEY FOR PLAINTIFFS.

Claimed error in admission of testimony of attorney who had acted on behalf of plaintiffs, former employees of defendant corporation, in action for damages for alleged breach of seniority provisions of collective bargaining contract, *held*, not well-founded, where no sufficient reason is apparent for excluding his testimony.

5. LABOR RELATIONS—BREACH OF COLLECTIVE BARGAINING CONTRACT—DAMAGES—UNEMPLOYMENT COMPENSATION.

It was error for trial judge to instruct jury, in action by former employees of defendant corporation for breach of seniority provision in collective bargaining contract in recalling employees who had been laid off, that jury should deduct payments received by the plaintiffs under the employment security act, since such act does not suggest that the payment of unemployment compensation is to be construed as in lieu of wages (CL 1948, § 421.2).

6. SAME—BREACH OF COLLECTIVE BARGAINING CONTRACT—DAMAGES—EVIDENCE—NEW TRIAL.

The right of each of the plaintiffs, former employees of defendant corporation in action against it for damages for breach of seniority provision of collective bargaining contract with respect to recall after layoff, to recover damages must be proved with the same degree of particularity as would be required if separate individual actions had been instituted instead of having been assigned to plaintiffs named, hence, where record fails to show that has been done, the verdict in an aggregate amount cannot stand, cause is reversed and remanded for further proceedings under Supreme Court's inherent authority to grant a new trial to prevent injustice to some plaintiffs.

7. NEW TRIAL—SUPREME COURT.

The Supreme Court's inherent authority to grant a new trial is exercised to prevent injustice to individual plaintiffs.

8. COSTS—NEW TRIAL.

No costs are allowed on appeal and cross appeal from order granting defendants' motion *non obstante veredicto,* where decision results in setting aside verdict but requires further proceedings pursuant to exercise by Supreme Court of its inherent power to grant a new trial.

Appeal from Wayne; Weideman (Carl M.), J. Submitted April 2, 1963. (Calendar No. 1, Docket No. 48,847.) Decided July 17, 1963. Rehearing denied September 4, 1963.

Action by Opal Pennington, Pauline Henson, and Joan Shore, individually and as assignee of 67 other employees, against Whiting Tubular Products, Incorporated, a Michigan corporation, their employer, and against Novi Products Company and Dover Products Company, both Michigan corporations, organized for manufacturing products similar to those of their employer, for wages claimed due because of failure to employ under seniority provisions in labor union employment agreement. Judgment for defendants *non obstante veredicto.* Plaintiffs appeal. Defendant Whiting Tubular Products, Incorporated, cross-appeals. Reversed and remanded for new trial.

Livingston, Ross & Van Lopik (*Winston L. Livingston, Bruce A. Miller,* and *Nancy Jean Van Lopik,* of counsel), for plaintiffs.

Bishop, Keller, Thoma & McManus (*Charles W. Bishop* and *Charles E. Keller,* of counsel), for defendant Whiting Tubular Products, Incorporated.

CARR, C. J. In 1953, and thereafter until June 30, 1955, defendant Whiting Tubular Products was engaged in a manufacturing business, including the fabrication of tubular products, in Melvindale. The

plaintiffs in this case and their assignors were each for a portion of said period employed by said company, hereinafter referred to as Whiting. It appears that they were members of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) and its affiliated Local 985, referred to in the record as the "union".

Under date of June 2, 1953, Whiting entered into a written agreement with said union acting on behalf of the company's employees, which set forth at some length the rights and obligations of the respective parties thereto. The union was recognized as the exclusive bargaining agency for the employees, with certain named exceptions not applicable in the instant case. Said agreement, among other clauses, provided for seniority on the part of employees, subject to the following provisions found in article 6, section 2, of the contract:

"*Section 2.* Employees shall lose seniority and employment rights shall cease for the following reasons:

"(a) Employee quits.

"(b) Employee is discharged and not reinstated through the grievance procedure.

"(c) Employee is absent for 2 days for any reason without notifying 1 of the members of the management of the company. Upon receipt of such notice, management shall in turn notify the chief steward in writing.

"(d) Employees on layoff fail within 3 calendar days to report for work after being notified to do so. Written notice by registered mail or telegram to last-known address shall be considered notice. Employees shall notify the company of any change in address and receive a receipt for same. This is to be applied to seniority employees.

"(e) After 1 year of continuous layoff or length of service, whichever is greater."

It was further provided that the company should keep a true copy of the seniority list. Provisions were also made in the agreement with reference to layoffs and the recall of employees thereafter. Article 2, section 1, of the agreement, involved in the present controversy, reads as follows:

"*Section 1.* The right to discharge or discipline for cause, maintain discipline and efficiency of employees, and establish standards of production is the sole responsibility of the company, subject to the right of appeal through the grievance procedure herein. In addition, and insofar as it does not conflict with the terms of this agreement, the right to hire, the work to be performed, the location of the plant, the schedules of production, the methods, processes and means of manufacturing and methods of control are solely and exclusively the responsibility of the company. It is understood that if the company changes the location of the present plant, employees on the seniority list shall be given the first opportunity to take a job at the new location."

It is a fair inference from the record before us that the operations of Whiting were not wholly satisfactory from a financial standpoint. Apparently its management concluded that the contract with the union imposed obligations resulting in excessive costs in the conduct of the business. When the agreement came up for renewal in June, 1953, a strike occurred. However, the agreement under date of July 30, 1954, was extended to June 2, 1955, and subsequently to June 2, 1956. Beginning in the spring of 1954 the company laid off a number of employees, and on July 30th of that year posted a notice advising its employees that it was going out of the tube fabricating business. Its plant was offered for sale. However, operations on a somewhat limited scale continued there until June 30, 1955.

Thereafter the plant was sold and possession given to the purchaser in September following.

In the summer of 1954 the defendant Novi Products Company was incorporated and commenced operations on or about August 15th of that year. By agreement with Whiting, machinery was moved to the Novi plant from Whiting. Defendant Dover Products Company was also organized, with its place of business located in the city of Detroit. Both of said corporations engaged in the business of fabricating tubular products. It was the claim of plaintiffs as set forth in their declaration that both were organized for the purpose of taking over the fabricating business previously conducted by Whiting, that each was wholly controlled by Whiting which acted as a sales representative, and that in effect the operations at Novi and Dover were merely a continuation of the fabricating business of Whiting. In other words, it was and is the theory of plaintiffs that the organizations of Novi and Dover merely effected a change in the location of Whiting's fabricating operations, and that, in consequence, employees laid off by Whiting were entitled to be employed at such new locations. The suit was instituted in circuit court on the theory that the agreement made with the Union with reference to continued employment of Whiting employees in the event of a change of location, above quoted, had been violated. It is conceded that such employment was not offered to plaintiffs, or any of their assignors, by Whiting or either of the other corporations.

Acting under the advice of counsel the employees selected 3 of their number, plaintiffs Pennington, Henson, and Shore, to bring suit for damages against the defendant corporations. The declaration filed was based on the theory that as third-party

beneficiaries[1] the plaintiffs were entitled to maintain the action for damages due to alleged loss of employment that defendants were obligated to furnish. It was specifically claimed that the purpose in the organization of Novi and Dover was to avoid the obligation of the contract that had been made by the union for the protection and benefit of employees of Whiting. An assignment was prepared by counsel, transferring to the 3 plaintiffs named the cause of action of a large number of employees so that the suit as filed actually consisted of many individual actions, each such claim, however, being based on the alleged breach of contract. It was provided in the form of assignment executed that any money collected as the result of a judgment, if obtained, would be distributed to the persons entitled thereto in proportion to the damages established by each, less attorney fees and costs.

On behalf of defendants it was denied that there was any breach of contract, it being claimed that Novi Products Company and Dover Products Company were organized in good faith and that they operated as independent corporations not subject to the control of Whiting. It was also claimed on behalf of defendants that the controversy involved an alleged unfair labor practice and as such was within the exclusive jurisdiction of the national labor relations board. A motion to dismiss on the ground of lack of jurisdiction in the State court was submitted, taken under advisement, and denied following the conclusion of the trial. For purposes of convenience the parties in whose names the suit was brought, and their assignors, will be referred to herein as plaintiffs.

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[1] PA 1937, No 296 (CL 1948, § 691.541 *et seq.* [Stat Ann 1953 Rev § 26.1231 *et seq.*]). (Superseded by section 1405, revised judicature act, effective January 1, 1963, PA 1961, No 236 [assigned CL 1948, § 600.1405 (Stat Ann 1962 Rev § 27A.1405)].)

The case was tried before a jury and continued for approximately 7 weeks. The trial judge submitted the issues involved to the jury, the members of which were furnished with writing materials to the end that they might make such notations as they desired as the proofs were submitted. The jury was directed, if it found the plaintiffs were entitled to recover, to return a verdict for the aggregate amount thereof. After the jury had deliberated for some time the trial judge recalled it to the courtroom and gave further instructions to pass separately on the claim of each plaintiff who had testified in the case. The result was a verdict against Whiting in the aggregate amount of $67,355. In connection with the rendition of such verdict the jury also reported its findings with reference to each plaintiff to whom damages were awarded, 49 in number. Counsel for plaintiffs moved that judgment be entered on the verdict, which motion was denied. Defendants had asked for a directed verdict at the conclusion of the proofs and renewed their request by motion for judgment notwithstanding the verdict, relying principally on the ground that the proofs were not sufficient to support the findings of the jury. Said motion was granted. The trial judge indicated his reasons for his ruling as follows:

"The defendant's second motion, for a judgment of no cause of action, filed by the defendant, will be granted, or to set aside the judgment, for the reason that the facts failed to show by a preponderance of the evidence the damages to which the individual plaintiffs were entitled. In this case the court instructed the jury to bring back the amount that each person was entitled to. The court finds that while 74 cases were consolidated into 1, that the measure of damages in each individual case should have been proven the same as if there were 74 individual suits filed in this court; that among other things, but not

in exclusion of other matters that were urged in the motions or set forth at various times during the trial or after the trial and before verdict, there was no date of seniority that was proven by a preponderance of the evidence in the individual cases; that the measure of damages were not proven in the individual cases; that there was a lack as to when the parties were entitled to go back to work, at what date they would have been entitled to be rehired at Novi or at Dover; there was nothing showing how many could have been employed at 1 day and were not, and the damages would not accrue against the defendant Whiting unless at the period within which damages were claimed it was shown that this particular or individual plaintiff was entitled to a job at Whiting or Novi or Dover, under the charge of the court."

Judgment was entered in accordance with the finding of the trial judge. Plaintiffs have appealed from such judgment and from the order denying motion to enter judgment in their favor. On behalf of Whiting a claim of general cross-appeal was filed for consideration in the event that the Court on appeal should determine that the trial court was in error in granting the motion for judgment notwithstanding the verdict of the jury. Counsel have discussed in their briefs and on oral argument the issues that they claim are controlling in the case but have not undertaken to analyze the testimony relating to the specific claims of plaintiffs or any of them. It is asserted by counsel for plaintiffs that the proofs were sufficient to support the verdict and that the trial court was in error in holding otherwise. Counsel for defendants argue to the contrary.

As before noted, counsel for defendants contended in the trial court that exclusive jurisdiction was vested in the national labor relations board on the ground that the case involved an alleged unfair

labor practice. It appears, however, that this question is in effect ruled by the decision of the United States supreme court in *Smith* v. *Evening News Association,* 371 US 195 (83 S Ct 267, 9 L ed 2d 246). The holding there is tersely summarized in the syllabus, which reads as follows:

"A common-law action for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting interstate commerce may be maintained against the employer in a State court by an individual employee who is a member of such labor organization—even when the conduct constituting the breach of contract concededly is also an unfair labor practice within the jurisdiction of the national labor relations board."

It is further suggested by counsel in their supplemental brief that because a grievance filed by the union was not pursued to a conclusion remedies provided by the contract had not been exhausted. We do not think the argument well-founded. Under the decision above cited the conclusion would seem to follow that the action of the union in abandoning the grievance claim was not binding on the plaintiffs. Furthermore, defendant Whiting's cross-appeal does not raise the issue.

On behalf of defendant and cross-appellant it is further argued that the assignment executed by Whiting's former employees to the 3 individuals in whose name the case was filed was improperly admitted in evidence because of lack of competent testimony establishing its verity. Apparently the exhibit consisted of 8 pages bearing signatures of plaintiffs, which may have been separately signed and then offered in connection with assignment of the individual causes of action. However, the testimony relating to the preparation of the assign-

ment, the procuring of signatures thereto, and particularly the identification by individual plaintiffs of their signatures when the exhibit was shown to them, was sufficient to indicate that no part of the exhibit was spurious. The trial court was not in error in admitting it in its entirety. Neither do we think that the objection interposed on behalf of defendants to the testimony of the attorney acting on behalf of plaintiffs was well-founded. No sufficient reason is apparent to indicate that such testimony should have been excluded.

In submitting the case to the jury the trial judge charged that payments received by the individual plaintiffs under the employment security act of the State[2] should be deducted. It may be noted in this regard that the report by the jury with reference to the awards of damages made to the individual plaintiffs receiving such made no mention of deductions, but it may be presumed that the direction of the court was followed. It is urged on behalf of plaintiffs that such deductions were not permissible, and it is suggested that in the event of a decision by this Court that judgment should be entered on the verdict of the jury, the amount of such deductions should be added and this Court should order the entry of judgment in the increased amount. Whether such course should be pursued under proper circumstances does not call for discussion at this time. We conclude, however, that the trial judge was in error in his direction to the jury. The purpose of the employment security act as set forth by the legislature in section 2[3] thereof indicates the object sought to be attained was the promotion of the public good and general welfare of the people of the State. There is nothing in the act to suggest

[2] PA 1936 (Ex Sess), No 1 (CL 1948, § 421.1 *et seq.*, as amended [Stat Ann 1960 Rev § 17.501 *et seq.*]).

[3] CL 1948, § 421.2 (Stat Ann 1960 Rev § 17.502).—REPORTER.

that the payment of unemployment compensation is to be construed as in lieu of wages. *Godsol* v. *Unemployment Compensation Commission,* 302 Mich 652 (142 ALR 910). An analogous question was decided in *Kurta* v. *Probelske,* 324 Mich 179, an action for damages for personal injuries, where it was held that:

"The fact that plaintiff received unemployment benefits during disability because of defendant's negligence does not mitigate damages recoverable for personal injuries received." Syllabus 5.

This brings us to a consideration of the most serious question involved in the case. Was the trial judge in error in holding as set forth in the following excerpt from his opinion?

"That the measure of damages were not proven in the individual cases; that there was a lack as to when the parties were entitled to go back to work, at what date they would have been entitled to be rehired at Novi or at Dover; there was nothing showing how many could have been employed at 1 day and were not, and the damages would not accrue against the defendant Whiting unless at the period within which damages were claimed it was shown that this particular or individual plaintiff was entitled to a job at Whiting or Novi or Dover, under the charge of the court."

The record indicates that on the 15th of August, 1954, when its operation started, 8 persons were hired at Novi. It is conceded that none of such individuals so employed had been on the payroll at Whiting. Apparently they were paid at a lesser rate per hour than the plaintiffs in the instant case had received. Under the agreement between Whiting and the union, which is the basis of the plaintiffs' suit, it may be assumed that 8 former employees of Whiting having sufficient seniority to give them preference

were entitled to offers of employment at Novi, which the jury evidently found to be under the control of Whiting. The question is naturally presented: which of such employees should have been tendered the available jobs? The record before us does not furnish the answer.

It is the claim of counsel for plaintiffs that a breach as to 1 such employee "became a breach as to all." We are not in accord with such claim. Whether all persons entitled to claim a breach of the contract as to them on the date mentioned are plaintiffs in the present litigation does not appear. It must be borne in mind that other employees of Whiting having proper seniority were entitled to the same rights as the plaintiffs possessed under the contract between the employer and the union. The record fails to show with requisite degree of clarity that Novi and Dover hired a number of employees equal to or greater than those who had seniority entitling them to preference in such hiring prior to the expiration of the respective periods during which such seniority continued.

That the contract between the union and Whiting contemplated a preference in employment to those who had worked for said corporation, and obtained seniority as specified, in accordance with their rank in that respect is scarcely open to question. It is not conceivable that the parties intended that in the event of a change in location of the Whiting plant all laid-off employees having seniority should be entitled to immediate employment at the new location. The contract did not so read.

Coming to the problem presented in the instant case it is apparent that the right of each plaintiff to recover damages must be proved with the same degree of particularity as would be required if separate individual actions had been instituted. It was, therefore, incumbent on each plaintiff to establish

by competent proof the date on which he or she was entitled to be employed at Novi or at Dover. The proofs in the record failed in this respect. Without such showing damages could not be properly computed, nor the right thereto determined. On the record before us the circuit judge correctly held that the verdict as returned by the jury could not be sustained.

The case presents an unusual and decidedly unsatisfactory situation. The record indicates that some of the plaintiffs may be entitled to recover damages while others to whom the jury actually made awards may not be so entitled. Judgment may not properly be entered on the verdict of the jury for the reasons stated. It is equally apparent that the judgment entered in circuit court in favor of defendants may result in injustice to at least some of these plaintiffs. With the thought in mind that such a result should be avoided if possible, this Court will exercise its inherent authority to grant the right to a new trial.

The case is remanded with directions to set aside the judgment entered in defendants' favor, and for further proceedings in the trial court. No costs are allowed on these appeals.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

MUNRO *v.* BOSTON INSURANCE COMPANY.

1. INSURANCE—EXPIRATION OF FIRE POLICY.

   No obligation rests on an insurer under a fire insurance policy covering real estate to seek the execution of another contract of insurance upon the expiration of a policy.

2. SAME—EXTENSION OF FIRE POLICY—ESTOPPEL—CUSTOM OF NOTIFYING INSURED OF EXPIRATION.

   Liability under an unambiguous contract of fire insurance may not be extended beyond term of contract by claimed estoppel arising from nonobservance of local custom of insurance agents to notify insured of expiration of policy.

3. CONTRACTS—WRITTEN—CUSTOMS AND USAGES.

   Generally, an unambiguous written contract cannot be varied or contradicted by proof of usage.

4. SAME—ESTOPPEL—WAIVER.

   The doctrine of estoppel and waiver may not be invoked to bring into existence a contract not made by the parties nor to create a liability contrary to the express and unambiguous provisions of the contract the parties did make.

5. SAME—FIRE AFTER EXPIRATION OF POLICY.

   Directed verdict and judgment were properly entered for insurer in action against it by insured, where fire occurred about 5 months after specified terminal date of 5-year fire insurance policy on which premiums had been paid in installments, notwithstanding the local insurance agency had not followed the custom of the area in notifying the policyholder of the expiration of his policy.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur, Insurance §§ 317–323, 525.
[2] 29 Am Jur, Insurance § 525; 29A Am Jur, Insurance § 1095.
[3] 55 Am Jur, Usages and Customs § 30.
[4] 12 Am Jur, Contracts §§ 12–15, 226 *et seq.*
[5] 29 Am Jur, Insurance §§ 317–323; 29A Am Jur, Insurance § 1286 *et seq.*

Appeal from Genesee; Parker (Donn D.), J. Submitted June 5, 1963. (Calendar No. 15, Docket No. 49,866.) Decided July 17, 1963.

Action by Lawrence V. Munro and Betty Munro against Boston Insurance Company, a foreign corporation, for reimbursement of loss by fire, claimed due because of failure to give customary notification of expiration date of policy. Directed verdict and judgment for defendant. Plaintiffs appeal. Affirmed.

Walter J. Barkey (*Douglas M. Philpott,* of counsel), for plaintiffs.

Davies & Moesta (*Joseph R. Brom,* of counsel), for defendant.

CARR, C. J. This is an action to recover on an insurance policy issued by defendant Boston Insurance Company to plaintiffs, covering property which plaintiffs were purchasing under a land contract. The buildings in question were located in Tyrone township, Livington county. Said policy was dated August 29, 1955, and by its terms covered direct loss by fire. The date of expiration was specifically stated as August 29, 1960. Attached to the policy was an installment premium indorsement which by its terms allowed the premium specified, which was the sum of $98.88, to be paid in installments. The first of such installments, due on the effective date of the policy, was in the sum of $24, and the ensuing 4 installments of $18.72 were payable on each "anniversary date."

The policy in question was written by a local agency operating under the name of "Preferred Insurance Agency", which was subsequently sold to other parties who continued its operation as the

"Holly Insurance Agency." Said agency was joined as a party defendant in this case but subsequently, by stipulation, suit was dismissed as to it. Said agency, as it is claimed, did not notify plaintiffs either before or after August 29, 1960, that the policy would expire, or had expired, on said date. Apparently neither defendant nor the Holly Insurance Agency desired to execute another agreement for insurance on plaintiffs' property.

The dwelling house covered by the insurance policy executed for the 5-year term on August 29, 1955, was destroyed by fire occurring January 23, 1961. It is the claim of plaintiffs that they were then advised that the policy issued by defendant had expired in accordance with its specific terms and, in consequence, that defendant was not liable to reimburse plaintiffs for their loss in accordance therewith. Suit was then instituted by plaintiffs on the basis of an alleged custom observed by insurance companies operating in the area to give notice of the expiration date of a fire insurance policy immediately prior to said date, that neither defendant nor its agent, the Holly Insurance Agency, had sent "any notice of cancellation of the described policy" to plaintiffs, and that, in consequence, plaintiffs were damaged to the extent of the amount of coverage under the terms of the policy.

In substance, plaintiffs asserted the right to recover on the theory that defendant insurance company was estopped to deny liability under the policy. Such was the theory on which the case was tried in circuit court. Counsel for plaintiffs in his opening statement to the jury at the outset of the trial indicated the position of the plaintiffs in the following language:

"The whole theory of this lawsuit, members of the jury, is that this Boston Insurance Company they

say in the law is estopped, or can't come into court and say there is no policy now because of their failure to notify the policyholders through their agent of this loss."

Defendant by its answer to plaintiffs' declaration denied that it was obligated either by contract or custom to advise policyholders with reference to the expiration of policies. On the trial it relied on the provisions of the contract and the fact that the date of expiration was specifically set forth therein. On the trial before the jury testimony was offered on behalf of plaintiffs with reference to the custom on which they relied, such proofs tending to show that agencies writing insurance agreements in the community, including the Holly Insurance Agency, observed the practice of sending notices to holders of policies with reference to premiums falling due thereunder and, in some instances at least, advising as to the date of expiration of the coverage. There is no testimony in the record before us, however, tending to establish the existence of such practice in the absence of a desire on the part of the insurer to issue a new policy for the purpose of extending the insurance coverage.

At the conclusion of plaintiffs' proofs counsel for defendant moved for a directed verdict. Following argument by counsel on the motion, the trial court concluded that under the unambiguous terms of the policy plaintiffs' theory that liability was extended beyond the date of expiration named therein was not tenable. Accordingly a verdict of no cause of action was directed, and judgment was entered accordingly. Plaintiffs have appealed.

Counsel for appellants in their brief state the principal question that they claim to be involved in the following language:

"May the acts of the defendant insurer's agent, in adopting and applying the local custom of notifying policyholders of expiration dates and renewal premiums, establish an estoppel so as to preclude the insurer defendant from forfeiting an insurance contract with the plaintiffs when said defendant's agent fails to inform plaintiff policyholders of the expiration date?"

Such statement indicates the theory on which the case was presented in the trial court and on which it is argued on appeal. It is obvious, however, that we are not here dealing with the *forfeiture* of an insurance contract because of failure to comply with its terms and conditions. This is not a situation in which liability is denied by an insurer because of failure to pay premiums when due. Cases involving such situations, with the usual claim of waiver and consequent estoppel to deny liability, are not in point. The provisions of the policy before us were duly observed. The installments of the premium were presumably paid as they fell due. The policy was not one for a continuing period based on compliance with its terms but, rather, specified clearly and unequivocally the date of expiration. Plaintiffs were bound by that provision. No obligation rested on defendant to seek the execution of another contract, and liability was not extended under the expired undertaking on the theory advanced by appellants.

Counsel for appellants cite and rely on *Wallace* v. *Fraternal Mystic Circle,* 121 Mich 263. That case involved the right of defendant, a mutual benefit society, to suspend a member for nonpayment of an assessment when due, it being claimed on behalf of plaintiff that it was the practice of defendant to receive assessments without declaring a forfeiture where the delay was less than 90 days. Extension of liability on the theory of estoppel of a contract that

had by its own terms expired was not involved. Obviously the case is not here in point. Like comment may be made with reference to *Pastucha* v. *Roth,* 290 Mich 1, and *Seavey* v. *Erickson,* 244 Minn 232 (69 NW2d 889, 52 ALR2d 1144), also cited.

There is no claim here advanced that the contract was in any way ambiguous. The date of expiration was specifically declared. An extension of liability on the theory of estoppel would obviously result in the creating of a contract different in its coverage from the agreement into which the parties entered. Of interest in this connection is *Hanna* v. *Smith,* 173 Mich 483, in which it was sought to introduce evidence of usage and custom claimed to prevail in oil fields with reference to the price to be charged for the operation known as "rimming." The Court in its opinion pointed out that the contract involved was specific in its terms with reference to the matter in issue, and made the following comment (p 490):

"The court was therefore in error in allowing evidence to be introduced as to usage and custom alleged to prevail in oil fields in respect to the price charged for 'rimming.' Such evidence is admissible in the absence of express stipulations, and where the meaning of the contract is equivocal, but is never admissible to contradict what is plain and unambiguous. 1 Greenleaf on Evidence, §§ 292, 294. The general rule is that a written contract cannot be varied or contradicted by the proof of usage. This has been announced by the United States supreme court in numerous cases, and the decisions of this Court are uniform to that effect. *Van Hoeson* v. *Cameron,* 54 Mich 609, 613, 614, and cases cited; *Lamb* v. *Henderson,* 63 Mich 302, 305, and cases cited."

In *Ruddock* v. *Detroit Life Insurance Co.,* 209 Mich 638, the action was brought on a life insurance policy

issued by defendant to plaintiff's decedent. Said policy contained a provision that risks in naval or military service in time of war, without a permit, were not assumed by the company. The insured was inducted into the military service in July, 1918, and his death from pneumonia occurred at Camp Custer shortly after the expiration of 1 year from the issuance of the policy. It was claimed on behalf of plaintiff that the defendant was estopped to deny liability under the policy because it had required plaintiff to furnish proofs of death, and also by pleading the general issue in the lawsuit based on the policy. In discussing the issue thus raised, the Court said (pp 453, 454):

"The cases where the doctrine of waiver, of estoppel, has been applied have largely been cases where the insurance companies have relied on a forfeiture of the contract, upon breaches of the warranties and conditions to work such forfeitures; and in many such cases this Court and other courts of last resort have held that if the companies have led the other party, to his prejudice, to his expense, to understand that such forfeitures, such breaches of warranties and conditions would not be insisted upon, then the companies would be estopped from asserting such defenses. But here the defendant makes no claim of forfeiture of the contract; on the contrary it is insisting upon the contract itself and insisting that by its terms it did not insure the deceased when engaged in military services in time of war. To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make."

The Court further referred to the opinion of the supreme court of Wisconsin in *McCoy* v. *Northwestern Mutual Relief Ass'n,* 92 Wis 577 (66 NW 697, 47 LRA 681), in which the action was based on an insurance policy that by its terms excluded liability if death resulted from suicide. In rejecting the claim of estoppel it was there said, in part (pp 584, 585):

> We are unable to see how the settled rules under which it is held that a forfeiture or condition of forfeiture may be waived applies here. What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel against insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture. It is a misuse of the term to so speak of the loss of benefits under the certificate in question. What is here sought is not to prevent a forfeiture, but to make a new contract; to radically change the terms of the certificate so as to cover death by suicide, when by its terms that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violations as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance and with the knowledge of the insured and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss."

The decision in *Ruddock, supra,* was cited with approval in *Ames* v. *Auto Owners Insurance Co.,* 225 Mich 44, 47, 48. Of interest also is the decision in *Chaney* v. *Lake Drive Garage,* 252 Mich 412, in which it was held that testimony of usage and custom was not admissible to vary the specific terms of an unambiguous agreement.

The trial judge was correct in his conclusion that liability under the express contract of insurance involved in this case could not be extended on the theory advanced by plaintiffs with reference to the alleged custom observed in the area by insurance agencies. As before noted, the issue here involved is not estoppel or waiver of performance in accordance with provisions of an existing contract, but presents an attempt to enlarge and extend the insurance coverage specifically provided in the contract. The acceptance of appellants' claim would result, in effect, in creation of liability following the expiration of the policy as written, and would from a practical standpoint be the equivalent of creating a new contract between the parties.

The judgment of the trial court is affirmed.

DETHMERS, KELLY, SMITH, and O'HARA, JJ., concurred with CARR, C. J.

BLACK, J. (*concurring*). I concur in affirmance.

Not assuming to decide the point of course, and simply to introduce what follows, it seems to me that the plaintiffs have made out a case against the insurance agency with which they dealt, rather than a case against the defendant insurer. See annotation, 29 ALR2d 171, "Duty and liability of insurance broker or agent to insured with respect to procurement, continuance, terms, and coverage of insurance policies." Without explanation here, however, plaintiffs joined prior to trial in a stipulation providing:

"It is hereby stipulated and agreed by and between the attorneys for the above named parties that the above entitled cause may be dismissed without prejudice and without costs, as to defendant Holly Insurance Agency, Inc. only."

I allude to the above so that, if unbeknown to us plaintiffs are yet possessed of a right to proceed

against the insurance agency, nothing written here may be construed as creating "prejudice" where—by the stipulation—there is now no prejudice. Further, and in the same tenor, I cannot support the comment of the Chief Justice, dealing as it does with the agency as well as the insurer, that:

"Apparently neither defendant nor the Holly Insurance Agency desired to execute another agreement for insurance on plaintiffs' property."

There is nothing of record justifying such a conclusion. It is unproved, either way. If not challenged, it might adversely affect what was legally reserved by the "no prejudice" stipulation above. So and again, as in *Mack* v. *Precast Industries, Inc.*, 369 Mich 439, 454, I respectfully suggest that "the adjective 'apparently' does not—by itself—supply facts."

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

RIES *v.* EVENING NEWS ASSOCIATION.

LABOR RELATIONS—DIRECT NEGOTIATION WITH EMPLOYER—EQUALLY DIVIDED COURT.

Dismissal of action by laid-off employee who had sought to negotiate with employer directly, rather than through his union, relative to application of seniority provision in recall to employment is affirmed by a court equally divided as to reversal and remand for filing necessary pleadings, and trial on the merits and affirmance with right to file an amended complaint within 30 days and direction to permit plaintiff's collective bargaining representative to intervene or appear as *amicus*, unless otherwise joined as a party (PA 1961, No 236, § 230).

Appeal from Wayne; Kaufman (Nathan J.), J. Submitted February 5, 1963. (Calendar No. 41, Docket No. 49,754.) Decided July 17, 1963.

Assumpsit by Clifton F. Ries against the Evening News Association, a Michigan corporation, for breach of contract in failure to honor seniority provision in labor contract. Action dismissed on motion. Plaintiff appeals. Affirmed by an equally divided court (PA 1961, No 236, § 230 [assigned CL 1948, § 600.230 (Stat Ann 1962 Rev § 27A.230)]).

Armstrong, Helm, Marshall & Schumann (*Frederick H. Greiner, Jr.*, and *George T. Roumell, Jr.*, of counsel), for plaintiff.

Butzel, Eaman, Long, Gust & Kennedy, for defendant.

REFERENCE FOR POINTS IN HEADNOTE

31 Am Jur, Labor §§ 102, 103.

DETHMERS, J. (*for reversal*). Defendant is owner and operator of radio and television broadcasting stations. Plaintiff was 1 of its employees. For lack of work, defendant laid off plaintiff and also other employees who did the same kind of work but who had less seniority than he. Later, defendant put the other employees, junior to plaintiff in seniority, back to work but refused to permit his return. Plaintiff claims that this was in violation of the seniority clauses of labor contracts between defendant and a union representing defendant's employees, which contracts were for the benefit of plaintiff and other employees as third-party beneficiaries.

Plaintiff filed this suit in circuit court for damages resulting from said contract violation by defendant. The court granted defendant's motion to dismiss on the grounds that plaintiff had failed to invoke the machinery existing within the industry for settlement of his dispute or to use or exhaust the grievance procedures available to him under the contract and that allowing an individual employee to follow his own grievance procedures, ignore his union and sue his employer would cause havoc both to labor and management. Reliance therefor appears to have been placed on *Cortez* v. *Ford Motor Co.*, 349 Mich 108.

Pertinent factual history is as follows: When plaintiff learned that he would not be re-employed, as those junior to him in seniority had been, he immediately had legal counsel represent him. By letter of his counsel, his grievance in this connection was presented to defendant in an effort to use voluntary methods, personally, to settle his claimed right to reinstatement to employment and back pay. A copy was served on the union, but the latter's assistance or action was never sought by plaintiff. Negotiations ensued between plaintiff and his counsel and defendant, with the knowledge and acqui-

escence of the union and with its representative present. The negotiations were broken off by defendant, which refused plaintiff's claim. Plaintiff then asked defendant for arbitration, which it refused. Plaintiff notified the union of all this, but cautioned it not to take any action on his behalf. Feeling that the door had been closed on him by defendant in the use of voluntary means of adjusting his grievance, either as in the contract provided or otherwise, plaintiff then brought this suit for damages. Thereafter he was notified that the union had sought arbitration, on which a hearing was set for a date certain, and he was invited to be present. He declined to participate, believing that doing so in an arbitration requested by the union would deprive him of his rights to act individually rather than by and through the union as his representative. The labor contract contained the following with respect to grievance procedures:

"10. In the event any complaint, dispute or question as to the interpretation, application or performance of the terms of this agreement shall arise, the union, at the request of the employee involved, may report in writing the grievance to the designated representative of the company on the report of complaint or grievance form, appendix D attached hereto, within 10 calendar days from the day the grievance first arose. In the event that such grievance is not settled within the 10 calendar days after the grievance has been submitted, then such grievance shall be immediately forwarded to the national office of the union and the employer for negotiation. In the event that the parties cannot reach agreement within 7 calendar days after the grievance is referred to the national office of the union, or during any extension thereof upon which the parties may agree in writing, the grievance will be closed unless submitted to arbitration as hereinafter provided in section 11.

"11. If the grievance is not settled by the national office of the union and the company within the time prescribed in section 10, either party may, within 30 calendar days from the expiration of such time, request arbitration by delivering a signed written notice to that effect to the other party.

"The procedure for arbitration shall be as follows:

"(a) Within 7 calendar days after delivery of the request for arbitration, the union and the employer shall attempt to select a single arbitrator acceptable to both parties. * * *

"(c) * * * Such decision shall be binding upon the employer, the union and the employee or employees, involved, and each of them will promptly comply."

Section 9(a) of the national labor relations act, as amended (29 USCA, § 159[a]), reads as follows:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

The language of Michigan's third-party beneficiary act (CL 1948, § 691.541 *et seq.* [Stat Ann 1953 Rev § 26.1231 *et seq.*]) and that of this Court's opinion in *Cortez* leave no doubt that plaintiff was a third-party beneficiary of the labor contract. Under the statute

a third-party beneficiary has the right to enforce the promises made for his benefit in the contract and to sue for damages for breach thereof. In the case of union-management labor contracts, however, the courts have placed a limitation on that right to sue, it being held, as in *Cortez,* that the employee, as third-party beneficiary, may not sue thereon without first resorting to and exhausting the grievance procedures provided in the contract. This is on the theory that the rights, having been created by contract, may only be enforced in accord with the contract's terms.

Starting from the above premise that plaintiff must first exhaust the grievance procedures provided in the contract, defendant urges, as the trial court appears to have held, that plaintiff could not do this personally or individually but only by requesting and accepting the aid and good offices of the union to process and conduct them for him with defendant. Because plaintiff undertook direct negotiations with defendant and personal presentation of his grievance to it, defendant says he did not follow the grievance procedure in the contract providing for such course of action by the union. This overlooks, of course, the language in the contract governing grievance procedures, that "the union, at the request of the employee involved, *may*" pursue the grievance procedures in the contract specified. The provision for union action is, thus, not mandatory but permissive, and then only at the request of the employee involved. It does not provide that the union *shall,* in all cases, do so, nor limit such course to union action nor exclude plaintiff therefrom. If there were a provision in the contract undertaking to do so, it would be invalid. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 US 711 (65 S Ct 1282, 89 L ed 1886). On the other hand, not only does the contract

not so provide, but section 9(a) of the national labor relations act, as above quoted, expressly provides:

"That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

In this case, then, plaintiff, in an effort to exhaust his contract remedies, has done that which is not prohibited by the contract, that which may reasonably be said to be permissible under it since plaintiff did not request union action as in section 10 of the contract permitted, and that which is expressly authorized by the Federal statute. This is not a case of attempting to enforce contract-created rights in a manner or under conditions other than is in accord with the terms of that contract. How, then, shall it be said that redress under this State's third-party beneficiary act is not now available to plaintiff? *Cortez* does not so hold, nor are there other decisions of this Court to that effect. In *Spencer* v. *Wall Wire Products Co.,* 357 Mich 296, for example, plaintiffs did not personally submit their grievance to the employer but left that to be done by the union.

Plaintiff says, correctly we think, that section 9(a) of the national labor relations act gives him the option of acting for himself or having the union represent him in presenting his grievance to his employer. He concedes that he may not do both and that resort to the latter, as occurred in *Spencer,* would work a waiver of his rights to the former.

Emphasizing that he has not asked the union to handle his grievance, he states that the employees did do that in cases cited by defendant, such as *Union News* v. *Hildreth* (CCA 6), 295 F2d 658, and that that distinguishing feature should be deemed persuasive of a different result in this case than in those.

Plaintiff points out that the following cases cited by defendant, namely, *Arsenault* v. *General Electric Co.*, 147 Conn 130 (157 A2d 918), *Ostrofsky* v. *United Steelworkers of America* (D Md), 171 F Supp 782, *Palnau* v. *Detroit Edison Co.* (CCA 6), 301 F2d 702, and *Black-Clawson Co., Inc.,* v. *International Machinists Lodge 355* (CCA 2), 313 F2d 179, were suits by individual employees against employers to compel arbitration, which was denied them on the basis that the right to arbitration sprang only from the contract which, in each case, provided for arbitration, not between employer and employee but only between the employer and the union, at the request of 1 of them. Plaintiff then distinguishes those cases from this in that this is not an action to compel arbitration, but a suit for damages for breach of contract. Plaintiff says that employees have always been able to enforce their individual rights under employer-union contracts in the State courts, citing the opinion of Mr. Justice Frankfurter in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 US 437 (75 S Ct 489, 99 L ed 510), which, in turn, cites, in a footnote at page 460, State court authorities for that proposition. We think apt, at this point, the statement in Mr. Justice Black's dissenting opinion in *Smith* v. *Evening News Association,* 371 US 195, 205 (83 S Ct 267, 9 L ed 2d 246), to which the rest of the court did not hold *contra,* as follows:

"I cannot believe that congress intended by the national labor relations act either as originally

passed or as amended by section 301 to take away rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the labor act was not intended to relegate workers with lawsuits to the status of wards either of companies or of unions."

The extent of the applicability of the recent case of *Smith* v. *Evening News Association, supra,* may be gathered from the holding of the court as epitomized in its headnote as follows:

"A common-law action for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting interstate commerce may be maintained against the employer in a State court by an individual employee who is a member of such labor organization—even when the conduct constituting the breach of contract concededly is also an unfair labor practice within the jurisdiction of the national labor relations board."

Reversed and remanded for filing necessary pleadings, taking essential proceedings, and trial on the merits. Costs to plaintiff.

CARR, C. J., and KELLY and O'HARA, JJ., concurred with DETHMERS, J.

Addendum. Six times it is pleaded in plaintiff's declaration and 3 times it is stated in an attached exhibit that defendant's failure to recall him to work according to his seniority was in violation of the labor contracts, as follows: (1) In paragraph 10 it is alleged that defendant "in violation of said labor contract, refused to permit him to work"; (2) in paragraph 11 it is alleged that reinstatement of employees junior to plaintiff in seniority when he

had not been so reinstated was "in violation of the seniority rights of plaintiff under said labor contract"; (3) in paragraph 12 it is alleged that defendant offered to recall in order of seniority all the other laid-off employees junior to plaintiff in seniority "in further violation of the rights of plaintiff thereunder, section 26(d) of said labor contract, which reads as follows:

"'(d) Technicians laid off to reduce the staff shall, in case a vacancy later occurs, be offered the opportunity of filling such vacancy if he is reasonably available and competent to perform the work. Should such technician accept this position he shall be paid a salary commensurate with his length of service at time of layoff.'";

(4) in paragraph 13 it is alleged "That defendant's failure to recall and reinstate plaintiff to employment * * * as the employee with the top seniority on layoff * * * was in clear violation of and a breach of said labor contract"; (5) in paragraph 14 it is alleged that it "was in clear violation of and a breach of said labor contract"; (6) in paragraph 15 it is alleged "that defendant's aforesaid actions and doings and breach of said labor contract constitute a matter of grievance on the part of plaintiff under and in accordance with the terms of said labor contracts". Attached to and made a part of the declaration is exhibit 'A', a copy of the grievance letter plaintiff filed with defendant. In it appears the following as to defendant's recall of employees junior to plaintiff in seniority: (1) "This action was a clear violation of the collective bargaining agreement", (2) "This violation of said contract was to Mr. Ries' great damage", and (3) that such damage will continue "until he is reinstated to employment, all as required and provided for in and by the collective bargaining agreement."

This case has not been tried. It was dismissed on defendant's motion, without trial. It must be noted that neither plaintiff's declaration, defendant's motion to dismiss nor plaintiff's answer thereto made the labor contract a part of such pleadings, nor were copies of it attached to any of them. A copy of that contract came into the record only because defendant's counsel offered it into evidence at the hearing on the motion to dismiss. In determining whether the declaration should be dismissed for failure to state a cause of action, its above quoted well-pleaded allegations that defendant's refusal to recall him according to his seniority rights was violative of the contract must be accepted as true. *Wright* v. *Houdaille-Hershey Corp.*, 321 Mich 21; *Zerfas* v. *Eaton County Drain Commissioner,* 326 Mich 657. This the trial court apparently did. Defendant has so accepted it and concedes it to be true, stating in its brief on this appeal:

"Appellant Ries, a laid-off employee of appellant's, claimed that appellee (The Evening News Association, owner and operator of the radio and television stations, WWJ, WWJ–FM and WWJ–TV) had failed to rehire him in line with his seniority and made a demand, through his attorney, that he be reinstated to employment, with full seniority rights and full back pay (ex. A to the declaration). *We concede that this claim constituted a grievance within the meaning of the collective agreement between appellee and the union.*"

Remand to permit plaintiff to amend his declaration in the respect noted could scarcely produce a result more emphatic and express than the allegations quoted above.

Plaintiff ought not to be deprived of his day in court, denied his right to trial on the merits and have his pleaded rights under and interpretation of the contract rejected, on review of an order granting

defendant's motion to dismiss, by an appellate court, through the process of construing the contract, which is not a part of the pleadings, contrary to the allegations of his declaration. That is the function of a trial on the merits.

SOURIS, J. (*for affirmance*). The parties to this appeal invite our pronouncement of legal principles of universal applicability in determination of the dispute they seek to assert at our bar: May an employee who has failed to present his grievance to his union for adjustment with his employer in accordance with the grievance procedures of a collective bargaining contract but who has, instead, attempted unsuccessfully to adjust his grievance personally with the employer pursuant to section 9 (a) of the national labor relations act, 29 USC, § 159 (a),[1] recover damages at law from the employer for alleged breach of seniority provisions of the contract?

The trial judge, on defendant's motion filed before answer, dismissed plaintiff's declaration on the ground that, having failed to exhaust his contractual remedies for adjustment of grievances, plaintiff was not entitled to sue at law, citing *Cortez* v. *Ford Motor Co.*, 349 Mich 108. The *Cortez Case,* however, did not involve assertion of an employee's section 9 (a) rights, nor did the plaintiffs in *Cortez* fail to request their union to process their grievances.

[1] "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.*" (Italics added.)

In *Cortez,* the plaintiffs commenced to follow the contractually prescribed grievance procedure by presenting their grievances to their union for adjustment. When their union refused to carry their grievances as far in the prescribed process as plaintiffs desired, plaintiffs did not undertake to process their own grievances personally in accordance with express provisions of their collective bargaining agreement (or even in attempted assertion of section 9 [a] rights), but chose, instead, to institute suit. This Court said that plaintiffs could not invoke the aid of the courts because their collective bargaining contract had expressly provided for an alternative nonjudicial method, including arbitration, for the resolution of such disputes. As a secondary ground for decision ("although not essential to our decision", p 126), this Court then said that, in any event, plaintiffs could not appeal to the courts, having failed to exhaust their contractual remedy.

In this case, on the other hand, Ries refrained from presenting his grievance to his union for processing and attempted, instead, to adjust his grievance personally with his employer as permitted by section 9 (a). His position is that section 9 (a) permits him to by-pass his "exclusive bargaining representative" entirely and to sue if not successful in personally adjusting his grievance with the employer.

Thus, whereas we barred the *Cortez* plaintiffs from suing their employer because their collective bargaining contract expressly provided a method for resolving such disputes without resort to the courts, the net effect of Ries' contention is that *Cortez* does not bar an employee from suing if he elects in the first instance not to request the aid of his union in processing his grievance in accordance with such contractual grievance procedure. Enough has been said to indicate the full import of what is urged upon

us today,—and to disclose the substantial limitation sought to be placed upon the primary rule applied in reaching decision in the *Cortez Case*.

Both parties to this appeal, employee and employer, press us for decision,—a decision which,—if made in favor of permitting or barring resort to the courts depending upon the unilateral choice of an aggrieved employee,—will have a profound effect upon labor-management relations heretofore sought to be stabilized by mutual agreement to submit collective bargaining contract disputes to a highly specialized process of settlement by negotiation and arbitration.[2] Such decision should be made by an appellate court only after the most searching consideration of its consequences and, hopefully, only in a case in which all parties directly affected, including the collective bargaining representative of *all* employees, have expressed their own views to the Court.

That decision cannot, however, be made in propriety today. Defendant's motion to dismiss was planted not alone upon the asserted bar to plaintiff's suit for having failed to exhaust his contractual remedies, but also upon the ground that plaintiff's declaration fails to state a cause of action. It does not appear from this record whether defendant urged this pleaded ground for dismissal upon the trial court. Inexplicably, defendant did not argue it on appeal. Nonetheless, before this Court is called upon to decide any issues, let alone issues of such grave importance to the delicate balance between labor and management, it should first determine that an actionable cause has been declared.

Plaintiff's declaration alleges his long employment with defendant from 1941; the layoff of 6 employees junior in seniority to plaintiff in a reduc-

[2] See Cox, "Rights under a Labor Agreement," 69 Harv L Rev 601 (1956).

tion of staff in 1959; and his own layoff for the same reason in January of 1960, together with another employee junior in seniority to him. He further alleges subsequent discovery that of the 8 employees laid off, all except plaintiff have been recalled to employment notwithstanding that he possessed seniority superior to them. It is his claim that the collective bargaining contract[3] required defendant to recall employees laid off in reduction of staff to be recalled in the order of their seniority.

In *Cortez, supra,* at 112, this Court noted that seniority is a contractual device for "job protection unknown to the common law and founded upon no statute law in this State." If plaintiff has any right, as he asserts, to recall to employment before those junior in seniority, such right must be found in the collective bargaining contract. The contract specifically provides that layoffs for reduction of staff "shall be in inverse order of seniority", but it does not expressly state that laid-off employees shall be recalled in direct order of seniority. The only provision relating to the recall of laid-off employees is:

"Technicians laid off to reduce the staff shall, in case a vacancy later occurs, be offered the opportunity of filling such vacancy if he is reasonably available and competent to perform the work."

Whatever the reason for the contracting parties' choice of this language, it did not bind defendant to a strict seniority system of recall. In fact, the express requirements of reasonable availability and competence, particularly the latter, are at war with the very concept of seniority as a technique for determination of job rights. Absent contractual provision for determining reasonable availability and

[3] There are 2 contracts involved, the contract in effect at plaintiff's layoff having subsequently been superseded by another. In all respects pertinent to this case, however, they are identical.

competence of a laid-off employee to perform the work required, and there being in the contract a clause reserving to the employer "normal functions and rights of ownership and management", the employer retained the right to determine such availability and competence among its laid-off employees regardless of seniority.

There is no other *pleaded* basis for plaintiff's claim. It rests squarely upon the collective bargaining contract. Such contract, unless otherwise supplemented or interpreted by the parties thereto, fails to require the employer to recall laid-off employees in the order of their seniority. Plaintiff's declaration in its present form fails, therefore, to state a cause of action and its dismissal, although ordered by the trial court for another reason, must be affirmed. However, since the trial court did not base its decision upon the failure of the declaration to state a cause of action and, therefore, did not consider the propriety of permitting plaintiff to replead, it is our judgment that the order of dismissal be affirmed, but with leave granted plaintiff to file an amended complaint within 30 days following the handing down of these opinions. In the event plaintiff repleads, upon application of his collective bargaining representative to intervene as a party or to appear as *amicus,* unless otherwise joined as a party, the trial court is directed to grant such application. Costs to defendant.

BLACK, KAVANAGH, and SMITH, JJ., concurred with SOURIS, J.

KNAPP-STILES, INC., *v.* DEPARTMENT OF REVENUE.

1. TAXATION—SALES—EXEMPTIONS—UNITED STATES.

   Sales to a person, engaged in construction on and improving real estate of the United States, of materials later affixed to and made a part of that real estate or used and consumed in fulfillment of a contract with one in an exempt classification such as the United States or one of its instrumentalities, are specifically exempted from taxation under the general sales tax act (CL 1948, § 205.51, as amended by PA 1960, No 76; CLS 1956, § 205.54).

2. SAME — SALES — EXEMPTIONS — DUMMY CORPORATIONS — UNITED STATES.

   Sales of tangible personal property to a dummy corporation that is wholly owned and controlled by the United States and which constitute sales to the United States for construction of housing facilities on real estate of the United States are exempt under the sales tax act (CL 1948, § 205.51, as amended by PA 1960, No 76; CLS 1956, § 205.54).

3. SAME—USE TAX—EXEMPTIONS—UNITED STATES—ARBITRARY CLASSIFICATION.

   Provision of use tax act exempting property purchased by contractors engaged in improving real estate for others when such property is made a part of real estate or is consumed in fulfillment of a contract for such improving within exempt classifications other than the United States and its instrumentalities or the State of Michigan, its departments or institutions

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur, Sales and Use Taxes § 20.

State tax on goods purchased by, or for the benefit of, the Federal Government, or on the privilege of conducting the business in connection with which the sales are made. 140 ALR 621.

Construction and application of exemption or deduction provision of general sales tax act. 157 ALR 804.

[3] 47 Am Jur, Sales and Use Taxes § 42 *et seq.*

constituted an unreasonable, arbitrary, and discriminatory classification, hence use tax may not be levied on property purchased by dummy corporation, a wholly owned and controlled instrumentality of the United States and used in construction of housing project on real estate of the United States (CL 1948, § 205.94, subd [m], as last amended by PA 1959, No 272).

Appeal from Kent; Searl (Fred N.), J. Submitted April 4, 1963. (Calendar No. 32, Docket No. 50,041.) Decided July 17, 1963. Rehearing denied November 7, 1963.

Bill by Knapp-Stiles, Inc., a Michigan corporation, against the Michigan Department of Revenue for declaratory decree exempting levy of sales and use taxes on materials to be used in United States air force housing project. Decree for plaintiff. Defendant appeals. Affirmed.

Warner, Norcross & Judd (*Harold S. Sawyer* and *Paul K. Gaston,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *T. Carl Holbrook, Maurice Barbour,* and *William D. Dexter,* Assistant Attorneys General, for defendant.

DETHMERS, J. Plaintiff corporation, a building contractor, sought a decree[1] declaring that it and its suppliers are not required to pay the Michigan sales tax or use tax upon the purchases, sales or use by it of materials for construction, on United States property in Michigan, of housing for the United States air force, under the contracts between the latter and plaintiff hereinafter discussed, which materials are either attached to or made a part of the real estate or consumed in the course of the perform-

[1] See CL 1948, § 691.501 *et seq.* (Stat Ann § 27.501 *et seq.*).—REPORTER.

ance of such contracts. Defendant appeals from decree granting plaintiff the relief sought.

The United States government, acting through its department of the air force, hereinafter called the department, determined to construct housing on certain of its bases in Michigan. It issued invitations to bid, setting forth full conditions and particulars for bidding, contracting to construct and performance. All procedures and actions in relation to the bidding, contracting, performing and constructing were conducted pursuant to the Capehart act, title 8, as amended by the housing amendment of 1955, title 4, Public Law 345, 84th Congress,[2] and regulations and requirements of the department of defense and the Federal housing administration. Everything with respect thereto was also done in conformity with the requirements of the department, which furnished all the forms used for creation of the contractual relationships here involved.

For each of the several housing projects, respectively, undertaken by plaintiff, the following was required by the department and done: after plaintiff had submitted its bid to the department, which accepted it, plaintiff, as obligated by the acceptance, organized a Delaware corporation having as officers plaintiff's officers, with $1,000 capitalization, which was authorized by its charter to negotiate with the Federal housing administration to secure insurance upon mortgages to finance the housing project, but forbidden to issue additional stock, declare dividends or engage in any other business; its stock with stock powers and the resignation of all of its officers were required to be deposited in escrow, for delivery to the department upon completion of construction of the housing; the department and the Federal housing administration were to be sole judges of when there

[2] See 12 USCA, § 1748 *et seq.*—REPORTER.

has been such completion; land upon which the construction was to occur, already owned by the United States government, was leased by the latter to the corporation for which it paid the $1,000 constituting its total capital; under the lease the right to use and possession of the land was reserved to the department; the corporation obtained loans from private sources to cover construction costs and executed therefor mortgages insured by the Federal housing administration, payment of which was also guaranteed by the department; funds obtained on such mortgages were paid in monthly instalments by the mortgagees to the corporation, upon certification of the department that certain stages of the work had been completed, and then turned over to plaintiff; when construction is completed and the escrow ends with the department owning the corporation, all further maintenance and supervision of the project will be carried on by the department, which may terminate the lease to the corporation whenever it chooses to do so; in the meanwhile, the agreements have consisted of a building contract between the department, plaintiff and the corporation, a lease from the United States government to the corporation, and mortgages from the corporation to mortgagees insured by the Federal housing administration and guaranteed by the department. The purpose of the corporation arrangement is to allow the United States government to carry on an extensive program of such housing without including its cost in the Federal fiscal budget, thus avoiding violation of its direct debt limit. Under the contract all of the machines, equipment, supplies, and materials which remain personal property under the laws of the State and are purchased or manufactured by either plaintiff or the corporation for use in constructing the project shall be so acquired or manufactured for sale to the department. Title to

all material and work covered by progress payments made by the corporation vests in the department. Plaintiff's actions and performance were in conformity with the above.

The Michigan sales tax act, section 1, subd (c) (CL 1948, § 205.51, as amended by PA 1960, No 76 [Stat Ann 1961 Cum Supp § 7.521]), provides:

"The term 'sale at retail' shall also include the sale of tangible personal property to persons engaged in the business of constructing, altering, repairing or improving real estate for others except property purchased by such persons which becomes affixed and made a structural part of real estate or is used and completely consumed in the fulfillment of a single contract with any of the exempt classifications hereinafter set forth in section 4 and subsections (a) and (b) of section 4a of this act."

Section 4 of that statute, CLS 1956, § 205.54 (Stat Ann 1960 Rev § 7.524), reads in part:

"No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American Red Cross and its chapters and branches, and the State of Michigan or its departments and institutions or any of its political subdivisions."

The Michigan use tax act, section 4, subd (m) (CL 1948, § 205.94, as last amended by PA 1959, No 272 [Stat Ann 1960 Rev § 7.555(4)]), provides that the tax levied by that act shall not apply to:

"(m) Property purchased by persons engaged in the business of constructing, altering, repairing or improving real estate for others when property so

purchased by such persons shall be affixed and made a structural part of real estate or used and completely consumed in the fufillment of a single contract within the exempt classifications set forth in subsections (b), (i), (j) and (k) of this section other than the United States, its unincorporated agencies and instrumentalities, or any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States or the State of Michigan, its departments or institutions; or which shall not be affixed and made a structural part of real estate but shall be transferred to a person in fulfillment of a contract with such person for his use for an exempt purpose as set forth in subsection (f) or (g) of this section."

The power of the State to impose the mentioned taxes on plaintiff in connection with the performance of a building contract with the United States is not in issue. It is conceded. The supreme court of the United States has upheld it. *Alabama* v. *King & Boozer,* 314 US 1 (62 S Ct 43, 86 L ed 3, 140 ALR 615); *United States* v. *City of Detroit,* 355 US 466 (78 S Ct 474, 2 L ed 2d 424); *United States* v. *Township of Muskegon,* 355 US 484 (78 S Ct 483, 2 L ed 2d 436); *City of Detroit* v. *Murray Corporation,* 355 US 489 (78 S Ct 458, 78 S Ct 486, 2 L ed 2d 441, 2 L ed 2d 460). The twofold question, rather, is whether Michigan has imposed the sales tax thereon or exempted the same therefrom, and, second, whether imposition of the use tax thereon by the use tax act works an unconstitutional discrimination rendering the act in that respect invalid and the use tax thereon unenforceable.

Plaintiff contends and the trial court held that the sales of materials in question are expressly exempted from the Michigan sales tax by the above quoted language of section 1 subd (c) and section 4 of the

sales tax act and also that their use is exempt from the use tax because the use tax act and particularly the quoted language of section 4, subd (m) thereof is unconstitutional in the respect that it discriminates against the United States and those who deal with it as distinguished from the State's political subdivisions and those who deal with them, inasmuch as the act undertakes to exempt from the tax such use of materials by the latter but excludes the former from that exemption.

Defendant, on the contrary, says that plaintiff's contractual relationship and building operations are with and for a private corporation and not at all with or for one in the exempt classifications, such as the government of the United States or any of its agencies, instrumentalities or owned corporations, and that, hence, the noted exemption provided in the sales tax act is without application in this case and the possibility of unconstitutional discrimination by exclusion of the United States government from the exemptions in the use tax act is not here involved.

Accordingly, each party presents a line of authorities in support of its arguments which lead to its conclusion, provided its major premise respecting the above issue is accepted at the outset.

We agree with the holding of the trial court that plaintiff's housing construction contract is with the United States acting through its instrumentality, the department. From this, it follows that here involved were sales, to a person (plaintiff) engaged in construction on and improving real estate of the United States, of materials later affixed to and made a part of that real estate or used and consumed in fulfillment of a contract with one in an exempt classification, namely the United States or one of its instrumentalities or sales by plaintiff or its suppliers to the latter. These are specifically exempted by the quoted language of the sales tax act.

Persuasive to us are the reasons advanced by the trial court for so holding. They are, in substance, as follows: (1) the construction contract names the United States as one of the contracting parties; (2) it is signed by the United States; (3) the governing Federal statute authorizes the department to enter such contract; (4) the department prepares the plans and specifications, invites bids, accepts a bid, issues a letter of acceptability to the successful bidder, and a meeting of the minds between the department and plaintiff bidder occurs before the corporation comes into existence; (5) the contract makes the United States not only a formal but the dominant party; (6) the contract gives the United States all the powers and gives the corporation none; (7) work must be done to the satisfaction of the department and payment to plaintiff for construction may be made only on its authorization; (8) the housing is built on and will become a part of United States real estate; title to all material and work, when paid for as the work progresses, vests in the department; (9) all equipment, machines, supplies and materials acquired by plaintiff for the job shall be acquired for sale to the department; (10) the only purpose served by the corporation is to enable the government of the United States to bypass its debt limit; (11) as stated in the department's invitation to bid, the corporation is intended by the governing statute to be a "channel" for the flow of loan proceeds to the contractor; (12) the corporation has no other function or authority; (13) the corporation had nothing to say about the terms of the contract which were agreed upon before it came into being; (14) the United States was not merely a nominal but the real party to the contract. To these reasons plaintiff adds that the corporation is of itself in an exempt classification in that it is wholly and beneficially owned by the United States. We further note that

not only does the department become owner of the corporate stock at completion of the construction but it takes over use and control of the property, and the mortgage loans, insured by the Federal housing administration, are guaranteed by the department. The net total result is that after the dummy corporation has served its purpose as a "channel" during the construction period, the department owns, operates and pays for the housing facilities from such receipts, rentals or otherwise, as it may determine. Under such combination of facts the corporate veil may and should be pierced to permit judicial discernment of the true situation. Plaintiff built housing for the department, an instrumentality of the United States, under a contract between them. By the wording of the sales tax act, the exemption applies. Such was the holding of a district court of appeal of Florida in *Green* v. *Eglin AFB Housing, Inc.,* 104 So 2d 463, in which the factual circumstances and the language of that State's sales tax act, in the respects here material, are very similar to those at bar.

Defendant states in its brief:

"The relationship between the contractor, the United States government proper and the Delaware corporations in question, as a factual matter, is no different in substance from that involved in *Application of S. S. Silberblatt, Inc.,* 6 App Div 2d 603 (180 NYS2d 210), affirmed April 17, 1959, by *Matter of Silberblatt, Inc.,* v. *Tax Comm., Court of Appeals,* 5 NY2d 635 (186 NYS2d 646, 159 NE2d 195); *Green* v. *Eglin AFB Housing, Inc.* (Fla App), 140 So 2d 463; and *Offutt Housing Co.* v. *Sarpy County,* 351 US 253 (76 S Ct 814, 100 L ed 1151)."

In discussing these 3 cases, defendant also treats with *Dayton Development Fort Hamilton Corp.* v. *Boyland,* 133 NYS2d 831. As already indicated, *Green* holds contrary to defendant's position, the

court saying that the interest of the corporation was so negligible that it could not destroy the exemption made applicable by the Florida statute to sales of personal property to contractors employed by the United States when such property goes into public works owned by the United States. In *Offutt* the United States government lease of its property to the petitioner was for 75 years, the housing the latter built thereon had an estimated life expectancy of 35 years, petitioner was entitled to the rents therefrom, and the court held, accordingly, that the full interest in the housing belonged to petitioner and that congress had consented to imposition of local tax thereon. In *Dayton* the lease from the United States was for 75 years, title to all improvements to be made thereon was reserved to the lessee, and the court held that congress had consented to local tax on such property when not required for public use. In the instant case, as distinguished from *Offutt* and *Dayton,* the lessee corporation got nothing, its leasehold interest was worth nothing to it or its stockholders, and the only ones receiving any benefits from the contractual arrangements were the department for whom the housing was built, plaintiff who presumably made some profit from building the same, and the mortgagees who apparently received interest on their loans. Nothing in that entire situation relieves the stark fact that the corporation was but a sham. In *Silberblatt* the court upheld the validity of imposition of a State mortgage tax on the mortgages given by the corporation to mortgagees who had financed the building project. To the extent that language therein indicates that the corporation was an independent entity apart from the United States government, we reject it as not applicable here inasmuch as the department held its stock and the resignation of its officers, could cancel the lease to it at will after completion of construction, and at all

times had use and control of the premises. At all events, the holdings in these cases are not authority for defendant's contention that plaintiff's contract was not with an instrumentality of the United States and that the exempting provisions of the Michigan sales tax act do not apply here.

We come now to consideration of the validity of imposition of the use tax under the facts in this case. As already noted, section 4, subd (m) of the use tax act exempts property purchased by contractors engaged in improving real estate for others when such property is made a part of the real estate or is consumed in fulfillment of a contract for such improving within exempt classifications other than the United States and its instrumentalities or the State of Michigan, its departments or institutions. Thus, the exemption applies to contractors' purchases of materials which are made a part of or are consumed in improving real estate for cities, villages, townships, counties, school districts, or other political subdivisions of this State but is not extended to materials purchased by contractors for like use under contract with the United States or its instrumentalities.

Plaintiff urges that the trial court was correct in holding that such discrimination is unconstitutional. Defendant's answer thereto is akin to its position with respect to the sales tax angle of this case, namely, that the problem of such discrimination is not presented in this case because plaintiff's contract and relationship is with a private corporation, not with the United States. In view of our contrary holding in that regard, as above stated, the constitutional question must be determined.

No reasonable basis appears to support a classification for use tax exemption purposes which distinguishes between the United States or its instrumentalities, agencies, or corporations and those

dealing or contracting therewith, on the one hand, and, on the other, the State's political subdivisions and those dealing or contracting with them. That such distinction is arbitrary, unreasonable, and discriminatory is evident.

Defendant cites *United States* v. *Department of Revenue of Illinois,* 202 F Supp 757, as holding that such distinctions made by statute for taxing purposes are not necessarily invalid. It happens, however, that the distinction for sales tax exemption purposes ultimately upheld in that case was that between retailers doing business with the United States and retailers doing business with charitable organizations, on the ground that a reasonable basis existed for such classification. At the same time, it was held that a classification distinguishing between retailers dealing with the United States and those dealing with the State, its agencies or political subdivisions, was not reasonable and hence invalid. There is no comfort in the holding in that case for defendant here.

In *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 US 376 (80 S Ct 474, 4 L ed 2d 384), the court held invalid a Texas statute imposing a tax on private users or lessees of United States property when another Texas statute exempted from the tax lessees of property owned by the State of Texas or its political subdivisions. It was held that this was discrimination against the United States and its lessees and that the discrimination was not justified by any significant difference between them. The court said (pp 385, 387):

"But where taxation of the private use of the government's property is concerned, the government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the government as

well as it treats those with whom it deals itself. Compare *Esso Standard Oil Co.* v. *Evans,* 345 US 495, 500 (73 S Ct 800, 97 L ed 1174). * * *

"It follows that article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch* v. *Maryland,* 4 Wheat (17 US) 316 (4 L ed 579), that a State tax may not discriminate against the government or those with whom it deals. See *United States* v. *City of Detroit,* 355 US 466, 473 (78 S Ct 474, 2 L ed 2d 424). Therefore, this tax may not be exacted."

We are in accord with the concluding sentence in the trial court's decision, reading as follows:

"Distasteful though it may be, this court must hold that section 4, subd (m) of the use tax act is invalid with respect to property purchased by plaintiff for fulfilling its contract with the United States for construction of housing at the air force bases."

Affirmed.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

McGUIRE *v.* REENDERS DAIRY COMPANY.

1. AUTOMOBILES—NEGLIGENCE—WRONG SIDE OF ROAD—AMENDMENT OF DECLARATION—EVIDENCE—INSTRUCTIONS—REMAND.

   Trial court on remand from Supreme Court is directed to permit *timely amendment of declarations in actions for injuries to* 2-1/2-year-old child by defendant's milk truck so as to permit a showing that the truck was on the wrong side of the road, to admit evidence thereof on retrial, and to omit instruction that jury may not find negligence of defendant based on location of the truck, where amendment of declaration so to show had been denied during the trial, proffer of supporting testimony refused and such instruction given to jury, although not holding such action constituted reversible error under the circumstances and error is otherwise discovered necessitating reversal.

2. EVIDENCE—HEARSAY—ADMISSIONS AGAINST INTEREST—AUTOMOBILES—INFANTS.

   Admission, over objection, of hearsay testimony as to mother's admissions against interest that her 2-1/2-year-old child had come out from between parked cars before being injured when hit by defendant's milk truck in residential neighborhood *held,* prejudicial.

3. SAME—ADMISSION AGAINST INTEREST—PARTIES—PARENT AND CHILD.

   An admission against interest by a mother who has no legal interest in action by an infant and derivative action by father for injuries received by the child, would not be binding upon the plaintiff child.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 1018–1036.
[2] 8 Am Jur 2d, Automobiles and Highway Traffic § 966.
[3] 20 Am Jur, Evidence §§ 544, 556.
[4] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 430–432.
Modern trends as to contributory negligence of children. 77 ALR 2d 917.

4. AUTOMOBILES—INFANTS—CROSSING STREET—IMPERTINENT EVIDENCE.

Admission over objection of testimony that 2–1/2-year-old child on previous occasions had never stopped to look before crossing street *held,* so prejudicial as to entitle child and her father to new trial, since contributory negligence of such a young child was not and could not be in issue, it was impertinent to issues of negligence of defendant's milk truck driver, proximate cause, and damages, and could not be admissible for impeachment purposes.

5. SAME—DRIVER'S DUTY TO OBSERVE—INSTRUCTIONS.

Instruction in actions to recover damages for injuries to 2–1/2-year-old child which occurred when defendant's truck hit her while delivering milk on a lightly traveled residential area, whereby in commenting on a driver's duty to make observation, a comparison was drawn involving a busy, main thoroughfare should not be repeated on retrial, since it could only serve to confuse the jury.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted June 4, 1963. (Calendar Nos. 5, 6, Docket Nos. 49,726, 49,727.) Decided July 17, 1963.

Case by Jeanne McGuire, a minor, by Donald McGuire, next friend, for personal injuries sustained when struck by milk truck. Derivative suit by father, Donald McGuire, for medical expense. Cases consolidated for trial and on appeal. Verdict and judgments for defendant. Plaintiffs appeal. Reversed and remanded.

James P. Mattimoe and *P. Charles Peters* (*Henry J. Freud,* of counsel), for plaintiffs.

Ford, Kriekard & Brown (*Gordon H. Kriekard,* of counsel), for defendant.

DETHMERS, J. Defendant was owner of a milk truck being driven by its employee within the ambit of his employment. It struck and injured 2–1/2-

year-old plaintiff, Jeanne McGuire. The 2 suits, here consolidated, are, respectively, for her damages and those of her father, plaintiff Donald McGuire, resulting from her injuries. From judgments for defendant, entered on the jury's verdict of no cause for action, plaintiffs appeal.

The accident occurred on a north and south street, paved with tarvia 18 feet wide, but without curbs, gutters or sidewalks. The area is residential and the lawns slope from the houses to the edge of the tarvia. The terrain is flat and affords good opportunity for observation by motorists. Defendant's driver was going north at a speed, as he said, of from 10 to 20 miles per hour. There also was testimony from others that his speed was from 5 to 10 miles per hour, very slow. He testified that he had seen a group of children cross the street about 300 feet ahead of him; that as he drove along he looked out for house numbers. He told an officer that he saw a "friend" to his left and waved to and greeted him and that the friend hollered "stop", and he stopped and did not know that he had hit the child. The middle of the front bumper struck the child who was then at the middle of the street. Three disinterested eyewitnesses to the accident testified that the child was crossing the street from east to west and that there were no vehicles parked on the east side of the street but there were some on the west side. At trial the driver testified that, just before striking her, he had seen the top 2 inches of the child's head about 3 feet ahead of the truck, that he could see the right part of her "forehead facing the east, more or less", her right eye toward the truck, and so he concluded she had come from behind a parked vehicle on the west side of the street. The child's left leg was fractured.

Plaintiffs' declarations alleged the driver's negligence to consist of failure to drive with due caution

or at a prudent rate of speed and failure to make proper observation. No charge was made of driving on the wrong side of the pavement. After considerable proofs were in, indicating that the vehicle had been driven other than in its own right-hand lane, plaintiffs sought to amend their declarations accordingly. This was first permitted by the court, but, later, the court took the opposite view and denied the motion to so amend. Plaintiffs' proffer of testimony as to location of the truck on the pavement just before the accident was refused on the ground that this was not within the scope of the pleadings. The court instructed the jury that, on that same ground, it might not base a verdict for plaintiffs on location of the truck when the child was struck. With respect to this instruction, rejection of testimony, and denial of amendment to the declaration as to where the truck was being driven, plaintiffs assign error. Without holding that, under all of the facts and circumstances of this case and the lateness of the motion to amend, these constituted reversible error, nevertheless, inasmuch as we are holding, for other reasons, that a new trial must be granted, we direct that the amendment should be allowed, if again sought well in advance of trial, the testimony on this matter should be received, and the said instruction omitted on retrial.

Another of defendant's employees was permitted to testify that, after the accident, he had called the child's mother to express his sympathy and that she then told him that they did not blame the driver and that the child had come out from behind a parked car. The mother was not a witness to the accident. She is not a party to nor has she any legal interest in the lawsuits. The child is not bound by admissions against interest made by her mother. The testimony was hearsay. On no conceivable ground was it admissible. It was prejudicial to plaintiffs' cases.

It should have been refused on plaintiffs' objection, weak though that may have been. Also received, over plaintiffs' objection, was the testimony of an 8-year-old boy living in plaintiffs' neighborhood, admitting that he remembered telling the deputies that the child had done this before and never stops to look. Contributory negligence of the 2-1/2-year-old child was not and could not be in issue. What she may have done on previous occasions could have no pertinence to the only questions in the case, namely, the driver's negligence, its proximate cause, and damages. It is urged as having been admissible for impeachment purposes, but the record discloses it could have had no such purpose. Its effect was prejudicial, entitling plaintiffs to a new trial.

The court charged the jury as follows:

"Now, drivers must notice persons in the street, of course. Drivers, however, need not watch others unless such persons evidence an intention to enter the street. The minute a person evidences any intention to enter the street, then the driver, of course, must pay attention until something happens that the law will then require him to assume from what he sees happening that that person is about to enter the street. Well, that is a perfectly practical rule anyway, if you stop to think. If when you are driving down Michigan avenue here in Kalamazoo, for example, you have to observe every person walking on the sidewalk and keep them in your view, goodness, you would hit somebody in the street where you should have been looking. But when that person on the sidewalk does something which a reasonable person would notice, would or should notice, that indicates he is about to step into the street, then your observation must be towards that person as well as what is in front of you to be seen."

It appears that the street on which the accident occurred is a lightly traveled residential street without

sidewalks and with lawns extending to the tarvia. Michigan avenue in the city of Kalamazoo is a busy, main thoroughfare. The use of the latter by way of illustration in negativing the duty of drivers to watch pedestrians on the sidewalks along a busy thoroughfare was unfortunate, indeed, tending to minimize the driver's duty, on a street with residential lawns extending right up to the pavement, to maintain a lookout, at least within the confines of the street, for the children which he knew had crossed the pavement in front of him. Aside from that, to the extent that this instruction represents an attempt to follow language in *Braxton* v. *Gazdecki,* 255 Mich 518, that language is equally unfortunate as applied to the facts in that and in this case. As this writer has already observed in *Kaiser* v. *Gooden,* 325 Mich 521, 527, about the *Braxton Case:*

"this Court affirmed the finding of the trial court, sitting as a trier of the facts without a jury, that defendant was not, as a matter of fact guilty of negligence. Our holding was, in effect, that the evidence did not preponderate against such finding of fact. In so holding this Court did not have occasion to, nor did it pass on the question of whether defendant should have been held to be free from negligence as a matter of law."

Applied to the case at bar, the language in *Braxton* should hardly afford the basis for jury instruction as to the law and its requirements for motorists' maintenance of a lookout for pedestrians on the streets. The gratuity in *Braxton* might more properly have emphasized that once a pedestrian does enter a street, as the child did both there and here, it is the duty of the motorist to see him and keep him in observation. Here the child, before being struck, walked on the pavement at least as far as from its

east edge to its center, 9–1/2 feet, before the driver saw her in front of him. It being the duty of the jury to determine whether the driver was guilty of negligence in not seeing her on the pavement before he did, the language from *Braxton* as to the absence of a duty to observe the child before she entered the street could only serve to confuse the jury. It should not be repeated on retrial.

Reversed. Remanded for new trial, with costs to plaintiffs.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

MAGNUSON *v.* KENT COUNTY BOARD OF CANVASSERS.

1. MUNICIPAL CORPORATIONS—HOME-RULE CITIES—ANNEXATION—STATUTES—AMBIGUITY.

   Provisions of section of home-rule statute relative to annexation of territory by one city from another city, where both have a population of more than 15,000 *held,* ambiguous (CLS 1956, § 117.9).

2. STATUTES—CONSTRUCTION—RESULT—LEGISLATIVE INTENT.

   A court which must construe an ambiguous statute may properly look to the result of the construction to aid it in determining legislative intent.

3. MUNICIPAL CORPORATIONS—HOME-RULE CITIES—ANNEXATION—REFERENDUM—CONSTRUCTION OF STATUTES.

   Final sentence of ambiguous section of home-rule city statute providing that "this section shall not be construed so as to give *any* city authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected" is construed as requiring that the vote of the entire cities affected be counted separately and by the use of the term *any city* is not limited to cities of less than 15,000 population as to which some preceding provisos especially pertained (CLS 1956, § 117.9).

4. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTES—HOME-RULE CITIES—ANNEXATION.

   No costs are allowed on appeal involving construction of ambiguous section of home-rule city statute relative to annexation of territory of one home-rule city to another, a public question being involved (CLS 1956, § 117.9).

REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations §§ 23–34, 107.
[2] 50 Am Jur, Statutes § 368 *et seq.*
[3] 37 Am Jur, Municipal Corporations §§ 23–34, 107; 50 Am Jur, Statutes §§ 225, 226.
[4] 19 Am Jur, Costs § 91.

Appeal from Kent; Searl (Fred N.), J. Submitted February 7, 1963. (Calendar No. 55, Docket No. 49,931.) Decided July 17, 1963.

Certiorari by Jack A. Magnuson and Everett Windemuller, registered electors residing in the city of Wyoming, against the Kent County Board of Canvassers challenging its cumulative tabulation of votes in an annexation election. The City of Wyoming, a municipal corporation, intervened as party plaintiff, and Charles J. Huizenga, a registered elector, the City of Grand Rapids, a municipal corporation, and the Board of Education of the City of Grand Rapids intervened as parties defendant. Writ dismissed. Plaintiffs and intervening plaintiff appeal. Reversed and remanded for entry of order directing board of canvassers to certify election results based upon separate count of votes in each political subdivision and area affected.

George R. Sidwell, for plaintiffs.

Schmidt, Smith, Howlett & Halliday (*William J. Halliday, Jr.,* of counsel), for intervening plaintiff City of Wyoming.

Vanderveen, Freihofer & Cook (*George R. Cook,* of counsel), for defendant.

Dilley & Dilley (*Albert R. Dilley,* of counsel), for intervening defendant Huizenga.

James K. Miller, for intervening defendant City of Grand Rapids.

Roger D. Anderson, for intervening defendant Board of Education of the City of Grand Rapids.

O'HARA, J. This is an annexation case. It arises under section 9 of the home-rule act.[1] A recent per curiam opinion[2] described the statute as "abstruse." This descriptive euphemism may well qualify as the understatement of the judicial year. The involved section when first enacted contained 22 printed lines. It set out clearly which electors would vote in the annexation proceedings, authorized and specified when the vote would be counted collectively and when separately. Since the enactment in 1909, the section has acquired 2 "provided howevers" and 3 "provided furthers." It has been rewritten changing the relative positions of the provisos which now are considerably larger than the original section itself. The problem posed by the appeal is to determine the legislative intent of the section in its present entirety.

The essential facts are accurately stated in appellants' brief. We herewith set them out:

"The city of Grand Rapids and the city of Wyoming are 'home-rule cities' governed by PA 1909, No 279, including matters pertaining to the annexation of territory thereto and the detachment of territory therefrom. According to the 1960 U.S. census, the population of Grand Rapids is 197,193 inhabitants, and that of Wyoming is 45,829 inhabitants. Therefore, at the time of the happening of all events pertinent to this case, the populations of both cities exceeded 15,000 inhabitants.

"On the second day of April, 1962, an election was held in each of the 2 cities on the question of annexing certain described territory (commonly called the airport property) of the city of Wyoming to the city of Grand Rapids. The vote on the question, according to the cities concerned was:

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[1] PA 1909, No 279, § 9, as amended (CLS 1956, § 117.9 [Stat Ann 1961 Cum Supp § 5.2088]).

[2] *Cavanagh* v. *Calhoun County Board of Canvassers,* 361 Mich 516.

	YES	NO
"City of Grand Rapids	36,916	4,042
City of Wyoming (outside area to be annexed)	754	13,977
City of Wyoming area to be annexed	36	8
City of Wyoming-balance of city	754	13,977

"The Kent county board of canvassers canvassed the votes cast at such election and by certificate, dated April 18, 1962, declared the annexation question to have been adopted. In arriving at such determination, the votes cast in the city of Grand Rapids and in that part of the city of Wyoming outside the territory proposed to be annexed to the city of Grand Rapids were added together so as to give a total in favor of such annexation."

The able trial court clearly framed the issue in his carefully considered opinion. We quote:

"The board of canvassers, following the advice of the county's civil counsel, counted the vote in 2 units, (1) that of the area to be annexed, (2) the combined vote of the city of Grand Rapids and the vote in the city of Wyoming, exclusive of the area to be annexed. So counted, the proposal was declared carried. This proceeding is certiorari to review the action of the board of canvassers.

"Plaintiffs assert that this being a proposal to annex to 1 city a portion of another city, it must, in order to carry, receive the affirmative vote of 3 units, (1) the area to be annexed voting separately, (2) the entire * * * city of Wyoming from which the territory is to be detached voting separately and (3) the entire * * * city of Grand Rapids to which it is to be attached voting separately. In making this contention, plaintiffs rely upon the last sentence of section 9 [CLS 1956, § 117.9 (Stat Ann 1961 Cum Supp § 5.2088)] which reads:

" 'This section shall not be construed so as to give any city the authority to proceed hereunder to attach territory from any other city unless the question

relative thereto has been voted upon by the voters of the entire cities affected, except * * *.' (The exception has no application here.)

"And plaintiffs rely upon the opinion of the Supreme Court in *Cavanagh* v. *Calhoun County Canvassers,* 361 Mich 516, and the opinion of the attorney general quoted therein.

"Defendants assert that the action of the board of canvassers was correct and rely upon other provisions of section 9 which will be quoted.

"Counsel for the respective parties each find support for their position in the same rules of statutory construction. I shall not repeat them. They are well known to the profession. They have been used by the courts when called upon to construe an ambiguous statute to aid them in determining the legislative intent. The first question here is: Is there an ambiguity in this statute?

"Section 9 of the home-rule act, adopted originally in 1909, has been amended 6 [8[3]] times. As originally adopted, it read:

" 'The district to be affected by every such proposed incorporation, consolidation or change of boundaries shall be deemed to include the whole of each city, village or township from which territory is to be taken or to which territory is to be annexed: *Provided,* That proposed consolidations or changes of boundaries shall be submitted to the qualified electors of the city, and to the qualified electors of the city, village or township from which the territory to be taken is located, and at the election when said question is voted upon, the city, village, or township shall conduct the election in such manner as to keep the votes of the qualified electors in the territory proposed to be annexed or detached in a separate box from the one containing the votes from the remaining portions of such city, village or township, and if the returns of said election shall show a

[3] PA 1917, No 225; PA 1925, No 337; PA 1931, No 314; PA 1935, No 48; PA 1947, Nos 36 and 334; PA 1951, No 58; and PA 1956, No 68.

majority of the votes cast in the district proposed to be annexed, voting separately, to be in favor of the proposed change of boundary, and if a majority of the electors voting in the remainder of the district to be affected as herein defined, voting collectively, are in favor of the proposed change of boundary, then such territory shall become a part of the corporate territory of the city or shall be detached therefrom, as the case may be.'

"The original provisions of section 9 defining 'the section has been amended and is a part of the section as it reads today.

"The language now embodied in the sentence relied upon by plaintiffs and above-quoted was placed in the statute in 1925. The amendment of that year repeated the provisions of the act as originally adopted (and as amended in 1917) and added to it[4] the following:

"'*Provided, however,* That territory may be attached or detached to or from cities having a population of fifteen thousand or less, if a majority of the electors voting on the question in the city to or from which territory is to be attached or detached, and a majority of the electors from that portion of the territory to be attached or detached as the case may be, both vote in favor of such proposition: And it is *further provided,* That this section shall not be so construed so as to give any city the authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected.'

"In succeeding amendments and, particularly, in that of 1947,[5] the provisions added to the act in 1925 have become separated, the first part beginning with the words '*Provided, however*' and ending with the words 'in favor of such proposition:' is moved ahead of some language it formerly followed and the last

[4] See PA 1917, No 225, and PA 1925, No 337.—REPORTER.

[5] See PA 1947, No 36, and the subsequent PA 1947, No 334.—REPORTER.

part is moved to the end of the section and made into a separate sentence which reads as previously quoted.

"The original provisions of section 9 defining 'the district to be affected' by the proposed change of boundaries and providing for a vote in which the votes of the qualified electors in the territory proposed to be annexed are kept in a separate box from that containing the votes from the remaining portions of the area to be affected and further providing:

" 'If the returns of said election shall show a majority of the votes cast in the district to be annexed, voting separately, to be in favor of the proposed change of boundary, and if a majority of the electors voting in the remainder of the district to be affected as herein defined, voting collectively, are in favor of the proposed change of boundary, then such territory shall become a part of the corporate territory of the city or shall be detached therefrom, as the case may be,' although separated by other language, are retained in the 1947 amendment and in 2 subsequent amendments, 1 in 1951 and 1 in 1956 (neither of which latter amendments changed any language here involved).[6]

"Are these provisions of the act as to the manner in which the votes are to be counted in effect repealed insofar as they apply to annexations from 1 city to another, by the sentence reading:

" 'This section shall not be construed so as to give any city the authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected'?

"The board of canvassers says that this last quoted sentence provides only who can vote not how the votes are to be counted and that in order to hold that the last sentence, in effect, repeals the earlier provisions in the section as to how the vote is to be

[6] PA 1951, No 58, and PA 1956, No 68.—REPORTER.

counted, we must read this last sentence as if it had been written something like this:

" 'This section shall not be construed so as to give any city the authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected *and the returns of the election shall show that a majority of the votes cast in each of said cities voting separately were in favor of the proposed change of boundary.*' (Emphasis of the trial court.)

"Plaintiffs contend that the last sentence of section 9 is to be construed as if it so read and say that the Supreme Court so held in the *Cavanagh Case.*"

From this point the trial court's opinion continues with an analysis of *Cavanagh;* its restriction to the specific case under consideration and a similar analysis of the opinion of the attorney general. Finally, the court below concludes:

"I am unable to be persuaded * * * the Supreme Court intended to decide more than the question before it."

We agree. The issue, therefore, now becomes whether the rationale in *Cavanagh* based as it was on the attorney general's opinion that "the intent of the legislature is clear that each city must vote separately on the question [of annexation]; otherwise the phrase 'entire cities' " would be meaningless, obtains here.

We believe the cited excerpt is equally applicable to the case at bar. We recognize Judge Searl's very able negation of the court's right to decide between the 2 "philosophies of annexation." Basically, he postulates that it is no business of the judicial branch to construe a statute in such manner as to achieve what the court might consider a more desirable result or a more equitable mode of procedure. In sup-

port of his premise and the logical conclusion therefrom, he quotes this Court from *Goethal* v. *Kent County Supervisors,* 361 Mich 104, at p 115:

"The statement that matters relating to incorporation and annexation are legislative in character necessarily excludes authority on the part of the courts to interfere in such a proceeding on the ground that the purpose to be achieved by following the legislative procedure is unreasonable because inconsistent with the rights of property owners, or of political subdivisions or municipalities."

We do not deviate from this stated principle in deciding as we do. The conclusion we reach, we believe, stems from the difference in the premises of the trial court and our Court on review. Judge Searl reasons to the conclusion that "there is no ambiguity here." Having accepted this premise, he rightly desists from applying any test of "result morality" to the conclusion and effect of his construction of the statute. Contrariwise we find the involved section not only ambiguous *per se,* but unclear in the relationship of the proviso designating who may vote to the method of counting the votes. Assuming we are correct that the statute is, as has been previously held "abstruse," we are freed from the limitation in construction Judge Searl imposed upon himself. We may in the construction of an ambiguous statute look to the result of the construction to aid us in determining legislative intent. In fact, the converse of the proposition becomes true and we are *obligated* to look to the result in order to determine *what* result our coequal branch intended. We regard the placement of the controlling language at the end of the statute and the use of the word *section* as important. We hold that when the legislature stated:

"This section shall not be construed so as to give any city the authority to proceed hereunder to at-

tach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected,"

that it mandated us to construe the whole section (not just the 15,000 population proviso) in such manner so as not to give any city the authority to attach territory from *any* other city without the vote of the entire cities affected counted separately. From here the next step to the applicability of the interpretation of the attorney general in *Cavanagh* to the instant case is obvious.

In further support of our conclusion we mention as significant what we believe must be recognized as a clearly intentional omission by the legislature. Had the legislature intended that the separate vote of the entire cities be limited to the proviso dealing only with cities of less than 15,000, the simple insertion of the word "such" between the words "any" and "city" would have accomplished the purpose.

Also meaningful, we believe, is the use in the final clause of the phrase "and it is further provided" in the portion added by PA 1925, No 337. This is the only place in the section where the legislature departs from the use of "provided however" and the more simple "provided further." The time of the addition of the words "and it is further provided" in the senate,[7] after the bill was approved in the house, indicates to us that the addition of the last proviso was to effect a clarification of the relationship of *any* city to *any other* city irrespective of population. Here, after all, is the heart of the case. Does *any* city mean *any city* or does it mean *any* city of 15,000 or less? We are constrained to hold that *any city* means *any city*. Thus, we apply the reasoning of

[7] See 1925 Senate Journal, pp 935, 936.—REPORTER.

Cavanagh and the opinion of the attorney general to the instant case.

The order of the trial court dismissing the writ of certiorari is reversed. The case is remanded with instructions to enter an order directing the Kent county board of canvassers to certify the result of the April 2, 1962 election on the basis of the vote (1) in the territory to be annexed; (2) in the city of Grand Rapids counted separately; and (3) in the city of Wyoming counted separately.

No costs, a public question being involved.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and SMITH, JJ., concurred.

WRIGHT *v.* BATESON.

1. CONTRACTS—DELAY IN PERFORMANCE—DAMAGES—EVIDENCE.
   Record in action against a subcontractor on highway project *held*, insufficient to support claim of damages because the contract was not completed by time set in original contract, where it appears a supplemental contract had been entered into, it is concluded both parties were at fault, delay occurred because of developments over which defendant subcontractor did not have full control, record fails to show with sufficient clarity specific items of damage to plaintiff because of the delay or because of alleged breach of contract by the defendant subcontractor, and claims advanced by plaintiff might have been incurred had there been no delay in performance.

2. EVIDENCE—BILL OF PARTICULARS.
   A bill of particulars may not be accepted in lieu of proper proof.

3. CONTRACTS—HIGHWAY SURFACING—PLEADING—BILL OF PARTICULARS.
   Plaintiff's declaration against subcontractor which did not allege breach of contract with reference to the quantity of materials required by subcontract to be used in highway surfacing, may not recover for breaches of the contract in such particular even though included in bill of particulars.

4. SAME—BREACH OF CONTRACT—DAMAGES.
   A plaintiff may not recover for alleged breaches of contract because of the defendants' failure to meet obligations imposed with reference to overruns in use of materials in highway construction, where there is no claim plaintiff was damaged by reason of such breaches.

REFERENCES FOR POINTS IN HEADNOTES

[1] 15 Am Jur, Damages § 47.
[2, 5] 41 Am Jur, Pleading § 273.
[3] 41 Am Jur, Pleading § 387.
[4, 6] 15 Am Jur, Damages § 356.

5. PLEADING—DECLARATION—BILL OF PARTICULARS.
The scope of a declaration may not be broadened by a bill of particulars.

6. CONTRACTS—BREACH OF CONTRACT—DELIVERY OF MATERIALS—EVIDENCE.
Proof as to plaintiff's claim of damage with respect to defendants' failure to schedule delivery of materials under his subcontract respecting highway surfacing *held,* insufficient to permit recovery, where plaintiff exercised active supervision over the operations even to the extent of giving directions to defendants' employees.

Appeals from Ingham; Coash (Louis E.), J. Submitted June 6, 1963. (Calendar Nos. 24, 25, Docket Nos. 49,597, 49,611.) Decided July 17, 1963.

Case by W. C. Wright, doing business as Wright Construction Co., against Ethel I. Bateson, survivor of a copartnership of William E. Bateson and Ethel I. Bateson, doing business as W. E. Bateson Co., subcontractor, and against the Fidelity & Casualty Company of New York, a New York corporation, surety, for breach of contract on highway construction projects. Cross declaration by subcontractor. Judgment for plaintiff. Defendants file separate appeals. Plaintiff cross appeals. Reversed and remanded for entry of judgment for defendants.

Glassen, Parr, Rhead & McLean (*Roland F. Rhead,* of counsel), for plaintiff.

Eugene H. Christman, for defendant Bateson.

Joseph W. Planck, for defendant Fidelity & Casualty Company of New York.

CARR, C. J. This case has resulted from contracts entered into for the construction of a section of the Ohio turnpike in 1955. Said section comprised approximately 11-1/2 miles of highway and was des-

ignated as projects C-53, C-54, and C-55. The general contractors for the work were Terry & Wright, Inc., and Calumet Paving Company. The plans contemplated two 24-foot strips of Portland cement concrete with a 10-foot bituminous paved shoulder on the outside of each strip and an 8-foot paved shoulder on the inside of each strip of concrete. The concrete work was performed by Calumet Paving Company and is not here involved.

In the construction of the shoulders to the concrete strips there was placed a base of porous material for the purpose of affording drainage as well as support. This portion of the project was performed by Terry & Wright. The added construction required was taken over by plaintiff in the present case, doing business as Wright Construction Company. The contract required the placing of a layer of heavy stone, No. 2 size, on top of the porous base which was required to be properly compacted. Bituminous material was specified, in the contract with the Ohio Turnpike Commission, to be applied to the stone, with a spreading of stone chips and a seal coat. The completion of the work required rolling to leave each shoulder with a smooth surface.

Plaintiff herein was the owner of 49% of the stock in Terry & Wright, Inc. A request for a copy of the contract between him and the general contractors was rejected by his counsel with a statement that there was no written contract. Testimony on the trial by the general superintendent, Orland Jones, of Terry & Wright, was to the effect that the contract was in writing; and witness Belsheim, the project engineer on the section of the Ohio turnpike in question, likewise so testified, stating in substance that he had approved the contract. The duties and obligations of plaintiff Wright under said contract, whether written or oral, were not shown on the trial of the case.

Under date of June 25, 1955, plaintiff entered into a subcontract with W. E. Bateson Company, a copartnership consisting of William E. Bateson and his wife, Ethel I. Bateson, for the spreading of the bituminous material on the stone required to be laid by plaintiff. Defendant Fidelity & Casualty Company obligated itself as surety on the bond given for the faithful performance of the agreement. Said partnership, hereinafter referred to as Bateson, was required to furnish all equipment necessary for the doing of the work. The agreement further specified that Bateson as subcontractor should schedule the trucks furnished by plaintiff and should remedy any defects in the work performed under the contract. Subdivision 5 of the agreement read as follows:

"There is a maximum or minium amount of bituminous material, choke stone and cover stone set forth in principal contractors' units of work. All quantities used over average will be charged back against subcontractor in their full value."

The agreement did not set forth the maximum and minimum amounts of material referred to in the language quoted, nor do we find it elsewhere in the appendix filed in this Court on appeal. The agreement declared that time of performance was of the essence thereof, and that the work assumed by Bateson should be completed not later than September 1, 1955. However, for reasons that are in dispute, the Bateson subcontract was not fully performed on the date specified. Apparently the general contractors (and the Ohio Turnpike Commission as well) felt that the portion of the project covered by the contract between them and the plaintiff was not progressing satisfactorily. On August 17, 1955, a meeting was held in the office of engineer Belsheim to discuss the situation. Criticism of the progress of the work, and of details in connection

therewith, with particular reference to the stone that had been laid, was met with assurances by Wright as to his intentions to make certain changes and to obtain more adequate supervision. On August 31st following a second meeting was held by representatives of the Turnpike Commission, Mr. Wright, and others. Bateson was not present at either of these conferences. An agreement was reached that, because of the lack of satisfactory progress, the work would be placed entirely under the supervision of Terry & Wright, Inc., and Wright Construction Company would be relieved of responsibility insofar as supervision was concerned. Thereafter Terry & Wright had charge, with its general superintendent, Mr. Jones, acting in behalf of the general contractors until the completion of the work on September 27, 1955.

On September 6, 1955, plaintiff and Bateson entered into a supplemental contract, to which the defendant Fidelity & Casualty Company of New York was a party, referring to supervision of the remaining work by Terry & Wright and further specifying that Bateson, with the partnership equipment and employees, should remain on the job until all work had been finished. Under this supplemental agreement plaintiff Wright was required to furnish such equipment as might be necessary to finish the job by the completion date established by the Ohio Turnpike Commission. Subdivision 4 of this agreement is significant in the instant controversy. It reads as follows:

"Wright shall pay Bateson in accordance with the minimum application unit prices set forth in the subcontract between Wright and Bateson. Bateson shall carry the costs of any 'overrun' over and above the required application. Materials shall not be charged to Bateson. The payments made by Wright to Bateson shall be made on the earned amount per-

formed by Bateson, under the terms of the subcontract, but there shall first be deducted from said payments, equipment rental, cost of supervision and miscellaneous expenses. Payment shall be made weekly. Fidelity & Casualty Company shall pay any deficiencies of costs."

The supplemental agreement also declared that except as modified thereby the subcontract between Wright and Bateson should remain in force and effect. As before noted, the work was completed on September 27, 1955. Thereafter, under date of December 21, 1955, plaintiff presented to Bateson and to claim agents of defendant Fidelity & Casualty Company a list of claims against Bateson aggregating $7,503.45. Included therein were various items apparently covering payments made by plaintiff and also items charged by Terry & Wright, Inc. It appears from the testimony of the representatives of defendant Fidelity & Casualty Company that the claims of plaintiff as set forth in his statement of account were not admitted by Bateson, or by them on behalf of their company. Apparently they had no authority to make any agreement binding their principal. In any event, plaintiff's apparent attempt to procure a voluntary settlement of moneys that he claimed were owing to him by Bateson, or from the surety on Bateson's bond, ended in failure.

The instant suit was started August 27, 1956, plaintiff seeking to recover damages on the theory of breach of contract. Prior to the bringing of the action William E. Bateson died, and Mrs. Bateson, as surviving partner, was named as a defendant with the Fidelity & Casualty Company of New York. After referring to the contract between plaintiff and Bateson, above discussed, the declaration averred the breach thereof in that: (1) performance was not completed by September 1, 1955; (2) nor was sufficient equipment furnished by the partners to per-

form the said contract; and (3) that delivery of materials was not properly scheduled by Bateson. Damages as a result of the breach of contract were claimed in the sum of $22,694.58, which by amendment to the declaration was subsequently increased to $22,715.27. Defendants answered denying any breach of contract on the part of Bateson and also denying that plaintiff had sustained any damages as a result of the alleged breach. Following a trial before the circuit judge without a jury judgment was entered for the plaintiff in the sum of $7,503.45, which was the sum that plaintiff had claimed in December, 1955, in his proposed accounting with defendants. Motion for a new trial submitted by defendants was denied, whereupon they appealed from the judgment entered, and plaintiff cross-appealed asserting that the trial court was in error in not granting a judgment in the full amount claimed in the declaration.

It is the claim of defendants-appellants that the failure on the part of Bateson to complete the work called for by the subcontract with plaintiff resulted from the failure of the latter to seasonably start and complete his part of the work. The claim is not without merit. As before noted, the contract between Wright and Bateson was executed June 25, 1955. As shown by the testimony of engineer Belsheim, the Wright Construction Company did not start placing stone until July 21st following. Apparently there was trouble in properly compacting the stone used and in holding it in position. Bateson started the application of the bituminous material on July 29th, which material, as before stated, was furnished by Wright. At first, asphalt emulsion was employed, for which refined asphalt was later substituted, the record suggesting that there was some experimentation, with consequent delay for which Wright was chargeable. The record before us

justifies the conclusion that both parties were at fault and that the delay occurred because of developments over which Bateson did not have full control. In any event, the record fails to show with sufficient clarity specific items of damage to plaintiff because of the fact that the contract was not completed by September 1st.

In his declaration plaintiff did not refer to the supplemental agreement of September 6, 1955, which by its terms remained in full force and effect until the completion of the work. The undertaking is significant in that it required plaintiff to furnish such supplementary equipment as might be necessary to finish the work by the completion date fixed by the Ohio Turnpike Commission. According to the provision of subdivision 4 of this supplemental undertaking, above quoted, plaintiff was required to pay Bateson in accordance with unit prices specified in the original subcontract. Materials, however, were not to be charged to Bateson and from the payments made deductions were authorized covering "equipment rental, cost of supervision and miscellaneous expenses." It may be assumed that this provision of the undertaking was carried out. Whether the bill of particulars relied on by plaintiff on the trial contained items that were, or may have been, taken care of in the manner suggested by the express provision of the supplemental agreement is not clear. The conclusion cannot be avoided that the proofs in the record before us do not establish specific items of damage sustained by plaintiff because of the alleged breach of contract on the part of Bateson. It is obvious that the claims advanced by plaintiff might have been incurred had there been no delay in performance.

This brings us to a consideration of the principal question involved in the controversy between the parties. As before noted, the contract of June 25,

1955, made specific reference to quantities of materials used above the average of the maximum and minimum amounts stated in the specifications prescribed by the Turnpike Commission, it being provided that all quantities over such average should be charged against Bateson. We are not informed by proper proof with reference to the average amount of bituminous materials specified in the agreement between the Ohio Turnpike Commission and the general contractors. Obviously we cannot accept plaintiff's bill of particulars in lieu of proper proof. However, the declaration under which plaintiff seeks to recover in this case does not allege a breach of contract with reference to the quantity of materials used by Bateson. Nor is there any claim that plaintiff was damaged with respect to obligations for the payment of overruns for which, possibly, he may have been held liable as a result of the breaches of contract actually set forth. On the theory of the declaration, and the specific averments thereof, plaintiff is not entitled to recover in this action because of possible failure on defendants' part to meet such obligations, if such there were. It is settled law that the scope of a declaration may not be broadened by a bill of particulars. *Gilmer* v. *Miller*, 319 Mich 136, 141, and prior decisions there cited.

With reference to the claim that Bateson did not properly schedule delivery of materials it is significant to note that the testimony in the case tends to establish that plaintiff, prior to August 31, 1955, exercised active supervision over the operations in connection with the paving of the shoulders of the turnpike, even to the extent of giving directions to Bateson's employees. It is of further significance that superintendent Jones after taking over supervision of the work covered by plaintiff's contract with the general contractors, as he testified, assumed

the task of scheduling the materials used on the job. There is no sufficient proof in this record for an awarding of damages to plaintiff on the basis of such alleged breach on the part of Bateson.

The issues in the case are factual in nature. For reasons not material here there was unfortunate delay in bringing them to trial. The pretrial hearing was not conducted until February, 1960, and the taking of the proofs was completed on October 24, 1961. It is an action for damages for alleged breach of contract rather than a suit for an accounting. On the record we are brought to the conclusion that the plaintiff has not established his right to recover damages, and accordingly the judgment of the circuit court is reversed and the case remanded with directions to enter verdict and judgment in favor of the defendants.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

REDMOND *v.* SHEER.

1. APPEAL AND ERROR—QUESTIONING OF WITNESSES BY TRIAL COURT —RECORD.

   The Supreme Court declines to hold that a trial court had indulged motions, gestures, facial expressions, or other actions designed to or which did influence the jury unfavorably against plaintiff's case upon record showing remonstrance in the judge's chambers to such type of conduct and denial by the court of intentional prejudicial conduct accompanied by statement that in view of contradictory methods of treatment of plaintiff's injuries by his medical and chiropractor witnesses the court saw fit to ask more than in the usual case of the doctor what he thought of the treatments given by the chiropractor in order to bring out the facts.

2. TRIAL—QUESTIONING OF WITNESSES BY TRIAL COURT.

   Jury's verdict for defendant in action arising out of automobile collision *held,* not to have resulted from unfair questioning of witnesses by the judge, under record showing questions directed toward (1) plaintiff's knowledge of the difference between medical doctors and chiropractors, by both of whom he had been treated, (2) elucidation of the fact that the medics had recommended immobilization of plaintiff's back and the chiropractor had advised to the contrary and manipulated it instead, (3) interpretation by the medics of X-ray pictures of plaintiff's back taken by the chiropractor, and (4) whether, if plaintiff's back had pained him for about 10 days after the accident, then stopped hurting, but pain resumed some months later when he started to do heavier work, the later pain could be the result of injuries received in the accident, which questions were not phrased in a manner slanted in 1 direction or indicating the judge's opinion as to what the answer should be.

BLACK, KAVANAGH, and SOURIS, JJ., dissenting.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 75.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted April 2, 1963. (Calendar No. 3, Docket No. 49,848.) Decided July 17, 1963.

Case by Carlton Redmond against Frank Sheer for personal injuries sustained in automobile collision. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Adams & Wade (*William E. Wade,* of counsel), for plaintiff.

Erickson, Dyll, Marentay & Slocum, for defendant.

DETHMERS, J. This is a suit for damages for injuries sustained in an automobile accident. From jury verdict and judgment for defendant the plaintiff appeals.

Plaintiff makes no claim of error in the court's rulings on admissibility of evidence or jury instructions. The only question he raises on appeal is as follows:

"Did the trial judge in his questioning of the parties and the witnesses usurp the duties of counsel, unfairly communicate to the jury his opinion on the weight and credibility of testimony, unduly stress the merits of medicine v. chiropractry, and by his demeanor and interference in the conduct of the trial, so prejudice the plaintiffs' case that a new trial should have been granted?"

Plaintiff says in his brief:

"As everyone knows, a written record is not capable of demonstrating tone of voice or physical gestures. There is no way plaintiff and appellant can show to this Court that the trial judge did indulge excessively in the use of the shrug, the expression of disbelief in raising the eyebrows, the stare of

doubt and the question accompanied by the vocal tone of incredulity, other than to simply state that he did. This we do."

After the trial had been in progress for a time, counsel for plaintiff, in chambers, stated to the judge the substance of the language just above quoted from his brief and, further, that the court had been questioning the witnesses excessively and in a manner calculated to influence the jury against plaintiff's case. He then said:

"I ask the court at this time to refrain from getting into the case to the degree of taking over the duties of counsel."

To this the court responded:

"Let the record show that the court did not knowingly make any gestures, smile or move his hands so as to show that the court was in any way prejudiced against the plaintiffs' lawyer or his client. In view of the fact that the plaintiffs' own medical experts advocated completely contradictory methods of treatment, as testified to by the plaintiff, the court did ask and did inquire more than in the usual case of the doctor as to what he thought of the treatments that were given by the chiropractor, and I think that was perfectly proper. It is up to the jury to decide when they hear the chiropractor who they will believe. I am bringing out the facts, that is all. The court will not refrain from asking any questions that it feels will help the jury to arrive at the truth."

This presents a record, then, of statements by plaintiff's counsel, made in chambers, that the judge had "with telegraphed motions and gestures to the jury, in the presence of the jury" given the jury an opinion as to what the judge thought of plaintiff's proofs and case and, in response, the judge's denial. We cannot, on the basis of nothing further than that in the record, and the bald assertion thereof by plain-

tiff's counsel in the brief, hold that the trial court indulged motions, gestures, facial expressions, or other actions designed to or which did influence the jury unfavorably against plaintiff's case.

There remains the matter of the court's questioning of witnesses. The questions to which plaintiff objects were directed toward (1) plaintiff's knowledge of the difference between medical doctors and chiropractors, by both of whom he had been treated in this case, (2) elucidation of the fact, already brought out in the testimony, that the medics had recommended immobilization of plaintiff's back and the chiropractor had advised to the contrary and manipulated it instead, (3) the interpretation by the medics of X-ray pictures of plaintiff's back taken by the chiropractor, and, finally, (4) whether, if his back had pained him for about 10 days after the accident, then stopped hurting, but the pain resumed some months later when he started to do heavier work, as plaintiff had testified, the later pain could be the result of injuries received at the time of and in the accident. The questions were not phrased in a manner slanted in 1 direction or indicating the judge's opinion as to what the answer should be. They were directed to plaintiff, an educated man, and to the doctors and chiropractor in the case, who appeared well able to take care of themselves as witnesses. Examination of the record does not impel us to the belief that the jury's verdict for defendant resulted from unfair questioning of witnesses by the judge.

Affirmed. Costs to defendant.

CARR, C. J., and KELLY, SMITH, and O'HARA, JJ., concurred with DETHMERS, J.

BLACK, J. (*for reversal*). What was said, in the early and regularly cited case of *Wheeler* v. *Wallace*,

53 Mich 355, 357, 358,[1] ushers appropriately the ensuing opinion for reversal. After having observed that reviewed exceptions "to the manner and deportment of the trial judge" are exceedingly "unusual," the Court (per COOLEY, C. J.) opened discussion of the presented exception this way:

"Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case; and when it is apparent that a fair trial has not been had, a court of review should give relief as soon for that cause as for any other. The fact that the duty to do so is unusual or unpleasant, is no reason for declining it.

"In this case we are satisfied the plaintiff has not had a fair trial. In saying this it is not necessary to impute to the judge any purpose to be a partisan in the case, or otherwise unfair. It is not likely he intended to try the case with less than his customary urbanity and courtesy; and when he brings before the jury, as he does in his charge, the familiar figure of the goddess of justice, with her scales nicely weighing and scrutinizing the evidence, it is to be assumed that he meant to be as impartial himself as he directed the jury to be. It is, nevertheless, possible for a judge, however correct his motives, to be unconsciously so disturbed by circumstances that should not affect him, as to do and say, in the excitement of a trial, something, the effect of which he would not at the time realize, and thereby accomplish a mischief which was not designed."

[1] "This Court has not hesitated to reverse for new trial when the trial judge's questions or comments were such as to place his great influence on one side or the other in relation to issues which our law leaves to jury verdict. *Wheeler* v. *Wallace,* 53 Mich 355; *McDuff* v. *Detroit Evening Journal Company,* 84 Mich 1 (22 Am St Rep 673); *People* v. *Bigge,* 297 Mich 58; *People* v. *Cole,* 349 Mich 175." *People* v. *Young,* 364 Mich 554, 558, 559.

Methinks the trial judge has protested his innocence too little, and not enough. Appellant's grave challenge (see the appendix at end of this opinion) having been made on the record at chambers, and the resultant issue having been duly saved and presented for review, this Court should be assured explicitly that the trial judge did not as charged, by "gestures and smiles and throwing up of hands," wittingly or unwittingly indicate to the jury his own opinion of appellant's case and testimony. Instead (see the appendix again) we find the trial judge declaring only that he did not "knowingly" make any gestures or other prejudicial indications as complained. And this is not all. Upon denial of appellant's motion for new trial, the judge modified the more his contradiction of such charged prejudicial conduct. He said:

"As to the court using facial grimaces or motions, the court denies that any such thing happened as far as the court was conscious about. If the testimony was such as to cause the court to unconsciously make facial grimaces, the court, of course, would not be aware of it, but over the years the court has heard much startling testimony and has become generally immune to it, so that I do not think the court was guilty of making unconscious gestures. Counsel naturally being an advocate is not an impartial judge of this matter.

"The jury decided the case on the question of liability and never got to the question of medical knowledge and reliability. If it were to be conceded that the court was guilty of the acts claimed by counsel, and unduly questioned his medical witnesses I do not see how that would have affected the question of liability."

One need but add that, whether any such judicial hint to the jury is made consciously or unconsciously,

the aggrieved party is and will be[2] at the absolute mercy of the trial judge; hence the strict rule of judicial deportment the law applies when the issue at hand is tried to a jury. True, the reviewing court takes the word of the trial judge when on rare occasion disputes such as this arise. Nevertheless, accepting that word, the court demands that it be both categorical and precise on penalty of reversal for retrial.

Reading now what was charged against the judge and what was equivocally denied by him, we are obliged to find that prejudice to appellant's case may have resulted from that which, as in *Wheeler* above, probably came about as a result of the judge being "unconsciously so disturbed by circumstances" as to produce some at least of the unrecorded facial and physical actions of which complaint was made. And we are impressed in such context by the apparently desperate action of counsel, when he decided to challenge the judge at chambers. It requires a fair share of audacious viscera to proceed thus, and the very fact of counsel's action called for something more, in the way of unqualified refutation by the trial judge, than the foregoing quotations disclose.

The second point made by appellant is governed by *In re Stockdale's Estate,* 157 Mich 593, 606 (followed in *Toms* v. *Vreeland,* 167 Mich 341, 344, and *Simpson* v. *Burton,* 328 Mich 557, 563, 564):

"We do not question the right or the duty of the circuit judge to question witnesses, and to see that the facts are properly brought before the jury, but in so doing it is his duty to so frame his questions as not to indicate his own opinion, and not to lay undue stress upon particular features of a witness' testimony tending to impeach him. We think that the course pursued by the trial judge in this instance

[2] At least until courtroom photography is permitted.

constituted reversible error. (Citing a number of Michigan cases including *Wheeler* v. *Wallace, supra.*)"

The trial judge, in the course of copious questioning of the professional witnesses appellant called to the stand, seems to have gone out of his way to discredit the chiropractic treatment a Dr. O'Dell had given appellant. Witness Ramsey, a doctor of medicine sworn for plaintiff, was interrogated by the judge:

"*The Court:* You gave him a belt to wear?
"*A.* Yes, sir.
"*The Court:* How long?
"*A.* For how long a period of time?
"*The Court:* Yes.
"*A.* Well, I saw him last on September 21, 1959. I prescribed the belt in July, 1959, so he had worn it during this period and when I last saw him I advised him to continue.
"*The Court:* What was the purpose?
"*A.* The purpose of the belt is basically to restrict motion, which tends to take some of the stress off the discs.
"*The Court:* Would chiropractic treatments help it?
"*A.* I have no knowledge of such.
"*The Court:* You gave him a belt to hold it rigid?
"*A.* Yes.
"*The Court:* Now, chiropractic treatment is the opposite, they manipulate?
"*A.* I must beg ignorance of all knowledge of chiropractic treatment.
"*The Court:* If they do manipulate you is that good for disc injuries?
"*A.* In my opinion it might be dangerous.
"*The Court:* Dangerous if there is a disc injury?
"*A.* Yes.

"*Q.* As I recall, you and Dr. McDonald consulted regarding the case, did you not?

"*A.* Yes.

"*The Court:* If the chiropractic treatments helped him what would be your conclusion then?

"*A.* Well, I would say this about it. Most of the things that happen to the human being, fortunately, tend to get well. Most people who have something wrong with them are trying to do something about it, and whatever they are doing about it when they get better they usually give credit to that.

"*The Court:* It might get better without it?

"*A.* Many times without any attention at all, because the human body has this marvelous capacity to get well. * * *

"*The Court:* The fact his back was manipulated by a chiropractor and he got better, would that mean anything to you as to what was wrong in the first place?

"*A.* No, sir.

"*The Court:* Would it rule out a ruptured disc?

"*A.* No, I don't believe it would.

"*The Court:* Your treatment of a ruptured disc is to bind them up and hold it firmly?

"*A.* Basically it is rest.

"*The Court:* And not to move it?

"*A.* Yes.

"*The Court:* So moving it would make it worse?

"*A.* It can make it worse.

"*The Court:* That would be what you would expect, wouldn't it?"

It will be noted that the judge forced Dr. Ramsey, much against the latter's desire, to criticize chiropractic manipulation. This was highly improper and, if admissible at all, should have been left to the interrogation of counsel. Other like questioning tends to support counsel's charge (refer again to the appendix) that the judge during the trial was not concealing too well from the jury his own adverse opinion of chiropractic treatment.

No judicial brief for either side of this wearisome public issue need be made or held. Subject only to the strictly circumscribed right of instructional comment provided by former Court Rule No 37, § 9 (1945) and present GCR 1963, 516.1, the opinions of trial judges upon such matters should be withheld from the jury. One occupying so important a position as circuit judge can influence jurors, and should —during the trial and prior to instruction at very least—keep to himself all opinions or hints of opinions upon disputed facts or issues he must commit to them. *McDuff* v. *Detroit Evening Journal Company,* 84 Mich 1, 10 (22 Am St Rep 673). "We have frequently called attention to the necessity of great care on the part of trial judges to avoid impressing upon the jury the judge's view of the testimony." *Walts* v. *Walts,* 127 Mich 607, 612. This is still the law, notwithstanding the cited court rules. As quoted and adopted from the pen of Judge Learned Hand (*People* v. *Cole,* 349 Mich 175, 200):

"'Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.' *Brown* v. *Walter* (CCA 2), 62 F2d 798, 800."

The case in foregoing respects corresponds with simultaneously considered *Dietz* v. *Fifty Plus Five Corporation,* 371 Mich 28, in which like action of the trial judge has come to this court for review. Views recorded there call for similar action here.

In all fairness this opinion should not conclude without recognition anew of a known fact;[3] that judges are men and men are different, and that men of high rectitude do find it difficult on occasion to suppress unconscious indications of their feelings and convictions; whereas others do not. The wit-

[3] 3 Cooley on Torts (4th ed), § 481, p 389.

ting, the unwitting, the conscious, the subconscious and the coconscious, are never far apart in the course of human conduct. Even so, when it appears that a trial judge—conceding he did not realize his action—has probably made some grimace or gesture suggestive of judicial scorn or derision respecting the testimony of a witness or the cause of a party, the effect is nothing less than partial usurpation of the jury's function. Consequently, if it requires extraordinary self-control on the part of the judge "to hold the balance nice, clear and true"[4] as between the litigatory contenders, then he must drill himself accordingly. There is no other way to guard the most cherished of all constitutional rights.

For the errors indicated I would reverse and remand for new trial, with costs to appellant.

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

APPENDIX

(Record made at chambers, during the trial, March 14, 1962)

"*Mr. Wade:* If the court please, I was going to make this motion before trial this morning, but I decided I wouldn't, but I feel after this morning I have to put it on the record to protect myself.

"No. 1, yesterday in chambers the court conceived the notion about the relationship between the treatment by a chiropractor and a doctor, which was expressed to me in chambers, and the court has with telegraphed motion and gestures to the jury, in the presence of the jury, in the questioning of each and every witness that took the stand, as to the relative value of chiropractic treatments versus medical

[4] The quotation appears in *In re Murchison*, 349 US 133, 136 (75 S Ct 623, 99 L ed 942). It was taken from *Tumey* v. *Ohio*, 273 US 510, 532 (47 S Ct 437, 71 L ed 749, 50 ALR 1243).

treatments, plainly and unabashedly gave the jury, in my opinion, and everybody in the court I talked to afterwards, the opinion the court thought little of chiropractor's treatment, and this was a lawsuit conceived in fraud and founded in it and a big hokus pokus. We have been waiting 2 years to come to trial, and I think the court by its gestures and smiles and throwing up of hands is indicating prejudicially to my client the court's opinion, and the facts are for the jury, without interference by the court.

"Secondly, the entire testimony this morning, in my opinion, consisted of the court interfering in the examination and cross-examination of the medical witness, Dr. Ramsey, and again it was the business of bringing up a chiropractor's treatment. That is not the issue at all. We are not trying out anything as to the relative merits of one practice or treatment against another. It is unfair and likely to disturb the result in this case and I ask the court at this time to refrain from getting into the case to the degree of taking over the duties of counsel.

"*Mr. Pike:* I think this motion is extreme to an almost unheard of degree. I do not agree with counsel's remarks in any respect whatever. As a matter of fact, the purpose of a trial is to get into the facts. The witness produced by the plaintiff, namely, Dr. Ramsey, is an orthopedic specialist, and I believe that he testified based upon the facts and questions asked by counsel. It is known by virtue of the pretrial statement that a chiropractor had seen this man numerous times, and for that reason I felt compelled to inquire of the plaintiff's position as to the efficacy of treatment by a chiropractor.

"*Mr. Wade:* I am not complaining about any inquiry you make. Let that be understood. I am complaining about the court's interference.

"*Mr. Pike:* I take issue with counsel's remark about the court's interference. That is a conclusion. Any court has a right to make certain inquiries in order to bring out the facts so the jury will understand the issues they are called upon to decide.

"*The Court:* Let the record show that the court did not knowingly make any gestures, smile or move his hands so as to show that the court was in any way prejudiced against the plaintiffs' lawyer or his client. In view of the fact that the plaintiffs' own medical experts advocated completely contradictory methods of treatment, as testified to by the plaintiff, the court did ask and did inquire more than in the usual case of the doctor as to what he thought of the treatments that were given by the chiropractor, and I think that was perfectly proper. It is up to the jury to decide when they hear the chiropractor who they will believe. I am bringing out the facts, that is all. The court will not refrain from asking any questions that it feels will help the jury to arrive at the truth."

HARRISON *v.* FORD MOTOR COMPANY.

ARTHUR G. McKEE & COMPANY, *for use and benefit of* GENERAL ACCIDENT ASSURANCE CORPORATION, *v.* SAME.

1. ACTION—WORKMEN'S COMPENSATION—THIRD-PARTY TORTFEASOR—DISTRIBUTION OF DAMAGES RECOVERED.

   Only 1 cause of action may be instituted under the workmen's compensation act section providing for action against third-party tortfeasor, restricting action by the employer or its insurer until lapse of 1 year after the injury, but where the employee has commenced an action even after the lapse of 1 year, neither the employer nor its insurer may start an action thereafter, damages recoverable in the employee's action being applicable to insurer's payments and future liability (CLS 1956, § 413.15).

2. PARTIES—REAL PARTY IN INTEREST—ACTION BY WORKMEN'S COMPENSATION INSURER—THIRD-PARTY TORTFEASOR.

   A workmen's compensation insurer is a real party in interest in an action under workmen's compensation act against third-party tortfeasor who injured the employee (CLS 1956, § 413.15).

3. SAME—SUIT AGAINST SELF.

   One may not sue himself, for a full and fair examination cannot be had when 1 person controls counsel for both sides.

4. SAME—WORKMEN'S COMPENSATION INSURER—INSURER OF THIRD-PARTY TORTFEASOR.

   A workmen's compensation insurer, although a real party in interest in an injured employee's action against third-party tortfeasor, and entitled to reimbursement from any recovery against such tortfeasor, would not be entitled to intervene in such an action, where it was also the insurer of the third-party tortfeasor, since one may not sue himself (CLS 1956, § 413.15).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Workmen's Compensation §§ 357–360.
[2, 4] 58 Am Jur, Workmen's Compensation § 63.
[3, 4] 39 Am Jur, Parties § 8.

Appeals from Wayne; Baum (Victor J.) and Montante (James), JJ. Submitted May 8, 1963. (Calendar Nos. 47, 48, Docket Nos. 49,732, 49,733.) Decided July 17, 1963.

Case by Samuel Harrison, Jr., against Ford Motor Company, a Delaware corporation, and Michigan Foundation Company, Inc., a Michigan corporation, for personal injuries sustained while in the employ of Arthur G. McKee & Company, which was engaged in reconditioning Ford blast furnaces. General Accident Assurance Corporation, workmen's compensation insurance carrier for Arthur G. McKee & Company and also liability carrier for Ford Motor Company, sought to intervene. Petition to intervene denied. General Accident Assurance Corporation appeals.

Case by Arthur G. McKee & Company, for the use and benefit of General Accident Assurance Corporation, its workmen's compensation insurance carrier, against Ford Motor Company and Michigan Foundation Company, Inc., to recover sums paid Samuel Harrison, Jr., because of injury sustained in course of employment. Case dismissed on motion.

Cases consolidated on appeal. Affirmed.

Goodman, Crockett, Eden, Robb & Philo (*Ernest Goodman* and *Norman L. Zemke,* of counsel), for plaintiff Harrison.

Glenn M. Taub, for General Accident Assurance Corporation.

DETHMERS, J. The 2 cases here consolidated for appeal arise out of the same factual background. Plaintiff in the first suit, Samuel Harrison, Jr., hereinafter called the plaintiff, was injured in the employ of Arthur G. McKee & Company on a con-

tract job being performed by the latter for Ford Motor Company, defendant in both suits. General Accident Assurance Corporation, hereinafter called the insurer, was the workmen's compensation insurer of plaintiff's employer, the McKee Company. It also insured Ford Motor Company against loss for injuries to plaintiff, if contributed to by the negligence of the McKee Company. After the injury the insurer paid plaintiff's medical bills and paid him weekly compensation.

Thereafter plaintiff sued Ford Motor Company as a third-party tortfeasor under CLS 1956, § 413.15 (Stat Ann 1960 Rev § 17.189). Under that same section the insurer filed a motion to intervene in the cause as party plaintiff. Later, on its behalf, its assured, the McKee Company, also filed a separate suit, under that same section, against the same defendants to enforce the same claim urged in the insurer's motion to intervene in the first suit, namely, to recover insurer's workmen's compensation payments to or for plaintiff.

The insurer's motion to intervene as party plaintiff in the plaintiff's suit was denied by 1 of the Wayne county circuit judges. Another judge of that circuit granted defendant Ford Motor Company's motion to dismiss insurer's suit on the ground that it involved the same cause of action as that in plaintiff's suit and that the insurer's remedy, according to the statute, was by intervention in that suit. Insurer appeals in both cases.

May the insurer maintain its separate action after plaintiff has already filed his suit? The statute provides that if the employee does not start suit within 1 year after the injury, then the employer or its insurer may commence action. Here plaintiff did not sue within the 1 year. However, he did start suit before the insurer did. We think the meaning of the statutory language is that the employer or

insurer may not start suit within the 1 year, but may do so thereafter if the employee has not done so. Plaintiff, here, having begun suit, the door was no longer open to suit by the employer or insurer, but intervention by them in the employee's suit, according to the language of the statute, alone remained to them. This legislative intent seems evident, further, from the statutory provision that, in the employee's suit, damages recovered are to be applied on the insurer's payments and future liability, while suit by the employer or its insurer is to be brought in the employee's name, indicating that there is but 1 cause of action. *Muskegon Hardware & Supply Co.* v. *Green,* 343 Mich 340. The order dismissing insurer's suit was, therefore, proper.

Should insurer have been permitted to intervene as party plaintiff in the plaintiff employee's suit? That the insurer is a real party in interest is manifest. *Muskegon Hardware & Supply Co.* v. *Green, supra.* As such, the statute permits it "to join said suit". Does that mean it may, under any and every circumstance, intervene and participate in the trial of the suit as a party plaintiff?

By its own action insurer has put itself on both sides of the fence in this matter. It has an ostensible interest in recovering from defendant Ford Motor Company, as third-party tortfeasor, the workmen's compensation payments it has made or in the future may be called upon to make to or for plaintiff under its policy of workmen's compensation insurance covering the McKee Company. On the other hand, its insurance contract with Ford makes it liable for Ford's loss on account of injuries to plaintiff if McKee Company's negligence contributed thereto. Thus, if recovery in plaintiff's suit should equal or be less than the amount paid or to be paid by insurer on its workmen's compensation policy covering plaintiff's employer, would the result be

anything other than insurer's collection from Ford of the money it then would be obligated to reimburse Ford under the contract between them? This has the earmarks of an idle process whereby insurer puts into 1 of its pockets what it has taken from another of its own pockets. What is the gain? On the other hand, if recovery in the suit should exceed that amount, to plaintiff's benefit, would this not be to insurer's detriment if it were required, under its contract with Ford, to pay that excess to Ford for transmittal to plaintiff? It can only be concluded that insurer's interest would not be on plaintiff's side of the counsel table at trial of plaintiff's suit. If negligence of plaintiff's employer did contribute to his injury, then, with respect to recovery in plaintiff's suit in an amount equal to insurer's workmen's compensation liability, insurer's intervention as a party plaintiff would amount to insurer suing itself; with respect to recovery in excess thereof, plaintiff's suit would, in effect, and in the final analysis, be against insurer. Their interests would thus be in conflict. Should insurer then be permitted to participate with plaintiff in the trial of the suit as co-plaintiff?

One may not sue himself. *Tate* v. *Tate,* 190 Tenn 39 (227 SW2d 50). One cannot be both plaintiff and defendant at the same time in the same suit. *Globe & Rutgers Fire Insurance Co.* v. *Hines* (CCA 2), 273 F 774. A town treasurer was held incapable of maintaining an action in his individual capacity against himself in his official capacity on his personal claim against the town. *Barber* v. *Barber,* 32 RI 266 (79 A 482). In *O'Morrow* v. *Borad,* 27 Cal2d 794 (167 P2d 483, 163 ALR 894), two parties, whose automobiles collided with each other, were insured by the same insurance company. One sued and the other not only answered but filed a cross complaint. The insurer claimed the right to defend. The court

held that one may not be both plaintiff and defendant in an action, and that the insurer might not be allowed to defend each of its 2 insureds against the claim of the other, as a full and fair examination of the merits of a case cannot be had when 1 person controls counsel for both sides. See, also, *Vernan* v. *Gordon,* 365 Mich 21. In *Sjoberg* v. *Joseph T. Ryerson & Son,* 8 Ill App2d 414 (132 NE2d 56), the governing statute was similar to that of Michigan and the factual situation was much as at bar except that the employer's workmen's compensation carrier was not also, as here, insurer of the third-party tortfeasor. There the court allowed the employer to intervene for the use and benefit of its insurer but prohibited its participation in conducting the trial except as consented to by the plaintiff employee. While the cases above considered are not strictly on all fours with the case at bar, they express a view germane to the subject, unfavorable to insurer's intervention and participation in the trial as a party plaintiff in plaintiff's suit. Insurer's position in the apparent role of a plaintiff, at least with regard to that portion of the claim which, as above noted, it would be to its interests to have defeated, would tend to be destructive of the adversary theory so essential to our system of administration of justice and arriving at truth and justice. Undoubtedly an appreciation thereof accounts for the failure of the legislature, in providing for insurer's "right to join in said suit", to specify that it should, in all events, be as a party plaintiff or that, as such, it should have the right to participate as party plaintiff with the plaintiff employee in the trial of the case.

The trial court, in its opinion denying the right to intervene as party plaintiff, stated that, upon insurer's application therefor, it would "fashion and establish such a lien", referring to insurer's statutory right to reimbursement, out of recovery from

the suit, of its past workmen's compensation payments and credits for future payments to plaintiff. This would give insurer the protection contemplated by the statute. The right to join and participate in the trial as party plaintiff, not expressly provided by statute, insurer, in this particular case, must forego by reason of having placed itself, through its contract with Ford, in a position inconsistent therewith.

Affirmed. Costs to appellees.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ., concurred.

KOSTARIDES *v.* CENTRAL TRUST COMPANY.

1. APPEAL AND ERROR—MOTION TO DISMISS—CHARITIES—TRUSTS.

   Allegation that gift lapsed because trust beneficiary does not and never has existed is required to be accepted as true for purpose of consideration of motion to dismiss bill for declaring charitable trust void and for purpose of reviewing order granting the motion before hearing on merits.

2. CHARITIES—CONSTRUCTION OF WILLS—HOSPITALS—NAME OF TESTATOR—INTENT.

   The dominant purpose of provision in residuary clause of will leaving net income of a fund to be paid to a hospital in Greece bearing testator's name, for the maintenance and preservation of present hospital building, construction of new buildings, purchase of hospital equipment and supplies, and such other purposes as, in the sole judgment of the board or other governing body of said hospital, "shall most effectively aid the hospital in its objective of providing medical facilities, drugs and medical care for the people of Andritsena and adjoining communities" together with provision that "if it becomes partially or wholly impossible in the judgment of the trustee to benefit" such people in the manner provided "the trustee shall select or cause to be created such other charitable, religious, or medical nonprofit corporation or foundations" to carry out the purposes specified in particular earlier provision of will, was not to support a hospital merely for purpose of having it bear testator's name but disclosed a very decided general charitable intent.

3. SAME—CONSTRUCTION OF WILLS—RULE AGAINST PERPETUITIES—CY-PRES DOCTRINE—INTENT.

   Bequest of net income of funds left in trust to a hospital in Greece, which is referred to as bearing testator's name, was not invalid as violative of the rule against perpetuities or because of the inapplicability of the doctrine of cy pres, where will also provided that in case it became impossible to do as directed with the fund that the trustee should otherwise carry out the testator's general charitable intent in a specific man-

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REFERENCES FOR POINTS IN HEADNOTES

[2] 10 Am Jur, Charities § 102.
[3] 10 Am Jur, Charities § 17 *et seq.*, § 123 *et seq.*
[4] 10 Am Jur, Charities § 12.
[5] 10 Am Jur, Charities § 17 *et seq.*

ner; hence, testator did not die intestate as to such fund as there was a proper disposition for a charitable purpose and his heirs-at-law are left without interest therein.

4. SAME—GREECE—HOSPITALS.

Charitable bequest to a hospital in Greece was not invalid by reason of the fact that the laws of Greece do not recognize a trust, where the will provided that in the event it became impossible to carry out the bequest to trustees of the specifically mentioned hospital in Greece that the trustee, in this country should, in a specified manner, make gifts to a charitable institution or cause in Greece.

5. TRUSTS—EXPENSE ITEMS FOR FLOWERS AND MEMORIAL SERVICES—RULE AGAINST PERPETUITIES.

Entire charitable trust structure was not invalidated by reason of provision in will authorizing and directing the trustee to deduct from earnings of trust funds, as an expense item, the cost of flowers which the testator requested to be placed on his and his wife's crypt 5 specified times a year and to make such expense deduction to reimburse any of his relatives for the reasonable cost of memorial or requiem services held for his or his wife's benefit in a specified church, even if such expense item were to fail as violative of the rule against perpetuities.

BLACK, KAVANAGH, and SOURIS, JJ., dissenting.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted June 5, 1963. (Calendar No. 16, Docket No. 49,941.) Decided July 17, 1963.

Bill by Eustathia Priggooris Kostarides and others, heirs of Angel Priggooris, against Central Trust Company and its successor in interest, American Bank & Trust Company, a Michigan banking corporation, as executor and trustee of the estate of Angel Priggooris, deceased, and against the Angel Priggooris Community Hospital of Andritsena, Olympias Province, Greece, and other beneficiaries under the will of Angel Priggooris, to declare void a provision in his will creating a trust for the benefit of a hospital located in Greece, and asking distribution of residue of estate to heirs-at-law. Bill dismissed on motion. Plaintiffs appeal. Affirmed.

Raikos, Barton, Rochford & Thomas (*John D. Raikos,* of counsel) and *MacLean & Seaman* (*Kenneth Laing, Jr.,* of counsel), for plaintiffs.

Foster, Campbell, Lindemer & McGurrin (*Richard B. Foster, Benjamin O. Schwendener, Jr.,* and *Edmund E. Shepherd,* of counsel), for defendant American Bank & Trust Company.

George S. Porikos, for defendants Angel Priggooris Community Hospital of Andritsena, the Consul General of Greece, and others.

DETHMERS, J. Plaintiffs are the heirs-at-law of Angel Priggooris, hereinafter called testator, who died leaving a will in which defendant trust company was named executor and trustee and the other defendants were made beneficiaries. Plaintiffs appeal from a circuit court order dismissing, on motion and without trial, their bill of complaint which sought a decree declaring void a charitable trust created in the will, vacating probate court orders approving the executor's final account and assigning the residue in accord with the trust provisions of the will, and directing the probate court to distribute the funds in the trust to plaintiffs.

As plaintiffs say in their brief, this is not a will contest. They challenge the validity of the gift, out of the residue of the estate, to 1 of 4 trusts, fund D. Provisions of the will for gifts out of residue to trust funds A, B, and C are not attacked. Grounds alleged in plaintiffs' bill of complaint as rendering the gift to fund D invalid are chiefly that a named beneficiary thereof, a hospital, is and always has been nonexistent, that the gift has, accordingly, lapsed so that the testator died, with respect thereto, intestate, and that plaintiffs, as heirs-at-law, are, therefore, by way of a resulting trust, entitled to

such fund. An additional reason alleged in plaintiffs' bill of complaint for invalidity of the gift to fund D is as follows:

"j. That the laws of the country of Greece do not recognize a trust of any kind in that trusts are unknown to the law of Greece and said attempted gift of fund 'D' is thereby impossible of administration in the country of Greece and is contrary to the public policy of the country of Greece."

The trial court dismissed the bill of complaint on the ground, *inter alia,* that its allegations and the provisions of the will, attached to the bill, fail to show invalidity of the trust or that plaintiffs have any legal interest in the trust fund or residue of the estate.

After provisions for specific bequests, the pertinent provisions of the will give the residue of estate to the trustee and direct its division, by the trustee, into certain amounts for funds A, B, and C, with the rest of the residue to be apportioned to fund D. With respect to fund D, article 6 of the will, after provision for certain sums out of income to be paid to a society and 2 churches, annually, directs, in paragraph 5, subsection '*c*' thereof, as follows:

"(c) The balance of the net income of Fund D, after the establishment and maintenance of reserves hereinafter mentioned in this subparagraph and subparagraph (b) of Article VII, shall be paid to the ANGEL PRIGGOORIS COMMUNITY HOSPITAL of Andritsena, Olympias Province, Greece, (Angel Priggooris Demotikon Nasakomion Andritainis), a nonprofit organization, having, pursuant to the laws of Greece, its own legal representative or representatives, in periodic installments but not less frequently than annually. Such income shall be used for the maintenance and preservation of the present hospital building, the construction of new buildings, the purchase of hospital equipment and supplies, and such

other purposes as, in the sole judgment of the board or other governing body of said hospital, shall most effectively aid the hospital in its objective of providing medical facilities, drugs and medical care for the people of Andritsena and adjoining communities."

Article 7, paragraph 1, of the will provides, in part:

"The trustee shall have the following powers with respect to each trust hereunder, to be exercised as the trustee in its discretion determines to be for the best interests of the beneficiaries: * * *

"(m) To take all acts deemed necessary to insure that the trust benefits provided in Article VI, paragraph 5 herein are being used for the purposes therein set forth; and in the event it becomes partially or wholly impossible in the judgment of the trustee to benefit the people of the City of Andritsena, Olympias Province, Greece, in the manner provided in Article VI, paragraph 5, the trustee shall select or cause to be created such other charitable, religious, or medical nonprofit corporations or foundations for the purpose of carrying out the charitable, religious and medical purposes therein specified."

The will's Article 7, paragraph 4, provides:

"The trustee is specifically authorized and directed to deduct from the income as an expense item, from any or all of the trusts created hereunder, the cost of bouquets of flowers which I request be placed on my beloved wife Anastasia's and my crypt in Deepdale Cemetery in Delta Township, Eaton County, Michigan, each year at Christmas time, the twenty-fifth of March, Easter Sunday, Decoration Day, and Thanksgiving Day. My trustee is also authorized and directed to make such expense deduction for the purpose of reimbursement of any of my relatives for the reasonable cost of any memorial or requiem services held for my wife's or my benefit in the Lansing Holy Trinity Church of Lansing, Michigan."

Plaintiffs' bill alleges that as to trust fund D the gift in the will's article 6(5c) is invalid and with respect thereto the testator died intestate because the beneficiary, Angel Priggooris Community Hospital of Andritsena, Olympias Province, Greece, does not now and never has existed, causing said gift to lapse. For consideration of the motion to dismiss and review here that allegation must be accepted as true. At this point, plaintiffs quote 10 Am Jur, Charities, § 127, as follows:

"If, however, the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of cy pres does not apply; in cases arising under a will, in the absence of any limitation over, or other provision, the legacy lapses."

Following this plaintiffs say that there was here no general charitable intent, but only desire for self-aggrandizement by providing for a hospital bearing testator's name, and with that purpose impossible to carry out, because of the nonexistence of such hospital, the gift lapsed. Cited in this connection by plaintiffs are cases such as *Trust Company of Georgia* v. *Williams,* 184 Ga 706 (192 SE 913), in which testator left the residue of his estate in trust to accumulate income for 25 years and then to provide for building a hospital in honor of his father and mother and the court held the legacy violated the rule against perpetuities because there was no requirement that any or all of the work of the hospital be gratuitously done; *In re Estate of Weeks,* 154 Kan 103 (114 P2d 857), in which the court held that a bequest to a hospital yet to be built was made with intent to create a memorial for testatrix's par-

ents rather than to make a gift for general charitable purpose and held it thus void, saying that the cy-pres doctrine does not justify appropriating an invalid private gift to a valid charitable purpose; *First Portland National Bank* v. *Kaler-Vaill Memorial Home,* 155 Me 50 (151 A2d 708), in which testator left a gift to the Kaler-Vaill Memorial Home at Scarborough for the general purpose of said home but, at time of his death, no such home existed; 6 months later a charitable home with that name was organized; the question raised was whether the court should apply the cy-pres doctrine in favor of the charity; the court held that testator failed to state the purpose of the home as intended by him and that when the court cannot ascertain his purpose or carry out his plan, cy pres has no application; *Industrial National Bank* v. *Drysdale,* 83 RI 172 (114 A2d 191, 119 A2d 729), in which testator gave a sum in trust, its income to go annually to the People's Mission of Pawcatuck; such payments were made for 10 years and then the mission went out of existence; the court found no general charitable intent expressed in the will and so held it impossible to apply the gift, further, cy pres.

Does an examination of the language of the will here indicate applicability of the above cases or, more particularly, does it support plaintiffs' contention that it discloses no general charitable intent or purpose? We think not. The will's article 6(1) directs the trustee to divide his residuary estate into 3 trusts, A, B, and C, for the benefit of certain individual relatives and a fourth trust, " 'Fund D' (for the benefit of the charities hereinafter named)." Article 6(5) provides that the income from fund D shall be paid in specific amounts to a charitable society for the purchase of food and other necessities for poor persons in Andritsena, Greece, and to 2 churches for operation and maintenance thereof,

and the remainder, thereafter, to the named hospital for its maintenance and preservation and purchase of equipment and supplies as, in the judgment of its governing body, "shall most effectively aid the hospital in its objective of providing medical facilities, drugs and medical care for the people of Andritsena and adjoining communities". Article 7(1)(m), as above stated, provides that if "it becomes partially or wholly impossible in the judgment of the trustee to benefit the people of the city of Andritsena * * * in the manner provided in article 6, paragraph 5, the trustee shall select or cause to be created such other charitable, religious, or medical nonprofit corporations or foundations for the purpose of carrying out the charitable, religious and medical purposes therein specified." Examination of the above language discloses a very decided general charitable intent. It is difficult to imagine how it might have been expressed more clearly. Manifestly, the dominant purpose was not support of a hospital merely for the purpose of having it bear his name.

Under the language of the will here, plaintiffs' contentions concerning the alleged invalidity of the gift to fund D as violative of the rule against perpetuities and concerning the inapplicability of the cy-pres doctrine are not supported by the cited cases. Inapplicability of cy pres results here, however, only from the provision of article 7(1)(m) expressly directing the trustee what to do with the portion of the income of fund D intended for the hospital if it be impossible to accomplish his general charitable purpose through a hospital named in his honor. From this plaintiffs can take no comfort. If, as they say, the mentioned hospital does not exist, then it becomes the clear and certain duty of the trustee to carry out testator's general charitable intent in favor of the people of Andritsena in the manner specified in 7(1)(m). Consequently, whether it be by operation of

6(5)(c) or 7(1)(m), the residue is properly disposed of for a charitable purpose, the testator did not die intestate as to fund D, and his heirs-at-law are left without interest therein.

We see, then, that plaintiffs' contentions concerning the gift to fund D by reason of the nonexistence, if proved, of the named hospital would avail them nothing, would entitle them to no share in the fund, and, thus, would leave their bill of complaint properly dismissed for failure to state a cause of action for relief in their favor, because the nonexistence of said hospital could, at most, serve only to bring the provisions of 7(1)(m) into play, still leaving nothing in the residue of the estate for plaintiffs.

Perhaps in an effort to overcome the effects of application of the will's 7(1)(m), if 6(5) cannot be given effect, plaintiffs further claim that trust fund D would be invalid, even if administered under 7(1)(m), for the additional reasons alleged in their bill of complaint, that the laws of Greece do not recognize a trust, that administration thereof is impossible and contrary to the public policy of Greece, it is impossible to transmit fund D to Greece for administration, and a trust cannot be enforced in Greece. If such be the law of Greece, (and we are not now called upon to decide what are the laws of Greece but only whether the allegations of the bill could or do entitle plaintiffs to relief) none of these allegations as to Greek law constitute a bar to administration of the trust, as the will clearly discloses the testator intended, in this country and periodic transmittal of funds, from earnings, by the local trustee, as gifts to a charitable institution or cause in Greece. The bill of complaint alleges nothing of that sort. No invalidity in this respect appears from its allegations.

Plaintiffs claim an interest in the fund because of the provision of the will's article 7(4) authorizing

and directing the trustee to deduct from earnings of trust funds, as an expense item, the cost of flowers which the testator requested to be placed on his and his wife's crypt 5 specified times a year and, also, to make such expense deduction to reimburse any of his relatives for the reasonable cost of memorial or requiem services held for his or his wife's benefit in a specified church. These are denominated expense items in the will, are to be charged off from income by the trustee as an expense of administration, and constitute no benefit to plaintiffs entitling them, as legally interested parties, to the relief sought in their bill of complaint. The same provision in the will is urged as violative of the rule against perpetuities, rendering the gift to the trust funds invalid. Annotation on this general subject is to be found in 47 ALR2d 596, *et seq.* Some of the cases there considered tend to lend support to plaintiffs' contention and others are to the contrary. None is entirely comparable on the facts. This case is distinguishable from those striking down testamentary provisions in this area in that here there is no provision for creation of a trust for the purposes of providing, in perpetuity, for flowers and memorial services. Rather, the trusts are created to benefit other charitable causes or persons out of income, the trustee merely being directed to deduct "as an expense item" reasonable sums for the 2 items here being discussed. Thus, if the flowers or memorial provisions must fail as violative of the rule against perpetuities, the said expense items may not be deducted, leaving unimpaired the correspondingly larger balance of income to be devoted to the charitable causes theretofore provided for. It follows that the entire trust structure is not, on that account, to be deemed invalidated.

Aware that the briefs invite us to consideration of other problems, including interesting questions of

law, we deem their treatment unnecessary to decision of this case.

Affirmed. Costs to defendants.

CARR, C. J., and KELLY, SMITH, and O'HARA, JJ., concurred with DETHMERS, J.

BLACK, J. (*dissenting*). As against defendants' motion to dismiss plaintiffs are entitled to prove, if they can, their pleaded factual allegation that, by the laws of a foreign country, in which country the testator directed disposition of trust fund D, the testator's alternative direction (subparagraph "m" of paragraph "1" of article 7) cannot be effectuated.

I would reverse and remand for entry of order denying defendants' motion to dismiss or, in the alternative, affirm with leave to submit an amendment meeting what to me are hypertechnical objections to this possibly well-founded bill; such amendment to be filed below within 30 days next following release of these opinions. For an instance of such suggested alternative and disposition thereof, see *Kent* v. *Bell,* 368 Mich 443, 451, 452.

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

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ABANDONMENT—See LABOR RELATIONS (2).

ABOLITION OF POSITION—See MUNICIPAL CORPORATIONS (20).

ABSENCE—See DISMISSAL AND NONSUIT (2–4).

ACCEPTANCE—See DEDICATION.

ACCESS—See EMINENT DOMAIN (5).

ACCIDENT—See INSURANCE (1).

ACCORD AND SATISFACTION—See ACCOUNTING (7).

ACCOUNTING.

1. Husband's claim, as appellant of himself and former wife, defendants in suit for accounting brought by daughters of the wife by a former husband, cotenants with the wife owning the premises on which the husband and wife had conducted a tavern business, that there should be allowed a credit to him for funds expended by himself and wife, during their marriage and living together as a family with plaintiffs, for the latter's support and education is disallowed, where he had filed no cross-bill, sought no such relief in his answers to plaintiffs' bills of complaint, and offered no proofs concerning such expenditure. *Tomchak* v. *Handricks* (*Sayles* v. *Same*), 143.
2. Conclusion of trial court in suit to set aside deeds and for an accounting *held*, to support finding of trial court that down payment for property conveyed to defendants, husband and wife, had come from funds of deceased, the husband's mother for whose estate plaintiff was special administrator, hence, order that, in effect, required defendant to account therefor is affirmed. *Mannausa* v. *Mannausa*, 181.
3. Testimony of defendant son and his wife in suit by special administrator of his mother's estate for accounting *held*, not to have sustained their burden of proof as to their claim that he had supported her for a greater part of the last 19-year period of her life. *Id.*
4. Evidence presented in suit for accounting, brought by plaintiff, daughter-in-law of defendant, after the death of her husband, to recover proceeds of account owned jointly by her husband and his father with rights of survivorship, *held*, to support trial court's denial of relief on the ground that there was no basis for finding that defendant had perpetrated a fraud upon her, where the evidence shows defendant had exhibited the account book to plaintiff and her husband at various times,

ACCOUNTING—Continued.

that defendant had deposited checks plaintiff had given him in an account jointly owned by herself and her husband, and that testamentary efforts on the part of her husband indicated the deposits had been made in compliance with the husband's wishes and of his own money. *Kuykendall* v. *Kuykendall*, 220.

5. Record in accounting suit by son of deceased and his first wife against widow, deceased's second wife, *held*, to have established that no parol family trust had been created by the father while his first wife was still living, as claimed by plaintiff. *MacKenzie* v. *Fritzinger*, 284.

6. Transfers of bulk of $450,000 estate from deceased to joint account of deceased and defendant, deceased's second wife, some 34 years his junior at time of their marriage when he was 73, *held*, to have been voluntary, devoid of either fraud, coercion, or undue influence in suit for accounting by plaintiff, a son of deceased by his first wife, irrespective of whether or not there had been an antenuptial agreement as claimed by plaintiff. *Id.* 285.

7. Finding of trial court in suit for accounting as to proceeds of sale of chattels hitherto used in automobile sales agency in which the parties had at one time been partners before plaintiffs sold their interest to defendant, that bill of sale had been given to defendant to enable him to liquidate the business rather than as an accord and satisfaction to resolve his claim that he had been defrauded by sale of the business to him at a grossly inflated price *held*, supported by record presented and justified court's imposition of lien on proceeds of auction sale. *Peters* v. *Brooks*, 363.

8. Decree for defendant hotel owners is ordered entered in suit against them by plaintiffs who had undertaken to manage and operate the business under an oral contract whereby plaintiffs were to receive 60% of the net profits, where trial court found neither party entitled to items for depreciation, that meals chargeable to expense of operation did not include meals for plaintiffs' son, and correct computation pursuant to trial court's findings shows a small overpayment to plaintiffs. *Wentzel* v. *Hutchison*, 420.

See APPEAL AND ERROR (6, 8, 9, 18); COSTS (5); TRUSTS (2).

ACTION.

1. A husband's right to recover in his derivative action depends entirely upon wife's right to recover in her action for breach of implied warranty of defendant's product as fit for human consumption. *Barefield* v. *La Salle Coca-Cola Bottling Company*, 1.

2. Only 1 cause of action may be instituted under the workmen's compensation act section providing for action against third-party tortfeasor, restricting action by the employer or its insurer until lapse of 1 year after the injury, but where the employee has commenced an action even after the lapse of 1 year, neither the employer nor its insurer may start an action thereafter, damages recoverable in the employee's action being applicable to insurer's payments and future liability (CLS

ACTION—Continued.

1956, § 413.15). *Harrison* v. *Ford Motor Company (Arthur G. McKee & Company, for use and benefit of General Accident Assurance Company,* v. *Same*), 683.

See GARNISHMENT (1, 2); LABOR RELATIONS (1, 2); MONOPOLIES (1); PARTIES (1).

ADDENDUM—See SCHOOLS AND SCHOOL DISTRICTS (2).

ADDITIONAL AUTOMOBILES—See INSURANCE (1).

ADEQUACY OF AWARD—See DAMAGES (3).

ADEQUACY OF REMEDY AT LAW—See EQUITY (2, 3).

ADMINISTRATIVE LAW.

Formal introduction of evidence upon which an administrative decision is based is not necessary where all the parties know that such evidence has been received by the administrative authority. *City of Ishpeming* v. *Public Service Commission,* 295.

See MUNICIPAL CORPORATIONS (29).

ADMISSION OF EVIDENCE—See APPEAL AND ERROR (2); ATTORNEY AND CLIENT (1); DISCOVERY (3, 4); EVIDENCE (1).

ADMISSIONS AGAINST INTEREST—See EVIDENCE (5, 6).

AD VALOREM TAXES—See TAXATION (1, 3, 4, 6, 10, 12).

AFFIDAVITS—See APPEAL AND ERROR (15); NEW TRIAL (2); PLEADING (3).

AIR-CONDITIONING EQUIPMENT—See APPEAL AND ERROR (17); COSTS (12); MUNICIPAL CORPORATIONS (25–27).

ALIMONY—See DIVORCE (1, 14).

AMBIGUITY—See COSTS (18); MUNICIPAL CORPORATIONS (37, 38).

AMBULANCES—See APPEAL AND ERROR (14); AUTOMOBILES (13).

AMENDMENT—See AUTOMOBILES (15); COURTS (4); LICENSES (1, 4).

ANNEXATION—See COSTS (18); MUNICIPAL CORPORATIONS (37, 38).

ANTENUPTIAL AGREEMENT—See ACCOUNTING (6).

APPARENT AUTHORITY—See APPEAL AND ERROR (2); PRINCIPAL AND AGENT (2).

APPEAL AND ERROR.

1. Plaintiff would not be entitled to a directed verdict for the amount of building permit fees that were in excess of what might be lawfully charged, where the ascertainment of the amount of excess payment would involve the Supreme Court's

APPEAL AND ERROR—Continued.

invasion of the province of the trier of the facts upon reversal of judgment for defendant, hence, case is remanded for new trial for such determination. *Beachlawn Building Corporation* v. *City of St. Clair Shores*, 129.

2. Admission of testimony that defendant father had not filed with the county clerk a certificate showing him to be the one doing business under the assumed name here employed *held*, not shown to have prejudiced his defense in action by plaintiff customer for injuries received when assaulted by such defendant's son then present at the station and who is shown to have had apparent authority to act as such defendant's agent. *Shinabarger* v. *Phillips*, 136.

3. The Supreme Court hears chancery cases *de novo*, but will not ordinarily substitute its judgment for that of the trial court on questions as to which the testimony was in sharp conflict, unless a reading of the entire record convinces the Supreme Court that it would have reached another result had it occupied the position of the trial court. *Mannausa* v. *Mannausa*, 181.

4. Provision of decree in suit by special administrator of estate of mother of defendant husband, requiring latter to make repayment of sum of $300, which is neither briefed nor discussed by defendant, is not passed upon by the Supreme Court. *Id.*

5. The Supreme Court does not, on *de novo* review of a chancery case, reverse a determination of disputed facts unless convinced from a reading of the entire record that it would have reached a different conclusion had it occupied the position of the trial court. *Windham* v. *Morris*, 188.

6. The Supreme Court considers an administrator's suit to set aside assignments and conveyances of real estate and for an accounting by a *de novo* review on the record presented. *Kouri* v. *Fassone*, 223.

7. The holding in a case that it was reversible error to admit, over timely motion to quash and objection, evidence which had been illegally seized, and the granting of a new trial, rendered it unnecessary to determine whether or not a decision of the supreme court of the United States holding such evidence constitutionally inadmissible should apply so as to require a new trial also (Const 1908, art 2, § 10, as amended in 1952). *People* v. *Carr*, 252.

8. Order dismissing bill for declaration of rights under employment contract against former employer of individual plaintiff is reversed and cause remanded with directions to consider advisability of consolidation of case with suit for equitable relief, accounting, and a money judgment under the same contract. *Panter* v. *Sobesky*, 257.

9. A decree in a suit for accounting is reviewed *de novo* on appeal to the Supreme Court. *MacKenzie* v. *Fritzinger*, 284.

10. The Supreme Court will not substitute its judgment for that of the public service commission on issues of fact, where the commission's findings are supported by competent evidence. *City of Ishpeming* v. *Public Service Commission*, 295.

APPEAL AND ERROR—Continued.

11. It must clearly appear that there was a failure of the public service commission to follow some mandatory provision of a pertinent statute or that the commission was guilty of an abuse of discretion in the exercise of its judgment before the Supreme Court will supplant the decision and order of the commission with an order of the Supreme Court. *Id.*

12. The Supreme Court must accept the view of the testimony most favorable to plaintiff in review of a directed verdict against him. *Hoag* v. *Fenton,* 320.

13. The Supreme Court views the evidence in the light most favorable to plaintiffs, where judgments were entered for defendants on their motion therefor following disagreement of the jury (CL 1948, § 691.701). *Todd* v. *Simonis,* 342.

14. Defendants' evidence that plaintiffs' car was stopped on the blizzard-swept highway must be accepted as true in action arising from rear-end collision by defendants' ambulance, where verdict was returned for defendants though their evidence was in conflict with plaintiffs' on that issue (CLS 1956, § 257-.627, as amended by PA 1957, No 190). *Patzer* v. *Bowerman-Halifax Funeral Home,* 351.

15. Undated affidavit in appellant's appendix could not be considered on appeal, where it was not a part of the original record on appeal from the trial court. *Banta* v. *Serban,* 367.

16. The Supreme Court does not reverse the determination of the trial court in a nonjury action of tort, where the evidence is conflicting unless the testimony clearly preponderates against the judgment rendered. *Siller* v. *Laitila,* 373.

17. Determination by Supreme Court on former hearing of suit to enjoin collection of demand charge for supply of water to users of air-conditioning equipment of the nonrecirculating type that such charge was unreasonable and arbitrary rendered it unnecessary to determine whether the additional charge was discriminatory by reason of the failure to impose the additional charge upon other seasonal users of water, since the charge made deprived plaintiffs of property without due process of law. *Theatre Control Corporation* v. *City of Detroit,* 382.

18. The Supreme Court hears an accounting suit *de novo,* since it is a chancery proceeding. *Wentzel* v. *Hutchison,* 420.

19. The Supreme Court does not reverse chancery cases which it hears on appeal *de novo,* unless it finds from an examination of the entire record that it would have reached a different conclusion than was reached by the trial court. *Haas* v. *Klapatch,* 499.

20. An unsworn statement by brother of defendant in paternity action may not be considered by the Supreme Court, where the statement had not been presented to the trial court. *Sylvester* v. *Grabowski,* 503.

21. Order denying application for leave to take delayed appeal from probate court order denying divorced mother's petition for restoration of custody of children, which does not set forth any of the substance of the record and proceedings in the probate court, which does not show by affidavit or other-

APPEAL AND ERROR—Continued.

wise that there is merit in the attempted appeal, or that justice requires a revision of the case *held*, fatally defective on its face for failure to comply with pertinent statute and court rule (CL 1948, § 701.43; Court Rule No 75, §§ 2, 6, 7 [1945]). *In re McCullough*, 517.

22. Appeal is dismissed, where record contains nothing from which Supreme Court may judge what was done by a circuit judge after testimonial hearing on application for leave to take a delayed appeal from a probate court order and after testimonial hearing on motion for rehearing by successor circuit judge, record presents no reviewable question and leave to appeal should have first been obtained (Court Rule No 60, § 1[b] [1945], as amended). *Id.*

23. Claimed error in admission of testimony of attorney who had acted on behalf of plaintiffs, former employees of defendant corporation, in action for damages for alleged breach of seniority provisions of collective bargaining contract, *held*, not well-founded, where no sufficient reason is apparent for excluding his testimony. *Pennington* v. *Whiting Tubular Products, Inc.*, 591.

24. The Supreme Court declines to hold that a trial court had indulged motions, gestures, facial expressions, or other actions designed to or which did influence the jury unfavorably against plaintiff's case upon record showing remonstrance in the judge's chambers to such type of conduct and denial by the court of intentional prejudicial conduct accompanied by statement that in view of contradictory methods of treatment of plaintiff's injuries by his medical and chiropractor witnesses the court saw fit to ask more than in the usual case of the doctor what he thought of the treatments given by the chiropractor in order to bring out the facts. *Redmond* v. *Sheer*, 670.

25. Allegation that gift lapsed because trust beneficiary does not and never has existed is required to be accepted as true for purpose of consideration of motion to dismiss bill for declaring charitable trust void and for purpose of reviewing order granting the motion before hearing on merits. *Kostarides* v. *Central Trust Company*, 690.

See COSTS (1, 3, 9, 11–13, 17); DIVORCE (16); EMINENT DOMAIN (2); NEW TRIAL (1).

APPEARANCE—See DISMISSAL AND NONSUIT (2–4); GARNISHMENT (1).

APPENDIX—See APPEAL AND ERROR (15); DIVORCE (16).

APPLICATION—See APPEAL AND ERROR (21).

APPRAISAL—See FRAUD (2).

APPROVAL—See COSTS (11); MUNICIPAL CORPORATIONS (22–24).

ARGUMENT TO JURY—See TRIAL (2, 8).

ARM INJURY—See DAMAGES (2).

ASSAULT AND BATTERY.

1. Evidence, presented in action for assault and battery against father and son, *held*, sufficient to present as a question of fact for jury consideration whether or not the son who inflicted injuries was acting as an employee of the father at the time and whether the wilful tort was within the scope of the agency. *Shinabarger* v. *Phillips*, 135.
2. Verdict for plaintiff in action against defendant owner of gasoline station for injuries inflicted by assault of such defendant's son *held*, not against the great weight of the evidence on question of whether the son was an employee of such defendant and, if so, acting within the scope of his employment when he beat plaintiff, where it appears plaintiff knew of the father and son relationship, had seen the son at the station functioning as an employee, and altercation arose incident to son's attempted charge for use of station tools. *Id.*

See APPEAL AND ERROR (2); DAMAGES (1); HOMICIDE (3, 4); PRINCIPAL AND AGENT (4); TRIAL (10).

ASSIGNMENTS—See APPEAL AND ERROR (6); DEEDS (6); EVIDENCE (4).

ASSUMED NAME—See APPEAL AND ERROR (2).

ASSUMPSIT—See COSTS (11); MUNICIPAL CORPORATIONS (23).

ASSURED CLEAR DISTANCE AHEAD—See AUTOMOBILES (5–7, 10, 11, 13).

ATMOSPHERIC CONDITIONS—See APPEAL AND ERROR (14); AUTOMOBILES (11).

ATTEMPTS—See MONOPOLIES (1).

ATTORNEY AND CLIENT.

1. A liberal interpretation of the common-law right of professional privilege between attorney and client is followed in this State in that the privilege is not confined to communications made for the purpose of obtaining advice but extends to communications made to the attorney in the course of any professional employment and relating to the subject of the employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other, hence, such communications may not be disclosed through the use of discovery procedure as they would be privileged (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Wilson* v. *Saginaw Circuit Judge (Chaffee* v. *Stenger)*, 405.
2. The privileged work product of an attorney that is not subject to discovery procedures is that part of the preparatory file he has obtained personally, not vicariously, in the performance of his personal-to-client duty in the preparation of a case (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.* 406.

See APPEAL AND ERROR (23); DISCOVERY (6); EQUITY (5).

AUCTION—See ACCOUNTING (7).

AUTHORITY—See PRINCIPAL AND AGENT (4).

AUTOMOBILES.

1. Instruction to jury in action arising from collision between plaintiff's eastbound car, just completing a left curve on ice-covered highway down a 3 to 3-1/2% grade, and defendants' westbound truck as it was passing another defendant's station wagon, also westbound but parked partially on the pavement, which failed to present plaintiff's theory of the case (1) with respect to the sudden emergency doctrine, (2) with respect to plaintiff's claim that the truck had crossed the yellow line in the center of the highway in passing the station wagon, and (3) with respect to negligence of the driver of the station wagon in making an impracticable stop on the paved portion of the highway, was reversible error, where plaintiff's requests to charge had covered such theory. *Horst* v. *Tikkanen*, 66.

2. Instruction to jury which assumed facts neither alleged nor proved with respect to observation by station wagon driver as to other traffic when she stopped partially on pavement and with respect to position of the other defendants' truck at time of head-on collision with plaintiff's car *held*, reversible error in action arising out of collision. *Id.*

3. It was reversible error in action arising out of head-on collision between plaintiff's eastbound car just completing a left curve on ice-covered highway down a 3 to 3-1/2% grade as it collided with defendants' truck when it passed another defendant's station wagon parked partially on the pavement, to instruct jury that if plaintiff found the station wagon in a position of peril, plaintiff had a duty to exercise due care and diligence so as to avoid injury to defendant operator of the station wagon when there was no claim or proof that such operator had been injured. *Id.*

4. Instruction that stopping of defendant's station wagon partly on the pavement so as to pick up a friend was not a prohibited stopping or parking within the meaning of statute, being a temporary stop for a necessary reason not prohibited under the statute which made it unlawful to stop, park or leave standing any vehicle upon the paved part of a highway when it is practicable to stop, park or to leave such vehicle off such part of the highway, *held*, reversible error, since it added to the statutory test of practicability the test of whether the stopping to pick up a friend is a necessary reason (CLS 1956, § 257.672). *Id.*

5. The question of contributory negligence was for jury, where plaintiff, fourth in line of eastbound cars on 2-lane, through highway near intersection, who sought to pass at speed of 27 miles an hour in north lane as first of the cars indicated intention to turn right and others slowed down to 10 to 15 miles an hour, when confronted with defendant's southbound car from intersecting road which plaintiff had observed for some 400 feet to the west approaching at 5 miles an hour but failed to stop as required, turned right some 70 feet from plaintiff and struck plaintiff's car after latter had accelerated to 32 miles an hour in an effort to avoid collision by veering slightly to the right as permitted by other eastbound cars after plaintiff had determined there was less likelihood of

collision by so doing than in remaining in northbound lane and stopping within what had been his previously assured clear distance ahead, but where now a head-on collision was imminent (CLS 1956, § 257.627, as amended by PA 1959, No 76). *Hoag* v. *Fenton*, 320.

6. A motorist who has been driving so as to be able to stop within what had been his assured clear distance ahead is not in violation of such rule where such clear distance is suddenly and unexpectedly invaded by another vehicle coming from the side at a time and place such that the first driver cannot avoid a collision with it (CLS 1956, § 257.627, as amended by PA 1959, No 76). *Id.* 321.

7. The matter of the negligence of a motorist, who is driving at a speed such that he is able to stop within the assured clear distance ahead but for intersection of his lane of travel or line of vision at some intermediate point by another vehicle or other moving object, is a question for the trier of the facts (CLS 1956, § 257.627, as amended by PA 1959, No 76). *Id.*

8. Recovery for injuries to minor bicyclist, inflicted in collision with defendants' car at a street intersection, would be barred as a matter of law if all reasonable men would agree that the minor was guilty of contributory negligence. *Todd* v. *Simonis*, 342.

9. Minor eastbound bicyclist *held*, not guilty of contributory negligence as a matter of law in colliding with defendants' northbound car at open street intersection, where evidence shows he had glanced southward before entering intersection and had not been able to see the car for 195 feet, it being within the jury's province to determine the car was not within the range of the bicyclist's vision and had traversed the distance from a point beyond his range of vision to the point of impact more quickly than would have been possible unless the car had been driven at an excessive speed, hence, judgment entered for defendants after disagreement of jury, on ground of contributory negligence of bicyclist was error (CL 1948, § 691.701). *Id.*

10. The statutory rule of motoring conduct that a driver must so drive as to be able to stop within the assured clear distance ahead has its antecedents in the common law, but is now a rule that must be reasonably construed (CLS 1956, § 257.627, as amended by PA 1957, No 190). *Patzer* v. *Bowerman-Halifax Funeral Home*, 350.

11. Requisite vigilance required of a motorist on blizzard-swept highway demands that he continue on, fast enough to minimize danger of collision from the rear and slow enough to minimize the danger of collision with what may loom ahead, the variable and jury-determinable rule of due care making it impossible always to obey the letter of the statutory assured-clear-distance-ahead rule (CLS 1956, § 257.627, as amended by PA 1957, No 190). *Id.*

12. The driver of an overtaking car which collides with the rear end of a preceding car is presumed to be guilty of negligence

AUTOMOBILES—Continued.

but such statutory presumption is rebuttable (CLS 1956, § 257.402). *Id.* 351.

13. Whether or not defendant's ambulance driver was guilty of negligence in colliding with rear end of plaintiffs' car on blizzard-swept, lakeshore highway in March *held*, properly left as a question for jury under instruction given and evidence presented showing the ambulance was being driven at speed of 20 to 25 miles an hour in response to an emergency call but with visibility ahead extremely limited (CLS 1956, § 257-.402; § 257.627, as amended by PA 1957, No 190). *Id.*

14. Decision of circuit judge in nonjury case arising out of collision between southbound car driven by plaintiff's decedent and defendant's northbound car on Christmas eve that defendant's negligence was the proximate cause of the decedent's injuries and death and that latter had not been guilty of contributory negligence, based upon evidence adduced and not upon presumption of due care on part of decedent *held*, not contrary to the preponderance of the evidence in record containing evidence that debris was all in southbound lane, that defendant's car had crossed the double yellow line and struck decedent's car at an angle, that defendant had partaken of intoxicating liquor in the afternoon, and that for some reason he was inattentive to possible traffic hazards. *Siller* v. *Laitila*, 373.

15. Trial court on remand from Supreme Court is directed to permit timely amendment of declarations in actions for injuries to 2–1/2-year-old child by defendant's milk truck so as to permit a showing that the truck was on the wrong side of the road, to admit evidence thereof on retrial, and to omit instruction that jury may not find negligence of defendant based on location of the truck, where amendment of declaration so to show had been denied during the trial, proffer of supporting testimony refused and such instruction given to jury, although not holding such action constituted reversible error under the circumstances and error is otherwise discovered necessitating reversal. *McGuire* v. *Reenders Dairy Company*, 642.

16. Admission over objection of testimony that 2–1/2-year-old child on previous occasions had never stopped to look before crossing street *held*, so prejudicial as to entitle child and her father to new trial, since contributory negligence of such a young child was not and could not be in issue, it was impertinent to issues of negligence of defendant's milk truck driver, proximate cause, and damages, and could not be admissible for impeachment purposes. *Id.* 643.

17. Instruction in actions to recover damages for injuries to 2–1/2-year-old child which occurred when defendant's truck hit her while delivering milk on a lightly traveled residential area, whereby in commenting on a driver's duty to make observation, a comparison was drawn involving a busy, main thoroughfare should not be repeated on retrial, since it could only serve to confuse the jury. *Id.*

See APPEAL AND ERROR (14); CONSTITUTIONAL LAW (4); COSTS (14); CRIMINAL LAW (18); EVIDENCE (5); INSURANCE (1);

AUTOMOBILES—Continued.

MUNICIPAL CORPORATIONS (28, 32, 34, 36); RAILROADS; SEARCHES AND SEIZURES; TRIAL (11).

AUTOMOBILE SALES AGENCY—See ACCOUNTING (7).

AWARD—See EMINENT DOMAIN (2, 4, 5).

BACK INJURY—See TRIAL (11); WORKMEN'S COMPENSATION (3).

BAKERY EMPLOYEE—See WORKMEN'S COMPENSATION (3).

BASTARDS.

Motion for new trial in paternity action because of alleged newly-discovered evidence was properly denied, where defendant produced neither testimony nor affidavit of his brother to the effect that if called he would testify as to sexual relations with plaintiff. *Sylvester* v. *Grabowski*, 503.

See APPEAL AND ERROR (20).

BICYCLES—See AUTOMOBILES (8, 9).

BILL OF PARTICULARS—See CONTRACTS (13); EVIDENCE (7); PLEADING (6).

BILL OF SALE—See ACCOUNTING (7).

BILLS AND NOTES—See DIVORCE (13).

BINDING OVER FOR TRIAL—See CRIMINAL LAW (15, 16).

BLIZZARD—See APPEAL AND ERROR (14); AUTOMOBILES (11, 13).

BLOOD TEST—See CRIMINAL LAW (18).

BONDS—See MUNICIPAL CORPORATIONS (3); WILLS (1).

BOUNDARIES—See MUNICIPAL CORPORATIONS (1).

BREACH OF CONTRACT—See APPEAL AND ERROR (23); CONTRACTS (13–15); EVIDENCE (4); LABOR RELATIONS (1–4).

BREAKING AND ENTERING—See CRIMINAL LAW (16, 17); SEARCHES AND SEIZURES.

BRIEFS—See APPEAL AND ERROR (4); COSTS (4, 6, 8); DISCOVERY (5).

BROKERS—See CONTRACTS (1–4); TRIAL (6).

BROTHERS—See GIFTS (1).

BUILDINGS—See APPEAL AND ERROR (1); LICENSES (1, 3–5).

BURDEN OF PROOF—See ACCOUNTING (3); DEEDS (6); DISCOVERY (7); GARNISHMENT (5); GIFTS (1); MUNICIPAL CORPORATIONS (21, 33, 34); PUBLIC SERVICE COMMISSIONS; REFORMATION OF INSTRUMENTS; TRIAL (8).

BUSES—See CARRIERS (1).

BUSINESS ACTIVITIES—See INSURANCE (2).

BUS PASSENGERS—See CARRIERS (2).

CARE AND KEEP—See ACCOUNTING (3); DEEDS (6, 9).

CARRIERS.

1. Question of negligence of defendant bus driver in suddenly stopping bus and thereby injuring plaintiff passenger who was thrown backwards while walking in aisle toward vacant seat in rear of bus *held*, to have been a question for jury, where the sudden stoppage was because a lady came from the left and ran in front of bus and driver offered no explanation of why he had not seen her earlier on the well-lighted street some 70' wide where traffic was not heavy. *Kasza* v. *City of Detroit*, 7.

2. Instruction in bus passenger's action against defendant city, as a common carrier, for injuries sustained due, as she claimed, to worn rubber flooring and accumulation of dirt thereon and omission to provide a railing for the support of passengers alighting from its bus to the street, that a common carrier owed "a higher degree of care to its passengers than a person ordinarily owes to another person"; that due care means that amount of care a reasonably prudent person would exercise under the circumstances then and there existing, that "it is more difficult for a common carrier to measure up to the standard of due care than it is for an ordinary person" because of the nature of the business; that a common carrier owes due care just like everybody else but has a harder time reaching that standard than the ordinary person does; that they are not insurers and that it was for the jury to determine whether there was a failure to use that amount of care that a reasonably prudent person would use under the circumstances, that a common carrier, a reasonable common carrier, would and should use *held*, a substantially correct statement of the applicable law. *Frederick* v. *City of Detroit*, 425.

3. The conduct of a common carrier of passengers is tested by the common law of negligence standard of reasonable care appropriate to the circumstances of the case, a standard of negligence which allows the fact finder to determine that some factual circumstances reasonably require greater or lesser diligence than do other circumstances in order to constitute reasonable or due care. *Id.*

4. A trial judge's description in charge to the jury of the standard of duty of a common carrier of passengers in terms of high, higher, or highest, care or the like, impinges upon the function of the jury as finder of fact. *Id.* 426.

5. A common carrier who holds a certificate of necessity from the public service commission is, nevertheless, subject to ordinances enacted by the municipalities in the exercise of their right of reasonable control of their streets (Const 1908, art 8, § 28; CL 1948, § 475.1 *et seq.*, as amended; Detroit Ordinance No 348-F). *Michigan Towing Association, Inc.*, v. *City of Detroit*, 440.

See MUNICIPAL CORPORATIONS (30).

CAR WASH—See NEGLIGENCE (6).

CASH—See WILLS.

CATTLE TRAILER—See NEGLIGENCE (8).

CAUSE OF ACTION—See PLEADING (5).

CENTER LINE—See AUTOMOBILES (1, 14).

CERTIFICATE OF NECESSITY—See CARRIERS (5).

CERTIORARI—See EMINENT DOMAIN (4).

CHANCERY CASES—See APPEAL AND ERROR (3, 5, 6, 19).

CHARITIES.

1. The dominant purpose of provision in residuary clause of will leaving net income of a fund to be paid to a hospital in Greece bearing testator's name, for the maintenance and preservation of present hospital building, construction of new buildings, purchase of hospital equipment and supplies, and such other purposes as, in the sole judgment of the board or other governing body of said hospital, "shall most effectively aid the hospital in its objective of providing medical facilities, drugs and medical care for the people of Andritsena and adjoining communities" together with provision that "if it becomes partially or wholly impossible in the judgment of the trustee to benefit" such people in the manner provided "the trustee shall select or cause to be created such other charitable, religious, or medical nonprofit corporation or foundations" to carry out the purposes specified in particular earlier provision of will, was not to support a hospital merely for purpose of having it bear testator's name but disclosed a very decided general charitable intent. *Kostarides* v. *Central Trust Company*, 690.
2. Bequest of net income of funds left in trust to a hospital in Greece, which is referred to as bearing testator's name was not invalid as violative of the rule against perpetuities, or because of the inapplicability of the doctrine of cy pres, where will also provided that in case it became impossible to do as directed with the fund that the trustee should otherwise carry out the testator's general charitable intent in a specific manner; hence, testator did not die intestate as to such fund as there was a proper disposition for a charitable purpose and his heirs-at-law are left without interest therein. *Id.*
3. Charitable bequest to a hospital in Greece was not invalid by reason of the fact that the laws of Greece do not recognize a trust, where the will provided that in the event it became impossible to carry out the bequest to trustees of the specifically mentioned hospital in Greece that the trustee, in this country should, in a specified manner, make gifts to a charitable institution or cause in Greece. *Id.* 691.

See APPEAL AND ERROR (25); TRUSTS (3); WILLS.

CHARTERS—See COSTS (7); ELECTRICITY (2); MUNICIPAL CORPORATIONS (13, 15-21); TAXATION (11, 13, 14).

CHILDREN—See DIVORCE (1).

CHIROPRACTOR—See APPEAL AND ERROR (24); TRIAL (11).

CHRISTMAS EVE—See AUTOMOBILES (14).

CHURCHES—See TRUSTS (3).

CIRCUIT COURT—See WILLS.

CIVIL RIGHTS—See CRIMINAL LAW (17).

CIVIL SERVICE—See MUNICIPAL CORPORATIONS (20, 21).

CLASSIFICATION—See TAXATION (17).

CLASS SUIT—See MUNICIPAL CORPORATIONS (4).

COERCION—See ACCOUNTING (6); DEEDS (4); MUNICIPAL CORPORATIONS (23).

COHABITATION—See DIVORCE (11).

COLLECTIVE BARGAINING—See APPEAL AND ERROR (23); EVIDENCE (4); LABOR RELATIONS.

COMBINATION—See MONOPOLIES (1, 3).

COMMENCEMENT OF PROCEEDINGS—See CRIMINAL LAW (7, 8).

COMMERCE—See LABOR RELATIONS (1).

COMMISSIONERS—See EMINENT DOMAIN (3).

COMMON CARRIERS—See CARRIERS (5); MUNICIPAL CORPORATIONS (30).

COMMON LAW—See ATTORNEY AND CLIENT (1); CARRIERS (3); CONSPIRACY (1); LABOR RELATIONS (1); MUNICIPAL CORPORATIONS (18); NEGLIGENCE (3).

COMPARATIVE GUILT—See DIVORCE (6).

COMPENSATION—See EMINENT DOMAIN (1); JUSTICES OF THE PEACE.

COMPLAINING WITNESS—See CRIMINAL LAW (6, 9).

CONCUSSION—See DAMAGES (1).

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN.

CONSENT—See DISMISSAL AND NONSUIT (1); MUNICIPAL CORPORATIONS (30).

CONSIDERATION—See CONTRACTS (1–4); DEEDS (3, 4); MUNICIPAL CORPORATIONS (24); TRIAL (6).

CONSOLIDATION—See APPEAL AND ERROR (8).

CONSORTIUM—See HUSBAND AND WIFE.

CONSPIRACY.

1. Conspiracy to do an unlawful act was an indictable offense at common law and was a misdemeanor only, but under the penal code it is a felony (CLS 1956, § 750.505; CL 1948, § 761-.1). *People* v. *Beasley*, 243.
2. The statute providing that "if, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not by reason thereof, be entitled to an acquittal of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts," unless court takes case from jury and directs indictment for felony, does not preclude prosecution for felony because trial was not of the *same* misdemeanor, but only where *the facts given in evidence amount in law* to a felony (CL 1948, § 768.4). *Id.*

See CRIMINAL LAW (13).

CONSTITUTIONAL LAW.

1. The legislature may not deprive a municipality of the right to reasonable control over its streets, even expressways within its limits, and, to the extent that a statute does so, it is invalid (Const 1908, art 8, § 28). *Michigan Towing Association, Inc.*, v. *City of Detroit*, 441.
2. City authorities may control, within reason, the use of their streets for any purposes whatsoever not inconsistent with the State law (Const 1908, art 8, § 28). *Id.*
3. The Supreme Court will not ordinarily substitute its judgment for that of a home-rule city as to the reasonable control of its streets (Const 1908, art 8, § 28; Detroit Ordinance No 348-F). *Id.* 442.
4. Record in suit by association of tow truck owners to have declared invalid home-rule city ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing vehicles disabled on the expressway to nearest exit ramp *held*, not to justify Supreme Court in substituting its judgment for that of the city as to necessity for such traffic regulation for the safety and convenience of the general public (Detroit Ordinance No 348-F). *Id.*
5. Refusal of employee of State highway commissioner to disqualify himself from conducting hearing on necessity for the taking of property for State highway purposes operated to deprive property owners of due process, since such employee was an interested person to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, and the situation required the calling in of a circuit court commissioner (US Const, Am 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CL 1948, §§ 213.174, 213.174a). *Glass* v. *State Highway Commissioner*, 482.
6. A fair trial in a fair tribunal is a basic requirement of due process (US Const, Am 14; Mich Const 1908, art 2, § 16). *Id.*

See APPEAL AND ERROR (7); CARRIERS (5); COSTS (7, 14, 15); CRIMINAL LAW (3–6, 17); EMINENT DOMAIN (3); JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS (2–4, 10, 12, 28, 29, 32); TAXATION (1, 10, 11, 13, 14).

CONSTRUCTION BUSINESS—See LICENSES (4).

CONSTRUCTION OF ORDINANCES—See MUNICIPAL CORPORATIONS (35, 36); STATUTES (2).

CONSTRUCTION OF STATUTES—See AUTOMOBILES (10); CONSTITUTIONAL LAW (1); COSTS (13, 18); COURTS (1); CRIMINAL LAW (1); MUNICIPAL CORPORATIONS (38); STATUTES.

CONSTRUCTION OF WILLS—See CHARITIES (1, 2); WILLS.

CONSTRUCTIVE FRAUD—See FRAUD (4).

CONSTRUCTIVE TRUST—See PRINCIPAL AND AGENT (5); TRUSTS (1, 2).

CONTINUANCE—See DISMISSAL AND NONSUIT (3).

CONTRACTS.

1. Statement, made before plaintiffs executed contract to purchase a house and gave defendant realtors an exclusive listing agreement as to hotel subject to a first mortgage and on which plaintiffs gave a second mortgage as security for down payment on house, that plaintiffs should not worry about foreclosure of the first mortgage as they will have a year in which to redeem and defendants would have the hotel sold by that time, *held*, not to constitute an express promise by defendants to do anything supported by a consideration, but only a representation and expression of defendants' belief they would be able to sell the hotel within 1 year. *Easley* v. *Mortensen*, 115.
2. The purchase of a house by plaintiffs and the giving of an exclusive listing agreement of a mortgaged hotel property to defendant realtors constituted but past consideration and was insufficient to support defendants' alleged promises thereafter made that they would raise the money to pay off the mortgage after foreclosure proceedings had been commenced. *Id.*
3. The placing of a copy of foreclosure notice of first mortgage on hotel in the hands of defendant realtors who had taken a second mortgage to vendors of house sold to plaintiffs as security for down payment thereon when they also gave defendants the exclusive listing agreement for sale of the hotel property did not constitute consideration for such past acts by plaintiffs, since it constituted no control over the right or power of plaintiffs to redeem. *Id.*
4. The self-imposed inaction of plaintiff mortgagors in not attempting to raise money from other sources to redeem mortgage on hotel property did not constitute a consideration for defendant realtors' unfulfilled promises to raise the money for such purpose, such latter promises being mere gratuities. *Id.* 116.
5. Rescission of a contract will not lie except for mutual mistake or unilateral mistake induced by fraud. *Windham* v. *Morris*, 189.
6. A written contract may be rescinded or may be modified either in writing or orally or a new contract may be entered into

CONTRACTS—Continued.

between the parties. *Chatham Super Markets, Inc.*, v. *Ajax Asphalt Paving, Inc.*, 334.

7. A motion to dismiss an amended declaration in an action for breach of a contract should be tested solely by and from the 4 corners of such declaration. *Id.*

8. Averment in plaintiff owner's declaration in action for loss under agreement between general contractor for erection of a supermarket and defendant subcontractor that latter was obligated directly to plaintiff to perform paving work according to architect's specifications and that plaintiff was a third-party creditor beneficiary of defendant's undertakings, promises, guarantees, and warranties under the third-party beneficiary statute *held*, sufficient to state a cause of action as against motion to dismiss, whether or not the statute was applicable being determined as a question upon trial (CL 1948, § 691.541 *et seq.*). *Id.*

9. Generally, an unambiguous written contract cannot be varied or contradicted by proof of usage. *Munro* v. *Boston Insurance Company*, 604.

10. The doctrine of estoppel and waiver may not be invoked to bring into existence a contract not made by the parties nor to create a liability contrary to the express and unambiguous provisions of the contract the parties did make. *Id.*

11. Directed verdict and judgment were properly entered for insurer in action against it by insured, where fire occurred about 5 months after specified terminal date of 5-year fire insurance policy on which premiums had been paid in installments, notwithstanding the local insurance agency had not followed the custom of the area in notifying the policyholder of the expiration of his policy. *Id.*

12. Record in action against a subcontractor on highway project *held*, insufficient to support claim of damages because the contract was not completed by time set in original contract, where it appears a supplemental contract had been entered into, it is concluded both parties were at fault, delay occurred because of developments over which defendant subcontractor did not have full control, record fails to show with sufficient clarity specific items of damage to plaintiff because of the delay or because of alleged breach of contract by the defendant subcontractor, and claims advanced by plaintiff might have been incurred had there been no delay in performance. *Wright* v. *Bateson*, 660.

13. Plaintiff's declaration against subcontractor which did not allege breach of contract with reference to the quantity of materials required by subcontract to be used in highway surfacing, may not recover for breaches of the contract in such particular even though included in bill of particulars. *Id.*

14. A plaintiff may not recover for alleged breaches of contract because of the defendants' failure to meet obligations imposed with reference to overruns in use of materials in highway construction, where there is no claim plaintiff was damaged by reason of such breaches. *Id.*

CONTRACTS—Continued.

15. Proof as to plaintiff's claim of damage with respect to defendants' failure to schedule delivery of materials under his subcontract respecting highway surfacing *held*, insufficient to permit recovery, where plaintiff exercised active supervision over the operations even to the extent of giving directions to defendants' employees. *Id.* 661.

See ACCOUNTING (8); COSTS (11); ELECTRICITY (2); EQUITY (5); MUNICIPAL CORPORATIONS (22, 23); SCHOOLS AND SCHOOL DISTRICTS; TRIAL (6).

CONTRIBUTIONS—See MUNICIPAL CORPORATIONS (23).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (5, 7–9, 14, 16); NEGLIGENCE (6); RAILROADS (2).

CONTROL—See CONTRACTS (3).

CORPORATIONS.

1. A restriction upon the transfer of stock of a corporation imposed by a bylaw of the corporation or in an agreement among the shareholders but not stated upon the certificate is unenforceable against the purchaser of the stock even though he has knowledge of the restriction (CL 1948, § 441.15). *Straits Transit, Inc.*, v. *Union Terminal Piers*, 275.
2. Case involving restrictions upon transfer of corporate stock, affected by statutory regulation, is determined in accordance with the statute presently effective rather than in accord with statute already enacted but effective at a time later than decision is rendered (CL 1948, § 441.15; PA 1962, No 174, § 8204). *Id.*

See MORTGAGES; TAXATION (16, 17).

CORRECTION OF DECREE—See DIVORCE (15).

CORROBORATION—See WITNESSES.

COST OF INSPECTION—See MUNICIPAL CORPORATIONS (24).

COSTS.

1. No costs are allowed on appeal in suit to enjoin further proceedings toward incorporation of new home-rule city, where relief sought is presently denied. *Taylor* v. *Township of Dearborn*, 47.
2. No costs are allowed in suit to enjoin defendant county road commissioners from claiming and maintaining woodland trail as a public road, a public question being involved (CL 1948, §§ 221.20, 247.1–247.13; CLS 1956, § 247.652 *et seq.*, as amended). *Indian Club* v. *Lake County Road Commissioners*, 87.
3. No costs are allowed in suit to declare zoning ordinance unconstitutional as applied to plaintiffs' property, where neither party has prevailed entirely on appeal. *Roll* v. *City of Troy*, 95.
4. Costs are awarded to both plaintiff and defendant-appellant, where liability for workmen's compensation was imposed by the workmen's compensation appeal board solely upon the

COSTS—Continued.

next to last Michigan employer of plaintiff, whom the board found primarily responsible for the disability, and Supreme Court imposes liability upon the last Michigan employer, there having been 2 other employers out of the State, all parties having filed briefs (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9). *Smith* v. *Lawrence Baking Company*, 170.

5. No costs are allowed in suit for accounting brought by special administrator of a woman's estate against her son and the latter's wife, where neither party has prevailed in full. *Mannausa* v. *Mannausa*, 181.

6. No costs are allowed in affirmance of decree, where appellees did not file a brief. *Windham* v. *Morris*, 189.

7. No costs are allowed in class suits by residents and nonresidents of home-rule city to declare invalid the city's ordinance imposing an income tax upon residents from whatever source and upon nonresidents from income having a local source (Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12[m]; Detroit Ordinance No 694–F, ch No 84). *Dooley* v. *City of Detroit (Poindexter* v. *Same)*, 197.

8. No costs are allowed in suit for accounting upon affirmance of decree, where appellee has not filed a brief. *Kuykendall* v. *Kuykendall*, 220.

9. No costs are allowed upon reversal in view of the record presented on appeal. *Panter* v. *Sobesky*, 257.

10. No costs are allowed on appeal by plaintiff city from decree of circuit court upholding public service commission's order making uniform the rates charged consumers of electricity in 10-county area in which theretofore there had been 4 separate rate schedules for 4 areas now integrated into 1 system, a public question being involved (CL 1948, § 460.557). *City of Ishpeming* v. *Public Service Commission*, 296.

11. No costs are awarded on appeal in plattors' action of assumpsit against village to recover sums paid under contract executed incident to approval of subdivision plats, where neither party has fully prevailed (CL 1948, § 560.1 *et seq.*, as amended). *Gordon* v. *Village of Wayne*, 329.

12. No costs are allowed on appeal in suit to recover demand charges made to users of water for air-conditioning equipment of the nonrecirculating type, in view of the nature of the questions involved. *Theatre Control Corporation* v. *City of Detroit*, 383.

13. No costs are allowed plaintiff-appellee on affirmance of judgment on appeal of defendant after judgment had been taken against him following fourth reinstatement of case from no-progress calendar, where a matter of statutory construction is involved (CL 1948, §§ 618.2, 618.3). *Leo* v. *Atlas Industries, Inc.*, 400.

14. No costs are allowed in suit to declare invalid home-rule city ordinance which prohibited towing of disabled vehicles on expressways during period of rush hour traffic, a public question being involved (Const 1908, art 8, § 28; CL 1948, § 475.1

COSTS—Continued.

et seq., as amended; Detroit Ordinance No 348-F). *Michigan Towing Association, Inc.*, v. *City of Detroit*, 443.

15. No costs are allowed on appeal by property owners in proceeding to condemn their land for State highway purposes, where employee of State highway commissioner declined to disqualify himself from conducting hearing on necessity notwithstanding his interest in the outcome of the case (US Const, Am 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CL 1948, §§ 213-.174, 213.174a). *Glass* v. *State Highway Commissioner*, 482.

16. No costs are allowed on appeal in suit to enjoin interference with distribution of handbills at shopping center, per BLACK, KAVANAGH, SOURIS, SMITH, and O'HARA, JJ. *Amalgamated Clothing Workers of America, AFL-CIO*, v. *Wonderland Shopping Center, Inc.*, 547.

17. No costs are allowed on appeal and cross appeal from order granting defendants' motion *non obstante veredicto*, where decision results in setting aside verdict but requires further proceedings pursuant to exercise by Supreme Court of its inherent power to grant a new trial. *Pennington* v. *Whiting Tubular Products, Inc.*, 592.

18. No costs are allowed on appeal involving construction of ambiguous section of home-rule city statute relative to annexation of territory of one home-rule city to another, a public question being involved (CLS 1956, § 117.9). *Magnuson* v. *Kent County Board of Canvassers*, 649.

See DIVORCE (10, 16).

COTENANTS—See ACCOUNTING (1); TENANCY IN COMMON.

COUNCILMAN—See MUNICIPAL CORPORATIONS (15, 17, 19).

COUNTIES.

Counties and their departments of social welfare function as agencies of the State in establishing and operating medical care facilities to provide general relief, hospitalization, and infirmary care other than hospitalization, to poor or unfortunate persons under State statute creating State department of social welfare and prescribing its powers and duties with respect to county departments of social welfare (CL 1948, § 400.1 *et seq.*). *Lewis* v. *Genesee County*, 110.

See HOSPITALS.

COURT RULES—See APPEAL AND ERROR (21, 22); ATTORNEY AND CLIENT; COURTS (4); DISCOVERY; DISMISSAL AND NONSUIT (1); DIVORCE (16); PLEADING (3).

COURTS.

1. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right, but 1 decision construing an act does not approach the dignity of a well settled interpretation. *Smith* v. *Lawrence Baking Company*, 169.

COURTS—Continued.

2. The failure of the trial court to dismiss action upon the fourth application for reinstatement after case had been placed on the no-progress calendar, did not oust the court of jurisdiction to try the case, the pertinent statute provision that when the plaintiff fails to try a case within the time allowed upon reinstatement the court shall dismiss the action, being directory and not self-executing (CL 1948, §§ 618.2, 618.3). *Leo* v. *Atlas Industries, Inc.*, 400.
3. It is the court's function to determine as a matter of law whether the relation of the parties gives rise to a duty and to define it. *Frederick* v. *City of Detroit*, 426.
4. A trial judge is required to make a concise statement of his reasons for granting or denying motions for new trial, amendment of judgment, and for judgment notwithstanding the verdict (Court Rule No 47, § 3 [1945]; GCR 1963, 527.7). *Id.*

See CONSTITUTIONAL LAW (3, 4); GARNISHMENT (1); LABOR RELATIONS (1); MUNICIPAL CORPORATIONS (1, 29).

COVERAGE—See INSURANCE (1).

CREDIBILITY—See HOMICIDE (4); WITNESSES.

CRIMINAL LAW.

1. Penal responsibility cannot be extended beyond the fair scope of the statutory mandate. *People* v. *Austin*, 12.
2. Denial of motion to quash information because defendant had not been taken forthwith before the magistrate who had issued the warrant was not error, as the statute requiring that such action be taken forthwith does not command the officer to do so nor cause the court to lose jurisdiction because the officer has not acted forthwith, and defendant's conduct which resulted in his incarceration in jail in another county for another crime was a barrier to compliance with the statute (CL 1948, § 766.3). *People* v. *Castelli*, 147.
3. One accused of crime is entitled to a speedy trial (Const 1908, art 2, § 19). *Id.*
4. A *speedy trial*, as the term is used in the Constitution according one accused of crime the right to a speedy trial, means such reasonable time under all the attendant circumstances as will give the people an opportunity to present its case in court (Const 1908, art 2, § 19). *Id.*
5. What constitutes a speedy trial in a criminal prosecution for crime depends upon the circumstances of the case, much being left to the discretion of the trial court (Const 1908, art 2, § 19). *Id.*
6. Defendant in prosecution for unarmed robbery *held*, not to have been denied a speedy trial, where record shows that warrant therefor was issued November 3, 1960, and sent to sheriff in another county where defendant was then in jail for a narcotics charge, return made by such sheriff on March 21, 1961, defendant was in the State prison, complaining witness was then ill, defendant was brought to county seat on August 25, 1961, for examination, informed against August 31, 1961,

CRIMINAL LAW—Continued.

and brought to trial November 3, 1961 (Const 1908, art 2, § 19; PA 1957, No 177). *Id.*, 148.

7. Public policy, as expressed by the legislature with respect to the meaning of a speedy trial of one serving a prison sentence upon conviction of some other crime, calls for bringing to trial within 180 days after the department of corrections shall notify the appropriate prosecuting attorney of the accused's imprisonment and a request for final disposition of the information, the statutory requirement being satisfied by the taking of good faith action to start the proceedings in motion (Const 1908, art 2, § 19; PA 1957, No 177). *Id.*

8. Jurisdiction to try defendant on charge of unarmed robbery was not lost, where defendant had been delivered to State prison on sentence for a narcotics charge on March 3, 1961, and proceedings on the robbery charge were commenced on August 25, 1961 (PA 1957, No 177). *Id.*

9. Error which may have been injected into prosecution for unarmed robbery by reason of prosecution's questioning of a police officer at the trial concerning pictures he had shown the complaining witness for purposes of identifying her assailant together with the testimony that defendant was identified in the showup at a county jail, because such testimony improperly injected into the minds of the jurors that defendant had been arrested before and perhaps had a criminal record *held*, obviated by defense counsel's opening statement wherein he told the jurors the police had shown the complaining witness pictures, including 1 of defendant which she identified as being a picture of the robber and that she had testified about it at the examination. *Id.*

10. The failure of the people to call a *res gestae* witness in a prosecution for crime is properly excused, where officers made a diligent search for him but were unable to locate him. *Id.* 149.

11. It was reversible error for the people in prosecution for unarmed robbery to fail to indorse on information the name of a witness who was known to police and who saw a man running where 3 other witnesses testified they had seen him but who gave police officers a different description than the unindorsed witness, inasmuch as identity of the robber was a major issue in the case and the testimony of such unindorsed witness would not have been merely cumulative. *Id.*

12. On review of order granting motion to quash a sworn criminal complaint, purporting to charge as a matter of the personal knowledge of complainant that defendant had committed an offense cognizable by a justice of the peace, attacked on the ground that the complainant did not have personal knowledge of the facts charged but had signed it on information and belief, complaint and warrant are reinstated, where record fails to show the complaint to have been insufficient. *People* v. *France*, 156.

13. Evidence presented upon trial of appellant woman for misdemeanor of resorting to a room for immoral purposes and of appellant man on charge of frequenting and attending a house of prostitution *held*, to have amounted in law to the

CRIMINAL LAW—Continued.

felony of conspiracy to commit the misdemeanor for which conspiracy defendants were later tried and convicted (CL 1948, § 768.4). *People* v. *Beasley*, 242.

14. A felony in this State is distinguishable from a misdemeanor as a grade of crime only by reason of the place and severity of punishment. *Id.*

15. The condition to holding one to trial for the commission of an alleged crime is that the testimony taken before the examining magistrate shall be such as justifies him in concluding that the crime charged has been committed, and that there is probable cause to believe the accused is the guilty party. *People* v. *Carr*, 251.

16. Evidence from identifying witnesses, presented at preliminary examination of defendant, accused of breaking and entering with intent to commit larceny therein, *held*, sufficient to meet the test of probable cause, hence, where the commission of the offense was adequately established, he was properly bound over for trial in the circuit court. *Id.* 252.

17. One who is imprisoned in a county jail for an unrelated misdemeanor to accusation for breaking and entering a store with intent to commit a larceny therein is not, by reason of such incarceration, stripped of all his civil rights and constitutional safeguards against unreasonable search and seizure (Const 1908, art 2, § 10, as amended in 1952). *Id.*

18. Prejudicial error was committed in the trial of defendant on charge of driving a car while under the influence of intoxicating liquor, where the assistant prosecuting attorney asked the police officer if defendant had been advised as to his rights as to the taking of a blood test, and was advised such advice was given, where no blood test was administered and statute provides that the refusal of any person to submit to any such test shall not be admissible in any such criminal prosecution, notwithstanding defendant's later explanation that he declined such test unless a physician of his own choosing administered the test, a right accorded him by statute, the statutory direction that refusal not be admitted being absolute and was not waived (PA 1949, No 300, § 625a, as added by PA 1960, No 148). *People* v. *Reeder*, 378.

See HOMICIDE; JUSTICES OF THE PEACE; SEARCHES AND SEIZURES.

CROSS APPEAL—See COSTS (17); LABOR RELATIONS (2).

CROSSING—See RAILROADS.

CROSSWALK—See EVIDENCE (3); HIGHWAYS AND STREETS (4).

CRUELTY TO CHILDREN—See DIVORCE (8).

CUSTODY OF CHILDREN—See APPEAL AND ERROR (21); DIVORCE (9, 10).

CUSTOMS AND USAGES—See CONTRACTS (9, 11); INSURANCE (6).

CY-PRES DOCTRINE—See CHARITIES (2).

DAMAGES.

1. Jury's consideration of future pain and suffering by plaintiff, in action for injuries received when assaulted by defendant gasoline station owner's son at the station, *held*, to have sufficient evidentiary support by plaintiff's testimony that hitherto he had been in good health but that at the trial, 1-1/2 years after the assault, he still suffered pain and a flick of the nerves in his nose and a doctor testified that plaintiff was still coming to him for treatment. *Shinabarger* v. *Phillips*, 136.
2. Judgment for $1,250 to plaintiff in nonjury action for injuries to arm sustained in fall on ice on defendant's premises *held*, not grossly inadequate, where out-of-pocket losses were $849.63, and $400.37 was allowed for pain and suffering. *Draper* v. *Switous*, 469.
3. The Supreme Court does not reverse the trier of fact as to the amount a plaintiff is permitted to recover where the amount is determined, as a matter of law, not to be inadequate. *Id.*

See ACTION (2); AUTOMOBILES (16); CONTRACTS (12, 14); EQUITY (1); LABOR RELATIONS (3, 4).

DEARBORN—See MUNICIPAL CORPORATIONS (15–19).

DEATH—See AUTOMOBILES (14); REFORMATION OF INSTRUMENTS.

DEBRIS—See AUTOMOBILES (14).

DECLARATION—See AUTOMOBILES (15); PLEADING (6); TRIAL (10).

DECLARATION OF AGENT—See PRINCIPAL AND AGENT (3, 4).

DECLARATION OF RIGHTS—See APPEAL AND ERROR (8).

DEDICATION.

A dedication of a highway must, in order to be rendered a public highway, be followed by an acceptance by the public authorities, with the way taken and maintained as other highways (CL 1948, § 221.20). *Indian Club* v. *Lake County Road Commissioners*, 87.

DEEDS.

1. Circumstances concerning deed to defendant and his mother, as joint tenants with right of survivorship, are deemed controlling in suit by special administrator to set aside conveyances by which defendant and his wife acquired title, rather than straw-man conveyance some 8 years later to a third person and by latter to defendant brother and his defendant wife which may have been obtained from deceased through undue influence. *Mannausa* v. *Mannausa*, 180.
2. A rebuttable presumption of undue influence is indulged in cases involving conveyances from parent to child only where a fiduciary relation is found to exist. *Id.*
3. A parent may convey property to a child without any consideration. *Id.*

DEEDS—Continued.

4. Deeds of property to defendant and his late mother, as joint tenants with right of survivorship, are declared valid, where, although the defendant was then living with his mother and contributed none of the consideration, it appears she was then mentally competent, did not repose any confidence or trust in him or rely upon his judgment, conducted other real-estate transactions, maintained her separate bank account, collected rents, and, generally, managed her own affairs, and plaintiff, special administrator of mother's estate, has failed to show defendant then obtained an interest in the property through fraud, coercion, or undue influence, wrongdoing not being inferred from mere opportunity. *Id.*
5. Invalidity of a conveyance of property to a grantee who stands in a fiduciary relation to the grantor is merely presumed, whereas if there be no such relation existing the party seeking to prove invalidity must show incompetence of, or undue influence upon, the grantor. *Kouri* v. *Fassone*, 223.
6. Defendant daughter with whom mother lived during her serious, prolonged, and final illness and who occupied a fiduciary relationship with the deceased *held*, to have sustained her burden of proof to overcome presumption of invalidity of the assignments and conveyances of property made to defendant while the mother was being cared for by defendant. *Id.* 224.
7. Mere weak mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat a conveyance. *Id.*
8. The ultimate question to be determined on the issue of exertion of undue influence in the execution of a conveyance is whether the disposition by the grantor was voluntary and in the search of undue influence the court looks at the whole spectrum of circumstances, not at 1 facet. *Id.*
9. Influence earned by kindness and care for the grantor of property then suffering a prolonged illness, while administering to the grantor's wants or contributing to her comfort, cannot be said to be undue. *Id.*

See ACCOUNTING (2); REFORMATION OF INSTRUMENTS.

DEFECT IN STREET—See EVIDENCE (3); HIGHWAYS AND STREETS (3, 4).

DEFECTIVE CATTLE TRAILER—See NEGLIGENCE (8).

DEFENSES—See GARNISHMENT (3).

DEFICIENCY—See MORTGAGES.

DELAY—See CONTRACTS (12).

DELAYED APPEAL—See APPEAL AND ERROR (21, 22); MANDAMUS.

DELIVERY OF MATERIALS—See CONTRACTS (15).

DEMAND—See MUNICIPAL CORPORATIONS (25).

DE NOVO REVIEW—See APPEAL AND ERROR (3, 5, 6, 9, 18, 19); DIVORCE (2, 4); EMINENT DOMAIN (2).

DEPRECIATION—See ACCOUNTING (8); MUNICIPAL CORPORATIONS (6).

DERIVATIVE ACTION—See ACTION (1).

DESCENT AND DISTRIBUTION—See WILLS.

DETROIT—See CARRIERS (5); CONSTITUTIONAL LAW (3, 4); COSTS (7, 14); MUNICIPAL CORPORATIONS (12, 28, 29, 32, 34, 36); TAXATION (11, 13).

DIESEL ENGINE—See RAILROADS.

DIRECTED VERDICT—See APPEAL AND ERROR (1, 12); CONTRACTS (11); TRIAL (1, 5, 6).

DIRECT NEGOTIATION WITH EMPLOYER—See LABOR RELATIONS (5).

DISABLED VEHICLES—See CONSTITUTIONAL LAW (4); COSTS (14); MUNICIPAL CORPORATIONS (28, 32, 34, 36).

DISAGREEMENT OF JURY—See APPEAL AND ERROR (13); AUTOMOBILES (9).

DISCONTINUANCE OF SERVICE—See MUNICIPAL CORPORATIONS (25, 26).

DISCOUNT—See FRAUD (1).

DISCOVERY.

1. The subject matter of an order for discovery is limited to any matter not privileged but admissible under the rules of evidence governing trials, which is relevant to the subject matter of claim or defense involved in the pending action (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Wilson* v. *Saginaw Circuit Judge (Chaffee* v. *Stenger)*, 404.
2. Statements and reports of witnesses and parties to action, procured by the defendants' insurance companies are properly the subject of an order for discovery, since, if they are called to testify at the trial, the contents of their prior extrajudicial statements and reports can be used for their possible impeachment by the opposite party (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.*
3. The requirement of admissibility of evidence of which discovery is sought is satisfied if the matter sought to be discovered is admissible by any party and is not limited to matters admissible in evidence by the party seeking discovery (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.*
4. The ultimate objective of pretrial discovery is to make available to all parties in advance of trial all relevant facts which might be admitted in evidence at trial (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.* 405.

DISCOVERY—Continued.

5. Information outside the record relating to matter sought to be discovered may not properly be included in a party's brief (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.*

6. Defendant's statement to his insurer and proof of loss to his insurance carrier, sought to be discovered by plaintiff in action for injuries received in explosion and fire on defendant's premises, *held*, not barred from discovery by reason of alleged attorney-client relation in the absence of testimony as to when the report of loss was made, when and by whom defense counsel was retained, the relationship between defendant's counsel and his insurance company, including the degree of control each exercised over the activities of the other, or any other proofs pertinent to the claimed agency; and there being no showing that the work product of an attorney for a party needed protection (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.*

7. Orders for discovery of statements and reports of witnesses and parties procured by the insured party's insurance carrier, not having been shown to have been obtained by defendant's attorney, *held*, to have been properly entered, where defendants have failed to show good cause for denying the requested discovery as it was their burden to do (Court Rule No 35, § 6[a], [b] [1945], as added and amended). *Id.*

See ATTORNEY AND CLIENT.

DISCRETION OF COURT—See CRIMINAL LAW (5); DISMISSAL AND NONSUIT (4); MANDAMUS; NEW TRIAL (1).

DISCRETION OF OFFICERS—See APPEAL AND ERROR (11).

DISCRIMINATION—See APPEAL AND ERROR (17).

DISCRIMINATION IN RATES—See ELECTRICITY (3, 4).

DISMISSAL AND NONSUIT.

1. Decree of divorce was properly entered in suit for divorce notwithstanding plaintiff's counsel had orally advised trial court of plaintiff's desire not to proceed after court had announced his decision, where answer and cross-bill, answer thereto, and reply to such answer had been filed, and hearing had been held, but no consent by defendant, stipulation, or order of court permitting discontinuance had been filed (Court Rule No 38 [1945]). *Wolford* v. *Wolford*, 103.

2. A trial court has power to dismiss an action upon the unexcused absence of plaintiff and his counsel when the case is called for trial. *Banta* v. *Serban*, 367.

3. It was not error for trial court to dismiss action when case was called, where plaintiff's counsel had ample notice of the impending trial, had failed to move for a continuance, and neither plaintiff nor his counsel were present when case was called. *Id.*

DISMISSAL AND NONSUIT—Continued.

4. The trial judge did not abuse his discretion in refusing to set aside order of dismissal that had been entered when neither plaintiff nor his counsel were present as case had been called for trial and record on motion for reinstatement offered no proof to excuse or explain such absences. *Id.*

See COURTS (2).

DISMISSAL OF APPEAL—See DIVORCE (16).

DISQUALIFIED EMPLOYEE—See CONSTITUTIONAL LAW (5); COSTS (15).

DISTRIBUTION OF DAMAGES—See ACTION (2).

DIVISION OF PROPERTY—See DIVORCE (1).

DIVORCE.

1. Decree entered in husband's suit for divorce on ground of extreme cruelty *held*, fully justified by evidence adduced, and not to have been entered on the grounds of public policy, division of property not being inequitable whereby defendant wife was allowed real estate on which she was conducting a business, rights of plaintiff were recognized with reference to carrying on work in which he was engaged, defendant was granted $2,500 in lieu of alimony, and jurisdiction expressly reserved to make orders in the future with reference to the care, maintenance, and support of the 5 minor children. *Wolford* v. *Wolford*, 103.

2. The Supreme Court does not reverse the determination of the trial court on *de novo* review of a divorce case unless convinced that a different conclusion would have been reached had the Supreme Court been in the position of the trial court. *Tiffany* v. *Tiffany*, 370.

3. Extreme cruelty, such as to endanger the mental or physical health of either spouse, *held*, not to have been shown in wife's suit for divorce, contested by the husband, although they have had some heated arguments over family financial affairs, hence dismissal of bill was proper (CL 1948, § 552.7). *Id.*

4. A divorce case is an equity case that is heard *de novo* and while the Supreme Court gives due consideration to the findings of the trial judge, it is the duty of the Supreme Court to weigh the evidence and reach an independent conclusion. *Jaikins* v. *Jaikins*, 488.

5. A divorce may be granted on the ground of extreme cruelty but the grievances whether they be physical or mental must be of a sufficiently aggravated nature to justify a decree (CL 1948, §§ 552.7, 552.8). *Id.*

6. Divorce on the ground of extreme cruelty is awarded plaintiff husband notwithstanding he may not have been blameless, where in applying the rule of compared fault his comparative guilt is outweighed by that of the wife (CL 1948, §§ 552.7, 552.8). *Id.*

DIVORCE—Continued.

7. Mental irresponsibility is not a defense to suit for divorce on the ground of extreme cruelty if the defendant wife was capable of comprehending and understanding the wrong she was committing (CL 1948, §§ 552.7, 552.8). *Id.*
8. The failure of parental due care of children coupled with some proof of mistreatment of them is evidence of statutory extreme cruelty justifying decree of divorce (CL 1948, §§ 552.7, 552.8). *Id.* 489.
9. Cause is remanded to circuit court for determination by trial judge who is authorized to request other judges of same circuit to sit with him when determining matters of custody of children and visitation rights of defendant mother, where Supreme Court granted husband divorce on ground of extreme cruelty. *Id.*
10. Costs and fees on appeal are left to trial judge, where Supreme Court has granted decree of divorce to plaintiff husband on ground of extreme cruelty and cause is remanded to circuit court for determination of custody and mother's right of visitation. *Id.*
11. Allegations with respect to husband's extreme and repeated cruelty *held*, amply sustained by testimony of wife that defendant refused to cohabit for upwards of a year prior to filing of bill and with reference to lack of money for doctors, medicines, support of the children, and support of the wife despite an earning capacity sufficient to make adequate provision, and further supported by testimony of wife's sister. *Donovan* v. *Donovan*, 507.
12. Order for temporary support money during pendency of divorce proceedings, requiring defendant to pay $75 weekly for plaintiff and their 10-year-old child *held*, not to have been erroneous when defendant then had earnings and income of more than $670 per month. *Id.*
13. Claim of error by defendant husband in divorce proceedings that the trial court had arbitrarily fixed the value of defendant's stock at $3,500 rather than its true value of $2,000 *held*, without merit, where record shows such stock was valued at $2,000 and the additional $1,500 value was placed on a $2,000 note given by the corporation whose stock was involved and testimony showed note had been paid in full with interest. *Id.*
14. It was not an abuse of discretion for trial court to order defendant husband to pay $25 weekly for support of their minor daughter, a like sum for support of plaintiff and $10 a week upon balance of delinquent temporary alimony, where record shows defendant had a monthly income of $670. *Id.* 508.
15. Decree of divorce is ordered corrected to show it was not a *pro confesso* case, where the property matters were contested although the grounds for divorce were not contested. *Id.*
16. No costs are allowed appellee wife in suit for divorce, where neither appellant nor appellee have filed a proper appendix, and dismissal of the appeal would benefit the appellee who is primarily guilty of violating appellate rules (Court Rule No 67, § 2 [1945]; GCR 1963, 813.2). *Id.*

See APPEAL AND ERROR (21); DISMISSAL AND NONSUIT (1).

DUE PROCESS—See APPEAL AND ERROR (17); CONSTITUTIONAL LAW (5, 6); JUSTICES OF THE PEACE (1); TAXATION (13, 14).

DUMMY CORPORATIONS—See TAXATION (16, 17).

DURESS—See LICENSES (4, 5); WORDS AND PHRASES (1).

DUTY—See COURTS (3).

EARNING CAPACITY—See DIVORCE (11, 12).

EDUCATION—See ACCOUNTING (1).

ELECTION NOT TO DEFEND—See GARNISHMENT (1, 4); INSURANCE (4).

ELECTRICITY.

1. Uniform rate for supplying electricity to 10-county area in which plaintiff city was located as established by order of public service commission met requirement of 1888 franchise for such purpose, granted by city, that "the charge for such electricity shall not exceed the average charge made for the same where supplied within a radius of 100 miles of this city" (CL 1948, § 460.557). *City of Ishpeming* v. *Public Service Commission*, 293.
2. Contract rights of plaintiff city relative to rates for supplying electricity to city or to its inhabitants, made between the city and the present supplier's predecessor, in settlement of certain differences, maintaining the status quo as to rates for a 3-year period, and containing a provision that neither party was waiving any of their respective claims or rights concerning the franchise rights of the utility to serve the city; a later contract for 5-year period also now expired between plaintiff and defendant relative to supplying electricity for street lighting purposes; charters and ordinances adopted by the city, neither of which franchises, charters, or ordinances require negotiation of rates between the city and the supplier, *held*, not to have prevented the defendant public service commission from presently exercising its authority to fix and prescribe uniform rates and charges for utility services rendered by the defendant supplier over 10-county area, including appellant city (CL 1948, § 460.557). *Id.*
3. The public service commission has a right and duty to eliminate discrimination in rates charged consumers of electricity by supplier thereof for like contemporaneous service rendered under similar circumstances and conditions (CL 1948, § 460.557). *Id.* 294.
4. A proceeding whereby the public service commission ultimately issued an order requiring the supplier of electricity in a 10-county area to charge rates that were uniform throughout the area in which the service was now rendered on an integrated basis but, for historical reasons 4 different and disparate rate schedules had theretofore been in effect, constituted a situation requiring the commission to eliminate discrimination as it was required to do under controlling statute (CL 1948, § 460.557). *Id.*

ELECTRICITY—Continued.

5. The public service commission was justified and properly exercised its jurisdiction in allowing defendant supplier of electricity opportunity to work out particular problems peculiar to purchaser of the service on a wholesale basis when establishing uniform rates on an area basis in 10-county area served by such defendant, with the understanding that the commission would take such action, ultimately, as was necessary to protect the public interests and the respective rights of the parties, especially where the severance resulted in a reduction of the revenues of the supplier (CL 1948, § 460.557). *Id.*
6. Competent evidence adduced at hearing before the public service commission supported its findings that 4 separate service areas of defendant supplier of electricity are interconnected and operated as 1 integrated system with more dependable service; that appellant city, whose rates were increased when rates throughout 10-county area were made uniform, was not entitled to a continuation of existing rate disparities, now that it was a part of the integrated system; that uniform rates throughout the system are in the public interest so that customers throughout the area will be charged the same rates for like service rendered under similar circumstances and conditions; and that the net operating income resulting in a rate of return of 6.36% was not in excess of the amount required by the supplier to maintain its financial standing and capital-raising ability at satisfactory levels, and that such rate was a fair rate to the consuming public (CL 1948, § 460.557). *Id.*
7. Claim by appellant city that public service commission was not legally authorized to take judicial notice of information contained in reports by supplier of electricity in commission's file but not offered in evidence at hearing in proceeding to establish uniform rates throughout 10-county area, including appellant city, where appellant had full and adequate opportunities to investigate the data and information contained in such reports, made no objections to the commission staff's conclusions and testimony based thereon, never claimed reports were untrue or unreliable or had been misinterpreted or that appellant had been prejudiced *held*, without merit on judicial review of order made (CL 1948, § 460.557). *Id.* 295.
8. The legislative mandate that in fixing rates to be charged by supplier of electricity the public service commission "shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price" *held*, to have been fully met by the commission at hearing which resulted in an order making uniform the rates to be charged after integration of 4 separate areas into 1 system which provided more dependable service for an area consisting of 10 counties, and which increased the rates charged in appellant city (CL 1948, § 460.557). *Id.* 296.

See COSTS (10).

ELIMINATION OF COMPETITOR—See MONOPOLIES (2).

EMERGENCY—See AUTOMOBILES (1, 13); NEGLIGENCE (1); STATUTES (2).

EMINENT DOMAIN.

1. Just compensation in condemnation proceedings for the taking of a part of a parcel of property is not measured by the proportionate area taken but by the amount to which the value of the property from which it is taken is diminished (CL 1948, § 213.171 *et seq.*). *State Highway Commissioner* v. *Schultz*, 78.
2. The Supreme Court on appeal in condemnation proceedings reviews the finding of damages merely to see that it is supported by the evidence and will not disturb the award made when it is so supported, the case not being heard *de novo* (CL 1948, § 213.171 *et seq.*). *Id.*
3. Commissioners, when appointed in condemnation proceedings, are a constitutional tribunal with the same powers and duties as a jury, are expected to view the premises, and use their own knowledge gained from such view and their experience as freeholders, as well as the testimony of witnesses as to matters of opinion, as they are the judges both of the law and fact (Const 1908, art 13, §§ 1, 2; CL 1948, § 213.171 *et seq.*). *Id.*
4. The proceedings in the Supreme Court to review an award in condemnation proceedings are in the nature of certiorari (CL 1948, § 213.171 *et seq.*). *Id.*
5. Order by circuit court confirming award of $64,042.37 by commissioners for the absolute taking of 16.5 acres for use in right-of-way, the ruination of .12 of an acre, and separation of 2.32 acres without access to remaining 13.3 acres of farm containing valuable sand and gravel deposits, *held*, not contrary to evidence presented in condemnation proceedings for interstate limited access highway (CL 1948, § 213.171 *et seq.*). *Id.*

See CONSTITUTIONAL LAW (5); COSTS (15).

EQUALLY DIVIDED COURT—See INJUNCTION; LABOR RELATIONS (5); WILLS.

EQUAL PROTECTION—See APPEAL AND ERROR (17).

EQUITABLE LIEN—See EQUITY (3–5).

EQUITY.

1. A court of equity which has jurisdiction of a case for the purpose of considering the matter of specific performance, has jurisdiction to grant complete relief, including an award of damages for the vendors' failure to perform. *Reinink* v. *Van Loozenoord*, 122.
2. A right being shown which otherwise might appeal to equity's concurrent jurisdiction, and the legal remedy being established as inadequate, is by itself a sufficient invocation of equity jurisdiction. *Schrot* v. *Garnett*, 161.
3. All well-pleaded allegations of bill to establish an equitable lien on defendant's home property, including inadequacy of legal remedy, having been admitted by defendant by his failure to answer or move, entitled plaintiff to decree in his favor, where the equities were all in favor of plaintiff and the rights of no other creditor of defendant have been disclosed or affected. *Id.*

EQUITY—Continued.

4. Equity from the relations of the parties may declare an equitable lien out of considerations of right and justice, and where the plaintiff has shown that, in good conscience, he is entitled to the lien claimed. *Id.* 162.

5. An equitable lien on real estate, the home property of defendant, is properly imposed in the absence of a written contract between plaintiff, an attorney, and defendant, his client, where the intent to give identifiable security for sums expended and attorney fees, is clear and the plaintiff has dealt in reliance upon such intent, such being established by having been taken as confessed by defendant. *Id.*

See APPEAL AND ERROR (8).

ESTABLISHMENT BY USER—See HIGHWAYS AND STREETS (1, 2).

ESTATES OF DECEDENTS—See GIFTS (1).

ESTOPPEL—See CONTRACTS (10); INSURANCE (6).

EVIDENCE.

1. Hospital record of plaintiff's treatment and diagnosis which showed he had suffered a concussion, made and kept in the regular course of business, was admissible in action against gasoline station owner and his son for injuries received by assault of latter at the station and was not prejudicial to the appellant owner even though the diagnosis had been made by a physician who was not called as a witness, where the content was supported by the testimony of another doctor. *Shinabarger* v. *Phillips*, 136.

2. Posed photographic reproduction of operation of defendant's mechanized street sweeper, taken over 2 years after nighttime collision had occurred in which minor plaintiff was injured, *held*, prejudicial and reversible error, where the composite effect of the photographic reconstruction operation with the same sweeper, the same operator, photographed in motion, the reference by defense counsel in his jury argument to the absence of dust in the pictures, the court's requirement that jury find presence of dust would have created an unreasonable hazard, when viewed from the impact of the stark blazing lights of the sweeper dominating the scene in the photographs, must have created a wrong impression in the minds of the jurors that the photographs were a representation of what the motorist saw as he approached the point of impact, especially in the absence of precautionary or limiting instructions that the exhibits were not the usual reasonable representation of the actual conditions. *Kaminski* v. *Wayne County Road Commissioners*, 389.

3. The opinion testimony of witness, who had had 7 years of experience in constructing and repairing asphalt pavements, that hole in pavement at crosswalk on defendant city's street near a city's parking lot had existed from 3 to 6 months, where it was testified to by others as having been 3" deep and about 36" in circumference *held*, admissible for such persuasive worth as might be given it by the trial court as trier of the facts, as it did constitute some proof that the city should, in the

EVIDENCE—Continued.

exercise of ordinary care, have discovered and remedied the defect prior to the occasion of plaintiff's injury (CLS 1956, § 242.1). *Cruz* v. *City of Saginaw*, 476.

4. Assignment of rights of action by former employees of defendant corporation was properly admitted in its entirety in evidence in action by the 3 assignees thereof in whose names the action was brought to recover damages for breach of collective bargaining contract with respect to seniority in the recall of employees after a layoff, where there was testimony relative to its preparation, procurement of signatures thereto, and identification by individual plaintiffs of their signatures, indicating no part of the exhibit was spurious. *Pennington* v. *Whiting Tubular Products, Inc.*, 590.

5. Admission, over objection, of hearsay testimony as to mother's admissions against interest that her 2-1/2-year-old child had come out from between parked cars before being injured when hit by defendant's milk truck in residential neighborhood *held*, prejudicial. *McGuire* v. *Reenders Dairy Company*, 642.

6. An admission against interest by a mother who has no legal interest in action by an infant and derivative action by father for injuries received by the child, would not be binding upon the plaintiff child. *Id.*

7. A bill of particulars may not be accepted in lieu of proper proof. *Wright* v. *Bateson*, 660.

See ACCOUNTING (1, 3–5); ADMINISTRATIVE LAW; APPEAL AND ERROR (10, 12–14, 16, 23); ASSAULT AND BATTERY; ATTORNEY AND CLIENT (1); AUTOMOBILES (3, 9, 13–16); BASTARDS; CONSPIRACY (2); CONTRACTS (12, 15); CRIMINAL LAW (9, 11, 13, 15, 16, 18); DAMAGES (1); DEEDS (6); DISCOVERY (1, 3, 4); DIVORCE (1, 3, 4, 11, 13); ELECTRICITY (6, 7); EMINENT DOMAIN (2, 3, 5); FOOD (2–4); FRAUD (1, 2); HIGHWAYS AND STREETS (2, 4); HOMICIDE (4); LABOR RELATIONS (4); MUNICIPAL CORPORATIONS (2, 21); NEGLIGENCE (6–8); PRINCIPAL AND AGENT (3, 4); PUBLIC SERVICE COMMISSIONS; RAILROADS (2); REFORMATION OF INSTRUMENTS; SEARCHES AND SEIZURES; TRIAL (1, 8); TRUSTS (2); WORKMEN'S COMPENSATION (3).

EXAMINATION—See DISCOVERY (1).

EXCISES—See MUNICIPAL CORPORATIONS (12); TAXATION (2, 5–7).

EXCLUSIONS—See GARNISHMENT (1, 3–5); INSURANCE (2, 3).

EXCLUSIVE LISTING AGREEMENT—See CONTRACTS (1–3).

EXECUTORS AND ADMINISTRATORS—See ACCOUNTING (2); APPEAL AND ERROR (4, 6); COSTS (5); DEEDS (1, 4).

EXEMPTIONS—See TAXATION (15–17).

EXPENSE ITEMS—See TRUSTS (3).

EXPIRATION OF POLICY—See CONTRACTS (11); INSURANCE (5, 6).

EXPLOSIVES—See GARNISHMENT (1); INSURANCE (2–4).

EXPRESSWAYS—See CONSTITUTIONAL LAW (1, 4); COSTS (14); MUNICIPAL CORPORATIONS (28, 32, 34, 36).

EXTENSION OF POLICY—See INSURANCE (6).

EXTREME CRUELTY—See DIVORCE (1, 3, 5–11).

FAILURE OF EITHER PARTY TO PREVAIL IN FULL—See COSTS (5, 11).

FAIR TRIAL—See CONSTITUTIONAL LAW (6); TRIAL (8).

FARM—See EMINENT DOMAIN (5).

FEES—See APPEAL AND ERROR (1); EQUITY (5); JUSTICES OF THE PEACE (1); LICENSES (1, 2, 4, 5).

FELLOW EMPLOYEES—See INSURANCE (4).

FELONY—See CONSPIRACY; CRIMINAL LAW (13, 14).

FENCES—See MUNICIPAL CORPORATIONS (22).

FERRY SERVICE—See MONOPOLIES (2).

FIDUCIARIES—See DEEDS (2, 4–6); GUARDIAN AND WARD; PRINCIPAL AND AGENT (5); TRUSTS (1); WORDS AND PHRASES (2).

FILING—See ELECTRICITY (7).

FIRECRACKERS—See GARNISHMENT (1); INSURANCE (2–4).

FIRE INSURANCE—See CONTRACTS (11); INSURANCE (5, 6).

FIRST-DEGREE MURDER—See HOMICIDE (3).

FITNESS FOR HUMAN CONSUMPTION—See FOOD.

FLINT—See MUNICIPAL CORPORATIONS (20, 21).

FLOWERS—See TRUSTS (3).

FOOD.

1. A food processor's implied warranty that its product is fit for human consumption should be applied only when its food is used in the usual, rather than in the unusual and improper, manner, hence, plaintiff should not have continued to drink defendant's product after she discovered, or should have discovered, that it contained glass particles, a warrantor not being a guarantor against injury to consumers resulting from the consumer's misuse of the product. *Barefield* v. *La Salle Coca-Cola Bottling Company*, 1.
2. Jury's verdict for defendant food processor *held*, not against the great weight of the evidence adduced in action for breach of implied warranty that the soft drink was fit for human consumption, where it appears that when contents of bottle were half consumed, plaintiff should have discovered something was wrong and that she should not have continued to drink it without examination, as she then proceeded without reliance upon defendant's implied warranty of fitness, and trial court's single use of technical term *assumption of risk* in instruction

FOOD—Continued.

did not erroneously distort an essentially correct statement of an available defense. *Id.*

3. Admission of evidence of defendant food processor's methods and techniques for excluding impurities from its bottled product for the purpose of negating probability that glass particles entered the bottle at defendant's plant *held,* proper in action for breach of implied warranty of fitness for human consumption of its product. *Id.* 2.

4. Verdict for defendant food processor in action for breach of implied warranty of fitness for human consumption *held,* not against the great weight of the evidence, where jury could have found that plaintiff had suffered no injury, that her injury occurred after she had discovered, or should have discovered the glass particles in the bottle of soft drink, or that the glass particles did not get into the bottle while it was under defendant's control. *Id.*

FORECLOSURE—See CONTRACTS (1–3); MORTGAGES.

FORTHWITH—See CRIMINAL LAW (2).

FRANCHISES—See ELECTRICITY (1, 2).

FRAUD.

1. Defendants in suit for specific performance of a land contract who claimed defense of fraud failed to substantiate their claim, where the testimony failed to show they had relied upon the alleged misrepresentation as to amount of discount involved in an FHA loan. *Reinink* v. *Van Loozenoord,* 121.

2. Plaintiff purchasers of defendant's house and lot *held,* not entitled to rescission or abatement on land contract because of alleged fraud, where record shows they had placed no reliance upon claimed fraudulent representations in an appraisal that had been made of the premises in connection with other proceedings. *Windham* v. *Morris,* 188.

3. Plaintiffs in suit for rescission of land contract for the purchase of a house and lot *held,* to have failed to sustain their burden of proof as to falsity of alleged statement of defendant as to estimated cost of repairs which if made would have been, at best, opinion statements which are not generally considered a proper basis for fraud. *Id.*

4. Constructive fraud in the execution of instruments is inferred from the conditions and relations of the immediate parties to the transaction. *Kouri* v. *Fassone,* 223.

5. Trial court's order setting aside option to purchase land which had been given to defendant on his representation that he had a purchaser who would pay the agreed price and no more, a material representation that was relied upon by plaintiffs, *held,* proper, where such representation was false. *Peters* v. *Brooks,* 363.

See ACCOUNTING (4, 6, 7); CONTRACTS (5); DEEDS (4); PLEADING (1).

FUTURE PAIN AND SUFFERING—See DAMAGES (1).

GARNISHMENT.

1. The issue of jurisdiction of the court which tried the original action against the principal defendant may not be raised by garnishee defendant in garnishment proceeding against insurer under a home owner's policy for injuries sustained by plaintiff when the principal defendant and another caused a firecracker to explode in room where plaintiff was working, and insurer withdrew appearance theretofore filed because policy allegedly excluded coverage. *Morrill* v. *Gallagher*, 578.
2. Judgment against principal defendant in original action may not be said to be void in garnishment proceeding, where trial court had jurisdiction of such original action. *Id.* 579.
3. A garnishee defendant who has elected to rely on the exclusion provisions of home owner's insurance policy is not entitled to assert other grounds as a defense to its liability in garnishment, since it has waived such other defenses. *Id.* 579.
4. Trial judge in garnishment proceeding on home owner's insurance policy properly limited defenses of insurer garnishee to issues presented by exclusion provision of policy, where the insurer had timely notice of the action against insured and elected not to defend the action because the exclusion provisions of the policy were claimed to relieve it from liability thereunder. *Id.*
5. An insurer has the burden of proof of showing application of exclusion provisions in its home owner's insurance policy, where it asserts nonliability in garnishment proceeding. *Id.*

See INSURANCE (1, 4).

GASOLINE STATION—See DAMAGES (1); EVIDENCE (1); PRINCIPAL AND AGENT (4).

GENERAL CONTRACTOR—See CONTRACTS (8).

GERRYMANDERING—See MUNICIPAL CORPORATIONS (2).

GIFTS.

1. Evidence presented in suit by 85-year-old plaintiff to set aside transfers of his interests in the estates of his 2 recently deceased bachelor brothers, together with a probate form of waiver of notice and consent, which he had given to a surviving brother and children of another deceased brother *held*, not to sustain burden of proof on plaintiff's contention that he did not intend or desire to give all of his interest in the estates to defendants but that he knew he was making such transfers and wanted and desired to do so. *Starr* v. *Lappley*, 457.
2. Whether or not a transferor of property intended to make a gift is determined as of the time the transfer was made rather than what he may have subsequently desired. *Id.*

See CHARITIES (3).

GLASS PARTICLES—See FOOD (1, 3, 4).

GOVERNMENTAL BENEFITS—See TAXATION (4).

GRADE CROSSING—See RAILROADS.

GRAVEL—See EMINENT DOMAIN (5).

GREAT WEIGHT OF EVIDENCE—See ASSAULT AND BATTERY (2); FOOD (2, 4).

GREECE—See CHARITIES.

GRIEVANCE—See LABOR RELATIONS (2).

GUARDIAN AND WARD.

The guardian of a ward occupies a fiduciary relationship to the ward. *Tomchak* v. *Handricks (Sayles* v. *Same)*, 143.

See REFORMATION OF INSTRUMENTS; TENANCY IN COMMON (3).

HANDBILLS—See COSTS (16); INJUNCTION.

HEAD-ON COLLISION—See AUTOMOBILES (2, 3, 5).

HEALTH—See DEEDS (9).

HEARING—See APPEAL AND ERROR (25); CONSTITUTIONAL LAW (5); COSTS (15); DISMISSAL AND NONSUIT (1); PLEADING (1).

HIGHWAY DEPARTMENT EMPLOYEE—See CONSTITUTIONAL LAW (5).

HIGHWAYS AND STREETS.

1. A highway which has not been established pursuant to existing statute must have a defined line, used and worked upon by the public authorities, traveled over and used by the public for 10 consecutive years, without interruption, and the possession thereof by the public must be open, notorious, and exclusive (CL 1948, § 221.20). *Indian Club* v. *Lake County Road Commissioners*, 87.
2. Woodland trail through resort area subdivision which evidence shows had been dedicated but not formally accepted, had been used by the public for approximately 60 years, and had been maintained in a passable condition by public authorities for about 20 years after it had been certified as a part of the county highway system *held*, to have been established as a public road (CL 1948, §§ 221.20, 247.1–247.13; CLS 1956, § 247.652 *et seq.*, as amended). *Id.*
3. Generally, the question whether a street defect, otherwise actionable against the municipality, has existed a sufficient length of time and under such circumstances that the municipality is deemed to have had notice is a question of fact, and not a question of law (CLS 1956, § 242.1). *Cruz* v. *City of Saginaw*, 476.
4. Evidence presented in plaintiff's nonjury action against city for injuries alleged to have been received by reason of hole in pavement of city street at crosswalk near city's parking lot *held*, sufficient to support determination of trial court for plaintiff on issue of prior notice of the existence of the hole as one of fact and that plaintiff's injuries were due thereto and not to other causes as claimed by defendant (CLS 1956, § 242.1). *Id.* 477.

See AUTOMOBILES (5, 13, 16); CARRIERS (5); CONSTITUTIONAL LAW (1–4); CONTRACTS (12–15); COSTS (2, 14); DEDICATION; EMINENT DOMAIN (5); EVIDENCE (3); MUNICIPAL CORPORATIONS (28–32, 36).

HOLOGRAPHIC WILL—See WILLS.

HOME OWNER'S POLICY—See GARNISHMENT (1, 3–5); INSURANCE (2–4).

HOME-RULE CITY—See CONSTITUTIONAL LAW (3, 4); COSTS (1, 7, 14, 18); MUNICIPAL CORPORATIONS (2–4, 10, 11, 13, 16–19, 28, 29, 37, 38); STATUTES (1); TAXATION (5, 10–14).

HOMICIDE.

1. Two of 3 co-robbers may not properly be charged with the murder of the third member, where he was killed by the victim of the attempted robbery, since the homicide was a justifiable homicide (CL 1948, § 750.316). *People* v. *Austin*, 12.
2. To include the justifiable homicide of 1 of 3 co-robbers by the victim of an attempted robbery as within the statute setting forth that "all murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree" and charge the surviving robbers with murder would infringe legislative prerogatives as to what is necessary to the public's safety and security (CL 1948, § 750.316). *Id.* 13.
3. An instruction in prosecution for murder in the first degree that plea of self-defense was not available to appellant if a second male defendant were not present *held*, prejudicial, where the presence or absence of such other defendant was not of pivotal importance to appellant's plea of self-defense because of alleged attack upon him by the victim with a pistol in his hand (CL 1948, § 750.316). *People* v. *Hunter*, 262.
4. Instruction that if jury did not believe appellant's testimony that a male codefendant was not present at time of alleged assault upon victim by defendant, that jury could not believe the balance of appellant's testimony under any circumstances *held*, prejudicial in prosecution for murder (CL 1948, § 750-.316). *Id.*

HOSPITALS.

Defendant county and defendant county board of social welfare were immune from liability for the negligent acts of their agents, servants, and employees in performance of functions involved in caring for plaintiff, a patient at hospital which had been established and was being operated pursuant to statute conferring supervisory power upon State social welfare commission, since defendants were functioning as State agencies (CL 1948, § 400.1 *et seq.*, as amended). *Lewis* v. *Genesee County*, 110.

See CHARITIES; COUNTIES; EVIDENCE (1).

HOTEL MANAGERS—See ACCOUNTING (8).

HOTELS—See CONTRACTS (1–3).

HOUSING FACILITIES—See TAXATION (16, 17).

HUSBAND AND WIFE.

1. Action by wife of employee, injured during and in the course of employment, by reason of alleged negligence of employer, for loss of consortium is ordered dismissed in view of exclusiveness of remedy for injuries to employees provided by the workmen's compensation act (CL 1948, § 411.4). *Balcer* v. *Leonard Refineries, Inc.*, 531.
2. Action by wife of employee, injured during and in the course of employment, by reason of alleged negligence of employer, for loss of consortium is ordered dismissed in view of exclusiveness of remedy for injuries to employees provided by the workmen's compensation act (CL 1948, § 411.4). *Moran* v. *Nafi Corporation*, 536.

See ACCOUNTING (1, 5); ACTION (1); TENANCY IN COMMON (2); TRUSTS (2).

ICE—See AUTOMOBILES (3); NEGLIGENCE (6).

IDENTITY—See CRIMINAL LAW (9, 11).

IMMUNITY FROM LIABILITY—See HOSPITALS.

IMPEACHMENT—See AUTOMOBILES (16); DISCOVERY (2).

IMPLIED AGENCY—See PRINCIPAL AND AGENT (1).

IMPLIED WARRANTY—See ACTION (1); FOOD.

IMPRISONMENT FOR ANOTHER CRIME—See CRIMINAL LAW (2, 6–8).

IMPROVEMENTS—See MUNICIPAL CORPORATIONS (24).

IMPURITIES—See FOOD (3).

INACTION—See CONTRACTS (4).

INCARCERATION IN JAIL—See CRIMINAL LAW (17); SEARCHES AND SEIZURES.

INCOME—See CHARITIES (2); DIVORCE (12, 14); TRUSTS (3).

INCOME TAX—See COSTS (7); MUNICIPAL CORPORATIONS (12); TAXATION (1–5, 8, 9, 11, 13, 14).

INDICTMENT AND INFORMATION—See CRIMINAL LAW (11).

INFANTS—See AUTOMOBILES (8, 15–17); DIVORCE (14); EVIDENCE (5, 6).

INFORMATION AND BELIEF—See CRIMINAL LAW (12).

INJUNCTION.

Decree enjoining interference with distribution of handbills, promoting purchase of merchandise bearing union label, on entire property of shopping center is affirmed, where court is equally divided between reversal and affirmance of decree as modified to permit distribution of handbills on sidewalk adjacent to front entrance of a particular store (PA 1961, No 236, § 230).

INJUNCTION—Continued.

Amalgamated Clothing Workers of America, AFL–CIO, v. *Wonderland Shopping Center, Inc.*, 547.

See APPEAL AND ERROR (17); COSTS (1, 2, 16); MUNICIPAL CORPORATIONS (2, 3, 27).

INJURY NOT DUE TO SINGLE EVENT—See WORKMEN'S COMPENSATION (1).

INSANE PERSONS—See REFORMATION OF INSTRUMENTS.

INSTRUCTIONS—See AUTOMOBILES (1–4, 13, 15, 17); CARRIERS (2, 4); EVIDENCE (2); FOOD (2); HOMICIDE (3, 4); TRIAL (3, 4, 7, 8).

INSURANCE.

1. Car involved in accident causing injuries for which plaintiff recovered judgment against principal defendant *held*, covered by *additional automobile* clause of policy on another car insured with garnishee defendant where accident occurred less than 30 days after car involved in accident had been acquired and policy provided for coverage of additional automobile acquired by the insured if notice be given insurer within 30 days of delivery, although car traded in for the additional car had not been insured with the garnishee defendant (CLS 1956, § 500.3006). *Auto Owners Insurance Company* v. *Zeller*, 496.

2. Act of insured, principal defendant, in causing a firecracker to explode in room where plaintiff was working, in committing such prank, *held*, not to have been excluded from coverage under home owner's insurance policy providing for exclusion from coverage of "business pursuits of an insured, other than activities therein which are ordinarily incident to nonbusiness pursuits", since such prank was obviously not done in connection with insured's business. *Morrill* v. *Gallagher*, 579.

3. Prank whereby insured and another caused a firecracker to explode in room where plaintiff was working with intention of frightening him but not intending to injure him, *held*, not to have been excluded from coverage by home owner's policy under clause relieving insurer from liability as "to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured." *Id.*

4. Home owner's policy provision excluding from coverage injuries or disease for which workmen's compensation benefits were payable *held*, not to preclude recovery for injuries received by plaintiff as result of prank whereby insured and another caused a firecracker to explode in room in which plaintiff was working, where issue of whether the pranksters were fellow employees could have been litigated in original action which insured garnishee elected not to defend, and such action resulted in a judgment which may not be said to be void. *Id.*

5. No obligation rests on an insurer under a fire insurance policy covering real estate to seek the execution of another contract of insurance upon the expiration of a policy. *Munro* v. *Boston Insurance Company*, 604.

INSURANCE—Continued.

6. Liability under an unambiguous contract of fire insurance may not be extended beyond term of contract by claimed estoppel arising from nonobservance of local custom of insurance agents to notify insured of expiration of policy. *Id.*

See CARRIERS (2); DISCOVERY (2, 6, 7); GARNISHMENT (1, 3–5); PARTIES (1, 3).

INTEGRATED ELECTRIC SYSTEM—See COSTS (10); ELECTRICITY (6, 8).

INTENT—See APPEAL AND ERROR (24); AUTOMOBILES (5); CHARITIES (1, 2); EQUITY (5); GIFTS; INSURANCE (3); MONOPOLIES (1, 3); STATUTES (3).

INTEREST—See MORTGAGES.

INTERESTED PARTY—See CONSTITUTIONAL LAW (5).

INTERSECTION—See AUTOMOBILES (5, 8, 9).

INTERSTATE COMMERCE—See LABOR RELATIONS (1).

INTERSTATE HIGHWAY—See EMINENT DOMAIN (5).

INTERVENTION—See LABOR RELATIONS (5); MUNICIPAL CORPORATIONS (28); PARTIES (3).

INTOXICATING LIQUORS—See AUTOMOBILES (14); CRIMINAL LAW (18).

JAILS—See CRIMINAL LAW (17); SEARCHES AND SEIZURES.

JOINT ACCOUNT—See ACCOUNTING (4, 6).

JOINT TENANCY—See DEEDS (1, 4).

JUDGES—See APPEAL AND ERROR (24); DIVORCE (9).

JUDGMENT—See APPEAL AND ERROR (13); INSURANCE (4); MUNICIPAL CORPORATIONS (4); PLEADING (5).

JUDGMENT NOTWITHSTANDING VERDICT—See COURTS (4).

JUDICIAL NOTICE—See ELECTRICITY (7).

JURISDICTION—See COURTS (2); CRIMINAL LAW (2, 8); DIVORCE (1); EQUITY (1, 2); GARNISHMENT (1, 2); LABOR RELATIONS (1); MUNICIPAL CORPORATIONS (4); WORKMEN'S COMPENSATION (2).

JURY—See JUSTICES OF THE PEACE; TRIAL (8).

JUSTICES OF THE PEACE.

1. Defendant, charged with illegally parking a motor vehicle under a city ordinance *held*, not denied due process of law by reason of having been denied a fair trial because tried in a court of a justice of the peace whose compensation for official duties was derived from fees including a fee of 60 cents for commitment or mittimus, 60 cents for certificate of conviction, and $2 for making and filing return on appeal, where trial was

JUSTICES OF THE PEACE—Continued.

had before a jury which convicted him, the jury in such court being the judge of both the law and the facts (US Const, Am 14; Mich Const 1908, art 2, § 16; CLS 1956, § 775.2, as amended by PA 1960, No 49). *People* v. *Cheever*, 165.

2. The method of remuneration of a justice of the peace in a criminal case can have no direct bearing upon the fairness of a trial by jury in such court as the jury in such court is the judge of both the law and the facts (US Const, Am 14; Mich Const 1908, art 2, § 16). *Id.*

See CRIMINAL LAW (12).

JUSTIFIABLE HOMICIDE—See HOMICIDE (1, 2).

KINDNESS—See DEEDS (9).

LABOR RELATIONS.

1. A common-law action for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting interstate commerce may be maintained against the employer in a State court by an individual employee who is a member of such labor organization, even when the conduct constituting the breach of contract concededly is also an unfair labor practice within the jurisdiction of the national labor relations board. *Pennington* v. *Whiting Tubular Products, Inc.*, 590.
2. Defendants' claim that failure of union to exhaust grievance remedies under collective bargaining contract precluded recovery in employees' action based on breach of seniority provision in recall of employees who have been laid off *held*, not tenable, since abandonment of grievance claim by union would not be binding on employees as third-party beneficiaries, especially where defendants' cross appeal does not raise the issue. *Id.*
3. It was error for trial judge to instruct jury, in action by former employees of defendant corporation for breach of seniority provision in collective bargaining contract in recalling employees who had been laid off, that jury should deduct payments received by the plaintiffs under the employment security act, since such act does not suggest that the payment of unemployment compensation is to be construed as in lieu of wages (CL 1948, § 421.2). *Id.* 591.
4. The right of each of the plaintiffs, former employees of defendant corporation in action against it for damages for breach of seniority provision of collective bargaining contract with respect to recall after layoff, to recover damages must be proved with the same degree of particularity as would be required if separate individual actions had been instituted instead of having been assigned to plaintiffs named, hence, where record fails to show that has been done, the verdict in an aggregate amount cannot stand, cause is reversed and remanded for further proceedings under Supreme Court's inherent authority to grant a new trial to prevent injustice to some plaintiffs. *Id.*
5. Dismissal of action by laid-off employee who had sought to negotiate with employer directly, rather than through his union,

LABOR RELATIONS—Continued.

relative to application of seniority provision in recall to employment is affirmed by a court equally divided as to reversal and remand for filing necessary pleadings, and trial on the merits and affirmance with right to file an amended complaint within 30 days and direction to permit plaintiff's collective bargaining representative to intervene or appear as *amicus*, unless otherwise joined as a party (PA 1961, No 236, § 230). *Ries* v. *Evening News Association*, 614.

See EVIDENCE (4).

LAND CONTRACT—See FRAUD (1, 2); SPECIFIC PERFORMANCE (2).

LANDOWNERS—See NEGLIGENCE (4, 5).

LARCENY—See CRIMINAL LAW (16, 17); SEARCHES AND SEIZURES.

LAST EMPLOYER—See WORKMEN'S COMPENSATION (1, 3).

LAYOFF—See EVIDENCE (4); LABOR RELATIONS (2–5); MUNICIPAL CORPORATIONS (20).

LEAVE OF ABSENCE—See MUNICIPAL CORPORATIONS (20).

LEAVE TO APPEAL—See APPEAL AND ERROR (21, 22).

LEGISLATURE—See CONSTITUTIONAL LAW (1); MUNICIPAL CORPORATIONS (17, 18, 29); STATES.

LICENSEES—See NEGLIGENCE (4, 5).

LICENSES.

1. Amendments to ordinances and fees charged thereunder for building permits were invalid, where the revenue derived therefrom was in excess of the cost of issuing the license and regulating the business to which it applied. *Beachlawn Building Corporation* v. *City of St. Clair Shores*, 128.
2. Payments of excessive permit fees to a public officer must have been made involuntarily in order to be recoverable. *Id.*
3. The statute relative to payment of taxes or special assessments on personal or real property under protest, in writing, and for suit, within 30 days, to recover the same has no application to the recovery of excessive building permit fees (CL 1948, § 211.53). *Id.*
4. Corporation engaged in the building construction business which could not safely proceed to build houses without securing building permits from defendant city under its valid ordinance was compelled to pay excessive fees under invalid amendments to the ordinance which had increased the fees for the permits in order to continue in its business, hence, such payments may not be said to have been made voluntarily, especially, where plaintiff had made reasonable, albeit futile, efforts to make payments under protest. *Id.*
5. Payment of fees for building permits, invalid because in excess of cost of issuing the license and regulating the business of building construction, matters peculiarily within knowledge of defendant city, *held*, involuntary so far as excess is concerned. *Id.* 129.

LIENS—See ACCOUNTING (7).

LOSS OF CONSORTIUM—See HUSBAND AND WIFE.

MAINTENANCE—See DEDICATION.

MANDAMUS.

Mandamus in the Supreme Court is the proper remedy to review a circuit judge's exercise of his discretion in granting or denying of the right to take a delayed appeal from the probate court when he passes upon the showing made and any answer thereto. *In re McCullough*, 517.

See MUNICIPAL CORPORATIONS (21).

MARRIAGE—See ACCOUNTING (1); TENANCY IN COMMON (1).

MEALS—See ACCOUNTING (8).

MEDICAL BILLS—See WORKMEN'S COMPENSATION (4).

MEDICAL CARE FACILITIES—See COUNTIES; HOSPITALS.

MEETINGS—See SCHOOLS AND SCHOOL DISTRICTS (2).

MEMORIAL SERVICES—See TRUSTS (3).

MENTAL COMPETENCY—See DEEDS (4, 5, 7).

MENTAL IRRESPONSIBILITY—See DIVORCE (7).

MINIMUM LOT SIZE—See MUNICIPAL CORPORATIONS (8).

MINORS—See AUTOMOBILES (8, 15–17); DIVORCE (14); EVIDENCE (5, 6).

MISDEMEANOR—See CONSPIRACY; CRIMINAL LAW (13, 14).

MODIFICATION—See CONTRACTS (6).

MONOPOLIES.

1. A cause of action under the State antimonopoly statute is sufficiently set forth in well-pleaded allegations that a combination is made and entered into either for the purpose of establishing and maintaining a monopoly or that a combination is made and entered into for the purpose and with the intent of attempting to establish and maintain a monopoly (CL 1948, § 445.762). *Straits Transit, Inc.*, v. *Union Terminal Piers*, 274.

2. Bill of complaint which alleged there were 2 companies engaged in the passenger ferry service between an island and the same 2 points on the mainland and that one seeks to create a monopoly by eliminating the other from competition and establishing a monopoly, including an averment of offer by 1 of the defendants to purchase the entire assets of plaintiff corporation, *held*, to have adequately stated a cause of action under the State antimonopoly statute (CL 1948, § 445.762). *Id.*

3. The gravamen of bill of complaint that had been filed under the State antimonopoly statute is the purpose together with the intent of the combination and not whether in fact a tendency to create a monopoly was alleged (CL 1948, § 445.762). *Id.*

MORTGAGES.

Mortgage, executed by defendant corporation, which provided for interest at the rate of 2% per month *held,* not subject to defense of usury in foreclosure proceedings, where trial judge found as a matter of fact that defendant was not organized by its incorporators as a dummy corporation at the request of the lenders but for the incorporators' own purposes, the plaintiff having waived any right to hold defendant indorsers, the incorporators, for possible deficiency (CL 1948, § 450.78, as amended by PA 1957, No 116). *Borinstein* v. *Raycon Land Company,* 359.

See CONTRACTS (1–4).

MOTHER—See EVIDENCE (5, 6).

MOTIONS AND ORDERS—See COURTS (4).

MOTION TO DISMISS—See APPEAL AND ERROR (25); CONTRACTS (7, 8); PLEADING (2–5).

MUNICIPAL CORPORATIONS.

1. The courts of this State are ever open for the hearing of any citizen who claims interference with his political rights on the ground of racial discrimination because of the location of city boundaries so as to deprive citizens of their pre-existing municipal vote. *Taylor* v. *Township of Dearborn,* 47.
2. Findings of trial court in suit to enjoin further proceedings toward incorporation of a new home-rule city from hitherto unincorporated portions of township territory to the north and south of incorporated village and joined by a corridor 3 blocks wide which included 1 through street in easterly edge of village, which was not so arranged as to racially discriminate against anyone remaining in the village, and was not gerrymandering, *held,* supported by evidence and to have justified dismissal of the bill (US Const, art 6). *Id.*
3. No right or penalty may accrue in favor of defendant township, new city officers or county officers on account of execution and filing of stay bond hitherto ordered in suit to enjoin further proceedings toward incorporation of new home-rule city from township and village territory (US Const, Ams 14, 16). *Id.*
4. Adjudication is made that proceedings to incorporate new home-rule city from township territory on north and south of incorporated village connected by corridor 3 blocks wide along easterly side of the village and from its territory are valid as against claim in class suit that constitutional rights are infringed, but jurisdiction is retained to permit future petitions seeking specific relief against new city from future action resulting in racial discrimination (US Const, Ams 14, 15). *Id.* 48.
5. Determination of the reasonableness of a municipal zoning ordinance must be made in the light of the facts presented in each case. *Roll* v. *City of Troy,* 94.
6. Mere depreciation in value by itself is not enough in testing a zoning classification in a municipal ordinance to hold it unreasonable. *Id.*

MUNICIPAL CORPORATIONS—Continued.

7. Comprehensive municipal zoning plans, like all others, must meet the test of reasonableness. *Id.*
8. Finding of trial court that municipal zoning ordinance providing for a minimum area of 30,000 square feet per lot in parcel plaintiffs sought to subdivide was unconstitutional under present conditions, because it was unnecessary to have such a large minimum area *held,* proper. *Id.*
9. Zoning is a legislative function, hence, provision of trial court's decree empowering plaintiffs to subdivide their property in accordance with zoning ordinance which they proposed was unauthorized, the court having no duty, right, or obligation to undertake to pass upon the reasonableness of proposed zoning that is not yet the subject of an ordinance. *Id.*
10. The home-rule provisions of the Constitution consigned broad general powers of government and almost exclusive rights in the conduct of their affairs to those units of government likely to be best informed of local needs and best able to satisfy them, subject to overriding legislative restraint to secure conservative action on the part of those responsible for the conduct of such affairs (Const 1908, art 8, §§ 20–25; CL 1948, § 117.4j). *Dooley* v. *City of Detroit (Poindexter* v. *Same),* 195.
11. Home-rule cities do not possess plenary powers and may not, absent legislative grant, assume powers not essential to local self-government, but such restriction does not require that every power exercised by a city, such as the imposition of a new tax, be specifically delegated by legislative grant where there is delegated the power to impose taxes of a designated generic kind (CL 1948, § 117.4i, as amended by PA 1957, No 131). *Id.* 196.
12. The legislative grant of power to a home-rule city to collect excises empowered such cites to seek municipal revenues by whatever excises the municipalities chose, such as an income tax, subject to the legislature's constitutionally ordained duty to limit their rate of taxation for municipal purposes (Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12[m]; Detroit Ordinance No 694–F, ch No 84). *Id.*
13. It is mandatory that a home-rule city charter shall provide for the qualifications, duties, and compensation of its officers (CL 1948, § 117.3[d], as amended by PA 1960, No 14). *Doyle* v. *City of Dearborn,* 236.
14. *Qualifications,* as the term is used in statute setting forth required provisions of a home-rule city charter, is used in a generic sense and includes qualifications to be elected to office and also qualifications to hold the office (CL 1948, § 117.3[d], as amended by PA 1960, No 14). *Id.*
15. Plaintiff, a State senator, concededly qualified to be elected to office of city councilman, was not qualified to serve as councilman without first having resigned his office as a member of the State legislature, where city charter provision declared it to be contrary to public policy for an elective city official to be employed by or hold office in, and paid wages or salary by, any other unit of government raising its operating budget in whole

MUNICIPAL CORPORATIONS—Continued.

or in part by public taxation (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19). *Id.*

16. It is within the express authority of the home-rule city act and consonant with general public policy for a city charter to impose a restriction upon a person holding an elective office in the city that the incumbent not hold office in another governmental unit raising its operating budget in whole or in part by taxation (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19). *Id.*

17. A State legislator who has been elected to office of home-rule city councilman in city whose charter restricted such officers from holding office in any other governmental unit raising its operating budget in whole or in part by taxation, had the option of resigning from the legislature or refusing the oath as councilman (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19). *Id.* 237.

18. A home-rule city charter may prohibit a person from holding 2 offices which the common law might not declare incompatible (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19). *Id.*

19. Summary judgment for defendant city was properly granted in action by former State senator to recover salary as city councilman during period when he was also a State legislator, where city charter automatically vacated his office as councilman if he were also an officer in a governmental unit deriving its operating budget in whole or in part from taxation, notwithstanding he had served as councilman without his privilege to do so having been challenged, since his right to salary had been automatically forfeited (CL 1948, § 117.3[d], as amended by PA 1960, No 14; Dearborn Charter, § 4.19). *Id.*

20. A layoff of city employees for economy reasons does not effect an abolition of the jobs within the meaning of city charter provision that in the event of abolition of a position the employee shall be given employment in the next lower position in the department but that if separated from service for economy reasons he should be given an indefinite leave of absence without compensation and recalled to active service when the first opening occurs according to his seniority at the time when the vacancy existed (Flint City Charter, § 245). *Bickell v. Flint Civil Service Commission*, 316.

21. Whether or not positions of plaintiff civil service employees of defendant city were abolished or they were given indefinite leaves of absence without compensation but with certain recall rights under city charter was a question of fact upon which plaintiffs had the burden of proof in their mandamus proceeding to compel reinstatement on the payroll, a burden which has not been sustained according to record presented (Flint City Charter, § 245). *Id.*

22. Plaintiff plattors who had constructed a 5′ fence to set off their property from abutting school lands *held*, not entitled to recover the cost thereof from defendant village, where record shows plaintiffs had never asked the FHA to waive requirement for a fence and that fence was constructed 1′

MUNICIPAL CORPORATIONS—Continued.

higher than that called for by agreement between plaintiffs and the village incident to approval of plat (CL 1948, § 560.1 *et seq.*, as amended). *Gordon* v. *Village of Wayne*, 329.

23. Requirement of contract, entered into between plattors of land and village authorities relative to approval of plats, that plaintiffs make a contribution into a so-called park fund, *held*, to have been tantamount to compulsion, there being no statutory authority to require either the donation of land or monetary equivalent, hence plaintiffs are entitled to recovery of such contribution in action of assumpsit (CL 1948, § 560.1 *et seq.*, as amended). *Id.*

24. Sums expended by plaintiff plattors for cost of inspection by defendant village of improvements, required to be made before plats of land were approved, *held*, recoverable in action of assumpsit, since the obligation of inspection was that of the village and furnished no consideration for such payments (CL 1948, § 560.1 *et seq.*, as amended). *Id.*

25. Payments of demand charges for supply of water to users of air-conditioning equipment of the nonrecirculating type were not voluntary, where discontinuance of service was a method available to the defendant city, as supplier of the water, in in the event of nonpayment of rates charged and was exercised as a matter of policy. *Theatre Control Corporation* v. *City of Detroit*, 383.

26. Payment under protest is not a condition precedent to recovery, where payment of demand charges to users of city water for air-conditioning equipment of the nonrecirculating type had not been made voluntarily as the service might have been discontinued in the absence of compliance with the demand. *Id.*

27. The statutory provision requiring payment of taxes and special assessments, under protest in writing, signed by the taxpayer and specifying the grounds of the protest is not applicable to demand charges for supplying water to users of air-conditioning equipment of the nonrecirculating type, since such charges are neither taxes nor assessments but a charge for furnishing of a utility service, hence, where plaintiff payers of such charges had commenced proceedings to enjoin collection of such charges and had unequivocally indicated their position, they were entitled to recover such charges (CL 1948, § 211.53). *Id.*

28. Home-rule city ordinance prohibiting the towing of vehicles on expressways within the city from 6 to 9 a.m. and from 3 to 7 p.m. except towing of vehicles disabled on the expressway to nearest exit ramp *held*, not invalid as being outside the power of the city to enact, especially where the State has not intervened nor made known any objection to the ordinance in question (Const 1908, art 8, § 28; Detroit Ordinance No 348-F). *Michigan Towing Association, Inc.*, v. *City of Detroit*, 440.

29. The reasonable control of streets accorded to home-rule cities under the Constitution does not give them exclusive control, the reasonableness of such control not being within the final determination of the city in all cases, but determinable in some instances in accordance with the legislature's interpretation, if it can be approved by the court, but such reasonable control

MUNICIPAL CORPORATIONS—Continued.

may not be taken from them by the courts, by individuals, by administrative bodies, or by the legislature (Const 1908, art 8, § 28; Detroit Ordinance No 348-F). *Id.*

30. The streets of a city belong to the public, and for ordinary use and general transportation and traffic they are free and common to all, and any control sought to be exercised over them by the city must be such as will not defeat or seriously interfere with their enjoyment, but common carriers have no right to such use for private gain without the consent of the city (CL 1948, § 475.1 *et seq.*, as amended). *Id.* 441.

31. The distinction between the use of streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental, and while, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld. *Id.*

32. The reasonable control of streets accorded municipalities by the Constitution empowers a home-rule city to protect drivers of vehicles by the enactment of an ordinance prohibiting the towing of vehicles on expressways during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing of vehicles disabled on the expressway to the nearest exit ramp, thereby eliminating a distraction and diminishing the danger of accidents (Const 1908, art 8, § 28; Detroit Ordinance No 348-F). *Id.*

33. One claiming an ordinance is arbitrary, unreasonable, or discriminatory has the burden of so showing. *Id.*

34. Plaintiff association of tow truck owners seeking to have declared invalid home-rule city's ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m. except towing vehicles disabled on the expressways to nearest exit ramp, *held*, not to have sustained their burden of proof that the ordinance was invalid, since they may yet drive their tow trucks thereon without towing vehicles at any time, mere inconvenience and additional cost of operation being insufficient to sustain allegation of discrimination or arbitrary hindrance and prevention from engaging in a lawful business (Detroit Ordinance No 348-F). *Id.* 442.

35. An ordinance that is subject to differing interpretations will be so construed as to result in the ordinance being held constitutional, where that is a permissible interpretation. *Id.*

36. Home-rule city ordinance prohibiting the towing of disabled vehicles on expressways within the city during hours from 6 to 9 a.m. and from 3 to 7 p.m., except towing vehicles disabled on the expressway to nearest exit ramp is construed as to permit towing of disabled vehicles entering the expressway from end-connecting highways at city limits to nearest exit ramp without being in violation of the ordinance (Detroit Ordinance No 348-F). *Id.*

37. Provisions of section of home-rule statute relative to annexation of territory by one city from another city, where both have a population of more than 15,000 *held*, ambiguous (CLS

MUNICIPAL CORPORATIONS—Continued.

1956, § 117.9). *Magnuson* v. *Kent County Board of Canvassers*, 649.

38. Final sentence of ambiguous section of home-rule city statute providing that "this section shall not be construed so as to give *any* city authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected" is construed as requiring that the vote of the entire cities affected be counted separately and by the use of the term *any city* is not limited to cities of less than 15,000 population as to which some preceding provisos especially pertained (CLS 1956, § 117.9). *Id.*

See CARRIERS (5); CONSTITUTIONAL LAW (1–4); COSTS (7, 11, 18); ELECTRICITY (1, 2, 8); STATUTES (1); TAXATION (1, 5, 9–12, 14).

MURDER—See HOMICIDE.

MUTUALITY OF OBLIGATION—See SPECIFIC PERFORMANCE (1).

MUTUAL MISTAKE—See CONTRACTS (5).

NAMES—See CHARITIES (1).

NARCOTICS—See CRIMINAL LAW (6, 8).

NECESSITY—See CONSTITUTIONAL LAW (5); COSTS (15).

NEGLIGENCE.

1. One who suddenly finds himself in peril without time to consider the best means to avoid impending danger is not guilty of negligence if he fails to adopt what subsequently may appear to have been the better method, unless the emergency is brought about by his own negligence. *Hoag* v. *Fenton*, 321.
2. Ordinary care is not what one does, considered of itself and apart from all other considerations, but what he does as related to the circumstances under which he acts, and it is in consideration of these circumstances that the test is to be applied. *Patzer* v. *Bowerman-Halifax Funeral Home*, 351.
3. The common-law standard of reasonable care is constant although it may require an infinite variety of precautions, or acts of care, depending upon the circumstances, and it is primarily a question of fact as to just what precautions were appropriate to the danger apparent in the case at hand. *Frederick* v. *City of Detroit*, 426.
4. A landowner is bound to use ordinary care to prevent injury, arising from active negligence, to a licensee of whose presence he is aware or, in the exercise of ordinary care, he should be aware. *Draper* v. *Switous*, 468.
5. Members of the public who go across a landowner's premises on a commonly-traveled way or with his knowledge and acquiescence are not trespassers, but licensees and the landowner has a greater duty of care than he would to licensees or trespassers generally. *Id.*

NEGLIGENCE—Continued.

6. Trial court's finding in nonjury case that pedestrian whose path on sidewalk was blocked by car waiting to be serviced at defendant's service station and car wash and who fell on ice which had accumulated on 3" slope from sidewalk to entrance of car wash was not guilty of contributory negligence in proceeding over defendant's property rather than around street end of car and that defendant was guilty of active negligence in creating the condition of thick ice near the opening of his wash rack, *held,* justified by record made in pedestrian's action for injuries sustained in fall on ice. *Id.* 469.
7. Evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, is held to the duty of exercising such care as would a reasonably prudent person having such notice or knowledge. *Freed* v. *Simon,* 473.
8. The rejection of testimony of witnesses of prior fall of another party through the same hole in the floor of a cattle trailer as plaintiff fell through and received injuries for which he sought recovery *held,* reversible error, where there is evidence that the hole was covered by the owner but that the covering lasted only a short time. *Id.*

See AUTOMOBILES (1, 12–16); CARRIERS (1–4); HOSPITALS; HUSBAND AND WIFE; RAILROADS (2); TRIAL (10).

NEITHER PARTY PREVAILING ENTIRELY ON APPEAL—See COSTS (3).

NET OPERATING INCOME—See ELECTRICITY (6).

NEWLY-DISCOVERED EVIDENCE—See BASTARDS.

NEW TRIAL.

1. The denial of a new trial is affirmed in the absence of a showing on appeal that the trial court had abused its discretion in so doing. *Sylvester* v. *Grabowski,* 503.
2. Hearsay affidavits are not proper affidavits upon which to base an order for a new trial. *Id.*
3. The Supreme Court's inherent authority to grant a new trial is exercised to prevent injustice to individual plaintiffs. *Pennington* v. *Whiting Tubular Products, Inc.,* 591.

See APPEAL AND ERROR (1, 7); BASTARDS; COSTS (17); COURTS (4); LABOR RELATIONS (4).

NIGHTTIME—See EVIDENCE (2).

NONAPPEARANCE—See DISMISSAL AND NONSUIT (2–4).

NONEXISTENT INJURY—See AUTOMOBILES (3).

NONJURY CASE—See APPEAL AND ERROR (16); AUTOMOBILES (14); HIGHWAYS AND STREETS (4); NEGLIGENCE (6).

NONPROFIT CORPORATIONS—See CHARITIES (1).

NONRESIDENTS—See COSTS (7); TAXATION (5, 9, 14).

NONSUPPORT—See DIVORCE (11).

NO-PROGRESS CALENDAR—See COSTS (13); COURTS (2).

NOTICE—See CONTRACTS (11); DISMISSAL AND NONSUIT (3); GARNISHMENT (4); GIFTS (1); INSURANCE (1, 6); WORKMEN'S COMPENSATION (3).

NOVATION—See CONTRACTS (6).

OBSERVATION—See AUTOMOBILES (2, 9, 17).

OCCUPATIONAL DISABILITY—See WORKMEN'S COMPENSATION (1).

OCCUPATION TAXES—See TAXATION (7).

OFFICERS—See MUNICIPAL CORPORATIONS (3, 13, 14, 16–19).

OPENING STATEMENT—See CRIMINAL LAW (9); TRIAL (5, 6).

OPINION EVIDENCE—See EMINENT DOMAIN (3); EVIDENCE (3).

OPINIONS—See COURTS (4).

OPINION STATEMENTS—See FRAUD (3).

OPPORTUNITY—See DEEDS (4).

OPTIONS—See FRAUD (5).

ORAL CONTRACTS—See ACCOUNTING (8).

ORDERS—See PUBLIC SERVICE COMMISSIONS.

ORDINANCES—See CARRIERS (5); CONSTITUTIONAL LAW (3, 4); COSTS (7, 14); ELECTRICITY (2); JUSTICES OF THE PEACE (1); LICENSES (1, 4); MUNICIPAL CORPORATIONS (5, 6, 8, 9, 12, 28, 29, 32–36).

OUT-OF-STATE EMPLOYER—See COSTS (4); WORKMEN'S COMPENSATION (2).

PAIN AND SUFFERING—See DAMAGES (1, 2).

PARENT AND CHILD—See ACCOUNTING (1, 3); APPEAL AND ERROR (2); DEEDS (1–3, 6); EVIDENCE (5, 6); PRINCIPAL AND AGENT (4).

PARKING—See AUTOMOBILES (1–3); JUSTICES OF THE PEACE (1).

PARKS—See MUNICIPAL CORPORATIONS (23).

PAROL FAMILY TRUST—See ACCOUNTING (5).

PARTIES.

1. A workmen's compensation insurer is a real party in interest in an action under workmen's compensation act against third-party tortfeasor who injured the employee (CLS 1956, § 413.15). *Harrison* v. *Ford Motor Company (Arthur G. McKee & Company, for use and benefit of General Accident Assurance Company,* v. *Same),* 683.
2. One may not sue himself, for a full and fair examination cannot be had when 1 person controls counsel for both sides. *Id.*
3. A workmen's compensation insurer, although a real party in interest in an injured employee's action against third-party tortfeasor, and entitled to reimbursement from any recovery against such tortfeasor, would not be entitled to intervene in such an action, where it was also the insurer of the third-party tortfeasor, since one may not sue himself (CLS 1956, § 413.15). *Id.*

See DISCOVERY (7); EVIDENCE (6); LABOR RELATIONS (5).

PARTNERSHIP—See ACCOUNTING (7); TENANCY IN COMMON (2).

PART OF A PARCEL—See EMINENT DOMAIN (1).

PASSENGERS—See CARRIERS (1–4); RAILROADS (2).

PAST CONSIDERATION—See CONTRACTS (2).

PATERNITY—See APPEAL AND ERROR (20); BASTARDS.

PATIENTS—See HOSPITALS.

PAVEMENT—See AUTOMOBILES (1–4); CONTRACTS (8); EVIDENCE (3); HIGHWAYS AND STREETS (4).

PAYMENT—See ACCOUNTING (2); APPEAL AND ERROR (1); CONTRACTS (1, 3); LICENSES (2–5); MUNICIPAL CORPORATIONS (25–27); SPECIFIC PERFORMANCE (2); WORKMEN'S COMPENSATION (4).

PEDESTRIAN—See NEGLIGENCE (6).

PENALTY—See MUNICIPAL CORPORATIONS (3).

PERFORMANCE—See CONTRACTS (12).

PERMITS—See APPEAL AND ERROR (1); LICENSES (1, 3–5).

PERSONAL KNOWLEDGE OF COMPLAINANT—See CRIMINAL LAW (12).

PHOTOGRAPHS—See EVIDENCE (2).

PHYSICIANS AND SURGEONS—See APPEAL AND ERROR (24); CRIMINAL LAW (18); DAMAGES (1); TRIAL (11).

PLATS—See COSTS (11); MUNICIPAL CORPORATIONS (22–24).

PLEADING.

1. A pleading which fails to allege facts and circumstances constituting the claimed fraud amounts to no more than pleading a conclusion and is not sufficient to entitle the party so pleading to a hearing on the claim of fraud. *Reinink* v. *Van Loozenoord,* 121.

PLEADING—Continued.

2. All well-pleaded allegations in a pleading are assumed to be true in determining whether or not to grant a motion to dismiss. *Straits Transit, Inc.*, v. *Union Terminal Piers*, 274.
3. A rule-provided motion to dismiss a declaration for failure to state a cause of action cannot be tested by factual affidavit of support, or factual affidavit in opposition, or both, in view of court rule requirement that pleading shall not state matters of evidence (GCR 1963, 11.9). *Chatham Super Markets, Inc.*, v. *Ajax Asphalt Paving, Inc.*, 335.
4. All facts that are well pleaded must be taken as true for the purposes of a motion to dismiss the pleading before trial. *Id.*
5. A cause of action, as the term is used in motion to dismiss for failure to state a cause of action, means the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant and is not to be confused with the plaintiff's right to judgment, the latter being dependent upon the proof offered in support of the asserted case and upon what defenses can be established against the cause of action asserted. *Id.*
6. The scope of a declaration may not be broadened by a bill of particulars. *Wright* v. *Bateson*, 661.

See ACCOUNTING (1); CONTRACTS (7, 8, 13); DISMISSAL AND NONSUIT (1); DIVORCE (1); EQUITY (3); MONOPOLIES.

POLICEMEN—See CRIMINAL LAW (2, 9, 11, 18); SEARCHES AND SEIZURES.

POLITICAL RIGHTS—See MUNICIPAL CORPORATIONS (1).

POLL TAX—See TAXATION (6).

POPULATION—See MUNICIPAL CORPORATIONS (38).

POSSESSION—See HIGHWAYS AND STREETS (1).

PRANKS—See GARNISHMENT (1); INSURANCE (2–4).

PREJUDICE—See APPEAL AND ERROR (2, 24); ELECTRICITY (7); HOMICIDE (4).

PRELIMINARY EXAMINATION—See CRIMINAL LAW (9, 15, 16).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (16); AUTOMOBILES (14).

PRESUMPTIONS—See AUTOMOBILES (12, 14); DEEDS (2, 5, 6).

PRETRIAL—See DISCOVERY (4); STIPULATIONS.

PRINCIPAL AND AGENT.

1. An implied agency must be based upon facts and facts for which the principal is responsible; and upon a natural and reasonable, but not a strained, construction of those facts. *Shinabarger* v. *Phillips*, 135.

PRINCIPAL AND AGENT—Continued.

2. A principal may be liable for the tortious acts of an agent if done while acting within the apparent scope of authority. *Id.* 136.

3. Agency cannot be established by the declaration of the supposed agent alone, but it is not necessarily reversible error to receive evidence of such declaration, where there are other attending facts and circumstances from which an inference of agency may be drawn, the question being one for the jury. *Id.*

4. Admission in evidence as to son's declaration that he was boss of gasoline station when his father was not in town *held*, not prejudicial error on father's appeal in action by plaintiff customer against the father and son for injuries received in assault by latter, in view of other facts and circumstances supporting a finding of agency on part of the son. *Id.*

5. A confidential or fiduciary relationship ordinarily exists between principal and agent, within the meaning of the rule as to the raising of a constructive trust in the case of breach of such relationship. *MacKenzie* v. *Fritzinger*, 285.

See APPEAL AND ERROR (2); ASSAULT AND BATTERY; TRUSTS (2).

PRIOR ACCIDENTS—See NEGLIGENCE (7, 8).

PROBABLE CAUSE—See CRIMINAL LAW (16).

PROBATE COURT—See APPEAL AND ERROR (21); MANDAMUS; WILLS.

PRO CONFESSO CASE—See DIVORCE (15).

PROFESSIONAL PRIVILEGE—See ATTORNEY AND CLIENT (1).

PROFITS—See ACCOUNTING (8).

PROMISE—See CONTRACTS (1).

PROSECUTING ATTORNEY—See CRIMINAL LAW (18).

PROSTITUTION—See CRIMINAL LAW (13).

PROTEST—See LICENSES (3, 4); MUNICIPAL CORPORATIONS (26, 27).

PROXIMATE CAUSE—See AUTOMOBILES (14, 16); HIGHWAYS AND STREETS (4); RAILROADS (2).

PUBLIC POLICY—See CRIMINAL LAW (7); DIVORCE (1); MUNICIPAL CORPORATIONS (15, 16).

PUBLIC QUESTION—See COSTS (2, 10, 12, 14, 18).

PUBLIC SAFETY—See CONSTITUTIONAL LAW (4); MUNICIPAL CORPORATIONS (32).

PUBLIC SERVICE COMMISSIONS.

Party who complains of an order of the public service commission has the burden of proof to show by clear and satisfactory evidence that the order is unlawful or unreasonable, as the

PUBLIC SERVICE COMMISSIONS—Continued.

case may be (CL 1948, §§ 460.4, 460.54; CLS 1956, § 462.26). *City of Ishpeming* v. *Public Service Commission*, 295.

See APPEAL AND ERROR (10, 11); CARRIERS (5); ELECTRICITY (1–7).

PUNISHMENT—See CRIMINAL LAW (14).

QUALIFICATIONS—See MUNICIPAL CORPORATIONS (14–17); STATES.

QUESTION FOR TRIER OF FACTS—See APPEAL AND ERROR (5, 10); ASSAULT AND BATTERY (1); AUTOMOBILES (7, 11, 13); CARRIERS (1, 4); HIGHWAYS AND STREETS (3); PRINCIPAL AND AGENT (3).

QUESTIONING OF WITNESSES BY COURT—See APPEAL AND ERROR (24); TRIAL (11).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (4, 7, 17, 20, 22); GARNISHMENT (1, 2); LABOR RELATIONS (2).

RACIAL DISCRIMINATION—See MUNICIPAL CORPORATIONS (1, 2, 4).

RAILROADS.

1. Motorist *held*, to have had right-of-way at grade crossing of railroad in open flat country, where defendant's slowly-moving diesel engine was approaching on irregularly used spur track. *Leman* v. *Grand Trunk Western Railroad Company*, 521.
2. Evidence presented in action by passenger of northbound automobile against railroad company for injuries sustained when injured at grade crossing in midafternoon in summer by slowly moving westbound diesel engine *held*, sufficient to sustain findings of jury that both the railroad and plaintiff's driver were guilty of causal negligence, there being no question of contributory negligence of the plaintiff passenger involved. *Id.*

RAMP—See CONSTITUTIONAL LAW (4); MUNICIPAL CORPORATIONS (28, 32, 34, 36).

RATES—See COSTS (10); ELECTRICITY.

REAL ESTATE—See TAXATION (15–17).

REAL PARTY IN INTEREST—See PARTIES (1, 3).

REAL REPRESENTATION—See EVIDENCE (2).

REALTORS—See CONTRACTS (1–4); TRIAL (6).

REAR-END COLLISION—See APPEAL AND ERROR (14); AUTOMOBILES (12, 13).

REASONABLENESS—See MUNICIPAL CORPORATIONS (5, 6).

REBUTTAL—See AUTOMOBILES (12).

RECALL—See EVIDENCE (4); LABOR RELATIONS (3, 5).

RECORD—See ACCOUNTING (7); APPEAL AND ERROR (3, 5, 6, 7, 15, 19, 21, 22, 24); CONTRACTS (12); COSTS (9); CRIMINAL LAW (6, 12); DISCOVERY (5); DISMISSAL AND NONSUIT (4); DIVORCE (13, 14); EVIDENCE (1); FRAUD (2); LABOR RELATIONS (4); MUNICIPAL CORPORATIONS (21); TRIAL (11).

REDEMPTION—See CONTRACTS (1, 3, 4).

REFERENDUM—See MUNICIPAL CORPORATIONS (38).

REFORMATION OF INSTRUMENTS.

Plaintiff, guardian of the estate of his mentally incompetent wife, in suit to reform a deed to include his wife's name as grantee therein along with that of the named grantee, her sister now deceased, which deed had been executed in 1954 and given pursuant to a 1928 land contract of which a copy identified the 2 sisters as "tenants by the entirety" *held,* not to have sustained his burden of proof, where wife had not sought any interest in the property for the 7 years after the deed was executed before she was declared incompetent and upkeep and taxes had not been paid for by the wife for last 22 years before deed was executed. *Haas* v. *Klapatch,* 499.

REGULAR COURSE OF BUSINESS—See EVIDENCE (1).

REGULATIONS—See MUNICIPAL CORPORATIONS (31).

REINSTATEMENT—See COSTS (13); COURTS (2); DISMISSAL AND NONSUIT (4); MUNICIPAL CORPORATIONS (21).

RELIANCE ON MISREPRESENTATION—See FRAUD (1, 2).

REMAND—See APPEAL AND ERROR (1, 8); AUTOMOBILES (15).

RENT—See TAXATION (8); TENANCY IN COMMON (3).

REPAIRS—See FRAUD (3).

REPORTS—See DISCOVERY (2, 6, 7); ELECTRICITY (7).

REPRESENTATION—See CONTRACTS (1).

REQUEST TO CHARGE—See AUTOMOBILES (1); TRIAL (2–4, 7).

RESCISSION—See CONTRACTS (5); FRAUD (2, 3).

RES GESTAE WITNESS—See CRIMINAL LAW (10).

RESIDENTS—See COSTS (7); TAXATION (13).

RESORT—See HIGHWAYS AND STREETS (2).

RETURN ON CAPITAL—See ELECTRICITY (6).

RIGHT-OF-WAY—See EMINENT DOMAIN (5); RAILROADS (1).

RIGHTS OF ACTION—See EVIDENCE (4).

ROBBERY—See CRIMINAL LAW (6, 8, 9, 11); HOMICIDE (1, 2).

RULE AGAINST PERPETUITIES—See CHARITIES (2); TRUSTS (3).

RUSH HOURS—See COSTS (14).

SALARY—See MUNICIPAL CORPORATIONS (19).

SALES—See TAXATION (15, 16).

SALVATION ARMY—See WILLS.

SCHOOLS AND SCHOOL DISTRICTS.

1. School board's contract with superintendent whereby latter was employed for 5-year term at an increase of $200 per year over previous 3-year contract which yet had 1 year to run *held,* to have been executed by the board within the limits of reasonableness and good faith. *Sharon* v. *Spalding School District,* 346.
2. Proposed addendum to contract with superintendent, had no effect in law, where the addendum was not executed by the school board at a meeting thereof (CL 1948, § 355.1). *Id.*
3. Contract with plaintiff superintendent for 5-year term, duly executed by school board at a meeting, which had been executed a year before end of term of previous contract, and which abrogated same, *held,* a complete contract that fully covered the entire subject matter between the parties, hence, school board was liable for its breach by not permitting him to serve after lapse of 1 year under the 5-year contract (CL 1948, § 355.1). *Id.*

See MUNICIPAL CORPORATIONS (22).

SEARCHES AND SEIZURES.

Evidence obtained by police officer as result of search, without a warrant, of defendant's car then in possession of the sheriff while defendant was lodged in jail on a charge unrelated to accusation of breaking and entering a store with intent to commit a larceny therein and without cause, probable or otherwise related to such latter crime, *held,* an unreasonable search and seizure and admission thereof over timely objection constituted reversible error, where the verdict of the jury might well have been different without it. *People* v. *Carr,* 252.

See APPEAL AND ERROR (7); CRIMINAL LAW (17).

SELF-DEFENSE—See HOMICIDE (3).

SELF-IMPOSED INACTION—See CONTRACTS (4).

SENATOR—See MUNICIPAL CORPORATIONS (15, 19).

SENIORITY—See APPEAL AND ERROR (23); EVIDENCE (4); LABOR RELATIONS (2-5); MUNICIPAL CORPORATIONS (20).

SHERIFFS AND CONSTABLES—See CRIMINAL LAW (6); SEARCHES AND SEIZURES.

SHOPPING CENTER—See COSTS (16); INJUNCTION.

SHOWUPS—See CRIMINAL LAW (9).

SISTERS—See REFORMATION OF INSTRUMENTS.

SOFT DRINK—See FOOD (2, 4).

SPECIFIC PERFORMANCE.

1. The fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the other party, the rule of mutuality being satisfied if there be mutuality of obligation. *Reinink* v. *Van Loozenoord*, 121.
2. Plaintiff purchaser under a contract for the purchase of land *held*, entitled to decree of specific performance conditioned upon securing an FHA loan and payment of purchase price as provided in the contract, where plaintiff had complied with the terms of the contract insofar as he could without vendors' co-operation in the matter of securing a loan. *Id.* 122.

See EQUITY (1).

SPECIFIC TAXES—See TAXATION (1).

SPEED—See AUTOMOBILES (5–7, 9, 11, 13).

SPEEDY TRIAL—See CRIMINAL LAW (2–7).

SPUR TRACK—See RAILROADS (1).

STARE DECISIS—See COURTS (1).

STATE HIGHWAY COMMISSIONER—See CONSTITUTIONAL LAW (5); COSTS (15).

STATEMENTS—See DISCOVERY (2, 7).

STATES.

The only valid limitations upon qualifications for membership in the State legislature are those imposed by State law. *Doyle* v. *City of Dearborn*, 236.

See COUNTIES; HOSPITALS; LABOR RELATIONS (1); MUNICIPAL CORPORATIONS (1).

STATION WAGON—See AUTOMOBILES (1–4).

STATUTES.

1. The local construction by a home-rule city of provisions of the home-rule city act does not preclude the Supreme Court from giving a different construction (CLS 1956, § 117.3, subd [g], as amended by PA 1960, No 14; CL 1948, § 117.4a). *Dooley* v. *City of Detroit* (*Poindexter* v. *Same*), 196.
2. Statutes and ordinances apparently expressing a universally obligatory rule of conduct may properly be construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. *Patzer* v. *Bowerman-Halifax Funeral Home*, 350.
3. A court which must construe an ambiguous statute may properly look to the result of the construction to aid it in determining legislative intent. *Magnuson* v. *Kent County Board of Canvassers*, 649.

See ACTION (2); APPEAL AND ERROR (11, 13, 14, 21); AUTOMOBILES (4–7, 9–13); CONSPIRACY; CONSTITUTIONAL LAW (1, 2,

STATUTES—Continued.

5); CONTRACTS (8); CORPORATIONS (1, 2); COSTS (2, 4, 7, 10, 11, 13–15, 18); COUNTIES; COURTS (1, 2); CRIMINAL LAW (1, 2, 6–8, 13, 18); DEDICATION; DIVORCE (3, 5–8); ELECTRICITY; EMINENT DOMAIN; EVIDENCE (3); HIGHWAYS AND STREETS; HOMICIDE; HOSPITALS; HUSBAND AND WIFE; INJUNCTION; LABOR RELATIONS (3); LICENSES (3); MONOPOLIES; MORTGAGES; MUNICIPAL CORPORATIONS (10–19, 22–24, 27, 30, 37, 38); PARTIES (3); PUBLIC SERVICE COMMISSIONS; SCHOOLS AND SCHOOL DISTRICTS (2, 3); STATES; TAXATION (5, 9–17); TRIAL (2–4).

STIPULATIONS.

An agreement or stipulation between the parties that is made at the pretrial conference is binding upon the trial court, unless it is modified at or before trial, or to prevent an injustice. *Wentzel* v. *Hutchison*, 420.

See DISMISSAL AND NONSUIT (1).

STOCK AND STOCKHOLDERS—See CORPORATIONS (1, 2); DIVORCE (13).

STOPPING—See AUTOMOBILES (1, 2, 4, 5); CARRIERS (1).

STREET SWEEPER—See EVIDENCE (2).

SUBCONTRACTOR—See CONTRACTS (8, 12, 13, 15).

SUBDIVISION—See HIGHWAYS AND STREETS (2).

SUDDEN STOPPING—See CARRIERS (1).

SUIT AGAINST SELF—See PARTIES (2).

SUPERINTENDENT—See SCHOOLS AND SCHOOL DISTRICTS.

SUPERMARKET—See CONTRACTS (8).

SUPERVISION—See CONTRACTS (15).

SUPPORT OF CHILDREN—See DIVORCE (1, 11, 14).

SUPREME COURT—See APPEAL AND ERROR (1, 3–6, 9–11, 13, 16, 18–20, 22, 24); AUTOMOBILES (15); CONSTITUTIONAL LAW (3, 4); COSTS (4, 17); DAMAGES (3); DIVORCE (2, 4, 10); EMINENT DOMAIN (2, 4); LABOR RELATIONS (4); MANDAMUS; NEW TRIAL (3); STATUTES (1).

SURVIVORS—See ACCOUNTING (4).

SWORN COMPLAINT—See CRIMINAL LAW (12).

TAVERN BUSINESS—See ACCOUNTING (1); TENANCY IN COMMON (3).

TAXATION.

1. The Constitution authorizes specific, as well as ad valorem taxes, but does not otherwise explicitly authorize the legislature or cities to impose income taxes, nor does it designate any specific taxes included in its general grant (Const 1908, art 10, §§ 3, 4). *Dooley* v. *City of Detroit (Poindexter* v. *Same)*, 194.

TAXATION—Continued.

2. Generally, income taxes are excises, not property taxes. *Id.*

3. The incidence of a tax on income differs from that of a tax on property as neither is dependent upon the possession by the taxpayer of the subject of the other, since the taxpayer's income may be taxed, although he owns no property, and his property may be taxed, although it produces no income; income being taxed but once, and the same property recurrently. *Id.*

4. The tax on income and the tax on property are predicated upon different governmental benefits; protection offered to the property in one state not being extended to the receipt and enjoyment of income from it in another. *Id.*

5. The income tax levied by home-rule city "on all salaries, bonuses, wages, commissions, dividends, interest, net profits from rentals, capital gains less capital losses, and other income of residents of the city; * * * and on the income of nonresidents of the city * * * on salaries, bonuses, wages, and other compensation for work done in the city, * * * services rendered in the city, * * * and on the net profits from rentals received from property located in the city * * * and capital gains less capital losses from the sale of real and tangible personal property located in the city; * * * and on the net profits from all businesses, professions, or other activities conducted in the city * * * by residents of the city; * * * and on the net profits from all businesses, professions, or other activities conducted in the city * * * by nonresidents; and on the net profits earned by all corporations as a result of work done, services rendered, and other business conducted in the city" *held*, an excise tax authorized by the home-rule act (Const 1908, art 10, §§ 3, 4; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Ordinance No 694-F, ch No 84). *Id.* 195.

6. An excise tax is any tax which is neither a poll tax nor a property tax and embraces every form of burden not laid directly upon persons or property. *Id.*

7. An excise is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. *Id.*

8. An income tax is not a tax upon property even as to the taxation of income from rentals of real property. *Id.*

9. Home-rule city income tax upon residents' total income and upon income earned or received by a nonresident in the city or from property located there fairly reflects the extent to which municipal services and protection are enjoyed by the taxpayer (CL 1948, § 117.4i, as amended by PA 1957, No 131). *Id.*

10. Provision of home-rule city act limiting rate of taxation in such city to 2% of the assessed value of the real and personal property in the city is a limitation which applies only to ad valorem taxes (Const 1908, art 8, § 20; CLS 1956, § 117.3, subd [g], as amended by PA 1960, No 14). *Id.* 196.

11. Provision of the Constitution that "the legislature shall provide by a general law for the incorporation of cities, and * * * shall limit their rate of taxation for municipal purposes" does

TAXATION—Continued.

not confine the legislature's imposition of limitations on home-rule cities' power to tax to ad valorem taxes, but the absence of legislative limitations upon a city's imposition of an excise does not invalidate an income tax imposed by a home-rule city (Const 1908, art 8, § 20; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12[m]; Detroit Ordinance No 694–F, ch No 84). *Id.*

12. Home-rule city act provision "that the subjects of taxation for municipal purposes shall be the same as for State, county and school purposes under the general law" is construed as applicable only to ad valorem taxes on property (CLS 1956, § 117.3, subd [f], as amended by PA 1960, No 14). *Id.* 197.

13. A governmental unit, such as a home-rule city, which has the power to impose an income tax is not limited in taxation of the income of its residents to income from sources within the unit's borders by due process provisions of the State and Federal Constitutions (US Const, Am 14; Mich Const 1908, art 2, § 16; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12[m]; Detroit Ordinance No 694–F, ch No 84). *Id.*

14. Due process provisions of the State and Federal Constitutions were not violated by home-rule city by reason of its taxation of the income of nonresidents from local sources (US Const, Am 14; Mich Const 1908, art 2, § 16; CL 1948, § 117.4i, as amended by PA 1957, No 131; Detroit Charter, title 3, ch 1, § 12[m]; Detroit Ordinance No 694–F, ch No 84). *Id.*

15. Sales to a person, engaged in construction on and improving real estate of the United States, of materials later affixed to and made a part of that real estate or used and consumed in fulfillment of a contract with one in an exempt classification such as the United States or one of its instrumentalities, are specifically exempted from taxation under the general sales tax act (CL 1948, § 205.51, as amended by PA 1960, No 76; CLS 1956, § 205.54). *Knapp-Stiles, Inc.*, v. *Department of Revenue*, 629.

16. Sales of tangible personal property to a dummy corporation that is wholly owned and controlled by the United States and which constitute sales to the United States for construction of housing facilities on real estate of the United States are exempt under the sales tax act (CL 1948, § 205.51, as amended by PA 1960, No 76; CLS 1956, § 205.54). *Id.*

17. Provision of use tax act exempting property purchased by contractors engaged in improving real estate for others when such property is made a part of real estate or is consumed in fulfillment of a contract for such improving within exempt classifications other than the United States and its instrumentalities or the State of Michigan, its departments or institutions constituted an unreasonable, arbitrary, and discriminatory classification, hence use tax may not be levied on property purchased by dummy corporation, a wholly owned and controlled instrumentality of the United States and used in construction of housing project on real estate of the United States

TAXATION—Continued.

(CL 1948, § 205.94, subd [m], as last amended by PA 1959, No 272). *Id.*

See MUNICIPAL CORPORATIONS (11, 12, 15–17, 27).

TEMPORARY ALIMONY—See DIVORCE (12, 14).

TENANCY IN COMMON.

1. A man who marries 1 of several cotenants of real property does not, by such marriage, become a cotenant. *Tomchak* v. *Handricks* (*Sayles* v. *Same*), 143.
2. A partnership was not a cotenant of premises, where the partnership consisted of a husband and wife who operated a tavern business on premises owned as cotenants by her and her daughters by a previous marriage. *Id.*
3. A mother, who with her minor daughters were cotenant owners of premises on which was operated a tavern business by the mother and her second husband as a partnership, was an exception, as guardian of her daughters, to the rule that 1 cotenant, in possession of premises owned by them, cannot be held liable to the other cotenant for rent. *Id.*

See ACCOUNTING (1).

TENDENCY TO CREATE MONOPOLY—See MONOPOLIES (3).

THEORY OF CASE—See AUTOMOBILES (1); TRIAL (4).

THIRD-PARTY BENEFICIARY CONTRACT—See CONTRACTS (8); LABOR RELATIONS (2).

THIRD-PARTY TORTFEASOR—See ACTION (2); PARTIES (1, 3).

THROUGH HIGHWAY—See AUTOMOBILES (5).

TIME—See CRIMINAL LAW (4); GIFTS (2); WORKMEN'S COMPENSATION (1).

TORTS—See ASSAULT AND BATTERY; PRINCIPAL AND AGENT (2).

TOWED VEHICLES—See CONSTITUTIONAL LAW (4); COSTS (14); MUNICIPAL CORPORATIONS (28, 32, 34, 36).

TOWNSHIPS—See MUNICIPAL CORPORATIONS (4).

TRAILER—See NEGLIGENCE (8).

TRANSFER OF STOCK—See CORPORATIONS (1, 2).

TRESPASSERS—See NEGLIGENCE (5).

TRIAL.

1. The failure of the trial court to grant a motion for a directed verdict at the close of plaintiff's proofs constitutes a denial of the motion, but evidence thereafter received on issue of negligence which plaintiff had asserted caused her injuries was properly considered by jury. *Kasza* v. *City of Detroit*, 7.

TRIAL—Continued.

2. Requests to charge may be presented before the case is argued or submitted to the jury, the better practice being to present them before argument (CL 1948, § 618.59). *Horst* v. *Tikkanen,* 65.

3. Requests to charge need not be given in the exact language of the request, but where not substantially covered by the charge as given, will be deemed to have been refused (CL 1948, § 618.59). *Id.*

4. It is the responsibility of the trial court to explain the issues and the principles of law applicable to the facts in issue including each party's theory of the case, especially where requests have been duly presented therefor (CL 1948, § 618.59). *Id.*

5. A trial court may grant a defendant's motion for directed verdict at the conclusion of plaintiffs' opening statement, where that statement shows that the plaintiffs have no cause of action or right to recover. *Easley* v. *Mortensen,* 116.

6. Plaintiffs' cause of action on alleged contract with defendant realtors was properly dismissed at the close of plaintiffs' opening statement, where plaintiffs failed to show a valid consideration for defendants' alleged promises. *Id.*

7. A request to charge becomes the instruction of the court when given and should not be given to the jury as emanating from either party to the case, either criminal or civil. *People* v. *Hunter,* 262.

8. Due process of law in the jury trial of a case requires that the trial court's preliminary admonition as to jurors' conduct during the course of what is expected to be a protracted trial be that they not discuss the evidence among themselves until all of the evidence has been introduced, the arguments to the jury made, and the jury charged by the court, since to permit the jurors to have previous discussion of the evidence among themselves would lead to effecting a shift in the burden of proof and a failure upon the part of individual jurors to weigh the evidence or argument fairly. *Id.* 263.

9. A verdict must be based on finding of fact on issues presented to the jury and may not be considered as embracing a determination on issues withdrawn from consideration by the jury. *Morrill* v. *Gallagher,* 578.

10. Verdict for plaintiff in action presented by declaration which included (1) a count based on negligence, (2) a count based on assault and battery, and (3) a count based on wilful and wanton misconduct, must be based on a finding of fact that defendants were guilty of negligence, where the other 2 counts were withdrawn before the case was submitted to the jury. *Id.*

11. Jury's verdict for defendant in action arising out of automobile collision *held,* not to have resulted from unfair questioning of witnesses by the judge, under record showing questions directed toward (1) plaintiff's knowledge of the difference between medical doctors and chiropractors, by both of whom he had been treated, (2) elucidation of the fact that

TRIAL—Continued.

the medics had recommended immobilization of plaintiff's back and the chiropractor had advised to the contrary and manipulated it instead, (3) interpretation by the medics of X-ray pictures of plaintiff's back taken by the chiropractor, and (4) whether, if plaintiff's back had pained him for about 10 days after the accident, then stopped hurting, but pain resumed some months later when he started to do heavier work, the later pain could be the result of injuries received in the accident, which questions were not phrased in a manner slanted in 1 direction or indicating the judge's opinion as to what the answer should be. *Redmond* v. *Sheer*, 670.

See DISMISSAL AND NONSUIT (2–4).

TRUCKS—See AUTOMOBILES (1–3, 15, 17); EVIDENCE (5).

TRUSTS.

1. Equity will raise a constructive trust and compel a fiduciary, who has gained something for himself which in equity and good conscience he should not be permitted to keep, to turn it over to the person equitably entitled to it, or to otherwise execute the trust as the court may direct. *MacKenzie* v. *Fritzinger*, 285.
2. Preponderance of evidence presented in suit for accounting against second wife of deceased *held*, to support establishment of constructive trust as to funds defendant had been given but had placed in her own account without authority from her late husband. *Id.*
3. Entire charitable trust structure was not invalidated by reason of provision in will authorizing and directing the trustee to deduct from earnings of trust funds, as an expense item, the cost of flowers which the testator requested to be placed on his and his wife's crypt 5 specified times a year and to make such expense deduction to reimburse any of his relatives for the reasonable cost of memorial or requiem services held for his or his wife's benefit in a specified church, even if such expense item were to fail as violative of the rule against perpetuities. *Kostarides* v. *Central Trust Company*, 691.

See ACCOUNTING (5); APPEAL AND ERROR (25); CHARITIES (2, 3).

UNDUE INFLUENCE—See ACCOUNTING (6); DEEDS (1, 2, 4, 5, 8, 9).

UNEMPLOYMENT COMPENSATION—See LABOR RELATIONS (3).

UNFAIR LABOR PRACTICES—See LABOR RELATIONS (1).

UNION LABEL—See INJUNCTION.

UNIONS—See LABOR RELATIONS (1, 2, 5).

UNITED STATES—See TAXATION (15–17).

USE TAX—See TAXATION (17).

USURY—See MORTGAGES.

VALUE—See DIVORCE (13); EMINENT DOMAIN (1); MUNICIPAL CORPORATIONS (6).

VENDOR AND PURCHASER—See CONTRACTS (1); FRAUD (1); SPECIFIC PERFORMANCE (2).

VERDICTS AND FINDINGS—See ACCOUNTING (8); APPEAL AND ERROR (14); DIVORCE (4); ELECTRICITY (6); EMINENT DOMAIN (2); FOOD (2, 4); MUNICIPAL CORPORATIONS (8); PRINCIPAL AND AGENT (4); RAILROADS (2); TRIAL (9, 10); WORKMEN'S COMPENSATION (3).

VIEW OF PREMISES—See EMINENT DOMAIN (3).

VILLAGES—See COSTS (11); MUNICIPAL CORPORATIONS (4, 22–24).

VIOLATION OF COURT RULES—See DIVORCE (16).

VIOLATION OF ORDINANCE—See MUNICIPAL CORPORATIONS (36).

VISIBILITY—See AUTOMOBILES (13).

VISITATION—See DIVORCE (9, 10).

VOLUNTARINESS OF PAYMENT—See MUNICIPAL CORPORATIONS (25).

VOLUNTARY TRANSFERS OF PROPERTY—See ACCOUNTING (6).

WAIVER—See CONTRACTS (10); CRIMINAL LAW (18); GARNISHMENT (3); GIFTS (1); MORTGAGES; MUNICIPAL CORPORATIONS (22).

WARRANT—See CRIMINAL LAW (2, 6, 12).

WATER RATES—See APPEAL AND ERROR (17); COSTS (12); MUNICIPAL CORPORATIONS (22–27).

WEAK MINDEDNESS—See DEEDS (7).

WEIGHT OF EVIDENCE—See ASSAULT AND BATTERY (2); FOOD (2, 4).

WHOLESALE BASIS—See ELECTRICITY (5).

WIDOWS—See ACCOUNTING (5).

WILFUL AND WANTON MISCONDUCT—See TRIAL (10).

WILLS.

Construction of expression in a holographic will that "any cash over & above what it takes too pay Said persons off I want left too Salvation Army" by probate and circuit courts as including $50,000 in bonds otherwise left intestate, where commercial bank account was insufficient to pay all of the money bequests testator had made, elsewhere his sole heir was left a specific bequest, and elsewhere he had made a specific bequest of a bond is affirmed by an equally divided court. *In re Bruin Estate (Mann* v. *Salvation Army),* 34.

See CHARITIES (1, 2).

WITHOUT WARRANT—See SEARCHES AND SEIZURES.

WITNESSES.

A jury which finds that a witness has deliberately testified falsely on a material point in the case may properly disregard the entire testimony of that witness except such testimony as it believed worthy of belief or which may have been corroborated by other reliable witnesses. *People* v. *Hunter*, 262.

See CRIMINAL LAW (10, 11); DISCOVERY (2, 7); HOMICIDE (4).

WOODLAND TRAIL—See COSTS (2); HIGHWAYS AND STREETS (2).

WORDS AND PHRASES.

1. Duress exists when one by the unlawful act of another is induced to perform some act under circumstances which deprive him of the exercise of free will. *Beachlawn Building Corporation* v. *City of St. Clair Shores*, 129.

2. A fiduciary relationship arises only when there is a reposing of faith, confidence, and trust and the placing of reliance by one upon the judgment and advice of another. *Mannausa* v. *Mannausa*, 180.

See COURTS (3); MUNICIPAL CORPORATIONS (14); NEGLIGENCE (2); PLEADING (5).

WORKMEN'S COMPENSATION.

1. The occupational disease portion of the workmen's compensation act requires that compensation for disability thereunder be recovered 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, the *time of injury* being elsewhere defined in case the injury is not attributable to a single event as the last day of work in the employment in which the employee was last subjected to the characteristic and peculiar conditions resulting in disability from being able to earn full wages at that work (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9). *Smith* v. *Lawrence Baking Company*, 169.

2. The Michigan workmen's compensation act may not be said to apply to employers outside of this State over whom this State has no jurisdiction. *Id.*

3. Liability for injury plaintiff incurred while operating bread-wrapping and bun-wrapping machines for defendant bakeries in which activity there was continuous, uninterrupted, and excessive turning, twisting, and bending of back that ultimately resulted in disability from continuing in such work is imposed upon the last bakery employer in this State, where there is ample testimony to support the finding of disablement and that the Michigan employers had notice of plaintiff's injury (CLS 1956, § 412.1; CL 1948, §§ 417.1, 417.2, 417.9). *Id.*

4. Workmen's compensation benefits for medical bills must be paid directly to the employee. *Springer* v. *Auto Air Industries*, 234.

See ACTION (2); COSTS (4); HUSBAND AND WIFE; INSURANCE (4); PARTIES (1, 3).

WORKMEN'S COMPENSATION APPEAL BOARD—See COSTS (4).

WORK PRODUCT—See ATTORNEY AND CLIENT (2).

WRITTEN CONTRACTS—See CONTRACTS (9).

WRONG SIDE OF ROAD—See AUTOMOBILES (15).

X-RAY PICTURES—See TRIAL (11).

YELLOW LINE—See AUTOMOBILES (1).

ZONING—See MUNICIPAL CORPORATIONS (5-9).