MICHIGAN REPORTS

CASES DECIDED

IN THE

Michigan.

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 15, 1960 to DECEMBER 1, 1960

HIRAM C. BOND
STATE REPORTER

VOL. 361

FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1961

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SUPREME COURT.

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JUNE TERM, 1960.*

PARKER *v.* PORT HURON HOSPITAL.

1. COURTS—STARE DECISIS.

   The rule of *stare decisis* establishes uniformity, certainty, and stability in the law, but it was never intended to perpetuate error or to prevent the consideration of rules of law to be applied to the ever-changing business, economic, and political life of a community.

2. SAME—NONLIABILITY OF CHARITIES FOR NEGLIGENCE.

   The exception to the rule of *respondeat superior* that the beneficiary of the services of a charitable organization may not recover from it for damages resulting from negligence of an employee or agent of the charity, having been placed in the law by the Supreme Court, may be changed by the Court on the ground that it was an erroneous conclusion that put it there.

3. TORTS—CHARITIES.

   Charity is generally no defense in an action for a tortious injury.

4. CHARITIES—NEGLIGENCE OF AGENTS—SOCIAL DISTRIBUTION OF LOSS.

   The fact that entrusted assets might be dissipated and thereby thwart the intent of the donor or donors of a charity, an

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* Continued from Volume 360.

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[2] 14 Am Jur, Courts § 78.
[3] 10 Am Jur, Charities §§ 140–143.
Immunity of nongovernmental charity from liability for damages in tort. 25 ALR2d 29.
[4] 10 Am Jur, Charities § 146.
[5] 10 Am Jur, Charities § 145.
[6, 7] 10 Am Jur, Charities § 143.
[8] 10 Am Jur, Charities § 155.
[9] 41 Am Jur Pleading § 293.
[10] 41 Am Jur, Pleading § 294.
[11] 15 Am Jur, Damages § 209.

argument advanced for granting immunity from liability for the negligence of agents and employees of a charity, no longer has compelling effect in view of changes in the law and in the organization and mores of community life, and the tendency of immunity to foster neglect and of liability to induce care and caution, and the tendency toward social distribution of losses.

5. SAME—BENEFICIARY—NEGLIGENCE—IMPLIED WAIVER.

The idea that the beneficiary of a charity, such as a patient in a hospital, waives any right of recourse for a negligent wrong done him is entirely fictional.

6. SAME—IMMUNITY FROM LIABILITY FOR NEGLIGENCE.

The old rule of charitable immunity from liability for the negligence of charity's agents no longer applies in view of the fact that today charity is a large-scale operation with salaries, costs, and other expenses similar to business generally and should pay its way.

7. HOSPITALS—PROSPECTIVE ABROGATION OF IMMUNITY FROM LIABILITY—CHARITIES.

A charitable, nonprofit hospital corporation is no longer immune from liability to patients for the negligence of its agents and servants from the time of filing the opinion overruling the previous bench-made rule of law by which such corporations were granted immunity.

8. SAME—NEGLIGENCE—EVIDENCE.

Admission of testimony in action by plaintiff husband, individually and as administrator of the estate of his wife who died in the defendant nonprofit charitable corporation's hospital because of the negligence of a laboratory technician and of other employees and doctors, *held*, proper, when allegations of error are considered in the light of the complete theory of plaintiff's case and not restricted to the negligence of the laboratory technician.

9. PLEADING—AMENDMENT—DISCRETION OF COURT.

Broad discretion rests in the trial court with reference to amendments and unless it can be shown that an abuse of the sound judgment and discretion vested in the trial judge has taken place, the Supreme Court ordinarily will not disturb the exercise of such discretion.

10. SAME—AMENDMENT—ACTION—SURPRISE—PREJUDICE.

An amendment to plaintiff's declaration was properly allowed by the trial court, where it did not create a new cause of action and did not surprise or prejudice defendant.

11. DAMAGES—DEATH—MOTHER—HYSTERECTOMY—NEGLIGENCE.
Verdict of $20,000 against hospital in administrator's action for negligence resulting in death of 31-year-old mother of 4 children *held,* not excessive, where it appears she lived 13 days following transfusion of mismatched blood after hysterectomy and suffered much pain.

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

Appeal from St. Clair; Streeter (Halford I.), J. Submitted January 5, 1960. (Docket Nos. 10, 11, Calendar Nos. 47,619, 47,620.) Decided September 15, 1960.

Two actions, one by Charles Parker and the other by Charles Parker, administrator of the estate of Elizabeth Catherine Parker, deceased, against Port Huron Hospital, a Michigan corporation, and others, for damages because of death resulting from the transfusion of blood of a wrong type. Actions dismissed as to hospital employees. Verdicts of no cause of action as to attending physicians and surgeons. Verdicts and judgments for plaintiff against defendant hospital. Defendant hospital appeals. Affirmed.

William J. McBrearty and *Covington, Davidson & Osborn,* for plaintiff.

Moll, Desenberg, Purdy & Glover, for defendant hospital.

Amici Curiae:

Benjamin H. Long, David M. Preston and *L. Stanford Evans, Jr.,* for Greater Detroit Area Hospital Council, Inc.

Warner & Hart, for Michigan Hospital Association.

KAVANAGH, J. Defendant Port Huron Hospital, a nonprofit Michigan hospital corporation, appeals from jury verdicts against it in 2 actions brought by the husband of Elizabeth Catherine Parker, deceased. Mr. Parker brought one action in his own right for out-of-pocket expenses and loss of his wife's services, and the second action as administrator of her estate for damages for her wrongful death. These actions were consolidated for trial. The verdict in the husband's action was for $548, and in the administrator's action the verdict was for $20,000. The 2 physicians and surgeons who attended the decedent were joined as parties defendant, and verdicts of no cause for action were returned as to them. Certain hospital employees were joined as parties defendant, but the suits against them were dismissed prior to trial.

Plaintiff's wife, a 31-year-old mother of 4 children, was admitted to Port Huron Hospital on January 27, 1952, as a full-paying patient. The purpose of this hospitalization was to have performed a total hysterectomy, the operation having been previously advised by Dr. Walter S. Novak following a diagnosis by him of cancer of the cervix. Dr. Novak made all the arrangements for admission and had complete charge of the case.

Certain preoperative preparations were administered to Mrs. Parker the evening of her admission, including certain blood tests by Mrs. Jeanette Weber, a laboratory technician in Port Huron Hospital laboratory, to determine Mrs. Parker's blood type. Mrs. Weber was the only laboratory technician working that evening. She testified she was tired and overworked and that in drawing the blood sample from Mrs. Parker she didn't mark the patient's name or identification on the tube while at her bedside—she simply dropped a slip of paper around the tube. This procedure was contrary to universal standard

practice required in this and other hospitals. On the same trip to Mrs. Parker's floor to obtain her blood sample, Mrs. Weber had taken samples from 2 other patients. She returned to the laboratory with the 3 samples and commenced the work of typing the samples, but was interrupted to do an immediate blood typing for a fourth patient. On her return to the work on the first 3 samples, she confused the sample tubes and the identification slips and designated Mrs. Parker's blood type as A–RH positive rather than the correct blood type of O–RH positive.

During the operation on Mrs. Parker the following morning, she was administered one unit of type A–RH positive blood while under anesthetic. The operation was completed and the patient left the table in apparently good condition, according to the record of operation. She was removed to a ward room, where Mr. Parker was with her until approximately 11:45 a.m. At approximately 1 p.m. in the afternoon of the same day, Mr. Parker was called by telephone and requested by someone at the hospital to return because his wife "had a little bad spell." Upon his return, at about 1:30 p.m., he found her bed empty and the sheets covered with blood. He made inquiry as to her condition and was told nothing but to wait. Testimony developed that Mrs. Parker received no attention from a doctor nor any medical treatment until after 3 p.m. Dr. Novak testified that when he reached her side it was discovered the patient was in severe shock and hemorrhaging badly "without a pulse and practically dead." Subsequently, she was again taken to surgery, and while in surgery for the second time the laboratory technician's mistake with reference to the blood typing was discovered. This mistake was reported to the operating surgeons. The record of operation shows that incompatible blood and mismatching of blood had caused hemorrhagic diathesis. The second sur-

gery was completed and Mrs. Parker was returned to her room. As a result of the incompatible blood transfusion Mrs. Parker suffered a complete kidney failure or renal shutdown, lingered until the early morning hours of February 10, 1952, and died. The cause of death, as reported on the death record signed by Dr. Walter S. Novak, was "acute nephrosis (lower nephron syndrome) incompatible blood transfusion."

In connection with the pain, discomfort, and mental suffering endured by decedent during the 13 days of complicated treatment following her operations, testimony disclosed that Mrs. Parker's arms and legs were black and blue from the many injections and intravenous feedings she received; that she had a catheter in her bladder the entire time; that she was swollen and in pain and discomfort constantly until the final hours of her life, when she was thrashing, pulling her hair and screaming in pain to the point where the husband could stand it no longer and was forced to leave the hospital room. One of the complications that ended Mrs. Parker's life was pulmonary edema, resulting in handicapping her breathing, which caused her extreme apprehension and mental distress.

A lengthy trial resulted covering all the allegations of negligence with reference to the doctors, Mrs. Weber, and other hospital employees. Considerable testimony was taken upon the question of whether Port Huron Hospital was in fact a charitable institution. Plaintiff denied it was. Defendant hospital contended it met the qualifications of such an institution. The record discloses that the Port Huron Hospital was organized as a nonprofit institution under Michigan law.[1] The record further discloses that it

[1] Organized under CL 1871, ch 105, §§ 3036–3041; reorganized under CL 1915, ch 176, §§ 9054–9062; for present law see CL 1948 and CLS 1956, § 450.117 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 21.118 *et seq.*).

was a completely self-sustaining institution from an operating standpoint, and that its policy is to adjust charges to patients from time to time to enable it to fully meet its operating expenses. Defendant hospital has operating revenues exceeding $1,000,000 annually, and had assets of over $1,808,000 as of December 31, 1954. The hospital originally was constructed by public subscription and government funds, and a recent sizable addition was financed in the same way. The testimony discloses that the hospital is completely unrelated to the city of Port Huron except for an agreement between the two under which the city turned over to defendant a former contagious hospital with the agreement to pay $15,000 per year to the hospital for building maintenance in lieu of operating the contagious unit. In all the years for which financial figures were introduced by defendant hospital, only one year—1954—showed an operating loss, and the hospital administrator said that was immediately taken care of by adjusting the rates upward. While the hospital administrator claimed they admitted charity patients, he could not substantiate this, and no effort was made on the part of defendant hospital to do so. The record further discloses that many organizations pay for the patients they send to Port Huron Hospital, including State crippled children commission, St. Clair county welfare department, veterans administration, and soldiers and sailors relief fund. The hospital administrator testified that in the year 1952 he would guess approximately 65% to 70% of the patients carried hospital insurance. The testimony further discloses that the hospital did receive some charitable contributions for operating expenses, but these were negligible as compared to receipts from patients. Net income from patients for the year 1952, after bad debts charged off that year and prior years, amounted to $1,003,725.92; and the

operating expense contributions, other than the contribution of the city of Port Huron of $15,000, amounted to $2,163.24.

Plaintiff claims the retention of proven inefficient and incompetent employees was negligence. He also contends the conduct of Mrs. Weber in regard to failure to follow standard practice and rules with reference to attaching the name to the tube of blood was negligence. He claims the treatment following the second surgery was such as to constitute negligence of the doctor defendants. Plaintiff further alleges there was careless, inadequate, and inaccurate record keeping on the part of defendant hospital and defendant doctors in that only parts of required records were preserved and others, including the nurses' notes, were missing entirely; that hospital rules were ignored; and that provisions of the Michigan Administrative Code, which require that hospitals preserve complete medical records in every case,[2] specifically including nurses' notes, were violated.

It is admitted by defendant hospital that the negligence of one of its employees, acting within the scope of her employment, caused the death of Mrs. Parker.

Defendant hospital moved for a directed verdict at the close of plaintiff's case and at the close of all the proofs on the ground that it was immune from liability as a "charitable" institution. These motions were taken under advisement under the Empson Act.[3]

After jury verdicts were entered, defendant hospital subsequently filed motions for judgments notwithstanding the verdicts and for new trials, all of which were denied.

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[2] See, currently, 1954 Administrative Code, § R 325.1028(8).—REPORTER.

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

We acknowledge briefs *amici curiae* from the Greater Detroit Area Hospital Council, Inc., and Michigan Hospital Association, which have been very helpful in presenting the various legal aspects of this important case.

Defendant hospital appeals from denial of its motions for new trial, and presents 4 questions to this Court:

(1) Is a charitable organization in this State liable to a beneficiary of its services for damages resulting from negligence of an employee or agent?

(2) Was there prejudicial error in admission of testimony concerning matters having no connection with any damage or injury to decedent and the court's refusal to withdraw consideration thereof from the jury?

(3) Was the amendment to plaintiff's declaration properly allowed?

(4) Was the verdict excessive?

We would state the question with which we are faced as follows:

Where a beneficiary of a so-called charitable, nonprofit hospital sustains injuries by reason of the negligence of an employee of the hospital, may such beneficiary recover damages from the hospital?

Under a rule adopted by this Court in 1894, the beneficiary of the services of a charitable organization has been unable to recover for damages resulting from negligence of an employee or agent of the charity. This rule was established by *Downes* v. *Harper Hospital,* 101 Mich 555 (25 LRA 602, 45 Am St Rep 427). It has been uniformly sustained in the cases of *Pepke* v. *Grace Hospital,* 130 Mich 493; *Bruce* v. *Henry Ford Hospital,* 254 Mich 394; *Greatrex* v. *Evangelical Deaconess Hospital,* 261 Mich 327 (86 ALR 487); *DeGroot* v. *The Edison Institute,* 306 Mich 339; *Erwin* v. *St. Joseph's Mercy Hospital of Detroit,* 323 Mich 114.

We are now asked by appellee to abolish this rule. We are told by the defendant that we are precluded from doing so by the principle of *stare decisis;* that the rule is so firmly established in this State that it should not be altered by the Court, but that if a change should be deemed desirable "it should be done by legislative action." Defendant relies upon the following statement of Justice NORTH in *DeGroot* v. *The Edison Institute,* 306 Mich 339, 345:

"Such a rule was adopted for the protection of those institutions and should it be desirable to depart from that rule, it should be done by legislative action."

As to the question of *stare decisis,* the same argument was made in *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697), in which this Court overruled the imputed negligence doctrine. It was again before the Court in *Sheppard* v. *Michigan National Bank,* 348 Mich 577, *Van Dorpel* v. *Haven-Busch Co.,* 350 Mich 135, and *Park* v. *Employment Security Commission,* 355 Mich 103; and has been discussed by courts, both State and Federal, for a century. All pay tribute to the important place such a doctrine must serve in our law in order to give continuity to law—the rules by which men regulate their lives, from which business finds the guidance for the management, direction, and planning of its affairs. The rule of *stare decisis* establishes uniformity, certainty, and stability in the law, but it was never intended to perpetuate error or to prevent the consideration of rules of law to be applied to the ever-changing business, economic, and political life of a community. Only in the rare case when it is clearly apparent that an error has been made, or changing conditions result in injustice by the application of an outmoded rule, should we deviate from following the established rule.

In reply to the argument that our Court, if we choose to reverse the line of legal authority with reference to so-called charitable immunity, would actually be legislating, we can only say that the exception to the common-law rule of *respondeat superior* was not, in this State, placed in our law by the legislature but by this Court. If we were to hold this exception to the rule in the previous cases erroneous, we would only be determining what the law should have been in this State, except for the erroneous conclusion reached in the line of cases relied upon by defendant hospital.

It has now been 12 years since this Court has been asked to review the question of the exemption from liability of so-called eleemosynary or charitable organizations. We believe it to be appropriate after this lapse of time—since the case of *Erwin* v. *St. Joseph's Mercy Hospital of Detroit, supra,* decided in 1948—that we should re-examine the public policy there announced in the light of present conditions and present-day thinking.

Before examining the situation in Michigan, some discussion should be had with reference to the historical background of the immunity exception and the reasons which have been advanced in its support. It should be noted that not only at the common law but also at the present time the general rule has been that one is liable for his negligence or tortious acts. The "rule" is that charity is no defense to tort. Harper, Torts, § 81, p 200 *et seq.;* Prosser, Torts, § 32, pp 194–197; 2 Restatement of Torts, §§ 323–325, pp 873–884. The immunity from suit granted charitable institutions for actions involving tortious conduct is an exception to this rule. The doctrine of immunity of charitable eleemosynary organizations from damage actions brought by beneficiaries of their service, which constitutes the present Michigan rule, is likewise an exception to the

general rule of liability. How, then, does history disclose that this immunity exception crept into the law of Michigan?

In *Downes* v. *Harper Hospital,* 101 Mich 555, Justice GRANT, relying principally on the authority of *McDonald* v. *Massachusetts General Hospital,* 120 Mass 432 (21 Am Rep 529), established the charity immunity doctrine in this State. The Massachusetts case, decided in 1876, was the first case in this country declaring charities to be immune from tort liability. It was there held that the funds of a charity are held in trust, the diversion of which courts will not permit. The Massachusetts court, as authority for establishing the rule, cited *Holliday* v. *St. Leonard's Vestry,* 11 CB NS 192 (142 Eng Rep 769), decided in England in 1861. The *Holliday Case* had followed dictum by Lord Cottenham, in *Duncan* v. *Findlater,* 6 Clark & Fin 894 (7 Eng Rep 934), handed down in 1839. In 1846, Chancellor Cottenham had uttered similar dictum in *Heriot's Hospital* v. *Ross,* 12 Clark & Fin 507 (8 Eng Rep 1508). However, the dictum of the *Duncan Case* was overruled in 1866 (*Mersey Docks Trustees* v. *Gibbs,* LR 1 HL 93 [11 HLC 686, 11 Eng Rep 1500, 14 LT 677]), and the *Holliday Case* was reversed in 1871. *Foreman* v. *Mayor of Canterbury,* LR 6 QB 214 (40 LJ QB NS 138, 24 LT 385). Thus the Massachusetts court resurrected the rule of *Holliday* v. *St. Leonard's Vestry* 5 years after it was repudiated in England.

In *Bruce* v. *Henry Ford Hospital,* 254 Mich 394, the question presented was "whether the hospital is liable to a patient for malpractice of its surgeons." This Court decided if it is a charitable organization, decision is controlled by the holding of nonliability in *Downes* v. *Harper Hospital, supra,* and *Pepke* v. *Grace Hospital, supra.* The Court then proceeded to find that the hospital was established through the benevolence of the Henry Ford family and the oper-

ating deficit was cared for in the same manner. It, therefore, found that it was a charitable organization and applied the trust theory of charitable immunity.

The decision in *Greatrex* v. *Evangelical Deaconess Hospital,* 261 Mich 327 (86 ALR 487), held that a hospital formed for nonprofit purposes and supported by the benevolence of its contributors was not liable for a nurse's mistake in giving plaintiff beneficiary's baby to another. The Court held that although the action therefor purported to be in assumpsit based on contract to properly care for the baby, it was apparent on its face that the action was one in tort. Justice BUTZEL in concluding his opinion in that case said (p 333):

"In directing a verdict for defendant, the trial judge correctly stated that there was no legal redress for the very grievous wrong done plaintiff; that the great good generally accomplished by a hospital and the private contributions given for its support should not be impaired or even entirely deleted by responsibility for the occasional lapses of its employees."

If any designation can be given to the reasoning of Justice BUTZEL in the above case, it would be that of the trust theory establishing as a matter of public policy that benevolence should not be impaired by recovery of damages for torts of the employees of the charitable trust.

In *DeGroot* v. *The Edison Institute, supra,* Justice NORTH quoted from the opinion of the circuit judge as follows (p 344):

"The law is well settled in this State that a charitable institution is not liable to a beneficiary for the torts of its servants, *unless it was negligent in the selection and retention of the employees and the instrumentalities used by it in carrying on and furthering its benevolent purposes.*" (Emphasis supplied.)

In this case plaintiff attempted to recover for injuries received when making her exit from a horse-drawn carriage at a historical museum, commonly known as Greenfield Village, which was established through the benevolence of the Ford family. The horses bolted and threw plaintiff to the ground, causing her to be injured. Here Justice NORTH followed the trust theory as established in *Downes* v. *Harper Hospital, supra,* and followed in *Bruce* v. *Henry Ford Hospital, supra,* and sustained a judgment notwithstanding the verdict by use of the charitable immunity doctrine. It is to be noted that the Court would not apply the immunity doctrine when the institution is negligent in the selection and retention of its employees or the instrumentalities used by it in carrying on and furthering its benevolent purposes.

Justice CARPENTER, writing in the case of *Bruce* v. *Central Methodist Episcopal Church,* 147 Mich 230 (10 LRA NS 74, 11 Ann Cas 150), distinguished the *Downes Case* and indicated it was limited to those who are beneficiaries of a charitable trust, and then proceeded to hold the church liable for injuries resulting to plaintiff by reason of defendant church negligently furnishing plaintiff's employer-contractor a defective scaffolding, which broke and threw plaintiff to the floor, injuring him.

In the case of *Manning* v. *Bishop of Marquette,* 345 Mich 130, the Roman Catholic bishop of the diocese of Marquette was held in tort for negligence of defendant in failing to maintain "the walkways and means of egress from the premises in a reasonably safe condition."

It is apparent the trust fund theory permeates the Michigan exception to the general rule by making charitable institutions and organizations in Michigan immune for the torts of their employees insofar as beneficiaries are concerned. Other theories used in other States and referred to in some of the Michi-

gan decisions fall into 4 groups as follows: The theory holding the doctrine of *respondeat superior* inapplicable to charitable institutions; the theory that such institutions are entitled to the rule of governmental immunity; the theory of implied waiver or assumption of risk; and the theory of public policy.

It is probably true that all these theories rest upon what some courts conceive to be sound public policy. The individual reasons for nonliability appear to be a product of rationalization. Those courts which concluded that the public interest demanded immunity for such organizations found a way for reaching this result. The reasoning behind each of these theories, the criticisms which have been leveled at them, and the extent to which they have been accepted or rejected by the courts of this country, have been exhaustively documented by Associate Justice Rutledge, writing for the court in the case of *President and Directors of Georgetown College* v. *Hughes,* 76 App DC 123 (130 F2d 810), where he said (pp 135–138):

"Liability would violate the donor's intention; misappropriate the funds to unauthorized purposes and to persons not within the intended class of beneficiaries; and in effect indemnify the trustees, if the charity is organized as a trust, against the consequences of their own or their subordinate's misconduct. More persuasive apparently, but hardly more substantial, are the frequently expressed fears that imposing liability would dissipate the fund in damages and deprive the favored class or the public of the charity's benefit. A variant is the assumed danger that donors would be deterred from creating the charity and from adding to its funds by subsequent donations. Other considerations are mentioned, but these are the principal ones.

"The confusion comes to climax when attempt is made to modify the rule in some of the ways pre-

viously mentioned and to reconcile the modifications with these reasons. It seems not to be recognized that all apply with equal force, on any basis of logic, whether the violation, misappropriation, dissipation or deterrence takes place through the negligent action of (1) the board of directors, (2) the principal or managing officers, (3) the operating superiors, as distinguished from the managers of finance and general policy, or (4) employees and representatives generally acting within their actual or apparent functions. There is the same failure to see that dissipation and deterrence also take place equally, whether damages are paid to a stranger or to a beneficiary and regardless of who falls within each class. Damage suits by employees, visitors, special nurses, physicians, and members of the general public are apt to be as frequent and as serious as those by patients. If, too, the donor's intention is controlling and he does not intend the fund to be expended for damages, but only for the purposes he specifies, the violation of his intention and the misappropriation from the objects of the trust are as great when a 'stranger' collects damages as when a patient does.

"These reasons therefore are not consistent with any of the modifications ordinarily made. They support general exemption and they negative one form or instance of immunity as much as another. The only sound arguments from them would be, first, for total immunity; second, for selection of the smallest class of claimants and the smallest or least-likely-to-be negligent group of agents or representatives, to whom and by whom liability would be incurred. The latter would reduce to the minimum the volume of dissipation and the deterrent effect, but would not escape, in a logical sense, violation of the donor's intention or the *ultra vires* effect of so applying the fund.

"Taking the reasons for their logical consequence —total immunity—we find them not convincing in the light of modern conditions, both in the law and in philanthropy. Whatever its form, the doctrine

of *ultra vires,* so strong in the nineteenth century, has shrunk constantly both in the law of private corporations and in that of trusts. This is true especially concerning responsibility for tort. From authority as a controlling premise, no corporation and no trust could possibly be guilty of tort. Corporate charters and trust indentures do not authorize corporate representatives or trustees to commit assaults, libel, slander, and negligent torts. But authority has given way to *respondeat superior* and 'course of employment,' for reasons not necessary to restate, in the highly organized society of this century. The surrender has been greater by corporations than by trusts, but with the latters' advent into business the old lines of limitation have been shaken. Breaches have been made too in the trustee's inability to secure indemnity from the fund and in the claimant's inability to reach it. Apart from charity organized in trust or corporate form, the law of *ultra vires* action as defeating liability has moved on from *authorized* action to conduct incidental to the enterprise and the actual or apparent function of the actor as the line of demarcation. There is no longer the same broad climate of exemption as existed when the 'rule' of immunity for charitable institutions took form. Nor is the law of negligence in its swaddling clothes as it was then.

"There are also reasons which take force away from the fears of dissipation and deterrence of donations. No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in States which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity.

"Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is high-

ly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums. While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence. What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets.

"Against this, we weigh the cost to the victim of bearing the full burden of his injury. In line with this view may be mentioned the general extension of workmen's compensation acts and social security legislation to include the employees of charitable institutions. Also, as some of the more recent cases point out, much of modern charity or philanthropy is 'big business' in its field. It therefore has a capacity for absorption of loss which did not exist in the typical nineteenth century small hospital or college. While the larger hospitals generally are not operated for profit, much of their revenue comes from paying patients, who are either not at all or are only partially beneficiaries on a charitable basis. To that extent, perhaps, the institutions should not be regarded as charitable and the paying patient, if he is injured and cannot recover, pays twice that others may have healing where he has injury.

"Finally, in recent years the real deterrents to donation have been taxation, despite contrary inducements in deductions, and the fears of persons well placed for the future of large individual accumulations of property, arising from economic trends much more fundamental than making charitable institutions liable for their torts.

"The chief arguments, therefore, for sustaining the immunity, namely, *ultra vires* action marked out by authority or intent of the donor and danger of destroying or preventing the creation of charitable institutions, no longer have, if they ever had, com-

pelling effect. Changes in the law and in the organization and mores of community life have taken away their major force. That is true, whether for full or for modified immunity.

"As against the factors favoring it, may be mentioned the tendency of immunity to foster neglect and of liability to induce care and caution; the departure from the general rule of liability; the anomaly of exempting charitable corporations and trust funds, when charity is not a defense to others; the injustice of giving benefit to some at the cost of injury to others and of the injured individual's having to bear the loss wrongfully inflicted upon him, at a time when the direction of the law is toward social distribution of losses through liability for fault, liability without fault, and legislation which gives the person disabled to work what is commonly but inaccurately called 'social' security. There are others we do not stop to mention.

"It is hardly necessary to discuss the various theories of exemption or their application in various modifications. Whether immunity be founded on the 'trust fund' theory, the rule of *respondeat superior,* so-called 'public policy,' or the more indefensible doctrine of 'implied waiver,' is not for us a controlling consideration. At bottom, except possibly for the last, these come down to the same thing, supported by the same considerations. They are merely different names for the same idea, cast according to the predilection of the user for technical or for broader terminology. The 'trust fund theory' comprehends all that is involved in 'public policy,' with only an apparent difference in approach. This is true likewise of '*respondeat superior*' and 'implied waiver.' In any event the result is a departure from general, and we think right, principles of liability. The differences in foundation do not affect even the extent of the departure. We think it should be complete and that charitable corporations should respond as others do for the wrongs inflicted by persons who act in their behalf about their business and

within the course of their duties, actual or apparent. Immunity, whether full or partial, is to be granted only when compelling reason requires it. If there has been, there is no longer such reason."

Justice Rutledge went on to say (pp 138–140):

"We think it does not matter whether the plaintiff is a stranger or beneficiary. Whether the one or the other is denied recovery, the distinction is without justice or legal justification. To give it to a stranger but not to a beneficiary makes the latter accept succor at the risk of greater harm. When it occurs he bears a burden which should fall on all alike, not on him alone. On the other hand, no one has the right to have cure or care at the cost of harm inflicted upon another. To allow recovery to the beneficiary, but deny it to the stranger, would unload on the latter in some part not only the cost of care and cure, but the cost of injury to the former.

"Furthermore, it is not easy to hew to the line and the chips do not fall consistently where they should lie. The distinction is not tenable upon any of the foundations asserted to support the immunity. Because the court's division is on this line, we spell out the matter, though others have done it beyond need of repetition.

"If immunity is founded on some form of *ultra vires* premise, there is no room for treating strangers and beneficiaries differently. Paying damages 'violates the donors [assumed] intention' and 'misappropriates the fund to unauthorized purposes' as much in one case as in the other. If the matter is regarded as 'diverting the fund to persons not within the class intended for aid,' it is impossible to assume that the donor intends everyone except the special object of his bounty to have reparation. If any assumption were justified, it would be exactly the contrary one. In reason the departure, in this respect, would be the greater when a stranger recovers. The person for whom the charity is founded at least is within the donor's contemplation, as the stranger may not.

be. And he is there as an object of help, not as one whose last state is to be made worse than his first. The distinction therefore applies *ultra vires* backwards and doing so undermines that narrow premise entirely.

"No more tenable foundation exists in considerations of preserving the fund, preventing its dissipation, depriving the intended class or the public of its succor, cutting off creative or sustaining donations, and the like. The reasons already stated to show that these do not support unqualified immunity apply with equal force to a limited one, whatever its form or extent. If damages dissipate the fund or deter donations, they do so equally whether paid to a stranger or to a beneficiary. When account is taken of the numbers in both classes and the probable burden of risk toward each, the heavier risk perhaps is incurred in favor of strangers.

"In hospitals, for instance, the stranger group generally includes all except patients, in some States all except nonpaying patients. Physicians, nurses, including special ones, those regularly employed and others in training, orderlies, laboratory technicians and assistants, business officers and office employees, maids, janitors, kitchen and cleaning help, all who render aid to the patient directly or indirectly, make their livelihoods doing so, and carry on the work of the institution, are within the 'stranger' class. So is the minister or priest who comes to give comfort or administer the last sacrament. Likewise the relative, friend or stranger who visits the sick. Deliverymen and others who have business to do on the premises may recover if they are injured. The ambulance driver or operator of the hospital's truck is protected, as is the person he negligently runs down on the street. All these the distinction favors at the expense of the only person the fund is created and maintained to aid. He alone is excluded. He alone enters at the risk of life and limb, of illness or injury to be aggravated, when he seeks cure, by the care-

less conduct of others who themselves are protected against like risk.

"If preservation of the fund or encouragement of donation required immunity, neither could justify the distinction. If the charity can assume the risk as to all the rest of the world and survive, it can do so for those it is designed to help. Neither the number of claims nor their amount will be greater in their behalf than for others. It is probable both would be smaller, because the class is so and because it is present in circumstances ordinarily conducive to precaution and care.

"The remaining foundations also crumble under the distinction. Inappropriate to the charitable corporation, as has been shown, is the idea that recovery in effect indemnifies the trustees against the consequences of their own or their subordinates' wrongs. It is equally so whether stranger or beneficiary is reimbursed.

"Finally, the idea of waiver is advanced, namely, that the benficiary by accepting the tendered aid impliedly agrees that is all he may accept and waives any right of recourse for wrong done, while strangers do not do so. The notion that there is any such agreement or waiver is entirely fictional. In some instances the fiction is based upon impossibility, as when a patient is unconscious from whatever cause when he enters. So, also, when he is received not by arrangement of his own but of others and has no voice or choice in the terms. Infants of tender years, if not those more mature, and insane persons have no legal capacity so to will away their rights. Nor does the ordinary conscious adult intend to do so. Usually he is ill or hurt. He does not haggle about terms. He expects care, not carelessness. Few hospitals would announce a policy of requiring such a waiver as a condition of entrance, and few patients would enter under such a condition unless forced to do so by poverty. In that case there could be no real choice. The idea of waiver, therefore, as implied from reception of benefit amounts merely to

imposing immunity as a rule of law in the guise of assumed contract or renunciation of right, when all other reasons are found insufficient to support the distinction. When the benefit turns into injury which aggravates the original ill, all basis for the waiver and all 'consideration' for it fail.

"It remains only to point out more fully the effects of the conflict in deciding who is stranger and who is beneficiary. The patient cannot recover, but the visiting spouse or parent may do so, notwithstanding he may pay the patient's bills. The visitor is an invitee, the patient is in a class worse placed than the trespasser. *Cf. Radio Cab, Inc.,* v. *Houser* (1942), 76 App DC 35 (128 F2d 604). The physician receives facilities for conducting his work. He seldom, if ever, pays for hospital connections. Often he is paid for accepting them. Without them he is worse than a ship without a rudder. Yet he is 'stranger,' not 'beneficiary.' So it is with nurses, orderlies, maids, and all who do the hospital's work. They receive livelihood from it year after year, perhaps for a lifetime, while the patient normally remains only for days or weeks. Yet they are 'strangers,' he is 'beneficiary.' Hospitals and schools are notably dependent upon income received from paying patients and students. Some pay the full cost of their care, except that overhead figured per capita for all, paying and nonpaying, makes an apparent deficiency. Others who pay only in part are beneficiaries only in part. Without these funds the institution could not operate. Beneficiaries who pay have a share in maintaining the fund and the work.

"Abolition of the immunity as to the paying patient is justified as the last short step but one to extinction. Retention for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements. He, least of all, is able to bear the burden. More than all others, he has no choice. He is the last person the donor would wish to go without indemnity. With everyone else protected, the additional burden of protecting him can-

not break the trust. He should be the first to have reparation, not last and least among those who receive it. So stripped of foundation, the distinction falls. It should fall in line with, not away from, the trend which has brought it about. The immunity should go and the object of the charity should be placed on a par with all others."

We feel that Justice Rutledge has answered most of the arguments presented by the appellant in the instant case far better than we ourselves could have done; thus this lengthy quotation.

Are the conditions and circumstances the same today as they were when the rule was established in *Downes* v. *Harper Hospital, supra,* and the later decisions of this Court? The immunity rule arose at a period in our society's development when charity typically operated on a small scale. Most gifts to charity were private, not corporate. Charitable needs were always poorly satisfied. It made sense in that period to hold that all gifts to charity should go to the purposes for which they were given, and not to outsiders who were by accident injured in the administration of the charity. This was a deliberate choice, designed to encourage gifts to charity by assuring the giver that his gift would be used as he intended.

Today charity is big business. It often is corporate both in the identity of the donor and in the identity of the donee who administers the charity. Tax deductions sometimes make it actually profitable for donors to give to charity. Organized corporate charity takes over large areas of social activity which otherwise would have to be handled by government, or even by private business. Charity today is a large-scale operation with salaries, costs, and other expenses similar to business generally. It makes sense to say that this kind of charity should pay its own way, not only as to its office expenses but

as to the expense of insurance to pay for torts as well.

The old rule of charitable immunity was justified in its time, on its own facts. Today we have a new set of facts. It is true that the new facts are still described by the same word in our English language —"charities"—but that is because our language has not changed as the facts of our life have changed. We have new facts described by old nomenclature. To say that the old rule of law still applies is to reach a result on the basis of nomenclature, not of facts; it is to apply a rule, proper in its time, to completely new facts, and to justify doing so by reference to language merely without regard to the facts.

It is our conclusion that there is today no factual justification for immunity in a case such as this, and that principles of law, logic, and intrinsic justice demand that the mantle of immunity be withdrawn. The almost unanimous view expressed in the recent decisions of our sister States is that insofar as the rule of immunity was ever justified, changed conditions have rendered the rule no longer necessary.

Since 1942, the year in which *President and Directors of Georgetown College* v. *Hughes, supra,* was decided, the following jurisdictions have abolished whatever immunity rule they previously had: Alaska; Arizona; California; Delaware; Idaho; Iowa; Kansas; Minnesota; Mississippi; New Hampshire; North Dakota; New Jersey; New York; Ohio; Puerto Rico; Vermont; and Washington.[4] Today

[4] *Moats* v. *Sisters of Charity of Providence* (1952), 13 Alaska 546; *Tuengel* v. *City of Sitka* (1954), 118 F Supp 399 (D Alaska); *Ray* v. *Tucson Medical Center* (1951), 72 Ariz 22 (230 P2d 220); *Malloy* v. *Fong* (1951), 37 Cal2d 356 (232 P2d 241); *Durney* v. *St. Francis Hospital* (1951), 46 Del 350 (83 A2d 753); *Wheat* v. *Idaho Falls Latter Day Saints Hospital* (1956), 78 Idaho 60 (297 P2d 1041); *Haynes* v. *Presbyterian Hospital Association* (1950), 241 Iowa 1269 (45 NW2d 151); *Noel* v. *Menninger Foundation* (1954), 175 Kan 751 (267 P2d 934); *Swigerd* v. *City of Ortonville* (1956), 246 Minn 339 (75 NW2d 217); *Mississippi Baptist Hospital* v. *Holmes* (1952),

these and most of the other States of the nation, having abolished the immunity rule, are now governed by the general doctrine of *respondeat superior* as far as liability for torts of employees and agents of charitable corporations are concerned.

It has been suggested, in the event this Court were to overrule the immunity exception, that it should do so on a prospective basis, as was done with reference to certain other doctrines which have been overruled by this Court.[5] There can be no question of the right of this Court to make the application of the new doctrine prospective or retroactive. See discussion in opinion of Justice Cardozo in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 US 358, 364–366 (53 S Ct 145, 77 L ed 360, 85 ALR 254).[6] However, we believe the following statement of Justice Frankfurter concurring in *Griffin* v. *Illinois*, 351

214 Miss 906, 940 (55 So2d 142, 56 So2d 709, 25 ALR2d 12); *Kardulas* v. *City of Dover* (1955), 99 NH 359 (111 A2d 327); *Rickbeil* v. *Grafton Deaconess Hospital* (1946), 74 ND 525 (23 NW2d 247, 166 ALR 99); *Collopy* v. *Newark Eye & Ear Infirmary* (1958), 27 NJ 29 (141 A 2d 276); *Bing* v. *Thunig* (1957), 2 NY2d 656 (163 NYS2d 3, 143NE2d 3); *Avellone* v. *St. John's Hospital* (1956), 165 Ohio St 467 (135 NE2d 410); *Taverez* v. *San Juan Lodge No. 972 B.P.O.E.* (1948), 68 Puerto Rico 681; *Foster* v. *Roman Catholic Diocese of Vermont* (1950), 116 Vt 124 (70 A2d 230, 25 ALR2d 1); *Pierce* v. *Yakima Valley Memorial Hospital Assn.* (1953), 43 Wash2d 162 (260 P2d 765).

These cases do not take into consideration the liability subsequently established by statute.

[5] Imputed negligence rule, *Bricker* v. *Green*, 313 Mich 218 (163 ALR 697).

See *Park* v. *Employment Security Comm.*, 355 Mich 103, and cases cited by Justice BLACK in his opinion in that case.

[6] "A State in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (*cf. Tidal Oil Co.* v. *Flanagan*, *supra* [263 US 444 (44 S Ct 197, 68 L ed 382)]), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. *Gelpcke* v. *Dubuque*, 1 Wall (68 US) 175 (17 L ed 520); *Douglass* v. *County of Pike*, 101 US 677, 687 (25 L ed 968); *Loeb* v. *Columbia Township Trustees*, 179 US 472, 492 (21 S Ct 174, 45 L ed 280); *Harris* v. *Jex*, 55 NY 421 (14 Am Rep 285); *Menges* v. *Dentler*, 33 Pa St 495, 499 (75 Am Dec 616); *Commonwealth* v. *Fidelity & Columbia Trust Co.*, 185

US 12, 25, 26 (76 S Ct 585, 100 L ed 891, 55 ALR 2d 1055), is peculiarly applicable to the instant case:

"Candor compels acknowledgment that the decision rendered today is a new ruling. * * * It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the court. See Address of Chief Judge Cardozo, 55 Report of New York State Bar Assn., 263, 294 *et seq.*, and *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287

Ky 300 (215 SW 42); *Mason* v. *Cotton Co.*, 148 NC 492, 510 (62 SE 625, 18 LRA NS 1221, 128 Am St Rep 635); *Hoven* v. *McCarthy Bros. Co.*, 163 Minn 339 (204 NW 29); *Farrior* v. *New England Mortgage Security Co.*, 92 Ala 176 (9 So 532, 12 LRA 856); *Falconer* v. *Simmons*, 51 W Va 172 (41 SE 193). On the other hand, it may hold to the ancient dogma that the law declared by its courts had a platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. *Tidal Oil Co.* v. *Flanagan, supra; Fleming* v. *Fleming, supra* [264 US 29 (44 S Ct 246, 68 L ed 547)]; *Central Land Co.* v. *Laidley*, 159 US 103, 112 (16 S Ct 80, 40 L ed 91); see, however, *Montana National Bank of Billings* v. *Yellowstone County, supra* [276 US 499 (48 S Ct 331, 72 L ed 673)]. The alternative is the same whether the subject of the new decision is common law *(Tidal Oil Co.* v. *Flanagan, supra)* or statute. *Gelpcke* v. *Dubuque, supra; Fleming* v. *Fleming, supra.* The choice for any State may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind, and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule."

See discussions in 60 Harv L Rev 437 (1947); 57 Mich L Rev 181 *et seq.*

US 358, 363–366 (53 S Ct 145, 77 L ed 360, 85 ALR 254). Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated."

In the interests of justice and fairness, in view of the new ruling and the reliance that some, albeit few, charitable, nonprofit hospital corporations may have placed on the old ruling, and may have failed to protect themselves by the purchase of available insurance, we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion.

It is our opinion that a charitable, nonprofit hospital organization should no longer be held immune from liability for injuries to patients caused by the negligence of its employees. Our previous decisions holding to the contrary are hereby overruled, subject to the above limitation as to this case and future cases.

We have carefully examined all the objections with reference to the admission of testimony in this case. We find that the trial court was correct in each of its rulings. Appellant's contentions are based upon the position that the entire case was confined to the negligent acts of Jeanette Weber relative to the blood sample incident. This is erroneous. The theory of plaintiff at the trial included liability for acts of negligence of the 2 doctors who were joined as parties defendant and for acts of other employees of the hospital in addition to those of the laboratory technician. When the allegations of error in regard to the testimony are considered in the light of the complete theory of plaintiff's case, the evidence appears to be material and admissible. We find no reversible error in the trial court's ruling with refer-

ence to evidence that in any way prejudices the appellant.

One of the other questions remaining to be answered is whether an amendment to plaintiff's declaration was properly allowed. Broad discretion rests in the trial court with reference to amendments. Unless it can be shown that an abuse of the sound judgment and discretion vested in the trial judge has taken place, this Court ordinarily will not disturb the exercise of such discretion. No new causes of action were created; no surprise is claimed by defendant-appellant; no prejudice to the defendant hospital appears in the record. Therefore, the authorities relied on by appellant are not applicable to the factual situation in this case.

The last question has to do with the excessiveness of the verdicts. There can be no question with reference to the verdict in favor of the husband. A discussion with respect to excessiveness of jury awards is found in the dissenting opinion of Justice SMITH in *Courtney* v. *Apple,* 345 Mich 223, 253. One of the cases discussed by Justice SMITH—that of *Hord* v. *National Homeopathic Hospital,* 102 F Supp 792, affirmed 92 App DC 204 (204 F2d 397)—upheld a jury award of $17,000 for the death of a child 3 days old. We are in no better position than the jury to place a dollar value on pain, suffering, and loss of life. We cannot say that a $20,000 verdict in the administrator's action was excessive under all the circumstances.

The judgments entered in the circuit court are affirmed, with costs to plaintiff and appellee.

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

CARR, J. (*dissenting*). Plaintiff administrator's decedent entered the defendant hospital on January

27, 1952, for surgery. A sample of her blood was taken which, unfortunately was labelled incorrectly by said defendant's employee, a laboratory technician. A blood transfusion for Mrs. Parker was deemed necessary and given. As a result of the error in labelling decedent's blood sample the wrong type of blood was used and the transfusion thereof resulted in the death of the patient.

Plaintiff brought suit against the hospital and the individual defendants who were the surgeons caring for Mrs. Parker, asserting in his declaration that the death was a result of negligence on the part of defendant hospital's employees, and on the part of said surgeons, and that said defendants were liable for damages based on such negligence. Plaintiff also sued in his individual capacity to recover damages sustained by him because of expenditures necessitated in the care and treatment of Mrs. Parker. Defendant hospital filed answers to the declarations, denying plaintiff's claims of negligence and asserting further by way of affirmative defense that it was a nonprofit charitable organization, that Mrs. Parker was a patient in its hospital and the beneficiary of its services, and that it was not subject to liability on the ground of negligence on the part of its agents, servants, or employees.

The cases were tried together. Following the introduction of proofs on the trial, the circuit judge submitted the cases to the jury, charging, insofar as the hospital was concerned, that it was liable to respond in damages if the jury concluded from the proofs that the negligence of its employee was a proximate cause of the death. The jury returned a verdict in plaintiff Parker's case against the defendant hospital in the sum of $548 and awarded in the suit brought by the administrator for damages under the death act the sum of $20,000. Motions for judgments notwithstanding the verdicts were submitted

and denied, as were motions for a new trial. The jury found that the surgeons who were defendants in the case were not liable and as to them the judgments entered accorded with such finding.

The hospital has appealed, claiming that the trial court was in error in rejecting its claim that it was exempt from liability under the facts in the case because of its status as a nonprofit charitable organization. It is further claimed on behalf of said appellant that the trial court committed prejudicial error in admitting, over objection, testimony relating to the claimed incompetence of an employee of the hospital not shown to have had any connection with the treatment of Mrs. Parker or the erroneous labelling of the blood sample which resulted in the use of an improper type of blood in the transfusion. Mr. Justice KAVANAGH has written for affirmance of the judgments on the theory that institutions of the character of the defendant should be held liable for acts of negligence on the part of their employees, notwithstanding that they are nonprofit and charitable organizations, and that the rule that has heretofore obtained in Michigan of nonliability for such cause should be abrogated by this Court. With such conclusion we are unable to agree.

The record before us clearly establishes that the Port Huron Hospital is a nonprofit organization and that it comes fairly within the scope of the concept of a charitable institution. The evidence offered on the trial in circuit court in this respect was not controverted. In its behalf attention is called to the fact that in 1948 an agreement was made between the hospital and the city of Port Huron whereby the contagious disease hospital of the municipality was taken over by the appellant and conducted as a part of its facilities. It is argued that this transaction amounted to an unequivocal recognition as to the public purposes and services of the appellant. It

appears also that in recent years its facilities have been enlarged and equipped at a total cost of more than $650,000. Of such sum approximately $400,000 was raised by popular subscription, and grants were made by the Federal government of about $200,000. It further appears that the hospital has received additional contributions, charitable in nature, from the Ford Foundation and from other sources, the total amount thereof, as shown by the proofs, approximating the sum of $300,000. Because of such assistance appellant has been able to extend its services to render a larger measure of benefits to the people of the community.

It has been uniformly recognized by the courts of this State up to the present time that an organization of the character of the defendant, formed and maintained with no purpose of private gain but to the end that those in need of surgical and medical attendance might receive proper treatment, and deriving a part of its resources from charitable gifts, cannot be held liable for injuries to a patient on the ground of negligence on the part of an employee or employees. In *Downes* v. *Harper Hospital,* 101 Mich 555 (25 LRA 602, 45 Am St Rep 427), this Court unequivocally recognized that such was the law of Michigan. In that case plaintiff's decedent, while being cared for and treated by the hospital for a mental ailment, committed suicide by throwing himself out of a window from which he had managed to tear out a protective grating. There, as in the case at bar, it appeared that the defendant was organized not for private gain but for the proper treatment and care of those needing medical assistance. It was the recipient of property and funds given to it to enable it to carry out the purposes for which it was formed as an eleemosynary institution. It was recognized that money or property so received constituted a trust fund to be used solely for the purposes for

which it was given. Since the holding in this case has been followed in subsequent decisions, we quote from the opinion as follows (pp 559, 560):

"If the contention of the learned counsel for the plaintiff be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects and builders, upon whose judgment reliance is placed as to plans and strength of materials; of physicians employed to treat patients; and of nurses and attendants. In this way the trust fund might be entirely destroyed, and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted by negligence for which the donor is in no manner responsible. If, in the proper execution of the trust, a trustee or an employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.

"The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded. The wrong-doer, in a case of injury, but not the trust fund, must respond in damages.

This proposition seems too clear to require argument or authority. It is not, however, inappropriate to remark that better facilities for the care, cure, and treatment of the sick, both of the poor and of those who are able to pay, are secured by the establishment of hospitals like that of the defendant. These facilities are increased by the receipt of money from those who are able to pay in whole or in part for the benefits received. Several hospitals of this character exist in this State, founded by private munificence. Obviously, they would not have been founded if their donors had known, or ever supposed, that their charitable purposes might be thwarted by the verdicts of juries for the negligent acts of those who must necessarily be employed in the execution of the charity. The following authorities appear to sustain the above position: *Heriot's Hospital* v. *Ross,* 12 Clark & F 507 (8 Eng Rep 1508); *McDonald* v. *Massachusetts General Hospital,* 120 Mass 432 (21 Am Rep 529); *Gooch* v. *Association,* 109 Mass 558; *Perry* v. *House of Refuge,* 63 Md 20 (52 Am Rep 495); *Union Pacific R. Co.* v. *Artist* (CCA 8), 9 CCA 14 (60 F 365, 23 LRA 581)."

In connection with the decision in the *Downes Case* it is of interest to note the opinion of the Court in *Bruce* v. *Central Methodist Episcopal Church,* 147 Mich 230, 246 (10 LRA NS 74, 11 Ann Cas 150). The Court there referred, apparently with approval, to *Powers* v. *Homœopathic Hospital* (CCA 1), 47 CCA 122 (109 F 294, 65 LRA 372), in which it was held that the defendant hospital was not liable to respond in damages for the acts of its employees on the theory that there was an implied agreement between the hospital and the patient, arising from the acceptance by the latter of the defendant's services, that there should be no such liability. It is also of interest to note that the Federal court recognized that the individuals guilty of the acts of negligence might be required to respond in damages.

The *Downes Case* was followed in *Pepke* v. *Grace Hospital,* 130 Mich 493, in which it was held that the trial court was correct in directing a verdict for the defendant hospital, a charitable institution. Like conclusion was reached in *Bruce* v. *Henry Ford Hospital,* 254 Mich 394, in which the Court quoted with approval from the opinion in *Downes* v. *Harper Hospital, supra.* In *Greatrex* v. *Evangelical Deaconess Hospital,* 261 Mich 327 (86 ALR 487), the action of the trial court in directing a verdict in favor of defendant hospital, a Michigan nonprofit corporation, was upheld, the Court discussing the matter at some length and citing numerous decisions from other States. The following excerpt from the opinion (p 333) fairly indicates the line of reasoning of the Court:

"In directing a verdict for defendant, the trial judge correctly stated that there was no legal redress for the very grievous wrong done plaintiff; that the great good generally accomplished by a hospital and the private contributions given for its support should not be impaired or even entirely deleted by responsibility for the occasional lapses of its employees."

In *DeGroot* v. *The Edison Institute,* 306 Mich 339, the defendant was organized as a nonprofit corporation for the dissemination of historical, scientific, sociological, and artistic information, and in general to advance the cause of education. Plaintiff sustained a personal injury while on the premises of the defendant, as a result of falling from a horse-drawn vehicle. The action for damages was based on the claim that there was negligence on the part of defendant's employees. It was recognized in the case that the question as to defendant's legal status as a charitable corporation and its liability for the torts of its agents were matters to be determined by the court. The jury returned a verdict in favor of

plaintiff which the circuit judge presiding at the trial set aside on the ground that there was no liability on the part of the defendant because of its character and the nature of the service that it was rendering to the public. In affirming the entry of judgment for defendant, it was said by Mr. Justice NORTH who wrote the unanimous opinion of the Court (p 345):

"In this jurisdiction it is well settled that eleemosynary institutions are exempt from such liability as is asserted in the instant case. Such a rule was adopted for the protection of those institutions and should it be desirable to depart from that rule, it should be done by legislative action."

In accord with the prior decisions is *Erwin* v. *St. Joseph's Mercy Hospital of Detroit,* 323 Mich 114. There the action was brought by plaintiff administratrix to recover damages for alleged improper treatment of her decedent as a patient in defendant hospital. A motion to dismiss the case was filed on the ground that defendant was a nonprofit, eleemosynary, and charitable institution which as a matter of law was not liable for the alleged torts on the part of its employees. Citing prior decisions relating to the question, the order of the trial court was affirmed. The Court declined to accept the argument of counsel that the immunity doctrine as applied to hospitals like the defendant in the case should be disregarded, saying:

"We are not convinced that the doctrine of immunity of charity hospitals from tort liability as announced in the above cases should be changed by the court."

As appears from the above cases, it has been the consistent position of this Court that the rule of immunity of nonprofit charitable institutions heretofore obtaining in this State should not be changed

by the Court, and that the matter is one, if such result is deemed desirable, for the consideration of the legislature. Involved are questions of public policy with which the law-making department of the State is concerned. That hospitals organized as is the defendant, and carrying on their operations in the interest of the public welfare, are serving a necessary public purpose is obvious. The practical necessity for the maintenance of adequate hospital facilities for the care and treatment of afflicted patients in need thereof is even more apparent at the present time than it has been in the past. Basically the rule that has heretofore been observed in the State was calculated to encourage the formation and maintenance of such institutions. The question as to whether they should be subjected to liability for acts of negligence on the part of their employees presents a matter to which careful consideration should be given. We are in accord with the prior position taken by this Court that if any change in the rule is to be made, or if it is to be wholly abrogated, action in that regard should be taken by the legislature and not by the Court.

While not directly involved in the determination of the instant controversy, it is of interest to note that the legislature of the State has by affirmative action expressly exempted from taxation the property of organizations like the appellant. A provision of the general property tax law found in CLS 1956, § 211.7* (Stat Ann 1959 Cum Supp § 7.7), 4th subdivision, expressly recognizes and declares the public policy of the State in this regard. To said section there was added by PA 1952, No 54, for the purpose of obviating any question that might arise with reference to the exemption of such hospitals from taxa-

* Amended by PA 1958, No 190, and by PA 1960, No 155.

tion, the following inclusion in the list of declared exemptions:

"Also real estate, with the buildings and other property thereon, owned and occupied by any nonprofit trust and used for hospital or public health purposes."

The application of said provision was before this Court in *In re Dearborn Clinic and Diagnostic Hospital,* 342 Mich 673. See, also, with reference to the State policy, relating to exemptions from taxation of nonprofit organizations, *Gull Lake Bible Conference Association* v. *Township of Ross,* 351 Mich 269.

In view of the action of the legislature in exempting from taxation the property of organizations of the class to which appellant in the instant case belongs, the conclusion follows that the declared public policy of the State is to encourage the formation and operation of nonprofit charitable hospitals created and existing for the care and treatment of members of the public generally. The fact that such institutions customarily collect from patients who are able to pay for such services does not alter the situation with respect to the public nature of the hospitals furnishing such facilities. It cannot be denied that they are essential to the well-being of the public. In our opinion the matter of a change in the policy heretofore existing should be left to the legislature of the State for determination.

The trial court was in error in submitting the case to the jury on the theory that defendant hospital was liable for damages if the negligent act of an employee was a proximate cause of the death of plaintiff's decedent. The judgments should be reversed and the cases remanded to the circuit court with direc-

tions to enter there judgments in favor of the defendant hospital.

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

BLACK, J., did not sit.

GABRISH v. MORSE.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —PEDESTRIAN'S DIRECTION OF TRAVEL.

Testimony of defendant motorist in action by administratrix of estate of deceased pedestrian as to direction of latter's travel in street after alighting from a bus when hit by defendant was properly disregarded by trial court in nonjury case as a matter equally within the knowledge of deceased (CL 1948, § 617.65).

2. AUTOMOBILES — NONJURY TRIAL — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

Finding of trial court for plaintiff administratrix of estate of deceased pedestrian in her action against defendant motorist on question of latter's negligence and contributory negligence of deceased *held*, not contrary to the preponderance of the evidence, where trial court chose to believe testimony given at trial of a disinterested witness rather than a previous statement taken and prepared by a claims adjuster for defendant's insurer or defendant's own testimony.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 250.
[2] 5A Am Jur, Automobiles and Highway Traffic §§ 1013, 1016.
[3] 58 Am Jur, Witnesses § 770.
Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate. 133 ALR 1454.
[4] 15 Am Jur, Damages § 209.

3. EVIDENCE—PRIOR STATEMENTS—IMPEACHMENT.

A prior statement of a witness that is introduced for impeachment purposes bears solely upon the credibility of the witness and may not be considered for the purpose of establishing the substantive truth of such prior statements.

4. DAMAGES—PAIN AND SUFFERING.

Award of $4,000 to plaintiff administratrix of estate of deceased pedestrian who had lived some 26 hours after being hit by defendant's car *held,* not shocking or excessive, where there is testimony that decedent had been conscious, responded to commands and spoke, and that she groaned and thrashed about.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted April 6, 1960. (Docket No. 22, Calendar No. 48,083.) Decided September 15, 1960.

Case by Josephine A. Gabrish, special administratrix of the estate of Anna Gabrish, deceased, against Donald E. Morse for damages under the death act arising when automobile struck pedestrian. Judgment for plaintiff. Defendant appeals. Affirmed.

John P. Murphy, Jr., for plaintiff.

Smith, Brooker & Harvey, for defendant.

SOURIS, J. This was an action for damages under the wrongful death act,* tried by the court without a jury.

Plaintiff's decedent had disembarked from a southbound bus which had stopped at Gage street on Genesee street in Saginaw. Gage street does not cross Genesee. It terminates there. Similarly, on the other side of Genesee street, and northward of the terminus point of Gage street, Annesley street terminates at Genesee from the east. There were no markings outlining the crosswalks across Genesee from either Gage street or from Annesley street.

* CL 1948, § 691.581 (Stat Ann 1959 Cum Supp § 27.711).

However, the Saginaw general code of ordinance, chap 2, art 1, § 101.1, defines "crosswalk" to include "that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections."

It was plaintiff's theory of the case that decedent was struck by defendant's automobile after she had commenced to cross Genesee street from a point near the rear of the bus from which she had disembarked and while she was lawfully upon the roadway included within the prolongation of the lateral lines of the Annesley street sidewalk. Defendant, on the other hand, testified (subject to plaintiff's objection) that decedent was crossing Genesee street at an angle and claimed, therefore, that she was not lawfully upon the roadway. His testimony was disregarded by the trial court, as indicated by its written opinion, because it related to a matter which, if true, must have been equally within the knowledge of the deceased, contrary to CL 1948, § 617.65 (Stat Ann § 27.914).

Defendant claims error in the exclusion of his testimony relating to decedent's direction of travel. He also claims that the finding was against the preponderance of the evidence and that the damage award made by the trial court was excessive.

It is defendant's claim that plaintiff has the affirmative burden of proving that decedent's direction of travel was equally within her own knowledge before the statute, *supra,* could be invoked to bar defendant's testimony relating thereto. Defendant relies upon *Noonan* v. *Volek,* 246 Mich 377; *Tomczyk* v. *Detroit, Grand Haven & Milwaukee R. Co.,* 267 Mich 474; *Hanna* v. *McClave,* 271 Mich 133; and *In re Boyer's Estate,* 281 Mich 618. The first 3 cases cited involved acts of the opposite party or of a third party alleged to be equally within the deceased's knowledge, and in each case this Court properly required an affirmative showing that the deceased did, in fact,

have such knowledge before the statutory bar could be invoked.

In re Boyer's Estate, supra, however, involved the position of decedent driver's automobile as it was driven by decedent around a curve in the dead of night. In that case the Court required affirmative proof that the driver knew his position on the highway before plaintiff properly could be barred from testifying that the car was on the wrong side of the road. In support of its ruling, this Court said (p 619) that "drivers do not always know or realize their precise position on the highway, especially at night." But in the case at bar, plaintiff's decedent was a pedestrian. There was testimony that she and a companion stepped into Genesee street directly opposite the Annesley street sidewalk; that they looked both ways; that decedent first proceeded straight across Genesee; and that she then stopped prior to reaching the center line of the roadway, where she was struck by defendant's automobile. To say that it does not affirmatively appear that decedent's direction of travel was equally within her own knowledge would be to hold, as this Court said in *Quick* v. *Western Michigan Transportation Co.,* 294 Mich 402, 407, that, although the decedent was in the exercise of her faculties of sight, it must be further proved that what she saw was within her knowledge. We cannot find error in the trial court's disregard of defendant's testimony. See *Davis* v. *Jermstad,* 350 Mich 439, 442.

Defendant's second claim of error is that the finding of the trial court was against the preponderance of the evidence. Defendant asserts that the evidence clearly preponderates in his favor respecting the issue of his negligence as well as the contributory negligence of the deceased. However, the only testimony which gives credence to defendant's view of the accident is the testimony of defendant himself.

As opposed to this, however, there is the testimony of a completely disinterested witness to the effect that defendant's automobile was on the left side of the road, striking the deceased as she was waiting for him to pass.

Defendant would discount this latter testimony because of allegedly inconsistent prior statements by the disinterested witness. It would be well to note here that even where such prior statements are wholly inconsistent, when introduced for impeachment purposes they bear solely upon the credibility of the witness and are not considered for the purpose of establishing the substantive truth of such prior statements. *Rosenberg* v. *Mageda,* 251 Mich 696, 699; *In re Dalton Estate,* 346 Mich 613, 622.

In the case at bar, it is not at all certain that the prior statement was inconsistent with the witness' testimony. The prior statement, taken and prepared by a claims adjuster for defendant's insurance company and signed by the witness, merely stated that the witness heard the accident, omitting any reference to whether or not she saw it. At the trial she described the accident as she said she saw it occur. There is no contradiction in fact unless we imply that since the prior statement merely stated that she heard the accident, she must not have seen it. In any event, the trial court, acting without a jury, chose to believe her testimony at the trial. Considering that testimony, the finding was not contrary to the preponderance of the evidence.

The final question posed by appellant is, "Was the award of damages made by the trial court excessive?"

The question merits little discussion. The alleged excessiveness is grounded upon the allowance of $4,000 for conscious pain and suffering. There was evidence that decedent was conscious, responded to commands and spoke, and that she groaned and

thrashed about. She lived aproximately 26 hours after the accident. In his opinion, the trial judge considered other cases reviewed by this Court in which damage awards were affirmed for terminal pain and suffering and then awarded plaintiff the sum of $4,000. We cannot in good conscience say that the award was shocking or otherwise excessive.

Affirmed. Costs to plaintiff.

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

LANSKI *v.* MONTEALEGRE.

1. COVENANTS—RECIPROCAL NEGATIVE EASEMENT.

   A reciprocal negative easement arises when the common owner of land in making grants of lots therein includes some affirmative or negative restriction for the benefit of the land retained evidencing a scheme or intent that the entire tract should be similarly treated, and once the plan is effectively put into operation the burden placed upon the land conveyed is, by operation of law, reciprocally placed upon the land retained and the purchasers relying upon the restriction thereby assured that the plan will be completely achieved.

2. SAME — RECIPROCAL NEGATIVE EASEMENT — COMMERCIAL USE — SUMMER RESORT SUBDIVISION.

   The restriction in plaintiffs' lots in private summer resort subdivision *against commercial use, imposed* by the common owner, *held,* to have effected a reciprocal negative easement, notwith-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 14 Am Jur, Covenants, Conditions and Restrictions § 193.
[3] 14 Am Jur, Covenants, Conditions and Restrictions § 218.
[4] 14 Am Jur, Covenants, Conditions and Restrictions § 242.
[5] 14 Am Jur, Covenants, Conditions and Restrictions § 357.

standing such common owner conducted on his retained lot the sale of lots or rental of cottages, a water supply system, and a garbage pickup service for it and other areas adjacent to the subdivision, such latter incidental services helping to make the area more desirable for the purpose used.

3. SAME—COMMERCIAL ACTIVITY—PROFIT.

Commercial activity, as used in covenants, in deeds, includes any type of business or activity which is carried on for a profit.

4. SAME—RECIPROCAL NEGATIVE EASEMENT—COMMERCIAL USE—CONVALESCENT HOME.

Operation of a convalescent home for profit open to the public that can afford to pay *held,* to constitute a commercial use of property subject to restriction against such use by reciprocal negative easement imposed by common owner of the subdivision in which defendants' lot was located.

5. SAME—RECIPROCAL NEGATIVE EASEMENT—COMMERCIAL USE—ENFORCEMENT—LACHES.

Claim of laches *held,* without foundation in suit by owners of lots in subdivision which had been subjected to a reciprocal negative easement against use for commercial purposes by common owner, and no proscribed commercial activity took place until the establishment of convalescent home by defendants the year before suit was commenced.

Appeal from Berrien; Hadsell (Philip A.), J. Submitted April 12, 1960. (Docket No. 48, Calendar No. 47,924.) Decided September 15, 1960.

Bill by Louis Lanski and other property owners against Harry Montealegre and Hazel Montealegre to enforce lot restriction and enjoin commercial activity in resort subdivision. Decree for plaintiffs. Defendants appeal. Affirmed.

Theron D. Childs, Jr., for plaintiffs.

Small, Zick & Shaffer (*Hahn & Zimmerman,* of counsel), for defendants.

SOURIS, J. In 1919 William Eiler, defendants' predecessor in title, acquired title to about 20 acres of land near Lake Michigan in Berrien county. The land was unimproved except for 3 buildings and a residence located on what is now known as lot 1. Until about 1922 Mr. Eiler and another conducted a hotel and restaurant business in those buildings. In 1922 Mr. Eiler and his partner divided the land, his partner taking the business and moving it across the road, Mr. Eiler retaining part of the land, including lot 1, as well as a 30-foot access strip to Lake Michigan. He continued to maintain his residence in a stone house on lot 1. In 1923, 12–1/2 acres of the Eiler land were subdivided, but the plat thereof was not recorded. Beginning in October of 1923, lots were sold or improved and rented by Mr. Eiler, such sale and rental business being conducted from an office in his residence on lot 1. As the number of residents increased in his subdivision, Mr. Eiler sold water through a pipeline he established throughout the subdivision, and he operated a garbage disposal business. The office work and bookkeeping for these enterprises were conducted from the office in his residence on lot 1.

The plaintiffs are owners of lots in the subdivision and trace title to Mr. Eiler. All of their deeds, and almost all of the deeds executed by Mr. Eiler, contain restrictions against using the lots conveyed for commercial purposes. Although the wording varies somewhat, a typical restrictive clause reads as follows:

"Second parties and their successors and assigns shall not use said premises for any commercial enterprise or engage in any commercial undertaking thereon; it being expressly understood and agreed that renting single or duplex cottages is not considered commercializing."

The Eilers retained lot 1, and it has passed by succession to the present defendants. In 1954 the defendants established a convalescent home on lot 1 in the building formerly used as the residence. That same year plaintiffs notified the defendants that such a use of lot 1 was a commercial undertaking; that the language in their deeds attached a reciprocal negative easement to lot 1; and that defendants' use of lot 1 as a convalescent home was in violation thereof. Since defendants continued to operate the home, plaintiffs instituted this action seeking an injunction in November of 1955. The lower court found that a reciprocal negative easement had been created and that the operation of a convalescent home was a violation of the restriction. A decree was entered permanently enjoining defendants' use of the land for such purpose.

Both parties agree upon the definition and effect of a reciprocal negative easement. There must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated. Once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained. In this way those who have purchased in reliance upon this particular restriction will be assured that the plan will be *completely* achieved. See *Sanborn* v. *McLean,* 233 Mich 227 (60 ALR 1212); *Denhardt* v. *De Roo,* 295 Mich 223; *Cook* v. *Bandeen,* 356 Mich 328.

That there was in this case a common owner of related parcels of land cannot be denied. Further, he was systematic in his inclusion of a covenant against the commercial use of the lots conveyed. The difficulty here lies in the fact that at the time of these

conveyances, Mr. Eiler used the office in his residence on lot 1 in connection with his various enterprises, *viz.*, selling lots and renting cottages in the subdivision, selling water, and a garbage disposal service. The defendants assert that since lot 1 was being used for such "commercial" purposes at the time the plaintiffs purchased their lots, they could not have relied upon a future noncommercial use of the retained lot. They contend that the only plan or scheme evidenced by the restrictions is that the grantor was jealously guarding against competition by preventing any of the lots sold to be used for commercial purposes, meanwhile continuing his commercial use of the land retained. If such were true, 2 elements necessary for a reciprocal negative easement would be lacking: (1) reliance, and (2) an intent or general plan that the entire tract retained should be similarly restricted.

The question presented in the first instance, therefore, is whether or not lot 1 at the time of the conveyances was being used commercially within the scope of the deed restrictions. It should be noted that the restriction quoted above, and others used, expressly excludes renting cottages from the ban on "commercializing". This was one type of transaction Mr. Eiler conducted from his residence office on lot 1. Another was the sale of the lots within the subdivision. Such activities cannot be said to negative a reliance by plaintiffs that a general commercial activity would not be conducted on lot 1. Sale of the lots was necessary for the improvement of the subdivision, and the fact that Mr. Eiler conducted the sales from his home does not lend a commercial atmosphere to the site. Nor can his activities be said to negative an intent or general plan that the entire subdivision should be noncommercial in character. Such activities certainly do not lead us to the conclusion that the restrictions were to protect him

from competition in his real estate business. No one else owned the subdivision to sell.

The remaining enterprises conducted from lot 1 are 2 "land improvement" type endeavors which would tend to make the lots of his subdivision more desirable and therefore more easily sold. A water system and a pick-up service for garbage are virtual necessities now and were at the time of the conveyances. These "businesses" were no more than incidental to the sale of the subdivided lots, fringe benefits without which the area would be less desirable for a private summer resort. The fact that Mr. Eiler subsequently extended these services to areas adjacent to his subdivision does not make his use of lot 1 into a commercial activity. It only served to further the desirability of the entire area. The facts indicate an intent or general plan that the whole subdivision was to be a summer resort area. There are no elements lacking. The restriction against a commercial use was attached to lot 1 by virtue of the doctrine of reciprocal negative easements.

Even so, defendants contend, a nursing or convalescent home cannot be construed as "commercial activity." Perhaps at its inception the term commerce was particularly applicable to a mercantile activity, the buying and selling of goods. This is, of course, still its meaning in the narrow sense today. But the general plan for a *private resort area* found from the above facts indicates that a broader definition was intended. In its broad sense commercial activity includes any type of business or activity which is carried on for a profit. *Mechanical Farm Equipment Distributors, Inc.*, v. *Porter* (CCA 9), 156 F2d 296; *City of Sioux Falls* v. *Cleveland*, 75 SD 548 (70 NW2d 62).

Defendants operate a convalescent home. A fee is charged and a profit is made. The services are open to the public if they can afford to pay. The

patients, the visitors, the nurses, and the over-all atmosphere detract from the general plan of the private, noncommercial resort area originally intended. Defendants' convalescent home is a commercial use of lot 1, in violation of the reciprocal negative easement imposed thereon by defendants' predecessor in title.

A further claim is made that the plaintiffs are guilty of laches. Since we find that no commercial activity in violation of the reciprocal negative easement took place until the establishment of the convalescent home in 1954, such claim is without foundation.

Decree affirmed. Costs to plaintiffs.

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

MOSS *v.* TOROSIAN.

1. APPEAL AND ERROR—MECHANICS' LIEN FORECLOSURES—FINDINGS OF FACT.

   The Supreme Court reviews *de novo,* as in a general chancery appeal, determinations involving mechanics' lien foreclosures, hence, the evidence must be examined and determination made as to whether findings of fact should be made that are different from those of the court below (CL 1948, § 570.27).

2. MECHANICS' LIENS — FINDINGS OF FACT — EVIDENCE — MAXIMUM PRICE—WORKMANSHIP.

   Findings of fact in mechanics' lien foreclosure proceeding that there was no maximum price on roof repair job undertaken

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REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 815.
[2] 3 Am Jur, Appeal and Error §§ 817, 895.

by plaintiff at defendants' request, that there was no poor workmanship by plaintiff necessitating additional repair work, and that a balance was due plaintiff, having been substantiated by the record, are not disturbed, where the trial judge heard the witnesses and was able to observe their demeanor and comportment as they gave their conflicting testimony.

Appeal from Wayne; Culehan (Miles N.), J. Submitted April 20, 1960. (Docket No. 63, Calendar No. 48,121.) Decided September 15, 1960.

Bill by Calvin Moss, doing business as Master Repair Service, against Edward Torosian and others to foreclose mechanic's lien. Cross bill for sums claimed necessary to make repairs. Decree for plaintiff. Defendants appeal. Affirmed.

Ernest Levin, for plaintiff.

Porritt & Louisell, for defendants.

SOURIS, J. This case involves the foreclosure of a mechanic's lien. Plaintiff claims he was given a "time and material" agreement to do roof repair work for the defendants. He alleges having done the work and having expended a total of approximately $30,000. He has submitted invoices and workmen's time sheets, and claims there is still a balance due of approximately $15,000. Defendants admit the time and material agreement, but claim that there was a maximum set therein at $15,000 total. They also filed a cross bill asking damages in the amount of $8,000, claiming plaintiff's faulty repair work necessitated hiring, and paying that amount to, another roofer. Plaintiff asserts that leaks in the roofs after his repair work was completed were caused by defendants' sandblasting the ceilings immediately beneath the roofs and by welders who, while making

other repairs, permitted heavy pipes and other equipment to fall on the roofs.

The following stipulation is found in the record:

"It is stipulated between the respective parties by their respective counsel that the plaintiff prepared invoices covering labor and material furnished the defendants in the aggregate amount of $27,690. That in addition thereto there was a separate contract for repair to a chimney in the amount of $4,000, as to which the plaintiff submitted no invoice or statement. It is further stipulated that the plaintiff has received from the defendant, by check or by cash, a sum in the amount of $19,247.89. It is further stipulated that the payment of $19,247.89 was applied against the invoices submitted and the $4,000 contract price for repair of the chimney. There remains in dispute and unresolved whether or not certain loans claimed by plaintiff to have been made to defendant were in fact loans or did in fact take place."

The lower court decree authorized foreclosure of the mechanic's lien in the amount of $13,964.27, plus interest from completion of plaintiff's work.

The sole question for review as presented by the appellants is:

"Was the decree foreclosing a mechanic's lien in the amount of more than $15,000, including interest, and dismissing the cross bill of complaint, contrary to the just rights of the defendants?"

Such a question presents 2 factual determinations of the lower court for review by this Court: (1) that there was no $15,000 maximum in the "time and material" agreement, and (2) that the additional repair work performed for defendants by another roofer was not necessitated by the plaintiff's incompetence.

By statutory provision, this Court reviews *de novo,* as in a general chancery appeal, determinations involving mechanic's lien foreclosures. CL 1948,

§ 570.27 (Stat Ann 1953 Rev § 26.307). Thus the evidence must be re-examined, and we may determine that findings of fact different from those of the court below are warranted. *Oliver* v. *Baldwin,* 201 Mich 336, 360; *In re Spears Estate,* 359 Mich 90.

On the basis of the record presented to us, if we find plaintiff's testimony to be credible, it substantiates his claims and repudiates the cross claim of the defendants. If we believe the defendants, however, the reverse is true. Hence it is clear that the entire controversy was resolved by the trial court on the basis of the credibility of the witnesses. It is apparent from the decree that the trial judge believed the plaintiff. He believed that there was in fact *no* maximum in the "time and material agreement", that there was in fact *no* poor workmanship by the plaintiff necessitating additional repair work, and that there was a balance due the plaintiff of $13,694.27, plus interest. Findings of fact in a chancery proceeding are given weighty consideration on appeal. *City of Madison Heights* v. *Manto,* 359 Mich 244. When the issues turn upon the credibility of witnesses in this type of proceeding, this Court is inclined to afford high regard to the findings of the trial judge who heard the witnesses and was able to observe their demeanor and comportment when the testimony was given. *Andrew C. Sisman Co.* v. *Miller,* 215 Mich 425, 431.

Our examination of the record discloses that the evidence supports the findings of the court below.

The decree should be affirmed. Costs to plaintiff.

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

MOLNAR *v.* MOLNAR.

DIVORCE—EXTREME CRUELTY—FALSE ACCUSATIONS OF INFIDELITY—DENIAL OF CONJUGAL RIGHTS.

Plaintiff physician in suit for divorce *held,* not to have substantiated his claim of extreme cruelty by proofs adduced with respect to false accusations by defendant wife of his marital infidelity or as to denial of conjugal rights.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted June 10, 1960. (Docket No. 43, Calendar No. 48,550.) Decided September 15, 1960.

Bill by Stephen K. Molnar against Marjorie M. Molnar for divorce on the ground of extreme cruelty. Decree for plaintiff. Defendant appeals. Reversed.

Dale D. Libby, for plaintiff.

Piggins, Balmer, Grigsby, Skillman & Erickson, for defendant.

SOURIS, J. The chancellor granted plaintiff a decree of divorce on the ground of defendant wife's extreme and repeated cruelties. She has appealed, claiming that her husband's proofs did not establish grounds for divorce.

Plaintiff is a physician, and his wife is a nurse. They were married in 1939. Two children were born to them, presently 11 and 17 years old. Mrs. Molnar

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REFERENCES FOR POINTS IN HEADNOTES

17 Am Jur, Divorce and Separation § 437.

worked during the early years of the marriage and, for part of their years together, assisted her husband as his office receptionist.

At the trial Dr. Molnar claimed his wife accused him falsely of marital infidelity, denied him conjugal rights, lacked affection for him and told him so, absented herself from home for long hours without explanation, was argumentative, condemned him as a failure, subverted his relationship with their children, and was never pleased with his efforts to make a success of their marriage. Mrs. Molnar denied her husband's charges or attempted to otherwise justify or explain her conduct, and made some charges of her own. In short, the Molnars' marriage of 20 years has been an unhappy one. Our task, as it was also for the chancellor, is to determine whether or not dissolution of the marriage can be decreed by a court limited in its power over such matters by legislative mandate.

There is striking similarity in the claims made and the proofs offered between the case at bar and *Williams* v. *Williams,* 351 Mich 210. Except for Dr. Molnar's claims that his wife falsely accused him of marital misconduct and denied him conjugal rights, mere citation of *Williams* v. *Williams, supra,* would dictate reversal of the decree of divorce entered here. It becomes necessary, therefore, to examine the proofs offered by plaintiff in support of these 2 claims.

Plaintiff testified that his wife accused him falsely of marital misconduct in 1946 with a member of a French family while he was in military service abroad and in 1950 with one of his patients. He also testified that from 1950 until they were separated in 1957 she would accuse him of "having had an affair with some woman" whenever he was late in making his hospital rounds. Such testimony, extremely general in nature, was equally generally denied.

Plaintiff testified that his wife resorted to various acts of subterfuge to avoid sexual relations with him. She would, he said, read late into the night to avoid retiring with him to the marital bed, and at other times she would refuse his embrace. On cross-examination, however, plaintiff testified:

"*A.* It was very difficult to have relations. Off and on she would. She would submit.

"*Q.* By off and on what do you mean?

"*A.* About once a month.

"*Q.* Once a month over what period of years, doctor?

"*A.* 1950.

"*Q.* 1950 until when?

"*A.* August of 1958.

"*Q.* It continued on that basis for 6 years?

"*A.* Yes, I was quite disturbed about having relations."

Neither of plaintiff's claims of false accusations and denial of conjugal rights was established by his proofs summarized above. Substantially more positive testimony than that offered by plaintiff is required to prove a charge of extreme and repeated cruelty consisting of false accusations of marital infidelity and denial of conjugal rights sufficient to empower our courts to sever the bonds of matrimony. Plaintiff's claims in these respects having failed of proof, what this Court said in *Williams* v. *Williams*, *supra,* is equally applicable here.

Decree reversed and bill of complaint dismissed. Costs to defendant.

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

CHAFFEE v. STENGER.

1. NEGLIGENCE—MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACCEPTANCE OF PAYMENTS.

Plaintiff's acceptance of payments voluntarily made by defendant's insurance carrier under the workmen's compensation act does not bar plaintiff from seeking damages for common-law negligence for injuries due to an explosion if plaintiff was not in fact an employee of the defendant (CL 1948, § 416.1).

2. TRIAL—QUESTION OF FACT—MOTION TO DISMISS—DENIAL WITHOUT PREJUDICE.

The granting of defendant's motion to dismiss plaintiff's action for common-law negligence due to injuries received from an explosion was error, where the issue as to whether plaintiff was or was not an employee of defendant was a disputed issue of fact at the hearing on the motion to dismiss, and plaintiff sought determination of such issue by a jury, there having been a voluntary weekly payment of 10 checks by defendant's workmen's compensation insurer and acceptance thereof by plaintiff, and the pertinent court rule providing for a denial of such motion without prejudice (CL 1948, § 416.1; Court Rule No 18 [1945]).

Appeal from Saginaw; Borchard (Fred J.), J. Submitted June 10, 1960. (Docket No. 49, Calendar No. 48,553.) Decided September 15, 1960.

Case by William Chaffee against William Stenger, doing business as Bill's Junction Garage, for personal injuries resulting from explosion and fire. By reason of plaintiff's acceptance of workmen's com-

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur, Payment § 32.
[2] 41 Am Jur, Pleading § 331.

pensation benefits, cause dismissed on motion. Plaintiff appeals. Reversed and remanded.

van Benschoten & van Benschoten, for plaintiff.

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

SOURIS, J. Plaintiff brought suit for damages resulting from defendant's alleged negligence. The declaration expressly alleged that plaintiff was not defendant's employee. The answer filed by defendant generally denied all of the substantive allegations made in the declaration and alleged that plaintiff was paid workmen's compensation benefits for his injuries as an employee of defendant for a period of 11 weeks.

The trial court dismissed the declaration on motion made by defendant before trial. The motion to dismiss asserted that payment to plaintiff of $396 in workmen's compensation benefits constituted a release to defendant of all claims arising from plaintiff's injury by virtue of section 1 of part 6 of the workmen's compensation law. CL 1948, § 416.1 (Stat Ann 1950 Rev § 17.212). The motion was supported by an affidavit of a claim adjuster for defendant's insurance company in which the adjuster swore that he had "personal knowledge that William Chaffee stated that he was an employee of William Stenger at the time of the explosion."

Plaintiff filed an answer to the motion alleging that the payments received by him were voluntarily paid by the insurance company, that he was not an employee of defendant at the time of the explosion, and that his status was a question of fact to be determined by a jury.

At the hearing on the motion to dismiss, defendant introduced in evidence certified copies of the work-

men's compensation department's forms 100, 101, and 102, the employer's report of injury, notice of commencement of payments and notice of stopping of payments, respectively. Also introduced were 10 canceled checks by which plaintiff was paid 11 weekly benefits of $36 each. No other evidence was taken at the hearing. Based upon the foregoing pleadings and exhibits, the trial court dismissed the declaration on the theory that plaintiff, having received compensation benefits for 11 weeks, "proceeded on the theory of employer-employee relationship, and having done so he cannot now bring proceedings on an inconsistent opposite theory or claim." The trial court ruled that section 1 of part 6 of the act controlled and that acceptance of such payments released defendant of all claims at law.

But, section 1 of part 6 of the act presupposes the existence of an employee-employer relationship:

"If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."

Unless we are to hold that acceptance of payments by plaintiff from defendant's insurance carrier constitutes proof of the existence of an employment relationship between the parties, there is no basis whatever for concluding that such a relationship existed such as to justify application of the provisions of that section. This Court has held that even where application was made for an award of compensation under the workmen's compensation act after voluntary payment of benefits had

been made and accepted, the injured party was not barred from seeking damages for common-law negligence when he was not in fact an employee of the defendant. *Holcomb* v. *Bullock,* 353 Mich 514. In *Holcomb's Case,* the trial court having found that the injured party was in fact an independent contractor, this Court said he had no right to seek benefits under the act and, therefore, had no right of election as to his remedy. The Court assumed that when voluntary payments were made and accepted (as here), both parties were in error as to the legal relationship existing between them. The important point is that in *Holcomb's Case,* there was a judicial determination, at the trial, of the relationship between the parties. There has been no such determination in the case at bar. It cannot be said yet, of course, that a bilateral or a unilateral mistake has been made, nor can it be said until plaintiff's status is determined. But, plaintiff is entitled to such a determination, and he was deprived thereof by the trial court's dismissal on motion.

Indeed, the relationship between the parties was a disputed issue of fact at the hearing on the motion to dismiss, made so by the declaration's express averment that plaintiff was not defendant's employee and by the answer's denial thereof and averment that workmen's compensation benefits had been accepted by plaintiff as an employee of defendant. It is interesting to note that defendant's motion to dismiss assumes the existence of an employee-employer relationship, just as did the trial court in its dismissal of the declaration.

Section 3 of Court Rule No 18 (1945) provides that the trial court shall deny without prejudice a motion to dismiss "if disputed questions of fact are involved" in an action at law if the opposite party demands that the issue be submitted to a jury. As

noted, a disputed question of fact did exist and plaintiff demanded that it be submitted to a jury. Under the circumstances disclosed by the pleadings before us, we believe the trial court should have denied defendant's motion to dismiss without prejudice.

Reversed and remanded. Costs to plaintiff.

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

RODGERS v. MIKOLAJCZAK.

1. JUDGMENT—PRINCIPAL CASE—GARNISHMENT—EMPLOYEE STATUS.
Two determinations controlling issue as to plaintiff's status when raised in garnishment proceedings against insurer under policy excluding coverage of employees, which had been made in principal case are (1) its general verdict for plaintiff on question of fact as to whether or not plaintiff was an employee of principal defendant's decedent at time plaintiff was injured when a passenger in decedent's truck and (2) jury resolution that plaintiff was then an employee in response to special question in harmony with its general verdict for plaintiff.

2. MASTER AND SERVANT—DEFINITION—SPECIAL QUESTIONS—AUTOMOBILE PASSENGER.
The term "acting employee" was correctly defined to jury incident to submission to it of special question in principal action as to whether plaintiff at time of injury was an employee of defendant well digger in that such term excluded one who is an employee but not then engaged in working for his employer but including an employee then engaged in his actual work or preparing for that work or doing incidents

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 5 Am Jur, Attachment and Garnishment § 957.
[2] 35 Am Jur, Master and Servant § 2.
[3] 53 Am Jur, Trial § 1065.
[5] 4 Am Jur, Attachment and Garnishment § 6.
[6] 5A Am Jur, Automobile Insurance § 165.

of that work, where plaintiff, at time of injury, was being transported in principal defendant's truck insured under garnishee's policy excluding coverage of injuries to employees (CL 1948, § 618.39).

3. TRIAL—SPECIAL QUESTIONS.
Special question which was determinative of plaintiff's relation with defendant well digger either as, or as not, latter's employee was properly given to jury, where such determination was controlling on the main issue of liability for negligent injuries (CL 1948, § 618.39).

4. JUDGMENT—RES JUDICATA—GARNISHMENT.
An unappealed judgment in action against principal defendant became conclusive of the plaintiff's status in the principal case and is equally conclusive in subsequent garnishment proceeding.

5. GARNISHMENT—ANCILLARY PROCEEDING.
A garnishment proceeding is ancillary to the main action against the principal defendant.

6. INSURANCE—AUTOMOBILES—LIMITATIONS.
The liability of an insurer under an automobile insurance policy to third persons is not greater than that of the insured and would be subject to limitation of such liability in the policy.

Appeal from Bay; Smith (Richard G.), J. Submitted April 13, 1960. (Docket No. 21, Calender No. 48,371.) Decided September 15, 1960.

Case by Roy Rodgers against Clarence Mikolajczak, administrator of the estate of Henry Groh, deceased, for personal injuries sustained while a passenger in deceased's truck, resulted in judgment for plaintiff. Garnishment proceedings against Allstate Insurance Corporation, an Illinois corporation, defended on policy exclusion. Judgment for garnishee defendant. Plaintiff appeals. Affirmed.

Baker & Baker (*Oscar W. Baker* and *Edward M. Sharpe,* of counsel), for plaintiff.

Stanton & MacKenzie (*H. Monroe Stanton,* of counsel), for garnishee defendant.

DETHMERS, C. J. This is a garnishment action against garnishee defendant insurance company to secure payment, under a liability insurance policy covering a truck owned and operated by the assured, principal defendant's decedent, Groh, on a judgment plaintiff had secured against the latter's estate for injuries sustained while a passenger in the truck. From judgment for garnishee defendant, plaintiff appeals.

In the principal suit plaintiff's declaration, as amended, alleged that at the time of injury plaintiff was not a guest passenger but an employee of Groh accompanying him on a business trip, that the business had been completed and they were on their way home, that it had been agreed in the contract of hire that, as part of the consideration for plaintiff's labor, Groh would furnish him transportation to and from work, and that plaintiff was at the time a passenger for hire. This was denied in defendant's answer. The pretrial statement sets forth that plaintiff claimed to be a passenger for hire and that defendant denied it. On trial plaintiff submitted a request to charge that he was "not a guest passenger in the vehicle of Henry Groh but was a passenger for hire and was in the said truck upon the business of the said Henry Groh."

On trial of the principal suit the proofs showed that Groh was in the well-digging business; that he employed plaintiff to use Groh's drilling equipment and to dig wells for him; that on numerous previous occasions Groh and plaintiff had made business calls on the proprietress of a tavern in a resort area, who cleared requests of cottagers for wells and directed such business to Groh; that Groh got the orders or jobs, turned them over to plaintiff and put him to work on them when plaintiff knew where the jobs were located; that on the occasion in question they called on her for that purpose and discussed a well

job in that area and the time when it could be drilled. After the discussion plaintiff and Groh left the tavern, entered the truck, and proceeded a short distance when the accident occurred. There was no testimony that Groh was then taking plaintiff home or that there was or had been any agreement that, as part of the consideration for plaintiff's labors, Groh would transport him to or from work. Neither was there any other testimony to show or from which it might be inferred that plaintiff was a passenger for hire.

At the conclusion of proofs in the principal suit the court submitted to the jury the following special question:

"Was the plaintiff, Roy Rodgers, an acting employee of Henry Groh at the time of the automobile accident on April 11, 1956?"

The jury answered the question "Yes" and returned a general verdict for plaintiff. In submitting the question to the jurors the court defined the term "acting employee" as excluding one who is an employee but not then engaged in working for his employer, but including an employee then engaged either in his actual work or "in the act of preparing for that work or doing the incidents of that work."

The insurance policy involved contains the following exclusionary clause:

"This policy does not apply: * * *

"(d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the assured arising out of and in the course of (1) domestic employment by the assured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured."

In these garnishment proceedings the question is whether plaintiff was an employee of Groh within

the meaning of the quoted clause, thus relieving the insurance company from liability. The trial court held that the jury's answer to the special question in the principal case, in effect, answered this in the affirmative, and that the answer was supported by competent evidence, and, hence, found for garnishee defendant.

Plaintiff objects, contending that the question was improperly submitted for 2 reasons which we shall consider first: (1) that it was not a question of fact, but law, which should not have been put to a jury under CL 1948, § 618.39 (Stat Ann § 27.1019), and (2) that its term "acting employee" was and is ambiguous. The question was one of fact which the jury needed to resolve in order to determine plaintiff's status as a passenger and right to a verdict, to which he would not have been entitled in this case had the jury, contrary to what it did do, found him to have been a guest passenger. Under the instructions of the court, as above set forth, the meaning of the term "acting employee" was correctly given for the purposes of this case and made plain to the jury so that it could not have left them confused. The evidence supported their answer which was in harmony with their general verdict.

Plaintiff's chief criticism of the special question, however, is that it does not call for an answer necessarily controlling on the main issue, relying on cases such as *Bennett* v. *Hill,* 342 Mich 754, and cases therein cited on this point. Plaintiff submits that either a "Yes" or "No" answer would be consistent with verdict for plaintiff, and that it could, therefore, be controlling of nothing. In this connection plaintiff does not detail his argument or theory, but apparently it is this: that a "Yes" answer, as here given, at least extricates him from the role of a guest passenger, permitting him to recover inasmuch as the workmen's compensation act was never raised as a de-

fense, but that a "No" answer, eliminating him as an acting employee, would not necessarily consign him to the ranks of a guest passenger but would still leave recovery open to him as a possible passenger for hire. That this is his theory is evident from the above mentioned statements in plaintiff's amended declaration, requests to charge, and the pretrial statement. For from these it is clear that plaintiff was attempting to bring his case within the meaning of *Francis* v. *Scheper,* 326 Mich 441, and its holding that plaintiff therein was a passenger for hire. In that case, however, plaintiff claimed and the jury in the principal case found, in effect, under the instructions given, that plaintiff's transportation from work at the end of the day by his employer, the defendant, was part of the consideration of the contract of hire, and the plaintiff and defendant both testified that plaintiff was no longer engaged in his employment for the day at the time of the accident. Here the jury found that plaintiff was acting in his employment at the time, the evidence supports it, and there is no evidence that Groh was taking plaintiff home from work at the time of the accident or that there was any agreement between them that he should do so as part of the consideration for hire. Plaintiff testified several times that under his agreement for working for Groh he received $7 a day, board, room, and washing. Never did he testify that transportation was included or agreed upon. This means, then, that there was no evidentiary support for a claim of passenger for hire as in *Francis* or otherwise. There remained, on the record, but 2 possibilities as to plaintiff's status, guest passenger, or, as the court termed it, acting employee. The answer to the question thus clearly would be controlling on a main issue because dispositive of the question of which of the 2 he was, as, of necessity, he had to be one or the other. The question was, therefore, proper.

The jury found plaintiff to have been an acting employee at the time he was injured and rendered a verdict for him. Unappealed from, that became conclusive of his status in the principal case, as between him and the principal defendant, Groh. It is equally conclusive here. This is not a new or different action, but a proceeding ancillary to the principal suit. *Stevens* v. *Northway,* 293 Mich 31; *Wyngarden* v. *LaHuis,* 251 Mich 276; *Milwaukee Bridge & Iron Works* v. *Wayne Circuit Judge,* 73 Mich 155. The insurer's liability to plaintiff is not greater than that of the assured. The insurer's liability is the liability of its assured except as limited by the terms of its policy. Defendant Groh would not have been liable to plaintiff as a guest passenger and, hence, defendant insurer could not have been. Defendant Groh was found liable to plaintiff as his employee. That risk or liability defendant insurer did not contract to assume, but, by the express terms of its policy, excluded from coverage. Plaintiff cannot be one kind of passenger for the principal suit and, after prevailing in that role, discard it and be a different kind for the garnishment proceedings.

Affirmed.

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

BLACK, J. (*concurring*). I agree with majority conclusion that plaintiff could not recover against Mr. Groh's administrator on his firmly declared and presented theory that the relationship of the parties was that of employer and employee and then, in this garnishment action, repudiate such theory in favor of that which would have denied recovery in the principal suit.

I disagree, however, with the holding of my Brothers that the special question (quoted in the ma-

jority opinion) was proper for submission to the jury in the principal case. Like the questions Mr. Justice COOLEY and his colleagues rejected in *Banner Tobacco Co.* v. *Jenison,* 48 Mich 459, and *Loomis* v. *Rogers Township Board,* 53 Mich 135, this question presented an issue of law rather than of fact. On that account the jury's affirmative answer thereto was altogether nugatory.

On above ground I concur in affirmance.

KAVANAGH, J., concurred with BLACK, J.

SOURIS, J., did not sit.

BAATZ *v.* SMITH.

ROYSTON *v.* SAME.

MIDDLETON *v.* SAME.

1. LIMITATION OF ACTIONS — PERSONAL INJURIES — IMPLIED CONTRACTS — TORTS.

   The 3-year statute limiting the time within which an action for injuries to the person may be brought applies to all actions to recover for an injury to the person whether based upon implied contract or tort (CLS 1956, § 609.13, subd 2).

2. STATUTES—SUPREME COURT—LEGISLATURE.

   The function of the Supreme Court is to apply a statute's clear language, the matter of whether or not application of the statute works an injustice being a policy question for legislative determination and control.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 34 Am Jur, Limitation of Actions § 103.
Action for "injury to person" in statutes of limitation as including actions *ex contractu.* 1 ALR 1313; 157 ALR 763.
[2] 50 Am Jur, Statutes § 371.
[3] 29 Am Jur, Innkeepers § 56.

3. INNKEEPERS—EXPLOSION—IMPLIED CONTRACTS.

An action by a paying guest against an innkeeper for personal injuries due to explosion of dynamite by a former disgruntled guest who had been evicted cannot be predicated on contract liability under theory of implied warranty.

4. LIMITATION OF ACTIONS—PERSONAL INJURIES—EXPLOSIONS—INNKEEPERS.

Actions by plaintiffs, paying guests at defendants' hotel, for personal injuries sustained when dynamite was exploded by a former disgruntled, evicted guest were barred by statute of limitations, where commenced over 4 years following the time when the actions accrued (CLS 1956, § 609.13, subd 2).

SMITH, KAVANAGH, and SOURIS, JJ., dissenting.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted April 8, 1960. (Docket Nos. 39, 40, 41, Calendar Nos. 48,051, 48,052, 48,053.) Decided September 15, 1960.

Assumpsit in 3 actions by Perlee Baatz, Worley A. Royston, and Jennie Middleton, all against Charles A. Smith, Abraham J. Smith, and David B. Smith, doing business as Charles A. Smith & Co., for personal injuries sustained while guests in defendants' hotel. Declarations dismissed on motion. Plaintiffs appeal. Cases consolidated on appeal. Affirmed.

I. Goodman Cohen, for plaintiffs.

Alexander, Cholette, Buchanan, Perkins & Conklin (*E. D. Alexander,* of counsel), for defendants.

DETHMERS, C. J. Plaintiffs commenced suits against defendants, hotelkeepers, in assumpsit, on June 13, 1958, for personal injuries and resultant damages sustained on April 30, 1954, while they were paying guests in defendants' hotel. Plaintiffs alleged in their declarations that another, former guest of defendants' hotel, who was a confirmed alcoholic, had been evicted therefrom, became disgruntled, har-

bored a grudge on that account, had threatened injury to the hotel, and on one occasion had set fire to it, all as defendants knew or should have known; and that, on the night in question, he did cause dynamite to explode in the hotel, injuring plaintiffs.

The trial court granted defendants' motions to dismiss on the ground that the actions were barred by the 3-year statute of limitations, CLS 1956, § 609.13, subd 2 (Stat Ann 1957 Cum Supp § 27.605, subd 2), which reads as follows:

"2. Actions to recover damages for injuries to person or property and actions for trespass upon lands shall be brought within 3 years from the time said actions accrue, and not afterwards."

Plaintiffs insist that the quoted statutory limitation applies only to actions sounding in tort but not to those brought in assumpsit even though based on tortious acts which are claimed to constitute, as well, a breach of contract.

In *Coates* v. *Milner Hotel, Inc.*, 311 Mich 233, plaintiff brought suit, more than 3 years after her cause of action had accrued, against defendant hotel company therein, charging that, because of that defendant's negligence, while she was a paying guest in the hotel, her room had been entered by an intoxicated person who had violently assaulted her. The relevant holding in that case is well expressed in the fifth syllabus, which reads as follows:

"The 3-year statute limiting the time within which an action for injuries to the person may be brought applies to all actions to recover for an injury to the person arising because of negligence whether based upon implied contract or tort (CL 1929, § 13976, as amended by PA 1941, No 72)."

Plaintiffs suggest that *Coates* should be re-evaluated and overruled. The only question is the meaning of the statutory language. It limits, in express

and plain words, to 3 years, actions to recover damages for injuries to person. Such was the nature of the action in *Coates*. The statutory language permitted of no other holding in the case. It was right then. It still is. And so, here, whether brought in tort or assumpsit, these are actions to recover damages for injuries to person. Accordingly, the 3-year limitation applies.

Whether application of the statutory limitation, as in *Coates*, works an injustice or not is a policy question for legislative determination and control. Our function is to apply the statute's clear language.

New York cases cited by plaintiff are: *Blessington* v. *McCrory Stores Corporation*, 305 NY 140 (111 NE2d 421, 37 ALR2d 698); *Robins* v. *Finestone*, 308 NY 543 (127 NE2d 330); *Golia* v. *Health Insurance Plan of Greater New York*, 7 Misc 2d 919 (166 NYS 2d 889). The support plaintiffs find in *Golia*, as cited, appears to have been pretty much dissipated upon review of that case in 6 App Div 2d 884 (177 NYS2d 550). The section of the New York statute involved differs from that of Michigan in that it expressly applies to actions for injuries "resulting from negligence". The reasoning in them becomes involved with questions of whether the causes of action did or did not arise out of defendants' negligence. The Michigan statute presents no such question, leaving these New York cases of scant assistance to us. In accord with the Michigan view expressed in *Coates* are *Farbach Chemical Co.* v. *Commercial Chemical Co.*, 101 Ohio App 209 (136 NE2d 363); *Seymour* v. *Union News Co.*, 349 Ill App 197 (110 NE2d 475); *Strzelczyk* v. *Marki*, 169 Cal App 2d 703 (337 P2d 846); and *Katz* v. *Manhattan General*, 2 App Div 2d 876 (156 NYS2d 302), which hold immaterial the form of action pursued. *Smith* v. *White Tower Management Corporation*, 129 NYS 2d 545; and *Moore* v. *James*, 5 Utah 2d 91 (297 P2d

221), hold that, at all events, actions such as these against an innkeeper cannot be predicated on contract liability under the theory of implied warranty.

Regardless of the discussion of the question as to whether an action is based on contract or tort in the cases from other jurisdictions, that question is not controlling under our statute.

Affirmed. Costs to defendants.

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

SMITH, J. (*dissenting*). Paragraph 9 of plaintiff's amended declaration[0] states as follows:

"That at time of the injuries complained of, plaintiff was a male of 57 years of age employed at a weekly wage of $82.50, and as a result of defendants' breach of contract sustained loss of earnings, incurred medical and hospital bills, underwent mental anguish, to plaintiff's damage in the sum of $75,000."

The reference to mental anguish, the pleader tells us, is made "not for the purpose of stating a cause of action *ex delicto* but for the purpose of showing a breach of contract and subsequent damage necessitating medical attention and hospitalization."

In short, plaintiff has sought to plead, and presumably will seek to prove, if allowed to go to trial, a breach of contract.

That the breach of contract resulted in personal injury does not convert it into an action for personal injury. The phrase "actions to recover damages for injuries to person or property,"[1] appearing in our statute, was introduced merely to replace the common-law designations for actions, which were made

[0] The quotation is from the declaration of plaintiff Baatz. It is to be noted the cases were consolidated for appeal.—REPORTER.

[1] PA 1915, No 314, ch 9, § 13, as amended, CLS 1956, § 609.13 (Stat Ann 1959 Cum Supp § 27.605).

obsolete through the adoption of the judicature act of 1915.[2] The draftsmen of our statute, following to some extent the model of the New York code of civil procedure, employed this phrase rather than the older common-law designations, in limiting certain tort actions to 3 years.[3] (Indeed, the phrase is so employed in the recently proposed revised judicature act.[4]) But they did not thereby effect any change in the substantive law applicable to causes of actions. The parties before us have entered into a lawful contract, according to the pleader. In return for a sum of money defendants agreed to furnish plaintiff a safe and tranquil lodging. While in this relationship thus voluntarily assumed (still following the declaration), the contract was breached by defendants. As a result of the breach, plaintiff had his rest disturbed, lost wages, and incurred bills.

Now, if these parties had entered into no contract whatever, plaintiff could have sued defendants for damages for personal injuries arising out of the bomb explosion, provided he could show duty and breach. He has this right regardless of contract. But just how defendants are able to convert the cause of action against them, based on the contractual relationship, and arising out of its breach, into a cause of action plaintiff would have had if the parties had been complete strangers, I am completely unable to follow. This is county-fair law: Now you see it, now you don't.

The problem before us is one of the most baffling of the current legal problems. Prosser treats it in

[2] PA 1915, No 314, ch 11, § 1, as amended, CL 1948, § 611.1 (Stat Ann § 27.651). See Sunderland, The Michigan Judicature Act of 1915, part 2, Forms of Action, 14 Mich L Rev 383.

[3] Compare NY Code of Procedure (1877), § 383(5) (now NY Civil Practice Act § 49[6]). [Clevenger's Practice Manual, § 49.—REPORTER.]

[4] Joint Committee on Michigan Procedural Revision. Final Report, part 2, Proposed Statutes and Comments, pp 306, 307.

his lecture on The Borderland of Tort and Contract,[5] pointing out that the cases are a riot of confusions, the result often depending upon the particular issue before the court (change of venue, limitations, joinder of parties, assignability, et cetera). He observes[6] that—

"there are hundreds of cases in which the court has construed the plaintiff's complaint, and on the basis of the presence or absence of some particular allegation, or the emphasis found to have been given to it, have held that contract or tort is pleaded. There is probably no more barren and unrewarding group of decisions to be found in the law. They turn almost entirely upon the details of language, which of course vary from case to case."

The criticism is well justified. The cases are, indeed, sterile, doctrinaire, and formalistic, a maze of tort, contract, and quasi-contract, the more complicated because of the historical development of the forms of action. See *Hart* v. *Ludwig*, 347 Mich 559. In this situation, we must plant decision on something other than sonorous legalisms or textual abstractions, if we are ever to progress.

I am constrained to reject *Coates* v. *Milner Hotels, Inc.*, 311 Mich 233, as authority on the matter before us. Reference to the briefs will disclose that neither party to that case cited any authority in support of the respective positions taken; our Court, in ruling, did so without discussion of applicable principles, or citation of case authority. So far as the text cited in the opinion is concerned I have no quarrel with its generalities. But it is based upon an assumption here challenged, namely, that we are ruling upon an action seeking "damages caused by negligence," its "real purpose" being to recover "for an injury to the person." When a declarant sets forth a com-

[5] Prosser, Selected Topics on the Law of Torts, pp 380–452.
[6] Prosser, Selected Topics on the Law of Torts, pp 430–432.

mercial host-guest relationship, and expressly pleads a breach of contract with respect to duties assumed in a public calling, I must reject any assumption that he is pleading a tort action he might have brought, but did not, particularly when such assumption has the effect of depriving the plaintiff of any hearing whatsoever. In other words, despite his protests, we assume him into the text quoted (he really wants, we say, damages for a personal injury) and thus assume him out of court.

The question before us is whether plaintiff has pleaded a cause of action in tort (now outlawed) or one in contract. To start at the beginning, both causes of action may arise in a proper case, of which innkeeper-guest is one. Others are carrier-passenger, bailor-bailee, attorney-client, and principal-agent, to mention but a few. "The same act or transaction," accurately states Corpus Juris Secundum,[7] "may, however, constitute both a breach of contract and a tort," though, of course, there can be but one recovery. (Plaintiff may ride either horse, says the Iowa court,[8] but not both.) Among such situations giving rise to the 2 causes of action, continues the cited text, are "certain classes of contracts which create a relation out of which certain duties arise as implied by law independently of the express terms of the contract, a breach of which will constitute a tort, and in such cases an injured party may sue either for breach of the contract or in tort for breach of the duty imposed by law, the rule being that, where there is a breach of duty imposed by law, an action in tort is not precluded because such duty arises out of a contract relation." One of the "particular contract relations" cited as an illustration of the general rule is that of the innkeeper, as to whom it is said (1 CJS, Actions, § 49(6), at p 1122):

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[7] 1 CJS, Actions, § 47, at p 1104.
[8] *Randall* v. *M. M. Moen Co.*, 206 Iowa 1319, 1323 (221 NW 944).

"The relation between innkeeper and guest originates in contract, but gives rise to duties imposed by law, for a breach of which duties the guest may maintain an action in tort."

With respect to our particular problem, the statute of limitations, do we have before us an action in tort or in contract? The pleader insists he is relying on the contractual cause of action, and so, in truth, the declaration reads, but it is hopeless to rely upon verbiage alone, unless the wheel has come full circle and lawsuits will once more, as in medieval times, stand or fall upon the words employed in the writ. We should, in determining the cause of action pleaded, examine the essential allegations of the complaint as a whole, stressing neither particular words nor particular allegations taken out of context.[9] If the substantial cause of action pleaded is a tort action, the tort limitation would follow. If contract, the longer period. If the facts give rise to 2 causes of action, as they do here, I see no reason, and none has been suggested, why defendants must necessarily be accorded the grace of the shorter period. If we look at the fundamental issues underlying the rule of law, as we must if we are to go beyond the province of the grammarians, it is clear that the law has imposed upon the innkeeper a peculiar obligation of care arising out of the fact that the traveler in a strange community has his defenses down, so to speak, and has entrusted both his goods and his person, and sometimes his family, as well, to the care of the keeper of the inn.[10] It is for these and similar reasons, that, in an early Georgia case,[11]

[9] See Winfield's Tagore Law Lectures, published by Cambridge University Press, London, under title "The Province of the Law of Tort," particularly pp 221 and 222, referring to the "substantial cause of action."

[10] See, generally, Beale's treatise on The Law of Innkeepers and Hotels.

[11] *Bonner* v. *Welborn*, 7 Ga 296, 307.

the court said "the law has taken them [inns and innkeepers] so strictly in charge." It is not to my mind, consonant with such strictness in charge to deny an allegedly injured plaintiff the longer period of limitations when he chooses to assert the contract, rather than the tort, remedy. Nor is this view as to the limitation period to be applied peculiar to the law of inns and innkeepers, despite its unique applicability thereto. As a matter of fact, the view here taken is the more common application of the law of limitations, innkeeper or no. The defense of limitations is recognized, but it is never favored, by the courts, and if there is doubt as to which of 2 limitation periods applies, the longer is generally used. 1 CJS, Actions, § 46.

Here there are 2 substantial causes of action. The one arises out of the duty imposed by law upon those in the relation of innkeeper-guest. Here the contract is pleaded merely as the inducement. The other arises out of the breach of the contract for care and shelter entered into, the obligation assumed. Here the contract is the gist of the action. That the injury may be shown in order to prove breach and damages does not convert the action to one "for" personal injuries. The substantial cause of action here pleaded is not for personal injuries but for breach of contract. As such, it is not barred by limitations.

The order should be reversed and the case remanded, with costs to appellant.

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

GOLAHER *v.* HUNTING.

1. QUIETING TITLE — PLAINTIFF IN POSSESSION — JURISDICTION — EQUITY.

   Chancery court properly exercised jurisdiction in suit to quiet title to 18-foot strip of land to which defendants had record title but to which plaintiffs claimed title by adverse possession, where defendants disputed plaintiffs' title only as to a part of the tract.

2. ADVERSE POSSESSION—TITLE—RECORDING—TAX ROLLS.

   One who claims possession of land adversely to the holders of record title need not have some notice of the claim recorded, cause the description thereof to be entered in their names on the tax rolls, erect a fence, or bring an earlier suit to quiet title, where the claim is based on adverse possession that is *open and notorious for 38 years.*

3. SAME—PUBLIC PROCLAMATION OF TITLE—ESTOPPEL.

   One who acquires title to land by adverse possession thereof need not make a public proclamation of his claim of title to the property in dispute or be estopped to assert claim of ownership.

4. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —ADVERSE POSSESSION.

   Reversible error was not committed in suit to quiet title to 18-foot strip of land by plaintiffs who claimed title by adverse possession by reason of their testimony as to matters which may have been equally within the knowledge of defendants' now deceased predecessor in title against whom plaintiffs' possession was adverse, where there was ample proof and corroboration of such adverse possession presented by disinterested witnesses (CL 1948, § 617.65).

REFERENCES FOR POINTS IN HEADNOTES

[1] 44 Am Jur, Quieting Title §§ 3, 45.
[2, 3] 1 Am Jur, Adverse Possession § 140.
[4] 3 Am Jur, Appeal and Error § 1028.
[5] 1 Am Jur, Adverse Possession § 246.

5. QUIETING TITLE—ADVERSE POSSESSION—EVIDENCE.

Evidence in suit to quiet title to 18-foot strip of land upon which plaintiffs had erected a garage and used adversely to holders of record title for 38 years, which was sufficient to satisfy the trial judge that plaintiffs had title to the entire tract instead of only the south end thereof *held*, not such as to indicate the trial court was in error.

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 7, 1960. (Docket No. 3, Calendar No. 48,196.) Decided September 15, 1960.

Bill by Kenneth Golaher and Thelma Golaher against Allen Hunting and Joyce Hunting to quiet title and restrain trespass. Decree for plaintiffs. Defendants appeal. Affirmed.

Annis & Cooper, for plaintiffs.

Thomas D. Anderson, for defendants.

DETHMERS, C. J. A borderline dispute prompted plaintiffs to bring this chancery action to quiet title in them to the 18-foot disputed strip in question and to restrain defendants from trespassing on it. From decree for plaintiffs the defendants appeal.

The legal descriptions in the lines of conveyances covering the 2 neighboring properties of the parties are the west half, appearing of record in the names of defendants, and the east half, in the names of plaintiffs, respectively, of a certain lot number 73. In dispute are the easterly 18 feet of the west half of the lot. Plaintiffs claim that they and their predecessors in chain of title acquired the same by adverse possession for 38 years.

The 2 properties front on a street running along their south ends. Defendants admit that plaintiffs' garage and driveway are on the south end of the 18-foot strip and that plaintiffs have acquired title thereto by adverse possession, and they say that they

are willing to deed that portion to plaintiffs. But a part of the strip, running along defendants' side of plaintiffs' garage and driveway and the north portion behind the garage defendants claim as their own.

Defendants bought on land contract and moved into their premises just a year before suit was commenced. They trimmed some bushes, on occasions cut the grass, removed plaintiffs' lawn furniture and placed their childrens' playground equipment on the disputed land. Plaintiffs promptly removed the latter. On the basis of these facts defendants say they were and are in possession of the strip and that plaintiffs' remedy, if any, is not in chancery but ejectment. Defendants' admission of plaintiffs' right to the garage and driveway portion and plaintiffs' insistence that they have continued to exercise dominion over the entire strip, throwing off defendants' playground equipment, and their contention that defendants have merely trespassed frequently, leave the question of possession of a part at least disputed. We think the court in chancery properly exercised jurisdiction for reasons set forth in *Brooks* v. *Michos,* 323 Mich 184, *Campbell* v. *Kent Circuit Judge,* 111 Mich 575, and others therein cited.

Defendants urge that they became purchasers for value without notice of plaintiffs' claims and that plaintiffs then were guilty of laches estopping them from asserting their rights by not having caused some notice of their claim to be recorded, or caused the description of the strip to be entered in their names on the tax rolls, or erected a fence or earlier brought suit to quiet title. For this they cite no authorities. Such has not been the law so long as the possession of one claiming adversely has been open and notorious. In *Yatczak* v. *Cloon,* 313 Mich 584, 590, 591, in response to a similar contention, this Court said of one who acquires title to land by adverse possession:

"But it is urged that defendant Esther Cloon was a bona fide purchaser for value without either actual or constructive notice. * * * Defendant having purchased the property in 1937, urges that a bona fide purchaser without notice should be protected against a claimant for adverse title. * * *

"We do not think plaintiff is estopped to assert her claim of ownership. It was not necessary to make a public proclamation of her claim of title to the property in dispute."

Defendants complain that plaintiffs were permitted to testify as to matters relating to the strip and the adverse use thereof which had been equally within the knowledge of a now deceased predecessor in defendants' chain of title.* Defendants fail to specify particular testimony, and there is question as to whether they did not open the door to all of plaintiffs' testimony. At all events, we think that the nature of the latter and the ample proof and corroboration, by disinterested witnesses, of the adverse possession leave the objection without particular merit under our holding in *Edwin S. George Foundation* v. *Allen,* 320 Mich 552.

We need not detail the acts of plaintiffs and their predecessors, the proofs of which combined to satisfy the trial judge that they had established 38 years of adverse possession of the entire 18-foot strip. We are not persuaded that had we been in his position we would have decided otherwise.

Affirmed. Costs to plaintiffs.

CARR, KELLY, SMITH, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

* See CL 1948, § 617.65 (Stat Ann § 27.914).—REPORTER.

STREET *v.* FERNDALE BOARD OF EDUCATION.

1. COURTS—MOOT QUESTION—PUBLIC QUESTION—TEACHER TENURE.
   Determination of a question as to plaintiff's right to tenure as principal in defendant school district for period of contract now expired is made notwithstanding it is patently moot, since it is a matter of public importance.

2. STATUTES—CONSTRUCTION—UNAMBIGUOUS LANGUAGE.
   Unambiguous statutory language may not be disregarded by the interpreter thereof in deference to what he determines to be and invokes as the spirit of the statute.

3. SCHOOLS AND SCHOOL DISTRICTS—TEACHER TENURE—ADMINISTRATIVE CAPACITY.
   The teacher tenure act explicitly provides that tenure is not acquired in administrative capacities when expressly excluded by contract (CL 1948, § 38.91).

4. SAME—PRINCIPAL—DEMOTION—VISITING TEACHER—SALARY.
   Plaintiff who was hired as a teacher under a contract vesting the superintendent of schools of the defendant district with discretion to assign and transfer him and withholding tenure in the capacity of principal, and who was subsequently designated as principal, was not *demoted*, as the term is used in the teacher tenure act, by a later designation as a visiting teacher, where his salary was not reduced (CL 1948, §§ 38.74, 38.91).

5. SAME—JURISDICTION OF STATE TENURE COMMISSION.
   The State tenure commission had no jurisdiction over controversy between plaintiff who had no tenure as a principal, but who

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REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Courts § 49.
[2] 50 Am Jur, Statutes § 302.
[3] 47 Am Jur, Schools § 129.
Teachers' tenure statutes. 110 ALR 791, 113 ALR 1495, 127 ALR 1298.
[4] 47 Am Jur, Schools § 136.
[5] 47 Am Jur, Schools § 141.

had been hired as a teacher, and who, after serving as a principal for 5 months, was reassigned to a teaching position at same salary he had had as principal, hence, his petition to the commission should have been dismissed (CL 1948, §§ 38.74, 38.91).

Appeal from State Tenure Commission. Submitted June 10, 1960. (Docket No. 11, Calendar No. 48,297.) Decided September 15, 1960.

Scott W. Street filed petition against the Board of Education of the School District of the City of Ferndale, Oakland County, for order reinstating him as a school principal, which order was granted. Defendant appeals. The Attorney General intervenes asking affirmance. Reversed and petition dismissed.

Roscoe O. Bonisteel and *Roscoe O. Bonisteel, Jr.*, for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Eugene Krasicky* and *Gerald J. O'Reilly,* Assistant Attorneys General, for intervenor.

Forsythe & Beasley (*William R. Beasley,* of counsel), for defendant.

DETHMERS, C. J. This case presents a question of tenure in the capacity as a principal under the teachers tenure act, CL 1948, § 38.71 *et seq.* (Stat Ann 1959 Rev § 15.1971 *et seq.*).

Defendant is a school district in which, by a majority vote of the qualified electors voting thereon, the provisions of the tenure act were adopted. On June 11, 1958, a written contract was entered into whereby defendant appointed and plaintiff accepted appointment as teacher under the tenure act for the school year September 1, 1958, to June 30, 1959. The contract contained the following language:

"The conditions of this appointment are: That you are subject to assignment and transfer at the discretion of the superintendent of schools, and subject to the rules and regulations of the board of education, and other regulations, duties, and requirements imposed by applicable statutes of the State of Michigan. * * *

"It is hereby specifically provided pursuant to the action of the board of education taken in accordance with section 1 of article 3 of Act No 4 of the Public Acts of 1937 (first extra session) as amended by Act No 119, Public Acts of 1941 and as may have been further amended from time to time, that the teacher with whom this contract is made shall not be deemed to be granted tenure in the capacity of principal under or by virtue of this contract."

This withholding of tenure as principal in the contract is authorized by article 3, § 1, of the act (CL 1948, § 38.91 [Stat Ann 1959 Rev § 15.1991]), which provides:

"Sec. 1. After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act: Provided, however, That when the controlling board of any school district shall specifically provide in each contract of employment of any teacher employed as superintendent, assistant superintendent, or principal, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure in such administrative capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such administrative capacity, but shall be deemed to have been granted continuing tenure as an active class room teacher in such school district. Upon the termination of any such contract of employment, if such controlling board shall not re-employ such teacher under con-

tract in any such administrative capacity, such teacher shall be continuously employed by such controlling board as an active class room teacher at a salary equal to the highest salary paid to any active class room teacher in the school district in which such teacher is employed, subject to the provisions of this act: Provided further, That a failure on the part of any controlling board to re-employ any such teacher in any such administrative capacity upon the termination of any such contract of employment shall not be deemed to be a demotion within the provisions of this act. Failure on the part of any such controlling board to so provide in any such contract of employment of any teacher in an administrative capacity shall be deemed to constitute the employment of such teacher on continuing contract in such administrative capacity and subject to the provisions of this act."

Article 1, § 4, of the act (CL 1948, § 38.74 [Stat Ann 1959 Rev § 15.1974]), provides:

"Sec. 4. The word 'demote' shall mean to reduce compensation or to transfer to a position carrying a lower salary."

In September of 1958 plaintiff was assigned as principal of a school in defendant school district. On February 2, 1959, he was relieved as principal, pursuant to a resolution of the board of education, and reassigned to a position as visiting teacher, at the same salary he had been paid as principal. Although the record does not show it, it is stated in one of the briefs that the position to which he was reassigned normally carried a lower salary than principal. Plaintiff appealed his reassignment to the Michigan state tenure commission and sought reinstatement as a principal. The latter held his reassignment to be a demotion and that plaintiff had special limited tenure as principal until the expiration of his contract at the end of the school year,

June 30, 1959, and ordered his reinstatement accordingly. This is defendant's appeal therefrom, on leave granted.

The question here is limited to plaintiff's right to tenure as principal for the period from February 2, 1959, to June 30, 1959. It is patently moot, but we pass on it because of its public importance.

Defendant's position is that under the quoted statutory provision and language of the contract pursuant thereto, plaintiff was not granted tenure as principal and, therefore, no question of tenure in that capacity could arise and, hence, the State tenure commission was without jurisdiction in the premises. This was the basis for defendant's motion to dismiss plaintiff's appeal before that commission, which it denied. We think defendant's position well taken. The motion should have been granted.

A composite of the arguments of the commission, plaintiff, and the attorney general, as intervenor, is as follows:

1. Every statute has a spirit which transcends its words.

2. The spirit of this statute is to protect teachers against the whim and caprice of changing officeholders.

3. The reassignment from principal to visiting teacher constituted a demotion in violation of the statute even though plaintiff continued to receive the same salary.

4. From the statute's provision, that failure to reemploy a teacher as principal upon termination of his contract shall not be deemed a demotion, it follows that relieving him as principal and reassigning him to teaching duties before the contract's termination is a demotion.

No authority is cited to support the claim that express, unambiguous statutory language may be disregarded by the interpreter in deference to what he

determines to be and invokes as the spirit of the statute. The language of the statute is explicit that tenure is not acquired in administrative capacities when expressly excluded, as here, by the contract. That is controlling. While the opinion in *Rehberg* v. *Melvindale, Ecorse Township School District No. 11,* 330 Mich 541, does contain reference, unnecessary to decision, to expressions from courts of other States as to the purpose of tenure acts, which tend to encourage the above expressed view as to the spirit of the act, we are not ready, on fuller consideration and as a step toward decision, to join a chorus whose theme is that permitting continued local control and regulation of schools amounts to abandoning them to whim and caprice. Those are traits on which local elective officeholders, closer and more responsive to the will and wishes of the people who elected them, have no monopoly as contrasted to members of appointed boards and commissions in higher echelons of government. If, however, the spirit of the act is of significance, it is important to note that while the teachers tenure act, as first enacted in 1937, provided for tenure for all teaching personnel, which included those in administrative capacities, apparent public dissatisfaction with such shackles on local control of school administration brought about the 1941 amendment providing for the exemption, by contract, of those in administrative capacities as in the present section 1, article 3, set forth. Surely this amendment cannot be denied to possess, equally, a spirit, the essence of which is not the stamping of desires for local administrative control as smacking of the rule of whim and caprice, but, rather, the perpetuating of such local adminis-

trative control as in the best public interests.* We discern then no spirit of the act transcending the plain exempting language of the statute.

As for the statute's above quoted prohibition against demotion of a teacher except upon proceedings had as in the statute provided, again, with apparent resort to the spirits rather than the language of the statute, it is contended that plaintiff's reassignment was a demotion, even though he was continued at the same pay (which the attorney general styles a mere subterfuge), because the position of principal ranks higher professionally than visiting teacher. On what authority, in the record or elsewhere, that assertion is made is not indicated. The trouble with this is that the statute has defined the word "demote" to mean "to reduce compensation or to transfer to a position carrying a lower salary." Plaintiff's compensation was not reduced. While the record is silent on what other visiting teachers customarily were paid in the district, statements in the briefs that it was less than the amount plaintiff received as principal fail to obviate the fact that the particular job to which plaintiff was reassigned carried, for him at least, the same salary. It is clear from the definition in the act that the demotion against which it sought to protect teachers, as such, was of a monetary rather than a prestige character. Finally, in this connection, the fact is not to be ignored that the very provision safeguarding teachers against demotions without appropriate proceedings is immediately followed by the proviso clause making an exception as to those in adminis-

* Even in *Rehberg* v. *Melvindale, Ecorse Township School District No. 11, supra,* 547, 548, this Court said:

"School districts, though State agencies, are governed locally and their controlling boards are chosen by the electorate. (See PA 1927, No 319 [CL 1948, § 341.1 *et seq.* (Stat Ann § 15.1 *et seq.*)].) If the legislature intended to deprive local governing bodies of administrative control of teachers, that intent should have been definitely stated in the tenure act."

trative capacities, insofar as such capacities are concerned, when so provided in the contract.

As above stated, it is contended that from the statutory provision that failure to re-employ a teacher in an administrative capacity under a contract such as here involved, upon termination of that contract, shall not be deemed a demotion, it follows that transfer from the duties of principal to teacher during the term of the contract is a demotion. We do not agree. Plaintiff's rights come from the statute or the contract or both. Inasmuch as the statute, under the contract in this case, withholds tenure in such administrative capacity, and does not grant it for any period of time whatsoever, the only remaining source to which plaintiff may look is the contract. His reliance, then, manifestly must be and is on the contract. But the contract in this case does not employ him as principal, only as teacher. After being so employed he was assigned to a principalship. The contract expressly provides, however, that plaintiff shall be "subject to assignment and transfer at the discretion of the superintendent." That is the measure of his rights in the premises under the contract.

Inasmuch as plaintiff had no tenure in his capacity as principal, his removal from that position and reassignment to a teaching position gave rise to no question of which the State tenure commission had jurisdiction. Defendant's motion before it to dismiss should have been granted.

Order of the commission reinstating plaintiff as principal is reversed. Plaintiff's petition in the nature of appeal to the commission is dismissed.

CARR, KELLY, SMITH, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

CUNNINGHAM *v.* GARBER.

1. BROKERS — COMMISSION — CONTRACTS — CONSUMMATION OF PURCHASE.

   Real-estate broker was not entitled to commission for sale of defendants' real estate, where commission was to be paid only upon consummation of the sale and purchasers failed to complete the sale within time provided by the agreement.

2. SAME—COMMISSION—CONSUMMATION OF PURCHASE.

   Agreement providing for consummation of purchase of defendants' real estate within 30 days after abstract of title was delivered, if marketable title could be conveyed, was not ambiguous, hence, court was justified in determining as a matter of law that plaintiff real-estate broker was not entitled to commission, where purchasers failed to complete sale within the 30-day period.

Appeal from Wayne; O'Hara (Chester P.), J. Submitted June 8, 1960. (Docket No. 13, Calendar No. 48,410.) Decided September 15, 1960.

Assumpsit by William T. Cunningham against Ralph Garber and Helen Garber for real-estate dealer's commission. Judgment for defendants *non obstante veredicto*. Plaintiff appeals. Affirmed.

Earl J. Demel, for plaintiff.

Ralph W. Cole, for defendants.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 8 Am Jur, Brokers § 180.

Real-estate broker's right to commission as affected by failure or refusal of customer to comply with valid contract. 73 ALR 926.

DETHMERS, C. J. This is a suit for realtor's commission claimed by plaintiff under the "acceptance of offer" portion of a so-called "offer to purchase," which defendants, as the property owners, had signed on June 22, 1957. The offer to purchase, previously drafted by defendant husband, an attorney, was executed on that same date by a husband and wife named LeBlanc as prospective purchasers. It contained paragraphs 2 and 3, which read as follows:

"2. As evidence of title, sellers will furnish purchasers as soon as possible a complete abstract of title and tax history, certified to a date later than the acceptance hereof, and issued by the Burton Abstract and Title Company. In lieu thereof, a policy of title insurance issued by said company, bearing date later than the acceptance hereof and guaranteeing the title in the condition required for performance of this offer will be accepted.

"3. If a marketable title can be conveyed, the sale shall be consummated within 30 days after delivery of such abstract or policy. If an abstract is furnished and an objection is made to title, and notwithstanding a Burton Abstract and Title Company policy of title insurance, insuring the title in the condition required by this offer can be obtained, the sale shall be consummated within 10 days after delivery of such policy."

On June 27, 1957, defendants' abstract of title was delivered to the LeBlancs. Their attorney, McCarthy, examined it for them and on July 26, 1957, prepared a written opinion pointing out certain technical defects of more than 40 years' standing consisting of slight misspelling of names of grantees or grantors in 2 instances and in another the omission of a middle initial. On August 2, 1957, more than 30 days after the LeBlancs had received the abstract, they having failed to consummate the

deal or make any arrangements with defendants to that end, defendants wrote them a letter notifying them that because of their failure in that respect, the agreement had lapsed by its own terms and was terminated, and that the deposit made therewith would be considered liquidated damages for their breach of the contract. The sale never was consummated, although LeBlancs offered to go through with the deal later in August of 1957.

On trial a jury returned a verdict for plaintiff. The court entered judgment for defendants *non obstante veredicto*. Plaintiff appeals here.

Plaintiff says that he produced a buyer ready, willing, and able to perform according to the terms of the agreement and thus earned the commission, that the question of his performance in that regard had been a question of fact resolved in his favor by the jury whose determination should not have been disturbed by the trial court as a question of law, and that the purchase agreement was ambiguous as to time for performance and should have been interpreted unfavorably to defendants because one of them drafted it.

Witnesses testified on trial, plaintiff's attorney conceded on the record and no one testified to the contrary, that defendants had good marketable title to the premises. No question exists on that point nor did one exist when the trial court entered its judgment *non obstante veredicto*. There is no disputing that LeBlancs did not consummate the deal nor offer or attempt to within 30 days after delivery to them of the abstract showing such marketable title. The record supports, uncontrovertedly, the trial court's finding that as late as August 5, 1957, LeBlancs, while perhaps willing, were not yet ready and able to purchase and make the down payment as in the agreement provided.

The commission was to be paid plaintiff only upon consummation of the sale in accordance with the terms of the agreement, and the sale was to be consummated, by those terms, within 30 days after delivery of the abstract to purchasers if defendants could convey marketable title; they could so convey, the abstract was delivered to purchasers, the sale was not consummated within 30 days thereafter, through no fault of defendants, and, hence, by the terms of the agreement, plaintiff did not become entitled to a commission.

Plaintiff seeks to point out some ambiguity in the above quoted provisions of paragraphs 2 and 3 of the agreement, suggesting that the language, "If an abstract is furnished and an objection is made to title," injected a new time element, other than the 30-day period following delivery of the abstract, which left indefinite the period within which the sale was to be consummated. We see no such ambiguity. The language, regardless of who drafted the agreement, is plain that "If a marketable title can be conveyed," and it is conceded that it could have been, then "the sale shall be consummated within 30 days after delivery of such abstract." More explicit words could not have been employed. Their clarity is not diminished by the following provision requiring purchasers, "if an objection is made to title," to nonetheless consummate the sale within 10 days if defendants elected to furnish them with a policy of title insurance. Defendants did not so elect, the occasion for it did not arise because they had furnished an abstract which showed, as the fact was, that defendants could convey marketable title, and hence no question of fact could have arisen, by any stretch of the imagination or of the meaning of the language of paragraphs 2 and 3, about the controlling effect of the 30-day provision. Not only was there no question of fact for the jury in this case

about the meaning of the governing provision of the agreement as to time for consummation of the sale* but there was none concerning the noncompliance therewith. There being no dispute of facts on the controlling issues and no inferences or version of the facts possible favorable to plaintiff, it was, therefore, the duty of the court to enter judgment *non obstante veredicto* for defendants. *Sieloff* v. *Hubbell,* 352 Mich 664; *Dykema* v. *Muskegon Piston Ring Co.,* 348 Mich 129.

When a realtor does not produce a purchaser ready, willing, and able to buy in accord with the terms of the agreement with the owner or within the time therein provided he has not earned the commission. *Horton* v. *Immen,* 145 Mich 438; *Sterk & Vogel, Inc.,* v. *Kuzee,* 334 Mich 249; *Fertel* v. *Adler,* 338 Mich 689; *Tyson* v. *Herrle,* 354 Mich 298.

Affirmed. Costs to defendants.

CARR, KELLY, SMITH, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

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* In *McPheeters* v. *Birkholz,* 232 Mich 370, 375, this Court said, in part:

"Construction of the lease, if it was open to construction, was for the court. He was right, clearly. The language fixing a definite term is not modified by the other provisions."

JUNE v. CITY OF LINCOLN PARK.

1. MUNICIPAL CORPORATIONS—ZONING ORDINANCE—TRAILER PARKS.
   The fact that areas in city in which trailer parks are permitted are already being used for other purposes does not serve to render zoning ordinance a ban on trailer parks altogether.

2. SAME—ZONING ORDINANCE—RESIDENCE—TRAILER PARKS—BURDEN OF PROOF.
   Plaintiff owners of 10-acre triangular tract of property within defendant city *held*, under evidence adduced, to have failed to sustain their burden of establishing that city's zoning ordinance was invalid as applied to such property by restricting it to residence use in which trailer parks are not permitted, where one side abuts a residential area, another is separated from a residential area by a railroad, and third side abuts area devoted to industrial purposes.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted June 10, 1960. (Docket No. 14, Calendar No. 48,357.) Decided September 15, 1960.

Bill by Jowon M. June, Louis J. Geiermann, and Myrtle J. Geiermann against the City of Lincoln Park, its mayor and councilmen, to declare zoning ordinance void as to their property. Bill dismissed. Plaintiffs appeal. Affirmed.

Bunin & Grandon (*Samuel F. Grandon*, of counsel), *Arthur M. Hoffeins*, and *Harry F. Vellmure*, for plaintiffs.

James D. Mueller, City Attorney, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Zoning § 142.

DETHMERS, C. J. Plaintiffs Geiermann, as title holders, and plaintiff June, as contract purchaser from them, own a 10-acre parcel of land in defendant city. It consists largely of a triangular piece which is zoned residential B. In addition, there is a narrow, necklike strip which extends from one corner of the triangle, fronting for 175 feet on a busy highway, and this is zoned industrial A. The city zoning ordinance does not allow trailer parks in areas so zoned, but limits them to business B districts. Desiring to make it a trailer park, plaintiff June made application for a building permit for that purpose. Permit was denied. Plaintiffs then brought this suit for decree permitting such use of the premises. From decree for defendants, the plaintiffs appeal.

Plaintiffs say the zoning ordinance is invalid as it applies to trailer parks because it attempts to ban them from the city, citing *Gust* v. *Township of Canton,* 342 Mich 436. *Gust* does not hold that there are no circumstances under which such ban would be valid. Here, plaintiffs base their claim of the existence of such ban on the argument that trailer parks are permitted by the ordinance only in districts zoned "business B," on parcels containing at least 1 acre in area, and that there are no such properties in the city not already being used for other purposes. The fact of such existing uses for other purposes does not, of itself, serve to render the zoning ordinance a ban on trailer parks altogether and, hence, as plaintiffs urge, invalid under our holding in *Gust.* Distinguishing this case from *Gust* and from others cited by plaintiffs, such as *Smith* v. *Plymouth Township Building Inspector,* 346 Mich 57; *Clark* v. *Lyon Township Clerk,* 348 Mich 173; *Kremers* v. *Alpine Township,* 355 Mich 563, is the fact that involved in those cases was open, undeveloped, or agriculture land and country, without

near residential, business, or industrial areas and, also, in *Kremers,* spot zoning. Such is not the fact here. Plaintiffs' property is within a city, with adjacent residential and industrial areas. The case does not, then, involve, as in *Gust,* merely a question of prospective, but, rather, of the present relationship of the zoning provisions to public health, safety, morals, or the general welfare.

Plaintiffs also urge that the ordinance is unreasonable and invalid as applied to their property. They stress that the neck-shaped strip, which is zoned industrial A, fronts on a busy U. S. highway, and that the triangular portion has as a boundary on one side a railroad right-of-way, an industrial A district on another side containing a cement mixing plant, and on the third side an alley with a row of houses backing toward it. Witnesses for plaintiffs testified that the property was not suited for or that it would have a lesser value for residence purposes than as a trailer park. Presented, thus, are some of the factors involved in cases in which we have held zoning for residential purposes unreasonable, as in *Janesick* v. *City of Detroit,* 337 Mich 549, *Industrial Land Co.* v. *City of Birmingham,* 346 Mich 667, *McGivern* v. *Huntington Woods,* 343 Mich 413, and *Pere Marquette R. Co.* v. *Muskegon Township Board,* 298 Mich 31.

Defendants point out, however, that a residential area was developed immediately across the railroad right-of-way, that across the alley the area is all residential, that the premises in question is part of a larger subdivision, all once owned by plaintiffs Geiermann, all of the rest of which they sold for residence use, and that the present zoning for residence B has been in effect since defendant city's first zoning ordinance was adopted in 1940. Expert witnesses, and others appearing for defendants, testified that the premises was well suited for residence

purposes, that government-insured financing for that purpose on that location was obtainable, that residences could economically be constructed on the premises and sold at a profit, that the best land use for the property would be residential, and that its best use is as presently zoned, residential B. It also developed that on July 28, 1958, five months before commencement of this suit, plaintiff Louis Geiermann had appeared before defendant city council to protest against a new zoning ordinance which would have zoned the property "industrial A," saying that that would "bar its better use as residential."

In the face of such conflict on the record, the trial court concluded that it could not be said that the testimony for plaintiffs outweighed that of witnesses called by defendants. He found, in accord with the testimony of the latter, that the property was suitable for residential use and that so zoning it was reasonable. We cannot say that had we been in his position we would have found otherwise on the proofs. On such finding of facts, it must be held that plaintiffs did not sustain the burden of establishing the invalidity of the ordinance as applied to their property.

Affirmed, with costs to defendants.

CARR, KELLY, SMITH, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

LaHOOD *v.* WIELADT.

1. Appeal and Error—Review of Common Pleas Court Judgment by Circuit Court—Preponderance of Evidence.

   The appeal from the Detroit common pleas court to the circuit court does not call for a trial *de novo* of a nonjury case in the latter court but permits review there, as in appeals to the Supreme Court, and reversal only upon a finding that the judgment below was against the clear preponderance of the evidence (CLS 1956, § 728.4).

2. Same—Common Pleas Court—Reversal by Circuit Court—Preponderance of the Evidence.

   The circuit court's reversal of a judgment of the Detroit common pleas court in a nonjury case was reversible error, where the judgment reversed was not against the preponderance of the evidence (CLS 1956, § 728.4).

3. Partnership—Third Parties.

   The power of one partner to bind another person, as partner, in an obligation to a third person requires the continuance of the existence of the partnership at the time the obligation is incurred (CL 1948, § 449.9).

4. Same—Lease Executed by Former Partner.

   Appellant, former partner, was not estopped to deny liability under renewal lease which was executed by other partner after partners had ceased doing business as a partnership, where appellant had specifically declined to sign the new lease when lessor approached him, and lessor's attorney struck appellant's name from lease, although no partnership dissolution certificate had been filed (CL 1948, § 449.9).

References for Points in Headnotes

[1] 3 Am Jur, Appeal and Error § 815.
[2] 3 Am Jur, Appeal and Error § 900.
[3] 40 Am Jur, Partnership § 274.
[4, 5] 40 Am Jur, Partnership § 78.

5. LANDLORD AND TENANT—PARTNERSHIP—NEW LEASE AFTER DISSOLUTION.

Appellant, former partner of partnership which had executed original lease but had ceased doing business as partnership before second lease was executed by other former partner and evidence of such disassociation was sufficient to cause common pleas court judge to hold appellant not liable was improperly subjected to liability for rent under second lease by circuit court on its review, as appellant was neither liable as a tenant holding over as there was a new lease, nor liable under the common counts.

Appeal from Wayne; McCree, Jr. (Wade H.), J. Submitted June 8, 1960. (Docket No. 26, Calendar No. 48,387.) Decided September 15, 1960. Rehearing denied October 10, 1960.

Action by Tom LaHood against Joseph Wieladt and Earle J. Teschendorf, individually and as partners doing business as Belmont Upholstering Co., for sums due on rent. Judgment in Detroit common pleas court for plaintiff against defendant Wieladt only and for no cause of action as to defendant Teschendorf. On appeal to circuit court judgment entered against both defendants. Defendant Teschendorf appeals. Reversed and remanded for entry of judgment in common pleas court as originally entered.

Albert Green, for plaintiff.

Maurice V. Victor (*Meyer Weisenfeld,* of counsel), for defendant Teschendorf.

DETHMERS, C. J. Plaintiff brought suit in the common pleas court of the city of Detroit against the 2 defendants, as partners, for rent under a written lease. Defendants had been partners doing business under the firm name of Belmont Upholstering Company, according to a certificate filed in 1949. In 1952, as such partners, they signed a 5-year lease naming that partnership as lessee and them as the

partners. Plaintiff was the lessor. Testimony, which the trial court had a right to and apparently did believe, showed that in 1956 defendants ceased doing business as a partnership, though they filed no certificate of dissolution, and formed a corporation, the Belmont Furniture Company, its registered office being at the address of the leased premises. The lease, containing a 5-year renewal option clause, expired on April 30, 1957. Some time prior to its expiration plaintiff tendered to defendant Teschendorf a new 5-year written lease, at a higher rental, naming the same partnership and partners as lessees. Teschendorf objected to its rent provisions and refused to sign. Plaintiff thereafter went to defendant Wieladt, who did sign. Plaintiff then took the lease to his attorney, who had drafted it, asked if it meant anything with Teschendorf refusing to sign, whereupon the attorney, in plaintiff's presence, struck out from the lease the typewritten names of the partnership and of defendant Teschendorf appearing in the first paragraph and at the place for signatures and the word "partner" following Wieladt's name, leaving only the names of plaintiff as lessor and of defendant Wieladt as lessee in both places, and sent a copy of the lease, so altered, to Wieladt. After the first lease had expired and the term of the new one commenced no apparent change in tenancy occurred. Defendant Teschendorf continued for a number of months to deliver to plaintiff checks for the rent. These checks, as had been true for the previous year, no longer named the partnership "Belmont Upholstering Company" as payor, but, instead, "Belmont Furniture Company," the name of the corporation. Plaintiff testified that he did not remember whether he had been told by defendant Teschendorf, shortly prior to execution of the second lease, that the business was no longer a partnership but a corporation. Teschendorf testi-

fied that he had given a form letter to that effect to his office girl for transmission to all creditors.

The rent due under the new lease for the last 2 months of 1957 and the first two of 1958 was left unpaid. Hence this suit. The common pleas court entered judgment therefor in favor of plaintiff against defendant Wieladt, but a judgment of no cause for action as to defendant Teschendorf. Plaintiff appealed to the Wayne circuit court and obtained a reversal as to Teschendorf and remand with directions to enter judgment for plaintiff against both defendants. From that, defendant Teschendorf appeals here.

The appeal to circuit court did not call for trial *de novo* there but permitted review as in appeals here and reversal only upon a finding that the judgment below was against the clear preponderance of the evidence. CLS 1956, § 728.4 (Stat Ann 1959 Cum Supp § 27.3654); *Ladney* v. *Ternes Steel Co.,* 359 Mich 228. We think that it was not and that, therefore, its reversal was error.

True, CL 1948, § 449.9 (Stat Ann 1959 Rev § 20.9), provides that one partner may bind another, but here there is competent testimony, accepted as true by the trial court, and no evidence to the contrary, that there was no partnership when the second lease was signed by Wieladt.

The circuit court, citing *Clippinger* v. *Starr,* 130 Mich 463, held that Teschendorf became estopped to deny that the second lease was a partnership obligation by his monthly payment of the rent after he knew of its existence and the signature by Wieladt. The proofs show, however, that that lease, by its terms, did not purport to be a partnership lease, but one between plaintiff and Wieladt and the rental payments were not out of Teschendorf's or partnership funds, but were payments by the corporation. No such estoppel was, therefore, effected.

It is urged that because the certificate of dissolution of the partnership was not filed and it was not shown that plaintiff had notice thereof plaintiff had a right to rely on Wieladt's apparent authority to bind Teschendorf. The answer is that he did not do so, but, after asking his attorney about it, caused Teschendorf's and the partnership's names to be stricken from the lease and made it to read as between him and Wieladt only.

Plaintiff stresses the holdings in *Township of Big Prairie* v. *Big Prairie Township Grange,* 286 Mich 268, and *Bakker* v. *Fellows,* 153 Mich 428, that, with a lease signed by the lessor, lack of lessee's signature does not affect its validity if he takes possession under its terms. Here its terms make Wieladt lessee and make no reference to Teschendorf. The evidence favorable to him, accepted by the trial court, is that Teschendorf did not possess as a partner or individual tenant, but as an officer or part owner of a corporation which paid the rent. Teschendorf was not liable as a tenant holding over under the first lease, as it had been replaced or succeeded by another between plaintiff and Wieladt. These facts and the existence of the second lease, upon which plaintiff declared and relied, are reasons sufficient for holding Teschendorf not liable under the common counts. *Geistert* v. *Scheffler,* 316 Mich 325; *Goldblum* v. *United Automobile Workers, Ford Local No. 50,* 319 Mich 30.

Judgment in circuit court is reversed and a remand directed to the common pleas court for reinstatement of its judgment for plaintiff against defendant Wieladt and of no cause for action as against defendant Teschendorf, with costs to the latter.

Carr, Kelly, Smith, Black, Edwards, Kavanagh, and Souris, JJ., concurred.

GOETHAL *v.* KENT COUNTY SUPERVISORS.

1. MANDAMUS—ANNEXATION PETITIONS.

   Mandamus was the proper procedure to use by party seeking to compel the submission of proposals to the electorate in areas for which petitions had been filed for annexation to a city.

2. STATUTES—CONSTRUCTION—INTENT.

   The legislative intent must be gathered from the language used in a statute, if possible, and such language should be given its ordinary meaning unless a different interpretation is indicated.

3. WORDS AND PHRASES—ALTERNATIVE.

   The term "alternative" means an opportunity for choice between 2 things, courses, or propositions, either of which may be chosen, but not both.

4. STATUTES—ALTERNATIVE ANNEXATION PROCEDURE.

   A statute which provided an alternative procedure for annexation to cities under certain circumstances is not construed as requiring the use of a particular alternative in the absence of language making it mandatory to do so.

REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Elections § 116.
[2] 50 Am Jur, Statutes § 238.
[4, 5, 11] 37 Am Jur, Municipal Corporations § 31.
[6] 37 Am Jur, Municipal Corporations § 7.
[7] 11 Am Jur, Constitutional Law § 225.
[8, 9] 11 Am Jur, Constitutional Law § 227.
Power to extend boundaries of municipal corporations. 64 ALR 1335.
Constitutionality of statutes for change of municipal corporations as affected by objection that they confer nondelegable powers, or impose nonjudicial functions, on a court. 69 ALR 266.
[10] 18 Am Jur, Elections §§ 102–104.
[12] 14 Am Jur, Costs § 91.

5. MUNICIPAL CORPORATIONS—ANNEXATION—PETITIONS—SIGNATURES.
Statute providing that proceeding to annex territory to a city could be commenced by petitions signed by 1% of the population of the territory affected thereby, with a minimum number of 100, with not less than 10 from each city, village, or township affected by the proposed change or in lieu thereof that signatures of owners of record legal title of 1/2 of the area annexed would suffice where there are less than 10 persons qualified to sign the petition living in the unincorporated territory is construed as providing for permitting, not requiring, the use of the alternative method where there are less than 10 persons qualified in area proposed to be annexed (CL 1948, § 117.6, as last amended by PA 1957, No 210).

6. SAME—ANNEXATION—BOUNDARIES—LEGISLATURE—HOME RULE.
The power to provide for the incorporation of municipalities, annexation to, and changes of boundaries thereof rests entirely in the legislature, not the courts, subject to provisions of the Constitution designed to afford the rights and privileges of home-rule government.

7. CONSTITUTIONAL LAW—SEPARATION OF POWERS—LEGISLATURE—COURTS.
Any attempt to vest courts with legislative authority would be invalid in view of the recognized division of powers between the different departments of government.

8. SAME—COURTS—LEGISLATURE—MUNICIPAL CORPORATIONS.
Courts may determine what are the corporate limits of a municipality already established, determine whether what is claimed by the municipal authority to be the corporate limits is so or not, and inquire whether the legislative authority has exceeded the powers with which it is invested but a court may not determine whether or not certain territory should be annexed to a municipal corporation as that would be a conferral of legislative power upon the courts that is unconstitutional.

9. MUNICIPAL CORPORATIONS—ANNEXATION—COURTS.
Whether or not circumstances exist that justify or make it desirable for annexation to a city to take place is not a question which courts may determine.

10. SAME—PETITIONS FOR ANNEXATION—BOARD OF SUPERVISORS—COURTS.
The board of supervisors may not reject petitions to annex territory to a city, where the petitions were duly submitted to it and contain a sufficient number of valid signatures on

each petition, merely because a majority of the board disapproved of the results which might follow and on certiorari to review action of circuit court in granting mandamus to compel submission of the matter of annexation to the electorate, and the courts are likewise without power to reject such petitions (CL 1948, § 117.6, as last amended by PA 1957, No 210).

11. SAME—ANNEXATION—INCORPORATION—TIME—STATUTES.
Proviso of home-rule act limiting manner in which annexation proceedings might be conducted on petitions filed less than 2 years following petitions relative to same or some of the territory involved theretofore does not apply to bar annexation proceedings commenced less than 2 years after petitions had been filed to incorporate township as a city (CLS 1956, § 117.8).

12. COSTS—CONSTRUCTION OF STATUTES—ANNEXATION.
No costs are allowed on certiorari reviewing action of circuit court granting mandamus to require submission to electorate of matter of annexation of townships' territory to city, questions of statutory interpretation being involved.

Appeal from Kent; Carland (Michael), J., presiding. Submitted June 7, 1960. (Calendar Nos. 48,662, 48,663, 48,664, 48,665.) Decided September 15, 1960.

Four actions of mandamus by Valjean L. Goethal against the Board of Supervisors of Kent County to compel election on annexation petitions. The townships of Grand Rapids and Walker and the city, formerly township, of Wyoming intervened as parties defendant. Cases consolidated for trial and appeal. Judgment for plaintiff. Defendants appeal. Affirmed.

Dilley & Dilley (*Albert R. Dilley,* of counsel), for plaintiff.

George R. Cook, Strawhecker & McCargar, and *Varnum, Riddering, Wierengo & Christenson* (*F. William Hutchinson* and *Eugene Alkema,* of counsel), for defendants.

CARR, J. This proceeding involves the following facts. On July 22, 1958, four petitions addressed to the defendant board were filed with the Kent county clerk, said petitions seeking the annexation to the city of Grand Rapids of certain territory contiguous thereto. Two proposals involved areas in Walker township and the others lands located respectively in the townships of Grand Rapids and Wyoming. Said petitions were duly submitted to the board of supervisors and were referred to the committee on annexation, incorporation, and consolidation. Investigation by local officials apparently indicated that there was a sufficient number of valid signatures on each petition. The committee also sent questionnaires to affected property owners and to school districts concerned, making reports to the board from time to time.

Following the final report by the committee, defendant board adopted the following resolution:

"Whereas petitions have been filed for the annexation of certain land from the townships of Walker, Grand Rapids, and Wyoming (now the city of Wyoming) from these respective townships to the city of Grand Rapids and said petitions have been reviewed by this board.

"Be it resolved that the petitions for the annexation of said properties to the city of Grand Rapids are hereby declared and found to be not in conformity with the provisions of PA 1909, No 279, as amended, that the signing thereof is not sufficient and that the petitions contain incorrect statements.

"Be it further resolved that no further proceedings pursuant to said petitions shall be had."

It will be noted that the said resolution did not specify wherein the petitions failed to conform with the provisions of the statute, nor did it indicate wherein the signing thereof was insufficient or statements therein incorrect. Being dissatisfied with the

action of the board the plaintiff filed petitions in comparable form and substance in the circuit court of Kent county seeking appropriate writs requiring the submission of the several proposals to the voters in the respective districts affected thereby. Such procedure was in accordance with that observed in *Attwood* v. *Wayne County Supervisors,* 349 Mich 415. Plaintiff's pleadings alleged in substance that the annexation petitions were in proper form and complied with the statute, and that it was the duty of defendant board to submit the questions of making the proposed changes of boundaries as sought. Defendant board by answer denied the right of the petitioner to the relief sought, asserting that the petitions for the annexations in question were not in accord with the statutory requirements, that if the proposals were submitted and adopted various units of government would be deprived of property without due process of law, and asserting further that the reasonableness of the petitions and the sufficiency thereof were subject to its determination. By amendment to the answer it was further alleged that the said petitions were insufficient and incorrect for the reason that the owners of property sought to be annexed to the city of Grand Rapids had not signed them, and that there were other objections with reference to the signing of the petitions. The townships of Walker, Grand Rapids, and Wyoming intervened as parties defendant and filed answers in accord with that of the board of supervisors.

On the hearing in the trial court it was the claim of the defendants that under the pertinent provision of the statute the petitions for annexation were insufficient because not signed by the owners of more than 50% of the property in each of the different parcels to be detached from the townships and annexed to the city. This argument was based on the

language of section 6 of the city home rule act* (CL 1948, § 117.6, as last amended by PA 1957, No 210 [Stat Ann 1959 Cum Supp § 5.2085]), which reads in part as follows:

"Cities may be incorporated or territory detached therefrom or added thereto, or consolidation made of 2 or more cities or villages into 1 city, or of a city and 1 or more villages into 1 city, or of 1 or more cities or villages together with additional territory not included within any incorporated city or village into 1 city, by proceedings originating by petition therefor signed by qualified electors who are freeholders residing within the cities, villages or townships to be affected thereby, to a number not less than 1% of the population of the territory affected thereby according to the last preceding United States census, or according to a census to be taken as hereinafter provided, which number shall be in no case less than 100, and not less than 10 of the signatures to such petition shall be obtained from each city, village or township to be affected by the proposed change: Provided, That in the incorporation of a city from an existing village without change of boundaries the requisite number of signatures may be obtained from throughout the village without regard to the townships in which the signers are residents: Provided further, That as an alternate method in the case of an annexation proceeding in which there are less than 10 persons qualified to sign the petition living in that unincorporated territory of any township or townships proposed to be annexed to a city, that the signatures on the petition of persons, firms, corporations, the United States government, or the State or any of its subdivisions who collectively hold record legal title to more than 1/2 of the area of the land exclusive of streets, in the territory to be annexed at the time of filing the petition,

* PA 1909, No 279, as amended (CL 1948, § 117.1 *et seq.*, as amended [Stat Ann 1949 Rev and Stat Ann 1959 Cum Supp § 5.2071 *et seq.*]).

will suffice in lieu of obtaining 10 signatures from the township in which such area to be annexed lies."

The petitions filed alleged that there were no qualified electors residing within the areas proposed to be annexed to the city of Grand Rapids. Assuming the correctness of such statement, it was the position of the defendants in the trial court, and it is their position on this appeal, that the petitions were insufficient because the "alternate method" set forth in the statutory language above quoted was not followed. In other words, it was asserted that the petitions were fatally defective because not signed by the owners of the record legal title to more than 1/2 of the area of the land, exclusive of streets, in each area to be annexed. On behalf of plaintiff such construction of the statutory provision was challenged, it being claimed in substance that the language of the statute necessarily implies that in the signing of the annexation petitions either method specified in the language above quoted may be followed. The trial judge agreed with plaintiff's claim as to the interpretation of the expression "alternate method." The judge further concluded that the matter of annexation proceedings was subject to control by the legislature and that the courts may not impose restrictions in cases of this character, based on size, shape, location or character of the areas proposed to be annexed, or inquire into the motives of the signers of the annexation petitions. Based on his analysis of the situation he determined that there was a clear legal duty on the part of the defendant board, as claimed by plaintiff, and accordingly judgment was entered that a writ of mandamus issue commanding the defendant board to take action for the submission to the respective districts affected thereby the annexation proposals in question. From

such judgment defendants, on leave granted, have taken an appeal in the nature of certiorari.

It is the claim of the appellants that the trial judge was in error in failing to construe the statute above quoted as requiring, there being less than 10 persons qualified to sign an annexation petition in each area proposed to be annexed to the city, that the petitions in the instant proceedings be held insufficient because not signed by the holders of the record legal title of more than 1/2 of the areas of such parcels. It is a cardinal rule of statutory construction that the legislative intent must be gathered from the language used, if possible, and that such language shall be given its ordinary meaning unless a different interpretation is indicated. Webster's New International Dictionary (2d ed), p 77, defines the term "alternative," which is synonymous with "alternate," used as an adjective, as:

"An opportunity for choice between 2 things, courses, or propositions, either of which may be chosen, but not both."

Such definition was cited with approval in the case of *Abernathy* v. *Rylee,* 209 Ga 317 (72 SE2d 300). We think it may fairly be accepted as expressing the ordinary conception of the term in question. The language of the statute is in accord therewith. It will be noted that the legislature did not say that if there were less than 10 persons residing in the territory to be annexed who were qualified to sign the petition that the signatures of the owners of more than 1/2 of the land in the area proposed to be annexed *must* be obtained. Rather, it is stated that the signatures of property owners "will suffice in lieu of" the previously specified 10 signatures from the township in which the area lies. In other words, had it been the intention of the legislature to make mandatory the adoption of the so-called alternate

method in cases of the character now before us, it must be assumed that appropriate language expressing such intent would have been used.

It appears from the wording of the statute that it was intended to provide an optional method that might be followed in the event that the property owners concerned desire annexation but are unable to obtain the requisite number of signatures from the township from which they seek to be detached. Such was the method followed in *Kalamazoo Township* v. *Kalamazoo County Clerk,* 339 Mich 619. It may be noted that in such proceeding the petitions were addressed to the board of supervisors of the county rather than to the common council of the city and the township board of the township, as contemplated by the so-called "alternate method" specified in section 9 of the home-rule act (CLS 1956, § 117.9 [Stat Ann 1959 Cum Supp § 5.2088]). We think the trial judge correctly determined in the case now before us that the annexation petitions were not insufficient because the alternate method provided in section 6 of the home-rule act was not followed.

This brings us to the question whether, as claimed by appellants, this Court should consider the reasonableness of the proposed annexations to the city of Grand Rapids and hold that the trial court should have refused to grant the remedy of mandamus because of results prejudicial to the appellant townships and city and to school districts, as well as to individual property owners, that it is claimed will follow if the annexation proceedings accomplish their purpose. The power to provide for the incorporation of municipalities rests in the legislature of the State, subject to constitutional provisions designed to afford the rights and privileges of home-rule government. In the statute, provisions of which are here involved, the legislature has exercised its

authority, and as incident thereto has provided for the changes of the boundaries of municipalities through certain definite procedures. Problems pertaining thereto are essentially legislative in character. No attempt has been made to vest in the courts authority to interfere in such proceedings on the ground that the objectives sought to be effected are unreasonable. In view of the recognized division of powers between the different departments of government any attempt to vest the courts with legislative authority would be invalid.

In 2 McQuillin, Municipal Corporations (3d ed), § 7.10, it is said:

"The extension of the boundaries of a city or town is viewed as purely a political matter, entirely within the power of the State legislature to regulate."

In accordance with the language quoted is the further statement in section 7.12 of the same work:

"Finally it should be borne in mind that 'the same power cannot be either legislative or judicial, as the legislature may incline to retain it, or surrender it to the judiciary. If the boundaries of municipal corporations can be altered and changed by the legislature, in its discretion, and the authorities are all that way, then it is impossible that the courts can be invested with such power. Courts may determine what are the corporate limits already established; they may determine whether what is claimed by the municipal authority to be the corporate limits is so or not, and they may inquire whether the legislative authority has exceeded the powers with which it is invested; but all this implies an existing law, applicable to the particular subject, and the inquiry is, what is the law, and has it been violated or complied with? Here, however, the inquiry is, what shall the law be, as respects the boundaries of this city; shall it be as designated by its charter, or shall it be as prayed by the petitioners?' Then a

court has no authority to act as the matter is for the legislature. If a statute requires the court to determine whether or not certain territory should be annexed to a municipal corporation, it is invalid as conferring legislative power on the courts."

Of similar nature is the following statement in 69 ALR 266, 267, in an annotation discussing at some length the delegation of legislative authority:

"It may be stated as a general rule, supported by practically all of the cases in which the proposition is considered, that the creation, enlargement, or diminution of political districts or municipal corporations is a legislative function, and that a statute which delegates the performance of this function to the judiciary, and leaves to the discretion of that body the determination of the circumstances which will justify the creation of a district or corporation, or the circumstances which will justify an enlargement or diminution of such a political subdivision, violates the constitutional provision separating the powers of the government into legislative, executive, and judicial departments."

The proposition here at issue was before the supreme court of Iowa in *State* v. *Town of Riverdale,* 244 Iowa 423 (57 NW2d 63), which involved proceedings for the annexation of property to a municipality of the State. In passing on the nature of the function it was said (p 428):

"The incorporation of a municipality is purely a legislative function. The power to create municipalities cannot be delegated to the judicial branch of government. The power to extend the boundaries of a municipality is an exercise of the power to create a municipality and is within the exclusive power of the legislative branch of government."

In support of its conclusion the Iowa court cited prior decisions from that State and also from other States. The principle announced is in accord with

the prior holdings of this State. See *Village of Kingsford* v. *Cudlip,* 258 Mich 144; *Attwood* v. *Wayne County Supervisors, supra.*

In the *Attwood Case* it was said (p 421):

"It is our opinion that the question of incorporation and annexation is a legislative one and that the board of supervisors has no power to pass upon the merits or reasonableness of the petition."

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. Moreover, in the instant case we are reviewing on certiorari a mandamus proceeding. The question before the trial court was whether the board of supervisors owed a clear legal duty to submit the propositions to the voters of the different districts affected thereby as shown by the petitions filed. The circuit judge was right in holding that the board could not reject the petitions because a majority of its members disapproved of the results that might follow.

Counsel for appellants have called attention to the fact that in *Presque Isle Prosecuting Attorney* v. *Township of Rogers,* 313 Mich 1, the Court discussed to some extent the claim that the incorporation of the city of Rogers City was invalid because of the incorporation of certain territory therein. The Court did not pass on the question as to whether the reasonableness of such a proceeding is a proper matter for judicial inquiry. The trial judge had considered the question, raised by the plaintiff in support of his contention that the election was invalid, whether the proposed boundaries of the new

city were in fact unreasonable. This Court agreed with the finding of the trial judge that such claim was not well-founded. It is significant that in reaching its conclusion that the proceeding was properly dismissed in circuit court it was said (p 7), citing *Bray* v. *Stewart,* 239 Mich 340, that:

"The original petition by which the proceedings are initiated is addressed to the board of supervisors of the county and filed with the county clerk. If the petition is found to conform to the provisions of the act, the board of supervisors orders the election and sets the date, section 8 of the act (CL 1929, § 2244 [Stat Ann § 5.2087]). The board of supervisors has no power to change the territory fixed by the petition."

As before noted, one of the parcels of land sought to be annexed to the city of Grand Rapids was located in Wyoming township, now the city of Wyoming. Petitions for the incorporation of said township as a city were filed pursuant to the statute on December 5, 1956. The annexation petitions involved in the instant case were delivered to the county clerk for submission to the defendant board on July 22, 1958. It is the claim of the appellants board of supervisors and city of Wyoming that the annexation petition was improper because filed less than 2 years after the petition for incorporation under which proceedings were taken resulting in the formation of the city. Attention is called to section 8 of the home rule act (CLS 1956, § 117.8 [Stat Ann 1959 Cum Supp § 5.2087]) which contains the following provision:

"Provided further, That a petition covering the same territory, or part thereof, shall not be considered by the board of supervisors oftener than once in every 2 years, unless such petition shall have been signed by a number of taxpayers assessed for real property taxes within the area proposed to be an-

nexed whose names appear on the latest assessment rolls therein under the requirements of the general property tax, equal to 35% of the total number of names which appear on the assessment rolls prepared pursuant to said act as being assessed for real property taxes within the area proposed to be annexed, and it shall be the duty of the assessing officers who are charged with the duty of assessing real property within the area proposed to be annexed to report as of the date on which the petition is filed the total number of names on such rolls, within such area, to the clerk of the board of supervisors not more than 14 days after said filing date."

It will be noted that the language above set forth refers specifically to real property "within the area proposed to be annexed." This indicates that the proviso on which appellants rely was intended to apply solely to annexation proceedings under the statute. It was so held in *Severance* v. *Oakland County Board of Supervisors,* 351 Mich 173, and again in *Attorney General, ex rel. Mullane* v. *Township of Wyoming,* 352 Mich 649. There was but one annexation proceeding affecting lands in Wyoming township and it was entitled to consideration by the board of supervisors without reference to the incorporation proceeding under which the township became a city prior to the action by the board rejecting the petition involved in the instant case. The carrying out of the mandate of the judgment entered in circuit court is not precluded because of the provision, above quoted from section 8 of the home-rule act, on which appellants rely.

The judgment from which the appeal has been taken is affirmed, but without costs, questions of statutory interpretation being involved.

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

TELLER *v.* GEORGE.

1. TRIAL—VERDICT.

It must be assumed that a jury's verdict is reached after full and deliberate consideration of the proofs as to disputed facts submitted to it, unless the contrary appears.

2. APPEAL AND ERROR—DAMAGES—QUESTION FOR JURY.

Adequacy of amount of verdict for personal injuries is generally a matter for jury and Supreme Court will not substitute its judgment therefor unless verdict has been secured by improper methods, prejudice, or sympathy or is so inadequate as to shock the judicial conscience.

3. NEW TRIAL—DISCRETION OF COURT—INADEQUATE DAMAGES.

Trial court did not err in denying plaintiff's motion for new trial on ground of inadequate damages, where it does not appear to have abused large measure of discretion in matter of granting new trials.

4. APPEAL AND ERROR—DISCRETION OF COURT—NEW TRIAL—DAMAGES.

The Supreme Court will not interfere with trial court's denial of a new trial because of inadequacy of damages given a plaintiff unless the abuse of trial court's discretion is palpable, especially in the absence of claim that improper methods were used by counsel for either party in presenting case to jury by appeal to sympathy, bias, or prejudice.

5. NEW TRIAL—LIMITATION TO DAMAGES—PAIN AND SUFFERING.

Trial court was not in error in denying new trial limited as to damages in action for negligent injuries, where jury had rendered a verdict for plaintiff of $1,500, there were undisputed items of damage of $1,072.95, and jury accepted plaintiff's claims as to past and future dental bills but limited the amount

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 1008.
[2] 15 Am Jur, Damages § 231.
[3, 5] 39 Am Jur, New Trial § 147.
[4] 3 Am Jur, Appeal and Error § 981.

awarded for pain and suffering, there being no claim that the amount of the award had been affected by improper methods, prejudice, or sympathy.

Appeal from Clinton; Cash (Paul R.), J. Submitted June 7, 1960. (Docket No. 4, Calendar No. 48,395.) Decided September 15, 1960.

Case by Lawrence Teller against Judy George and Roy George for personal injuries sustained in automobile collision. Verdict and judgment for plaintiff, who claims them inadequate. Motion for new trial denied. Plaintiff appeals. Affirmed.

Sinas, Dramis, Brake & Werbelow (*Lee C. Dramis*, of counsel), for plaintiff.

Timothy M. Green, for defendants.

CARR, J. This action for damages resulted from a traffic accident occurring about 5:30 p.m., on January 30, 1958. Plaintiff's car was struck and damaged by an automobile driven by the defendant Judy George and owned by the other defendant, the vehicle being driven at the time with the knowledge and consent of the latter. The case was tried in circuit court before a jury, defendants denying any liability on their part because of the injuries sustained by plaintiff. It was their claim in substance that the pavement at the place where the accident occurred was icy, that such condition had not been anticipated, and that control of defendants' car was lost because of such fact.

The issues were submitted to the jury which returned a verdict in favor of plaintiff in the sum of $1,500. Judgment was entered accordingly and thereafter plaintiff moved for a new trial limited to the amount of damages only, said motion being predicated on the claim that the amount of the verdict

was grossly inadequate under the proofs. Said motion was denied, and plaintiff has appealed from the order entered.

On behalf of appellant it is contended that certain items of damages, aggregating $1,072.95, were not disputed insofar as the proofs relating thereto were concerned. As a result of his injuries plaintiff required dental treatment, and the amounts of the bills rendered therefor were questioned by defendants. Also in dispute was the necessity for future expenditures for dental treatment that plaintiff claimed would be required. It is apparent from the verdict of the jury that defendants' claims in such respect were accepted. It is also evident that the amount awarded for pain and suffering that plaintiff claimed he had undergone as a result of the injuries sustained by him in the accident was limited.

No claim is made that the trial court did not properly submit to the jury the various issues relating to the matter of damages in the event that a verdict was returned in plaintiff's favor. Neither does it appear, nor is it claimed, that because of matters occurring during the course of the trial the jury may have been prejudiced. In seeking a new trial on the question of damages appellant relies wholly on his claim that the amount of the verdict was too small to constitute fair and reasonable compensation for his injuries and financial damage. The determination of disputed questions in the case rested within the province of the jury and it must be assumed, unless the contrary clearly appears, that the verdict was reached after full and deliberate consideration of the proofs.

The record before us discloses that following the accident plaintiff was hospitalized for approximately 4 days. His injuries were treated by his family physician, who was a witness in the case, and it is not in dispute that the results obtained were satis-

factory. Plaintiff suffered no permanent injury, and returned to his employment at the end of a 6-weeks' period. The physician's testimony indicates clearly that the suffering incident to treatment was minimized by the use of local anesthetics. After the 14th of March following the accident plaintiff did not require further medical attendance or treatment and was discharged by his physician. The proofs indicate that at the time he was not suffering pain and was, according to his physician, "symptom free."

Questions involving alleged inadequacy, or excessiveness, in jury verdicts have been before this Court in numerous cases. In the absence of a clear showing of an improper verdict the Court has been loath to interfere with the judgment of a jury. As stated in *Campbell* v. *Brown,* 276 Mich 449, 454:

"The adequacy of amount of a verdict is also generally a matter for the jury. We do not substitute our judgment on this question unless a verdict has been secured by improper methods, prejudice, or sympathy. *Michaels* v. *Smith,* 240 Mich 671. No such showing has been made, nor is the verdict so inadequate as to shock the judicial conscience. *Watrous* v. *Conor,* 266 Mich 397. See, also, *Sebring* v. *Mawby,* 251 Mich 628. However, we do not pass upon this question in the instant case because of the conclusions hereinafter stated."

In said case the plaintiff sustained severe physical injuries, was unconscious for 5 days, and remained in a hospital for a total period of 76 days. The total medical expense incurred up to the time of the trial was $736.70. The amount of the verdict returned was $1,250.

In *Brown* v. *Arnold,* 303 Mich 616, the amount of the verdict returned by the jury was $547.60, which barely covered the actual expenses incurred by plaintiff. Motion for a new trial was made on the ground that the verdict was inadequate in view of the proofs

relating to the pain and suffering undergone by the plaintiff. Commenting thereon it was said in the opinion of this Court (p 627):

"The court did not err in refusing to grant plaintiff's motion for a new trial on the ground of inadequate damages. Trial courts have a large measure of discretion in the matter of granting new trials and this Court will not interfere unless the abuse of that discretion is palpable. *Graeger* v. *Hager,* 275 Mich 363, and many cases there cited. There is no claim that improper methods were used by counsel for either party in presenting this case to the jury. There is no claim of appeal to sympathy, bias or prejudice. The case was fairly presented. No question is raised as to the fairness of the charge, except on the one question we have discussed."

Other decisions are in accord with the cases cited, each involving a determination on the basis of the proofs. See, in this connection, the recent decisions in *Nowak* v. *Twin Pines Farm Dairy, Inc.,* 356 Mich 548, and *Moyer* v. *Shampo,* 357 Mich 391.

The factual situation in the case at bar is not comparable with that presented in *Zielinski* v. *Harris,* 289 Mich 381, and in other cases of like nature. In the case at bar the jury had the advantage of seeing and hearing the witnesses and, hence, was in position to fairly evaluate the testimony of each. The trial judge, who had a like advantage, rejected plaintiff's claim that the verdict was so grossly inadequate as to require the granting of a new trial limited to the question of damages. His ruling was in accord with the decisions of this Court in comparable cases. On the record before us we are not prepared to say that he was in error, and the judgment entered on the verdict is affirmed.

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

KEENAN *v.* KEENAN.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.
   Decree of divorce was properly awarded to plaintiff wife on ground of extreme cruelty of husband, where there was testimony that he falsely accused her of misconduct with other men, was irritable and abusive in his manner toward her, was discourteous to her relatives and friends, neglected her when she was confined in a hospital after an automobile accident and objected to her getting proper treatments to alleviate her physical condition, told her he did not care for her, threatened her with physical violence, did not entertain proper respect for her and did not have confidence in her, extreme cruelty not being confined to physical violence.

2. SAME—EXTREME CRUELTY.
   Grievances to justify a decree of divorce on the ground of extreme cruelty may be mental or physical, if they are of a sufficiently aggravated nature.

3. SAME—DE NOVO REVIEW—CREDIBILITY OF WITNESSES.
   A divorce case is heard *de novo* on appeal, but especial consideration is given to findings of the circuit court that are largely based upon the credibility of witnesses.

4. SAME—EXTREME CRUELTY—CONDONATION.
   A claim of condonation in defense of a suit for divorce on the ground of extreme cruelty is not made effectual merely because no new misconduct constituting a cause for divorce is shown to have occurred subsequent to the alleged condonation, but

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REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation § 63.
Accusation of improper relations as cruelty constituting ground for divorce. 143 ALR 623.
[2] 17 Am Jur, Divorce and Separation § 49.
[3] 3 Am Jur, Appeal and Error § 833.
[4] 17 Am Jur, Divorce and Separation § 225.
Condonation of cruel treatment as defense to action for divorce. 32 ALR2d 107.

it is necessary that the conditions upon which the condonation was granted should have been complied with by the offending party.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted June 9, 1960. (Docket No. 37, Calendar No. 48,458.) Decided September 15, 1960.

Bill by Mary A. Keenan against Melbourne F. Keenan for divorce on grounds of extreme and repeated cruelty. Decree for plaintiff. Defendant appeals. Affirmed.

Donald C. Neitzel, for plaintiff.

Arnold F. Zeleznik, for defendant.

CARR, J. The parties to this divorce suit were married in November, 1948. Each had been previously married, and the defendant was approximately 22 years older than the plaintiff. They lived together until the 26th of October, 1957, at which time because of difficulties arising between them they separated, the plaintiff leaving the home and instituting a divorce proceeding. On the 30th of November following they resumed cohabitation for a period of 4 or 5 days.

Plaintiff's bill of complaint, filed January 11, 1958, alleged as a basis for her cause of action conduct on the part of defendant claimed to constitute extreme and repeated cruelty. Defendant, by answer, denied the charges of conduct constituting cruelty, asserting in effect that plaintiff had no sufficient grounds for seeking a decree of divorce. On the trial of the case plaintiff testified that defendant falsely accused her of misconduct with other men, that he was irritable and abusive in his manner toward her, that he was discourteous to her relatives and friends, that he neglected her when she was con-

fined in a hospital at West Branch as a result of an automobile accident, and that he objected to her procuring proper treatments to alleviate her physical condition. She claimed that he had stated to her many times that he did not care for her, and that if she did not like the way that he treated her she could leave the home. Plaintiff claimed also that defendant was ill-tempered, that he threatened her with physical violence, and that in general his conduct was such as to indicate that he did not entertain proper respect for her or have confidence in her. In the main these charges were denied by defendant in his testimony, which was directed principally to minimizing the accusations that she made against him.

After listening to the proofs of the parties the trial judge came to the conclusion that plaintiff was entitled to a decree of divorce, which was duly granted. Defendant has appealed, claiming that there were insufficient grounds to support the decree, and that plaintiff's bill of complaint should have been dismissed. Such claim is disputed by appellee. It is argued in her behalf that the trial judge after listening to the testimony was in position to evaluate the proofs and that his conclusions ought not to be disturbed.

In *Brookhouse* v. *Brookhouse,* 286 Mich 151, the Court recognized that incompatibility is not a ground for divorce but that a course of conduct over a period of years involving abusive and humiliating treatment of one spouse by the other may properly be regarded as constituting extreme and repeated cruelty. In sustaining the decree of the trial court in plaintiff's favor, it was said (p 155):

"The statutes do not confine the definition of extreme cruelty to physical violence; the grievances to justify a decree of divorce may be mental or physical, if they are of a sufficiently aggravated

nature. *Cooper* v. *Cooper,* 17 Mich 205 (97 Am Dec 182). Extreme cruelty is not confined to physical violence. *McCue* v. *McCue,* 191 Mich 1. Unfounded accusations of misconduct, tending to degrade and humiliate, and which, if believed, would cause loss of friends and respect, constitute extreme cruelty. *De Vuist* v. *De Vuist,* 228 Mich 454. Grounds for divorce exist where a husband falsely accuses his wife of adultery. *Simon* v. *Simon,* 225 Mich 645; *Farley* v. *Farley,* 278 Mich 361 (109 ALR 678). Under the evidence in the case the trial court properly entered a decree for plaintiff."

In *Chubb* v. *Chubb,* 297 Mich 501, 506, this Court sustained a decree granted to the defendant husband and cross-plaintiff on grounds of extreme cruelty. In reaching such conclusion, it was said:

"While we are not restricted by the findings of the circuit court, a divorce case on appeal being heard *de novo,* especial consideration is given to such findings, so largely based upon the credibility of the witnesses, and the reviewing court ought not to reverse the determination of the trial court in such a case, unless convinced that it must have reached a different conclusion had it occupied the position of the lower court, under like circumstances. *Brookhouse* v. *Brookhouse,* 286 Mich 151; *Stratmann* v. *Stratmann,* 287 Mich 94; *Westgate* v. *Westgate,* 291 Mich 18."

See, also, *Pinchuk* v. *Pinchuk,* 317 Mich 523.

Under plaintiff's proofs in the instant case, which the circuit judge accepted as indicating the difficulties of the parties and the reasons therefor, we think that sufficient grounds were shown to justify a finding of extreme and repeated cruelty, and for the granting of a decree of divorce to plaintiff on that ground. Defendant's conduct in stating to plaintiff that he did not care for her and that if she did not like the way he treated her she was at liberty

to leave the home might well have resulted in mental suffering and a feeling of deep humiliation on her part. If defendant's attitude toward her was of the nature suggested by her testimony, she could scarcely have reacted otherwise.

As before noted, the parties after their first separation in October, 1957, resumed their marital relations, approximately one month later, for 4 or 5 days. Plaintiff then again left the home. On behalf of appellant it is argued that the resumption of the family relation for the period of time indicated constituted a condonation of any improper conduct on defendant's part prior thereto. On the trial of the case plaintiff testified that she had returned to the home at the request of defendant, and in reliance on his assurances that he would change his ways, that he would treat her with more consideration, and that he would arrange his property matters so as to give her an interest therein. It was her claim that none of these promises were kept, and that he indicated his attitude by stating to her shortly following her return to the home that her act in so doing had terminated the divorce case. If plaintiff's testimony was correct, and the circuit judge obviously determined that it was, the conclusion cannot be avoided that the brief reconciliation rested on the bases of promises and assurances given by defendant to plaintiff which were not kept, and which inferentially were not made in good faith.

In *Creech* v. *Creech,* 126 Mich 267, it was said that:

"A claim of condonation in defense of a suit for divorce on the ground of extreme cruelty is not made effectual merely because no new misconduct constituting a cause for divorce is shown to have occurred subsequent to the alleged condonation, but it is necessary that the conditions upon which the condonation was granted should have been complied with by the offending party." (Syllabus.)

The above decision was cited with approval in *Stewart* v. *Stewart,* 329 Mich 198, 208, and in *Hollway* v. *Hollway,* 344 Mich 304, 309. Under these decisions and others of like import we conclude that appellant's claim as to condonation is not well-founded.

The decree of the circuit court is affirmed, with costs to plaintiff.

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

ROMEO HOMES, INC., *v.* COMMISSIONER OF REVENUE.

1. STATUTES—CONSTRUCTION—INTENT.

The legislative intent of a statute must be ascertained from the language used therein, given its ordinary significance, and with due regard to the form of the expression and where the intent is plain there is no room for construction, the Court being bound by the expressed intent.

REFERENCES FOR POINTS IN HEADNOTES

[1] 50 Am Jur, Statutes § 227.
[2] 50 Am Jur, Statutes § 303.
[3] 47 Am Jur, Sales and Use Taxes § 55.
[4–7] 47 Am Jur, Sales and Use Taxes § 56.
Construction and building materials as exempt from use tax. 30 ALR2d 1446.
Use tax on property purchased by nonresident in another State. 41 ALR2d 535.
[8] 50 Am Jur, Statutes § 240.
[9] 50 Am Jur, Statutes § 281.
[10] 47 Am Jur, Sales and Use Taxes §§ 44–46.
Constitutionality of general use tax designed to complement State sales tax. 153 ALR 609.
Use tax on property purchased by nonresident in another State. 41 ALR2d 535.
[11] 14 Am Jur, Costs § 91.

2. SAME—CONSTRUCTION.

A statutory provision that is in dispute must be read in the light of the general purpose of the act and in conjunction with pertinent provisions thereof.

3. TAXATION — USE TAX — CONSUMER — ERECTOR OF PREFABRICATED HOMES.

The word "consumer", as used in the use tax act, includes a person who acquires tangible personal property when engaged in the business of constructing, altering, repairing, or improving the real estate of others who are not exempt, hence, includes the purchaser of prefabricated houses who installs them (CLS 1956, § 205.92).

4. SAME—EXEMPTIONS.

An exemption from a tax may not be allowed unless the legislative intent to grant it clearly appears.

5. SAME—PREFABRICATED HOUSES—EXEMPTIONS FROM USE TAX.

The purchase of prefabricated houses from the manufacturer thereof in another State, delivery to a site in this State, and erection for sale to private individuals was not exempt from the use tax act, since it was not within the categories specifically exempted from such tax (CLS 1956, §§ 205.92, 205.94).

6. SAME—EXEMPTIONS—BURDEN OF PROOF.

Exemptions from general tax measures are not favored and the burden rests on one asserting the right thereto to establish his claim.

7. SAME—USE TAX—PREFABRICATED HOUSES—EXEMPTIONS.

Provision of use tax act exempting "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 fulfillment of a single contract within the exempt classifications (naming them)" did not exempt purchases of prefabricated houses by corporation from manufacturer in another State which were erected and sold to private individuals in this State who were not in the exempted classifications, the word *or* not being construed disjunctively to intend an exemption of that which precedes it without regard to that which follows (CLS 1956, § 205.94).

8. STATUTES—CONSTRUCTION—INTENT.

The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the legislature apparent

from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, that construction should be adopted.

9. WORDS AND PHRASES—OR—AND.

The words "or" and "and" are not to be treated as interchangeable and are to be followed when their accurate reading does not render the sense dubious, but their strict meaning is more readily departed from than that of other words and one is read in place of the other in deference to the meaning of the context.

10. TAXATION — USE TAX — PREFABRICATED HOUSES — INTERSTATE COMMERCE.

The imposition of the use tax upon prefabricated houses purchased out of the State, brought in here and erected and then sold to nonexempt purchasers, is not a tax in conflict with the interstate commerce clause (US Const, art 1, § 8[3]; CL 1948, § 205.91 *et seq.*, as amended).

11. COSTS—CONSTRUCTION OF STATUTES.

No costs are allowed in suit for declaratory judgment by parties who had paid a use tax, where questions of statutory construction were involved (CL 1948, § 205.91 *et seq.*, as amended).

Appeal from Macomb; Carroll (Howard R.), J. Submitted June 10, 1960. (Docket No. 44, Calendar No. 48,296.) Decided September 15, 1960.

Bill by Romeo Homes, Incorporated, a Michigan corporation, against Louis M. Nims, Commissioner of Revenue, State of Michigan, for declaration of rights relative to exemptions claimed under use tax. Fenton & Fenton, a partnership, intervened as party plaintiff. Judgment dismissing complaint and intervening complaint. Plaintiffs appeal. Affirmed.

Fixel & Fixel (*Arthur E. Fixel,* of counsel), for plaintiffs.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *T. Carl Holbrook, William D. Dexter,* and *Philip Wuntner,* Assistant Attorneys General, for defendant.

CARR, J. The facts in this case are not materially in dispute. Plaintiff Romeo Homes was engaged, during the period here involved, in the erection of buildings for its customers, principally, or perhaps entirely, prefabricated houses. The prepared parts for such houses were manufactured by Scholz Homes, Inc., which was located at Toledo, Ohio, and which customarily from time to time prepared basic plans for submission to prospective customers of contractors. Alterations in said plans were permitted and written contracts for the construction work in accordance with specifications therein set forth were executed by the property owners. In accordance therewith the method of operation contemplated in each instance the construction of a concrete floor with service outlets as specified in the selected blueprint.

Scholz Homes constructed the parts of each building for which plans were submitted to it, including the preparation of the interior trim. Such prefabricated parts were then shipped from Toledo to the contractor for erection, the latter paying the transportation charges to the site of the contemplated construction. It is conceded that the sections of each building so prepared and shipped could not be used except in the construction of a building having the identical plans selected by the property owner. Plaintiff Romeo Homes was assessed by the defendant for taxes under the use tax act of Michigan,* in the sum of $3,134.73, which sum was paid. Claiming that it was not subject to the tax in view of the nature of its operations Romeo Homes filed suit in the circuit court of Macomb county for a declaratory judgment. Thereafter the other plaintiff, Fenton & Fenton, was granted leave to submit its claims in conjunction with Romeo Homes. It appears that Fen-

* PA 1937, No 94, as amended (CL 1948, § 205.91 *et seq.*, as amended [Stat Ann 1950 Rev § 7.555(1) *et seq.*, as amended]).

ton & Fenton was engaged in the same business as was the original plaintiff, and that it had paid by way of taxes assessed against it under the use tax act the sum of $4,371.69. Each plaintiff sought reimbursement of the amount paid by it.

Directly in issue here are the exemption provisions of the use tax act as set forth in section 4 thereof, as amended by PA 1955, No 235 (CLS 1956, § 205.94 [Stat Ann 1957 Cum Supp § 7.555(4)]). We are not concerned with the subsequent amendment of the section by PA 1959, No 263. Plaintiffs rely specifically on subdivision (m) of said section as amended by the 1955 act, which reads as follows:

"(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 fulfillment of a single contract within the exempt classifications set forth in subsections (b), (i), (j) and (k) of this section; 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."

Other exempting provisions of the section which require consideration in determining the disputed interpretation of subdivision (m) are as follows:

"(b) Property, the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution, or laws of the United States, or under the Constitution of this State. * * *

"(f) Property sold to persons engaged in or having an interest in, as a business enterprise and using and consuming such property in the tilling, planting, caring for and/or harvesting of the things of the soil, in the breeding, raising or caring for livestock and/

or poultry or horticultural products, including transfers of livestock and/or poultry or horticultural products for further growth: Provided, That in all such cases, at the time of the transfer of the tangible personal property, the transferee shall sign a statement, in the form approved by the department of revenue, stating that such property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. Such statement shall be accepted by all courts as prima facie evidence of the exemption: Provided further, That this exemption shall not be construed to include transfers of food, fuel, clothing or any similar tangible personal property for personal living or human consumption: Provided further, That this exemption shall not be deemed to include tangible personal property permanently affixed and becoming a structural part of real estate.

"(g) Property sold to persons for use or consumption in industrial processing: Provided, That the term 'industrial processing' shall not be deemed to include tangible personal property permanently affixed and becoming a structural part of real estate. * * *.

"(i) Property sold 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, the State of Michigan, its departments or institutions, or any of its political subdivisions.

"(j) Property sold to schools, hospitals, homes for the care and maintenance of children or aged persons, and other health, welfare, educational, charitable or benevolent institutions and agencies, operated by an entity of government, a regularly organized church, religious or fraternal organization, a veterans' organization, or a corporation incorporated under the laws of the State of Michigan, when not operated for profit, and when the income from the operation does not inure, in whole or in

part, to the benefit of any individuals or private shareholders, directly or indirectly.

"(k) Property sold to regularly organized churches or houses of religious worship excepting when such property is used in activities as are mainly commercial enterprises."

It is the claim of the plaintiffs in substance that subdivision (m), above quoted, exempts them from the payment of the use tax on the theory that the parts purchased by them in their carrying on of their business operations are "affixed and made a structural part of real estate", that the exemption is absolute, and that the reference to the exempt classifications set forth in subdivisions (b), (i), (j), and (k), do not modify the words quoted but, rather, is limited to instances where the materials purchased are used and completely consumed in the fulfillment of a single contract. Emphasis is placed on the use of the word "or" in the subdivision in question, plaintiffs contending that such word is employed in a disjunctive sense. On behalf of defendant it is insisted that the reference to the exempt classifications referred to in subsections (b), (i), (j), and (k), is applicable to purchases of personal property used in this State, and not subject to the payment of a sales tax, in such manner that it is affixed and made a structural part of real estate, and to property purchased that is used and completely consumed in the fulfillment of a single contract. Attention is called to the fact that the situations suggested are not separated by any mark of punctuation, and it is argued a legislative intent is thus indicated that both shall be subject to the reference to "exempt classifications" as set forth in the subsections stated.

Following hearing of the case at which proofs were offered and received with reference to the nature of the businesses and methods of operation of the plaintiffs, the trial judge filed an opinion in which he up-

held the claim of the defendant as to the interpretation of the statutory provision in question. Thereafter a motion seeking a rehearing was filed and denied. Plaintiffs have appealed, claiming that the trial judge erred in his interpretation of the statutory provision on which they rely, that the judgment entered should be reversed, and that each should be permitted to recover the amount of the use tax paid on its purchases of prefabricated units following the amendment of 1955.

The primary question before us is one of statutory construction. The legislative intent must be ascertained from the language used in the statute under consideration, given its ordinary significance, and with due regard to the form of the expression. Where the intent is plain there is no room for construction and the Court is bound by the expressed intent. *MacQueen* v. *City Commission of City of Port Huron,* 194 Mich 328. A statutory provision that is in dispute must be read in the light of the general purpose of the act and in conjunction with pertinent provisions thereof. In this connection it may be noted that section 2,* subdivision (g), of the use tax act defines the word "consumer" as including "a person acquiring tangible personal property when engaged in the business of constructing, altering, repairing or improving the real estate of others." Obviously, plaintiffs were subject to the payment of the use taxes in question unless expressly exempted therefrom by subdivision (m) of section 4, on which they rely. In accordance with the general rule such an exemption may not be allowed unless the legislative intent to grant it clearly appears.

Counsel for appellants have called attention to the decision of this Court in *Acorn Iron Works, Inc.,* v. *State Board of Tax Administration,* 295 Mich 143

* CLS 1956, § 205.92 (Stat Ann 1957 Cum Supp § 7.555[2]).—REPORTER.

(139 ALR 368). Said decision was referred to in *R. C. Mahon Co.* v. *Department of Revenue,* 306 Mich 660, and attention directed to the fact that the decision in said case was controlled by the statute, the sales tax act, prior to the amendment thereof by PA 1939, No 313. In the later case it was held that plaintiff contractor was subject to the payment of a sales tax, except as to its contracts with the United States, the State of Michigan, institutions or subdivisions of either, and likewise with reference to certain designated entities as to which the legislature had specifically granted exemption. In *Garavaglia* v. *Department of Revenue,* 338 Mich 467, the question at issue was the liability of the plaintiff for the payment of sales taxes or use taxes for materials to be used in contracts with the State highway department. The prior decision in the *Mahon Case, supra,* was cited and followed, the Court holding that such a transaction with the State or any of its subdivisions was within the specific language of the statute and not subject to the payment of a tax.

In the instant case we are impressed that the trial judge correctly determined the matter at issue and that the language on which plaintiffs rely in section 4, subdivision (m), of the use tax act may not properly be read as granting them an exemption. From the form of expression used, read in conjunction with other provisions of the statute, we think it obvious that the legislature intended that the exemption should not be allowed on property purchased by contractors to be affixed and made a part of real estate, except where the contract under which the work was done was within the scope of the exempt classifications specifically set forth in subdivisions (b), (i), (j), and (k), of section 4. The reference to transfers of property, in fulfillment of a contract, to be used by the transferee for an exempt purpose as set forth in subsections (f) and (g) is significant in that it

indicates that subdivision (m) was enacted with the thought in mind that it should operate in connection with other subsections setting forth certain specific exempt classifications. Had the legislature intended the result for which plaintiffs argue as applicable to their operations, such intent would undoubtedly have been clearly expressed. Exemptions from general tax measures of the character here in question are not favored, and the burden rests on one asserting the right thereto to establish his claim.

We are not in accord with the argument predicated on the use of the word "or" in section 4, subsection (m) of the use tax act. It may not be regarded as a disjunctive in the sense in which counsel are urging its acceptance. In view of the language used and the absence of any mark of punctuation between the classes of cases referred to we think it obvious that what the legislature had in mind was to grant the exemption to each such class when and only when the transaction came within the classifications expressly mentioned.

This Court in *L. A. Darling Company* v. *Water Resources Commission,* 341 Mich 654, was confronted with a question of like nature, and held as follows:

"The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, that construction should be adopted." (Syllabus 1.)

"While words 'or' and 'and' are not to be treated as interchangeable and are to be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words and one read in place of the other in deference to the meaning of the context." (Syllabus 2.)

In support of the conclusion reached that the word "or" was not used in a disjunctive sense the Court cited with approval and quoted from *Reynolds* v. *Great American Insurance Company of New York,* 328 Mich 391, 397. See, also, *Heckathorn* v. *Heckathorn,* 284 Mich 677.

In the instant case the word "or" may not be given the controlling significance suggested by counsel for appellants. Clearly the legislature intended to treat alike the 2 classes of operations referred to, and in joining them together the word "or" was employed in a not unusual manner, but without any indicated intent that they should be differently treated insofar as the payment of the use tax was concerned. Significant also in this connection are the provisions of subsections (f) and (g) of section 4. Subdivision (f) has reference to sales for certain agricultural use, subject to the specific provision that it should not be deemed to include "tangible personal property permanently affixed and becoming a structural part of real estate." Subdivision (g) grants the exemption from the tax as to personal property sold for use or consumption in industrial processing, but said term was declared not to include "tangible personal property permanently affixed and becoming a structural part of real estate." Subdivision (m) may not be construed as at variance with other subsections of section 4.

A similar question was involved in *Custom Built Homes Co., Inc.,* v. *Kansas State Commission of Revenue and Taxation,* 184 Kan 31 (334 P2d 808).* Plaintiff there questioned the right to impose a use tax on its operations which involved the construction of prefabricated houses and the purchase of units therefor from a manufacturer in another State. Under the facts in the case it was held that the mer-

* Certiorari denied 361 US 816 (80 S Ct 55, 4 L ed 2d 62), 361 US 904 (80 S Ct 204, 4 L ed 2d 158).—REPORTER.

chandise in question was (p 46) "tangible personal property purchased from a vendor without the State of Kansas," for use, storage, or consumption within the State of Kansas, and that the use tax was properly assessed thereon.

Appellants also claim that the assessment of the use tax against them is in conflict with article 1, § 8(3), of the Constitution of the United States, the so-called interstate commerce clause. This question has been raised in prior litigation and determined adversely to appellants' contentions. See *Don McCullagh, Inc.*, v. *Department of Revenue*, 354 Mich 413, and prior decisions of this Court and of the United States supreme court therein cited. In accord is the holding in *Custom Built Homes Co., Inc.*, v. *Kansas State Commission of Revenue and Taxation, supra.*

The judgment of the circuit court is affirmed, but without costs, a question of statutory construction being involved.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, and SOURIS, JJ., concurred.

KAVANAGH, J., did not sit.

PEOPLE *v.* KING.

1. HOMICIDE—SECOND-DEGREE MURDER—EVIDENCE.

   Verdict of murder in the second degree *held,* supported by evidence presented in prosecution for homicide (CL 1948, §§ 750-.316, 750.317).

2. SAME—QUESTIONS BY TRIAL JUDGE.

   The asking by the trial judge of questions which had the purpose of clarifying matters the prosecutor and defendant's counsel had brought out by their inquiries so that the jury might have as clear a picture as possible of what had occurred and the general situation involved in prosecution for homicide *held,* not to have made the judge assume the role of a prosecutor nor to have amounted to cross-examination (CL 1948, §§ 750.316, 750.317).

3. SAME—QUESTIONS BY TRIAL JUDGE—ADMISSIONS.

   Inquiry by trial judge in prosecution for homicide as to whether certain statements and admissions by defendant had been voluntarily made to State police lieutenant *held,* not to have prejudiced defendant (CL 1948, §§ 750.316, 750.317).

REFERENCES FOR POINTS IN HEADNOTES

[1] 26 Am Jur, Homicide § 455.
[2–4] 53 Am Jur, Trial § 75.
58 Am Jur, Witnesses § 558.
26 Am Jur, Homicide § 488.
3 Am Jur, Appeal and Error § 1056.
Propriety of conduct of trial judge in propounding questions to witnesses in criminal case. 84 ALR 1172.
[5] 26 Am Jur, Homicide § 314.
Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children. 67 ALR2d 731.
[6] 26 Am Jur, Homicide § 337.
[7] 26 Am Jur, Homicide § 488.
[8] 58 Am Jur, Witnesses §§ 657–661.
[9] 26 Am Jur, Homicide § 554.
[10] 26 Am Jur, Homicide § 580.

4. SAME—QUESTIONS BY TRIAL JUDGE—PREJUDICE.

Questions put to witnesses by the trial judge which indicate the trial judge followed the testimony closely and exercised his prerogatives on the trial to insure a proper presentation of the case to the jury *held,* not to have prejudiced defendant in prosecution for homicide (CL 1948, §§ 750.316, 750.317).

5. SAME—SYMPATHY—PREJUDICE.

Claim that defendant in prosecution for homicide was prejudiced by injection of an element of sympathy into case by inquiring of victim's widow with reference to the number of children in the family *held,* not tenable, since the inquiry was obviously directed to bringing out the situation existing at the home and who were present there when the victim was killed (CL 1948, §§ 750.316, 750.317).

6. SAME—SELF-DEFENSE.

Reversible error was not committed by permitting inquiries of witnesses to show that defendant in prosecution for homicide and his hunting companions left the county where homicide occurred shortly after victim was killed and without notifying local authorities as to what had taken place, since facts of such nature had a bearing on the good faith of defendant in claiming self-defense (CL 1948, §§ 750.316, 750.317).

7. SAME—REMARKS OF TRIAL COURT.

Remarks of trial court to defense counsel in prosecution for homicide that his objection to testimony of witness on ground it lacked responsiveness was open only to prosecutor who was then examining the witness *held,* not to have constituted disparaging treatment of such counsel prejudicial to defendant (CL 1948, §§ 750.316, 750.317).

8. CRIMINAL LAW—CHARACTER WITNESSES.

Any character witness, in a prosecution for crime, regardless of his official position may be questioned for the purpose of showing any particular interest he may have in the one for whom he testifies and for the purpose of bringing out the basis for his expressed opinion without prejudicing the defendant.

9. HOMICIDE—REFERENCE TO FIRST-DEGREE MURDER.

Reference to first-degree murder when defining second-degree murder and manslaughter after reminding jury that verdict of first-degree murder could not be brought in under the proofs *held,* not prejudicial to defendant who had interposed defense of self-defense and whose conviction of second-degree murder was sustained by the proofs (CL 1948, §§ 750.316, 750.317).

10. SAME—SECOND-DEGREE MURDER—SENTENCE.

Sentence of 20 to 30 years for second-degree murder is permitted by statute, hence, claim that it was excessive is without merit (CL 1948, § 750.317).

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted June 9, 1960. (Docket No. 50, Calendar No. 48,299.) Decided September 15, 1960.

James King was convicted of murder in the second degree. Affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Russell L. Shepherd,* Special Prosecuting Attorney, for the people.

Moe F. Wolfgang (*Meyer Weisenfeld,* of counsel), for defendant.

CARR, J. Defendant was tried in the circuit court of Newaygo county before a jury under an information charging that on the 16th day of November, 1956, he "feloniously, wilfully and of his malice aforethought did kill and murder one George Lloyd Krise." A verdict of guilty of murder in the second degree was returned and accepted by the court. Motion for a new trial was made and denied. Defendant was sentenced to imprisonment for a term of not less than 20 nor more than 30 years.

The record in the case discloses that George Lloyd Krise was the owner of 80 acres of land in said county on which he resided with his family. Some annoyances resulted to the occupants of the property because of trespasses thereon by hunters, and perhaps others. On occasions it appears that Krise had ordered such parties to leave, and such direction was followed. There is some testimony in the record indicating that on the day when he was killed he had insisted that several hunters, of whom defendant

was one, should leave the premises. It does not appear, however, that such prior incident, if it occurred, had any direct bearing on the subsequent occurrence here involved.

Late in the afternoon of the day in question, November 16, 1956, Krise left his home to go hunting. He was at the time armed with a 16-gauge single barrel shotgun. While so engaged, and at a distance of approximately 60 rods from his house, he encountered 3 automobiles occupied by hunters, of whom the defendant was one. Such encounter took place on a trail on the property of Krise, and he ordered the occupants of the cars to turn around and leave the premises. Thereupon defendant got out of the automobile in which he was riding and approached Krise, engaging in some conversation with him. There is testimony in the case that Krise renewed his orders and retreated somewhat as defendant came closer to him. Finally defendant reached a point where he could grasp the gun that Krise was carrying, and he did so with his left hand. He then drew a 38-caliber revolver which he was carrying on his person and shot Krise 5 times, each wound being serious. Defendant then entered his automobile, making some remark to his companions at the time to the effect that he would handle the matter. The cars were then driven along the trail to a county road, and immediately thereafter the occupants left the community for their respective homes. It is conceded that neither the defendant nor any of his companions reported the occurrence to local officers in the county, or to the State police.

Alarmed because her husband did not return within the time that she expected him to do so, Mrs. Krise, who had heard shots fired at some distance from the home, proceeded down the trail in the direction in which her husband had gone, in search of him. She discovered his body lying near the trail and appar-

ently concluded that he had been killed. She immediately sought help. The sheriff's office was notified, and the State police were called into the case. The officers made an investigation and discovered the wounds on the body of Krise, which was lying on the ground near the trail. Beneath the body, which was lying on its back, there was discovered a bullet buried a few inches in the sand which was directly beneath a wound in the back. Apparently such bullet had passed entirely through the body, and had been fired while Krise was lying prone on the ground. The shotgun was lying beside the body and was found to be loaded. It was the claim of the defendant on the trial that as he grasped the barrel of the gun in his encounter with Krise it was discharged. He asserted further that while the 2 men were engaged in their physical encounter Krise reloaded the gun. It was the theory of the prosecution on the trial that the shotgun had not been fired at all, and that it would have been impossible under the circumstances for it to have been reloaded as claimed by defendant.

The identity of defendant and of the others with him was discovered by the investigating officers largely, it is claimed, through a piece of mail addressed to defendant's wife which was found near the scene of the occurrence in question. Defendant at first denied any connection with the death of Krise but finally changed his story and gave his version of what occurred, claiming in substance, as he did on the trial, that he was acting in self-defense in shooting Krise with the revolver. The trial of the case took 7 days, the examination of some of the witnesses being prolonged, due in part, apparently, to a reluctance to testify, and to the giving of somewhat evasive answers. The transcript of the testimony indicates, however, that for a case of such nature and length it was conducted in a manner not subject to

material criticism. The rights of the defendant were carefully safeguarded by the trial court in the introduction of testimony and in other particulars as well.

The case was submitted to the jury in a charge that set forth the theory and claims of the defense. The jury was advised in detail with reference to the rights of one who is assailed by another and has reason to fear that his life is in possible danger. The jury, however, rejected defendant's claim that he acted in self-defense and returned the verdict indicated. At the conclusion of the people's proofs the trial judge, on motion, ruled that defendant could not be convicted of first-degree murder and that the question was whether he was guilty of second-degree murder or manslaughter. Such ruling, in substance, was repeated in the charge. There is no basis in the record for a claim that the verdict as returned was not fully supported by evidence.

On behalf of appellant reversal of the conviction and a new trial are sought on several grounds. Among others, complaint is made of the attitude of the trial judge, and, in particular, of his examination of certain witnesses. Counsel have not discussed in their brief the particular instances which they generally assert to support their claim of prejudice but have merely directed our attention to certain pages of their appendix on which questions asked by the circuit judge appear. We have examined the pages of the appendix on which counsel rely and find no basis for the assertion that the judge assumed the role of a prosecutor or in fact that the questions that he asked amounted to cross-examination. In each instance the obvious purpose was to clarify matters which the prosecutor and counsel for the defendant had brought out by their inquiries, to the end that the jury might have as clear a picture as possible of what had occurred and the general situation involved.

Bearing in mind the length of the trial, and the fact that the transcript of the testimony exceeds 1,000 pages in length, we do not think it may be fairly said that questioning of witnesses by the judge was unduly extended, nor were such questions phrased in such manner as to suggest to the jury that the judge had formed any opinion as to the guilt of the defendant. As a matter of fact, in several instances the questions were obviously directed to insuring to defendant the protection of his rights. Of such character were the inquiries propounded to a witness for the prosecution, a lieutenant in the State police, designed to ascertain whether certain statements and admissions on the part of the defendant were voluntarily made. The purpose of the inquiry was obvious, and we fail to see how defendant could have been prejudiced thereby.

Apparently some of the references to the appendix setting forth questions asked by the judge have been included without particular consideration as to the subject matter. By way of illustration, attention has been called by counsel to 2 questions propounded to 1 of the witnesses for the people as to the driver with whom the witness rode from Detroit to Newaygo county and return. We think it unnecessary to discuss in detail the other references made. It is our conclusion that the defendant was not prejudiced by the fact that the trial judge followed the testimony closely and exercised his prerogatives on the trial to insure a proper presentation of the case to the jury.

Counsel for appellant further contend that the prosecutor erroneously injected an element of sympathy into the case by inquiring of Mrs. Krise with reference to the number of children in the family. The inquiry was obviously directed to bringing out the situation existing at the home and who were present thereat at the time of the occurrence in

which Krise was killed. Such questions were not open to objection on the theory that they were prejudicial to defendant. Likewise, we find no merit in the contention that there was reversible error in permitting inquiries of witnesses to show that defendant and his companions left Newaygo county shortly after the occurrence in which Krise was killed and without notifying local authorities as to what had taken place. Facts of such nature obviously had a bearing on the good faith of defendant in claiming that he acted in self-defense. It was not improper to show to the jury the conduct of the defendant and of his companions to which the inquiries were directed.

It is also argued that counsel for defendant and his witnesses were treated disparagingly by the court and by the prosecutor. Typical of incidents on which counsel rely in support of such claim was an occurrence during the examination of a witness for the people. The prosecutor asked a question which was answered by the witness, whereupon the following occurred:

"*Mr. Early* [defense counsel]: I will object to this other testimony as not responsive.

"*The Court:* You are not the one to make that objection?

"*Mr. Early:* Sir?

"*The Court:* You are not the one to make that objection.

"*Mr. Early:* I will make it, though.

"*Mr. Russell Shepherd* [prosecuting attorney]: I find his answer responsive.

"*The Court:* All right, if you have an objection on some other ground, you may make it.

"*Mr. Early:* I will object to it, then. It is not binding on this defendant in any way.

"*Mr. Shepherd:* Your Honor, it hasn't been answered in fine detail. I am trying to get the fine detail of obtaining the bullet from the ground.

"*Mr. Early:* In addition, I will object that it is immaterial and irrelevant.

"*The Court:* What is your objection to it?

"*Mr. Early:* What is my objection to it?

"*The Court:* Yes.

"*Mr. Early:* I am trying to keep the record as clear of clutter as possible.

"*The Court:* I hope you will bear that in mind.

"*Mr. Early:* Yes, sir.

"*The Court:* Objection is overruled. You may proceed. You made the objection that it was not responsive. That is an objection that is only available to the party who asked the question.

"*Mr. Early:* Thank you, sir.

"*The Court:* All right."

The colloquy between court and counsel speaks for itself. We do not think that it may fairly be said that the remarks of the court to counsel could have had any possible tendency to affect the jury to the prejudice of the defendant. Like comment may be made as to the questions asked of character witnesses for the defendant. Any such witness, regardless of his official position, may be questioned for the purpose of showing any particular interest that he may have in the one for whom he testifies and, likewise, for the purpose of bringing out the basis for his expressed opinion.

In charging the jury the trial judge made reference to the statutory provisions* relating to the crime of murder. As before mentioned, the judge also reminded the jury that he had previously informed them that a verdict of first-degree murder could not properly be returned under the proofs presented by the people. After reading the statutory provisions directly involved, he proceeded to define murder in the second degree and also manslaughter,

* CL 1948, §§ 750.316, 750.317 (Stat Ann 1954 Rev §§ 28.548, 28.549).

leaving it to the jury to say whether under the proofs the killing was one with malice or otherwise. As before noted, the charge also set forth in detail defendant's claim and the course that may be pursued by one who is assaulted by another and acts in the belief that his life is in danger from such other. Counsel for appellant insist that murder in the first degree should not have been mentioned. It is not conceivable, however, that the reference thereto in the charge, after defendant's motion to eliminate first-degree murder from the case had been granted, could have been prejudicial. The statute which the court read and which contained the definition of first-degree murder was of necessity the basis for the granting of such motion. It is obvious also that any reference to the statute in a case of this nature would involve differentiating between first- and second-degree murder, which is precisely what the court did. The argument advanced by counsel is answered by the holding of this Court in *People* v. *Palmer,* 105 Mich 568, where it was held that:

"In a prosecution for murder, the court, after defining the different degrees of murder, and also manslaughter, and after stating to the jury that, where a crime was divided into degrees, they might acquit of the principal charge and convict of the lesser offense, and that in such a case they should first consider the matter of the higher crime, and then go through the different degrees, withdrew from their consideration the subject of murder in the first degree, the respondent having been acquitted of that offense on a former trial. And it is held that the charge was not misleading and prejudicial in that the court first defined murder in the first degree, and instructed the jury that they should commence with the higher crime." (Syllabus 4.)

Under the proofs in the case the trial judge was correct in submitting to the jury the question of de-

fendant's guilt of murder in the second degree or of manslaughter. *People* v. *Droste,* 160 Mich 66; *People* v. *Collins,* 303 Mich 34. Such submission was coupled with instructions that he was entitled to be acquitted if he acted in self-defense. The evidence in the case supported the finding of the jury that the killing was not in self-defense and was committed with malice. The sentence imposed was authorized by statute and the claim that it was excessive is without merit. The record discloses that the case was fairly and carefully tried, that the rights of the defendant were fully protected, and that no reversible error prejudicial to defendant occurred during said trial.

The conviction and sentence are affirmed.

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

DETROIT EDISON COMPANY *v.* CORPORATION & SECURITIES COMMISSION.

1. TAXATION—COMPUTATION OF TAX—DELEGATION OF POWER.
   Generally judicial or quasi-judicial duties of an officer relating to the computation of a tax cannot be delegated in the absence of express statutory authorization so to delegate.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 51 Am Jur, Taxation § 664.
Extent of power of tax commission or other officials charged with duty of administering tax statute to deputize or delegate to others matters relating to computation of tax. 107 ALR 1482.
[2] 42 Am Jur, Public Administrative Law § 66.
[3] 43 Am Jur, Public Officers § 341.
[6] 42 Am Jur, Public Administrative Law § 206 *et seq.*
[7] 14 Am Jur, Costs § 106.

2. SAME—CORPORATION TAX APPEAL BOARD—QUASI-JUDICIAL DUTIES.

An appeal from the corporation and securities commission to the corporation tax appeal board, a statutory board consisting of the attorney general, State treasurer, and auditor general, imposed a duty upon the latter 3 officers that was quasi-judicial in nature (CLS 1956, § 450.309).

3. OFFICERS—PUBLIC OFFICERS—EX-OFFICIO SERVICES—COMPENSATION.

Ex-officio services are those imposed by law upon a public officer by virtue of his office, relating to public interests as contra-distinguished from those relating to private interests; and for which no remuneration is allowed.

4. ATTORNEY GENERAL—DEPUTIES AND ASSISTANTS—CORPORATION TAX APPEAL BOARD.

The attorney general is an ex-officio member of the corporation tax appeal board and the deputy attorney general and assistant attorneys general are empowered by statute to act for the attorney general as a member of such board (CLS 1956, §§ 14-.35, 450.309).

5. TAXATION—CORPORATION TAX APPEAL BOARD—COMPUTATION OF TAX—STATE TREASURER—AUDITOR GENERAL.

The State treasurer and auditor general must personally act as members of the corporation tax appeal board, since they are designated as members thereof without statutory authority having been conferred upon their respective deputies to exercise the quasi-judicial discretion involved in a recomputation of the tax upon a corporation (CLS 1956, § 450.309).

6. APPEAL AND ERROR—CORPORATION TAX APPEAL BOARD—QUESTIONS REVIEWABLE.

The Supreme Court does not have authority to review substantive questions presented on an appeal from the determination of the corporation tax appeal board that was not properly constituted in that deputies functioned for the State treasurer and auditor general without statutory authority so to do (CLS 1956, § 450.309).

7. COSTS—PUBLIC QUESTION—CORPORATION TAX APPEAL BOARD.

No costs are allowed on appeal from the corporation tax appeal board, where a public question was involved (CLS 1956, § 450-.309).

SMITH and EDWARDS, JJ., dissenting.

Appeal from Corporation Tax Appeal Board. Submitted January 7, 1960. (Docket No. 31, Calendar No. 48,333.) Decided September 16, 1960.

The Detroit Edison Company, a New York corporation, protested and appealed the redetermination of its annual franchise fee by the Michigan Corporation and Securities Commission. Amount of claimed deficiency increased by the appeal board. Plaintiff appeals. Reversed and remanded.

Fischer, Sprague, Franklin & Ford (*Harvey A. Fischer* and *Gerald C. Simon,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *T. Carl Holbrook* and *William D. Dexter,* Assistant Attorneys General, for defendant.

KELLY, J. Appellant filed its 1956 corporate annual report and paid the corporation and securities commission the sum of $1,131,061.63 as its annual franchise fee. The commission determined that the fee was deficient in the amount of $54,848.10. A redetermination was made at appellant's request, and the deficiency was again assessed at the same amount. An appeal was taken to the corporation tax appeal board, during the pendency of which appellant paid the deficiency under protest.

When the proceedings on appeal were commenced, appellant vigorously objected to a hearing before the chief assistant attorney general, the deputy State treasurer, and the deputy auditor general, contending that the 3 above named did not constitute a statutory board and, therefore, was an appeal board without jurisdiction. The objection was overruled, and the hearing proceeded with exception granted.

The deputies sat throughout the hearing, and the board's final decision increasing the deficiency from $54,848.10 to $62,436.72 was signed by the deputies in their own names.

Appellant presents 5 questions in its statement of questions involved. The first question presented is as follows:

"Do the chief assistant attorney general, the deputy State treasurer, and the deputy auditor general have any authority to perform the quasi-judicial duty of the appeal board provided for in section 9 of PA 1921, No 85, as amended, 'to recompute the liability of the taxpayer,' when that duty is imposed upon elected public officers, *viz.*, the attorney general, the State treasurer, and the auditor general, as statutory members of this appeal board?"

The conclusion and the prayer for relief in appellant's brief contain the following statements:

"The appellant concludes that the appeal board as composed of the deputy officers was an invalid board. It should have consisted of the elected public officers designated by the taxing statute. The decision of this invalid board was therefore a nullity. Appellant is entitled to a hearing before the statutory board. On the possibility, however, that such appeal board's action may be held to be valid, the appellant has been compelled in order to protect its rights on appeal to raise the issues set forth in questions 2, 3, 4 and 5 above. * * *

"Appellant respectfully requests this Court to reverse, set aside, and hold for naught the decision of May 29, 1959, entered by the invalidly constituted appeal board with instructions that the properly elected constitutional public officers hear the cause."

PA 1921, No 85, § 9, as amended (CLS 1956, § 450.309 [Stat Ann 1959 Cum Supp § 21.210]), provides in part:

"Any corporation conceiving itself to be aggrieved by any such redetermination may appeal within 20 days after notification thereof to an appeal board composed of the attorney general as its chairman, the State treasurer, and the auditor general as its secretary. The appeal board shall recompute the liability of the taxpayer and shall notify the taxpayer and the commission promptly on its decision.

"The commission and/or the corporation may, within 30 days after notification of such decision, and not after, appeal from the decision of the appeal board to the Supreme Court of the State."

The general principle that judicial or quasi-judicial duties relating to the computation of a tax cannot be delegated in the absence of express statutory authorization so to delegate, is set forth in 107 ALR 1482.

There is no doubt (and appellee so admits) that the statutory duty imposed on the attorney general, the State treasurer, and the auditor general in appellant's appeal was quasi-judicial in nature. Appellee states:

"In advancing the argument that the board was properly constituted in the instant case, counsel for the appellee are not unmindful of the authorities referred to by the appellant in its brief limiting the activity of deputies to the ministerial duties of their principals but respectfully submit that the basic question here posed is one of the construction of specific statutory language pertaining to the composition of the corporation tax appeal board during the sickness or absence of the auditor general and State treasurer and by specific designation of the attorney general to have the chief assistant attorney general sit in his stead."

The Revised Statutes of 1846, chapter 12, §§ 9 and 26, gave the treasurer and the auditor general the authority to appoint deputies:

"Sec. 9. The treasurer may appoint a deputy, for whose acts he shall be responsible, and may revoke such appointment at pleasure; and such deputy may execute the duties of the office during the sickness or necessary absence of the treasurer, and shall receive an annual salary at the rate of $700, payable quarter yearly."

"Sec. 26. The auditor general may appoint a deputy, for whose acts he shall be responsible, and may revoke such appointment at pleasure; and such deputy may execute the duties of the office during the sickness or necessary absence of the auditor general, and shall receive an annual salary at the rate of $700, payable quarter yearly."

The above-quoted sections, amended without significant change, are the law today. See CL 1948, §§ 12.9, 13.26 (Stat Ann §§ 3.83, 3.130).

By PA 1917, No 153, the legislature granted to the attorney general the right to appoint a deputy to sit for him on boards and commissions. This act provided:

"He (deputy attorney general) may also serve in place of the attorney general as a member of the Michigan securities commission, created by Act 46 of the Public Acts of 1915, and other boards and commissions of which the attorney general now is or may hereafter be an ex-officio member."

The attorney general's right to designate assistant attorneys general to sit on administrative boards has been granted by CLS 1956, § 14.35 (Stat Ann 1952 Rev § 3.188), which provides as follows:

"In addition to a deputy provided by law, the attorney general may appoint such assistant attorneys general as he may deem necessary, and who when appointed to such office shall take and subscribe the constitutional oath of office. Any such assistant attorney general may, when designated thereto by his principal, serve in the place of the attorney general

as a member of the public debt commission created by Act No 13, Public Acts of 1932, Extra Session, and on any other board or commission of which the attorney general is now or may hereafter be an ex-officio member, appear for the State in any suit or action before any court or administrative body, or before any grand jury, with the same powers and duties and in like cases as the attorney general."

The claim was made in *Chemical Bank & Trust Co.* v. *County of Oakland,* 264 Mich 673, that action taken by the loan board in approving the issuance of bonds was void because the deputy attorney general, instead of the attorney general, acted thereon without authority. In disposing of this claim, this Court stated (pp 685, 686):

"It is claimed the action of the loan board was invalid because the attorney general did not act in person thereon. The approval of the issuance of the bonds in question was made by the loan board, the State treasurer and the auditor general being present, and the attorney general being represented by the deputy attorney general. It is claimed the deputy attorney general had no power to act. PA 1917, No 153 (CL 1929, § 184),* provides that the attorney general may appoint a deputy attorney general. 'He (deputy) may also serve in place of the attorney general as a member of the Michigan securities commission created by PA 1915, No 46, and other boards and commissions of which the attorney general now is or may hereafter be an ex-officio member.' What are ex-officio services? They are services imposed by law upon a public officer by virtue of his office. 'They are services which relate to the public interests, or business of the county or State, as contradistinguished from those relating to the private interests of individuals.' *Gilbert* v. *Justices of Marshall County,* 18 B Mon (57 Ky) 427, 430. 'When the State requires services to be

* CL 1948, § 14.41 (Stat Ann 1952 Rev § 3.201).—REPORTER.

performed by its officers, for which no remuneration is allowed, they must be regarded as ex-officio services, for which no charge can be made.' *Allin* v. *Mercer County,* 174 Ky 566, 570 (192 SW 638). See, also, *Wortham* v. *Grayson County Court,* 13 Bush (76 Ky) 53. The attorney general is ex officio a member of the loan board and the deputy attorney general had a right to act thereon."

The attorney general is an ex-officio member of the corporation tax appeal board and the deputy attorney general and assistant attorneys general were empowered by statute to act for the attorney general as a member of said board.

Appellee calls attention to the fact that the attorney general, State treasurer, and auditor general are ex-officio members of many State boards or commissions. Appellant answers by stating:

"The rule of law under which the appellant has challenged the authority of the deputies to sit for their principals in the instant case involves situations where the members have a *quasi-judicial* duty to make a *tax computation.* * * * We have carefully examined the powers of each of the boards and commissions listed by the appellee. Not one involves the computation of a tax or the extent of a taxpayer's liability (except the corporation tax appeal board which is the one under discussion)."

The legislature in clear and certain language created the corporation tax appeal board "composed of the attorney general as its chairman, the State treasurer, and the auditor general as its secretary." (CLS 1956, § 450.309 [Stat Ann 1959 Cum Supp § 21.210].)

The legislature clearly provided that the attorney general had the privilege and power to designate his deputy or assistant to represent him on the board. The legislature did not grant a similar right to the State treasurer or to the auditor general. Un-

til such a right to so designate is granted to the State treasurer and the auditor general we conclude that it is the legislative wish and mandate that the State treasurer and the auditor general personally act as members of the corporation tax appeal board.

The legislative enactment (in existence without substantial change since 1846) giving power to the State treasurer and the auditor general to appoint a deputy who "may execute the duties of the office during the sickness or necessary absence" of the treasurer or auditor general, cannot be construed to authorize the deputy to exercise quasi-judicial discretion and in an ex-officio capacity recompute the liability of the present appellant as a taxpayer.

We do not agree with appellee that "this Court has the authority to review the substantive questions presented even though it were to determine the board was not properly constituted" because "a nonprejudicial or harmless error has generally been said not to constitute a basis for reversal of a case."

We agree with appellant's contention that: "The board being invalid, there was no hearing and no decision. Without such a hearing and decision there is nothing for this Court to review."

The decision of the appeal board is reversed, set aside and held for naught, and the cause is remanded for further proceedings consistent with this opinion. No costs, a public question being involved.

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

EDWARDS, J. (*dissenting*). This appeal presents 2 questions of some considerable importance:

Was the corporation tax appeal board (hereinafter referred to as the "board") consisting of the chief assistant attorney general, the deputy State treasurer, and the deputy auditor general lawfully

constituted to hold a hearing and issue a decision as provided in PA 1921, No 85, § 9, as amended by PA 1954, No 153?

Was the item "Reserve for deferred Federal income taxes," appearing on the appellant's balance sheet in the amount of $13,712,026, properly included as "surplus" for franchise fee computation purposes under PA 1921, No 85, § 4, as amended by PA 1954, No 144?

Mr. Justice KELLY would hold that the corporation tax appeal board which heard this case was invalidly constituted because the deputy auditor general and the deputy State treasurer sat as members, and would remand this matter for hearing before a reconstituted board.

There is, of course, no doubt that the statute creating the board did not specifically authorize the deputies to substitute for their principals, the attorney general, the State treasurer, and the auditor general, who were named therein. CLS 1956, § 450.309 (Stat Ann 1959 Cum Supp § 21.210).

Justice KELLY, however, concedes that other legislation allowing the attorney general to appoint a deputy and assistant attorneys general also authorizes such assistants to sit on the corporation tax appeal board. See CLS 1956, § 14.35 (Stat Ann 1952 Rev § 3.188).

We think that the legislature, when it authorized the treasurer and auditor general to appoint deputies, likewise granted them the power to function for their superiors in performing the duties legislatively assigned to the office.

Thus the statute authorizing the appointment of a deputy treasurer provides:

"The State treasurer may appoint a deputy, for whose acts he shall be responsible, and may revoke such appointment at pleasure; and such deputy may

execute the duties of the office during the sickness or absence of the State treasurer." CL 1948, § 12.9 (Stat Ann 1952 Rev § 3.83).

And the statute authorizing appointment of a deputy auditor general provides:

"The auditor general may appoint a deputy for whose acts he shall be responsible, and may revoke such appointment at pleasure; and such deputy may execute the duties of the office during the sickness or absence of the auditor general." CL 1948, § 13.26 (Stat Ann 1952 Rev § 3.130).

It appears undisputed that since the creation of the corporation tax appeal board the administrative interpretation placed upon the above statutes was that membership upon the tax appeal board was one of the "duties of the office" within the meaning of the statutory provisions just quoted.

While such interpretation, even if as here undisputed for years, is not binding on this Court, it is entitled to respectful consideration. *Boyer-Campbell Co.* v. *Fry,* 271 Mich 282 (98 ALR 827).

In determining the legislative intent of these 2 provisions, we can properly take into account also the fact that the State treasurer is assigned ex-officio membership on 14 other boards and commissions by other legislative enactments, while the auditor general has 7 additional such assignments. Such a multiplicity of assignments suggests that the legislature could not reasonably expect them to be performed by 1 person.

The fact that this board obviously performs quasi-judicial functions is not determinative of the question as to whether or not a deputy may properly sit thereon. Mr. Justice KELLY recognizes this when he holds that the deputy attorney general was a properly qualified member.

The ALR annotation relied upon by Justice KELLY concerning this quasi-judicial distinction is entitled:

"Extent of power of tax commission or other officials primarily charged with duty of administering tax statute to deputize or delegate to others matters relating to computation of tax or extent of taxpayer's liability." 107 ALR 1482.

The annotation deals primarily with cases wherein deputies were administratively authorized and appointed. In such instances, the courts have held that such deputies could perform ministerial functions for their principal, but not the quasi-judicial duties assigned to him by statute. *State Tax Commission of Utah* v. *Katsis,* 90 Utah 406 (62 P2d 120, 107 ALR 1477); *Woodman* v. *Auditor General,* 52 Mich 28; *Paldi* v. *Paldi,* 84 Mich 346.

In the first case (cited as the leading case by appellant), the Utah court said (p 412):

"The fact that the legislature gave the tax commission authority to employ agents, statisticians, experts, attorneys, and other assistants and employees as may be necessary to perform its duties does not give the commission authority directly or by implication to deputize those matters which are quasi judicial in character. It takes authority from the legislature to appoint a general deputy. If such deputy may be appointed or the commission is given authority by the legislature to deputize quasi-judicial matters to others, it may do so. *Dorr* v. *Clark,* 7 Mich 310; *Andres* v. *Ottawa Circuit Judge,* 77 Mich 85 (6 LRA 238); *Wilkerson* v. *Dennison,* 113 Tenn 237 (80 SW 765, 106 Am St Rep 821, 3 Ann Cas 297); *Steinke* v. *Graves,* 16 Utah 293, (52 P 386)."

In our present case we deal with statutorily created deputies, statutorily authorized to perform "the duties" of the office.

We find no need to amend the legislative authorization by judicially excepting the quasi-judicial duties assigned to the office.

We hold that the corporation tax appeal board which heard this case was properly constituted under the legislative enactments quoted.

As to the second question, which reaches the merits of the tax dispute, we can be more brief.

The essence of plaintiff's contention is that $13,712,026 which it has set aside on its books as a "reserve for deferred Federal income taxes" should not be considered as a part of its "surplus" for purpose of computing the privilege fee required to be paid by PA 1921, No 85, as amended.

The applicable statutory definition of "surplus" is as follows:

"The term 'surplus,' as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of the same." CLS 1956, § 450.304 (Stat Ann 1959 Cum Supp § 21.205).

We have recently construed this definition in these terms:

"The corporation privilege tax statute should be read and administered to secure to the State all sums justly due it, but no more.

"Surplus, as that term is used in determining the privilege fee payable by a corporation for doing business in this State, is the difference between assets and liabilities plus paid-up capital." *Duluth, South Shore & Atlantic R. Co.* v. *Corporation & Securities Commission* (syllabi), 353 Mich 636.

The only substantial question presented here is whether or not the "reserve" set up on appellant's

books is an "outstanding indebtedness" within the meaning of the statute. In determining the answer, the corporation and securities commission was not required to accept at face value the accounting labels on appellant's balance sheet. *In re Appeal of Hoskins Manufacturing Co.*, 270 Mich 592.

There is no need to use complex language to describe an essentially simple situation. The Detroit Edison has in past years built additional physical facilities for the purposes of its business of supplying power and light. In computing its Federal income taxes it has elected (as it was legally entitled to do) to employ 2 accelerated methods of depreciation. These methods of depreciation had the effect of allowing it to charge off the cost of these facilities in 5 years. The effect of this accelerated depreciation was to reduce the Federal income tax which Detroit Edison actually paid in each of these years as compared to what it would have had to pay without this accelerated depreciation.

Upon accountants' advice, Detroit Edison set up an account to which were charged a portion of such tax savings. The purpose claimed for this "reserve" was to enable Detroit Edison more easily to meet the possibility of higher income taxes in future years when these accelerated depreciation benefits were exhausted.

We are not concerned with whether or not this is a sound accounting practice or good business, or even whether or not it is a procedure required by orders of the public service commission. Assuming the truth of all of appellant's contentions in these matters, none of them has the effect of turning this "reserve" into "an outstanding indebtedness," or of removing these funds from the definition of surplus which we have cited.

The corporation tax appeal board found:

"In the instant case the Federal income taxes for which the reserve of $13,712,026 has been segregated were not owing and unpaid as of the date of the annual report, December 31, 1955.

"For all of the reasons hereinbefore assigned, it is the conclusion of the appeal board that the sum of $13,712,026 did not constitute an outstanding indebtedness at the date of the annual report and that appellee was correct in including this sum as a part of the surplus of the appellant."

Appellee's expert witnesses testified as to the reserve in question (Lyle D. Hepfer):

"*Q.* (*By Mr. Dexter, continuing*): Now, getting to your opinion, Mr. Hepfer, as an expert, I believe you stated that in your opinion this reserve was not a liability, in the generally accepted sense of that term?

"*A.* It is my opinion that it is not a liability, at the balance sheet date, payable as a current obligation to the United States treasury department.

"*Q.* Is there any outstanding obligation existing at the balance sheet date to which this item could be related?

"*A.* I see no existing liability at the balance sheet date."

(Samuel Beglin):

"*Q.* Now, in your opinion, what is the nature of the charge to be made to this reserve for deferred Federal income taxes?

"*A.* You mean the credit to this account?

"*Q.* Yes. * * *

"*A.* In my opinion, I would not consider this as being an outstanding indebtedness of the company."

An expert witness, Philip R. Potter, testified:

"*Q.* Now, would you care to express an opinion on that, as to whether or not at December 31, 1955,

this reserve might not be properly considered part of the stockholders' equity as of that date—not thinking in terms of regulatory purposes, but I am thinking of you, as an expert accountant?

"*A.* * * * Insofar as The Detroit Edison Company is concerned, at December 31, 1955, if it went into liquidation, it is doubtful whether the internal revenue department has any claim on any accumulated reserve at that point.

"*Q.* Well, it is a fact that they do not, isn't it? I mean, this is not a deferred item in reference to anything—in reference to any tax liability incurred on past transactions, as such, is it?

"*A.* * * * I know of nothing in the internal revenue code from which I draw the conclusion that there is a tax liability presently.

"*Q.* And nothing would indicate that in the present code?

"*A.* Nothing that I know of. I may have overlooked something, but I know of nothing presently, as the code is presently promulgated, that would make that a liability of The Detroit Edison Company, if, at December 31, 1955, they liquidated."

This record leaves no doubt but that Detroit Edison had clear title to these funds, and that they are unencumbered by any present legal obligation.

Where there is competent evidence to support the findings of fact of the board, this Court does not reverse. *Duluth, South Shore & Atlantic R. Co.* v. *Corporation & Securities Commission, supra.*

Nor was the Tax Appeal Board in error in recomputing the liability of the taxpayer and including several smaller items which the Michigan corporation and securities commission had mistakenly excluded from plaintiff's surplus account.

Section 9 says:

"The appeal board shall recompute the liability of the taxpayer." CLS 1956, § 450.309 (Stat Ann 1959 Cum Supp § 21.210).

This language is ample to authorize the recomputation made here.

The decision should be affirmed. No costs, matters of statutory construction being involved.

SMITH, J., concurred with EDWARDS, J.

KAVANAGH, J., did not sit.

LENZ *v.* CITY OF DETROIT.

MUNICIPAL CORPORATIONS—PRESENTATION OF CLAIMS—WAR VETERAN'S SALARY.

War veteran's claim for salary alleged to be due from defendant city was barred by reason of noncompliance with charter provision requiring that unliquidated claim be presented to common council as a condition precedent to bringing an action thereon (Detroit Charter, title 6, chap 7, § 11).

SMITH and SOURIS, JJ., dissenting.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted April 6, 1960. (Docket No. 15, Calender No. 47,944.) Decided September 16, 1960. Rehearing denied October 10, 1960.

Assumpsit by John N. Lenz against the City of Detroit, a municipal corporation, its mayor, and certain of its officials for salary and pension benefits of which he was deprived by reason of alleged wrongful discharge from civic employment. Judgment for defendants. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, *Municipal Corporations* § 677.

Craig Thompson, for plaintiff.

Nathaniel H. Goldstick, Corporation Counsel, *Helen Miller Smith* and *John R. McKinlay,* Assistants Corporation Counsel, for defendants.

KELLY, J. November 2, 1956, plaintiff filed his declaration alleging:

(1) That he was notified by letter on November 14, 1949, that he was discharged from his position of legislative clerk in the department of city clerk of Detroit for the following reasons: "Insubordination, conduct unbecoming a city employee, threatened intimidation of employer, misuse of council office, and fraudulent use of council stationery."

(2) That he appealed and protested, in due course, to the civil service commission and was duly heard at a scheduled hearing before said commission, after which said commission made a finding that said discharge was not for political reasons and was "not for reasons other than the good of the service."

(3) That following the finding of the civil service commission, plaintiff filed a written protest with the mayor of the city of Detroit on December 14, 1949.

(4) That he (plaintiff) was notified by the mayor on February 6, 1950, as follows:

"After full and due consideration of all the facts submitted at the hearing granted you before me on January 27, 1950, in accordance with the provisions of the veterans preference act, you are hereby advised of my decision.

"I find as a matter of fact that you did, while an employee of the city clerk, take militant action without regard to the recommendation of your employer, to change your classification and secure an increase in your salary. That you did, while so employed, collect facts in regard to the administration of the city clerk's office, and did attempt to use such facts

to embarrass and discredit your employer. That you did use official stationery of the common council and assume the title of 'secretary of the common council' for your personal benefit and prestige.

"It is my decision that you are guilty as charged and it is, therefore, my order that you be discharged as a city employee in accordance with the recommendations of the city clerk and the civil service commission."

(5) That plaintiff's mandamus action against the mayor to effect plaintiff's reinstatement as an employee was granted January 28, 1953, but the circuit court's decision was reversed by this Court on December 29, 1953 (*Lenz* v. *Mayor of Detroit,* 338 Mich 383), this Court ruling mandamus was not the proper remedy.

(6) That on February 10, 1955, the Wayne circuit court sustained plaintiff's writ of certiorari thereby quashing the proceedings before the mayor and setting aside the order of discharge, and on December 1, 1955, this Court reversed the circuit court (*Lenz* v. *Mayor of Detroit,* 343 Mich 599).

Plaintiff concludes his declaration (paragraphs 22, 23 and 24) as follows:

"It was above and beyond the official power, authority, and jurisdiction of defendant Albert E. Cobo to hold the required statutory hearing on the protest of plaintiff, in the manner in which he did proceed, as hereinbefore recited; same being unfair, biased, prejudiced, and wholly denying to plaintiff his undoubted right to due process of law.

"It was above and beyond the scope of authority, power, and jurisdiction of defendant city of Detroit to deny, through its agency the civil service commission, plaintiff's protest against and appeal from the void order made by Ernest Jones, deputy city clerk, as hereinbefore recited.

"As a direct and proximate result of the void acts of said defendants, made without jurisdiction to make them, as hereinbefore recited, plaintiff was arbitrarily, forcefully, and without due process deprived of valuable contractual and property rights, and suffered other financial losses, and was thus damaged in the sum of $68,200.17."

In finding no cause for action on the part of plaintiff, the court stated, in part, in its opinion:

"Finally, on November 2, 1956, plaintiff started suit in assumpsit in this court to recover damages for alleged breach of contract between himself and the city. This was just 9 days short of 7 years from the date of discharge, and 6 years, 8 months and 27 days after the mayor's decision. * * *

"Testimony was offered by the plaintiff and plaintiff's witness, in addition to a 'stipulation of facts' which attempted to incorporate everything that had transpired in the past in the plaintiff's efforts at reinstatement—'providing it was admissible.'

"Notwithstanding plaintiff's claim that he was not afforded a full and fair hearing (and, implicitly, that he was not guilty of the charges laid against him), he offered no testimony to refute the charges against him, but confined his testimony to his concept of damages as a result of the alleged breach of contract. The testimony on this point was quite disjointed, and appeared to establish that plaintiff prospered to a greater degree after he left the employment of the city than he had with the city."

Defendants contend that plaintiff is barred by his failure to file a claim with the common council of Detroit.

Title 6, chap 7, § 11, of the Detroit city charter, reads:

"The common council shall audit and allow all accounts chargeable against the city, but no unliquidated account, or claim, or contract shall be re-

ceived for audit or allowance unless it be accompanied by an affidavit of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered to the city, and the sums charged therefor are reasonable and just, and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except as are included or referred to in such account or claim. It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against said city that it has never been presented to the common council for audit or allowance or if on contracts that it was presented without said affidavit and rejected for that reason or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it."*

A previous decision by this Court in regard to the necessity of a war veteran complying with this provision of the Detroit city charter is disclosed by *Burkheiser* v. *City of Detroit,* 270 Mich 381, wherein we held:

"Charter provision requiring that unliquidated claim be verified when presented to common council and that court action on any claim may be barred by claimant's failure to present claim to council *held,* applicable to war veteran's claim for wages as inspector of sewer construction during period he was laid off (Detroit charter, title 6, chap 7, § 11)." (Syllabus 3.)

That proof of claim is a condition precedent to recovery is also established by *Springer* v. *City of Detroit,* 102 Mich 300; *Moulthrop* v. *City of Detroit,*

* Municipal Code, City of Detroit, charter section, p 206.—REPORTER.

218 Mich 464; and *Grand Trunk W. R. Co.* v. *Detroit,* 342 Mich 537.

We see no merit to plaintiff's contention that he did not have to comply with the charter provisions because "at the time of filing this suit appellant did not have any claim to present to the council, and still has no claim to present. Appellant will never have a claim to present to common council on the facts of this case, unless and until it be determined by this Court that his discharge was illegal and void."

Appellant's action was barred by his failure to file a claim with the common council.

Defendants also contend that plaintiff-appellant does not have a cause of action. In endeavoring to meet the statute of limitations argument, plaintiff, in his brief, states:

"It was only on the date when this Court handed down its decision in 343 Michigan 599; that is to say, on December 1, 1955, that appellant's status was cleared to the point where he could no longer ask for or receive a valid hearing before the mayor of Detroit."

Having failed to establish the illegality of the mayor's decision of discharge, plaintiff, 6 years and 8 months after said hearing, commenced this action in assumpsit charging that because of the void acts of defendants, plaintiff is entitled to $68,200.17.

To grant plaintiff's request in this assumpsit action would result in final determination that even though the court has refused to uphold plaintiff's contention that the discharge was illegal and void, plaintiff is entitled to damages in an assumpsit action based upon a declaration that the hearing before the mayor was "unfair, biased, prejudiced, and wholly denying to plaintiff his undoubted right to due process of law" and that "plaintiff was arbi-

trarily, forcefully, and without due process deprived of valuable contractual and property rights."

The case of *Sewell* v. *Detroit Electrical Contractors Assn.*, 345 Mich 93, dealt with a discharged employee of the city of Detroit who sued his department head and another superior in the department, claiming damages for a wrongful discharge. The suit was dismissed upon motion because of former adjudication by the civil service commission which upheld the validity of the discharge. The Supreme Court, in the appeal of the damage suit, held that the finding of the administrative tribunal was final and could not be attacked in a collateral proceeding such as a suit for damages, and, in deciding the case, stated (p 115):

"It is urged by defendants Steiner and Wolff that the dismissal of plaintiff's second application for leave to appeal in the nature of certiorari by Judge O'Hara on July 17, 1953, by reason of plaintiff's failure to furnish the trial court the transcript of the rehearing held by the civil service commission, left the decisions of the civil service commission on the hearing and rehearing and the judge's opinion and order of denial in full force and effect.

"In *Hailey* v. *Saginaw Justice of the Peace,* 320 Mich 59, 63, we said:

" 'The effect of a dismissal of an appeal is stated in 4 CJS, Appeal and Error, § 1386, pp 2007, 2008:*

" ' "On the dismissal of an appeal * * * the cause stands in the trial court as if no appeal had ever been taken; * * * the decree or order appealed from becomes final, *and the effect of such dismissal is to leave the parties where they were before the appellate proceeding was instituted.*" ' (Emphasis supplied.)

"We think the above rule should apply with equal force to quasi-judicial bodies such as the civil service

* Currently, 5 CJS, Appeal and Error, § 1386, pp 507–509.—REPORTER.

commission of Detroit. In our opinion the action taken by the civil service commission on plaintiff's subsequent attempt to appeal is an adjudication that plaintiff was lawfully discharged from employment with the city of Detroit, and it also follows that any claim for damages against defendants Steiner and Wolff, growing out of such discharge, is foreclosed by reason of such discharge."

See, also, *Van Sant* v. *Atlantic City*, 68 NJL 449 (53 A 701); 37 Am Jur, Municipal Corporations, § 264, p 886; and McQuillin on Municipal Corporations, § 12.227.

We conclude that defendants' contention that plaintiff did not have a cause of action should be upheld.

Because of what has been said hereinbefore it is not necessary to pass upon the question of statute of limitations.

Affirmed. No costs, a public question being involved.

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

SMITH, J. (*dissenting*). Apparently John N. Lenz just cannot get the notion out of his head that somehow, sometime, our Court will dispose of his case on the merits.

Many years ago the mayor of Detroit, charged by law with the duty of affording Lenz a full hearing as to his discharge, became impatient with him, walked out of the hearing before Lenz' testimony was all in, and then ruled against him.

Lenz thought this was unfair and went into the circuit court in mandamus. His theory was that the mayor had a clear legal duty to give him a fair hearing before firing him, and, not having done so, the mayor should be ordered to restore him to duty.

Certiorari, he argued, would lie to bring up errors of law if a hearing were fairly conducted, but this, he claimed, was no hearing at all, but, rather, a kangaroo court. At any rate, in the circuit court he won and it was ordered that the mayor forthwith restore plaintiff to employment. We, however, reversed on the ground that mandamus was not the proper remedy.[1] Before us the city argued strenuously that Lenz was guilty of laches but we found it unnecessary to pass on the question. Nor did we pass on the merits. The decision was solely on procedural grounds, resting entirely on the murky distinction, easy to state and hard to apply, between certiorari and mandamus. *Lenz* v. *Mayor of Detroit,* 338 Mich 383.

Lenz then started all over again, this time in certiorari. Again he won in the circuit, and again the city appealed. This time a majority of our court found the city's charge of laches, which we had ignored in the former case, decisive. *Lenz* v. *Mayor of Detroit,* 343 Mich 599.

It was said that his position had been abolished, though the dissent pointed out that the so-called abolition

"did not take the other legislative clerk (there were 2 such, Lenz and Hardy) off the city payroll, he having been transferred to other work at the same pay, and a similar solution, the record indicates, was at one time contemplated with respect to plaintiff but rejected because of actions taken by him."

It may be gathered, I assume, that I am not impressed with the legality of the device of abolishing an alleged troublemaker's job as a handy means of

[1] *Cf. DeGuzman* v. *Wayne Circuit Judge,* 225 Mich 606, 610, where we considered the questions brought to us in mandamus "as though presented by certiorari." See Note, 27 Iowa L Rev 291, pointing out the overlapping in part of mandamus and certiorari, and steps taken in New York, and under the Federal rules, to avoid the "procedural pitfalls" occasioned thereby.

getting rid of him, particularly where he is protected by the veterans' preference act.[2] Since any text will furnish the authorities, I forego the citations.

It will be noted that neither decision went to the merits. The most that could be said for the last one was that we reached back on the shelf for the sword of laches tendered us for use against Lenz in the first case, dusted it off, and ran him through with it.[3]

But Lenz dies hard. He has read somewhere of something called "a day in court" and he doggedly pursues it. When our majority decided in the second *Lenz Case* that he came to law too late to get his job back he had to, perforce, accept the decision. But we did not decide whether his discharge had been

2 CL 1948, § 35.401 *et seq.* (Stat Ann 1952 Rev § 4.1221 *et seq.*).

3 The following comments on the defense of laches are taken from the dissenting opinion in *Lenz* v. *Mayor of Detroit,* 343 Mich 599, 608, 609.

"This, then, is defendant's defense of laches, unreasonable delay before starting the original mandamus action. It has been twice rejected by the trial court. We find no error of law in such rejection.

"Moreover, my conscience troubles me about its application as a ground for decision in this Court. In the original mandamus action the question of laches was argued, was decided by the trial court, was claimed as a reason and ground for appeal, and was briefed to the court. We held, in substance, that Lenz had mistaken his remedy, that 'the sole remedy available' to him was certiorari. Appellee argues that implicit in such holding, or necessarily included therein because of our failure to disturb the trial court's holding of no laches, is our holding that his remedy was not lost by laches. This we reject. We did not pass on the question of laches. But the application of the doctrine of laches to the case at bar cannot be settled by any mechanical rule as to whether or not one ground of decision necessarily includes or rejects others. The question involves the application of an equitable doctrine controlled by equitable considerations, a formula whereby the conscience of the court finds expression. As to this we are clear: We do not regard it as consonant with our practice that in a litigant's second appearance in this Court in the same case he be struck down in part because of a nonjurisdictional defect existing, if at all, before we heard him the first time and concerning which, though then briefed to us, we refrained from comment, particularly in view of the fact that our ruling then on such ground would have finally disposed of his action and would have saved him his long and expensive second journey into this Court."

wrongful or rightful. He insists it was wrongful and arbitrary and he conceives that he has a right to damages arising therefrom, whether he ever gets his job back or not.

Consequently this suit, in assumpsit. He says he was wrongfully fired and he wants his damages, which include loss of salary, pension rights (he was within a few years of it), and other claims we need not recount. The facts were all stipulated.

But at this juncture another procedural objection was successfully interposed by the city. This time it was the statute of limitations that was used against him. The trial court expressed some doubt as to damages suffered and mentioned (without ruling thereon) the possible defenses of *res judicata* and failure to file a claim with the city council under its charter provisions.[4]

Is such failure fatal to Lenz' right to recover? On the one hand we might close the matter simply by pointing out that the charter provides that "any demand or claim against said city" shall first be presented to the common council. Lenz admittedly has not done so. Thus inexorable logic, if that is all we should consider, would lead us to the facile conclusion that he may not sue.

But it is only by divorcing these words from their history and the precedents that we are justified in such conclusion. For if anything is clear in the development of the claims and demands statutes common in this country, it is that they are interpreted neither broadly, being in derogation of the common law, nor blindly. Their purpose will be found in the cases cited in 17 McQuillin,[5] §§ 49.11 and 49.12. The city, it is said, is to be provided with full information concerning the rights asserted against it, in order

[4] Title 6, ch 7, § 11, Detroit city charter (Detroit Municipal Code [1954], charter section, p 206).

[5] Municipal Corporations (3d ed).

that it may investigate the incident complained of, discover the pertinent facts, and possibly adjust in amity. It must not be left in the dark as to what is involved in some obscure claim. Much of this, of course, goes straight back to the divine right of kings, for a city has the same discovery and settlement processes open to it as any other litigant, but such, at any rate, is the theory. But the rule does not have the all-embracing effect appellees here seek to give it. Thus if an affirmative act of the city itself causes the injury, it has been held[6] that no notice need be given of the claim or demand. Why not? Because in such case (p 180) "the municipality which is entitled to the notice must know of the injury, and hence notice would be unnecessary." But the most comprehensive shrinking of the literal breadth of the notice requirement was that of our own court, and properly so. Claims and demands made against a city arising out of its operation of a bus were held not within the notice requirement in *Borski* v. *City of Wakefield,* 239 Mich 656. Why not? Because the city was operating the bus in a proprietary capacity, not as a sovereign. Obviously, then, it is not enough merely that a "claim or demand" be involved. The words require interpretation, not automatic application. We proceed, then with interpretation.

Here Lenz asserts that his presentation of a claim to the city would be, in his words, ridiculous. He argues that the situation presented is not within the purpose of the act, since no investigation is called for and, obviously, there is no hope "amicably" to adjust the matter now being litigated for the third time. He says that no official of the city of Detroit would have the legal power to award damages for his wrongful discharge since there has never been a determination of this question on its merits. He

[6] *Hughes* v. *City of Nashville,* 137 Tenn 177 (192 SW 916).

makes, as well, additional arguments with respect to the application of the ordinance to his case but they all boil down to the simple proposition, variously stated that a claim, under the circumstances of his case, is not within the purview of the ordinance.

The problem here faced is as old as the law itself. It involves the conflict between the administration of justice according to the literal words of a statute, ordinance, or rule, and its administration according to what we conceive, after much search, to be the purpose in the words employed. It was Judge Learned Hand who once wrote that it is "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."[7] The late Judge Jerome Frank, of the second circuit, expressed the same thought, reminding us of Corbin's insistance that "able judges cannot live by rules alone." They, he said, serve to "nudge the judge, give him hints, strong hints he must seldom disregard; but a judge who knows nothing but the rules will be a judicial routineer, a dispenser of injustice, since * * * the art of judging really lies in the ability to cope with the unruly."[8]

As for me, the choice was long-since made and I am not induced to recant. Viewing the ordinance in the light of its purpose it is clear to me that it has no application to the case before us, indeed, as Lenz himself put it, that it would be ridiculous to make such application. If we interpret the ordinance (as we did in *Borski, supra*), within the framework of applicable common-law principles, there is an elementary, conclusive answer to the asserted requirement that claim should have been made before this court action was filed: the law never requires a litigant to go through the idle ceremony of making a

[7] *Cabell* v. *Markham* (CCA2, 1945), 148 F2d 737, 739.

[8] Frank, Book Review [of Corbin on Contracts], 61 Yale LJ 1108, 1113.

futile demand. The principle finds application in all fields of the law. In the law of conversion, no demand need be made if it is clear that it would be useless or unavailing.[9] In the law of corporations, no demand need be made (that the corporation itself sue) prior to a stockholders' derivative suit if it would be fruitless.[10] The futility, moreover, need not be proved to a mathematical nicety. The law is a practical business and it does not require the impossible, namely, precise proof of future events. It is enough if refusal may be "inferred with reasonable certainty." (*Polish American Case, supra.*) But we need not rely upon analogy, apt though it may be. We have held squarely in this area (of the demand upon the Detroit common council) that such will not be required if "it would have been a useless gesture." (*Ely* v. *City of Detroit,* 306 Mich 300.) In *Ely* the corporation counsel had refused to recommend payment of any part of the bill sued upon. In the case before us his action was even more clear, involving, as it did, protracted litigation.

There may be those who would insist that after 10 years of unremitting effort to obtain reinstatement, and after 2 lawsuits, each of which was won below but lost in this Court, if Lenz now presents to the city of Detroit a claim for damages, it might see the error of its ways (despite what we have ruled), repent, and concede that he has suffered a wrong after all, something it has successfully denied, through its proper legal and administrative officials, for the past decade. The gracious and generous thought does credit to all who nourish it. As for myself, I do not regard it as reasonable. I have concluded, with much regret, that the milk of human kindness is neither so rich nor so abundant. In short, it is my opinion that making such demand

[9] *Iler* v. *Baker,* 82 Mich 226.
[10] *Polish American Publishing Co.* v. *Wojcik,* 280 Mich 466.

would be a useless act. If I were convinced otherwise I would order its filing *nunc pro tunc* upon remand for trial.[11]

Without, as we have noted, passing upon the defenses of *res judicata,* or failure to file a claim, the trial court squarely held that "the statute of limitations is a complete bar to recovery by the plaintiff if he has any right to sue for damages in the first place."

Is it? Is there only one cause of action involved here? Or may the same set of facts eventually give rise to several causes of action? We take it as settled that the latter is the true situation. Thus in *Kelly* v. *Chicago Park District,* 409 Ill 91 (98 NE2d 738), plaintiffs, asserting wrongful discharge, were upheld after prolonged mandamus proceedings. Their action for salaries wrongfully withheld was challenged on the ground that the 5-year statute of limitations barred recovery. The court held not.

"The cause of action for salaries could not accrue to plaintiffs until their rights to their respective positions were first determined. * * * Where a party's success in one action is a prerequisite to his right to maintain a new action, the statute of limitations does not begin to run as to the new action until the determination of the pending suit, which decides whether the new right exists." (pp 95, 96.)

Similar was the result in *City of Phoenix* v. *Sittenfeld,* 53 Ariz 240 (88 P2d 83). Here a policeman, allegedly wrongfully discharged after fruitlessly appealing to the civil service board, tested the action in certiorari. The trial court, on December 29th,

[11] "The courts have been reasonably liberal in interpreting the notice provisions of the statute, so long as the municipality had in fact received adequate notice on which to base an investigation and discover the facts pertinent to the alleged negligence. If there is any question about the matter, we hereby grant leave *nunc pro tunc* to plaintiffs to file the complaint herein." *Martini, Jr.,* v. *Olyphant Borough School District,* 83 Pa D & C 206, 208.

found the discharge wrongful and ordered his reinstatement. The city was reluctant and did not finally reinstate him until May 7th, just short of the time limit for appealing the decision of the trial court. His salary claim was resisted under the statute of limitations. This the court rejected. It first held that the salary claim must be determined by the validity of the discharge, and that this was not known until the court's decision on December 29th. It then held that, since the city had 6 months for appeal, the policeman's action for salary would have been premature until expiration of the right to appeal or acquiescence in the trial court's decision. The statute did not begin to run, it was concluded, until May 7th, the date the city accepted the judgment by reinstating the officer.

The reasoning of the above and similar cases directly supports plaintiff's position. At the time of plaintiff's so-called discharge he had, theoretically, 2 inconsistent courses of action open to him: he could accept the discharge as effective (this being the normal situation when an employee is discharged) and sue for damages if the discharge were wrongful, as, perhaps, in violation of contract. Or, in the alternative, he might reject the discharge as being ineffective and sue for reinstatement, with incidental damages. As a matter of fact there is some authority to the effect that a municipal employee who asserts he has not been legally dismissed must move seasonably in asserting his continued claim to the office or his failure will result in an abandonment thereof. *Jones* v. *Doonan,* 265 Mich 384; *Wayne County Prosecuting Attorney, ex rel. Taxpayers,* v. *City of Highland Park,* 308 Mich 425. Consistently therewith it has been held that the dismissal cannot be inquired into collaterally, but must be reversed in a direct proceeding therefor. *Van Sant* v. *Atlantic City,* 68 NJL 449.

The latter course (of contesting the validity of the discharge) was that adopted here by Lenz. He would hardly dare not resist the legality of the discharge, lest such failure be construed as abandonment of the office and he was within a few years of his pension. Moreover he had had no hearing at all, in the legal sense. Consequently his action tendered us the issue of the legality of his discharge. If such issue is decided against the employee, he has no further claim. If it is decided in his favor a new cause of action for the reparation of financial damages suffered arises, as we have seen, simultaneously with and dependent upon, the decision rendered.

But there is a third possibility. The court may decline to rule upon the legality of the discharge, merely denying reinstatement because of its alleged impracticability from the city's point of view,[12] in other words, change of conditions, laches. In such case does the employee lose his right to have the legality of his discharge (the issue seasonably tendered by him) passed upon by the running of the statute of limitations?

We could rule, of course, that it does. We could simply say that it has been over 10 years since the alleged discharge and that the statute has run. But the difficulty with this position is obvious. None of the reasons for the running of the statute is present. The matter has been in constant litigation ever since it happened. There is nothing "stale" about the claims asserted, nor (limitations being statutes of repose, as we have held) is the defendant in any position to assert that his repose is being disturbed

[12] "Plaintiff seeks reinstatement to an abolished position, with resultant disruption of the existing system under which the duties of the abolished positions have been distributed and otherwise integrated therein, and giving rise to a serious question of rights to pension and unearned back pay for a 6-year period." *Lenz* v. *Mayor of Detroit*, 343 Mich. 599, 601.

by an unsuspected claim arising out of a long-settled transaction as to which all memories have faded.

I do not think it fruitful to theorize upon a purely conceptual basis. We have a practical problem. The specific issue now facing us is whether a cause of action for damages accrued to plaintiff upon our final refusal to order his reinstatement to employment with the city. He asserts, and the record bears him out, that from the very outset, back in 1949, he has done everything possible to obtain a ruling from us upon the legality of his alleged discharge. He also points out that with our ruling in the second *Lenz Case* that change of conditions exists, and that such change of conditions prevented the granting of the relief prayed by him, a new cause of action arose, simultaneously with and dependent upon the court's decision, as it did in the *Kelly* and *City of Phoenix Cases, supra.*

Our problem is one of statutory interpretation. What, in this factual situation, is the meaning of the expression "cause of action" in the statute of limitations? It is nowhere defined therein nor is it a term of fixed content. Actually it is no more than an aggregation of operative facts "which should afford ground or occasion for the court to give judicial relief."[13] This, of course, "is frankly placing the matter [where it belongs] in the hands of the judge and seems much preferable to the seeming exactness of many definitions which turns out to be mere delusion."[14]

To me one choice is so clear that there is no other. Far from there being, in Judge Clark's words, *supra,* no "ground or occasion for the court to give judicial relief," we are under a bounden duty so to do. The spectacle of our whipsawing this litigant back and forth between certiorari and mandamus without ever

13 Clark, Code Pleading (2d ed), p 137.
14 Clark, Code Pleading (2d ed), p 138.

passing on the merits is a reproach to both bench and bar. It gains nothing in luster or in dignity that we finally cast him out on the ground that he has brought us a stale claim. Stale it may be to us, but a wrong that cannot even be heard, to say nothing of being righted, has a way of burning on and on, for days without end, of outliving even its perpetrators. I say to hear Lenz out. I want to know whether an official charged by law with the duty of conducting a full hearing can walk out of the hearing before the defendant has been heard, slam the door, and make it stick.

The judgment should be reversed and the case remanded. Costs to appellant.

SOURIS, J., concurred with SMITH, J.

BLACK, J. (*concurring*). The defendant city's charter validly (there is no challenge to its validity) provides that "any demand or claim against said city,"* not previously presented to the common council for allowance or rejection, shall not be actionable against the city. It is agreed that the claim upon which plaintiff declares has never been presented according to requirement of such provision. Is the provision not applicable in bar of this suit?

I neither read nor hear any argument upon which it might be said, plausibly or otherwise, that the provision does not so apply. Accordingly, and on sole strength of the city's right to insist that the mentioned provision of its charter be observed as a condition of suit, I vote to affirm.

KAVANAGH, J., concurred with BLACK, J.

EDWARDS, J., did not sit.

* For quotation of such charter provision, see opinion of Mr. Justice KELLY.

STATE BAR OF MICHIGAN *v.* CITY OF LANSING.

1. ATTORNEY AND CLIENT—REGULATION OF ATTORNEYS—COURTS—STATUTES.

   The inherent power of a Supreme Court to regulate the qualifications of persons permitted to practice law and to suspend or disbar an attorney for sufficient cause and jurisdiction to do so does not depend upon statute but the enactment of legislation for such purpose does not make the act unconstitutional (CL 1948, § 691.51 *et seq.*).

2. CORPORATIONS—SPECIAL ACTS.

   A corporation may not be created by a special act of the legislature (Const 1908, art 12, §§ 1, 2).

3. SAME—POWERS.

   A corporation, as the term is used in the Constitution, includes associations having any of the powers or privileges of corporations not possessed by individuals or partnerships (Const 1908, art 12, § 2).

4. STATUTES—CONSTITUTIONAL LAW—CORPORATIONS—STATE BAR.

   It is assumed that the legislature knew of restrictions imposed upon it with respect to creating corporations by special act when it enacted the statute creating the State bar (CL 1948, § 691.51 *et seq.*).

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur, Attorneys at Law § 19.
Power of legislature respecting admission to bar. 144 ALR 150.
[2] 13 Am Jur, Corporations § 24.
[3] 13 Am Jur, Corporations § 5.
[4] 11 Am Jur, Constitutional Law § 129.
[5, 6] 5 Am Jur, Attorneys at Law § 2.1.
Integration of bar. 114 ALR 161; 151 ALR 617.
[7] 11 Am Jur, Constitutional Law § 97.
[8] 51 Am Jur, Taxation § 561.
[9] 14 Am Jur, Costs § 23.

5. ATTORNEY AND CLIENT—STATE BAR—STATUTES—INTENT.
The statute authorizing the creation of the State bar clearly intended to provide for an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of functions that in the final analysis, pertain to the judiciary (CL 1948, § 691.51 *et seq.*).

6. SAME—STATE BAR—RULES AND REGULATIONS—DISCIPLINE—PUBLIC WELFARE—JUDICIARY.
The rules and regulations concerning the State bar which have been adopted by the Supreme Court are consistent with the legislative purpose of the statute creating the State bar and, insofar as the rules pertain to the discipline, suspension, or disbarment of the members of the profession and the fixing of ethical standards to be observed in the practice of the law, they relate to the public welfare and protection and are within the scope of the inherent power of the judiciary (CL 1948, § 691.51 *et seq.*).

7. STATUTES—CONSTRUCTION.
If a statute is of such a character that it is subject to differing interpretations one of which would result in the act being held unconstitutional and the other permitting its being upheld as valid, the latter alternative will be accepted.

8. ATTORNEY AND CLIENT—STATE BAR—PROPERTY—TAXATION.
The State bar, as organized pursuant to statute creating it, is a public, not a private, agency subject to direct control of the State and is, in effect, a governmental agency whose property is exempt from taxation (CL 1948, § 691.51 *et seq.*).

9. COSTS—PUBLIC QUESTION—TAXATION OF STATE BAR PROPERTY.
No costs are allowed in State bar's suit for declaration of rights as to its liability for property taxes, a public question being involved (CL 1948, § 691.51 *et seq.*).

Appeal from Ingham; Fox (Raymond W.), J., presiding. Submitted April 6, 1960. (Docket No. 25, Calendar No. 48,356.) Decided September 16, 1960.

Bill by State Bar of Michigan, a public body corporate, against the City of Lansing, a municipal corporation, and certain of its officials, with Lansing School District No. 1 and County of Ingham subse-

quently joined as parties defendant, for declaration of rights and refund of taxes paid on State Bar properties. Decree for plaintiff. Defendants appeal. Attorney General intervenes asking reversal. Affirmed.*

Joseph W. Planck and *Everett R. Trebilcock,* for plaintiff.

Joseph Lavey, City Attorney (*Hubbard, Fox, Thomas & Born* and *Donald G. Fox,* of counsel), for defendant City of Lansing.

MacLean & Seaman (*Charles R. MacLean,* of counsel), for defendant Lansing School District No. 1.

Jack W. Warren, Prosecuting Attorney, for defendant County of Ingham.

Paul L. Adams, Attorney General, and *Samuel J. Torina,* Solicitor General, for intervenor-appellant.

KELLY, J. This controversy involves certain real and personal property belonging to the State Bar of Michigan, including the land upon which the present State Bar headquarters were at time of trial being erected, and the personal property of the State Bar which was at that time situated in the Hollister Building, Lansing, Michigan.

* REPORTER'S NOTE: The following communication, dated September 16, 1960, and addressed to the Commissioners of the State Bar of Michigan, was made by the Supreme Court:

"This Court has this day decided as a matter of law that the property involved in *State Bar of Michigan* v. *City of Lansing* is tax exempt.

"As a matter of policy, however, in pursuance of its supervisory function in relation to the integrated State Bar, this Court also desires to express its unanimous view that the State Bar of Michigan should forthwith contract for payment of the same sums as would be paid by the State Bar to interested taxing units if the State Bar were not tax exempt."

The real estate involved had been assessed for city, school, and county taxes for the years 1955, 1956, 1957, and 1958, and all of said taxes had been paid under protest.

Plaintiff appeared before the board of review of the city of Lansing and filed a written claim of exemption from taxation, claiming that it is a public body corporate, created by statute, organized and regulated under the rules of and under the direct and immediate control of the Supreme Court of Michigan, and that it is an educational and scientific institution and, therefore, exempt from taxation under the general property tax laws.

The exemption was denied by the board of review. The State Bar of Michigan filed a petition for declaration of rights.

At the hearing, Mr. Raymond Dresser, then president of the State Bar of Michigan, testified that the State bar association maintained offices at 384 Hollister Building, Lansing, Michigan, on leased property and that the quarters were not adequate; that the State Bar had about 8,900 members and was in the process of completing new headquarters; that the new building would house executive offices of the State Bar, including administrative work of the State bar association as well as the work of its 49 regular committees and 28 grievance committees and the board of bar examiners; that there were no plans for any charge for use of the building; that there is a large lounge in the building for entertainment purposes with limited facilities for the service of food through a catering service; that the building contains a large meeting room, primarily for the use of committees and sections of the State Bar; and that, although members of the public might be permitted the use of the facilities, the facilities were primarily intended for the members of the bar; that "if the public has matters which are germane to the

functions of the State Bar, they will probably use the building, but to open it up for general public purposes, any meetings they might want to hold, I know of no plans for that"; that the State Bar of Michigan controls the building subject to the rules adopted by the Supreme Court; that the money for the construction of the State Bar building came from lawyers and donations from the public; that no money was contributed by the State of Michigan and there is no obligation of the State of Michigan on any bonds in connection with the building; that the land was purchased from funds of the State Bar and the building constructed through voluntary contributions from lawyers, banks, trust companies, and relatives of deceased lawyers; that funds used to purchase the land came from dues contributed by lawyers, which dues were set by the Supreme Court, plus small additional revenues from advertising in the Bar Journal and a few other sources; that no funds are received by the State Bar from taxes collected by the State of Michigan.

Mr. Milton Bachmann, executive secretary of the State Bar, testified that action had been taken by the board of commissioners seeking a change of the rules of the Supreme Court relative to the designation of the State Bar of Michigan as a public body corporate just before the State Bar made the final determination to construct its building; that a commissioners' committee of the State Bar presented recommendations to the board of the State Bar and the board approved presentation of the recommendations to the Supreme Court; that the petition of the State Bar was approved by the Supreme Court, as the result of which the rules were changed so as to refer to the State Bar of Michigan as being organized and existing as a public body corporate; that the books of the State bar association are not audited by any division of the government of the State of

Michigan, and no accounts are filed with any division of the State government except the clerk of the Supreme Court; that none of the employees of the State Bar are paid out of tax funds collected by the State of Michigan; that it was not contemplated that the State of Michigan would maintain the building; that the operating expenses would be paid for out of funds accruing to the State Bar through dues; that 18 of the commissioners of the State Bar are elected by lawyers of their respective congressional districts and 4 are appointed by the Supreme Court at large, making a total board of 22, and that neither the governor nor the legislature has anything to do with the appointment of the State Bar commissioners.

E. Blythe Stason, A.B., B.S., J.D., after having been qualified as an international authority on legal education, testified that the legal education of a lawyer begins in a formal way somewhere in the middle of college years, continues through college and law school and into post graduate years, for the reason that the body of the law is constantly changing and the lawyer today must deal with problems that differ from those yesterday and the day before yesterday; that the need for continuing legal education is being met by 3 or 4 institutes offered by the University of Michigan Law School, the program of the American Bar Association, and educational programs offered by the State Bar of Michigan, both by institutes and convention workshops; that various committees of the State Bar involve legal research in many fields toward the end of improvement of certain phases of the law; that the institutes offered by the law school and the State Bar are specialized training intended for the legal profession.

At the conclusion of proofs defendants' motion to dismiss was denied. Defendants appeal, asking:

"That the decree entered below be set aside.

"That the case be remanded for entry of a new

decree declaring the real and personal property involved to be subject to taxation."

The integrated State Bar was first created by the legislature by the enactment of PA 1935, No 58 (CL 1948, § 691.51 *et seq.* [Stat Ann § 27.101 *et seq.*]), using the following language:

"An act to create the State Bar of Michigan; and to authorize the Supreme Court to provide for the organization, regulation and rules of government thereof.

"*The People of the State of Michigan enact:*

"Sec. 1. There is hereby created an association to be known as the State Bar of Michigan, the membership of which shall consist of all persons in the State now or hereafter regularly licensed to practice law in this State.

"Sec. 2. The Supreme Court is hereby authorized to provide for the organization and regulation of the State Bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein * * *."

The Supreme Court has adopted certain rules granting powers and duties to the State Bar,[1] some of which are:

a. The State Bar is charged with enforcement of the Supreme Court rule that any person not an active member who practices law in this State shall be subject to discipline. (Rule 3.)[2]

b. The State Bar is required to prosecute by way of injunction any of its members in case of persistent or repeated misconduct publicly committed. (Rule 14, § 2.)[3]

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[1] See 317 Mich xxxix; 330 Mich xlii; 337 Mich xxxix; 340 Mich xxxviii; 343 Mich xli; 350 Mich xiii; 351 Mich xiv; 354 Mich xiv; 355 Mich xvii; 359 Mich xiii; 39 MSBJ, June, 1960, p 12 *et seq.*—REPORTER.

[2] See 351 Mich xv.—REPORTER.

[3] See 317 Mich xlvi.—REPORTER.

c. The State Bar has the duty and power to investigate complaints against members of the bar and to hold hearings thereon. It may dismiss or may reprimand. It may prosecute for suspension or disbarment in circuit court which shall confirm the recommendation unless just cause is shown to the contrary. (Rule 15.)[4]

d. Every grievance committee of the State Bar has the power to issue subpoenas in the name and under the seal of the State Bar of Michigan and to cause evidence to be taken under oath. (Rule 15, § 27.) Failure of a witness to appear and give evidence constitutes contempt of court. (Rule 15, § 29.)[5]

e. Depositions in grievance matters may be taken before any member of a grievance committee or before any judge authorized to take depositions. (Rule 15, § 28.)[6]

f. The State Bar has the power and the duty to investigate petitions for reinstatement and to file with the Court its certified report and recommendations thereon. (Rule 15, § 18.)[7]

g. The State Bar has the power and the duty to investigate the moral character of student applicants for admission to the bar and report thereon to the board of law examiners. (Rule 16.)[8]

h. The State Bar is authorized and empowered to investigate and to file and prosecute actions and proceedings pertaining to the unauthorized practice of law, and its general counsel is directed to assist therein. (Rule 17.)[9]

In determining the right of an inactive member of the State Bar of Michigan to engage in practice

[4] See 343 Mich lix; 354 Mich xv; 355 Mich xvii; 359 Mich xiii.—REPORTER.

[5] See 343 Mich lxi; 359 Mich xiii.—REPORTER.

[6] See 343 Mich lx; 359 Mich xiii.—REPORTER.

[7] See 343 Mich liv; 359 Mich xiii.—REPORTER.

[8] See 337 Mich xxxix.—REPORTER.

[9] See 355 Mich xix.—REPORTER.

of law, our Court in *Ayres* v. *Hadaway,* 303 Mich 589, 597, said:

"In our opinion there is inherent power in the Supreme Court to regulate the qualifications of persons who may be permitted to practice law in this State. That the legislature has seen fit to adopt legislation to this end does not make the act unconstitutional."

Commenting upon this *Ayres Case,* appellants state:

"The court below seemed to attach some weight to the fact that regulation of lawyers is a matter which properly falls within the judicial department of government and that all lawyers are 'officers of the court'. Granting that such regulation is inherent in the Supreme Court, we find no authority for the creation of a State department or agency to accomplish this purpose. Moreover, as pointed out in *Ayres* v. *Hadaway,* 303 Mich 589, 597, quoting from a Minnesota case:

" 'An attorney is not an officer of the State in a constitutional or statutory sense of that term, but he is an officer of the court, exercising a privilege during good behavior.' "

This appeal involves the question as to the status of the plaintiff: Is it, as defendants seem to contend, actually a private organization made up of the members of the bar? Or is it, on the contrary, a governmental agency created for a specific purpose logically falling within the scope of the judiciary?

Under article 12, §§ 1 and 2, of the State Constitution (1908), a corporation may not be created by special act of the legislature. Under section 2 the term "corporation" is declared to include associations having any of the powers or privileges of corporations not possessed by individuals or partnerships.

It must be assumed that the legislature in the enactment of PA 1935, No 58, creating the integrated State Bar, knew of the restrictions imposed by said sections of the Constitution. What then was the purpose of the legislature in enacting the statute?

The provisions of this act are such as to clearly indicate that it was the intent of the legislature to provide for the organization of an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of functions that, in the final analysis, pertain to the judiciary. Clearly if such was not the intention there would have been no attempt to invest this Court with the powers of organization and regulations obviously contemplated by the language of the statute.

This Court proceeded accordingly, and, in so doing, actually construed the legislative enactment. The rules and regulations that have been adopted are consistent with the legislative purpose, as disclosed by the act. This is particularly true insofar as matters pertaining to the discipline, suspension, or disbarment of members of the profession are concerned and the fixing of ethical standards to be observed in the practice of law. These are matters that relate to the public welfare and protection. Likewise, they are matters within the scope of the inherent power of the judiciary. Such proposition was recognized by this Court in *Ayres* v. *Hadaway, supra,* where the constitutionality of the act was assumed and its operation construed to some extent.

It would seem that we are confronted with this situation: Either it is, as claimed on behalf of plaintiff, a State agency, the property of which is exempt from taxation under the general law; or, its existence is subject to attack on the ground that the act of the

legislature is invalid under article 12, §§ 1 and 2, of the Constitution (1908).

It may be noted in passing that the question of constitutionality was raised in *Emmons* v. *Smitt* (CCA 6), 149 F2d 869, but the Federal court declined to pass on the theory that such an issue must be determined by the court of last resort of the State. It is apparent that under the reasoning in *Ayres* v. *Hadaway, supra,* this Court has, in effect, rejected any possible claim of unconstitutionality, which action was consistent with the discussion as to the purpose of the act and the rules of this Court adopted thereunder.

The general principle has repeatedly been invoked that if a legislative enactment is of such a character that it is subject to differing interpretations, one of which would result in the act being held unconstitutional and the other permitting its being upheld as valid, the latter alternative will be accepted. In other words, the presumption is that the legislature would not intend to pass an act in contravention of a constitutional restriction or otherwise invalid.

The oral arguments in this case were heard on April 6, 1960. On the preceding day, April 5th, the supreme court of Wisconsin handed down its decision in *Lathrop* v. *Donohue,* 10 Wis2d 230, 232, 233, 237, 238, 242, 243, 245 (102 NW2d 404), and we quote from the report of that case as follows:

"Action commenced June 8, 1959, by Trayton L. Lathrop to recover the sum of $15 paid by him to the defendant Joseph D. Donohue under an alleged unconstitutional compulsion.

"The material allegations of the complaint are as follows: The plaintiff was admitted to practice of law by the supreme court of Wisconsin in 1948 and since his admission he has practiced his profession at the city of Madison. The defendant is the treasurer of the State Bar of Wisconsin (hereinafter re-

ferred to as the 'State Bar') which was integrated on a trial basis in 1956, by order of the supreme court of Wisconsin, and functions under the rules and by-laws of such organization approved by further order of the same court. This integration of the bar was continued in effect on a permanent basis by further order of such court entered December 22, 1958. Such rules and by-laws impose compulsory membership and the payment of annual dues upon all persons admitted to practice law and engaged in the active practice of law in the State as a requisite of such persons continuing in such active practice. On or about March 6, 1959, the plaintiff paid under protest to the defendant the sum of $15 to cover his annual dues to the State Bar for the calendar year 1959, and accompanied such payment with a letter which stated that such payment was made under compulsion of the by-laws of such organization requiring such payment. * * *

"The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year. He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

"The right to practice law is not a right but is a privilege subject to regulation. *Petition for Integration of the Bar of Minnesota* (1943), 216 Minn 195, 200 (12 NW2d 515, 518). As the Arizona court well stated in *In re Greer* (1938), 52 Ariz 385, 389 (81 P2d 96, 98):

" 'The right to practice law is not a natural nor constitutional one, in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege

only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the State may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them.'

"The only limitation upon the State's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process. *Schware* v. *Board of Bar Examiners of New Mexico* (1957), 353 US 232 (77 S Ct 752, 1 L ed 2d 796, 64 ALR2d 288). * * *

"The State Bar is a public and not a private agency. In the annotation entitled, 'State bar created by act of legislature or rules of court; integrated bar,' 114 ALR 161, the author states:

"'While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the State or under the direction of the State, and of being under its direct control, and in effect they are governmental bodies.'

"*State Bar of California* v. *Superior Court* (1929), 207 Cal 323, 328 (278 P 432, 434), and *In re Gibson* (1931), 35 NM 550, 570 (4 P2d 643, 653), support the above-quoted statement. * * *

"It is our considered judgment that the orders of this court integrating the bar, and continuing such integration, violate none of the First-Amendment freedoms of the plaintiff as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment."

We affirm the trial court's finding that "the property of the State Bar of Michigan located at the city of Lansing, which was dedicated on May 1, 1959, and which is described in the pleadings in this cause, is determined to be public property belonging to the

State of Michigan and as such is exempt from taxation."

Affirmed. No costs, a public question involved.

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

TURNER *v.* COTHAM.

1. AUTOMOBILES—GROSS NEGLIGENCE—WILFUL AND WANTON MISCONDUCT.

   Each case of gross negligence or wilful and wanton misconduct under the guest act must be determined upon the basis of the facts involved in the case (CLS 1956, § 257.401).

2. SAME—WILFUL AND WANTON MISCONDUCT.

   Wilful and wanton misconduct under the guest act arises where there is knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another with ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand and the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another (CLS 1956, § 257.401).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 5A Am Jur, Automobiles and Highway Traffic § 534.
What amounts to gross negligence, recklessness, or the like, within statute limiting liability of owner or operator of automobile for injury to guest. 96 ALR 1479.
[2, 7] 5A Am Jur, Automobiles and Highway Traffic § 532.
[3] 5A Am Jur, Automobiles and Highway Traffic § 537.
[5, 6, 8] 5A Am Jur, Automobiles and Highway Traffic § 1041.
[9] 39 Am Jur, New Trial § 140.
Duty of jury to follow instructions as to amount of party's liability if liable at all. 23 ALR 305.
[10] 39 Am Jur, New Trial § 24.
[11] 58 Am Jur, Witnesses §§ 477, 478.
[12] 14 Am Jur, Costs § 93.

3. SAME—WILFUL AND WANTON MISCONDUCT—EXCESSIVE SPEED—GUEST ACT.

Excessive speed, unless accompanied by wilful and wanton misconduct, is insufficient to impose liability under the so-called guest act (CLS 1956, § 257.401).

4. SAME—WILFUL AND WANTON MISCONDUCT—FAILURE TO HEED WARNING BY GUEST PASSENGER.

The mere fact that the guest passenger gave the driver warnings which were not heeded does not, standing alone, constitute wilful and wanton misconduct (CLS 1956, § 257.401).

5. SAME—WILFUL AND WANTON MISCONDUCT—EXCESSIVE SPEED—FAILURE TO HEED WARNING BY GUEST PASSENGER.

Excessive speed and driver's failure to heed the warnings of his guest passenger, each of which, standing alone, are insufficient to constitute wilful and wanton misconduct under the guest act are proper objects, in addition to other circumstances, for consideration by a jury in arriving at its determination (CLS 1956, § 257.401).

6. SAME—WILFUL AND WANTON MISCONDUCT—DRIVER'S STATE OF MIND.

The state of mind of the driver is obviously involved in every action in which a guest passenger alleges there has been gross negligence or wilful and wanton misconduct by the driver and such matter is necessarily a matter of inference from the facts in each case (CLS 1956, § 257.401).

7. SAME—WILFUL AND WANTON MISCONDUCT—ORDINARY NEGLIGENCE.

The acts necessary to constitute wilful and wanton misconduct under the guest act are of a different quality than those comprising mere negligence, although acts of ordinary negligence may be included (CLS 1956, § 257.401).

8. SAME—WILFUL AND WANTON MISCONDUCT.

Evidence presented in guest passenger's action against host motorist who lost control of his car while engaged in overtaking 2 cars going in the same direction *held*, to have presented a jury question as to whether defendant was guilty of wilful and wanton misconduct (CLS 1956, § 257.401).

9. DAMAGES—PERSONAL INJURY ACTION—QUESTION FOR JURY.

A defendant in an action for personal injuries is entitled to have the jury, once it has found him liable at all, give deliberate consideration to the amount of the damage that plaintiff sustained and where such consideration is not given by the jury the defendant is entitled to a new trial.

10. NEW TRIAL—WILFUL AND WANTON MISCONDUCT—DAMAGES.
A new trial, not restricted to issue of damages, is granted in guest passenger's action against host motorist, where trial court had granted defendant's motion for judgment *non obstante veredicto*, and a question for the jury was presented as to whether defendant was guilty of wilful and wanton misconduct, and jury had not given deliberate consideration to the matter of amount of the damage that the plaintiff sustained (CLS 1956, § 257.401).

11. ATTORNEY AND CLIENT—CONSULTATION—EVIDENCE.
Testimony of attorneys, with whom it is claimed plaintiff had consulted before engaging counsel who represented him at the trial, should be restricted to the fact as to whether a consultation was held.

12. COSTS—NEW TRIAL—FAILURE OF EITHER PARTY TO PREVAIL.
No costs are allowed upon reversal of judgment and remand for new trial in guest passenger's action against host motorist, where new trial not restricted to amount of plaintiff's damage is given, since neither party has prevailed (CLS 1956, § 257.401).

Appeal from Berrien; Hadsell (Philip A.), J. Submitted April 7, 1960. (Docket No. 34, Calendar No. 48,282.) Decided September 16, 1960. Rehearing denied December 1, 1960.

Case by Irving Turner against Bennie Willie Cotham for personal injuries sustained while a guest passenger in automobile. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Defendant cross-appeals as to excessiveness of verdict. Reversed and remanded for new trial.

George S. Keller (*Robert S. Feldman* and *Henry W. Gleiss,* of counsel), for plaintiff.

J. T. Hammond and *John T. Hammond,* for defendant.

KELLY, J. A jury award of damages to plaintiff in his guest passenger action* against defendant was

* See CLS 1956, § 257.401 (Stat Ann 1952 Rev § 9.2101).—REPORTER.

nullified by judgment *non obstante veredicto*. Plaintiff appeals.

After dark, about 7:30 p.m., on December 1, 1956, plaintiff, defendant, and their friend, Ivan Orr, decided to drive from Euclid Center to Niles to shoot some pool and to try and collect a debt owed Orr.

The trip was made in defendant's newly-acquired Chevrolet, and as they drove south on US–31 defendant and Orr argued as to whether the Chevrolet possessed more speed than Orr's Buick.

Defendant admits that in demonstrating the speed of his Chevrolet he drove at the rate of 95 miles per hour over a 1–1/2 mile stretch of highway some 4 or 5 miles distant from the point of accident, but estimated his speed at the time of accident to be between 60 and 70 miles per hour.

Orr testified defendant was driving 98 miles per hour as he passed the first car just previous to the accident. Plaintiff testified defendant was traveling more than 90 miles per hour at the time of the accident.

Defendant's speed caused him to overtake 2 cars, approximately 300 feet apart, proceeding southerly, the same direction defendant was traveling. Defendant passed the first car and swung back into the southbound lane but as he pulled out sharply to pass the second car he lost control, crossed over to the opposite shoulder, knocked down a post and mailbox and came to rest against a tree.

The driver of the first car defendant passed testified that he observed defendant's car rapidly overtake and pass him at about 80 miles per hour; that he observed defendant lose control of his car as he attempted to pass the second vehicle.

Plaintiff testified: "I asked him (defendant) several times to slow down. I told him the car was too light; he'd go off the road." Defendant answered by saying that "it would go faster"; that Orr told

defendant, "'Bennie, you'd better slow this thing down', and said something about being too light to stay in the road."

Orr testified that he asked defendant to slow down at least 3 times, and "told him she wouldn't do no more; too light for the road." Defendant answered by saying that "she'd do more * * * the Buick wouldn't outrun his Chevy."

Defendant denied that he was asked to slow down, but stated: "I was comparing my car with his (Orr's) car entirely. * * * He was comparing to his car. He said 'Your car is too light for this speed. My car is a heavier car.'"

Defendant was cross-examined as to the speed he drove the 4 or 5 miles previous to the accident and he referred to curves in the road, as disclosed by the following questions and answers:

"*Q.* That's how you arrive at the opinion that the car was only going 60 to 70? The circumstance that you didn't have your gas pedal all the way to the floor? Is that true?

"*A.* Not entirely.

"*Q.* What other circumstance assisted you in arriving at such estimate of your speed in that span?

"*A.* The outlay of the road. In other words, the road itself. I know the road curves wouldn't permit speeds higher than those speeds.

"*Q.* In other words, your knowledge of the circumstances showed you should not have been going at speeds in excess of 60 to 70 miles an hour because of the curves in that span of highway? This is a circumstance that permitted you to come to the estimate of 60 to 70 miles an hour in that 4 or 5 mile span? Is that true?

"*A.* Yes, partially."

In passing on defendant's motion for judgment *non obstante veredicto,* the court in its opinion stated:

"There was no ill will or anger or evidence of liquor having been consumed by the defendant or his passengers. Defendant had expressed a desire to prove that his car would go faster than a Buick owned by the other passenger. * * *

"There was no wilful and wanton disregard of known or apparent dangers. The negligence of the defendant was of short duration and consisted entirely of an excessive rate of speed. * * *

"There was nothing in the speed of the defendant in the instant case which was so grossly excessive as to shock the conscience with its overwhelming probability of harm. * * *

"In the instant case the defendant was guilty of ordinary negligence beyond question, but there was no showing of gross negligence or wilful and wanton misconduct."

Defendant and appellee filed a cross-appeal to be considered by this Court in event a decision is reached that plaintiff's proof presented a jury question as to defendant's gross negligence and wilful and wanton misconduct.

In the cross-appeal it is claimed:

(1) That the $17,700 verdict was grossly excessive because the jury disregarded the instructions of the court with respect to damages;

(2) That "the ends of justice require that a jury be permitted to consider newly-discovered evidence of a conspiracy to perpetrate a fraud upon the court by use of perjury."

In considering the question as to whether the jury did not understand or did not give any attention to the charge of the court regarding damages, the court in its opinion stated:

"Defendant also filed motion in the alternative for a new trial on several grounds. While these grounds do not specifically cover the court's basis for granting

a new trial, the action of the jury in fixing the verdict was such that it can not be allowed to stand.

"During the trial plaintiff's counsel selected a figure of $17,700 as the amount of damage which the plaintiff would consider satisfactory. This figure was written on the blackboard in the courtroom and was before the jury during the argument of counsel and the instruction of the jury. When the jury first returned with its verdict, the foreman stated, 'The jury finds the case in favor of the plaintiff in the full amount allowed as specified in the chart or in our instructions.' After being informed that they were not instructed as to the amount of the verdict and that it was for them to determine the amount from the evidence, the foreman announced, 'The amount was $17,900.' Plaintiff's counsel then volunteered, '$17,700.' The foreman then repeated the latter figure, but the court then returned the jury to the jury room to establish the amount of damages. Another member of the jury asked, 'What was that total amount? Do you remember it?' The court stated. 'If I did, I wouldn't dare tell you. You are supposed to do that.' The jury then returned to the deliberation room and was gone from the courtroom only 4 minutes when the verdict was recorded in the amount of $17,700.

"This action by the jury shows conclusively that the jury either did not understand or did not give any attention to the charge of the court regarding the damages to be awarded. The defendant was entitled to have the jury give deliberate consideration to the amount of the damage that the plaintiff sustained. This certainly was not done. No judgment should be entered on the jury's verdict under any circumstance."

Defendant testified that in March, 1957, plaintiff came to his home and asked him to cook up a story that he (plaintiff) was a pedestrian in order to get the insurance company to pay his bills and that he told plaintiff he would refuse to do so. Defendant's

mother testified that she was at home when plaintiff called upon her son but that she did not hear the conversation as she was in the kitchen; that 10 days or 2 weeks after this visit plaintiff called her on the telephone and said: " 'Mrs. Muff, I have taken this policy to different lawyers and they tell me I haven't got a case.' He says, 'Ben and I will have to cook up a story that I was hit hitchhiking;' the way he stated it to me, 'that I was hit along the road, in order for me to have a case.' "

Delores Cotham (wife of defendant but at time of accident his fiancee) testified that she was present when plaintiff called at defendant's home and she heard plaintiff inform her husband "that he wanted to cook up a story so he'd get some money from the insurance company, and Ben said 'No', he wouldn't do it; that it 'wouldn't be right.' "

Plaintiff testified on cross-examination that he had made a social call to defendant's home in March, 1957; that this call was made before he retained attorney Keller, who represented him in the present action; that it was his first visit to the home and that he had hardly known defendant before the accident; that he doesn't know what the conversation during his visit was about, but "never talked much about the accident"; that he did not ask defendant to testify that he was a pedestrian walking down the highway when he was run down; and that Mr. Keller was the only attorney he talked to about the accident.

On redirect examination the following questions were asked and answers given by plaintiff:

"*Q.* Is it true that you first approached me (Keller) in October of 1957?

"*A.* Sometime along there, yes.

"*Q.* Had you, before you had ever approached me or retained me as your attorney, ever secured the services or consulted with any other lawyer?

"*A.* No, I didn't.

"*Q.* And since October, 1957—I think I am entitled to this answer—have you ever consulted with or sought the services of any other lawyer?

"*A.* No, I haven't."

Witness Orr also testified that he had never discussed his testimony with any other attorney other than Mr. Keller.

At the time of argument on motion for new trial, counsel applied for and obtained leave to take the testimony of attorneys Carroll Williams and Dean Jennings.

The questions of privilege and professional ethics were raised by the witnesses with the court in chambers, and the court directed the witnesses to testify. The questions asked witnesses were limited to the fact of consultation and details disclosed by Orr and plaintiff in the presence of third persons.

Attorney Jennings testified that plaintiff consulted him in his office about the case and that he decided, and so instructed plaintiff, that he would not represent him because he did not believe the facts established gross negligence.

Attorney Williams testified that plaintiff first consulted him on August 28, 1957, and that he requested plaintiff to return with witness Orr; that plaintiff and Orr returned 4 or 5 days later, and that after the interview "I don't know whether he asked me or whether I told him I couldn't represent him."

In the reply brief, appellant does not claim the court erred in allowing the attorneys to testify, but states:

"It was not until after the verdict of $17,700 was rendered that the defendant made a concerted effort to discover who the other attorneys were who might be involved in this matter, although he knew before the time of trial of this possibility because of the statements of his defendant and defendant's mother and wife.

"If the additional testimony presented to the court by the defendant is analyzed, it would seem that it does nothing more than buttress to some extent the testimony of the defendant's wife and mother. * * *

"The only real relevance this additional testimony could have would be to impeach the credibility of the plaintiff and witness Orr. The defendant presented the testimony of the defendant's mother and his wife. This testimony served to contradict and impeach that of the plaintiff. The defendant now seeks a new trial in order to present more impeaching testimony."

In *Horton* v. *Fleser,* 340 Mich 68, 71, 72, this Court said:

"The term 'gross negligence or wilful and wanton misconduct' has been defined in numerous cases, among which are *Goss* v. *Overton,* 266 Mich 62; and *Titus* v. *Lonergan,* 322 Mich 112. In both of these it was held that each case must be determined upon the basis of the facts involved. In the *Titus Case* the Court referred to *Willett* v. *Smith,* 260 Mich 101, where it was said that the elements necessary to constitute wilful and wanton misconduct may be summarized as follows (p 104):

"'"(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another."'

"Excessive speed, unless accompanied by wilful and wanton misconduct, is insufficient to impose liability under the so-called guest act. *Bushie* v. *Johnson,* 296 Mich 8. For the statute involved, see CL 1948, § 256.29 (Stat Ann § 9.1446).* The mere fact that the guest passenger gave the driver warnings which were not heeded does not, standing alone, constitute wilful and wanton misconduct. *Greimel* v.

* See current citation, *ante,* 200.—REPORTER.

Fischer, 305 Mich 45; *Rogers* v. *Merritt,* 307 Mich 459; and *Cramer* v. *Dye,* 328 Mich 370. However, this in addition to other circumstances is a proper object for consideration by the jury in arriving at its conclusion."

Karney v. *Upton,* 353 Mich 262, after quoting with approval *Horton* v. *Fleser, supra,* stated (p 270):

"Specific discussion of other decisions in accord with *Horton* v. *Fleser, supra,* would serve no useful purpose. Whether the driver of a motor vehicle has proceeded recklessly in the face of a traffic hazard that is or should be apparent to him, with a wilful and wanton disregard of the safety of a passenger, is, generally speaking, a question of fact for determination by the trier of the facts. Obviously involved is the state of mind of such driver, which is necessarily a matter of inference from the facts in each case. See *Titus* v. *Lonergan,* 322 Mich 112, and prior decisions there cited."

In *Stevens* v. *Stevens,* 355 Mich 363, we held that to have liability under the guest passenger act for gross negligence or wilful and wanton misconduct of the motorist there must be a knowledge on the part of the latter of the existence of a very dangerous situation, an ability to avoid it, and a reckless and complete disregard of the rights of passengers and a disregard of warnings, acts of a different quality than those comprising mere negligence, although acts of ordinary negligence may be included.

We conclude that the sharp conflict between plaintiff's and defendant's testimony presented a jury question as to whether defendant was guilty of wilful and wanton misconduct.

We agree with the trial court's statement that:

"This action by the jury shows conclusively that the jury either did not understand or did not give any attention to the charge of the court regarding the damages to be awarded. The defendant was entitled

to have the jury give deliberate consideration to the amount of the damage that the plaintiff sustained. This certainly was not done."

A new trial is granted. The record is such that a redetermination should not be restricted to damages but should also include the question as to whether defendant was guilty of wilful and wanton misconduct.

Also, the testimony of attorneys, which was offered on the motion for new trial, should be restricted to the fact as to whether a consultation was held.

Reversed and remanded for new trial. No costs, neither party prevailing.

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

BLACK, J. (*concurring*). I agree with Mr. Justice KELLY that the question of defendant's guilt of actionable gross negligence was for the jury, and that the judgment for defendant notwithstanding the verdict of the jury should on that account be reversed.

I do not agree that consideration of defendant's alternative motion for new trial—and hence his "conditional" cross-appeal—is now in order. The trial judge, having determined to enter judgment for defendant, has not as yet acted upon that motion. Until he does the issues presented thereby and brought here by cross-appeal are not ready for review. Defendant's said motion and cross-appeal are pointedly addressed, not to alleged errors occurring at or during the trial,* but to alleged excessiveness of verdict and newly-discovered evidence (see opinion of Mr. Justice KELLY for details).

* See *Peters* v. *Aetna Life Ins. Co.*, 282 Mich 426; *St. John* v. *Nichols*, 331 Mich 148, 158, 159; *George* v. *Wayne Circuit Judge*, 336 Mich 543, 545–547; also old and new [347 Mich xxi] section 8 of Court Rule No 66 (1945) and author's comment thereunder, Honigman, pp 632, 637, and 1960 supplement, pp 181, 186.

Since the question is due to arise when defendant's motion for new trial comes to determination below, I record emphatic agreement with my Brother that the testimony of attorneys Jennings and Williams, if admissible at all, should be confined to the fact of consultation distinguished from communications made in the course of consultation. No attorney, previously consulted by a party to a subsequently instituted action, should in the circumstances disclosed here be forced to testify otherwise.

I concur, then, in reversal of the judgment for defendant. This means that plaintiff is entitled to judgment on the verdict, and that both parties are entitled from that point to pursue such proceedings as each may be advised, including right of defendant to press in the court below his pending and yet undecided motion for new trial.

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

TIREMAN-JOY-CHICAGO IMPROVEMENT ASSOCIATION *v.* CHERNICK.

1. MUNICIPAL CORPORATIONS — ZONING — UNNECESSARY HARDSHIP — DUE PROCESS.

   Finding of unnecessary hardship by city board of zoning appeals in the application of city zoning ordinance to defendants' tracts of 15 lots without a disclosure of facts by the board which supported its determination *held*, a denial of due process in suit by property owners to review board's decision (CL 1948, § 125.581 *et seq.*, as amended; Detroit Zoning Ordinance [1957], § 20.7).

2. ADMINISTRATIVE LAW—DUE PROCESS—FRAUD—BAD FAITH.

   Once a complainant has shown a lack of administrative due process it is utterly immaterial that there be fraud, bad faith, mendacity or deceit, or other misconduct charged.

3. MUNICIPAL CORPORATIONS—ZONING ORDINANCE—VARIANCE—FINDING OF BOARD OF ZONING APPEALS.

   The broad grant of authority to the board of zoning appeals to authorize variances where the literal enforcement of the ordinance would result in unnecessary hardship or involve practical difficulties may result in arbitrary action if the board does not set forth its reasons and facts upon which it bases its finding for a variance (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4, 7] 58 Am Jur, Zoning § 228.
[2] 42 Am Jur, Public Administrative Law § 116.
[5] 42 Am Jur, Public Administrative Law § 149.
Necessity of express finding of fact to support administrative determinations. 146 ALR 209.
[6] 42 Am Jur, Public Administrative Law § 211.
[8] 58 Am Jur, Zoning § 229 *et seq.*
[9] 58 Am Jur, Zoning § 250.
[10] 14 Am Jur, Costs § 106.

4. SAME—ZONING ORDINANCE—FINDING OF BOARD OF ZONING APPEALS.

The provision of city's zoning ordinance that the decision of the board of zoning appeals shall be final insofar as it involves discretion or the finding of facts would preclude a court from making a meaningful review if the finding made by the board is not accompanied by a full disclosure on the record of the facts relied upon for the board's findings (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7).

5. ADMINISTRATIVE LAW—FINDINGS—JUDICIAL REVIEW.

The combination of a delegation of broad powers to an administrative agency plus restricted review cannot be employed to prevent effective recourse to courts and since the judicial function cannot be discharged without a knowledge of the facts justifying the agency's statutory conclusion, the agency must set forth its reasons and facts justifying its determination.

6. SAME—FINDING OF FACTS.

It is not the function of the Supreme Court to act as a fact-finding commission but it is acutely sensitive to the capricious exercise of power that has been broadly granted to an administrative agency.

7. MUNICIPAL CORPORATIONS—BOARD OF ZONING APPEALS—VARIANCE—FINDINGS.

A city board of zoning appeals must state the grounds upon which it justifies the granting of a variance, the extent and detail of the disclosure not being capable of precise delineation (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7).

8. SAME—ZONING—ADMINISTRATIVE LAW—JUDICIAL REVIEW.

Neither a State legislature nor a municipal council has authority to divest courts of their inherent power to review the action of a board of zoning appeals or other zoning administrative board, in order to determine whether the administrative action unlawfully impairs personal or property rights.

9. SAME—ZONING ORDINANCE—FINAL DETERMINATION—JUDICIAL REVIEW.

The provision of a city zoning ordinance that the decision of the board of zoning appeals "shall not become final until the expiration of 5 days from the date of entry of such order unless the board shall find the immediate effect of such order is necessary" does not limit the time for bringing an action

in court for the purpose of determining the validity of the board's action (Detroit Zoning Ordinance [1957], § 20.7).

10. COSTS—PUBLIC QUESTION—VARIANCE OF ZONING ORDINANCE.
No costs are allowed in suit to determine validity of variance of city zoning ordinance by board of zoning appeals, a public question being involved (CL 1948, § 125.581 *et seq.;* Detroit Zoning Ordinance [1957], § 20.7).

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

Appeal from Wayne; Toms (Robert M.), J. Submitted January 8, 1960. (Docket No. 42, Calendar No. 48,278.) Decided September 16, 1960. Rehearing denied October 10, 1960.

Bill by Tireman-Joy-Chicago Improvement Association, a nonprofit Michigan corporation, and various individual property owners against Michael F. Chernick, Belle Chernick, the Detroit Board of Zoning Appeals, its members, and the Department of Building and Safety Engineering and its commissioner, to review a determination which granted a variance in zoning permitting construction of apartments. Bill dismissed on motions. Plaintiffs appeal. Reversed and remanded.

Allen H. Blondy (*Joseph J. Geraci,* of counsel), for plaintiffs.

Nathaniel H. Goldstick, Corporation Counsel, and *John F. Hathaway,* for defendant City of Detroit departments.

J. Leon Katz and *Earl Leader,* for defendants Chernick.

SMITH, J. Appellants complain of variances (exceptions) granted by defendant board of zoning appeals without rhyme or reason. They say that the ordinance permitting the grant of variances is vaguely phrased and without specific standards (for ex-

ample, "unnecessary hardship" is a ground). In addition they complain that the board's action here was "wholly unwarranted under the facts." What, in truth, was the warrant for the board's action? We are not told. The board says we do not have to be told.

Thus, under the board's argument, the citizen gets it going and coming. Were the legislative standards followed by the board? There are no specific standards to be followed. What, then, are the reasons for the board's finding the broad standard of "unnecessary hardship" to be satisfied? No one knows. No reasons are given. In other words it boils down to this: There is unnecessary hardship because there is unnecessary hardship, and, because there is unnecessary hardship, the standard (of unnecessary hardship) is satisfied.

Thus by mumbling an incantation the bureaucrat forecloses effective judicial review. What is there, for example, in the case before us, to review? After all, unnecessary hardship obviously is unnecessary hardship. Such was the factual determination. The legal determination is equally simple: The statute requires merely a case of unnecessary hardship. We found it, says the board. *Q.E.D.*

There are many things that this is, but we will forego elaboration at length, much as we would relish the task. But one thing it is not: due process. And if there is lack of due process it is utterly immaterial whether the complainant charges, as well, fraud, bad faith, mendacity, deceit, or any of the other of the lengthy litany of bad words.

Appellees Michael and Belle Chernick, defendants below, are the owners and contract purchasers of certain parcels of land located on the east side of Wyoming between Joy road and McKenzie street in the city of Detroit. This area is classified as R–2 under the Detroit zoning ordinance. It is limited

to the uses and structures falling within that classification, among which are multiple dwellings occupied by not more than 8 families, approved by the city plan commission. On October 22, 1958, Chernick and his wife made application to the department of buildings and safety engineering for building permits which would allow them to erect 2 multiple dwellings on this property. One of the proposed structures was to be an 18-unit structure on lots 127 through 133 of Robert Oakman Land Company's Bonaparte Boulevard subdivision; the other, a 20-unit structure on lots 136 through 143 of the same subdivision. This application was denied. Upon appeal to the board of zoning appeals, a variance was granted, on November 5, 1958, permitting the erection of the desired dwellings. On January 29, 1959, the appellant Improvement Association and others, plaintiffs below, filed a bill of complaint in the Wayne county circuit court, in equity, to review the orders of the board of zoning appeals granting the variance. After argument, plaintiffs' amended bill of complaint was dismissed by the lower court in separate motions filed by defendants Michael and Belle Chernick, and by defendants board of zoning appeals and department of building and safety engineering, and its commissioner. This appeal is taken from said order granting the defendants' motions to dismiss.

The framework for zoning in the city of Detroit is provided by the Detroit zoning ordinance, passed pursuant to, and in compliance with, the enabling act.[1] If an individual wishes to use his property in a manner not permitted by the ordinance, a procedure is provided whereby he may obtain a "variance," *i.e.*, relief from compliance with the literal terms of the ordinance. Thus if the corner lot on a street has an irregular shape, because of confluence of streets,

[1] CL 1948 and CLS 1956, § 125.581 *et seq.* (Stat Ann 1958 Rev § 5.2931 *et seq.*).

rather than the normal rectangular shape of the rest of the lots, a variation might conceivably be justified if the ordinance prohibits attached garages. But in such case, it will be noted, there is a hardship unique to this particular lot, not shared by all others. The power to grant the variance, as has been said, acts as a safety valve in such situations. But it is perfectly obvious that unless the power to grant variances is circumscribed with care we have not a safety valve in the boiler, but, as some writers put it, a leak. Each owner's desire to put his property to his own desired uses, gasoline filling station, apartment houses, or what not, if indulged, would simply mean no effective zoning whatever. It was well put in a recent study of the variance problem[2] that:

"This 'hidden zoning' is unfair and will eventually undermine confidence in the protection that zoning is supposed to bring * * * Finally, the use of zoning as a positive and thus necessarily strict measure to aid in comprehensive city planning is impossible if the board of appeals constantly creates new problems of land use."

A modification, or variance, then, may be granted, according to the terms both of the enabling act and of the ordinance, only when a literal enforcement of the provision in question would result in "unnecessary hardship or involves practical difficulties." Here the board so found. Why? What is there in the situation or location of lots 127 through 133, and lots 136 through 143 that makes out a case of "unnecessary hardship" if defendants Chernick may not construct large multiple dwellings thereon? The board does not tell us. All we have is its conclusion, framed in the precise words of the ordinance, that there was "practical difficulty and unnecessary hard-

[2] Reps, Discretionary Powers of the Board of Zoning Appeals, 20 Law and Contemporary Problems, pp 280, 282.

ship." And at this juncture appellants make their attack, namely, that such finding was "a whimsical conclusion, and wholly unwarranted under the facts," that "the substance and effect of the decisions of the board of zoning appeals is to create 'spot zones' for the benefit of the defendants Chernick," and that such alleged abuses have resulted since: "The power to grant exceptions [variances?] from literal enforcement of the ordinance by the board of zoning appeals is coupled with no guides or standards by which it shall exercise such authority."

The delegation of authority to the board of zoning appeals to grant variances is found in section 20.7 of the zoning ordinance, City of Detroit, Official Zoning Ordinance (1957), § 20.7, p 24, which provides as follows:

"Where owing to special conditions a literal enforcement of the provisions of this ordinance will result in unnecessary hardship or involve practical difficulties, the board shall have power upon appeal in specific cases to authorize such variation or modification of the terms of this ordinance as will not be contrary to the public interest and so that the spirit of this ordinance shall be observed, public safety secured and substantial justice done."

The above language respecting "unnecessary hardship" and "practical difficulties" is common to legislation in many States.[3] Whether the twin concepts of hardship and impracticality must be defined more precisely, or are capable of more precise definition, is debatable. Most courts have approved delegation in such terms,[4] although it has occasionally

[3] See Green, The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinance, 29 NC L Rev 245.

[4] *E.g., Thayer* v. *Board of Appeals of Hartford* (1931), 114 Conn 15 (157 A 273); *Matter of Otto* v. *Steinhilber* (1939), 282 NY 71 (24 NE2d 851); *Stolz* v. *Ellenstein* (1951), 7 NJ 291 (81 A2d 476).

been rejected.[5] Actually, however, the courts are not far apart, for many of them, while upholding delegation framed in broad language, require not merely conclusions, but a statement of the basis for the board's findings of "unnecessary hardship" and "practical difficulty," set forth in factual detail, thus preventing arbitrary, unguided action. In other words, the latter courts have distinguished an invalid delegation from an arbitrary exercise of authority validly delegated by requiring the board to set forth the reasons and facts upon which it bases its findings of "unnecessary hardship" or "practical difficulty." In *Stolz* v. *Ellenstein,* 7 NJ 291 (81 A2d 476), the board of adjustment granted a variance after making a personal inspection but without disclosing on the record the facts and circumstances that impelled their action. The supreme court of New Jersey held that full disclosure on the record of the facts relied upon for the board's findings was requisite, citing (p 297) an earlier opinion in *Giordano* v. *City Commission of the City of Newark,* 2 NJ 585, 589 (67 A2d 454, 455):

"No determination can be permitted to rest upon undisclosed findings or information dehors the record. If such could be the parties would be denied the essence of a hearing, they would be kept in ignorance of the things controlling the action of the board, and due process would be flouted. The rights of the parties can only be protected, both in the trial tribunal and on review, by a full disclosure on the record of the facts relied upon for the board's findings."

This requirement of full disclosure is particularly meaningful where, as here, the ordinance states[6] that:

[5] *Welton* v. *Hamilton* (1931), 344 Ill 82 (176 NE 333); *Jack Lewis, Inc.,* v. *Mayor and City Council of Baltimore* (1933), 164 Md 146 (164 A 220); *Sugar* v. *North Baltimore Methodist Church* (1933), 164 Md 487 (165 A 703).

[6] City of Detroit, Official Zoning Ordinance (1957), § 20.7, p 24.

"The decision of the board in these and all other matters heard by it shall be final insofar as it involves discretion or the finding of facts."

The courts are thus precluded from a reversal of the ruling of the board save upon the traditional grounds of showing of arbitrary action or a clear abuse of discretion. Such judicial function cannot, however, be discharged without a knowledge of the facts justifying the board's statutory conclusion. The combination of the delegation of broad powers plus restricted review cannot be employed to prevent all recourse to the courts. It may be well to emphasize again, as in the past, that it is neither the function nor desire of this Court to act as a fact-finding commission or a superzoning commission. *Brae Burn, Inc.*, v. *City of Bloomfield Hills*, 350 Mich 425. Nevertheless we remain acutely sensitive to the capricious exercise of power, particularly when broadly granted.

It is our holding, on this branch of the case, that the board of zoning appeals must state the grounds upon which it justifies the granting of a variance. So far as *Beardsley* v. *Evangelical Lutheran Bethlehem Church*, 261 Mich 458, may be interpreted as inconsistent herewith it must be regarded as overruled. The extent and detail of such disclosure are obviously not capable of precise delineation.

The court of appeals of New York has required that, before a variance may be granted upon the ground of unnecessary hardship, the record must show: (1) that the land cannot yield a reasonable return if used only for a purpose allowed in that zone, (2) that the plight of the owner is due to unique circumstances and not to the general conditions of the neighborhood, and (3) that the use sought will not alter the essential character of the neighborhood. *Matter of Taxpayers' Association* v. *Board of Zoning*

Appeals of Town of Hempstead, 301 NY 215 (93 NE2d 645); *Matter of Otto* v. *Steinhilber,* 282 NY 71 (24 NE2d 851).[7]

Defendants next urge that plaintiffs' court action was not "taken timely." We are not specifically told what "timely" action would be. The trial court relied upon the 30-day limitation for court review of orders concerning nonconforming uses,[8] obviously not here involved. It is a fair interpretation, however, of appellees' briefs, that they rely upon the 5-day provision respecting "finality" of decision. The enabling act provides as follows:[9]

"The decision of such board shall not become final until the expiration of 5 days from the date of entry of such order unless the board shall find the immediate effect of such order is necessary for the preservation of property or personal rights and shall so certify on the record."

The meaning of the above is made clear upon examination of the history of the act. The original provision was simply that the decision of the zoning board of appeals should be final insofar as it involved discretion in the finding of facts.[10] Clearly, this meant no more than that the decision of the board of appeals was final as to their proper findings of fact. It cannot reasonably be construed to state that the judiciary is to be foreclosed thereby from its hearing of the charge here made, of abuse of discretion. As one author phrases it:[11]

"There is always a minimum inherent judicial power of review of administrative action, and this is

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7 See, also, 8 McQuillin, Municipal Corporations (3d ed), § 25.167; 1 Metzenbaum, Zoning (2d ed), pp 769–772.

8 CL 1948, § 125.590 (Stat Ann 1958 Rev § 5.2940).

9 CLS 1956, § 125.585, subd (d) (Stat Ann 1958 Rev § 5.2935, subd [d]).

10 PA 1921, No 207, § 5, subd (d), p 405.

11 8 McQuillin, Municipal Corporations (3d ed), § 25.302, p 751. See, also, 3 Metzenbaum, Zoning (2d ed), p 1878; 1 Yokley, Zoning Law and Practice (2d ed), p 325.

true with respect to zoning. * * * Accordingly, neither a State legislature nor a municipal council has authority to divest courts of their inherent power to review the action of a board of zoning appeals or other zoning administrative board, in order to determine whether the administrative action unlawfully impairs personal or property rights."

The generally accepted meaning of such a proviso as that involved here is simply that the appellate court cannot act as a fact-finding commission. It cannot substitute its judgment for that of the board. The zoning ordinance, it will be noted, reads as follows:[12]

"The decision of the board in these and all other matters heard by it shall be final insofar as it involves *discretion or the finding of facts.*" (Emphasis added.)

Such provision undoubtedly reflects the correct interpretation of the words in the enabling statute. It cannot be held that the purpose of the 5-day provision was to create a period of limitation of such short duration, particularly in view of the complexity of pleadings and exhibits required for the proper presentation of involved zoning cases. As a practical matter, so interpreted it might well include all recourse to the courts. Moreover, if the 5-day provision creates a 5-day statute of limitation, by parity of reasoning, no court action whatever would be available if the order were given immediate effect, a procedure permitted by the enabling act under some circumstances.[13] It is our conclusion that the 5-day provision does not limit the time for bringing an action.

There is nothing to the contrary in *Jones* v. *DeVries,* 326 Mich 126, *Mitchell* v. *Grewal,* 338 Mich

[12] City of Detroit, Official Zoning Ordinance (1957), § 20.7, p 24.
[13] CLS 1956, § 125.585, subd (d) (Stat Ann 1958 Rev § 5.2935, subd [d]).

81; or *McVeigh* v. *City of Battle Creek*, 350 Mich 214. None of them decided that there was only 5 days allowed for appeal to the courts when the order becomes "final" in 5 days, or (which would logically follow) that there is no access to the courts whatever if the order becomes final immediately. Such remains for this Court. Our opportunity, in fact, is unique. We can first approve a legislative standard so vague as to require factual disclosures to justify action under it, next deny the necessity for making any factual disclosure whatever, and, finally, having given the citizen nothing to review, tell him that he has 5 days to do it in, unless, of course, the order becomes "final" immediately, in which case he cannot get into court at all. We return to our opening thesis: Many things this is, all of them offensive. But one thing it is not: due process.

Reversed and remanded to the circuit court for proceedings not inconsistent herewith. No costs, a public question.

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

KELLY, J. (*dissenting*). Appellants' 7 questions in their "statement of questions involved" do not request reversal because the board of zoning appeals failed to set forth the facts that resulted in the board's granting of variance.

Appellants inform this Court that they did not "charge the board with 'fraud or bad faith.'"

The Detroit corporation counsel and attorneys for appellees ask this Court to keep in mind the character of the block involved by stating:

"On the north end of the block on the east side of Wyoming avenue, which is a heavily traveled main street, there is located a Cunningham drug store and a supermarket. Directly south thereof is a

large parking lot zoned P–1, which classification allows the parking of motor vehicles only. On the south end of the block, there are located 3 multiple dwellings 2 of which were erected under permits granted by the city plan commission of the city of Detroit in 1952. The third building was erected, after a denial by the city plan commission, as a result of an action for a writ of mandamus filed in the circuit court in 1956. The circuit court issued its writ directing the department of buildings and safety engineering to issue a permit for the erection of said multiple dwelling. The rest of the block remains vacant, and it is on the vacant portion that the defendants Chernick now wish to erect the 2 multiple dwellings aforementioned. Permits have been issued by the department of buildings and safety engineering for said multiple dwellings."

The board in its findings alleges that "field inspections of the premises were made, reports of which were given at the hearing" and that "based upon the information obtained and evidence presented * * * the board found that the proposed construction and use would not be unduly harmful or injurious to other property owners in interest." The board also found that defendants were faced with "practical difficulty and unnecessary hardship."

Justice SMITH, after setting forth the provisions of the ordinance that: "The decision of the board in these and all other matters heard by it shall be final insofar as it involves discretion or the finding of facts," properly concludes that courts, including this Court, are precluded from a reversal unless there is a showing of arbitrary action or a clear abuse of discretion.

In my opinion the record in this case does not disclose arbitrary action or clear abuse of discretion and does not call for reversal of the decisions of the board of zoning appeals and the circuit court of Wayne county.

Plaintiffs' bill of complaint (filed January 29, 1959) to review the orders of the board of zoning appeals was filed 85 days after the board's orders (November 5, 1958). Plaintiffs were represented by counsel at the hearing before the board.

Justice SMITH sets forth the paragraph of the enabling act stating that the decision of the board becomes final after the expiration of 5 days from the entry of the order. (CLS 1956, § 125.585, subd [d] [Stat Ann 1958 Rev § 5.2935, subd (d)].)

I agree with appellees that the decision of the board became final because of failure of timely appeal and to sustain this conclusion refer to our decisions in *Jones* v. *DeVries,* 326 Mich 126; *Mitchell* v. *Grewal,* 338 Mich 81; and *McVeigh* v. *City of Battle Creek,* 350 Mich 214.

In *Jones* v. *DeVries, supra,* appealed to this Court since the zoning enabling statute was amended to provide that the orders of zoning appeal boards are final after 5 days unless made immediately effective, we stated (p 133):

"Right of review by the courts *if the proceedings are instituted within the time prescribed,* as was done in the instant case, is clearly indicated in the amended statute to which the ordinance must conform, and such is established practice in this jurisdiction." (Emphasis supplied.)

In *Mitchell* v. *Grewal, supra,* at page 92, we said:

"Immediate effect was given to the order of the board, and that order must be held to be final in the absence of fraud or bad faith. No evidence of this nature was adduced. The trial judge was correct in refusing to substitute his discretion for that of the board."

In *McVeigh* v. *City of Battle Creek, supra,* it was held that the board of zoning appeals could not grant a rehearing of its own decision after the expiration

of 5 days upon the request of the city itself, and that its original order was final and conclusive against the city.

Decree should be affirmed. No costs, a public question being involved.

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

STANN *v.* FORD MOTOR COMPANY.

1. PLEADING—HOSPITALS—NEGLIGENCE.

Motion to dismiss plaintiff's declaration in action for negligent treatment was properly granted as to defendant hospital, where allegation that it had failed "to employ competently trained nurses, physicians, surgeons, interns, and other employees" was not supported by pleaded facts showing that any of the hospital's employees was incompetent or that plaintiff was injured because of the incompetence of any such employee; and the pleading affirmatively averred that defendant corporation, not the hospital, had employed the physician and the surgeon involved.

2. SAME—HOSPITALS—NEGLIGENCE.

The general assertion that defendants failed to exercise ordinary and reasonable care and skill in the treatment of plaintiff is insufficient to advise the defendant hospital as to plaintiff's claims with reference to any acts of negligence on its part.

BLACK and KAVANAGH, JJ., dissenting.

Appeal from Wayne; Bowles (George E.), J. Submitted January 5, 1960. (Docket No. 8, Calendar No. 48,260.) Decided September 16, 1960. Rehearing denied October 10, 1960.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 26 Am Jur, Hospitals and Asylums § 18.

Case by Michael J. Stann against Ford Motor Company, a Delaware Corporation, Oakwood Hospital, a Michigan corporation, and others for damages arising from personal injury, medical treatment, and attendance. Dismissed on motion as to defendant hospital. Plaintiff appeals. Affirmed.

Seymour Tilchin, for plaintiff.

Moll, Desenberg, Purdy & Glover, for defendant Oakwood Hospital.

BLACK, J. (*dissenting*). This case presents an oft-mooted question of procedure on motion to dismiss. Where at law the declaration on its face states a reasonably-informed cause of action (see Court Rule No 19, § 1 [1945]), or where in equity the bill within its 4 corners exhibits a case cognizable by equity, may the court hearing a defendant's motion to dismiss utilize an *ex parte* affidavit of the moving party for the purpose of determining the truth or falsity of some pivotal allegation of the attacked pleading? I say "No." The question recently and correspondingly was before us in *Mathews* v. *United Association,* 351 Mich 293, and *Peoples Savings Bank* v. *Stoddard,* 351 Mich 342, 357, and it continues to arrive in circumstances of analogy. Apparently some counsel adhere to conviction that questions of fact can and should be resolved, generally on motion to dismiss; whereas Court Rule No 18, steadily since 1931, has limited the practice in terms of easily understood specificity.

This declaration alleges a cause of action for damages against several parties including defendant Oakwood Hospital. It alleges that defendant Oakwood Hospital is not a charitable institution. Defendant Oakwood Hospital, traversing the declaration in such regard, alleges in its motion that it is

such an immune-from-suit institution. On strength of an accompanying affidavit attesting such counter-allegation, the named defendant succeeded below in obtaining dismissal as sought. Thus the circuit court has determined on motion an issue which, according to recognized practice, should be tried or at least pursued through pretrial to determination on possibly recast pleadings—by order of court—and motion for judgment thereon. Why? Because, as even now some members of this Court perceive in the simultaneously submitted *Port Huron Hospital Cases*,* the same question—whether a defendant hospital is as a matter of fact or law immune from liability according to Michigan's doctrine of charitable immunity—is best determined in any close case from a thoroughgoing testimonial record rather than nonevidentiary proceedings before trial.

I regard the circuit court's action as prejudicial to the right of fair trial and due process, and stand again on that which appears over my signature in *Schulte* v. *American Box Board Co.*, 358 Mich 21, 31, 32. It is, after all, just possible that this plaintiff may be able to prove the cause he in general terms has alleged. Further, and if the moving defendant deems itself not fairly apprised of the case it is called upon to meet, a motion for more certain pleading—not one for dismissal—is in order.

The defendant Oakwood Hospital will receive fair and due justice by orthodox pursuit of our rules of practice. So will the plaintiff. If the latter is unable to prove the cause he has alleged—or may be compelled to more explicitly allege—against such moving defendant, will not the trial court dismiss with prejudice as to such defendant or direct a verdict in its favor?

I vote to reverse and remand with costs to plaintiff.

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* *Parker* v. *Port Huron Hospital*, 361 Mich 1.—REPORTER.

SUPPLEMENT (September 2, 1960).

This case was duly assigned to the writer prior to submission thereof during our January term last. In pursuance of such assignment the foregoing opinion was prepared and submitted to other members of the Court February 11, 1960. Since that date decision of the case has been "held," in our parlance, pending preparation of opinions in the simultaneously submitted case of *Parker* v. *Port Huron Hospital,* 361 Mich 1, which opinions are due now for release September 15th next. Finally, and under date of September 1st, Mr. Justice CARR has written in the present case.

This supplement explains the means by which many of our decisions are delayed as they are, and it affirms my steady conviction that a motion to dismiss, cornered solely on an affidavit or affidavits fitting no one of the exceptions authorized by section 1 of Court Rule No 18 (1945), does offend the plaintiff suitor's right to the process that is due him, *i.e.* the right to trial of issues he has properly if generally pleaded. I say again, as in the foregoing opinion, that if the moving defendant deemed itself not fairly apprised of the case it was called upon to meet, a motion for more certain pleading (see section 7 of Court Rule No 17), rather than a motion to dismiss, was in order when it came time to plead to plaintiff's declaration.

KAVANAGH, J., concurred with BLACK, J.

CARR, J. Plaintiff instituted this action in circuit court to recover damages alleged to have been sustained by him as the result of negligence on the part of defendants. The declaration set forth that in May, 1956, plaintiff was injured while in the employ of the defendant Ford Motor Company, that he was given a physical examination by a company physi-

cian, and permitted to return to work. It was further alleged in the pleading that plaintiff's condition became progressively worse and that he was sent by his employer to defendants Peterson and Ramsey, a physician and a surgeon of the city of Detroit, for examination and diagnosis. On or about July 17, 1956, he was hospitalized and thereafter an operation was performed to alleviate a condition resulting from a ruptured disc, said operation being performed and treatment given in Oakwood Hospital.

The declaration stated generally that it was the duty of the defendants to exercise reasonable prudence and care with reference to plaintiff's ailments and the alleviation thereof, that such degree of care was not exercised, and that as a result plaintiff sustained injuries to his person, causing pain and suffering, the incurring of expense, loss of earnings, and a general condition of mental and physical weakness and disability. Damages in the sum of $100,000 were asked.

On behalf of defendant Oakwood Hospital a motion to dismiss the cause was filed, asserting nonliability on its part because plaintiff was a beneficiary of the care and services provided by it, and that it was a nonprofit and charitable institution organized and operating under the laws of the State of Michigan. It was also asserted as a further basis for the motion that there were no allegations of fact in the declaration showing that said defendant had violated any duty owing by it to plaintiff, to his damage or injury. The motion specifically alleged that the articles of incorporation of the hospital were on file with the Michigan corporation and securities commission, that a copy thereof was also on file in the office of the county clerk of Wayne county, and that the said articles contained the following provisions:

"(a) The purpose or purposes of this corporation are as follows:

"To establish, build, own, lease or otherwise acquire, maintain, equip, and operate a general hospital or hospitals in the State of Michigan; to furnish or make available therein such professional and other services as are necessary or desirable for the care of sick, afflicted, infirm or injured persons; and, incidental to the foregoing and in connection therewith, to engage in scientific research and educational or other activities which are related to and are designed to promote and improve the general health and welfare.

"(b) This corporation is organized and shall be operated exclusively for charitable, scientific and educational purposes as a nonprofit corporation. It is not its purpose to, and it shall not, engage in activities involving or designed for the pecuniary gain or profit of its members or any individual or other organization. No part of its net earnings shall inure to the benefit of any member, trustee, officer or individual. It shall not be the purpose of this corporation to, and it shall not, engage in carrying on propaganda or otherwise attempting to influence legislation.

"(c) None of the members, trustees, or officers of this corporation shall have any interest in the property, funds, or earnings of this corporation in their individual or private capacities; and prior to any dissolution of this corporation, after payment of debts, necessary expenses and obligations of the corporation, all of its properties and moneys shall be applied and used and entirely consumed, distributed and paid over exclusively to such public, charitable, scientific or educational hospital institutions, societies, organizations and corporations not for profit as shall be selected and in such amounts and manner and at such time or times as determined by the board of trustees of this corporation."

The motion was supported by affidavit which set forth that the construction of the Oakwood Hospital was financed from funds allocated to it from the Greater Detroit Hospital Fund in the sum of $3,060,000; by Federal funds, granted under act of congress, amounting to $1,442,300; by private contributions of $1,250,000; and by the gift of 33 acres of real estate on which the hospital was erected. In addition to such contributions the sum of $600,000 was borrowed. Reference was also made in the affidavit to the exemption from taxation under the Federal income tax law pursuant to a ruling of the United States treasury department, and to the fact that the property of the hospital had been held by the Michigan State tax commission to be exempt from taxes under State law.

The claims of the defendant hospital as to the purposes of its organization, the financial assistance rendered it from charitable sources to enable it to carry out its purposes, and its status as a nonprofit charitable institution, were not controverted by the plaintiff. The circuit judge before whom the motion to dismiss was heard pointed out in his opinion that the question was whether "the ancient immunity of a charitable institution should no longer be enjoyed and that the law should be rewritten on this fundamental proposition." From the record before him it is obvious that the judge found as a matter of law that defendant hospital was a nonprofit charitable institution. The motion was granted and plaintiff has appealed. The question presented to this Court is whether the action of the circuit judge should be sustained.

The declaration filed by plaintiff alleged that Oakwood Hospital "operates as a private hospital, and not a charitable institution." In support of such statement no facts were alleged as to the organization, sources of income, purposes, or manner of op-

eration of said defendant. We have, in other words, a mere negative conclusion of the pleader, unsupported by factual averments. It is the settled law of this State that statements in a declaration, or bill of complaint, that are merely legal or factual conclusions may not be accepted as true on motion to dismiss. As said in *Dodge* v. *Detroit Trust Co.*, 300 Mich 575, 596:

"The rule that facts well pleaded must be taken as true on demurrer does not extend to conclusions of fact or law."

Also recognizing the general rule is *Doyle* v. *Kammeraad,* 310 Mich, 233, 235, where it was said:

"Well-pleaded material allegations of fact in the declaration and necessary inferences to be drawn therefrom must be considered as true and viewed in the light most favorable to plaintiff; conclusions and opinions must be disregarded."

In accord are *Prawdzik* v. *City of Grand Rapids,* 313 Mich 376, 380 (165 ALR 1165); *Johnson* v. *Borland,* 317 Mich 225, 229, 230; *Pfaffenberger* v. *Pavilion Restaurant Company,* 352 Mich 1, 4.

Plaintiff's statement in his declaration, whether regarded as a conclusion or as an opinion, may not be considered to be a well-pleaded averment of a material fact. The declaration did not undertake to set forth facts on which to base a legal conclusion as to the character of the defendant hospital. On the showing made in support of the motion to dismiss the trial judge properly considered it a matter for his determination as a question of law, there being no factual issues in dispute. In granting the motion the circuit judge followed the rule as heretofore recognized without exception by the decisions of this Court. Counsel for appellant suggests in his brief that such rule should be changed. For the reasons pointed out in our opinion in *Parker*

v. *Port Huron Hospital,* 361 Mich 1, 29, 36, 37, if the rule of immunity from liability of institutions like the defendant because of negligence of employees is to be changed or abrogated such result should come about through legislative action. The question presented is peculiarly one for determination by the law-making department of government, involving as it does important questions of public policy. The circuit judge was correct in granting the motion, and the order from which the appeal has been taken should be affirmed. Insofar as the procedure is concerned, it will be noted that the trial court followed *Erwin* v. *St. Joseph's Mercy Hospital of Detroit,* 323 Mich 114, in which plaintiff's declaration was dismissed on motion.

The trial judge did not pass on the question raised by defendant hospital as to the sufficiency of the averments of the declaration to charge it with negligence. From our examination of plaintiff's pleading, we think defendant's claim in such respect is well-founded. The only specific duty that the hospital was charged with having violated was:

"To employ competently trained nurses, physicians, surgeons, interns and other employees."

There was no showing, however, that any employee of the defendant hospital was incompetent. In other words, the pleading does not set forth any facts on which to base a conclusion that plaintiff was injured because of the incompetence of any particular hospital employee or employees. It may be noted in this connection that the pleading affirmatively averred that the Ford Motor Company employed the physician and the surgeon. We think it must be said also that the general assertion that defendants failed to exercise ordinary and reasonable care and skill in the treatment of plaintiff is insufficient to advise defendant hospital as to plain-

tiff's claims with reference to any acts of negligence on its part. The order of dismissal might properly have been based on both grounds asserted therein. For the reasons stated, the order of the trial court should be affirmed.

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

EDWARDS, J. (*concurring*). I concur with Mr. Justice CARR in affirmance of the order of dismissal entered by the circuit judge but only on the grounds stated in the last 2 paragraphs of his opinion.

SMITH, J., concurred with EDWARDS, J.

SOURIS, J., did not sit.

WILLIAMS *v.* LAKEY FOUNDRY CORPORATION.

This case is controlled by *Gauthier* v. *Campbell, Wyant & Cannon Foundry Co.*, 360 Mich 510.

Appeal from Workmen's Compensation Appeal Board. Submitted January 7, 1960. (Docket No. 34, Calendar No. 48,305.) Decided September 16, 1960.

Patsy Williams, widow of Jess Williams, deceased, filed her claim for additional compensation from Lakey Foundry Corporation upon death of her husband as result of silicosis, asserting unconstitu-

tionality of statutory maximum. Claim denied. Plaintiff appeals. Affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Benjamin Marcus,* of counsel), for plaintiff.

Joseph T. Riley, for defendant.

BLACK, J. This case was submitted with its companion, *Gauthier* v. *Campbell, Wyant & Cannon Foundry Co.,* 360 Mich 510. The decisive questions are the same. Both cases are governed by that which was written for the Court, in *Gauthier,* by Mr. Justice EDWARDS.

Affirmed, without costs.

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

ATTWOOD BRASS WORKS *v.* AERO-MOTIVE MANUFACTURING CO.

1. WORK AND LABOR—SPECIAL TOOLING—ACCEPTANCE OF PRODUCTION PARTS—EVIDENCE.

   Finding of trial court in nonjury action to recover for work done and materials furnished defendant by reason of special tooling required to manufacture certain parts for defendant who had an order for a hydraulic pump assembly, that plaintiff had not shown that it had produced parts as a result of such special tooling which were acceptable, hence, not entitled to recover under an admitted custom of the trade *held*, not against the preponderance of the evidence.

2. APPEAL AND ERROR—NONJURY CASE—FINDINGS OF FACT—PREPONDERANCE OF THE EVIDENCE.

   Findings of fact by a trial judge in a nonjury case, which are supported by a clear preponderance of the evidence will not be disturbed by the Supreme Court on review.

3. SAME—AMENDMENT OF PLEADING.

   The Supreme Court does not permit an amendment of a pleading on appeal, where the proposed amendment would avail nothing to the party proposing it, notwithstanding it has such power pursuant to court rule (Court Rule No 72 [1945]).

4. CUSTOMS AND USAGES—SPECIAL TOOLING—EVIDENCE.

   Evidence adduced in nonjury action whereby plaintiff sought recovery for cost of special tooling incident to the production by it of parts for hydraulic pump assembly *held*, to show that plaintiff recognized trade custom that it would not be entitled to recover until samples of production parts had been approved.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Work and Labor § 60.
[2] 3 Am Jur, Appeal and Error § 900.
[3] 3 Am Jur, Appeal and Error § 841.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted April 6, 1960. (Docket No. 17, Calendar No. 48,150.) Decided September 16, 1960.

Action by Attwood Brass Works, a Michigan Corporation, against Aero-Motive Manufacturing Co., a Michigan corporation, for work done and materials furnished. Judgment for defendant. Plaintiff appeals. Affirmed.

McCobb & Heaney, for plaintiff.

Stratton, Wise, Huston, Early & Starbuck, for defendant.

SOURIS, J. Plaintiff sued in assumpsit for work done and material furnished. At the conclusion of plaintiff's proofs, the court granted defendant's motion to dismiss and, upon appeal thereof in 1956 this Court reversed and remanded for further proceedings (347 Mich 693). In January of 1959, after completion of defendant's proofs and plaintiff's rebuttal evidence, the trial court again entered judgment of no cause against the plaintiff.

Plaintiff's declaration alleged defendant's indebtedness to it for work done and material furnished on tools and machine parts; attached copies of invoices and a statement showing the amount owing; alleged that the work and materials were reasonably worth $3,483.34; acknowledged payment by defendant of $594.63 and a credit to defendant of $25.95 and claimed a balance due of $2,862.76. Defendant's answer denied the amount claimed due and asserted as an affirmative defense that there was a custom in the trade whereby, whenever production parts are ordered for which special tools are to be made by the vendor at the purchaser's expense, the purchaser's obligation to pay for the tools does not

arise until the tools can produce production parts complying with the specifications therefor; that plaintiff never produced parts complying with their specifications; and that, therefore, plaintiff was not entitled to be paid the contract price for either the production parts or the special tools.

Plaintiff filed a reply admitting the custom in the trade as alleged by defendant, but asserting that "the second run of samples for the defendant was in accordance with the specifications and drawings furnished by the defendant and that the tooling and the parts were accepted by the duly authorized agents and employees of the defendant after making rigid inspection and tests."

Trial commenced before the court without a jury, and plaintiff put in its proofs. These proofs, in essential entirety, included as exhibits defendant's purchase orders; the plaintiff's original quotation, invoices and summary statement of amount claimed due; and certain letters, including a letter dated April 1, 1953, from plaintiff to defendant enclosing copies of the invoices for tooling, noting that the production parts have "now" been approved and requesting payment on said invoices. There was testimony offered that the sample of the finished product (a hydraulic pump assembly) ultimately delivered by defendant to its customer included the part *numbers* descriptive of the parts plaintiff was supposed to manufacture for the pump assembly. There was also testimony offered that defendant received $76,122.94 from its customer for the work done on the pump assembly before termination of defendant's order with its customer; that defendant supported its charges to its customer with cost data and invoices from its subcontractors; and that defendant had submitted to its customer plaintiff's invoices in the amount of $3,386.14, which sum was included in the $76,122.94 received by defendant. Fol-

lowing several continuances, plaintiff was allowed to introduce a field audit file compiled by defendant's customer in negotiating the termination settlement, in which file there were plaintiff's invoices to defendant which defendant used to support its claim for payment of the aforedescribed $3,386.14. Plaintiff thereupon rested, and defendant's motion for judgment of no cause was taken under advisement by the court.*

While defendant's motion for judgment was under advisement, plaintiff moved for leave to amend its reply to the affirmative defense relating to the trade custom. The amendment sought consisted of deletion of the prior admission of the trade custom and substitution of the following therefor:

"Plaintiff acknowledges that in the absence of agreement between a purchaser and vendor of special tools *regarding time of payment therefor* (emphasis supplied), there is the custom in the trade referred to by defendant. Plaintiff denies that said custom has any materiality in the case at bar because the parties contracted specifically on all matters that might in the absence of such agreement be affected by said custom.

"Plaintiff denies that defendant relied on said custom, denies that the tools it produced failed to conform to specifications; denies that its tools were rejected at any time and denies that defendant rejected any parts except those for which plaintiff issued credit memos and shipped new parts in replacement, and denies all other allegations contained in paragraph C of said answer."

The trial court denied plaintiff's motion to amend its reply and filed a written opinion in which he set forth his reasons and his findings of facts in the following fashion:

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

"Apparently plaintiff relies upon certain credit terms which were arranged between the parties and claims that this is a specific agreement contrary to the custom of the trade. This motion is made after plaintiff's proofs were concluded and the defendant had made a motion for judgment of no cause of action. The defendant objects to the amendment.

"This court finds that the credit terms arranged between the parties do not constitute an agreement contrary to the custom existing in the trade. The court finds that the proofs establish that defendant would pay for the work done and materials furnished according to the credit terms arranged but only if the tools produce a specially designed part which itself meets the specifications.

"Plaintiff by its motion seeks to amend its reply to conform to those proofs. There are, in the opinion of the court, no proofs to negative the custom of the trade nor are there any proofs of any specific agreement to the contrary.

"For the foregoing reasons, plaintiff's motion for leave to amend its reply is denied."

Shortly thereafter, the trial court granted defendant's pending motion to dismiss and entered judgment in its favor. In its opinion, the trial court said:

"The plaintiff has offered no direct proof of the production of parts in accordance with the terms of the purchase order or that the parts made complied with the specifications. Plaintiff's witness testified to the demands made upon the defendant for payment and the contract between the parties. The only other proof offered, besides some correspondence, was the file of Republic Aviation (defendant's customer). * * * It is the claim of plaintiff's counsel that the Republic Aviation files show an admission on the part of the defendant of a liability to this plaintiff. Nowhere in the file is there any statement made by the defendant that it owed the plaintiff any money. * * *

"Under the pleadings in this case, it was incumbent upon the plaintiff to prove that the plaintiff has complied with the purchase orders by producing acceptable parts. Two or more of the exhibits indicate that objection was made to the parts produced, and nowhere in the record is there positive proof that plaintiff has complied with the terms of the purchase orders. Plaintiff has proved the existence of the contracts and the demand for payment, but without evidence that plaintiff is entitled to recover, the motion must be granted."

Plaintiff's first appeal to this Court thereupon was taken and resulted in reversal as above noted. Upon remand for further proceedings, the defendant put in its proofs, the plaintiff put in rebuttal testimony and the trial court thereupon entered judgment, once again, in favor of defendant. Plaintiff again appeals.

It should be noted that upon remand plaintiff did not renew its motion for leave to amend its reply to defendant's trade-custom affirmative defense, nor did this Court on original appeal grant it that right. As the trial court noted in its opinion supporting its final judgment for the defendant:

"The Supreme Court (on original appeal) makes reference to the allegation in defendant's answer with reference to the 'custom in the trade' to the effect that plaintiff could not recover for tooling if the parts thereby manufactured were unacceptable. *This allegation in defendant's answer is admitted in plaintiff's reply.* In view of the pleadings, it therefore appears to this court that the question is whether or not plaintiff manufactured such tools as would produce parts meeting the required specifications." (Emphasis supplied.)

The trial court correctly defined the issues, and both parties on remand clearly understood what the issues would be. Defendant's proofs consisted of

evidence that the production parts furnished by plaintiff did not comply with their specifications; that defendant itself had to custom-make such parts for use in the sample assembly it supplied its customer; and that defendant disclosed these facts to its customer in an effort to recover from it the additional costs defendant had thus incurred, but that the customer paid no more for such parts than the price defendant otherwise would have had to pay plaintiff. Plaintiff's proofs on rebuttal consisted of evidence that the production parts furnished by it did comply with their specifications (no such testimony having been offered in plaintiff's original proofs) and that defendant's agents had advised plaintiff that the parts were acceptable.

In its opinion the trial court carefully reviewed all of the evidence relating to whether or not the parts produced met specifications, whether or not plaintiff's parts were used in the assembled unit delivered to defendant's customer, and whether or not defendant had ever accepted such parts or tools. The trial court concluded:

"The testimony of defendant's witnesses in the opinion of this court clearly establishes that the parts produced by plaintiff corporation were not in fact used on the assembled unit which was approved by Republic Aviation. * * * Witness Miller definitely testified that the 3 parts made by him were on the assembled unit which was approved by Republic Aviation. Witness Rosewarne testified similarly as to the fourth. This court is satisfied and finds that in fact parts produced by and as a result of tooling on the part of the plaintiff for which recovery is sought in this action were not in fact used on the assembled unit. * * *

"There is no question but that plaintiff was advised that an assembled unit had been approved by Republic Aviation, and there was discussion with reference to arrangements for mass production of

parts, but this court cannot find from the evidence that any employee of defendant company ever stated that parts produced by the plaintiff were included in the unit.

"After seeing the witnesses and hearing their testimony, this court feels that it must find that the parts produced by the plaintiff were not used on the assembled unit and that the parts produced by the plaintiff did not meet the specifications and, therefore, under the pleadings the plaintiff is not entitled to recover in view of the admitted custom of the trade."

The plaintiff does not in this appeal assign as error that the court's judgment is against the preponderance of the evidence. In any event, we conclude that it is not.

But plaintiff's appeal presents several questions for review which assume facts contrary to the trial court's findings of fact. Each of the trial judge's fact determinations, thus obliquely challenged, is supported by a clear preponderance of the evidence and will not be disturbed by this Court on review. *Harden* v. *Widovich,* 359 Mich 566. Plaintiff, however, raises another question for review which merits comment. It contends:

"The trial court found that plaintiff admitted defendant's allegation concerning the 'custom in the trade' as controlling the question of acceptance in this case, but he failed to consider plaintiff's amended * * * [reply to defendant's answer] which denied the materiality of the 'custom of the trade' because the relationship of the parties here was covered by written contractual documents."

The foregoing quotation from plaintiff's brief refers to the amendment of its reply which the trial court denied plaintiff the right to make, from which denial no appeal was taken either when the case was originally before this Court or now. In its supple-

mental brief, filed after argument on this appeal, plaintiff suggests that it should be permitted now to so amend its reply. Without denying the power of this Court to permit amendment of pleadings at this stage of the proceedings under Court Rule No 72 (1945), we must conclude that such amendment, in view of the facts of this case as disclosed by the record made below, would avail plaintiff nothing.

Plaintiff's claim, in essence, is that the written quotation it submitted defendant and letters exchanged between the parties subsequent to the issuance of defendant's purchase orders, set forth the parties' specific agreement for payment, thereby removing the transaction from the scope of the admitted trade custom. The written quotation stated the plaintiff's offering price for the production parts and the price to be charged defendant for the necessary tooling to make such parts. It included the following language:

"This quotation is based upon your agreeing to consider as 'accepted' all shipments made hereunder, for which discrepancies as to quantity, dimensions, or specifications have not been reported within 30 days from receipt."

In reply to a letter from defendant concerning defendant's credit, plaintiff's secretary-treasurer wrote defendant, in part, as follows:

"Our terms of sale on tools and patterns are always net cash upon rendering invoice. Ordinarily we allow a 2% 10 day, net 30 basis, but in this instance where we are not furnishing any material and doing the machine work only, our terms will be net cash in 10 days. We are proceeding with the tools necessary for doing the machining with the understand[ing] that you will abide by the terms as outlined above."

It must first be noted that the 30-day provision in the plaintiff's written quotation appears to be inconsistent with "net cash upon rendering invoice" and the "net cash in 10 days" provisions found in its secretary-treasurer's letter. In any event, the language of the quotation refers to receipt of shipments, but this can have meaning only with reference to the production parts (constituting only $71.49 of the plaintiff's total claim) for the reason that the special tooling involved in this case was not to be delivered to defendant but was to be used continuously by plaintiff in the anticipated production runs. Hence, as the quotations related to the price of special tooling, the quoted provision therefrom was inapplicable.

The language in the letter from plaintiff's secretary-treasurer, to the effect that its terms for tools "are always net cash upon rendering invoice" might suggest that by acquiescence thereto defendant deviated from the trade custom and contracted to pay for production tools without requiring samples of the parts to be produced, but subsequent events clearly establish the fact that even plaintiff did not so construe its agreement with defendant. On April 1, 1953, plaintiff's secretary-treasurer again wrote defendant and in this letter he implicitly recognized the applicability of the trade custom involved herein. After stating that he was enclosing copies of the *tooling* invoices, the originals of which had been rendered previously to defendant, he concluded his letter with the following:

"It is our understanding that these parts have *now* been approved; consequently, the 3 invoices totalling $2,791.27 are *now* due for payment. We would appreciate your check in the above-mentioned amount to reach us for banking not later than Monday, April 6th." (Emphasis added.)

As noted in the trial court's opinion, there was some conflict in the testimony as to whether or not employees of defendant had told employees of plaintiff that its parts had been approved. However, the trial court found in favor of defendant on this fact issue, and we will not reverse this finding, there being competent testimony to support it. The fact remains, however, that as late as April 1, 1953, plaintiff's understanding of the agreement with defendant conformed with the pleaded trade custom that payment for tooling would be required only when samples of the parts to be produced by such tooling were approved.

Even if we were to allow amendment of plaintiff's reply to defendant's affirmative defense at this late date, the proofs offered would not support plaintiff's allegation of immateriality of the trade custom.

Affirmed. Costs to defendant.

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

CASS COUNTY PARK TRUSTEES *v.* WENDT.

1. JUDGMENT—RES JUDICATA—PARTIES—HIGHWAYS AND STREETS.
   Determination made in suit by property owners against board of county road commissioners that public roadway bordering lake had been established by user, followed by property owners erecting a fence on lake side of road which plaintiffs herein, the county park trustees, and the former defendant sought to have removed, *held,* to have definitely disposed of the main issues involved in instant suit.

2. HIGHWAYS AND STREETS—NAVIGABLE WATERS—BARRIERS.
   The title owner of land subject to public user for highway purposes of a highway contiguously bordering a nonprivate navigable lake may not erect a barrier in such a manner as to interfere with public passage between the highway and lake, where it appears the public authorities have need of the area between the water and the traveled portion of the highway to maintain protection for the highway against the action of the lake.

3. COURTS—PRECEDENTS.
   Former decision of the Supreme Court of this State is not of controlling significance in passing on an appeal where situation to which rules there applied differs materially from the situation here involved.

Appeal from Cass; Mosier (Carl D.), J. Submitted April 7, 1960. (Docket No. 27, Calendar No. 48,459.) Decided September 16, 1960.

Bill by Park Trustees for Cass County and Board of County Road Commissioners for Cass County

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REFERENCES FOR POINTS IN HEADNOTES.

[1] 14 Am Jur, Counties § 80.
[2] 25 Am Jur, Highways § 291
[3] 14 Am Jur, Courts § 79.

against Don C. Wendt to compel removal of barbed wire fence separating highway and navigable waters. Decree for plaintiffs. Defendant appeals. Affirmed.

Jones & Grier, for plaintiffs.

Glenn Squiers (*Williams & Williams,* of counsel), for defendant.

BLACK, J. (*concurring*). Plaintiffs sued to abate a barbed wire fence defendant had constructed for the purpose of preventing public passage—and uses related to such passage—between a county highway and Cass county's Eagle lake.[1] At the point of controversy such highway skirts Eagle lake for a considerable distance. For a corresponding distance—at the same point—the highway separates defendant's property from the lake. It seemingly is agreed (see *Croucher* v. *Wooster,* 271 Mich 337) that defendant holds legal title to the entire highway subject to the public right. On that basis defendant claimed and now claims the right to maintain the fence between the respective rights of highway use and navigational-recreational use.

The highway is of black-top construction. At one time it was the principal thoroughfare between Cassopolis and Elkhart. Like *Croucher* (and unlike presently considered *Meridian*), there is at the point of controversy no land between the highway and the "somewhat deep" waters of the lake. The result, fully shown by testimony and finding, is that the ordinary public right of use of such highway[2] has,

1. The fence, 4 strands high supported by steel posts, extended some 1,600 to 1,800 feet along the waterside highway. Part of it was in the water of the lake and part of it, according to a witness, was on the berm of the highway. The fence was taken down, pending trial below, by order of the court.

2 For definitional consideration of such right, see *Macomber* v. *Nichols,* 34 Mich 212 (22 Am Rep 522), followed in *Grand Rapids, G. H. & M. R. Co.* v. *Stevens,* 219 Mich 332, 336, 337.

for many years opposite defendant's property, been joined in fact with the corresponding public right of use of the waters of the lake. Whether such public rights have been joined together in law, and so may be enjoyed generally without interposition of defendant's fence, is the question before us.

The chancellor, relying principally on a previous adjudicatory suit and the unappealed decree entered therein, ruled in favor of the public authorities and entered a decree restraining defendant as recited in the margin.[3] From such decree defendant appeals and presents this question:

"Where a public highway has been established by user along and to the edge of a nonprivate lake, does the fee owner of the right-of-way have the right to erect a fence along the water's edge of the highway right-of-way?"

The previous suit was brought by defendant Wendt and his wife Patricia, as plaintiffs, against the Cass county board of road commissioners. By such suit Mr. and Mrs. Wendt sought injunctive relief, and a money decree, alleging that the road commission had no right to bolster and "build up" the highway along the waterside—by means of stone fill and the like—and was in fact "trespassing" on their land by such activity. That suit resulted in a decree adjudging "that the public has acquired an easement by user for highway purposes across any lands of the plaintiffs which lie 33 feet easterly [the waterside]

[3] "Ordered, adjudged and decreed that the defendant be, and is hereby, restrained from building, erecting or maintaining any fence or similar obstruction between the Eagle lake road in Ontwa township in said county, and the waters of Eagle lake, along that portion of said highway that extends to the shore of said lake as heretofore adjudged and decreed by this court, and further restrained from maintaining any similar obstruction in the waters of said lake or upon said highway that will interfere with the use of said highway, beach and lake by members of the public, along the aforesaid portion of Eagle lake road where the same extends to the shore of said Eagle lake."

of the following described line and westerly thereof to the shore of Eagle lake (here follows the appropriate legal description)."

Thereafter, such decree having become final, Mr. Wendt constructed the mentioned fence. This suit, presenting its afore-stated question, followed.

To sustain his affirmative answer to such question defendant relies particularly on *Meridian Township* v. *Palmer,* 279 Mich 586. There, however, the contentions of the public authorities were statedly limited, and there was no earlier adjudication of a pertinent public right. A decisive factor, apparently, was the failure of Meridian township to adduce (p 590) "testimony showing any interest in the public beyond an easement of passage over the 66-foot strip, constituting the road." Yet I would not evade due —and possibly overdue—re-examination of *Meridian.* The naked dixit of *Meridian*—that *Backus* v. *City of Detroit,* 49 Mich 110 (43 Am Rep 447), does not apply where a highway skirts rather than ends at navigable water—has bred more disputatious litigation than it has settled. This is well known to veteran circuit judges of such counties of Michigan as are blessed with a plenitude of navigable lakes and waterways.

The situation made by *Meridian* is especially difficult for public authorities charged with the duty of maintenance and protection—from erosion—of such water-contiguous public ways. Further, as the demand grows for private frontage on navigable waters, more and more of that which *Backus* once prevented takes place at the expense of the public right.

Backus—surely a leading presentation of Michigan's "Big Four"—did not reason to its decree on any supposed theory that the law therein expounded is or should be different when the public way borders

and follows the water's edge.[4] And it requires no torrent of words to demonstrate that *Backus* was broadly designed as a guide for all like cases where public ways actually end in or contiguously border the waters of navigable lakes and watercourses. The principal authority relied on by Mr. Justice COOLEY (writer of *Backus*) actually was an instance of dispute involving a waterfront street, in Pittsburgh, which extended along rather than terminated in the river Monongahela (*Barclay* v. *Howell's Lessee,* 31 US 498 [6 Pet 498, 8 L ed 477]). What was said in *Barclay* became, by adoption in *Backus,* good Michigan law. I would adopt again, and apply as presently decisive, the reasoning of *Barclay* as follows (p 512):

"It is admitted by both parties, that the river Monongahela, being a navigable stream, belongs to the public; and a free use of it may be rightfully claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend that between this boundary and the public right, a private and hostile right could exist, would not only be unreasonable, but against law."

Having adopted the rule of *Barclay* the Court—in *Backus* (p 118)—went on to quote from a New Jersey case as follows:

"If the shore is extended into the water by alluvial deposits, or is filled in by the proprietor of

[4] In *Meridian* the Court held *Backus* inapplicable, without explanation or reference to supporting authority, by this curious statement (pp 590, 591): "It is clear, however, that cases involving a street which *terminates* upon a navigable body of water are beside the mark when applied to the instant case" (one of a highway bordering a navigable lake). Why such cases "are beside the mark" was left to professional conjecture. For my part, I perceive no reason for holding such cases "beside the mark" as the public water frontage, even of this much-blessed State, grows unto visible scarcity as the public need for such frontage develops apace.

the soil, the public easement is, by operation of law, extended from its former terminus over the new-made land to the water."

Meridian should be overruled, and *Backus* should be reinstated for general application where it is shown that a street or highway actually and in the natural state of things contiguously borders or ends in navigable public waters. Thus should respective and well understood public rights be joined, one and inseparable.

The plaintiff authorities, representing Cass county, have over the years at public expense provided along Eagle lake "the means of access from the highway by land to the highway by water" (*Backus,* p 120). No law—and certainly no rule of equity in this case of a physically barbed answer to an earlier decree—commands that such highways be separated. As Judge Mosier found, in the first of these cases:

"The testimony is clearly persuasive that the public has used all of the land between the main traveled portion of the highway and the lake, and it is also clear that the public authorities need that area for the purpose of building and maintaining protection for the highway against the action of the lake."

I would affirm, with costs to plaintiffs.

CARR, J. The controversy from which this suit in equity has resulted involves a public highway along the east shore of Eagle lake in Cass county. In 1955 defendant Wendt and his wife brought suit against the board of county road commissioners of said county claiming that they were the owners of land abutting Eagle lake over which the public right-of-way existed, and that the defendant board had trespassed on their property, causing injury thereto. They sought damages and also injunctive relief The defendant denied any wrongful conduct on its

part, contending that plaintiffs' property had always been subject to a 66-foot easement for public purposes, that it had been necessary to improve said thoroughfare from time to time and to widen it in order to render it safe for traffic purposes, and that much work had been necessary in order to prevent erosion on the westerly side of the highway.

The circuit judge before whom the case was tried concluded that the roadway as it actually existed at the time had been established by user, and that the primary question at issue was the extent of the public use. On the basis of the proofs it was determined that a strip of land between the highway and the water's edge had been used for various public purposes including the launching of boats, swimming, fishing, and the parking of automobiles, and that such use had been a constant one. The claim of plaintiffs Wendt that they had riparian rights in the land adjacent to Eagle lake and that the strip in question was not a part of the public way was rejected. It was, in consequence, determined, as set forth in the court's opinion on file, that the defendant board had not been guilty of trespass, that plaintiffs' property had not been damaged, and that they were not entitled to the injunctive relief sought.

A decree was entered on January 31, 1957, in accordance with the opinion filed, it being expressly set forth therein, among other matters, that the public had acquired an easement by user for highway purposes across any lands of the plaintiffs lying 33 feet easterly of a described line and westerly of said line to the shore of Eagle lake. It was, in other words, expressly adjudged that the highway as actually established by user extended to the shore of the lake. From such decree no appeal was taken. It appears, however, that Mr. Wendt erected a fence along and in the westerly side of the road, consisting

of barbed wire attached to metal posts, some of which were located on the beach and others placed 5 or 6 feet therefrom in the water.

Plaintiffs brought the instant suit to enjoin the maintenance of the fence in question, and to prevent defendant from maintaining any obstruction that would interfere with the public access from the highway to the lake. It was plaintiffs' position in the trial court that any obstruction that interfered with the rights of the general public to the use of the highway in question, as described in the prior suit, or the use of the waters of the lake, was and would be wrongful, and that equity should forbid it on that basis. It was alleged in plaintiffs' bill of complaint that Eagle lake was navigable, and such allegation was admitted by the answer. Following a hearing of the cause the trial court found in favor of the plaintiffs, pointing out that the decree in the suit brought by Mr. and Mrs. Wendt in 1955 had adjudicated the interests of the parties in the highway and the strip lying between the traveled portion thereof and the shore of the lake, and that, in consequence, the matter at issue was whether the fence erected by defendant Wendt interfered with the enjoyment of public rights. A decree was entered in accordance with the opinion of the court granting the relief sought, and defendant has appealed.

That the decree entered in the prior suit on January 31, 1957, from which no appeal was taken, definitely disposed of the main issues involved in the controversy between the parties is not open to question. Our examination of the testimony in the record now before us leads to the conclusion that the circuit judge was right in holding that defendant was not entitled to maintain the fence that he had erected, that it constituted a wrongful interference with the rights of the public, established by user, in the highway, and with the right of access to the waters of

the lake and the use and enjoyment thereof, as previously adjudged. We concur in the affirmance of said decree.

In support of its claims as to the rights of defendant and appellant, counsel have called attention to *Meridian Township* v. *Palmer,* 279 Mich 586. As appears from the opinion of this Court, the facts in that case are not analogous to those presented in the instant litigation. The public thoroughfare there involved was, as pointed out in the opinion of this Court, 66 feet in width. It was established with reference to a definitely fixed center line extending, in part, along the north side of Lake Lansing, in Ingham county. The proofs established no public interest other than an easement over the roadway as laid out. At the time the case arose there was a strip of land between the edge of the lake and the south line of the highway that was approximately 20 to 25 feet in width. The evidence indicated that such strip had been created by the recession of the water line, by filling in to protect the highway, and by the improvement of the strip by the defendants to prepare it for use as a bathing beach.

Defendants had fenced in a section of said beach. Plaintiff township brought suit for an injunction to require defendants to remove the fence and to permit free access across the strip mentioned from the road which, it will be noted, was not contiguous to the shore of the lake. Applying the rule relating to riparian rights as recognized and declared in *Hilt* v. *Weber,* 252 Mich 198 (71 ALR 1238), it was held that the township was not entitled to the injunctive relief sought for the reason that defendants were exercising rights to which they were entitled in view of the facts shown. Such decision, set forth in a unanimous opinion of the Court, was correct, but because of the situation presented in the record in

the case it is without controlling significance in passing on the appeal now before us.

The holding in the *Meridian Township Case* is not at variance with the prior decision in *Backus* v. *City of Detroit,* 49 Mich 110 (43 Am Rep 447). There certain property south of Fort street in the city of Detroit was platted, some of the lots fronting on the Detroit river. Between 2 of said lots there was a street 30 feet in width. Plaintiff owned 6 of such lots and had built a wharf extending into the river in front of 3 of them. He had excavated at the end of the street referred to for a slip to be used in connection with said wharf and another wharf in front of the lot on the opposite side of said street extended. The city of Detroit desired to construct for the public use a wharf at the end of the street, claiming that the way dedicated did not extend merely to the bank of the river but to and over the waters of the river to the channel bank, or as far toward said point as should be found desirable for the benefit of the people of the city.

Relying on a provision of the municipal charter granting the right to construct wharves the city let a contract for the doing of the work, whereupon plaintiff brought injunction proceedings. It was held, in accordance with the defendant city's claim, that the dedication on the plat to the shoreline did not restrict the public use to such line, and that it should be construed with like effect as would be a grant to an individual. The injunctive relief sought was denied, and the bill of complaint dismissed. It will be noted that the decision was based on the conclusion of the Court as to the scope of the dedication of the street as shown on the plat, and in support of its conclusion the Court cited decisions from other States and also decisions of the Federal supreme court. A consideration of the factual situations involved clearly indicates that the holding in *Meridian*

Township v. *Palmer* was not in any way at variance with the decision in *Backus* v. *City of Detroit.* The appeal now before us must be determined on the basis of the facts, and the decree of the circuit court is not inconsistent in any respect with either decision cited.

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

KNOX *v.* LOCAL 900, UNITED AUTOMOBILE, AIRCRAFT, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO).

1. LABOR RELATIONS—EXHAUSTION OF UNION REMEDIES.
   A union member who is aggrieved by acts of the union must exhaust his remedies within the framework of the union before coming into court.

2. SAME—COURTS—EXHAUSTION OF UNION REMEDIES.
   Bill by union member to compel his reinstatement within the defendant union, which failed to allege exhaustion of intra-union remedies available to him, was properly dismissed, since redress in the courts is not available until there has been exhaustion of such remedies or futility of an attempt to do so is shown.

3. INJUNCTION—UNIONS—POLITICAL ACTIVITIES—EXHAUSTION OF UNION REMEDIES.
   Portion of plaintiff's bill to enjoin use of union funds for political purposes failed to state a cause of action, since the right to re-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 31 Am Jur, Labor § 68.
Exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member. 168 ALR 1462.
[3] 31 Am Jur, Labor § 72.

lief was dependent on his union membership or right thereto and such right had not been alleged in that there was no allegation of exhaustion of available intraunion remedies or futility of an attempt to do so before seeking redress in courts.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted April 12, 1960. (Docket No. 45, Calendar No. 48,440.) Decided September 16, 1960.

Bill by Ralph Knox against Local 900, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO) and certain officers thereof to compel his reinstatement in union, to enjoin interference with his rights as a union member, and to enjoin contributions for political purposes. Bill dismissed on motion. Plaintiff appeals. Affirmed.

Davidow & Davidow (*Larry S. Davidow,* of counsel), for plaintiff.

Harold A. Cranefield, Redmond H. Roche, Jr., Gordon A. Gregory, and *John A. Fillion,* for defendants.

BLACK, J. (*concurring*). Plaintiff's bill was dismissed on motion of defendants. He appeals.

A fair summary of the allegations and purpose of the bill, together with the chancellor's primary reason for dismissal thereof, appears in the following connected portion of his opinion:

"Plaintiff filed a bill in equity divided into 2 divisions, or counts. In the first count he seeks: (1) to be restored to membership in good standing in the defendant union; and (2) a mandatory injunction restraining defendants from interfering with his membership in good standing. In count 2 he seeks to enjoin defendants from expending any union moneys for political purposes.

"Defendants have moved to dismiss on several grounds, which are adverted to below.

"With respect to count 1 of the bill, plaintiff does not allege facts in his bill indicating he has exhausted his intraunion remedies. The exhausting of these remedies is a condition precedent to a lawsuit of this type. For many years the Supreme Court of this State has adhered to the principle that a union member who is aggrieved by acts of the union must exhaust his remedies within the framework of the union before coming into court (*Martin* v. *Favell,* 344 Mich 215; *Harris* v. *Detroit Typographical Union,* 144 Mich 422). The intraunion remedies available to plaintiff in the instant case are set out in the defendant's constitution in article 30, § 19, and article 32 of the constitution of 1957 (article 48, § 19, of the constitution of 1953). Plaintiff, in paragraph 17 of his bill, alleges that he has 'repeatedly made demands to the proper union officials for the reinstatement of his rights.' But such allegation does not satisfy the requirements of exhausting specific intraunion remedies 'provided by the (union) constitution' within the meaning of Mr. Justice BUTZEL'S opinion in the *Martin Case, supra.*

"Recognizing this general rule, plaintiff attempts to bring himself within an exception to this rule and says that he is in the same position as the plaintiff in *Howland* v. *Local Union No. 306, UAW-CIO,* 323 Mich 305. But there are several important differences in the 2 cases. First, Howland was deprived of a tangible property right in that his employment was terminated as a result of his failure to maintain 'membership in good standing' in the union. He offered his dues to the union and they were accepted, yet he was not restored to membership. Plaintiff Knox has not been deprived of his job. Plaintiff Howland also positively averred that he had never received notice of a proposed trial and that none of the other steps required in the defendant union's constitution had been followed by the defendant union. He therefore argued that, based upon this

performance, it would be futile to attempt to obtain relief through the intraunion remedies.

"In the instant case, no such facts are pleaded in plaintiff's bill."

I agree with the ruling as quoted, and find it a good and sufficient reason for grant—so far as concerns the first division of the bill—of defendants' said motion. As the chancellor said later (in the course of his opinion):

"When he [plaintiff] has exhausted these remedies without avail as he must under the many decisions of the Michigan Supreme Court, he may then seek redress in the courts (citing *Mayo* v. *Great Lakes Greyhound Lines,* 333 Mich 205, and *Hartley* v. *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees,* 283 Mich 201)."

I do not, however, for reasons given in *Mathews* v. *United Association,* 351 Mich 293 (followed by Justice KAVANAGH and the writer in *Jackson Broadcasting and Television Corporation* v. *State Board of Agriculture,* 360 Mich 481), approve the practice below of utilizing on motion to dismiss the *ex parte* averments of an affidavit (attached to the motion to dismiss), the purpose being that of traversing plaintiff's pleaded and repeated allegation that he was and is a legal member of the defendant local union and so is entitled to recognition as such by force of judicial process. Our recent experience shown in *Peoples Savings Bank* v. *Stoddard,* 351 Mich 342 (same case 359 Mich 297) proves again that justice can be and often is denied by following similar short cuts to decree in avoidance of the trials and labors of a testimonial hearing.

Noting from the variety of motions, petitions, and causes coming here that this practice of trying cases on affidavits—offered in support of and against mo-

tions to dismiss—seems to be increasing rather than decreasing, and noting further that such practice is authorized only in the specifically exceptional instances shown in Court Rule No 18 (1945), I make these allusions solely for the purpose of arresting such unauthorized practice. Here the chancellor's ruling that the first division of plaintiff's bill is insufficient, for want of unequivocal and proper allegation of due exhaustion of remedies available to plaintiff within the constitutional structure of the defendant local union, is by itself sufficient cause for dismissal of such division of the bill. That ruling required no fortification by acceptance of the mentioned affidavit.

As to the second division of the bill, by which plaintiff seeks to enjoin defendants from making use of union funds for political purposes, I agree with the chancellor that the bill fails to state a case cognizable in equity for want of allegation or reference to any law, or rule of law or equity, by which defendants' use, as alleged, of union funds has been made or should be deemed unlawful.

Plaintiff's original bill was filed July 5, 1955. The case was dismissed twice for want of prosecution. Following apparent reinstatement, an amended bill (sworn to under date of December 31, 1956) was filed. It is not without significance that the amended bill was conceived and sworn to shortly after *United States* v. *International Union, United Automobile, Aircraft & Agricultural Implement Workers UAW-CIO,* 352 US 567 (77 S Ct 529, 1 L ed 2d 563), had been argued (December 3 and 4, 1956) and prior to the supreme court's determination thereof. An examination of the *International Union Case* shows that the second division of plaintiff's bill has not as yet received that necessary support upon which it may ride to decree for relief as prayed.

I would affirm, with costs to defendants, allowing plaintiff per statute 30 days within which to amend (see *Lamb* v. *Jeffrey,* 41 Mich 719; *Melvin* v. *Reading,* 346 Mich 348, 356, 357; *Board of Education of Presque Isle Township School District No. 8* v. *Presque Isle County Board of Education,* 357 Mich 148, 155; CL 1948, § 650.18 [Stat Ann 1943 Rev § 27.2608]).

DETHMERS, C. J. I concur with Mr. Justice BLACK in affirmance. Insofar as the first division of plaintiff's bill of complaint is concerned, seeking his restoration to union membership and injunctive relief against interference therewith, I agree with Justice BLACK's position and reasoning that plaintiff's bill must fall for lack of allegations of due exhaustion of union remedies.

As for the bill's second division, seeking to enjoin expenditure of union funds for political purposes, plaintiff's bill evidently plants his right, and we hold that his right to be heard in court on that subject is dependent on his union membership or right thereto sought to be established by the bill's first division. It follows that, with the first division of the bill falling for stated reasons, the second must fall with it.

Affirmed.

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

HAENLEIN *v.* SAGINAW BUILDING TRADES COUNCIL, A.F.L.

1. LABOR RELATIONS—UNFAIR LABOR PRACTICES—DAMAGES—DEFAULT—JURISDICTION.

   Decree enjoining certain illegal and unfair labor practices and holding appellants liable in substantial damages is affirmed per BLACK and KAVANAGH, JJ., on ground that default of appellants had been regularly entered and no motion to set it aside had been timely filed and no fraud was claimed or shown and per DETHMERS, C.J., and CARR and KELLY, JJ., on ground that trial court had not abused his authority in proceeding to trial without appellants having been present or represented thereat or in denying their motion to set aside the decree and grant a rehearing and because claim trial court lacked jurisdiction in that plaintiff was engaged in interstate commerce had not been properly pleaded and was not substantiated at the trial was without merit.

2. COSTS—AFFIRMANCE OF DECREE.

   Costs are awarded appellee in suit to enjoin unfair labor practices upon affirmance of decree by BLACK and KAVANAGH, JJ., and notwithstanding appellants would have prevailed under opinion concurred in by SMITH, EDWARDS, and SOURIS, JJ.

SMITH, EDWARDS, and SOURIS, JJ., dissenting.

Appeal from Saginaw; Bach (Arthur M.), J., presiding. Submitted April 13, 1960. (Docket No. 53, Calendar No. 48,285.) Decided September 16, 1960. Rehearing denied October 10, 1960. Certiorari denied by the Supreme Court of the United States February 20, 1961.

Bill by Andrew J. Haenlein against Saginaw Building Trades Council, A.F.L., International

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REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Labor § 590.
[2] 14 Am Jur, Costs § 92.

Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local Union No. 486, Neil Dalton, Jr., and others for injunction against certain illegal and unfair labor practices. Default entered against defendants International Brotherhood of Teamsters and Neil Dalton, Jr. Decree for plaintiff. From a denial of petition to set aside decree and grant a rehearing, the defaulted defendants appeal. Affirmed.

Martin & Martin (*Walter Martin,* of counsel) and *Gilbert & Gilbert* (*Donald W. Gilbert,* of counsel), for plaintiff.

George S. Fitzgerald, David Previant, David Leo Uelmen and *Vandeveer, Haggerty, Garzia & Haggerty,* for defendants International Brotherhood of Teamsters and Neil Dalton, Jr.

BLACK, J. The tie game played by *Moody* against *Carnegie* a year ago (356 Mich 434) did but forecast our disagreement in this case.

Having bumped my own way through this Court's bulbous verbosity of dissertation, upon the supposed elasticity of time-limitations appearing in Court Rules Nos 28 and 48 (1945), I find the field clear for independent judgment that a personally served defendant (or plaintiff for that matter), seeking by late motion or application to avoid his entered default (on strength of which due proceedings have been taken), may do so only by charging and proving that his litigant opponent has committed a fraud, upon him or the court, either in bringing about entry of such default or in the inducement of inaction by such personally served defendant. Such judgment shortens the present opinion, which is well.

In *Moody* the total time allowed—by Court Rule No 48—for application for rehearing had expired.

Here the corresponding time allowed by Court Rule No 28—for setting aside the default of defendants Dalton and International Brotherhood—had expired more than 8 months prior to filing of the present petition for rehearing. It is *not* claimed that plaintiff, in the proceedings leading up to entry of such default or, for that matter, in the course of proceedings thereafter, was guilty of fraud or other deception which, according to recognized exception, would relieve such defendants from the limitational consequences of said Rule No 28. Further, and as against the claim of these defendants that entry of their default was irregular, I agree with Judge Bach that the default proceedings were meticulously proper and that such defendants were repeatedly and promptly notified thereafter, not only of the fact of entry of their default, but of impending trial of the cause.

No heed was given, by defendants Dalton and International Brotherhood, to any of these notices. The last one was given by the assignment clerk of the court. By it counsel of record were notified, under date of October 9, 1958, that the cause would come on for trial October 21, 1958 (which it did). Between the date of such notice and the stated date of trial, Milwaukee counsel appearing for defendants Dalton and International Brotherhood wrote a Saginaw representative of defendant Local Union No. 486 as follows:

"We received notice from William L. Hellerman that the Haenlien case was set for trial on October 21, 1958. We understand that the Teamsters have no interest in the Haenlien Company and do not desire to litigate the issues involved in that case. We suggest that your local attorney inform the court and the plaintiff's counsel of this fact with the view in mind of having the Teamsters dismissed as a party by stipulation."

This letter, proving as it does timely knowledge of counsel that hearing of the cause was imminent and that a decision "not to litigate" had been reached, fully supports the chancellor's summary conclusion "that there was no intention on the part of defendants [referring to defendants Dalton and International Brotherhood] to defend the action."

In denying this application for rehearing, the chancellor rightfully followed the rule of *White* v. *Sadler,* 350 Mich 511, that is to say:

"Our Court has traditionally been strict on setting aside defaults once regularly entered. Where a default following personal service is regularly taken, the court rule providing that it shall not be set aside after a certain time (presently 4 months) has generally been regarded as mandatory (*Hensey* v. *Hensey,* 331 Mich 518; *Gombasy* v. *Gombasy,* 318 Mich 139; *Watkins* v. *Wayne Circuit Judge,* 247 Mich 237), and this rule, however, harsh, has been subject to few exceptions, the most notable being that of fraud (*Hensey* v. *Hensey, supra*), which is not urged or suggested here." (Quotation from *White,* pp 521, 522.)

An application for rehearing under Court Rule No 48, by a party in default, provides no means of getting around the time-limitation of Court Rule No 28, which is to say that these defendants presently have no standing to apply under Rule No 48 for rehearing. Their default has never been set aside. Nor has any petition or motion to vacate such default been submitted. Consequently, this application was out of order and is now out of order. See, to the point, *McInerney's, Inc.,* v. *Dunford,* 341 Mich 477.

A final question is raised; that no State court may entertain jurisdiction over a case "which originated with an employer's charge of unfair labor practices against unions in an industry which affects com-

merce," unless there is "proof of violence." Our recent decision in *Town & Country Motors, Inc.,* v. *Local Union No. 328,* 355 Mich 26, is cited in support.

In my view this jurisdictional question was not open to consideration below, nor is it here, for want of fact-proof of its decisive premises. See *Austin* v. *Painters' District Council,* 339 Mich 462, 484, 485. There the defendants, by "petition to reopen the cause for certain purposes," sought without success to introduce a corresponding defense of exclusively Federal jurisdiction. Sometimes, jurisdictional questions need proof to make them effective. That is true here. The asserted want of jurisdiction does not appear in or on the face of the record.

I would affirm, with costs to plaintiff.

SUPPLEMENT (July 12, 1960):

This case was duly assigned to the writer prior to submission thereof during the April term. In pursuance of such assignment the foregoing opinion was submitted for consideration of our membership on May 11, 1960. Now, under term-delayed date of June 30th, Justices CARR and SMITH have gotten around to writing that the Court should pursue other and separate courses toward appellate judgment. One would affirm with explanation of what he has written in *Moody* v. *Carnegie,* 356 Mich 434. The other would reverse for want of determination below of a question of jurisdiction, pleaded affirmatively by these defaulted defendants, the validity of which question depended below and depends now on defensive-essential proof the defaulted labor union chose not to present.

My Brother CARR, bolstering his extended writing in *Moody,* refers to the allegedly defrauded party (in that case) as "an elderly widow." The "elderly widow," for whom my Brother bleeds anew, was shown in the cited case as having been party to a

secret agreement for champertous maintenance of the suit; her share of the litigious spoils to be $250 in event of success with the subject realty going to the thoroughly concealed real party in interest (one Frank B. Donohue). For Justice CARR's conclusionary presentation of these facts, see 356 Mich at page 436. For my presentation thereof, with direct quotation of the agreement to sue in the name of the "elderly widow," see pages 450 and 451 of the same volume.

I would say this only, by way of compendious reply to my Brother's bootstrap review of *Moody*: At first writing Justice CARR warily refrained from saying *who* perpetrated the "fraud" as found by him. Writing in today's case, he is yet unwilling to name and so accuse the alleged perpetrator. One thing is sure. Defendant Carnegie and his counsel were innocent of fraud, or participation in the commission of fraud. So, if "fraud" really did taint the plan and the presentation of the suit brought in Mrs. Moody's name, was it not committed exclusively by some one or all of those who participated in the illegal agreement to sue and divide?

Aside from the above, both opinions of *Moody* speak for themselves. One group would insert a stretchable-at-will number of weeks, months, or years in the time-limitational periods of Court Rule Nos 28 and 48 (1945). The other group would not. Such being the divisive state of things, how trustworthy—anyway—are limitations of time by court rule? Let troubled lawyers answer in the safe privacy of Michigan law offices, seasoning their speech with salt*, and let them invent more and more arbitrational ways of keeping their clients out of our courts.

* "Let thy speech be alway with grace, seasoned with salt, that ye may know how ye ought to answer every man." (Colossians 4:6.)

As for Mr. Justice SMITH's opinion, I can say only that my signature will never sanction the mere pleading, of crossed jurisdictional fingers tagged "you can't touch us," as a means of forcing the trial court to investigate and record the evidentiary facts which deny or uphold local jurisdiction under the national labor relations act. That burden rests on the affirmative pleader, and our trial courts are not to be toyed with by the practice of depositing such a pleading and then ignoring the court. Which is to say that this defendant labor union should have presented proof in support of its jurisdictional plea if possessed of such proof. There being no such proof, clear jurisdiction to proceed appeared below and now appears on the face of this record.

Today's question of jurisdiction is simple of presentation: Did the court have power to enter upon the inquiry presented by the pleadings? The very nature of its self-styled "affirmative defense" is an admission by the defendant union of a "yes" answer. By that plea the union asked the court to receive evidence in support thereof and, upon such evidence, to find judicially that it—the union—was immune from State court suit as pleaded. Having duly acquired jurisdiction—conferred by the plaintiff's bill and the defensive pleadings as filed—the court below was authorized to proceed until it was "judicially informed that its power over the cause has been suspended." *Phoenix Insurance Company* v. *Pechner,* 95 US 183, 186 (24 L ed 427). It was never so informed, and this my Brother SMITH admits.

I voted to sustain the defendant union in *Town & Country Motors, Inc.,* v. *Local Union No 328,* 355 Mich 26, because that union amply supported, with proof, its plea to the jurisdiction. I vote here to overrule the defendant union because it has failed to offer proof supporting its like plea. When a union is right, I shall vote to support its cause. When it

is wrong, I shall vote to say so. No particular class of litigant is always right, which remark goes for corporate unions and labor unions alike.

I vote again to affirm, with costs to plaintiff.

KAVANAGH, J., concurred with BLACK, J.

SMITH, J. (*dissenting*). We are concerned at the threshhold of this case, as we were in *Taylor* v. *Auditor General,* 360 Mich 146, with a question of jurisdiction.

One of the appellants set up lack of jurisdiction over the subject matter as an affirmative defense in a suit brought by the appellee to obtain an injunction in a labor dispute:

"As and for an affirmative defense, defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 486, AFL-CIO, alleges that the plaintiff's business and the employment relations of the plaintiff affect interstate commerce within the terms and definitions of the national labor relations act, 29 USCA, § 151 *et seq.*, exclusive jurisdiction over which resides in the national labor relations board; and further alleges that any assumption of jurisdiction by the courts of the State of Michigan would violate article 1, § 8, and article 6 of the United States Constitution."

It should be obvious to any lawyer that reliance is being placed on the doctrine of Federal pre-emption, a doctrine vital to the effectuation of national policy in the field of labor relations. See *Town & Country Motors, Inc.,* v. *Local Union No. 328,* 355 Mich 26. When such a jurisdictional question has been brought to the attention of a court, its first duty is to make an inquiry and determination even despite failure of the parties themselves to plead or argue the question. Thus, in *New York, N. H. & H.*

R. Co. v. *Jenkins,* 331 Mass 720, 728 (122 NE2d 759), *reversed on other grounds,* 350 US 155 (76 S Ct 227, 100 L ed 166), the court held: "It is the duty of the court to decide its jurisdiction when the question appears on the record even though the point has not been raised by the parties." This, however, was not done by the chancellor below.[1]

It answers nothing of substance to say that the appellant alleged no "facts" in support of its jurisdictional defense. What it alleged in its sworn answer was that plaintiff's business and employment relations affected interstate commerce. It asserted that exclusive jurisdiction over the case resided in the national labor relations board, and cited specifically the applicable sections of the Federal code. Are these "facts"?

Much ingenuity has been spent in the past distinguishing facts from conclusions, and questions of fact from questions of law. We cannot build the jurisprudence of a great State upon these slippery semanticisms. They represent, in all but the simplest cases, of which this assuredly is not one, terms not susceptible of either definition or accurate description. They are often *ex post facto* rationales for decisions reached, rather than reasons for arriving at the decision. Moore points out that the Federal courts under their present rules "are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law."[2]

No more should we be so hampered. The Federal courts have regarded their rules as freeing them from such mysticisms and we, as well, have adopted a liberal interpretation of our rules of pleading. *Baker* v. *Gushwa,* 354 Mich 241. If a pleading gives

[1] The authority of the chancellor to make such a determination is well established. *Teeter* v. *Teeter,* 332 Mich 1; *Lehman* v. *Lehman,* 312 Mich 102; *In re Estate of Fraser,* 288 Mich 392.

[2] 2 Moore, Federal Practice (2d ed 1948), § 8.13, at p 1647.

a fair notice to the other party of the basis of the claim or defense asserted, with such reasonable particularity as the circumstances of the case permit (call it fact, law, conclusion, mixed question, or whatnot), the pleading has fulfilled its function, and it is not necessary (Court Rule No 17, § 2 [1945]) to go further and plead one's evidence. There could be no reasonable doubt in the mind of any party to this litigation that it was defendant's position that the national labor relations board had exclusive jurisdiction over this case on the ground that interstate commerce was affected. It was not the pleader's burden to prove this assertion in his pleading. If plaintiff were actually in doubt as to what this defense was all about, he could have demanded greater particularity in the pleading. There is no doubt that he knew how to make such demand, as will next appear.

A motion was made to strike the entire answer of the appellants, which contained the affirmative defense. It was not made within the 15 days specified by Court Rule No 27, § 6 (1945), but some 8 months later. It was granted and a default taken for want of an answer. The objections to the answer were directed to the paragraphs by which facts alleged in the bill of complaint were denied; no reply was made to the affirmative defense and no objection was raised to the manner in which it was made. As the cause thus proceeded nothing appeared to suggest that the defense of lack of jurisdiction was frivolous or otherwise did not deserve the attention of the chancellor. Counsel for the appellants did not contest the motion, indeed, took no further action until some time after the default decree had been entered. Yet the inaction or ineptitude of counsel does not relieve a court of the duty of determining its own jurisdiction. *Jones* v. *Amsel*, 388 Pa 47, 51 (130 A2d 119): "The chancellor himself is not [because of

failure of the parties to raise the issue] thereby relieved of the obligation of determining his own jurisdiction."

The employment of an analogy may serve to bring the issue before us in sharper focus. We will assume that through some misconception of the law, a bill for divorce is filed in the probate court, that general appearance is entered by the defendant, who challenges jurisdiction in the answer, that thereafter he writes letters to all parties that he will not participate in the trial, does not do so, and that decree *pro confesso* against him is taken. The decree of the probate court is a complete nullity. Challenge thereto will be heard by any court at any time from any party and will be raised by any court itself, *sua sponte,* should the circumstances become known to it. No rights can be built on such a decree, any officer attempting execution on the faith thereof is a mere trespasser, and the decree may be directly or collaterally assailed. In short, it is a mere *brutum fulmen,* wastepaper. See *Fox* v. *Martin,* 287 Mich 147.

Finally, it is argued that defendants did not move to vacate the default. What they did, more than 4 months after the entry of the default, was to file a pleading called "petition for rehearing" in which they requested that the decree be set aside, that they be allowed to file an amended answer, and that a rehearing be granted. The name attached to a pleading does not establish its character: it must be construed so as to accomplish its manifest purpose. The chancellor construed it as a prayer that the default be set aside and in so doing he was clearly correct.[3]

[3] The chancellor held, in part, as follows: "Rule No 28, § 4 (1945), provides proceedings to set aside a default must be made within 4 months after the default is regularly filed and entered. This was not done." Also: "Defendants further allege the default should be set aside because of the neglect of the attorneys." Also: "This writer is a visiting judge and many trips were made to hear this

Generally a motion to set aside a default must be made before the expiration of the 4-month period of Court Rule No 28 (1945). But even assuming this default to have been "regularly" taken, despite the unanswered jurisdictional question, the policy underlying the rule limiting reconsideration must be weighed against the possible confusion that would result from permitting such a decree to remain outstanding, although beyond the power of the court, void, and subject to collateral attack. Congress, in the exercise of its plenary power in the field of labor relations affecting interstate commerce, completely displaced State power to deal with matters entrusted to the national labor relations board, *Guss* v. *Utah Labor Relations Board,* 353 US 1 (77 S Ct 598, 609, 1 L ed 2d 601), and acts of a State court intruding upon the jurisdiction of the board are nullities and vulnerable collaterally. *Cf. Kalb* v. *Feuerstein,* 308 US 433 (60 S Ct 343, 84 L ed 370). See, generally, Restatement, Judgments, § 10, comment b.

Reliance upon *Austin* v. *Painters' District Council No. 22,* 339 Mich 462, is misplaced. In that case, defendants attempted to interject a jurisdictional point in a supplemental brief on appeal. This court examined the record and found nothing therein to form a basis for raising the point, concluding that "it is evident that defendants' purpose in seeking to reopen the case was to explore the possibilities of establishing evidence upon which to base a Federal question." *Id.* at 485. Where the point is not raised frivolously, proper respect for congressional purpose and the orderly administration of justice compels a court to consider the question of jurisdiction.

Whether there is jurisdiction of the subject matter in this cause cannot be determined without further

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matter, and afford all parties their rights. It can find nothing in the record to justify setting aside the default because of neglect of the attorneys."

inquiry. In *Town & Country Motors, supra,* there was a lack of jurisdiction. Here there may be or there may not be.

What appellee's argument actually presents is a monument to Baron Parke, whose "almost superstitious reverence for the dark technicalities of special pleading"[4] was so profound that he resigned from the bench when liberalizing reforms were introduced. The union, appellant before us, pleaded lack of jurisdiction over the subject matter from its first pleading in the trial court to its briefs before us. The point has never been ruled upon from that day to this, yet it is now proposed that we affirm a judgment against it of some $20,000. True, its counsel handled the case poorly,[5] but poor handling does not invest a court with jurisdiction over the subject matter.

The situation is reminiscent of Sergeant (later Mr. Justice) Haye's dialogue, "Crogate's Case; A Dialogue in the Shades on Special Pleading Reform."[6] Here Baron Surrebutter (obviously the Baron Parke, to whom we made reference herein-

[4] Frankfurter, J., dissenting in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 US 48, 62 (73 S Ct 125, 97 L ed 77).

[5] The principal fault here, according to counsel's affidavits, was that appellants' Milwaukee counsel understood that appellants' Detroit counsel would forward them all papers filed in the cause but, due to misunderstanding, this was not done. We are told by affidavit:

"That the address of the attorneys for said Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 486, and Neil Dalton, Jr., upon the Notice of Appearance was 2550 Guardian Building, Detroit, Michigan, and that the affiant understood that the Detroit office would forward all papers having to do with this case to the office in Milwaukee as soon as they were received in the Detroit office; that a misunderstanding in this regard occurred which was inadvertent and unintentional and which resulted in the fact that the papers above mentioned, to-wit: the motion to strike the answer, the order of the court that the answer be stricken unless an amended answer be filed, the notices of default for failure to file an amended answer and the notice of hearing were received in the Detroit office, but were not forwarded to the Milwaukee office, and that they did not come to the attention of affiant until after said decree was made and entered."

[6] 9 Holdsworth, History of English Law, p 427.

above) is discussing with Crogate[7] the system of special pleading:

"*Sur. B.:* Done away with special pleading? Heaven forbid! * * * We framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the court, have been decided upon points of pleading.

"*Crogate:* You astonish me. But pray how do the suitors like this sort of justice?

"*Sur. B.:* Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adopted to suit the tests and capacities of the ignorant."

In ancient times, when trials were mere combats between opposing counsel, he who best knew the intricacies of repleader and surrebuttal would prevail as a matter of course. Cases were disposed of in great numbers without taking the testimony of so much as a single witness. Justice was thus sacrificed on the altar of lifeless formalism. Today pleadings are construed, not as an impediment to justice but to further its accomplishment. Save in the clearest possible cases, of which this, assuredly, is not one, modern courts do not dispose of substantial issues on pleading points alone, but on proofs. Since it is enough that challenge to jurisdiction over the subject matter need merely be suggested on the record to impose upon a court the duty of conducting inquiry as to its jurisdiction to proceed, we need hardly add that inartistic or unskillful pleading thereof (even should such exist) will not serve to relieve the court of its duty.

The order of the chancellor denying the relief prayed by the appellants is reversed and the cause

[7] See *Crogate's Case*, 8 Co Rep 66b (77 Eng Rep 574).

remanded for proceedings not inconsistent with this opinion, and upon such terms and conditions as may seem equitable to the chancellor under the circumstances. Although appellants have prevailed in this Court, the appellee may have his costs.

Decree should be reversed and remanded.

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

CARR, J. (*concurring*). Plaintiff brought this suit in equity, seeking injunctive relief and damages based on alleged wrongful conduct on the part of defendants. The bill of complaint alleged that plaintiff was a contractor engaged in building houses in Saginaw county, that as such he had a number of employees, and that the defendants engaged in a conspiracy to interfere with plaintiff's business, and with his employees, for the attainment of an unlawful labor objective. The conduct of which plaintiff complained was set forth in detail in his pleading. The defendants filed their answers thereto, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 486, and defendant Dalton joining in a pleading that denied some of plaintiff's allegations, pleaded lack of information as to others, and asserted by way of affirmative defense that the exclusive jurisdiction with reference to the plaintiff's alleged cause of action was vested in the national labor relations board. The answers filed on behalf of other defendants are not material in the instant controversy.

On behalf of plaintiff a motion was submitted to strike the answer filed on behalf of Teamsters Union and Dalton, its local representative, on the ground that its averments were evasive and not in compliance with the requirements of Michigan Court Rules

Nos 17 and 23 (1945).* Plaintiff asked that the answer either be stricken or that said defendants be required to file an answer in accordance with the rules and practice of the court. Following a hearing on said motion the circuit judge entered an order requiring that an amended answer be filed within 15 days thereafter, and that in default thereof the answer as filed be stricken from the cause. No amended answer was filed and approximately 4 weeks after the order was entered counsel for plaintiff filed a motion and order for default of said defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 486, and Neil Dalton, Jr.

No attempt was made to have the default referred to set aside. Several months later the case was set for trial on October 21, 1958. Counsel representing the plaintiff, and also counsel representing defendants other than the Teamsters Union and Dalton, were present and announced themselves ready for trial. In a colloquy between the court and counsel appearing in the case reference was made to the fact that the 2 defendants named were not present or represented although notice of trial had been sent to them by the clerk of the court, as specifically requested by counsel for the plaintiff. It is not disputed that the notice was received, and it further appears from the record before us that said defendants, the appellants in the case, were also notified by counsel representing another defendant that the case would be brought on for trial on October 21, 1958. It is not disputed that the following letter was written by general counsel for the Teamsters Union, who also represented defendant Dalton:

* See amendment to Court Rule No 17, § 9, in 335 Mich lxii.—REPORTER.

"October 16, 1958

"Mr. Gerry McIlvain
Teamsters Local 486
229 North Jefferson Street
Saginaw, Michigan
"*Dear Gerry:*

"We received notice from William L. Hellerman that the Haenlein case was set for trial on October 21, 1958. We understand that the teamsters have no interest in the Haenlein Company and do not desire to litigate the issues involved in that case. We suggest that your local attorney inform the court and the plaintiff's counsel of this fact with the view in mind of having the teamsters dismissed as a party by stipulation.

"Please advise if there is anything further we can do on this case.

"Yours very truly,
"PADWAY, GOLDBERG & PREVIANT,
By DAVID LEO UELMEN

"DLU*ED
"cc Mr. William L. Hellerman
Attorney at Law
Shearer Building
Bay City, Michigan"

The trial judge proceeded to hear testimony in the case, and concluded that the charges made in the bill of complaint had been sustained by the evidence. A decree was accordingly entered granting against the defendants an injunction as sought by plaintiff, and also providing as follows:

"It is further ordered, adjudged and decreed that the defendants, Teamsters, Chauffeurs, Warehousemen & Helpers of America, Union No. 486, American Federation of Labor, and Neil Dalton, jointly and severally pay to the plaintiff Andrew J. Haenlein, his damages sustained by reason of the illegal and unlawful primary and secondary boycott which the court finds and assesses at $20,000, and that plaintiff may have execution therefor."

On being advised of the entry of the decree the defendants against whom damages were assessed, as indicated in the provision above quoted, made a motion for a rehearing, to which motion counsel for plaintiff filed objections. The trial judge denied the application to set aside the decree and grant the rehearing sought, and said defendants, the Teamsters Union and Dalton, have appealed.

The decree entered in circuit court made no reference to the order of default entered by counsel for plaintiff against appellants. It did, however, recite that appellants had regularly appeared in the case, that they had received notice of the date and place of trial, and that neither said defendants, nor either of them, nor their counsel, had appeared in court. It thus appears that the circuit judge determined that under the circumstances he was justified in proceeding in accordance with the notice of trial, and in permitting the introduction of proofs offered on behalf of the parties to the case who were represented. It further appears that the decree was based on the proofs taken in open court. No claim is made that appellants sought, or desired, a continuance for any reason. It is a matter of inference only that they believed that plaintiff's alleged cause of action could not be maintained as against them. Whatever the reason for the failure to appear or to take possible action to bring about a postponement of the trial, the fact remains that defendants elected to take no further part in the proceeding. Under the admitted facts we think the trial judge did not abuse his authority in proceeding with the trial, or in denying appellants' motion to set aside the decree and grant a rehearing.

On behalf of appellants it is claimed that the trial court was without jurisdiction on the theory that the national labor relations board was vested with sole and exclusive authority in the premises. However,

the bill of complaint does not indicate that plaintiff was engaged in interstate commerce in connection with his building operations, and the statement in the answer filed to the effect that such business "affects interstate commerce within the meaning of the national labor relations act, 29 USCA, § 151 *et seq.*" was a mere conclusion unsupported by factual averments. In any event appellants did not appear at the trial for the purpose of offering proof in support of their claim in such respect.

On the record before us the situation is analogous to that in *Way Baking Company* v. *Teamsters & Truck Drivers Local No. 164, American Federation of Labor,* 335 Mich 478. In that case the claim of the defendant that the plaintiff was engaged in interstate commerce was an issue of fact in the trial court, was determined adversely to defendant, and this Court on appeal concluded that the record supported such finding. It may not be assumed that plaintiff in the case at bar was engaged in interstate commerce, and appellants did not avail themselves of their right to offer proofs in support of their pleaded affirmative defense with reference thereto. The claim now made that the trial court lacked jurisdiction is without merit. For the reasons indicated we concur in affirmance of the decree entered.

Every controversy of this nature must be determined in accordance with the facts involved. Mr. Justice BLACK has referred in his opinion to *Moody* v. *Carnegie,* 356 Mich 434, in which this Court, on equal division, affirmed an order of the circuit court of Wayne county granting a rehearing in an equity case. The fact there was that the plaintiff, an elderly widow, who was a necessary witness in her own behalf, was not given notice that her case had been set for trial at a certain time. As a result she was not present when the case was called and the hearing proceeded without her. Her attorney, who was in

court, apparently made no explanation to the trial judge nor did he seek a continuance, or the opportunity to advise plaintiff that her case was being heard. The result was a decree adverse to her. Subsequently she learned what had occurred, obtained other counsel, and filed a petition to set aside the decree and to grant a rehearing. This was after the time fixed by rule for making such a petition, other than on the basis of fraud. The circuit judge presiding at the hearing of the application concluded that in the interest of justice plaintiff should be granted her right to her day in court and ordered a rehearing. The result was a decree in plaintiff's favor. On appeal the action taken was approved as indicated, the facts disclosing that plaintiff had been improperly deprived of her right to appear and testify when the case was first called for hearing. Such deprivation amounted to fraud. The case now before us does not present a like situation. No claim is made that appellants were wrongfully deprived of their right to appear at the trial and present their proofs.

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

UNION CENTRAL LIFE INSURANCE COMPANY *v.* PETERS.

1. RECORDS—UNITED STATES TAX LIENS—STATE STATUTES.
   United States tax liens, to be valid, must be filed in accordance with the law of the State where the property subject to the lien is situated and in the office in which the filing of notices is authorized by State law (26 USCA, §§ 6321–6323; CL 1948, § 211.521).

2. LIENS — PREFERENCE — CHOATENESS — RECORDING — FEDERAL TAX LIENS.
   The test of choateness as applied to a properly recorded business lien, or other lien created by operation of local law and duly recorded, if record is required, means that the business lien will receive preference over a Federal tax lien only to the extent of the fixed amount thereof as of due recordation of the competing Federal lien (26 USCA, §§ 6321–6323; CL 1948, § 211.521).

3. COURTS—STATES—UNITED STATES—PRECEDENTS—FEDERAL QUESTION.
   It is the duty of a State supreme court to follow current decisions of the supreme court of the United States upon decisive Federal questions.

4. TAXATION—FEDERAL TAX LIENS—RECORDING—PREFERENCES.
   Amount mortgagees paid in local taxes previously levied against the mortgaged property but paid after Federal tax lien had been recorded in office of the register of deeds is not accorded preference over such Federal tax lien (26 USCA, §§ 6321–6323; CL 1948, § 211.521).

5. COSTS—FEDERAL TAX LIENS—PRIORITY—FAILURE OF EITHER PARTY TO PREVAIL IN FULL.
   No costs are allowed in suit to determine priority of Federal tax liens over other liens, where neither side has prevailed in full (26 USCA, §§ 6321–6323; CL 1948, § 211.521).

Appeal from Oakland; Beer (William John), J. Submitted June 7, 1960. (Docket No. 8, Calendar No.

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur, Taxation § 1010.
[2] 51 Am Jur, Taxation § 1016.
[3] 14 Am Jur, Courts § 117.
[4] 51 Am Jur, Taxation § 1020.
[5] 14 Am Jur, Costs § 11.

48,252.) Decided September 16, 1960. Certiorari granted by the Supreme Court of the United States March 27, 1961.

Bill by the Union Central Life Insurance Company, an Ohio corporation, against Robert G. Peters, Jr., and Helen R. Peters to foreclose mortgage, with the United States of America joined as party defendant to determine priority of mortgage lien over tax liens. Decree for plaintiff. Defendant United States of America appeals. Affirmed in part and reversed in part.

Clark, Klein, Brucker & Waples (*Joseph B. Sherrard* and *H. William Butler,* of counsel), for plaintiff.

Charles K. Rice, Assistant Attorney General, *Lee A. Jackson, George F. Lynch* and *Moshe Schuldinger,* Attorneys, Department of Justice, *Frederick W. Kaess,* United States Attorney, and *Elmer L. Pfeifle, Jr.,* Assistant United States Attorney, for defendant United States of America.

BLACK, J. The defendant United States appeals from a decree foreclosing a real-estate mortgage, executed by defendants Peters as mortgagors in favor of plaintiff as mortgagee.* The decree grants supremacy of the lien of the mortgage, to extent of all sums due and to become due according to its tenor, over competing Federal liens for income taxes Mr. and Mrs. Peters failed to pay for the tax periods 1952, 1953, and 1955.

It is stipulated, "apart from the legal questions raised in this action relating to priority of liens," that plaintiff's said mortgage "is a valid and subsisting

* The mortgage was duly recorded in the proper register of deeds office November 24, 1954.

first lien" upon the mortgaged premises. It is stipulated also that 2 of the 3 liens claimed by the United States were recorded only in the office of the clerk of the proper United States district court, and it is agreed further that the third of such liens (No P–1697), which is based on 1955 income taxes owing by Mr. and Mrs. Peters, was not recorded in the register of deeds office until July 12, 1957. Shortly thereafter plaintiff paid, as was its self-protective right under the terms of the mortgage, unpaid local taxes previously levied against the mortgaged premises. The sum so paid by plaintiff was $646.89.

Refer to sections 6321, 6322, and 6323 of the revenue code of 1954 (26 USCA, §§ 6321, 6322, and 6323). Thereunder these Federal liens arose against "all property and rights to property" of the taxpayers. Said section 6323 provides that such lien "shall not be valid as against any mortgagee * * * until notice thereof has been filed * * * in the office designated by the law of the State or Territory in which the property subject to the lien is situated." When the events giving rise to this litigation occurred, it was provided by Michigan law (CL 1948, § 211.521 [Stat Ann 1950 Rev § 7.751]) "That whenever the collector of internal revenue, * * * shall desire to acquire a lien in favor of the United States for any tax payable to the United States against any property, real or personal, within the State of Michigan, * * * he is hereby authorized to file a notice of lien, setting forth the name and the residence or business address of such taxpayer, the nature and the amount of such assessment, and a description of the land upon which a lien is claimed, in the office of the register of deeds in and for the county or counties in Michigan in which such property subject to such lien is situated." None of the Federal liens for unpaid income taxes owing by Mr. and Mrs.

Peters were recorded, according to Michigan statute, excepting as previously noted.

Two questions are presented. Such questions, taken from the respective briefs, are as follows:

"1. Should a Federal tax lien against Robert G. Peters and wife, which was not filed with the register of deeds of Oakland county in accordance with the requirements of the Michigan recording statute, be allowed to take priority over the mortgage executed by Robert G. Peters and wife to the appellee?"

"2. Whether the Federal tax liens are entitled to priority over payments made by the mortgagee for local taxes, as well as over payments for such taxes which the mortgagee might make in the future during the redemption period following foreclosure?"

First: For an affirmative answer to stated question 1 defendant United States relies particularly on *United States* v. *Rasmuson* (CCA 8), 253 F2d 944. For a negative answer to such question plaintiff relies principally on *Youngblood* v. *United States* (CCA 6), 141 F2d 912. *Rasmuson* and *Youngblood* were not reviewed by the supreme court and it is conceded, with respect to the specific question each court considered, that the supreme court has not spoken save only by opposing analogies counsel have pressed upon us. Having considered the briefs and arguments addressed to stated question 1, we accept *Youngblood's* reasoning and application of our statute as decisive. The question is therefore answered by adoption of the following conclusion of the court of appeals of the sixth circuit (*Youngblood,* p 915 of report):

"*United States* v. *Snyder,* 149 US 210 (13 S Ct 846, 37 L ed 705), adds no force to the government's contention for the reason that, while it was there held that the tax system of the United States is not subject to the recording laws of the States, the acts of congress since that decision have required recording

of United States tax liens: first, in accordance with the law of the State where the property subject to lien is situated; and, later and presently, in the office in which the filing of notices is authorized by the State law. Upon obvious principles of comity, the congress of the United States has provided for compliance by the government with State recording laws. The notice of tax lien involved in this controversy does not so comply."

Second: This is the more difficult question. Much though we might agree with the plaintiff mortgagee that a decision to subordinate its mortgage-provided lien, for expenditures made and to be made for protection of its primary lien, is bound to impede if not demoralize the so-called mortgage business in Michigan, there appears no alternative than that of due application of what is known in authoritative Federal decisions as the "test of choateness." In plain backyard words, the "test of choateness" as applied in cases as at bar means that a properly recorded business lien, or other lien created by operation of local law and duly recorded (if record is required), will receive preference over a Federal tax lien only to the extent of the fixed (yes, "choate") amount thereof as of due recordation of the competing Federal lien. The legal nature of such test will be found in the recent opinion of the 4th circuit in *United States* v. *Bond,* 279 F2d 837, 844–846 (handed down May 31, 1960, and cited to us since argument of this case). Since the whole ground has been so freshly and thoroughly covered in *Bond,* and since the Federal courts of appeal are usually better equipped than State courts to appraise and apply decisions of the supreme court, we abstain from quotation or discussion of the question and refer the reader to *Bond* for understanding of our ruling that stated question 2 must be answered by granting supremacy of duly recorded Federal tax lien No P–1697 over the mort-

gagee's lien for local taxes paid by it after July 12, 1957.

Our concern over this result is shared elsewhere, so much as to give impetus to recent effort of the American Bar Association to correct matters by proposed congressional act.* Nevertheless it is the duty of this State Court to follow current decisions of the supreme court upon decisive Federal questions. This is such a question, since its present solution—shown in *Bond*—determines the extent to which Congress has consented that Federal tax liens may be subordinated to business or statutory liens. And we have no right to look into the "womb of time" or the "seeds of time" to anticipate a possible doctrine of modification (see *Scholle* v. *Secretary of State*, 360 Mich 1, 114). If a State court were possessed of such right, it is likely that a portent of re-examination might be found in the newest decisions of the supreme court (see *United States* v. *Brosnan*, 363 US 237 [80 S Ct 1108, 4 L ed 2d 1192]; and *Acquilino* v. *United States*, 363 US 509 [80 S Ct 1277, 4 L ed 2d 1365]; and *United States* v. *Durham Lumber Co.*, 363

* "The Federal government possesses a powerful weapon for the collection of delinquent taxes, a sweeping lien which attaches to all property of the taxpayer, real, personal, or intangible, which he then owns or thereafter acquires. That lien has been a matter of increasingly grave concern to banks, in their capacities both as creditors and as debtors of persons who are or may become delinquent in their taxes. That concern is based principally on a series of supreme court decisions, most of them unenlightening *per curiam* reversals, which lay down the rule that no contractual or statutory lien can prevail over even a subsequently arising Federal tax lien unless the non-Federal lien meets a most exacting standard of 'choateness.' Regardless of State laws to the contrary, a private lien securing a contingent or unliquidated claim, or which attaches to a shifting mass of property, is regarded as 'inchoate' and is subordinated even to Federal tax liens that did not exist when the private lienor extended credit on the faith of the debtor's property. The alarming trend of those decisions moved the American Bar Association to appoint a special committee on Federal liens, whose legislative recommendations were approved by the association on February 23, 1959." ("Federal Tax Liens: Effects of the American Bar Association Proposals on Banks and Secured Lenders"; The Banking Law Journal, Vol 76, No 5, May, 1959, pp 369, 370.)

US 522 [80 S Ct 282, 4 L ed 2d 1371]). In *Acquilino* and *Durham* the supreme court hints circumstantially that it may be ready to qualify the mentioned test of "choateness." The hint, however, is neither loud nor clear; hence it is our plain duty to follow the supreme rule *Bond* expounds from *United States* v. *Security Trust & Savings Bank,* 340 US 47 (71 S Ct 111, 95 L ed 53); *United States* v. *New Britain,* 347 US 81 (74 S Ct 367, 98 L ed 520); *United States* v. *Acri,* 348 US 211 (75 S Ct 239, 99 L ed 264); *United States* v. *Liverpool & L. & G. Ins. Co.,* 348 US 215 (75 S Ct 247, 99 L ed 268); *United States* v. *Scovil,* 348 US 218 (75 S Ct 244, 99 L ed 271); and *United States* v. *R. F. Ball Construction Co., Inc.,* 355 US 587 (78 S Ct 442, 2 L ed 2d 510).

Affirmed in part and reversed in part, and remanded for entry of decree in accordance with the respective answers we have given to the stated questions. No costs.

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

DETROIT EDISON COMPANY *v.* STATE.

COURTS—COURT OF CLAIMS—JURISDICTION—CORPORATIONS—ANNUAL PRIVILEGE FEE—PAYMENT UNDER PROTEST.

The court of claims has jurisdiction to determine claim against State by corporation for alleged overpayment of annual privilege fee, paid under protest, where corporation and securities commission had rescinded its redetermination of such fee, withheld repayment of the payment, declined to proceed with redetermination as provided by statute thereby preventing completion of the administrative process as to such tax, and declined to give the corporation an unqualified certificate of good standing, essential to financing operations (CLS 1956, §§ 450.82, 450.304, 450.305, 450.309, 450.310).

Appeal from the Court of Claims; Smith (Richard G.), J., presiding. Submitted June 8, 1960. (Docket No. 21, Calendar No. 48,506.) Decided September 16, 1960.

The Detroit Edison Company, a New York corporation, filed claim against the State of Michigan and the Michigan Corporation and Securities Commission for refund of 1958 annual corporate franchise fee paid under protest. Claim dismissed on motion. Plaintiff appeals. Reversed and remanded for trial.

REFERENCES FOR POINTS IN HEADNOTES

42 Am Jur, Public Administrative Law § 200.

Fischer, Sprague, Franklin & Ford (*Harvey A. Fischer* and *Gerald C. Simon,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for defendants.

BLACK, J. This case was duly assigned to the writer at the beginning of our present June term. In pursuance of such assignment the following opinion is submitted to members of the Court this 22d day of July, 1960.

We split in this case for and against a doctrine that the law implies and so exacts an actionable promise of the State to repay that which it has wrongfully taken by the bludgeon of coercion. If such promise is implied, and I hold that it is whether the unwilling promisee happens to be person, corporation, municipal unit, or the State itself, then it is visibly actionable at plaintiff's present suit under the simple and inclusive language of the court of claims act.*

A scant year ago 5 members of this Court voted (*Spoon-Shacket Company, Inc.,* v. *County of Oakland,* 356 Mich 151) to adopt the then unanswered and now unanswerable reasoning of Mr. Justice SMITH which, in carefully assembled detail, the reader will find in the respective dissenting opinions of *Janiszewski* v. *Behrmann,* 345 Mich 8, 10–32, and *Consumers Power Company* v. *County of Muskegon,* 346 Mich 243, 251–266. Repeating now my allegiance therewith in the form of a text-beginning, I submit as

* The court of claims act grants unqualified "power and jurisdiction," to the court of claims, "to hear and determine *all* claims and demands, liquidated or unliquidated, *ex contractu* and *ex delicto,* against the State and any of its departments, commissions, boards, institutions, arms or agencies." CL 1948, § 691.108 (Stat Ann 1959 Cum Supp § 27.3548[8]).

follows respective and indicated quotations from the 2 opinions:

"I find nothing in the Constitution or the statute law of this State forbidding a governmental unit from exercising ordinary principles of common honesty.* Until such appears I shall conclude that this Court is as free to uphold such principles by its decrees and judgments as was Lord Mansfield when he said (in *Moses* v. *Macferlan,* 2 Burr 1005, 1008 [97 Eng Rep 676]) that 'if the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract.' " *Consumers Power Company* v. *County of Muskegon,* dissent, 346 Mich 243, 257.

"Excesses of governmental power, abuses of governmental authority, are not new to mankind and we are neither speechless nor helpless with respect thereto without statute. It is precisely in this situation, where the citizen stands before us opposed by all the panoply of power, that we are most acutely conscious of our historic function. It is my opinion that under existing Michigan law we require no legislative authority to order the restitution of moneys paid to and received by the taxing authorities through mutual mistake of fact." Same case, p 260.

"Having such an involuntary payment, our law, also, is clear that recovery thereof may be had. It was a quarter of a century ago that we held in *Blanchard* v. *City of Detroit,* 253 Mich 491, 495, that:

" 'If payment of a tax is involuntary, in the absence of statutory provision to the contrary, it may be recovered, although there is no express statutory provision therefor.

" 'It is a well-settled rule that "money got through imposition" may be recovered back; and, as this

* Yes, as this Court said in *Hilt* v. *Weber,* 252 Mich 198, 224 (71 ALR 1238), and *School District No. 8 of the Township of Ecorse* v. *State Land Office Board,* 313 Mich 560, 567, "The State must be honest."

Court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Ward* v. *Love County,* 253 US 17 (40 S Ct 419, 64 L ed 751), citing cases.' " Same case, p 261.*

"It is the law which is quick to fasten the yoke of contract on the wrongdoer. It is law which makes the implication of the promise. The wrongdoer is asserting to all who will listen that he made no contract, that the idea of contract never entered his head, that what he was doing was strong-arming this plaintiff, reducing his goods and chattels to possession, converting his property. We nod. That, we say, is precisely why we imply the promise." *Janiszewski* v. *Behrmann,* 345 Mich 8, 31.

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* This case of *Ward* v. *Love County,* unearthed and applied as it was in *Blanchard* and again in *Consumers,* is a dependable guide to proper decision here. If exactions paid under a mistake of fact beget an implied promise, certainly amounts "obtained by coercive means—by compulsion," do likewise.

In *Ward,* similarly on demurrer to the taken-as-true petition, it was shown that the sums sued for by claimants had been "coercively collected from them by Love county, Oklahoma, as taxes on their allotments." The supreme court found—on this pleaded showing—that claimants had paid the sums in question under threat of losing their lands in event of nonpayment; also that they had (p 23) "yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal." Holding (p 24) that the sums thus collected were obtained by coercion and "compulsion," the court said (as quoted partly in *Blanchard*):

"As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' *Marsh* v. *Fulton County,* 10 Wall (77 US) 676, 684 (19 L ed 1040); *City of Louisiana* v. *Wood,* 102 US 294, 298, 299 (26 L ed 153); *Chapman* v. *County of Douglas,* 107 US 348, 355 (2 S Ct 62, 27 L ed 378). To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law."

Unless, by judicial fiat, it is to make a decisive difference that this plaintiff happens to be the Detroit Edison Company, represented by the firm of Fischer, Sprague, Franklin & Ford, instead of Consumers Power Company, represented as it was by the firm of Sessions & Barlow; or unless our majority is to make *Consumers*—enlivened as it was in *Spoon-Shacket*—distinguishable by pointing out that the defendants in both cases were counties of Michigan rather than the State of Michigan, then the outright and exclusive jurisdiction of the court of claims to hear and decide the presented merits of plaintiff's claim should be upheld without further vomitus of pages and pages of quibbling words. We are not supposed to live, as Justice SMITH observed in *Consumers* (p 256), under a double standard of morality, whereby that which is an abomination when committed by a private citizen is approved with unction when accomplished by the State; a State which, as in the case of any similarly charged defendant standing at the bar of a circuit court, is by statute made directly accountable *ex contractu* in the special court whose judgment we now review.

The facts of this case are of written record. By demurring to plaintiff's statement of claim defendants have automatically stipulated that the court below and this Court in turn may and should test their demurrer by accepting such written record at face value. Pursuing such stipulation, I relate the substance of that record as follows:

According to the requirements of CLS 1956, §§ 450.82, 450.304, 450.305 (Stat Ann 1959 Cum Supp §§ 21.82, 21.205, 21.208), plaintiff Detroit Edison Company calculated and paid, with its timely annual report of 1958 to the defendant commission, the Company's annual privilege fee in the sum of $1,353,695.51 (the amount includes a filing fee of $2.00). October 20, 1958, the commission formally notified the

Company of its computation and determination of such fee in the amount of $1,473,481.40 (including the filing fee). By its letter of notification the commission called on the Company to pay the computed deficiency in the sum of $119,785.89.

Refer now to CLS 1956, §§ 450.309, 450.310 (Stat Ann 1959 Cum Supp §§ 21.210, 21.210[1]). The Company immediately applied for a statutory redetermination of the amount of such fee, thus invoking statutory duty of the commission to "*promptly* redetermine the liability of such corporation."

December 10, 1958, the commission notified the Company that it had redetermined the fee in question by reducing its previous determination of the amount to $1,472,824.76, leaving a net redetermined amount owing in the sum of $119,129.25. December 30, 1958, the Company paid such additional sum of $119,129.25 "involuntarily and under protest so that the commission will issue a certificate of good standing to the Detroit Edison Company upon request." At the same time the company notified the commission of its intent to sue in the court of claims for refund of the amount so paid under protest.

The present suit was instituted in the court of claims January 23, 1959. The gut-basis of the suit is the brief-admitted fact that "The plaintiff was forced to pay the disputed fee so that it could secure a certificate of good standing from the defendant commission upon request in connection with its financing."

The next event in the course of developing controversy was a decision of the defendant commission to "rescind" its aforesaid redetermination of the amount of such fee. This was accomplished by a letter dated February 4, 1959, addressed to Detroit Edison Company by the defendant commission, reading as follows:

"Upon reviewing your file to date including your petition for redetermination of your 1958 privilege fee dated November 10, 1958, and our reply of December 10, 1958, we find and determine that we were and are in error in making the redetermination set forth in our letter of December 10, 1958.

"The letter of December 10th was sent out inadvertently by the director of annual reports. It is not the policy of this commission to issue redeterminations on controversial questions currently pending in some appellate body whose determination would resolve the controversy and would be binding on the parties concerned.

"Inasmuch as the same questions that are in controversy over your 1958 franchise fee are also in controversy in an appeal pending before the corporation tax appeal board involving your 1956 annual franchise fee (*Detroit Edison Company* v. *Corporation and Securities Commission*, Docket No. 57–3),* we hereby rescind our letter of redetermination of December 10, 1958, and hold the question of redetermination of your 1958 fee in abevance until the above-referred-to case is finally adjudicated.

"Unless otherwise advised by you, we will hold the moneys paid for your 1958 franchise privilege fee over and above the amount you claim to be properly due, as a credit for any further franchise fees which may be owed by you for past, current or future years. In the application of any interest and penalties on unpaid amounts, this credit will be treated as an amount paid at the date it was received by the commission."

Two days later the defendant State and the defendant commission moved to dismiss plaintiff's statement of claim, pertinently assigning reasons as follows:

"1. That the court of claims does not have jurisdiction to hear appeals in reference to determinations

* See 361 Mich 150.—REPORTER.

and redeterminations of corporate franchise privilege fee matters, which jurisdiction is lodged exclusively in the corporation tax appeal board pursuant to PA 1921, No 85, as amended."

"4. That the redetermination of the corporation and securities commission of plaintiff's 1958 annual franchise privilege fee, dated October 20, 1958, giving rise to the alleged 'claim' in the amount of $119,785.89, has been rescinded and held at naught by the Michigan corporation and securities commission, until final adjudication of Detroit Edison Company, *supra,* before the corporation tax appeal board, which would dispose of this matter."

"5. That a copy of the letter rescinding the redetermination and setting it aside, dated Feburary 4, 1959, from the Michigan corporation and securities commission to the Detroit Edison Company, is appended hereto and made a part of this motion to dismiss."

The motion to dismiss was noticed for submission before the court 2 months later (April 8, 1959). February 12, 1959, plaintiff filed motion to advance the date of hearing of the aforesaid motion to dismiss. February 23, 1959, the defendants countered with a motion "to hold in abeyance any further action in this cause until adjudication of the appeal of the Detroit Edison Company before the corporation tax appeal board," alleging that the present suit was "premature because the defendant Michigan corporation and securities commission * * * has specifically held in abeyance, by its letter of February 4, 1959, any final disposition of plaintiff's request for redetermination of plaintiff's 1958 franchise privilege fee," and alleging further that plaintiff's suit was "premature because plaintiff has not exhausted its administrative remedies as set forth in sections 9 and 10" (referring here to above cited CLS 1956, §§ 450.309, and 450.310 [Stat Ann 1959 Cum Supp §§ 21.210, 21.210(1)]).

March 27, 1959, the then-seated judge of the court of claims heard the parties and entered the following order:

"A motion by defendants having been filed and brought on to be heard to hold the above cause in abeyance pending a redetermination of 1958 franchise fees by the Michigan corporation and securities commission, and arguments being heard and briefs submitted, and the court being fully advised in the premises.

"It is hereby ordered, that the motion of plaintiff-petitioner to advance for early hearing the defendant's motion to dismiss this cause, is hereby denied; and

"It is hereby ordered, that the effect of the commissioner's letter of February 4, 1959, was to rescind the redetermination of December 10, 1958, and that there has been no redetermination of plaintiff-petitioner's 1958 franchise privilege fee; and

"It is ordered, that the motion of the Michigan corporation and securities commission to hold the above cause in abeyance until after a redetermination of the 1958 franchise fee has been made by the Michigan corporation and securities commission, is hereby granted, provided, and it is further ordered, that defendant is not to withhold the issuance of a certificate of good standing the same as the 1957 certificate dated 8/13/57 to the plaintiff-petitioner because of the status of the 1958 franchise fee of the plaintiff-petitioner *so long as this cause is held in abeyance*, but defendant shall grant the same as though the 1958 franchise fee had been finally determined and paid."

April 1, 1959, plaintiff wrote the defendant commission demanding (per the order of March 27, 1959) issuance to it "of a certificate of good standing"; also that the mentioned sum of $119,129.25 be returned to it. April 21, 1959, the commission wrote plaintiff's counsel its refusal to comply with the aforesaid

demand, reciting that "It is the position of this commission that you are entitled to a certificate of good standing so long as there has been no redetermination made by the commission *and so long as the court matter is held in abeyance.*" The commission's letter, declaring its firm position in such regard, appears (appendix "A") at the end of this opinion.

May 28, 1959, plaintiff applied to this Court for leave to appeal from the aforesaid order of March 27, 1959, also from a subsequent order of the same court dated May 13, 1959, by which last order the then-seated judge denied plaintiff a rehearing of the March 27th order. As a result of such application we entered (July 13, 1959) the following order:

"In this cause an application is filed by plaintiff for leave to appeal from an order of the court of claims, and an answer thereto having been filed by defendants, and due consideration thereof having been had by the court, it is ordered that the order of the court of claims dated March 27, 1959, be set aside and that the cause be remanded to the court for prompt hearing and determination of defendants' pending motion to dismiss. The court of claims may, either on such motion to dismiss or trial of the merits, determine the question whether the defendant corporation and securities commission became authorized after commencement of this suit to rescind or otherwise recall the redetermination of December 10, 1958."

While such application for leave to appeal was pending, the defendant commission voluntarily sent plaintiff a qualified certificate, the nature of which may be seen by comparison thereof with the regular form of certificate as issued by the commission. For such comparison see appendix "B."

Circuit Judge Smith, assigned meanwhile to the court of claims, proceeded promptly to carry out our quoted order of July 13th. He held, following due

hearing, that "The court of claims has no jurisdiction to hear this matter since the legislature has in fact created an exclusive remedy for taxpayers who seek review of the commission's redetermination." From an ensuing order granting defendants' said motion to dismiss, plaintiff has appealed.

Defendants' motion to dismiss is groundless—utterly. The court of claims has jurisdiction as against their allegation that plaintiff has an administrative remedy, there having been no "redetermination" plaintiff might have or might now review.* The commission hastily repudiated (after plaintiff had paid under protest) its letter of December 10, 1958. It has since refused, upon announced intent of holding the question of redetermination "in abeyance," to proceed with its statutory duty of "prompt" action. Meanwhile, wielding an administratively-spiked club over the head of the plaintiff taxpayer, it withholds the unqualified certificate to which such taxpayer—so far at least—is lawfully entitled. With all this, it continues to retain the sum which on the face of these pleaded documents was coerced from plaintiff.

The commission's letter, sent plaintiff after the latter had applied for leave to appeal (refer again to appendix "A"), tells the whole story of abuse of administrative authority; of determination to employ the administrative process as a means of denial of due process; of design to force this taxpayer to pay—without final disposition of tortoise-pending administrative proceedings—a disputed sum on penalty of having its necessary financing crippled; of "holding in abeyance" such taxpayer's fair appeal for relief to a jurisdictionally-appointed court.

* This is the precise position of the commission. Commissioner Gubow affirmed, by affidavit attached to the commission's subsequent motion "to hold in abeyance," that "he has not made any final recomputation and redetermination of plaintiff's 1958 franchise privilege fee."

Even a giant utility corporation, treated this way by the public authority, is no less than a similarly treated widow or orphan entitled on application to judicial relief. This plaintiff in fact happens to be one of the "Samaritans of Michigan" to which we made reference in *Spoon-Shacket, supra.** See Senate resolution No. 20 (Senate Journal, regular session 1959, pp 106, 107; February 5, 1959), commending industry of Michigan for its advance payment of taxes for the relief of Michigan, and the governor's news release of February 20, 1959 (reported Lansing State Journal), praising "the 'wonderful response' of 35 business taxpayers whose $32,000,000 in early tax payments eased the State's cash crisis."

When any like corporation abuses its power (say by application of "the corporate hammerlock") and so is shown guilty of oppression, I have not hesitated to say so (*Peaden* v. *Employment Security Comm.*, 355 Mich 613, 616, 619, 630, 631). When the State's half-nelson is applied to such a corporation without shred of justification, I am, if the law permits, equally on the side of the oppressed. Here the law—shaped by the court of claims act—does permit, and so I vote to reverse. It is no more than "State-minded" nonsense to suggest that this plaintiff, proceeding as it may only do in the court of claims, has no right to invoke justiciably an implied promise of

* "Consider for a moment that Michigan's major taxpayers (in other areas of levy) have been asked and doubtless will be asked to assist, by premature payment, in meeting the State's now chronic financial crises. Necessarily these payments have been made and must be made on the basis of estimates and ahead-of-time calculations. Such practice, inherently, is fruitful of honest and before-the-fact error. Now, in this very year of urgent concern, our divided court again leaves the Samaritans of Michigan in doubt upon the question whether they may receive relief, in the courts, in event they ultimately discover overpayment on their part. What would we do should Ford Motor or General Motors overpay, say, $500,000, followed by righteous appeal on their part for judicial relief? Ah, there is a piquant question. Would that it were here, for decision in a companion case." *Spoon-Shacket Company, Inc.*, v. *County of Oakland*, 356 Mich 151, 167.

the State to repay that which the State coerced from it on December 30, 1958.

SOURIS, J., concurred with BLACK, J.

APPENDIX "A"

STATE OF MICHIGAN

MICHIGAN CORPORATION AND SECURITIES COMMISSION

LANSING

April 21, 1959

Lawrence Gubow
Commissioner

Fischer, Sprague, Franklin & Ford
Attorneys at Law
1100 Dime Building
Detroit 26, Michigan

Attn: Mr. Gerald C. Simon
Re: The Detroit Edison Company

Gentlemen:

This will acknowledge receipt of your letter dated April 1, 1959, in which you request the return of $119,129.25, together with interest at the rate of 5% per annum from the date of our receipt of payment to the time of returning said moneys. You also request, in behalf of the Detroit Edison Company, a certificate of good standing without exception, dated the day following the return of the above moneys.

Please be advised that we have taken the subject matter of your letter under advisement and conclude that both of the requests you make in such letter cannot be granted. It is not the policy of this office to issue the certificate of good standing in the form you have requested until there has been a formal ac-

ceptance of all prior annual reports to this commission, which includes a final determination of all fees due with these reports.

It is recognized that this general rule of the commission has been modified by the proceedings you have commenced in the court of claims involving the proper determination of your 1958 franchise privilege fees, and by said court order in that matter dated March 27, 1959.

Under this order, it is the position of this commission that you are entitled to a certificate of good standing so long as there has been no redetermination made by the commission and so long as the court matter is held in abeyance. This means that the issuance of the certificate of good standing without exception is conditioned upon your not taking any further proceedings in the court of claims, including not filing any motion for rehearing, and upon your not taking any further steps in regard to the redetermination of your 1958 franchise privilege fee before the corporation and securities commission, including demanding the refund of the amounts referred to in my letter of February 4, 1959.

If you had not requested the refund of the amount of money paid in regard to your 1958 franchise privilege fee, and if you had not requested a rehearing in the court of claims matter, this commission would issue a certificate of good standing without exception pursuant to the court of claims order of March 27, 1959. For the reasons stated above, however, it is not possible for this commission to grant the requests as made in your letter of March 27, 1959.

We realize that in accordance with our letter of Feburary 4, 1959, you are entitled to a refund of the $119,129.25 requested and that pursuant to the aforesaid court of claims order dated March 27, 1959, you are entitled to a certificate of good standing so long

as all proceedings in regard to your 1958 franchise privilege fee are held in abeyance. However, we also realize that you are not entitled to both.

Please find enclosed your check for $3.00 for the issuance of a certificate of good standing.

Very truly yours,
/s/ LAWRENCE GUBOW
Lawrence Gubow
Commissioner

LG:pl
Enc.
cc: Mr. A. G. Maihofer, Secretary
The Detroit Edison Company
W. D. Dexter
Annual Reports Division

APPENDIX "B"

The regular certificate of corporate good standing is issued by means of a formal certificate, carrying the great seal of the State above the heading "Michigan Corporation and Securities Commission." The form is addressed "To all to whom these presents shall come." It bears the date of execution and the signature of the commissioner together with the seal of the commission.

Such regular certificate, as last issued to Detroit Edison Company under date of August 13, 1957, reads as follows:

"The Detroit Edison Company, a New York corporation, was admitted to do business in this State on January 29, 1903. The corporation has filed all annual reports, paid the fees in connection therewith, is in good standing in this office and is duly authorized to transact business in Michigan. This certificate is in due form and made by me as the proper officer and is entitled to have full faith and credit

given it in every court and office within the United States."

The qualified certificate, which the commission issued after filing of the Company's application (of May 28, 1959) for leave to appeal, is dated June 15, 1959. It reads:

"The Detroit Edison Company, a New York corporation, was admitted to do business in this State on January 29, 1903. The corporation has filed all annual reports, paid the fees in connection therewith determined to be due as of this date, is in good standing in this office, and is duly authorized to transact business in Michigan.

"This certificate is in due form and made by me as the proper officer, is issued without prejudice to the commission to determine or redetermine additional fees for the current or prior years, and is entitled to have full faith and credit given it in every court and office within the United States."

CARR, J. (*concurring*). This case involves a dispute between the plaintiff and the defendant commission with reference to the amount of the annual corporate franchise fee for 1958 for which the plaintiff was liable. It is the claim of plaintiff that it filed its annual report with the defendant commission on May 13, 1958, and at that time paid a fee in the sum of $1,353,695.51. Subsequently it was notified that such amount was insufficient, and that the additional sum of $119,785.89 was owing. The latter amount was thereafter reduced by the sum of $656.64, and plaintiff paid under protest on December 30, 1958.

Following such payment plaintiff instituted the present action in the court of claims to recover the amount paid, alleging that said sum was unlawfully exacted from it, that it made the payment in order to secure a certificate of good standing from the defendant commission which it needed for use in con-

nection with certain contemplated financing operations, and that at the time of the payment under protest the commission was advised that suit for recovery would be brought.

On behalf of defendants motion was filed to dismiss the case for lack of jurisdiction, it being further asserted that a like question of liability was pending in another proceeding before the corporation tax appeal board, and that the redetermination order of the commission wherein the reduction above referred to was made had been set aside. It appears that the attempt to rescind such order was made after the instant case was instituted.

The motion to dismiss was granted on the ground that the court of claims was without jurisdiction to hear and determine the matter. It was the opinion of the presiding judge that under PA 1921, No 85*, as amended by PA 1954, No 153 (CLS 1956, §§ 450-.309, 450.310 [Stat Ann 1959 Cum Supp §§ 21.210, 21.210(1)]), plaintiff was limited to the remedies allowed by the procedure therein set forth. The specific sections cited provide for notice to a corporation subject to the provisions of the act as to the amount of its franchise fee liability, with the right to ask for a redetermination thereof by the commission within a period of 20 days after receipt of such notice. Review by an appeal board composed of the attorney general, the State treasurer, and the auditor general, may be claimed by either the commission or the corporation, with subsequent review by this Court. The amendments made further permitted a demand for a refund on the part of a corporation for an excessive payment made by it for franchise fee liability with the right of review by the appeal board and subsequently by this Court. Such methods of procedure were indicated to be

* CL 1948, § 450.301 *et seq.*, as amended (Stat Ann § 21.201 *et seq.*, as amended).

independent, it apparently being the intention of the legislature that either or both might be followed.

It is significant that the legislature did not specify that the remedies to a corporation, thereby afforded, would be exclusive. In view of the decision of this Court in *In re Consolidated Freight Co.,* 265 Mich 340, 348 (4 PUR NS 397), it may be assumed that the legislature intended that the review in this Court should be confined wholly to questions of law, in other words, an appeal in the nature of certiorari. If, therefore, the statutory procedure under the 1954 act, above cited, is exclusive, a corporation considering itself aggrieved by being required to pay the amount of the franchise fee as fixed by the commission has no remedy by which factual issues can be tried in court. Such result is not consistent with the provision of the general property tax law (CL 1948, § 211.53 [Stat Ann 1950 Rev § 7.97]) allowing the payment of taxes under protest, with the right to sue to recover such payments.

Had it been the intention of the legislature in the enactment of PA 1954, No 153, to deprive corporations of the right recognized in *Consumers Power Company* v. *Corporation & Securities Commission,* 326 Mich 643 (16 ALR2d 1084), to bring action in the court of claims to recover a franchise fee paid under protest, we think such intent would have been clearly expressed. The administrative procedures as provided in said amendatory act are not inconsistent with the right to sue in the court of claims, the review of such procedure being limited to questions of law only. The implied abrogation of a right analogous to that granted by the general property tax law to taxpayers may not be assumed. An intent to abolish a cause of action previously allowed to a given class must be clearly expressed. Such is the legislative policy in this State as evidenced by the workmen's compensation act and other statutes abolishing cer-

tain actions. We concur in reversal of the case and its remand to the court of claims for trial.

The sole question before us at the present time being jurisdictional in nature, any consideration of the controversy on its merits is not required. Issues of such character must necessarily be determined first in the trial court. It may be noted, however, that it is plaintiff's claim here that it paid the tax that it now seeks to recover *under protest,* and that it was, as a matter of fact, compelled to do so for the reason above indicated. The case presents questions not involved in *Consumers Power Company* v. *County of Muskegon,* 346 Mich 243, and *Spoon-Shacket Company, Inc.,* v. *County of Oakland,* 356 Mich 151, in each of which the tax for which suit was brought to recover was not paid under protest and under alleged duress or coercion of any kind, but solely for other reasons.

Reversed and remanded for trial.

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

EDWARDS, J. (*concurring*). On this record I concur with Mr. Justice BLACK that the court of claims had jurisdiction and that it should have proceeded to hearing of the claim on the merits since plaintiff's normal administrative remedy had been barred by the refusal of the commission to issue the redetermination called for by the statute.

The basic issue underlying this litigation is dealt with on the merits in my opinion in *Detroit Edison Co.* v. *Michigan Corporation & Securities Commission,* 361 Mich 150.

SMITH, J., concurred with EDWARDS, J.

KAVANAGH, J., did not sit.

CITIZENS' MUTUAL AUTOMOBILE INSURANCE COMPANY *v.* HOUTZ.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—FARM TRACTORS—OWNER LIABILITY.

   A question as to whether or not a farm tractor is a "motor vehicle" within the meaning of the owner-liability statute is not open for appellate consideration, where neither raised nor considered in the trial court (CLS 1956, §§ 257.33, 257.401).

2. AUTOMOBILES—FARM TRACTORS—CONSENT OF OWNER—RESPONDEAT SUPERIOR.

   Plaintiffs who proved negligence of operator of farm tractor and that it was being driven by such operator with the express or implied consent or knowledge of defendant owner made out a case against such owner without proof of liability under the doctrine of *respondeat superior*, it being assumed the tractor was a motor vehicle within the public-protective scope of the owner-liability statute (CLS 1956, §§ 257.33, 257.401).

Appeal from Hillsdale; Arch (Charles O.), J. Submitted June 13, 1960. (Docket No. 53, Calendar No. 48,340.) Decided September 16, 1960.

Case by Citizens' Mutual Automobile Insurance Company, a Michigan corporation, and Farn H. Salmon against J. Wallace Houtz for personal injuries and property damage arising from collision of automobile and farm tractor. Judgment for plaintiffs. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 246.
[2] 5A Am Jur, Automobiles and Highway Traffic § 619.

Lucien D. Walworth, for plaintiff Citizens' Mutual Automobile Insurance Company.

Dimmers, MacRitchie & Moes, for plaintiff Salmon.

Harold F. Bristol, for defendant.

BLACK, J. Plaintiffs' suit, for damages to person and property, arose out of an automotive collision which occurred in September of 1957 on a public highway of Hillsdale county. It was tried to the court without a jury and resulted in judgment for the plaintiffs in the sum of $1,526.02. Defendant has appealed.

Two questions are presented for review. The first is whether an ordinary farm tractor is a "motor vehicle" within purport and meaning of our owner-liability statute (see CLS 1956, §§ 257.33, 257.401 [Stat Ann 1952 Rev §§ 9.1833, 9.2101]).* The second question, assuming an affirmative answer to the first, is whether the defendant owner of the involved farm tractor was shown as being legally responsible to plaintiffs for the rather clearly established causal negligence of one Robert Sines, driver at the time of collision of such tractor.

Careful review of defendant's appendix, and of the original record brought here, discloses that the first stated question was neither raised nor considered in the court below. Recalling again that this is a court of review rather than trial anew, it must be held that the question is not open for appellate consideration. We proceed, as did the trial judge, on assumption that the tractor was a motor vehicle within the public-protective scope of said statute.

* To the point of this question, see *Haveman* v. *Kent County Road Commission,* 356 Mich 11.

The case was tried with principal address to plaintiffs' contention that Sines was an employee of defendant and was engaged in the course of such employment at the time his acts of negligence were committed. However, our recent decision in *Frazier* v. *Rumisek,* 358 Mich 455, considered, it was unnecessary that plaintiffs prove liability under the doctrine of *respondeat superior.* It was enough that plaintiffs establish that the tractor was, on the occasion, driven by Sines with the express or implied consent or knowledge of defendant. This they did.

We vote to affirm, with costs to plaintiffs.

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

KUKLA *v.* PERRY.

1. ATTORNEY AND CLIENT—GOOD FAITH.

   The attorney who assumes the double position of purchaser and confidential legal adviser is bound to observe the utmost good faith towards the party with whom he is dealing.

REFERENCES FOR POINTS IN HEADNOTES

[1, 15, 16] 5 Am Jur, Attorneys at Law § 48.
[2] 5 Am Jur, Attorneys at Law § 46.
[3, 4] 5 Am Jur, Attorneys at Law § 139.
[5] 5 Am Jur, Attorneys at Law § 140.
[6] 12 Am Jur, Contracts §§ 209, 213.
[7–9] 12 Am Jur, Contracts §§ 220, 221.
[10] 5 Am Jur, Attorneys at Law § 169.
[11, 12] 5 Am Jur, Attorneys at Law § 123.
[13] 13 Am Jur, Corporations § 1001.
[14] 13 Am Jur, Corporations § 1040.
[17] 3 Am Jur, Appeal and Error § 1211.

2. SAME—SKILL—LOYALTY—FIDUCIARY.

The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of highest trust and confidence.

3. SAME—BURDEN OF PROOF.

The burden is on the attorney to show full information and freedom from restraint on the part of the client in all dealings between the attorney and client.

4. SAME—EVIDENCE.

A transaction between an attorney and his client will be set aside if the attorney cannot produce evidence which puts the transaction beyond reasonable controversy or question.

5. ACCOUNTING—EVIDENCE—PURCHASE OF CORPORATE STOCK.

Trial court's findings that defendant attorney had appropriated to himself corporate stock for which plaintiff and her son had ultimately given 2 real-estate and chattel mortgages to secure note given for purchase of such stock and as security for other loans and that defendant should account to plaintiff for sums paid on the note and for bonus thereon *held,* supported by evidence adduced in suit for accounting which showed there had been an overreaching on defendant's part which constituted a fraud upon all other parties concerned.

6. CONTRACTS—ILLEGAL BARGAIN.

A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover for the performance that he has rendered thereunder or its value.

7. SAME—ILLEGAL CONSIDERATION—INSURANCE.

Defendant attorney who exacted written promise from mortgagors to purchase their insurance in connection with their business from defendant's insurance agency, not being severable, so tainted the agreement as to render void the entire consideration he furnished and rendered promises involved in the agreement unenforceable (CL 1948, § 514.9a).

8. SAME—INSURANCE—ILLEGAL CONTRACT.

A provision of a contract that is void by reason of statute prohibiting a creditor from insisting that debtor procure insurance from a particular insurance agent or insurer renders the entire contract void unless such provision is severable (CL 1948, § 514.9a).

9. SAME—CONSIDERATION—VOID IN WHOLE IF VOID IN PART.

If any part of a consideration is void the whole consideration is void as public policy will not permit a party to enforce a

promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal.

10. ACCOUNTING—ATTORNEY AND CLIENT—INCOME TAX SETTLEMENT.
Defendant attorney in suit for accounting was properly required to repay to plaintiff with interest the entire amount over and above sum actually paid in settlement of claim for income tax, where plaintiff had given him $6,000 and only $1,610.40 had been paid, and the alleged contingent fee contract had not been filed with treasury department as required, the defendant not being entitled to any fee where he represented that the entire sum was for tax settlement.

11. SAME—RESCISSION—ATTORNEY'S SELF-DEALING WITH CORPORATE CLIENT.
Provision of decree ordering rescission of contract whereby defendant attorney, as president, obligated defendant corporation to pay him rental on property hitherto purchased by the corporation and plaintiff notwithstanding cash loan made to corporation from plaintiff's relatives of more than sufficient to take care of corporate share of the contract *held,* not error in suit for accounting.

12. SAME—INVALID ASSIGNMENT—INTEREST.
Interest, except upon amount defendant had expended to cure default on contract which he had caused to be assigned to himself, was properly disallowed by trial court on an invalid assignment made by defendant attorney to himself while president of defendant corporation when rescission of the transaction was ordered in suit for accounting.

13. CORPORATIONS—OFFICERS—DIRECTORS—CONTRACT WITH CORPORATION.
A fiduciary relation exists between a corporation and its officers and directors and the latter may deal with the corporation only in good faith with all the material facts made known to the other directors, the burden of proving the fairness of any contract between a corporation and a director thereof is upon the party asserting its validity.

14. ACCOUNTING—OFFICERS—CORPORATIONS—SALARIES.
Reimbursement of corporation by defendant attorney of entire salary he had voted himself after illegally acquiring control of the corporation involved in accounting suit by other stockholder *held,* proper, where defendant neither showed what the reasonable value of his services as president and treasurer would have been or that anyone else had participated in the decision to vote him a salary.

15. SAME—CORPORATE STOCK—OVERREACHING BY ATTORNEY.
Shares of stock defendant attorney acquired from plaintiff for a token consideration are ordered returned to plaintiff in her suit for accounting without repayment of the consideration, where the circumstances of defendant's acquisition thereof involved an overreaching by defendant.

16. ATTORNEY AND CLIENT—OVERREACHING.
Overreaching by an attorney in his dealings with a client cannot be condoned.

17. APPEAL AND ERROR—REMAND—INSUFFICIENT APPENDIX BY APPELLANT.
Remand to circuit court in chancery is ordered for purpose of ascertaining damages sustained by plaintiff-appellee due to appellant's failure to print a sufficient appendix and exhibits, where prayer for such relief is made by appellee (Court Rule No 70, § 5).

Appeal from Wayne; FitzGerald (Frank), J. Submitted January 14, 1960. (Docket No. 75, Calendar No. 47,887.) Decided September 16, 1960. Rehearing denied October 10, 1960.

Bill by Mary Kukla, formerly Mary Pabis, against Alexander P. Perry and West Dearborn Motor Sales, Inc., a Michigan corporation, for accounting, cancellation of certain financial transactions, and for corporate receivership. Decree for plaintiff. Defendants appeal. Appeal of corporate defendant dismissed for lack of prosecution. Affirmed as to individual defendant and remanded for determination of certain costs.

Joseph H. McMicken and *Michael J. Hand,* for plaintiff.

Arthur C. Lumley (*Charles H. King,* of counsel), for defendant Perry.

SMITH, J. This is a suit in equity brought by the plaintiff, Mary Kukla, for various accountings by the defendant, Alexander P. Perry, for cancellation of various items of indebtedness and mortgages securing the same, and for placing in receivership

West Dearborn Motor Sales, Inc., control of which had passed from her to the defendant. The defendant has appealed from an adverse decree of the chancellor.

The plaintiff was one of the incorporators of West Dearborn Motor Sales, Inc., a Michigan corporation. The other incorporators were Ernest Pabis, the plaintiff's son, and Raymond Beeler. The original subscribed capital was $2,000, consisting of 100 shares of common stock, of which the plaintiff held 50, Ernest 25, and Beeler 25. Late in 1945 Ernest conceived the idea of entering the automobile sales business and was introduced to the defendant by a mutual acquaintance. Ernest sought the defendant to assist him in procuring a loan to build the showroom and establish the business. This the defendant did by securing a building loan from the Guardian Life Insurance Company.

Before proceeding further in our review of the facts, a basic issue must be considered. This is the nature of the relationship that existed between the defendant and the plaintiff from the time of the formation of West Dearborn Motor Sales, Inc., until it ceased doing business in 1954. The plaintiff maintains that the defendant was during all this period her attorney and counselor. This the defendant denies, claiming, in brief, that "he was not her attorney or the attorney for the corporation except in connection with certain specific transactions, and that he was not bound by the obligations of an attorney to his client when engaged in the various financial transactions here."

The chancellor concluded that the defendant was the attorney of the plaintiff and, later that of the corporation, "from the first contact." He held, in part, that:

"During all this time, the evidence is convincing that the plaintiff considered defendant Perry to be

her attorney and also the attorney for West Dearborn Motor Sales, Inc., of which he also became an officer and director in January of 1948. There is no evidence that defendant Perry ever did anything to negative the idea that he was their attorney; that, in connection with any of his financial and insurance transactions with plaintiff and the corporation, he ever advised the plaintiff or her son, Ernest Pabis, that his interests might be adverse to theirs or those of the corporation and that independent advice should be sought or other counsel consulted."

We agree, as the chancellor stated, that this relationship "was fostered rather than abated by defendant Perry. It did not wink on and off, dependent on whether he was negotiating for them, drafting documents for them, giving them advice, selling insurance to them, or engaging in a financial transaction with them." The layman does not see the attorney remove his counselor's hat and don that of the insurance man, or the shrewd businessman, or the lender of money. The uninformed regard the attorney as just that especially when he is met in the same surroundings, regarding the same business transactions, and without any semblance of warning that he is anything but their counselor. As we have before stated, the attorney who assumes the double position of purchaser and confidential legal adviser is bound to observe the utmost good faith towards the party with whom he is dealing. *Payne* v. *Avery,* 21 Mich 524; *Coveney* v. *Pattullo,* 130 Mich 275. The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of the highest trust and confidence. *Rippey* v. *Wilson,* 280 Mich 233. His position is not one "measured by the rule of dealing at arm's length." *Id.* at 243.

In addition to this, in all dealings between the attorney and the client, the burden is upon the attorney to show full information and freedom from restraint on the part of the client. If he cannot produce evidence which puts the transaction beyond reasonable controversy or question, it will be set aside and he will be held as a trustee for his client. *McIntosh* v. *Fixel,* 297 Mich 331. It is in this light that we must review the transactions which took place between the parties themselves and the corporation.

One of the first transactions was the formation of West Dearborn Motor Sales, Inc., preparation and filing of the articles of incorporation, preparation of the stock certificates and stock record, drafting the by-laws and minutes and related matters. Soon after this occurred the first transaction to be examined by us. In the fall of 1947, Beeler wished to leave the corporation and sought to dispose of his stock. The plaintiff and Ernest agreed to purchase his 25 shares for $35,000. In regard to financing this transaction, they consulted the defendant, who "thought it was outrageous, knowing the financial condition of the corporation and seeing the statements." The transaction was consummated, however, after the plaintiff and Ernest had given Beeler cash and automobiles amounting to $10,334. The balance of $24,666 was represented by a promissory note. The defendant agreed to lend this money to the plaintiff and Ernest but not by a direct loan. It was accomplished by a note executed by plaintiff and Ernest as makers and Beeler as payee, and by an agreement which contained a clause providing for the indorsement in blank by Beeler of his stock certificate. This note the defendant purchased from Beeler. The note and agreement were executed on June 10, 1948. It was on June 12th, however, that defendant paid Beeler the amount of the note and

also on that same day the stock certificate was indorsed. The certificate was kept by the defendant in his office, contrary to the agreement which provided that it be delivered to the plaintiff and Ernest.

Pending the purchase of this stock, the defendant was elected to Beeler's office in the corporation—vice-presidency. On January 5, 1949, defendant had 25 shares of stock of the corporation transferred on the stock records to himself. This stock "could only have been that originally held by Beeler." "There is no evidence that this was done as nominee for the plaintiff and Ernest Pabis; nor is there any evidence that it was by way of foreclosure of a pledge." For the moment, we will leave this transaction, to consider another closely related to it.

In December, 1949, the corporation was in need of working capital and, in addition, the plaintiff and Ernest were in default on their Beeler note, held by the defendant. The defendant agreed to rewrite the Beeler note to keep them out of default. A new note for $23,900 was executed by the plaintiff, Ernest, and the corporation. This figure was arrived at by deducting the 3 payments which had been made on the note and adding accrued interest. The new note was secured by 2 real mortgages, one on the corporation's property and one on a bar owned by plaintiff. In addition, a chattel mortgage was referred to in the note, but the defendant in his brief conceded that this is an error, for "no chattel mortgage was executed incident to this note."

On the same date the defendant issued to the plaintiff, Ernest, and the corporation, 2 checks in the amount of $10,000 and $8,000. In return the plaintiff, Ernest, and the corporation executed to the defendant a promissory note in the amount of $18,000. The plaintiff also executed 2 real mortgages, again on the property she owned on Michigan avenue on which the salesroom was situated, and on

the bar she owned. The corporation, in addition, executed a chattel mortgage on "all its property, including the business, good will, trade name, dealership franchise, leasehold interest in the Michigan avenue property, and all its stock, furniture, fixtures, tools and equipment." More regarding this chattel mortgage will appear later.

In scrutinizing the transaction involving the Beeler stock, the trial chancellor made a careful analysis of the conflicting and irreconcilable testimony, concluding as follows:

"From all the evidence presented, the court is convinced that Perry, from the date of the transfer, if not before, considered the stock his—at least, he so conducted himself in his dealings thereafter. The consideration therefor must have been at least satisfaction of the debt of the plaintiff and Ernest therefor, if not more. * * *

"Further, to hold other than that Perry took the stock in satisfaction of the indebtedness for its purchase is to brand Perry a converter of the stock.

"This court cannot give credence to the implausible story of defendant Perry that the 25 shares were given to him as consideration for his forbearing to bring action to collect on the Beeler note, with the understanding they would pay when able to do so. * * *

"If Perry's holding of the stock could be considered, originally, as a pledge thereof, the manner of its appropriation by him was a violation of the Michigan statute governing foreclosure of pledges. CL 1948, § 442.301 (Stat Ann 1959 Rev § 19.411). Unless the same be waived by agreement of the parties, a sale or disposition of pledged stock without notice to the pledgor and without a public sale is a conversion of the stock. *Feige* v. *Burt,* 118 Mich 243 (74 Am St Rep 390); *Wilkes* v. *Allegan Fruit & Produce Co.,* 233 Mich 215; *Holland Furnace Co.* v. *Allen* (CCA 6), 118 F2d 969.

"There was no pledge agreement covering these 25 shares of stock, hence no waiver contained therein; nor any other waiver shown of any statutory provision concerning it. The facts, as found by this court, are that the stock from Beeler was intercepted by Perry and kept by him, without any agreement or consent by the plaintiff to that effect. Later, as aforesaid, Perry had it transferred to his name and treated it at all times thereafter as his stock. The plaintiff and Ernest never did receive it.

"Accordingly, this court concludes and holds that there was no indebtedness to Perry to support the $23,900 note he obtained on December 22, 1949; and hence there was no basis for the purported mortgages exacted by Perry to secure payment of this nonexistent indebtedness."

Thus, the chancellor ordered cancellation of the note and mortgages and an accounting for the $3,000 received in partial payment of the note. The record amply supports such findings and there is no error therein.

We return to the instruments executed on December 22, 1949, relating to the $18,000 advance of working capital to the corporation. As part of this transaction the plaintiff, Ernest, and the corporation executed a promissory note for $18,000 to the defendant. In addition the plaintiff executed 2 mortgages on real estate owned by her. A chattel mortgage, previously described, was executed by the corporation. Although the loan was for $18,000, the chattel mortgage recited that it was securing $23,900, apparently to cover future insurance premiums. This chattel mortgage also contained the "following unusual covenant":

"It is further expressly agreed by the mortgagors, their heirs, executors or administrators, assigns and/or successors that they will cause the West Dearborn Motor Sales, Incorporated, to purchase all its insurance in connection with its business and

insure all installment sales contracts for fire, theft and collision originating from the business of West Dearborn Motor Sales, Inc., and/or as individuals, either directly or indirectly, during the term and life of this mortgage through the mortgagee, the said Alexander Perry; and it is also agreed that the West Dearborn Motor Sales, Inc., will submit proof to the mortgagee, his successors, or assigns, upon his request that there has been and continues to be a full compliance of this agreement; that a *failure* on the part of West Dearborn Motor Sales, Inc., and/or as individual or successors, *to fully comply with the said and within agreement shall be construed as a default in the terms and conditions hereof and shall be treated as in the case of any other default.*" (Emphasis supplied.)

This clause, made by virtue of the emphasized portion an essential part of the chattel mortgage, was inserted in direct contravention of the following statute:*

"Henceforth it shall be illegal for any person, firm or corporation to require, as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended, or whose obligation said creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurance agent or with a particular insurer. * * * Each violation of this section shall be a misdemeanor, punishable by a fine of not more than $100."

An additional factor should be observed with respect to this same transaction. At the time that the $18,000 loan was made, 2 checks were issued and part of the proceeds given to the corporation. The plaintiff charged that the defendant took back $3,000 of the money as a bonus for the loan; this was sub-

* CL 1948, § 514.9a (Stat Ann 1955 Cum Supp § 24.173[1]). For current similar law, see CLS 1956, § 500.2077 (Stat Ann 1957 Rev § 24.12077).

stantiated by the testimony of Ernest. The defendant denied the bonus. As between the conflicts in the testimony, however, the chancellor found that the plaintiff's version was the "correct one" and we are not persuaded that he was in error.

In summarizing his findings on this point the chancellor held:

"The court finds that the December 22d transactions were not arm's-length transactions. The court finds that, by use of his influence arising from the position of confidence and trust he enjoyed, defendant Perry obtained added security for the claimed indebtedness to him on the Beeler stock purchase. He did so by adding the corporation as an obligated party and securing the obligation by the chattel mortgage, which indebtedness, as later explained, the court is of the opinion no longer existed. Perry not only sought an unwarranted profit at the expense of the corporation (of which he was a stockholder and officer) by the bonus extracted on the $18,000 loan, but he did so at the expense of fellow stockholders and clients, to their detriment.

"The court concludes that the transactions were an overreaching by defendant Perry and constituted a fraud on all the other parties concerned, from which the plaintiff and the corporation are entitled to relief in this suit in equity."

Accordingly the court ordered the note and mortgages securing this loan to be canceled, and that the defendant account for all moneys received and credited against this indebtedness.

The defendant claims in this appeal that the $18,000 is subject to repayment since the promise to lend the sum is a lawful consideration, a separate and enforceable promise. The chancellor found otherwise. He held that:

"This agreement * * * was a part of the consideration for making the loan and cannot be sep-

arated from the whole transaction. The court finds that the transaction is not severable, as defendant Perry urges. If any part of such consideration is illegal, the entire consideration is void. *Nichols* v. *Waters,* 201 Mich 27; *LaFrance* v. *Cullen,* 196 Mich 726."

The agreement referred to, of course, is the illegal covenant extracted by the defendant, in the chattel mortgage securing this loan, to purchase insurance exclusively from his agency, the Alexander Perry Agency. The principles governing this problem are stated in the Restatement of Contracts:*

"A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value, except as stated in §§ 599–609."

In this case none of the exceptions to this general rule will permit the defendant to recover. Certainly, having been an attorney and an insurance agent for some years, he was not ignorant of the illegal nature of the covenant. This is not a matter of slight illegality. Nor can the defendant claim that refusal to enforce or rescind the contract will be harmful to those for whose benefit the statute was enacted. Moreover, this is not an unessential illegal provision, for, as the chancellor found, the defendant by express provision made default in this provision of the same effect as any default in the mortgage. The only possible basis for the defendant's argument is in section 607 of the Restatement:†

"Except as this rule is qualified by the rules stated in §§ 578, 599–605, where any part of a bilateral bargain is illegal, no promise can be enforced unless not only that promise is legal but a corresponding

* 2 Restatement, Contracts, § 598.

† 2 Restatement, Contracts, § 607 (emphasis supplied).

legal promise is, by the terms of the bargain, apportioned as consideration therefor, *nor even in that case if the illegal portion of the bargain is an essential part of it.*"

As has been noted, however, the chancellor found that this illegal covenant was an essential part of the mortgage and loan; that it was not severable. With this we agree, for it was a part of the entire plan of the defendant which was carried into effect on December 22d. The chancellor properly found that in these transactions the defendant was guilty of serious breach of his fiduciary duty, of overreaching, of an unwarranted profit at the expense of the corporation and its stockholders, of exacting an illegal covenant in the mortgage. That this covenant was an essential part of the loan to the corporation and the plaintiff cannot be seriously disputed. Thus the cases involving severable contracts (*e.g., Eastern Distributing Corp.* v. *Lightstone,* 257 Mich 184) are not in point. Rather the rule is as stated in *Nichols* v. *Waters,* 201 Mich 27, 38:

"If the void agreement not to settle without consent of the attorneys was a part of the consideration for the whole contract, or otherwise inseparably related to, modified or contaminated its other provisions so that with that provision stricken out the remainder could not stand as it read, a distinct, valid and enforceable contract, then it was not a divisible contract, the illegality of the objectionable clause permeated and vitiated it in its entirety and rendered the whole contract void."

Unless separable, of course, the contract is rendered void by the statute even though the statute does not expressly so provide. *Groves* v. *Jones,* 252 Mich 446; *In re Reidy's Estate,* 164 Mich 167. In this situation, we have consistently held that where an illegal contract is involved, the court will not enforce it or grant relief thereunder, particularly

where it is not the innocent party that is pleading to the court. See *Groves* v. *Jones, supra; Cook* v. *Wolverine Stockyards Co.*, 344 Mich 207; and cases cited therein. Our position may be best summarized by the following excerpt from *McNamara* v. *Gargett,* 68 Mich 454, 462 (13 Am St Rep 355):

"It is said, however, that Gargett received 25 bushels of oats, and ought not to be permitted to complain, as there is not a total failure of consideration. But the trouble is, the whole contract is tainted and avoided by the part of the consideration which is illegal. If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. 1 Parsons, Contracts, p 457; *Snyder* v. *Willey,* 33 Mich 483, 496."

The chancellor ordered the defendant to account to the plaintiff and the corporation for moneys received incident to these transactions. We find that this under the circumstances is amply justified.

There are several matters remaining which the defendant has brought before us for review, but in none of them has he presented a meritorious claim. The first involves a fee charged by the defendant as an attorney for the handling of an income tax matter for the plaintiff. In 1948 the plaintiff's personal income tax returns for the years 1943 through 1947 came under scrutiny. It was defendants' testimony that "the special agent demanded from them $20,000" for additional income tax, and a penalty for fraud. This additional tax, defendant testified was based upon higher mark-ups (for example, 120% in certain years) and net worth. The demand for such sum, upon such theory, was said never to have been made in writing, and it was more than a coincidence, plaintiff asserts, that $20,000 is the approximate increase

in income (not income tax) resulting from the application of 120% mark-up for the years 1946, 1947, and 1948. The audit changes, however, relate not to mark-ups, or fraud, but to disallowance of items of advertising, automobile expense, and depreciation. At the time the alleged settlement was made, plaintiff executed in favor of defendant 3 notes, each for $2,000, a total of $6,000. Defendant testified these notes were to cover the $1,610.40 tax liability plus his fee. There is, we will note, testimony from Ernest Pabis that at a later date defendant had told him the entire $6,000 was for tax settlement, and Mrs. Pabis herself testified that she paid $6,000 to Mr. Perry for the government by check, thus paying off the notes.

As between the conflicting versions of this matter, and the conflicting interpretations of exhibits, we are unable to conclude that the chancellor was in error. We note that the alleged contingent fee contract was not filed with the treasury department, as was required,* nor was there a statement submitted for service rendered in plaintiff's behalf, nor any receipt tendered the court for fee paid. We are constrained to agree with the chancellor that—

"the conduct of defendant Perry in this matter did not measure up to the standard required of an attorney toward his client. By such conduct, an attorney may lose his right to any fee. *Rippey* v. *Wilson*, 280 Mich 233, 245. This is the position in which the Court holds defendant Perry placed himself. Accordingly, it is the conclusion of the Court that defendant Perry be required to account for and repay to the plaintiff the $4,399.60 claimed as a fee in this tax matter, together with interest."

* Treasury Department Circular No. 230 (Revised), § 10.2(y)(3), 1947–2 Cum Bull, p 293, revised by Rev Proc 59–3, 1959–1 Cum Bull, p 801, § 4.06, pp 803, 804 and supplemented by Rev Proc 59–16, 1959–1 Cum Bull, pp 825, 826.

In November, 1954, two relatives of the plaintiff, Gertrude Pabis and Genevieve Pabis, were ready to put $20,000 into the business to help it recuperate since it was experiencing difficulty in securing a floor-planning arrangement. The defendant, however, refused to participate any further since, he maintained, new floor-planning would require his personal guaranty; therefore, he desired control of the corporation. The plaintiff, who wished to go to Florida, transferred to the defendant 35 of her shares, giving him now 60 shares or 60% of the stock. For this the defendant credited the plaintiff with $350 on her indebtedness. Having thus secured control, the defendant procured his election as president and treasurer of the corporation.

In August, 1951, the corporation had found it necessary to acquire adjoining property to provide easy access to the service portion of its sales and service building and for the display of used cars. Dr. Kadlubowski had agreed to purchase the property and resell it to the corporation, the plaintiff, and Ernest on land contract. In 1954 the corporation was in arrears to the extent of 4 months in their payments. Ostensibly to secure this land contract from foreclosure and preserve it for the corporation, the defendant, on November 15th, shortly after he took control, assigned to himself the corporation's interest for $5,648. He also paid to the doctor the amount, $880, necessary to make the payments current and correct the default. The defendant then leased the property to the corporation for $150 per month (while its land contract payments had been $220 per month). Yet on November 17, 1954, Gertrude and Genevieve transferred their $20,000, providing additional capital, which was used to pay off old bills amounting to some "eleven or twelve thousand dollars." It was the conclusion of the chancellor that the defendant had not sustained his burden of prov-

ing the fairness of the above-described transaction and ordered rescission thereof. In this we find no error.

Of the findings regarding these transactions, the defendant does not complain of the order of the chancellor that the assignment of the Kadlubowski land contract be rescinded and the defendant be reimbursed, with interest, for $880 expended to cure the default in the contract and, without interest, for the $5,648 paid to the corporation for its equity. The defendant does, however, claim interest on the latter sum. The chancellor denied interest since it was an "invalid assignment." With this we cannot disagree, for the same reasons that the chancellor ordered the defendant to reimburse the corporation for the salary which he voted himself. We quote briefly from his opinion regarding the land contract transaction and the payment to him of salary by the corporation:

"A fiduciary relation exists between a corporation and its officers and directors. The latter may deal with the corporation only in good faith, with all the material facts made known to the other directors. *Barber* v. *Kolowich,* 283 Mich 97, 104; *Baker* v. *Hellner Realty Co.,* 265 Mich 625, 631. Further, when questioned, the burden of proving the fairness of any contract between a corporation and a director thereof is upon the party asserting its validity. CLS 1956, § 450.13 (Stat Ann 1959 Cum Supp § 21.13).

"This court is of the opinion that defendant Perry has not sustained this burden. Again, this does not represent an arm's-length transaction. * * *

"This purported ownership of the majority of the stock of West Dearborn Motor Sales, Inc., did enable Perry to make himself the president and the treasurer of the corporation. As a result of this control, he was able to provide himself with a salary from the corporation. Not only was this salary traceable to an improper act by which he enabled himself to

obtain it, but it is further subject to attack because it was, in effect, voted to himself by himself, with no showing that anyone else participated in the decision. *McKey* v. *Swenson,* 232 Mich 505, 513–515. Defendant Perry made no showing as to what, if anything, would have been a reasonable salary for his services as president and treasurer."

The chancellor also properly ordered the return to the plaintiff of the 35 shares which defendant secured from her in November, 1954, in return for the repayment to him of the "token consideration" of $350.

To summarize, we will again quote from the chancellor's careful and extensive opinion, his concluding paragraphs fully treating the fundamental question:

"Speaking in general, it is patent that this litigation involves more than mere money and material things. It also involves the relation that must be required and protected between members of the Bar and the public.

"In no manner or way or to the least extent can an overreaching by an attorney in his dealings with a client be condoned. It may be said that almost every private transaction, as distinguished from professional representation, between an attorney and a client presents the possibility of overreaching by the attorney. While not *per se* illegal, every such transaction places the integrity of the Bar as a body in jeopardy. Accordingly, every such transaction must be scrutinized closely, and each is fraught with danger to the attorney involved.

"Herein, the whole evidence presents clearly, and without doubt, an overreaching by an attorney in his dealings with his clients. Whether it was born of a plan, from the start, to profit personally at the expense and injury of the clients, the court need not say. To point to the result that was unfolding is ample to illustrate the evil thereof. While serving as their attorney, defendant Perry was about to con-

clude the saga vested personally with ownership of stock control of the corporation, with the physical property of the corporation, and with the real property of the plaintiff, both the Michigan avenue and the DeSoto Bar properties—in short, with practically everything owned by the plaintiff and the corporation. This is not compatible with the concern for their well being the clients were entitled to expect and demand from one who undertook to represent them as their attorney."

The decree of the chancellor required further accountings between the parties. At that time a proper determination may be made, as well, concerning the funds which the defendant expended in connection with the Kadlubowski land contract.

The decree is affirmed, with costs to appellee. The appeal of West Dearborn Motor Sales, Inc., not prosecuted in this Court, is dismissed.

It is further prayed by appellee—

"that she be awarded the costs of this court and attorney fees, including costs of printing the appellee's appendix and punitive damages for appellant's failure to print a sufficient appendix and exhibits to fairly present the entire controversy."

For the purpose of making recommendations to this Court upon such prayer, the case is remanded to the circuit court in chancery.* See *Greenough* v. *Greenough,* 354 Mich 508.

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

SOURIS, J., did not sit.

* See Court Rule No 70, § 5. 347 Mich xxx.—REPORTER.

WYCKO v. GNODTKE.

1. STATUTES—CONSTRUCTION—LEGISLATIVE ACQUIESCENCE.
   A legislature legislates by legislating, not by doing nothing, not by keeping silent, by acquiescing in interpretations of statutes made.

2. DAMAGES—DEATH OF MINOR CHILD.
   The hitherto adopted rule for measure of damages suffered through the death of a minor child, his probable wages less the cost of his keep, is overruled.

3. DEATH—CONSTRUCTION OF DEATH ACT.
   The wrongful death act is remedial in character and should be construed liberally in favor of its beneficiaries (CL 1948, §§ 691.581–691.583).

4. SAME—PECUNIARY VALUE—COMPANIONSHIP.
   The pecuniary value of a human life is a compound of many elements, including mutual society and protection, companionship (CL 1948, §§ 691.581–691.583).

5. SAME—DAMAGES.
   Recovery of damages under the death act for the death of a minor is limited to pecuniary losses, including the child's wage-profit capability (CL 1948, §§ 691.581–691.583).

REFERENCES FOR POINTS IN HEADNOTES

[1] 50 Am Jur, Statutes § 326.
[2, 5] 16 Am Jur, Death § 216.
Measure and elements of damages for personal injury resulting in death of infant. 14 ALR2d 485.
[3] 16 Am Jur, Death § 57.
[4] 16 Am Jur, Death § 199.
"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death. 74 ALR 11.
[6] 16 Am Jur, Death §§ 216, 243.
Measure and elements of damages for personal injury resulting in death of infant. 14 ALR2d 485.

6. SAME—MINORS—DAMAGES—REMITTITUR—PREJUDICE.

Trial court's order of remittitur from jury's verdict of $14,979.50 for death of 14-year-old boy, of all in excess of $8,479.50, including $979.50 funeral and burial expenses *held,* error, as the verdict of $14,000 was not so patently oppressive as to indicate prejudice, the remittitur being occasioned by application of the child-labor standard of pecuniary loss, an outmoded fiction (CL 1948, §§ 691.581–691.583).

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

Appeal from Berrien; Robinson (Thomas N.), J. Submitted April 8, 1960. (Docket No. 12, Calendar No. 48,322.) Decided September 16, 1960.

Case by John E. Wycko, administrator of the estate of John L. Wycko, deceased, against Armand Gnodtke and Emil Gnodtke for damages arising from the death of a 14-year-old boy struck by automobile. Verdict for plaintiff. Order granting new trial unless remittitur filed. Plaintiff appeals. Reversed and remanded for entry of judgment upon verdict.

George S. Keller and *Theron D. Childs,* for plaintiff.

Seymour & Seymour (*Dale A. Seymour,* of counsel), for defendants.

SMITH, J. The case before us concerns, in general, damages for the life of a child negligently killed. Specifically it is whether or not a jury award of approximately $15,000 to the parents of a 14-year-old boy was excessive.

So far as the facts are concerned we will simply say that the deceased was walking, completely off a highway, with some other boy scouts. He was killed by an automobile owned by one defendant and driven by the other. The car suddenly ran onto the shoulder and hit 2 of the scouts. The plaintiff here is the administrator of the estate of one of them.

To substantiate the damage claims, testimony was introduced as to the boy's dependability, trustworthiness, and ambition. It was established that he helped his father and brothers work the family farm. Upon such evidence the jury awarded $14,000, plus $979.50 for funeral and burial expenses. The trial judge said it was too much. He said that the proofs justified an award of only $7,500, plus $979.50 for funeral and burial expenses, since no boy his age "could have had the earning capacity indicated by this verdict," and he ordered a new trial unless remittitur were filed.

Thus we come once more to a consideration of the problem of the "pecuniary loss" suffered by the parents of a deceased minor child. What we in Michigan have done, in common with many other courts, is to require the subtraction, from the hypothetical earnings of the child prior to his majority, the speculative costs of his rearing.[1] The difference, if any, we say is the parents' pecuniary loss. We have commented, in a prior dissenting opinion,[2] upon the unreal nature of the computation we of the courts (for nothing in the act so requires) have thus imposed upon the bereaved parents. In the present case, however, not only is the measure of damages once more under attack, but also its application by the trial court.

Lord Campbell's act[3] was the predecessor of the American wrongful death acts. It did not contain the words "pecuniary loss." It provided simply that "in every such action [for wrongful death] the jury may give such damages as they may think proportioned to the injury resulting from such death."[4] It was the leading case of *Blake* v. *Midland R. Co.*

1 *Courtney* v. *Apple,* 345 Mich 223, and cases there cited.
2 *Courtney* v. *Apple,* 345 Mich 223, 237 (dissenting opinion).
3 Officially, fatal accidents act, 1846, 9 & 10 Vict, chap 93.
4 Fatal accidents act, 1846, 9 & 10 Vict, chap 93, § 2.

(1852)[5] that interpreted this provision to limit the award of damages to the probable pecuniary loss to the beneficiaries, which limitation has been followed in some of the American statutes, including that of Michigan. We agree with Tiffany, however, that: "In spite of these differences in phraseology * * * the principles applicable to the measure of damages under all these acts is generally the same, *viz.*, that *the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.*"[6] We have, accordingly, considered cases from other jurisdictions in our analysis without differentiating according to the precise statutory wording employed.[7]

The interpretation of the requirement of pecuniary loss found in the early cases, which even today are followed as precedent, reflected the moral and legal standards of their times. In *Bramall* v. *Lees*,[8] the court considered the case of a 12-year-old girl,[9] negligently killed. Despite the fact that she had attained such age she remained, nevertheless, "living at home" and hence was "peculiarly then a burden to [her] parents." The father, however, succeeded in securing a verdict for 15 pounds. His theory was that in the course of a year or two the child would have gone into a factory "and taken back money as its earnings for the parents." A year or two in the future, however, was held "not sufficient to found an action." A rule nisi for a new trial was granted

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5 18 QB (A & E NS) 93 (21 LJ QB 233, 118 Eng Rep 35).

6 Tiffany, Death by Wrongful Act (2d ed), § 153, at p 323.

7 See, also, *Ensor* v. *Compton*, 110 Neb 522, 524 (194 NW 458, 459), where it was said, with reference to the Nebraska statute from which had been stricken the words "pecuniary loss": "The loss under the statute is still a pecuniary loss."

8 29 LT (OS) 111.

9 The original report does not mention the sex of the child. In *Chapman* v. *Bothwell*, 4 Jur (NS) pt 1, 1180, 1181, Sir Charles Crompton speaks as follows: "*Bramall* v. *Lees* (tried before me at the spring assizes at Liverpool in 1857), * * * was an action by the father for the death of a girl aged 12 years."

by the exchequer court. We find no further report. Apparently the case was settled on some such basis as the bar of our State so well knows in these child death cases. More fortunate was the father in *Duckworth* v. *Johnson*.[10] Here a verdict for 20 pounds was obtained "by reason of the son, a boy 14 years of age, having been killed by the falling of a wall in consequence of the defendant's negligence." The father, unlike Mr. Bramall, was able to show that his son had been working for 2-1/2 years. Chief Baron Pollock, after expressing the warning that this act was not intended "to enable persons to sue in respect of some imaginary damage" thought that the jury's determination of the "value of the boy's services, and the cost of boarding and clothing him" should not be disturbed, and the rule nisi to enter verdict for the defendant was discharged.

The judges so ruling we do not condemn. They were merely interpreting the statute in accordance with the social conditions of the day, which, presumably, the legislative body had in mind in the enactment of the legislation then under consideration. The rulings reflect the philosophy of the times, its ideals, and its social conditions. It was the generation of the debtor's prisons, of some 200 or more capital offenses,[11] and of the public flogging of women. It was an era when ample work could be found for the agile bodies and nimble fingers of small children. Defoe's England was not long past. He noticed with approval[12] that at Colchester and in the Tauton clothing region " 'there was not a child or in the villages round it of above 5 years old, but, if it was not neglected by its parents and untaught, could earn its bread.' " Halevy writes that the "number of children employed in factories was so

[10] 4 H & N 653 (29 LJ Ex 25, 157 Eng Rep 997).
[11] 13 Holdsworth, History of English Law, p 284.
[12] As quoted in Trevelyan, English Social History, p 322.

great in proportion to the adults that it was out of the question to restrict the working hours of children without restricting at the same time the hours of adults."[13] The apprenticeship of children to factory owners amounted to what Professor Trevelyan, Master of Trinity College, Cambridge, has described as "a slave traffic."[14] "The atrocities visited upon these boys and girls" it is reported in the Encyclopaedia of the Social Sciences,[15] "literally driven to death in the mills, form one of the darkest chapters in the history of childhood." Age limits were set in an effort to control the traffic. In 1816 the apprenticeship of parish children under the age of 9 was forbidden,[16] but the underground employment of children under 10 was not forbidden until 1843,[17] just 5 years before the passage of the progenitor of our statute. It is only against this somber background that we can fully understand the significance of the comment made in the *Bramall Case, supra,* that the girl was "living at home and getting nothing." At the age of 12 she was already long overdue at the mill.

This, then, was the day from which our precedents come, a day when employment of children of tender years was the accepted practice and their pecuniary contributions to the family both substantial and provable. It is not surprising that the courts of such a society should have read into the statutory words "such damages as they [the jury] may think proportional to the injury resulting from such death" not only the requirement of a pecuniary loss, but, moreover, a pecuniary loss established by a wage

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13 Cited in Trevelyan, English Social History, p 542.

14 Trevelyan, English Social History, p 483. See, also, 5 Encyc Brit 483 (1946 ed), describing the exploitation of very young children in industrial work.

15 Vol 3, Child Labor, pp 413, 414.

16 56 George 3, chap 139, § 7, cited in 13 Holdsworth, History of English Law, p 313.

17 Lord Shaftesbury's act, 5 & 6 Vict, chap 99, § 2.

benefit-less-costs measure of damages. Other losses were unreal and intangible and at this time in our legal history the courts would have no truck with what Chief Baron Pollock termed in *Duckworth, supra,* "imaginary losses." Loss meant only money loss, and money loss from the death of a child meant only his lost wages. All else was imaginary. The only reality was the king's shilling.

That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to "one of the darkest chapters in the history of childhood." Yet in other areas of the law the legal and social standards of 1846 are as dead as the coachman and his postilions who guided the coaches of its society through the dark and muddy streets, past the gibbets where still hung the toll of the day's executions. In most areas the development of the law has paralleled the enlightened conscience of our people. Examples abound. We no longer tolerate the intentional infliction of mental suffering. Illness from such cause is not, we now recognize, imaginary. A right to privacy is recognized, haltingly, it is true, but a start has been made. The exploitation of children by avaricious parents and guardians is no longer permitted, much less condoned. A combination of influences, all arising from the public condemnation of child labor, has resulted in almost universal State child-labor and compulsory school attendance laws.[18] In fact, our society, by one means or another, now attempts to keep children out of the general labor market. Yet there still exists in the law this remote and repulsive backwash of time and civilization, untouched by the onward march of society,

[18] See State Child-Labor Standards Bulletin 158, Combined Publications of United States Department of Labor and Bureau of Labor Standards, (1952).

where precedents we alone honor tell us that the value of the life of a child must be measured solely by the standards of the day when he peddled the skill of his hands and the strength of his back at the factory gates. We are not unaware of the argument in support of the proposition that legislative silence, subsequent to decisions interpreting a statute, must be construed as legislative acquiescence in the interpretation made. Our thoughts thereon will be found in our concurring opinion in *Sheppard* v. *Michigan National Bank*.[19] We there expressed the view, with appropriate citation of authority, that a legislature legislates by legislating, not by doing nothing, not by keeping silent.

It follows from the foregoing that we now reject, as prayed by appellant, the child-labor measure of the pecuniary loss suffered through the death of a minor child, namely, his probable wages less the cost of his keep, and all cases consistent therewith we now overrule.

What, then, is the pecuniary loss suffered because of the taking of the child's life? It is the pecuniary value of the life. We are aware, of course, that there are those who say that the life of a human being is impossible to value, that although we will grapple mightily with the value of the life of a horse,[20] of a team of mules,[21] we will stand aloof where a human is concerned and assign it no value whatever.[22] This

[19] 348 Mich 577, 599–603; see, also, *Van Dorpel* v. *Haven-Busch Co.*, 350 Mich 135, 145–149.

[20] *Ellis* v. *Hilton*, 78 Mich 150 (6 LRA 454, 18 Am St Rep 438).

[21] *Jones* v. *Texas & P. R. Co.*, 125 La 542 (51 So 582, 136 Am St Rep 339).

[22] *E.g.*, *Hyatt* v. *Adams*, 16 Mich 180, 191, 192: "For myself, I think * * * that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred. Among barbarous

kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening. But we cannot shirk this difficult problem of valuation. In the cases coming to us a life has been taken and it is our duty, as best we can, to put a fair valuation on it. In so doing, we will keep in mind that the act[23] is remedial in its character and our duty is to construe it liberally in favor of the beneficiaries.[24]

The pecuniary value of a human life is a compound of many elements. The use of material analogies may be helpful and inoffensive. Just as with respect to a manufacturing plant, or industrial machine, value involves the costs of acquisition emplacement, upkeep, maintenance service, repair, and renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter.[25] Moreover, just as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, so an individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and

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and half civilized nations, it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied. While this has been the natural result, it has at the same time been, to some extent, the *cause* of their inhuman customs, their barbarous manners and social degradation, and of the comparatively low estimate in which human life has been held among them.

"To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting."

[23] CL 1948, §§ 691.581–691.583 (Stat Ann 1959 Cum Supp §§ 27.711–27.713).—REPORTER.

[24] Accord, *Cook* v. *Rafferty*, 200 Wash 234, 240 (93 P2d 376).

[25] See Dublin & Lotka, The Money Value of a Man; Weinstein, Jury Verdicts—Excessive or Inadequate, 39 Mich SBJ (Jan) 11; Comment, 54 NW U L Rev 254.

protection, in a word, companionship.[26] The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain. We are, it will be noted, restricting the losses to pecuniary losses, the actual money value of the life of the child, not the sorrow and anguish caused by its death. This is not because these are not suffered and not because they are unreal. The genius of the common law is capable, were it left alone, of ascertaining such damages, but the legislative act creating the remedy forbids. Food, shelter, clothing, and companionship, however, obtainable on the open market, have an ascertainable money value. Finally if, in some unusual situation, there is in truth, or reasonably forthcoming, a wage-profit capability in the infant (an expectation of an excess of wages over keep, the measure heretofore employed) the loss of such expectation should not be disregarded as one of the pecuniary losses suffered.[27] In such case, however, the assessment is made as a matter of fact and not of fiction. It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created.

The jury heard the testimony and was charged by the court on what we have here termed the child-labor

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[26] See *Holder* v. *Key System*, 88 Cal App2d 925, 940 (200 P2d 98, 106), wherein it is held that "Although damages must be measured by the pecuniary loss to the plaintiffs, in fixing such loss the trier of the facts is not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of the loss of such noneconomic interests of a family as loss of comfort, society and protection." Also, *Bond* v. *United Railroads of San Francisco*, 159 Cal 270 (113 P 366, 48 LRA NS 687, Ann Cas 1912C, 50).

[27] *Cf.* Thoughtful discussion of related problem by EDWARDS, J., in *Thompson* v. *Ogemaw County Board of Road Commissioners*, 357 Mich 482.

measure of damages. As a result of its deliberations its award was for $14,000, plus funeral and burial expenses. This the trial judge set aside as excessive. He said that no child this age had a $14,000 earning capacity, but only one of $7,500, and ordered remittitur. This was error. The jury's award is not to be set aside unless so gross as to carry its own obvious proofs of prejudice. But an award of $14,000 is not so patently oppressive as to meet this test, judged by modern standards, not only in our own jurisdiction,[28] but elsewhere.[29]

Error, then, there was. But the error into which the court was betrayed was the direct and natural result of this Court's insistence upon the continued employment of the child-labor standard of pecuniary loss. Whatever the situation may have been in 1846, as the children brought home their wages from plant, mine, and mill, today their gainful employment is an arrant fiction and we know it. The trial judge may have been on sound ground as a matter of economics in saying that he didn't think the deceased child had a $14,000 earning capacity. But we are not dealing in economics. We are dealing with a fiction, the fiction that under today's conditions, not those of 1846, the minor child is a breadwinner. He is not. He is an expense. A blessed expense, it is true, but nevertheless an expense. We permit the use of the fiction that he is a wage-earner solely in an effort to accomplish a semblance of justice. If, indeed, this is our purpose, as it is, the fiction must be allowed to operate in both directions. We cannot uphold a jury verdict for zero dollars and zero cents pecuniary loss on the theory that the jury, after all, made its computations and they evenly balanced,[30]

[28] *Elliot* v. *A. J. Smith Contractors,* 358 Mich 398.

[29] See cases cited in *Courtney* v. *Apple,* 345 Mich 223, 237 (dissenting opinion).

[30] *Courtney* v. *Apple,* 345 Mich 223.

yet upset a $14,000 verdict on the ground that the computations made were not real after all, that we know better. If a fiction is to be employed it must not operate solely on a one-way track, to be respected if no recovery results from its employment, but exposed for the fiction it is, and thus rejected, if an award substantial, though still within the bounds of reason, is made.

The fiction now employed as the measure of pecuniary loss should be abandoned. It perpetuates an attitude towards the value of a child's life completely repudiated by modern legislation and the enlightened child-welfare policies of this jurisdiction. It does violence to the intent of the act, which is to grant a recovery whenever a death "of a person" is caused by the wrongful act of another. The child is a person and is not to be read out of the act by judicial acquiescence in the chief baron's theory that his life has no pecuniary value save as that of a wage-earner. The bloodless bookkeeping imposed upon our juries by the savage exploitations of the last century must no longer be perpetuated by our courts.

The order granting new trial subject to remittitur is reversed and the case remanded for entry of judgment upon the verdict of the jury. Costs to appellant.

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

CARR, J. (*dissenting*). The traffic accident from which this case has resulted occurred on a public highway in Berrien county on August 26, 1957. Plaintiff's decedent, a boy 14 years of age, was struck by an automobile, driven by defendant Armand Gnodtke and owned by the other defendant, sustaining injuries that resulted in immediate death. Plain-

tiff administrator brought action for damages claiming negligence on the part of defendant Armand Gnodtke, and based the right of recovery on the Michigan death act.*

The case was tried before a jury which returned a verdict in favor of the plaintiff in the sum of $14,979.50. It appears that the funeral expenses amounted to $979.50, and death being instantaneous no damages were included for pain and suffering on the part of decedent. Defendants moved for a new trial alleging as a basis that the verdict was excessive in amount. The trial judge agreed with the claim and ordered a new trial unless within 15 days from the date of the order the plaintiff should remit the amount of the verdict in excess of $8,479.50. From such order plaintiff has appealed.

The basic issue in the case is whether the trial judge abused his discretion in making the order in question. Involved in the controversy is the interpretation of pertinent provisions of the death act, above cited, and the further question whether the rule with reference to the computation of damages in a case of this nature, heretofore recognized in this State, should be modified in such manner as to permit the trier of the facts to award damages of a nature that hitherto have not been considered as within the scope of the statute. It may be noted in this connection that counsel for the plaintiff requested the trial court to charge the jury that in computing damages:

"You may take into consideration and employ as a yardstick or measure of damages, the investment of the parents in their child from the time of his birth, including prenatal, hospitalization and medical care of confinement, through infancy and schooling up to the time of his death, including funeral expenses."

* PA 1848, No 38, as amended (CL 1948, § 691.581 *et seq.* [Stat Ann 1959 Cum Supp § 27.711 *et seq.*]).

This the trial judge refused to do, charging the jury in accordance with the recognized interpretation of the death act. In substance the jury was told that the measure of damages would be the value of the services of John L. Wycko to his parent over and above the cost and expense of educating, clothing, and maintaining him, together with the payment of such other ordinary expenses as might be expected to be incurred, during the years before majority. Testimony was offered on behalf of plaintiff tending to show that his decedent was an industrious lad, that he did chores on his father's 10-acre farm, including the picking of berries and similar tasks, and that he was of good habits. He had not worked for others for pay. The record does not disclose how far he had advanced in school, nor that he was particularly gifted in any special regard. The testimony of others, parents of minor sons, was introduced as bearing on the question as to the value of the services that decedent might reasonably be expected to have rendered, before attaining majority, to and for the benefit of his father.

It is undisputed that at common law there was no right of action for damages for negligently or feloniously causing the death of a human being. With reasons for such rule we are not here concerned. In 1846 a statute was enacted in England (9 & 10 Vict, chap 93), known as Lord Campbell's act, which permitted the recovery of damages in such a case for the benefit of designated surviving relatives. Said statute did not in terms refer to damages being based on the pecuniary injury sustained by such relatives, but it was so construed by the English courts. The situation existing in Michigan was well stated in *Lincoln* v. *Detroit & Mackinac R. Co.*, 179 Mich 189, 195, 196 (51 LRA NS 710), as follows:

"We summarize the following from the American authorities: The death loss act of the English statute of 1846 (9 & 10 Vict, chap 93), commonly called 'Lord Campbell's act,' and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by the statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. The action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives; it is rather a new action given by CL 1897, §§ 10427, 10428 (How Stat [2d ed], §§ 13702, 13703), which can be brought, not for the benefit of the estate but solely for the benefit of the beneficiaries named in the statute."

The Michigan legislature at the session of 1848 enacted Act No 38 of said year, which was entitled:

"An act requiring compensation for causing death by wrongful act, neglect or default."

The first section of said act created the cause of action indicated by the title, and the second section directed that the action must be brought by and in the name of the personal representatives of the deceased person, and the amount recovered should be for the exclusive benefit of the widow and next of kin thereof to be distributed to such beneficiaries in the proportion fixed by statute for the distribution of personal property left by persons dying intestate. In every such action the jury was authorized to give such damages as might be deemed fair and just "with

reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person."

It thus appears that in the inception of the death act the damages were limited to compensation for the "pecuniary injury" sustained by the beneficiaries under such recovery. The phraseology of section 2 was modified to some extent by PA 1873, No 94. Said section as so amended (CL 1929, § 14062 [Stat Ann § 27.712]) read as follows:

"Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action, shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

The death act was in substance reenacted by PA 1939, No 297, above cited. The title and both sections of the original act were amended, and a third section containing a repealing provision was added. With the changes made in section 1 we are not concerned in the instant case. The title of the act was broadened to read as follows:

"An act requiring compensation for causing death and injuries resulting in death by wrongful act, neglect or default; to prescribe the measure of damages recoverable and the distribution thereof; and to repeal inconsistent acts."

For purposes of comparison with section 2 of the prior statute, we set forth section 2 of the re-enactment of 1939 as follows:

"Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death: *Provided, however,* That such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action for pecuniary injury resulting from such death shall be distributed to the surviving spouse and next of kin who suffered such pecuniary injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the total pecuniary loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total pecuniary loss suffered by the surviving spouse and each of the next of kin of such deceased person, as shown by the evidence introduced upon the trial of such case. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total pecuniary loss suffered by the surviving spouse and next of kin shall be distributed, and the proportionate share thereof to be distributed to the surviving

spouse and the next of kin. The remainder of the proceeds of such judgment shall be distributed according to the intestate laws."

It will be noted that the legislature of 1939, while changing some of the language of the statute as previously in force, and permitting recovery for pain and suffering and funeral expenses, did not change the basis for recovery of damages for the benefit of the class that by law would be entitled to inherit the personal property of the deceased had he died intestate. In fact, the language used emphasizes the intention of the legislature to allow damages solely for "pecuniary injury", resulting from the death, on the part of those entitled to participate in any award under the statute. The specific reference to the "pecuniary loss suffered by the surviving spouse and the next of kin" further emphasizes the fact that the legislature obviously did not intend to permit the recovery of damages on behalf of those entitled thereto on any other or different basis than as provided in the death act as originally enacted.

There is no opportunity for dispute as to the interpretation placed by this Court on the provisions of the death act, relating to the recovery of damages for the benefit of those sustaining a pecuniary injury, from the time of the enactment of the original statute in 1848 to and including the present time. In *Chicago & Northwestern R. Co.* v. *Bayfield,* 37 Mich 205 (16 Am Neg Cas 87), Chief Justice COOLEY, writing for the Court, pointed out that the damages recoverable for negligently causing the death of any person were required by the statute to be assessed with reference to the pecuniary injury resulting to those entitled to the damages when recovered. In accord therewith is *Mynning* v. *Detroit, L. & N. R. Co.,* 59 Mich 257, where it was said with reference to the provisions of the death act (p 262):

"It will be noticed that the language of the statute includes only such damages as may be recompensed by pecuniary compensation, not exceeding the statutory amount; and which should be based upon some well-defined facts or known circumstances in the case, —such facts as are susceptible of some proof under the well-settled rules governing the admissibility of testimony. The mental sufferings and injured feelings, or any other injuries which are not susceptible of being compensated by a money consideration to those who are entitled to the benefit of the statute, are therefore necessarily excluded as elements to be taken into consideration by the jury in determining the amount of damages in this class of cases: *Chicago & N. W. R. Co.* v. *Bayfield,* 37 Mich 205 (16 Am Neg Cas 87); 2 Rorer on Railroads, pp 860, 1167; 2 Thompson, Negligence, p 1289; 2 Sedgwick, Damages, p 537; *Board of Commissioners of Howard County* v. *Legg,* 93 Ind 523 (47 Am Rep 390)."

Of like import is *Hurst* v. *Detroit City Railway,* 84 Mich 539.

The rule of construction recognized in these decisions has been repeatedly followed in later cases, among which may be cited *Beach* v. *City of St. Joseph,* 192 Mich 296, 305; *Elliott* v. *Detroit United Railway,* 226 Mich 92, 97; *Covell* v. *Colburn,* 308 Mich 240. These decisions and numerous others of like import recognized that the pecuniary loss to be recovered for the benefit of those entitled thereto should be determined in the case of the death of a minor with reference to his prospective earnings until arrival at majority, less the expenses of his care, education, and support.

The construction placed on the death act by this Court from the time of the enactment thereof to the present is in accord with the general rule as recognized throughout the country in States having statutes of like nature to the Michigan act. In jurisdictions confining recovery to the pecuniary loss sus-

tained by the members of a particular class it is generally held that there can be no recovery for solatium or so-called sentimental loss. See annotation 74 ALR 11, 23 *et seq.* Among other decisions in this general field is *Michigan Central R. Co.* v. *Vreeland,* 227 US 59 (33 S Ct 192, 57 L ed 417, Ann Cas 1914C 176). There the action was brought under the Federal employers' liability act to recover damages for the alleged negligent killing of an employee engaged in interstate commerce. Commenting on the nature of the action under the statute it was said, in part (pp 68, 69):

"The obvious purpose of congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds,—'or in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' et cetera. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only.

"The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever

provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's act. This act has been, in its distinguishing features, reenacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death."

The above decision was cited and followed in *Sipes* v. *Michigan Central R. Co.*, 231 Mich 404, in which the action for damages was brought under the Federal statute. Plaintiff had verdict in the trial court, which was reversed in this Court on the ground that the amount thereof was excessive and not supported by the proofs. It was specifically recognized that the purpose of the statute, which may be regarded as analogous to State death acts, was to permit recovery for the "pecuniary loss" sustained by the widow and child of the decedent in said case.

It must be borne in mind that we are here dealing with a cause of action based wholly on a statute. Without legislative action there could be no recovery. The power of the legislature to prescribe the measure of damages, for whose benefit they may be recovered, and the nature and extent thereof, is not open to question. As has been repeatedly emphasized by this Court, from the original enactment of the death act to the present, we are concerned with the matter of damages for pecuniary loss. The measure of such damages is not the value of the life of the decedent. The legislature has not provided for damages based on any such theory. Obviously human life cannot be evaluated on a pecuniary basis. A human being is not property, and the measure of recovery suggested

by counsel for appellant and which this Court is urged to adopt is at variance with the purpose and theory of the statute as adopted by the legislature. This Court may not amend that statute. We are not invested with legislative powers. If the rule for the determination of damages as prescribed in the statute is to be extended to include items of an intangible nature, in other words to permit a recovery based on injury to feelings, loss of companionship, grief, or other intangible elements that cannot be measured on a pecuniary basis, the legislature alone may bring about such result. The arguments of counsel should be addressed to that body.

We come now to the crux of this case insofar as the present statute is concerned. The legislature of 1939 did not change the purpose or scope of the act except as expressly set forth therein. No provision was made for damages other than for pecuniary loss. The controlling provisions of the prior statute with reference thereto were continued in force and effect, and this the legislature did with knowledge as to the interpretation placed thereon by the courts of the State. *In re-enacting the basic provisions of the act it must be assumed that the legislature intended that such re-enactment should carry with it the interpretation thereof observed from the time of the original statute in 1848.* The rule, well established, is that when a legislative enactment that has been previously construed is adopted by a legislative body such adoption will be regarded as embodying the interpretation so given. Commenting on a situation of this nature, this Court, in *McEvoy* v. *City of Sault Ste. Marie,* 136 Mich 172, 182, 183, said with reference to the interpretation of a statute that in substance re-enacted a prior act:

"When this legislation was enacted, *Joslyn* v. *City of Detroit* [74 Mich 458] had determined the

construction of the act of 1879. If some other State had adopted this legislation, it would be held to have adopted it with that construction. Is it not clear that this same reasoning compels us to say that our legislature, in enacting this legislation, adopted the construction placed upon it in *Joslyn* v. *City of Detroit?*"

Recognizing the principle applied in the above case are *Gwitt* v. *Foss,* 230 Mich 8; *Jeruzal* v. *Wayne County Drain Commissioner,* 350 Mich 527. The recognized rule applicable to the re-enactment of the language of the prior statute leaves no question as to the intent of the legislature of 1939 in the redraft of the death act. Prior decisions of the courts left no question as to the interpretation placed on such provisions, and the language of the revised enactment is in accord therewith. The will of the legislature as expressed in the act of 1939 is controlling in the case at bar. That it was intended to prescribe the measure of damages in cases brought under the statute is clearly indicated by the language of the amended title. The declaration there set forth is significant, and the conclusion may not be avoided that the measure of damages so prescribed was that established by court decisions in previous cases construing the death act.

In the instant case the circuit judge submitted the case to the jury in accordance with such legislative intent, setting forth the nature of the damages that might be recovered in the action if the jury found in favor of the plaintiff, and specifying also the method for determining damages for pecuniary loss on the part of decedent's father. The charge as given was correct. However, it appears from the verdict returned that the jury did not follow the instructions. Our examination of the testimony in the case brings us to the conclusion, in accord with that of the trial

judge, that the proofs failed to justify the size of the verdict.

In granting the motion for a new trial unless plaintiff consented to a remittitur the circuit judge said in the opinion filed by him:

"The jury knew and understood that it was dealing with the rule of damages as specified in the statute and interpreted by the courts, *viz:* (1) Expenses of decedent's funeral and burial; and (2) the present value of decedent's earnings, if any, during the remainder of his minority, less the present value of the cost of his support during the same period, in such amount as found by the jury to be fair and just under the proofs submitted.

"There is no question involved in the amount of the funeral and burial expenses, undisputed in the sum of $979.90. This leaves $14,000 as the amount the jury found in damages under the second above-stated rule. This court does not hesitate to say that it believes this amount to be excessive under the rule. It can conclude only that the jury was influenced by sympathy surely, or possibly also by some other motive in obtaining such result.

"The writer of this opinion, based on his own experience and observation covering a period of upwards of 60 years, during which the purchasing power of money has progressively decreased, cannot bring himself to believe that any boy of the age of decedent, with all of the excellent personal qualities and traits of character that decedent is shown by the testimony to have possessed, and which are conceded, but with no special skills or qualifications for obtaining earnings above average in the community in which he lived, and with his background, could have had the earning capacity indicated by this verdict, even under modern conditions.

"Believing that damages in this case should be substantial, particularly on the basis of the proofs submitted, the court feels bound by what the proofs justify, rather than by what this jury has awarded,

and feels itself in duty bound to correct the verdict.

"Accordingly, an order may be entered granting defendants' motion for a new trial unless plaintiff shall within 15 days remit all of the amount of the verdict rendered herein in excess of $8,479.90."

We think the finding of the judge as indicated by the above language was fully justified. It appears from the transcript of the testimony filed as part of the original return to this Court that he followed the proofs carefully, having in mind the issues in the case and the proneness to sympathy on the part of a jury in an action of this nature. The supreme court of California in *Bond* v. *United Railroads of San Francisco,* 159 Cal 270 (113 P 366, 48 LRA NS 687, Ann Cas 1912C 50), cited by Mr. Justice SMITH in his opinion, in construing a State statute allowing the recovery of damages for death resulting from wrongful act or neglect, which statute differed materially from the Michigan act, took occasion to comment on the claim that under the rule recognized by the California court excessive verdicts might be rendered, and the duty of the trial judge in such cases, saying in part (pp 285, 286):

"With regard to the danger of excessive verdicts from this rule, we can only say that the remedy is practically committed entirely to the judge who presides at the trial in the court below. If he does his duty he will carefully weigh the evidence himself and will not allow a verdict to stand for its full amount if he believes it gives more damages than the pecuniary loss that it may be reasonably supposed the plaintiff will actually suffer by being deprived of the services, earnings, society, comfort, and protection of the child. The rule that allowance may be made for pecuniary loss from deprivation of society, comfort, and protection of a son is apparently settled and cannot now be disturbed. It is evident to us, however, from the cases that have come before us,

that it often leads to extravagant verdicts in which the jury, in fact, allow a supposed compensation for sad emotions and injured feelings, instead of confining their verdict to the actual pecuniary loss. While it cannot be said that comfort, society, and protection is never of any pecuniary benefit either in saving or gaining money or property, it must be admitted that the connection can seldom be traced from one to the other. Juries should be insistently cautioned not to allow compensation for the sorrow and distress which always ensues from such a death, nor for a pecuniary loss which is remote or conjectural in the particular case. The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. (See *Hale* v. *San Bernardino Valley Traction Co.,* 156 Cal 713, 716 [106 P 83]; *Wheaton* v. *North Beach & M. R. Co.,* 36 Cal 590, 591.) Practically, the trial court must bear the whole responsibility in every case."

We think it may fairly be said that the trial judge recognized the responsibility resting on him in the trial of the instant case and that his action in granting a new trial in the event of a refusal on the part of the plaintiff to consent to the remittitur was based on his familiarity with the proofs and the applicable principles of law in litigation of this nature. Generally speaking, the granting of a new trial rests largely in the judicial discretion of the trial court.

Deffenbaugh v. *Inter-State Motor Freight Corporation,* 254 Mich 180, 183; *Van Lierop* v. *Chesapeake & Ohio R. Co.,* 335 Mich 702; *Murchie* v. *Standard Oil Company,* 355 Mich 550.

Under the record in the instant case it may not be said that there was any abuse of discretion on the part of the trial judge in entering the order from which plaintiff has appealed. Such an order is not unusual in connection with motions for new trials in personal injury cases. In *Cabana* v. *City of Hart,* 327 Mich 287 (19 ALR2d 333), plaintiff's decedent, who was 16 years of age at the time, came to his death by coming in contact with a lamp post that was charged with electricity. The action was brought on the theory that defendant municipality was guilty of negligence in the maintenance of the post, and consequently was liable under the provisions of the death act. The case was submitted to the jury which returned a verdict in the sum of $7,483.63. On motion for a new trial an order was entered granting the motion unless plaintiff consented to a reduction to the sum of $5,000. That was done, and the verdict for the latter sum was sustained by this Court, it being found that it was supported by the proofs.

Under the proofs in the case at bar we think that the trial judge acted properly and that his conclusion that the evidence did not support the verdict returned by the jury was well-founded. There was no abuse of discretion on his part, and the order from which the appeal has been taken should be affirmed.

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

DALEY *v.* GRUBER.

1. BOUNDARIES—OCCUPATIONAL LINES—SURVEYS.
   Long established occupational lines are not to be disturbed by recent surveys.

2. SAME—IMPLIED AGREEMENT—ACQUIESCENCE.
   Courts will "imply" agreement from conduct of the parties, where there has been a settled boundary acquiesced in by both over a long period of time.

3. SAME—DEPENDENT DESCRIPTIONS—ACQUIESCENCE.
   A boundary line between property conveyed by a common owner of the property on both sides thereof and upon which other descriptions were dependent for their location, not being subject to disturbance as between the grantees of the common owner by reason of acquiescence, will likewise control the dependent descriptions.

4. SAME—ADVERSE POSSESSION—EVIDENCE.
   Finding of trial court of lack of adverse possession by defendants of strip of land the subject of a boundary dispute *held*, not contrary to the preponderance of the evidence.

5. APPEAL AND ERROR—REMAND—APPENDIX—DAMAGES.
   Case is remanded for determination of damages claimed by appellee because of inadequate compliance with court rule by appellants' appendix (Court Rule No 67, § 6 [1945], as amended).

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur, Boundaries § 80.
[2] 8 Am Jur, Boundaries §§ 72, 80.
Establishment of boundary line by oral agreement or acquiescence. 69 ALR 1430, 113 ALR 421.
[3] 8 Am Jur, Boundaries § 50 *et seq.*
[4] 1 Am Jur, Adverse Possession § 246.
[5] 3 Am Jur, Appeal and Error § 1211.

Appeal from Tuscola; Quinn (Timothy C.), J. Submitted April 6, 1960. (Docket No. 16, Calendar No. 47,902.) Decided September 16, 1960.

Ejectment by Minnie Daley against Norman Gruber and Irene Gruber regarding adjoining parcel of land. Judgment for plaintiff. Defendants appeal. Affirmed. Remanded for recommendation as to certain costs. See opinion on acceptance of report, 362 Mich 366.

Kern & Kern (*Roland O. Kern,* of counsel) and *Maurice C. Ransford,* for plaintiff.

Martin & Martin (*Fred Martin, Jr.,* of counsel), for defendants.

SMITH, J. This case involves a dispute between 2 neighbors over a common boundary. The ownership of some 3–1/2 feet of land is involved. The defendants have fenced the strip. Plaintiff asserts that they unlawfully appropriated it and brings an action in ejectment. In answer the defendants contend not only that they have title to the strip but, in addition, that they have held it adversely for the statutory period.

Defendants claim under a deed granting them land of the following legal description:

"A piece of land commencing at a point 16 rods east of southwest corner of east half of southeast quarter of section 7, town 12 north, range 7 east, thence east 64–1/2 feet, thence north 153 feet, thence west 64–1/2 feet, thence south 153 feet to beginning."

Plaintiff's deed describes her land as:

"Commencing at a point 328.5 feet east of the southwest corner of the east half of the southeast quarter of section 7, town 12 north, range 7 east, thence north 153 feet, thence east 64.5 feet, thence south 153 feet, and thence west 64.5 feet to place of beginning."

So far, at least on paper, there seems to be no basis for dispute. Defendants' property commences 16 rods (264 feet) east of "southwest corner of east half of southeast quarter." Plaintiff's property commences 328–1/2 feet east of "the southwest corner of the east half of southeast quarter," just 64–1/2 feet east of the point at which defendants' property commences. But behind all of this there exists a difficulty, the location of "the southwest corner of east half of southeast quarter." Theoretically, it ought to be 1320 feet east of the south quarter post. Indeed, at this point the surveyor engaged by plaintiff, Mr. Black, found an iron stake in the base of a maple tree. Theoretically also, it ought to be 1320 feet west of the southeast corner post. Actually, however, it was discovered, there was an overrun of 6.56 feet between the south quarter post and the southeast corner post.

All of the land involved, the east half of the southeast quarter, was once farmland owned by the father of plaintiff's husband. The father conveyed property lying to the west of defendants', the Reese school property. In 1912, plaintiff and her husband took title to the remaining farmland. For many years there has been a fence of some kind on the line running 264 feet to the east of the iron stake which has served to divide the Reese school property from the adjoining property. Plaintiff testified that, in 1909, there was an old board fence there, which was replaced by a wire fence, that, in fact, there has been a fence there for 90 years.

In 1939, without the benefit of a survey, plaintiff and her husband agreed to sell part of their property to defendants' predecessors in title; the portion was determined by measurement and, on it, a house was built which has been occupied by defendants ever since. In 1940, they gave a deed, employing the legal description that appears in defendants' deed. In

1941, defendants put a picket fence up on the old fence line, replacing the wire fence that was there, and planted a hedge 64–1/2 feet to the east of that line. Clearly, defendants intended these to mark the boundaries of their property. Mr. Gruber testified that the hedge was "on the east line." He testified that he did not claim more than 64–1/2 feet of frontage. When asked, "Do you claim more than 64–1/2 feet frontage now?," he said, "I do now, after all those years I have had it, since I have surveyed it but I didn't know it before."

Following her husband's death, plaintiff disposed of the farm and reacquired the land she now holds and on which she now resides.

There seems to have been no serious boundary dispute until a survey was made by the State highway department. As the trial court observed, "although the record does not clearly disclose what this survey unveiled, it is a reasonable inference from exhibit 4 and exhibit 13 (Black's survey of March, 1957, and Martin's survey of June, 1956) that it disclosed the overrun of 6.56 feet in the southeast quarter of section 7."

The overrun mentioned would place "the southwest corner of the east half of the southeast quarter" 3.28 feet east of the iron stake and would cause a corresponding dislocation of all boundaries reckoned from it.

Relations between the parties became strained. Defendants erected what is described in the record as a "Page wire fence." In the course of erecting this fence, which marked the extent of defendants' claim to the strip, they destroyed, plaintiff testified ("grubbed out" was her expression), in her absence, the forsythia, mock orange, lilac, hyacinths, and other flowers and shrubs she had planted. The fence erected appears from photographs in exhibit to be both hog-tight and bull-strong. It was equally effec-

tive, as the trial court remarked, to "prevent the passage of the dove of peace."

The trial court concluded that "long established occupational lines are not to be disturbed by recent surveys." This statement is correct and it was correctly applied to the facts before us. Difficulty arises when the descriptions in deeds of conveyance must be applied to the land itself. Uncertainties that too often are left unresolved at the time of conveyance give birth to bitter dispute. Boundaries designated by the parties on the ground conflict with boundaries described in their deeds. A recent study has indicated the variety of doctrine brought to bear by the courts and the confusion that has resulted.[1] Fundamentally, however, the courts have observed a consistent policy, the same policy that is behind statutes of limitation and the doctrine of *res judicata,* namely, the policy of repose. Their decisions have been guided by the principle that settled boundaries shall be allowed repose and shall not be disturbed. In many cases there are elements of estoppel and in others there are agreements of the parties. But if the lack of an agreement threatens a settled boundary we do not hesitate to "imply" agreement, sometimes from the conduct of the parties, or from surrounding circumstances,[2] just as we do in other cases.[3]

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[1] Browder, The Practical Location of Boundaries, 56 Mich L Rev 487; Browder, Boundaries, Description *v.* Survey, 53 Mich L Rev 647.

[2] *Tillman* v. *Hutcherson,* 348 Mo 473 (154 SW2d 104).

[3] Mr. Justice Holmes spoke with insight of conditions "implied" in a contract:

"You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place." Holmes, The Path of the Law, 10 Harv L Rev 457, 466.

In the case before us, we do not have acquiescence in a boundary line settled by agreement following a dispute, nor acquiescence for the prescriptive period. See *Hanlon* v. *Ten Hove,* 235 Mich 227 (46 ALR 788). What we have is acquiescence of the sort considered in *Maes* v. *Olmsted,* 247 Mich 180. It arises from the intention to describe in the deed the boundary marked on the ground by a common grantor. Although the 90-year fence above described is not on the eastern boundary of defendants' property, and thus on the line in dispute, it is on the western boundary thereof. Furthermore, it marks not only the intended point of commencement of the description of the defendants' property, upon which, in turn, plaintiff's is dependent, but it marked the boundary, as well, between land conveyed to the defendants by plaintiff and her husband, and the Reese school property, formerly owned.

The doctrine of acquiescence would not permit the line of the old fence, so marked, to be disputed as a boundary between adjoining owners. Nor, it follows, may it be disputed with respect to other descriptions dependent upon its location. Under these circumstances, after such a boundary has been so established, it must be presumed that descriptions in later conveyances by one of these parties, necessarily involving such boundary, are intended to refer to the boundary so located on the ground and not to some other imaginary line or point which might have been taken in the absence of such location. Lapse of time is not involved in the situation, nor a compromise line after dispute, but, rather, an identification of intended location by those who are to be affected.

With respect to the adverse possession asserted by defendants there was much testimony regarding a stone wall near the eastern boundary of defendants' lot, of picket fences, of gates and other para-

phernalia, and of their movements and locations through the years of each. We do not find that the trial court's holding of lack of adverse possession was contrary to the preponderance of the evidence.

Once again we have a litigant praying "special costs or award of special damages for inadequacy of appendix." For determination of defendants' compliance with Court Rule No 67, § 6 (1945), as amended,[4] we remand the case for the determination and recommendation to us described in *Greenough* v. *Greenough,* 354 Mich 508.[5]

The judgment of the lower court is affirmed. Costs to appellee.

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

[4] See 347 Mich xxii, 355 Mich xiv.—REPORTER.
[5] See opinion on acceptance of report, 362 Mich 366.—REPORTER.

RICHARDSON *v.* MESSINA.

1. BILLS AND NOTES—DEFAULT—HOLDER—DEFENSES AVAILABLE.
A party who acquires a promissory note after default thereon by the maker is not a holder in due course and is subject to the defenses of absence or failure of consideration, should they be established in whole or in part (CL 1948, §§ 439.30, 439.54).

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur, Bills and Notes §§ 431, 572.
[2] 46 Am Jur, Sales § 315.
[3] 46 Am Jur, Sales § 349.
[5] 46 Am Jur, Sales § 333.
[6] 8 Am Jur, Bills and Notes § 281.
[7] 46 Am Jur, Sales §§ 761, 762.

2. SALES—WARRANTY OF FITNESS—AUTOMATIC CAR-WASHING EQUIPMENT.

   Trial judge's finding in nonjury case that there was a warranty of fitness as to automatic car-washing equipment for which conditional sales promissory note had been given *held*, correct in action brought on the note (CL 1948, § 440.15).

3. SAME—IMPLIED WARRANTY—AUTOMATIC EQUIPMENT—FAILURE OF CONSIDERATION.

   Equipment sold as automatic in its operation is impliedly warranted to be automatic and a failure of automatic operation involves a failure of consideration for note given in payment for the purchase (CL 1948, § 440.15).

4. SAME—DISAVOWAL OF WARRANTIES—IMPLIED WARRANTY.

   A seller's disavowal of warranties, other than those specified, if any, is not inconsistent with a warranty of fitness implied by law.

5. SAME—WARRANTY—IMPLIED WARRANTY.

   A vendor who desires to avoid that warranty which the law implies must incorporate it in his contract or insert therein a warranty which will exclude all others (CL 1948, § 440.15).

6. BILLS AND NOTES—CONDITION PRECEDENT TO LIABILITY.

   The interlineation in a promissory note that payments were "to start 1 month after *all* equipment is operating" constituted a condition precedent to liability on the note.

7. SALES—RESCISSION—AUTOMATIC CAR-WASHING EQUIPMENT.

   The requirement of redelivery of material purchased under conditional sales contract as to automatic car-washing equipment which failed to function automatically, in order to effect rescission must be construed reasonably and, as so construed, rescission was properly found to have been effected under evidence adduced (CL 1948, § 440.15).

Appeal from Macomb; Carroll (Howard R.), J. Submitted April 14, 1960. (Docket No. 61, Calendar No. 47,940.) Decided September 16, 1960.

Assumpsit by R. B. Richardson and R. B. Richardson, Jr., copartners doing business as Richardson Company, against Vincent Messina, Walter Jabalee, Patrick Higdon and Helen M. Higdon, individually and as present or former copartners doing business as Town and Country Auto Wash, for sums due on conditional sales promissory note. Judgment for plaintiffs in reduced amount, the major portion

being denied because of breach of implied warranty and rescission. Plaintiffs appeal. Affirmed.

Moll, Desenberg, Purdy & Glover, for plaintiffs.

Sanborn & Monks, for defendants.

SMITH, J. The action before us is brought at law upon a conditional sales promissory note. Plaintiffs were not holders in due course thereof, the note being in default upon their acquisition thereof,* and are subject to the defenses of absence or failure of consideration, in whole or in part,† should such be established. The defense asserted is rescission for breach of warranty of fitness.

The controversy concerns automatic car-washing equipment. Prior to the purchase of the machinery hereinafter described, defendants relied upon manual operation. Plaintiffs' agent proposed to mechanize the operation through the use of a wheel washer that was represented to be "completely automatic and required no man power to operate," brush equipment to wash the sides and tops of the cars, also "completely automatic in operation," and "a completely new idea in car-drying equipment," namely, a flexible nozzle type which, also "was fully automatic in operation." Such equipment was contracted for, it being financed in part through the conditional sales note here sued upon. The machinery was installed in September of 1956. Upon the evidence before the trial judge he was well warranted in finding that serious trouble with the equipment was experienced from the very outset. The wheel washer, upon occasion, gouged tires, and threw the front wheels out of alignment, scraped paint off rims and

* CL 1948, § 439.54 (Stat Ann 1959 Rev § 19.94), *Miller* v. *Ashton,* 241 Mich 46.

† CL 1948, § 439.30 (Stat Ann 1959 Rev § 19.70).

streaked the body sides "because the steam wasn't shut off." The brushes damaged aerials and the top nozzle of the blower unit functioned improperly, also causing damage to cars being washed. Efforts were made at once to correct the operation of the equipment but troubles of various kinds persisted. Business was adversely affected. "Our customers were just going out and telling everybody that if you go in that building, why you are going in at your own risk, you might come out with part of your car or just half of it, and you don't know what you are going to come out with. That was the conversation around Mount Clemens." After about 1 month of this kind of operation, defendant Patrick Higdon, on October 17, 1956, wrote plaintiffs, in part, as follows:

"As this is a small town and we don't have much transient business we have to depend on repeat customers. In the last month we have paid over $200 for damages caused by this equipment. As word of this gets around it will result in the loss of much business. Therefore, you can readily understand why we cannot afford to keep this equipment and having exhausted all my time and patience I have come to the final decision that the blower and wheel washer must be removed and returned to you immediately. I am requesting your immediate attention in this matter."

Subsequent thereto further discussions were had and adjustments and changes made but difficulties continued. Defendants have made no payments upon the note. The wheel washer has not been used since May of 1957, although the blower has been used, with, however, manual operation, since that time.

The defendants count upon the letter of October 17th, above quoted in part, as a rescission. The plaintiffs assert, however, that defendants' contin-

ued use of the equipment thereafter is inconsistent with rescission.

There was, as the trial judge correctly found, a warranty of fitness. What these purchasers sought to purchase was automatic car-washing equipment. They wished to replace their manual operation with a mechanized operation. They did not get it, as the evidence amply demonstrates. Equipment sold as automatic in its operation is impliedly warranted to be automatic* and a failure of automatic operation involves a failure of consideration. Moreover, the seller's disavowal of warranties (other than those specified, if any), is not inconsistent with the warranty of fitness implied by law.

" 'Where one sells an article for a particular purpose, he thereby warrants it fit for that purpose.' *Blodget* v. *Detroit Safe Co.*, 76 Mich 538, 541. * * * If a vendor in such cases [where the entire contract is expressed in a writing] desires to avoid that warranty which the law implies, he must incorporate it in his contract, or insert therein a warranty which will exclude all others. Where a parol express warranty has been agreed upon outside the written contract, and that warranty is such as the law implies without any agreement, the vendee cannot be deprived of the benefit of this warranty by a provision in the contract that 'there is no agreement or understanding between the salesman and myself otherwise than herein mentioned.' Such a clause is not in conflict with the implied warranty which the law attaches to all such contracts." *Little* v. *G. E. Van Syckle & Co.*, 115 Mich 480, 483, 484.

Our conclusions in this respect, we might add, are fortified by certain provisions of the instruments before us. A condition precedent to liability on the note was the proper functioning of all equipment, the note bearing the interlineation, "payments to start

* CL 1948, § 440.15 (Stat Ann 1959 Rev § 19.255).

1 month after *all* equipment is operating." As the trial court correctly observed with respect to this language, it clearly meant that "the purchasers intended that all of the equipment would operate properly before payments were to become due."

But, appellants further argue, the purchasers cannot rely upon their attempted rescission because of their failure to return, and their continued use of the equipment thereafter. The problem presented arises out of the alternative courses of action open to one who has suffered fraud or misrepresentation. He may either affirm the transaction and sue for damages, or he may disaffirm, in which event he is entitled to be reinstated to the position he formerly occupied. The latter alternative is fraught with the hazards collateral to disaffirmance. He may not, of course, disaffirm and at the same time exercise rights of ownership and enjoy profits inconsistent therewith. At the same time there are many situations in which substantial use of the unsatisfactory article is necessary in order fully to examine, to make satisfactory adjustment, or, indeed, to prevent the accrual of even greater damage to the unfortunate purchaser, arising from the exigencies of his business. It may be unfeasible to remove *instanter,* because of physical or economic considerations. It does not lie in the seller's mouth to demand the utmost in nicety between permissible and impermissible use, for the perilous situation in which the purchaser finds himself arises from the imperfections of that furnished, for a consideration, by the seller himself. The ultimate inquiry at this point* is whether or not the purchaser has in truth "accepted" the article, or, on the other hand, abandoned (or in good faith sought to abandon) the article and surrender his interests therein. Thus we have held that

* See discussion in 2 Durfee and Dawson's Cases and Materials on Remedies, Restitution at Law and in Equity, pp 161–164.

where, as here, continued efforts, made in good faith and for a time deemed reasonable under all the circumstances, to remedy the difficulties encountered, rescission is not defeated by failure immediately to return.*

Nor was the purchaser's rescission defeated, upon the facts before us, by their failure to redeliver the equipment to the seller. The requirement of redelivery must be reasonably construed. Here the trial court found that the blower and wheel washer were "attached to the building and [that] manual delivery was not practical." The situation was analogous to that examined by us in *Bailey* v. *Perkins,* 224 Mich 27, wherein we held that an attorney's letter unequivocally tendering back certain property was a sufficient tender back to support rescission. Here the letter of October 17th, it will be recalled, closed with the words: "I have come to the final decision that the blower and wheel washer must be removed and returned to you immediately. I am requesting your immediate attention in this matter."

The judgment below is affirmed. Costs to appellees.

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

* *Felt* v. *Reynolds Rotary Fruit Evaporating Co.,* 52 Mich 602.

DAVIS *v.* KRAMER BROS. FREIGHT LINES, INC.

1. CONTRACTS—CHANGE OF TERMS.
   It is necessary to determine first what the terms of a contract are in order to recognize a change in the terms.

2. SAME—CONSTRUCTION.
   The meaning of a word used in a contract must be ascertained in the light of all of the relevant circumstances, not excluding, where helpful, the experience of courts and linguists, and including the meanings accepted by the parties.

3. SAME—CONSTRUCTION.
   Words used in contracts are not necessarily transparent and unchanging but may vary greatly in color and content according to the circumstances and the time in which used.

4. SAME—PRACTICAL INTERPRETATION.
   A practical interpretation of the terms of a contract by the parties is admissible as an aid in the determination of the meaning to be given legal effect, but a one-sided, self-serving interpretation by one party without acquiescence by the other party is ineffective to establish such practical interpretation.

5. PLEADING—MOTION TO DISMISS.
   A motion to dismiss for failure to state a cause of action comprehends all objections formerly raised by demurrer, pleas in abatement, or pleas to the jurisdiction (Court Rule No 18 [1945]).

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Contracts § 427.
[2] 12 Am Jur, Contracts §§ 247–249.
[3] 12 Am Jur, Contracts § 247.
[4] 12 Am Jur, Contracts § 249.
[5] 41 Am Jur, Pleading § 330.
[6] 41 Am Jur, Pleading § 332.
[7] 41 Am Jur, Pleading § 95.
[8] 1 Am Jur, Actions § 2.
[9] 1 Am Jur, Actions § 3.
[10, 11] 41 Am Jur, Pleading § 331.

6. SAME—MOTION TO DISMISS—WELL-PLEADED FACTS TAKEN AS TRUE.

All facts well pleaded must be taken as true for the purposes of a motion to dismiss such pleading for failure to state a cause of action (Court Rule No 18 [1945]).

7. SAME—CONTRACTS.

A declaration which properly alleged the making of a contract, its breach, and damages flowing therefrom would state a cause of action.

8. SAME—CAUSE OF ACTION.

A cause of action, for purposes of a motion to dismiss a declaration, means merely the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant.

9. SAME—JUDGMENT—EVIDENCE—DEFENSES.

A plaintiff's statement of a cause of action must not be confused with a plaintiff's right to judgment since the latter depends upon proof adduced and upon what defenses can be established against the cause of action asserted.

10. TRIAL—MOTION TO DISMISS—AFFIDAVITS—SUFFICIENCY OF DEFENSES.

Whether or not a defendant's defenses are ample is not a matter that is triable upon affidavits upon a motion to dismiss (Court Rule No 18 [1945]).

11. CONTRACTS—CONSTRUCTION—MOTION TO DISMISS—AFFIDAVITS.

Motion to dismiss truck lessor's action against lessee for sums claimed to be due under contract of lease *held*, to have been improperly granted, where plaintiff's counter affidavit controverted defendant's interpretation of the contract (Const 1908, art 2, § 13; Court Rule No 18, § 3 [1945]).

Appeal from Wayne; Culehan (Miles N.), J. Submitted June 7, 1960. (Docket No. 7, Calendar No. 48,522.) Decided September 16, 1960.

Assumpsit and case by Jack Davis, in his own behalf and as assignee of 5 others, against Kramer Bros. Freight Lines, Inc., a Michigan corporation, for sums due on oral contracts and leases of operating equipment. Dismissed on motion. Plaintiff appeals. Reversed and remanded.

Hugh K. Davidson and *J. Connor Austin,* for plaintiff.

Devine, Kent & Devine, for defendant.

SMITH, J. This case involves the interpretation of a contract.

The declaration charged that plaintiffs had entered into an oral contract with defendant, according to the terms of which plaintiffs were to be paid 65% of the gross revenue derived from transporting freight over highways, that they had performed the work contemplated, and that deductions had been made improperly from their earnings, in total amount, $950,000.[1]

It was further pleaded that, "from time to time, lease contracts in furtherance of said oral agreement" had been entered into. One of such contracts was set forth as an exhibit. It provided specifically how compensation should be computed.[2] The declaration charged, however, that unauthorized deductions (listing them by types) had been made from

[1] Actually, one plaintiff appeared pleading assignments from other persons of their claims.

[2] "The company hereby agrees that it will credit to the lessor a gross sum of 65% of the freight revenue the company shall receive from each load of freight transported on or by the vehicle leased hereunder. The lessor agrees that from such gross credit there shall be deducted the company's charges for picking up and delivering the freight transported at rates established and published by the company at each point of origin and destination. The equipment leased hereunder shall be used by the company at its discretion to pick up freight at origin or deliver same at destination without additional compensation to lessor. The compensation paid hereunder shall be the entire compensation for equipment rental, driver's wages, layover time, breakdown time, lodging allowance, vacation pay and any other payment or remuneration due or payable under any union contract. The total compensation paid during the existence of this lease shall equal or exceed the minimum compensation required to be paid under the particular union contract applicable.

"Lessor further agrees that should any power unit leased hereunder transport cargo in any trailer not the property of the lessor, that the lessor shall pay the company 3 cents per mile for each single-axle trailer pulled by such power unit and 4 cents per mile for each tandem-axle trailer pulled by such power unit."

sums due plaintiffs, by reason of which plaintiffs claimed damages.

Defendant thereupon moved to dismiss the declaration. It was asserted in the motion, supported by affidavits, that the items for which plaintiffs claimed reimbursement were "clearly excluded by the written instruments between the parties," and hence there was no issue of fact before the court "because plaintiffs are barred by the terms of their agreement from maintaining this action." It was asserted, in addition, that payments had been "received and accepted by plaintiffs without objections," in pursuance of accounts stated, and hence that "no further liability" rested upon the defendant.

Counter affidavit was filed, in response to which defendant filed answer controverting the interpretations placed upon the contract in the counter affidavit, urging that defendant's motion to dismiss be granted. After argument upon the motion it was granted, the court holding that, without charging fraud, "the plaintiff now is attempting to change the terms of the lease, or to place a different interpretation upon the same than has been applied in the past during the years of operation thereunder."

It will be unnecessary to discuss in detail all of the claims of improper deductions, since all involve the same legal principles. Plaintiffs assert, for example, that tolls paid by them are nowhere covered in the agreement and, since the defendant could specify the routes to be taken, it was "never intended that bridge and highway tolls should be charged to the lessors." Defendant replies that these are included within the words "operating costs" and thus to be assumed by the lessors. Plaintiffs reply that operating costs were meant only "to include such things as gasoline, oil, and maintenance of equipment." So the debate goes, not only as to this item, but others.

The trial court took the position that plaintiffs were "trying to change the terms of the contract." But before we can recognize a change in the terms of a contract we have to determine what the terms are. The initial issue on the contract is a matter of the interpretation of the words used. We know that a word, to use Mr. Justice Holmes' expression, is "flexible."[3] Its meaning must be ascertained in the light of all of the relevant circumstances, not excluding, where helpful, "the experience of courts and linguists,"[4] and including, as well, the meanings accepted by the parties. Thus, even the "dollar" in a promissory note cannot be taken as clear and definite under some circumstances;[5] nor, indeed, as our brothers in Minnesota have pointed out, the word "wife."[6] The difficulties inherent in the rule that we cannot disturb a "plain" meaning are discussed by Professor Wigmore.[7] The preoccupation of some with the search for words with fixed and immutable meanings recalls the experience of the brother of Ali Baba, who forgot the word "sesame" and was thus unable to open the door to safety.[8] Today words themselves are not so powerful, for we are well aware that words are not "transparent and unchanged," but "may vary greatly in color and content according to the circumstances and the time in which [they are] used."[9]

But, the defendant continues, the parties themselves have for many years acquiesced in interpretations of the contract at variance with those now asserted by plaintiffs. There is no doubt that evidence

3 *International Stevedoring Co.* v. *Haverty*, 272 US 50, 52 (47 S Ct 19, 71 L ed 157).
4 3 Corbin, Contracts, § 535, at p 16.
5 *Thorington* v. *Smith*, 75 US (8 Wall) 1 (19 L ed 361).
6 *In re Estate of Soper*, 196 Minn 60, 69 (264 NW 427).
7 9 Wigmore, Evidence (3d ed), §§ 2461, 2462.
8 9 Wigmore, Evidence (3d ed), § 2461, at p 187.
9 *Towne* v. *Eisner*, 245 US 418, 425 (38 S Ct 158, 62 L ed 372, LRA1918D, 254).

of practical interpretation by the parties is admissible as an aid in the determination of the meaning to be given legal effect. But the key word in this sentence is in the plural, "parties." A one-sided, self-serving interpretation by one party is of no help in interpretation. Acquiescence by the other party is required to establish a practical construction by the parties and this is precisely the thrust of appellants' claim of error. "The plaintiff and other brokers, fleet owners and owner-operators," states the affidavit in opposition to the motion to dismiss, "complained continuously of their treatment and the construction attempted to be placed upon said leases, and never acquiesced in the defendant's construction of the contract."

We have developed the above in some detail in order that the error of the court may be made clear. A motion to dismiss for failure to state a cause of action is manifestly within Court Rule No 18 (1945), which rule comprehends all objections formerly raised by demurrer, pleas in abatement, or pleas to the jurisdiction.[10]

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 giv-

[10] See Honigman, Michigan Court Rules Annotated, pp 147, 148.

ing 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.

What defendant actually sought to establish on its motion was that the trial of the cause of action asserted would be no more than an idle ceremony since plaintiff must inevitably lose. Why? Because, it was asserted, under the "clear" words of the contract (the meaning of such words being established, as well, by the practical interpretation placed upon them over many years by the parties themselves) plaintiffs were not entitled to recover. The counter-affidavit disputed such contentions.

What defendant is really insisting is that it has ample defenses, not that no cause of action has been stated. Such matters are not triable upon affidavits upon a motion to dismiss. They go directly to the merits of the cause pleaded. They are controversies the resolution of which may well (nothing more appearing) control the right to judgment. As to them, plaintiffs are entitled to trial upon the merits, and, in fact, to a jury trial, should they so demand upon issue reached. Michigan Constitution (1908), art 2, § 13; Court Rule No 18, § 3 (1945). See, on corresponding equity practice, *Mathews* v. *United Association of Journeymen,* 351 Mich 293. In the case before us a cause of action was stated. The declaration speaks for itself.

Reversed and remanded. Costs to appellants.

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

BOLLES *v.* EMPLOYMENT SECURITY COMMISSION.

1. UNEMPLOYMENT COMPENSATION—INTENT OF EMPLOYMENT SECURITY ACT.

   The intent of the employment security act is not to supply anyone a supplemental income but rather to furnish protection against the hazard of involuntary unemployment through the systematic accumulation of funds during employment to be disbursed to the involuntarily unemployed in times of need, to maintain purchasing power and to limit the serious social consequences of relief assistance (CL 1948, § 421.2).

2. SAME—INTENT OF EMPLOYMENT SECURITY ACT.

   The employment security act was not intended to place a premium on idleness, to stifle initiative, or to penalize a laid-off worker's attempt to make his time economically productive (CL 1948, § 421.1 *et seq.*, as amended).

3. SAME—SELF-EMPLOYMENT—DISQUALIFICATION FOR BENEFITS.

   The mere fact that an employee who has been laid off from his customary employment enters into self-employment in some occupation from which a living is customarily derived would not alone be sufficient to disqualify him from receiving benefits under the act irrespective of the amount earned at the self-employment (CLS 1956, §§ 421.27[c], 421.28, 421.29).

4. SAME—SELF-EMPLOYMENT—AMOUNT OF REMUNERATION—DISQUALIFICATION FOR BENEFITS.

   Two employees of motor manufacturer who were laid off from their jobs after having become qualified to receive unemployment benefits under the employment security act were not disqualified from receiving such benefits by reason of the fact that they opened a watch repair shop and each received an

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 10.

[3, 4] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 34.

Right to unemployment compensation of one working on his own projects or activities. 65 ALR2d 1182.

[5] 14 Am Jur, Costs § 23.

average of perhaps $1 a day, where they registered and were available for work, unsuccessfully sought other employment, and eventually returned to work for their employer (CL 1948, § 421.1 *et seq.*, as amended; CLS 1956, §§ 421.28, 421.29, 421.48).

5. COSTS—PUBLIC QUESTION—UNEMPLOYMENT COMPENSATION.
No costs are allowed in proceeding to determine whether or not plaintiffs who became self-employed during period of layoff were entitled to unemployment compensation benefits irrespective of amount of remuneration received, a public question being involved (CL 1948, § 421.1 *et seq.*; CLS 1956, §§ 421.28, 421.29, 421.48).

Appeal from Muskegon; Roth (Stephen J.), J., presiding. Submitted June 8, 1960. (Docket Nos. 17, 18, Calendar Nos. 48,169, 48,170.) Decided September 16, 1960.

Claims by Lewis F. Bolles and Charles J. Sabin, employees of Continental Motors Corporation, a Virginia corporation, for unemployment compensation benefits were denied by the Michigan Employment Security Commission and its Appeal Board. On certiorari, orders set aside and claims remanded for determination and allowance of benefits. Defendant commission appeals combined cases. Affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Jerry S. McCroskey,* of counsel), for plaintiffs.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *Arthur W. Brown,* Assistant Attorney General, for defendant commission.

SMITH, J. This case[1] involves unemployment compensation. In general terms the problem is this: How can a man use his time, when he is laid off, and still not lose his unemployment compensation? At

[1] Actually, there are 2 cases before us, combined for submission and argument on appeal to this Court.

one extreme the problem is clear. If he goes fishing, or sits on the porch and whittles, he is safe. But if he works, a real problem arises. Let us assume he is a good lawn mower. It is argued to us that if he goes to work as an employee of a lawn mowing company, he is still safe, but that if he mows lawns on his own, he loses his compensation. The cliche is that if he is self-employed he is not unemployed. Why not?

There is no dispute over the controlling facts. The appellees were employees of the Continental Motors Corporation, of Muskegon. They were laid off for lack of work in August and September of 1955. Each had been trained in watch repair work and each had at one time or another engaged in this occupation. Consequently, they pooled their resources, rented a building, remodeled and redecorated it, and opened it for business on November 1, 1955, under the name of Muskegon Jewelers. They advertised and they did what work they could get. It wasn't much. Each averaged about a dollar a day over the period in question.

Appellee Bolles returned to work on January 3, 1956, in response to an offer from the Norge Company, and at the time of the hearing (February 16th) had regained his old job with Continental Motors. Appellee Sabin was recalled by Continental just before Thanksgiving (but was laid off the day after Thanksgiving) and again on January 10, 1956. At the time of the hearing Sabin was tending the store in the morning, his mother in the afternoon, and Bolles after work in the evening.

During the period of 7 weeks' operation from October 30th through December 17th, the period here involved, the claimants reported a total gain each of around $60, although some doubt is cast upon the accuracy of such figure as "gain" since additional expenses of almost the same amount had not been

included in the computation. During this same period both appellees were actively seeking work in industry, both applied, unsuccessfully, for jobs referred to them by the employment security commission, and both drew their unemployment compensation.

It was the commission's position that neither man had been unemployed after the store was opened, and hence must make restitution of unemployment benefits received. The referee, and the appeal board, held in favor of the commission, the latter concluding that neither was "an unemployed individual and accordingly [neither was] * * * entitled to receive unemployment benefits for the period from October 30, 1955, through December 17, 1955."

The circuit court, upon appeal, reversed.[2] It was not the legislative intent, it was held, to discourage industry and self-help during a lay-off period, but, rather, the contrary. The claimants were held to be entitled to unemployment benefits, "provided their remuneration does not exceed the standards set forth in the act," and the cause was remanded to the commission for such determination. Appellants are before us on a general appeal, a motion for certification of the cause as involving more than $500 having been heard by the trial court,[3] the cause so certified, and no challenge thereto made in the circuit, or by motion in this court.[4]

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[2] The application of substantially undisputed facts to the statute is, of course, a matter of statutory construction and hence for the courts. *Ford Motor Co.* v. *Unemployment Compensation Commission*, 316 Mich 468; *Hubbard* v. *Unemployment Compensation Commission*, 328 Mich 444, 449.

[3] Michigan Court Rule No 60 (1945).

[4] It was stipulated below in the Sabin case that "should the [trial] court conclude on submission of said question of certification that less than $500 is actually involved in said controversy, that said appellee will waive any and all right of objection as to the timeliness of any delayed application for leave to appeal provided same is filed and served upon said appellant (*sic*) within 20 days after any such disposition or order pertaining to certification is made by the circuit judge."

The act to be construed is the Michigan employment security act.[5] Its counterparts, outgrowths of the depression of the early 1930's, will be found in one form or another in all the States of the Union. All courts would agree that the legislatures did not intend thereby to supply anyone a supplemental income. Rather, it was intended, in the words of the act, to furnish "protection against this hazard [one of involuntary unemployment]" through the systematic accumulation of funds during employment to be disbursed to the involuntarily unemployed in times of need, "thus maintaining purchasing power and limiting the serious social consequences of relief assistance."[6] On the other hand, all courts would undoubtedly agree that the act was not intended to place a premium on idleness, to stifle initiative, or to penalize a laid-off worker's attempt to make his time economically productive.

So much is agreed. What is not agreed, however, is the manner and capacity in which a laid-off workman can make use of his time without forfeiting his unemployment compensation benefits. It is the commission's position that the claimants before us were "both employed in the partnership business and were, therefore, neither unemployed nor eligible for benefits." Why the "therefore"? Because, it is said, a living is customarily derived from the activity they attempted, and hence they "cannot" be regarded as unemployed. So far I see nothing but words without reasons. I would assume that a "living is customarily derived" from any gainful occupation. If this be the test, an unemployed workman would be well advised not to seek work lest he find it in some occupation from which a living is customarily derived. Yet the act requires that he continue "seeking

[5] CL 1948 and CLS 1956, § 421.1 *et seq.* (Stat Ann 1960 Rev § 17.501 *et seq.*).

[6] CL 1948, § 421.2 (Stat Ann 1960 Rev § 17.502).

work"[7] to remain eligible for compensation, and occupations from which livings are not customarily derived cannot be numerous in a world in which most must work for a living.

But this does not exhaust the appellees' alleged errors. Rather than working for wages for another (the record does not disclose whether or not such jobs were available), they started out on their own. In other words, instead of being employed by another they became self-employed. Just at this point we are unable to comprehend how they may have hurt their status. The act does not forbid self-employment, as we shall see. Nor does the portion of the act defining how much an individual shall draw in compensation should he find work elsewhere[8] forbid self-employment or discriminate against it. The State would argue that the earnings from self-employment may be "profit or loss" but are not "remunerations." This we reject. The administration of the act is not controlled by accountant's definitions but by human need. Furthermore, the act itself defines remuneration as "all compensation paid for personal services,"[9] and personal services for pay are precisely what these self-employed persons did render.

Actually, what the claimants have run afoul of is not the act itself, not even literal words of the act, but a catch-phrase: "One who is self-employed is

[7] CLS 1956, § 421.28, subd (a) (Stat Ann 1960 Rev § 17.530, subd [a]).

[8] Section 27, subd (c) of the act provides in part as follows:

"Subject to the provisions of subsection (g) of this section, each eligible individual shall be paid his weekly benefit rate with respect to the week for which he earns or receives no remuneration or remuneration equal to less than 1/2 his weekly benefit rate, or shall be paid 1/2 his weekly benefit rate with respect to the week for which he earns or receives remuneration equal to at least 1/2 but less than his weekly benefit rate." CLS 1956, § 421.27, subd (c) (Stat Ann 1955 Cum Supp § 17.529, subd [c]).

[9] CLS 1956, § 421.44, subd (1) (Stat Ann 1960 Rev § 17.548, subd [1]).

not unemployed". Why not? Isn't the unemployed workman who tries to sell a few Christmas cards to better his lot still unemployed? True, he is self-employed in a technical, legal sense, as to his Christmas-card enterprise, but does this circumstance automatically disqualify him in some way? If so, it is not made clear to us why, particularly since the act itself provides that if any unemployed workman has some available form of self-employment, he must return to it when directed by the commission[10] or be disqualified from benefits. Yet if it is literally true, sled-length, that "one self-employed is not unemployed," his mere return to his customary self-employment (as directed) will automatically disqualify him from benefits as a matter of case law, whatever his remuneration therefrom may be. If he does not return, then, he is disqualified by the act, and if he does he is disqualified by the courts.

It is obvious that we must go deeper than such arguments if the act is to accomplish its remedial purposes and at the same time not be defeated by unwarranted depredations upon its resources. The answer may be found within its 4 corners. First to be noted are those sections of the act setting up the qualifying requirements for coverage under the act, *e.g.*, the claimant must have worked a certain number of weeks, earning wages in excess of a specified amount.[11] These and similar provisions are inserted in the acts, according to Larson and Murray's study of unemployment insurance, in order to "limit benefits to claimants who have had substantial and

[10] "An individual shall be disqualified for benefits: (a) For the duration of his unemployment in all cases where the individual has: * * * (5) failed without good cause to accept suitable work when offered him, or to return to his customary self-employment, if any, when so directed by the employment office or the commission." CLS 1956, § 421.29, subd (1)(a)(5) (Stat Ann 1960 Rev § 17.531, subd [1][a][5]).

[11] CLS 1956, §§ 421.28, 421.46 (Stat Ann 1960 Rev §§ 17.530, 17.550).

recent attachment to the covered labor force and ordinarily depend upon wages for their livelihood."[12] Such, also, is the purpose of the requirement (for eligibility to benefits) that a claimant be "able and available" to work, that he register for work, and seek work.[13] These, also, are indicia of genuine attachment to the labor market.[14] Riesenfeld's study of unemployment insurance[15] leads him to a similar conclusion, namely, that: "There is * * * widespread agreement that merely temporary, transitional or casual affiliation with the labor force does not suffice * * * and that more substantial connection must be looked for." The language of the cases reflects the same controlling consideration, *e.g., Dwyer* v. *Unemployment Compensation Commission,* 321 Mich 178, 188, which speaks of "persons who are genuinely attached to the labor market."

Without undertaking a detailed analysis of cases cited pro and con, reconcilable, in the main, on their facts, suffice it to say that the test properly to be employed is that of genuine attachment to the labor market. This test will serve to differentiate the business or professional man, who temporarily attaches himself to the industrial market, from the workman who seeks a temporary augmentation of funds in a period of lay-off. Here, in our opinion, is the explanation of such cases as *Phillips* v. *Unemployment Compensation Commission,* 323 Mich 188, in which compensation was denied a lawyer of 45 years' experience who, after undertaking industrial war work, had reopened his law office and thereafter, when laid off, sought unemployment benefit. This, at the most,

[12] Larson and Murray, The Development of Unemployment Insurance in the United States, 8 Vand L Rev 181, 215.

[13] CLS 1956, § 421.28 (Stat Ann 1960 Rev § 17.530).

[14] See Freeman, Availability—Active Search for Work, 10 Ohio St LJ 181.

[15] Riesenfeld, The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage-Loss, 8 Vand L Rev 218, 232.

was transitional industrial work. To be contrasted is the situation in *People* v. *Nest,* 53 Cal App 2d Supp 856 (128 P2d 444), in which a workman tried, with even less success than the claimants before us (Mr. Nest lost some $1,200 in the venture) to start a clothing business. The court stressed his ability to work and his continued availability for work (*i.e.,* his genuine attachment to the labor market), finally concluding that he had not offended the unemployment insurance act in certifying as to his total and partial unemployment. It was not the intention of the legislature, held the court, "to discourage citizens out of employment from making early and earnest attempts to re-establish themselves economically to avoid becoming or continuing to be charges on society." *Id.* at 860 (128 P2d at 446). Thus the *Phillips* and *Nest Cases,* while reaching opposite results, are not in conflict.

The claimants before us, subsequent to their layoff, continued seeking work. Each of them accepted referrals to other industrial employment. Each was ready, willing, able, and anxious to continue work in industry. They were genuinely attached to the labor market, neither casually nor as a matter of transition. Their meager efforts to augment their unemployment checks did not break their genuine attachment to the labor market. They were "unemployed" within the meaning of the act (section 48[16]), they were eligible under the act (section 28[17]), and they were in no manner disqualified for benefits (section 29[18]). The circuit judge's disposition of the case was correct. Both the language of the act and its obvious intent foster and encourage industry and self-help rather than idleness and inactivity.

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[16] CLS 1956, § 421.48 (Stat Ann 1960 Rev § 17.552).
[17] CLS 1956, § 421.28 (Stat Ann 1960 Rev § 17.530).
[18] CLS 1956, § 421.29 (Stat Ann 1960 Rev § 17.531).

The order below is affirmed. No costs, a public question.

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

GREENBERG *v.* GLATTKE.

1. BILLS AND NOTES—PAYEE AS MERE PROMISEE.
   A payee of a negotiable instrument who takes as a mere promisee, not as a purchaser or as a holder in due course, may properly be confronted with the defense that there has been a material breach of performance undertaken (CL 1948, § 439.60).

2. SAME—DEFENSES—FAILURE OF CONSIDERATION.
   Payee of a negotiable instrument who might be found to be a mere promisee and not a holder in due course, because he failed to assign an account *held,* not entitled to summary judgment under record in which affidavit opposing motion for summary judgment disclosed his agreement to make such an assignment (CL 1948, § 439.60).

Appeal from Saginaw; Quinn (Timothy C.), J., presiding. Submitted June 8, 1960. (Docket No. 30, Calendar No. 48,044.) Decided September 16, 1960.

Action by Matt Greenberg, doing business as Matt Greenberg Lumber Sales, against Benjamin L. Glattke, the indorser of a promissory note. Summary judgment for plaintiff. Defendant appeals. Reversed and remanded.

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur, Bills and Notes § 572.
[2] 41 Am Jur, Pleading § 342.

B. J. Tally (*Norman J. Miller,* of counsel), for plaintiff.

Frank L. Talkow, for defendant.

SMITH, J. This is an action against the indorser of a promissory note. The issue arises upon a motion for summary judgment.

It appears from the record that Howard Industries, Inc., was indebted for the purchase of lumber to plaintiff, Matt Greenberg, who was pressing for payment. Howard J. Doss, president and largest stockholder of Howard Industries, Inc., offered to purchase the account from Greenberg. Pursuantly, he executed 2 promissory notes in favor of Greenberg, as payee, one of which was indorsed by Benjamin L. Glattke, who, also, guaranteed payment thereof. The indorsed note was unpaid upon maturity, and this action was commenced against Glattke. A motion for summary judgment, supported by affidavit, was filed. In opposition, defendant filed an affidavit of merits, stating that:

"It was agreed that Matt Greenberg should assign his account to Howard J. Doss and Benjamin L. Glattke for the sum of $2,500, payable by Howard J. Doss in 90 days. That in the event that Howard J. Doss did not pay said sum, then he, Benjamin L. Glattke, would pay said sum for and in behalf of Howard J. Doss. Thereupon the parties did prepare 2 notes, same being signed by Howard J. Doss as maker thereof, and made payable to Matt Greenberg Lumber Sales. That on one of the notes deponent did sign on the face, or did initial same, that on the other he signed on the back of said note. That Matt Greenberg did not assign said indebtedness at any time, nor has he done so up to the present time."

It was argued in support of the motion that the matters raised in the affidavit of merits would be

inadmissible upon trial as oral allegations attempting to change the written instrument. The circuit judge, without opinion, granted the motion for summary judgment and the case is before us upon a general appeal.

The defendant argues that the agreement to assign collateral, allegedly made at a meeting between Doss, Greenberg, and himself, was never carried out, thus depriving him of recourse on such assignment against the debtor, Howard Industries, Inc. Plaintiff, on the other hand, asserts that he occupies the position of a holder in due course, as against whom the defense asserted is unavailing.

We have several times held that a payee may be a holder in due course. *Price* v. *Klett,* 255 Mich 354. This, however, does not mean that all payees are holders in due course. Since the extraordinary protection given holders in due course of negotiable instruments seems to be a specialized application of the same principle that underlies the doctrine of *bona fide* purchase of property generally, the essential question as to negotiable paper, in the determination of the payee's status, is whether he takes as a purchaser or as a mere promisee. See *First National Bank of Los Angeles* v. *Lovell H. Turnbull Co.,* 257 Mich 295; Aigler, Payees as Holders in Due Course, 36 Yale LJ 608. If the payee takes not as a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable,* one of which, of course, is material breach of performance undertaken. Upon the record before us a finding would be justified that plaintiff took as a promisee, which, in the terms of a promissory note he would appear to be, and not as a purchaser.

* Negotiable Instruments Law, § 60, CL 1948, § 439.60 (Stat Ann 1959 Rev § 19.100).

There is no other error in the case. Reversed and remanded for proceedings not inconsistent herewith. Costs to appellant.

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

PEOPLE *v.* JACKSON.

CRIMINAL LAW—ATTORNEY GENERAL'S OPINION—CONFRONTATION OF WITNESSES—TURNING OVER COURT RECORDS TO SUCCESSOR IN OFFICE.

It was not error in prosecution of justice of the peace for failure to turn over court records to successor in office for prosecution to read to jury, without calling the attorney general to the stand, a letter from the attorney general to the auditor general relative to such transfer of records, where the letter which had been examined by defendant when his successor made demand for the records was thus presented to jury for the sole purpose of illustrating the nature and circumstances of the discussion between the parties at the time of the demand and not for the purpose of showing what the law was (CL 1948, § 750.480).

Appeal from Monroe; Weipert, Jr. (William J.), J. Submitted June 9, 1960. (Docket No. 39, Calendar No. 48,313.) Decided September 16, 1960.

William H. Jackson, a justice of the peace, was convicted of refusal to turn over court records to his successor in office. Affirmed.

Williamson & Sawyer (*Robert N. Sawyer,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

20 Am Jur, Evidence § 954.

SMITH, J. This case involves the failure of one justice of the peace to transfer complaints and warrants to his successor in office.

The defendant, William H. Jackson, justice of the peace for Frenchtown township, Monroe county, was defeated at the polls in the 1957 spring election by James J. Basile.

Prior to Basile's taking office the defendant transferred approximately 700 cases to other justices of the peace in other townships in the county. Consequently, when the newly-elected justice, Basile, assumed office it was depleted of large numbers of cases. Those remaining were turned over to him. Demand (actual or constructive) for the balance was made at this time.

Defendant, however, reassumed office by reason of appointment, on August 13, 1957, to succeed the late John Bayne, also a justice of the peace for Frenchtown township. The cases formerly transferred by defendant to other justices of the peace were then retransferred to him and were in his possession and control on February 18, 1958. At this time further demand was allegedly made upon defendant for the files and records so transferred and retransferred, which demand was again refused. Following this incident Basile signed a criminal complaint, on the basis of which a warrant was issued and trial had, resulting in defendant's conviction and sentence.* We granted leave to appeal, our review being limited to the question "Whether receipt in evidence of the copy of the attorney general's opinion (dated Febru-

* Section 480 of the Michigan penal code provides:

"Any officer or agent of this State or of any county, city, village, township or school district within the State, into whose hands money, books, papers, evidence of debt or other property shall come by virtue of his office or agency, who shall wilfully refuse or neglect, on demand, to deliver the same to his successor in office or to the person authorized by law to receive or have charge of the same, shall be guilty of a felony." CL 1948, § 750.480 (Stat Ann 1954 Rev § 28.748).

ary 10, 1958) and reading of same to the jury constituted reversible error?"

We will so restrict our discussion of the case. The question put arises in this way: It was Basile's contention that upon February 18, 1958, when defendant had in his hands again the files and records he had transferred, he refused to deliver them, although a demand therefor was made. The making of this demand, we note, was vigorously denied by defendant. In support of his version of the incident, Basile asserts not only that he made a formal demand, but that he showed defendant the letter in question, that defendant scanned it page by page, as though reading it, and returned it to him with certain remarks. All of this was put before the jury, including the contents of the letter itself.

Appellant objects that the reading of the letter to the jury was reversible error in that it violated the defendant's right of confrontation with the witnesses against him (the attorney general was not produced), that the letter was not "proved to be an official record, nor is it nor was it proved to be a record made in the regular course of business," nor was it expert opinion, but rather "unfair and prejudicial hearsay," that it usurped the function of the court in declaring the law, and that undue emphasis was placed upon it as having its origin in "some higher, recognized authority," following an official investigation.

All of this overlooks the purpose for which the letter was employed and the restrictions placed upon it by the circuit court in permitting it to be received into evidence. It was neither offered nor received as evidence of guilt or innocence, or of establishing the law applicable. It was tendered and accepted for the sole purpose of illustrating the nature and circumstances of the discussion between the parties at the time of the alleged but controverted demand

made on February 18th. As the circuit judge put it in his opinion denying the motion for new trial (the emphasis is that of the circuit judge):

"Ground 6 misstates the reasons and limitations under which evidence concerning the copy of a communication from the attorney general to the auditor general was admitted. Such was admitted, not to show what the law concerning the turning over of justice court cases was—the court carefully ruled that out—but solely as relating to the complaining witness' claim that he *did* make demand on defendant, basing such demand on *his* version of the law, right or wrong, and that defendant knowing what such demand was spurned it. Reference to the attorney general's letter was allowed for whatever light it might or might not shed on those questions only; the court instructed fully on the subject and the letter was not allowed to be taken into the jury room.

"To say that its limited and indeed necessary use violated the constitutional right of defendant to be confronted with witnesses would be to say, if the complaining witness had instead showed defendant a copy of the statute books (which would have served the same purpose) that he should produce in court the members of the legislature enacting the statute. To say that it was inadmissible 'as a public record without proof of its official character' ignores the fact that no official standing was claimed or granted it."

We find no error in the case. Affirmed.

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

ZAINO *v.* OLSON.

1. LANDLORD AND TENANT—RENT—MEDICAL CLINIC—PARKING—EVIDENCE.

   Evidence of proceedings of city board of zoning appeals with reference to granting of waiver as to off-street parking requirements for medical clinics was properly received in landlord's action against physician tenant for rent due on new building after acquisition of adjoining lot for parking purposes, as such testimony bore directly upon the enforceability of the lease according to its terms, one of which stipulated the lease was conditional upon the tenant having the right to conduct a medical office at the premises.

2. SAME—MEDICAL CLINIC—PARKING.

   Tenant of medical clinic *held*, entitled to use of additional lot purchased to provide off-street parking facilities as required by city zoning ordinance, under lease giving him right to abandon lease if he were forced to discontinue his practice there for insufficient parking facilities.

3. SAME—NEW MEDICAL CLINIC—TENANTABILITY—EVIDENCE.

   It was not error to exclude testimony relative to completeness and tenantability of new medical clinic building in landlord's nonjury action for rent, where lease provided term should begin on a given date or, if not then completed, on the first day of occupancy, and trial court concluded the property was proved to have been completed and the prospective tenant was to take the property as it was on the date the lease was executed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 32 Am Jur, Landlord and Tenant § 531.
[2] 32 Am Jur, Landlord and Tenant § 164.
[3] 32 Am Jur, Landlord and Tenant § 532.

Parol evidence rule as applied to lease. **25 ALR 787, 88 ALR 1380, 151 ALR 279.**

Appeal from Oakland; Holland (H. Russel), J. Submitted June 13, 1960. (Docket No. 52, Calendar No. 48,017.) Decided September 16, 1960.

Assumpsit by Ernest Zaino and Rose Zaino against Kenneth R. Olson for rent money due on lease. Judgment for plaintiff. Defendant appeals. Affirmed.

Forsythe & Beasley (*Carl W. Forsythe,* of counsel), for plaintiff.

Stanton G. Dondero, for defendant.

SMITH, J. The question before us involves the proper interpretation of a lease. The plaintiffs are husband and wife, owners of certain lots, and lessors herein. Defendant is the lessee.

Plaintiff Ernest Zaino was also a builder. In the fall of 1954 the defendant, Dr. Olson, talked with him about the construction of a building, a clinic, upon plaintiffs' lots. In time the clinic was constructed and a lease, prepared by plaintiffs' attorney, was discussed by the parties. Defendant objected to signing. He was worried about parking space. A friend of his had told him of difficulties he had had with respect to parking facilities for a building he had put up and he suggested that Dr. Olson might have similar difficulties. Consequently, Dr. Olson went to the municipal authorities and made inquiries. He learned that he "would not be able to conduct a medical practice at that site" because of lack of adequate parking facilities. Nevertheless, and with this knowledge, which he had brought to plaintiffs' attention, a lease was executed, bearing date of July 21, 1955. The lease provided, in the following clause, for the term thereof:

"beginning on the first day of July, 1955, or if the premises are not then completed, for a term beginning the first day of occupancy and ending the 30th day of June 1960, or ending 5 years from and after the first day of occupancy. Provided, however, that this agreement is conditional upon tenant having the right to conduct a medical office at said premises and, in the event that the city of Oak Park forbids the conducting of a medical office at said location for lack of adequate parking space, this agreement shall be declared null and void and any moneys paid hereunder returned and the parties placed in *status quo*. Said premises to be used and occupied only for a doctor's and dentist's offices and clinic and for no other purposes."

The matter of the parking facilities we can dispose of rather summarily. Defendant lent plaintiffs $2,000 for the purchase of an adjacent lot, lot 31, so "this deal [could] go through, if possible." The lot was acquired, and the board of zoning appeals thereafter (upon appeal by the plaintiffs "seeking waiver of parking requirements for clinic"), despite the fact that the clinic was still 3 vehicle parking spaces short of the number required, granted a waiver "due to the hardship involved." With this acquisition of additional property, it was testified by the planning director of the city of Oak Park, there was no longer any legal impediment to the use of the leased premises for the intended purpose of a medical clinic. Dr. Olson asserted, and Mrs. Zaino denied, that he wished to have this lot added to the lease. However this may be, upon September 23, 1955, only some 60 days after execution of the lease, and some 6 weeks after the favorable action of the board of zoning appeals, defendant sought summarily to terminate, assigning as reason therefor the sole asserted ground that the lease "does not meet the ordinance requirements of the city of Oak Park for clinic facilities." The ordinance reference here made relates to the

parking requirements of the city of Oak Park. Action brought by plaintiffs on the lease resulted in judgment against defendant, from which a general appeal has been taken.

Appellant first complains of the trial court's reception into evidence of the proceedings of the board of zoning appeals with reference to the waiver granted, thus (we are quoting appellant) "enlarging the terms of the lease agreement by extrinsic evidence." The argument made overlooks the provisions of the lease itself. The parties hereto entered into an agreement "conditional upon tenant having the right to conduct a medical office at said premises and, in the event that the city of Oak Park forbids the conducting of a medical office at said location for lack of adequate parking space, this agreement shall be declared null and void." Defendant repudiated the lease on the ground that it did not give him the right to the use of property sufficient to meet the city's requirements. The determination of the board of zoning appeals (to waive the requirements of off-street parking since an adjoining lot, lot 31, would be devoted to such use) was properly admitted into evidence. It tended to show that defendant would have the right to conduct his practice at the premises without hindrance by the city so long as the adjoining lot was used for off-street parking and thus bore directly upon the enforceability of the lease according to the terms.

Defendant argues, also, that the adjoining lot should have been included in the lease, and that without its inclusion he did not have the *legal* right "to conduct a medical office at said premises." The language of the agreement, however, indicates an intention to go forward with the plans for establishing a clinic with the expectation that any legal difficulties could be resolved. The circumstances surrounding the agreement reenforce the conclusion. Purchase of the adjoining lot was under negotiation at

the time the lease was executed; with this lot, 15 of the 18 parking spaces required would be available and an appeal could be taken again to the board of zoning appeals. The obvious intention, then, was to enter upon a lease of the premises, and, in the event the difficulties in providing sufficient off-street parking proved insoluble, to void the agreement and restore the *status quo*. The defendant, it would seem, intended to go forward with his plans and rely upon restitution if they could not be carried through to completion. Clearly, he did not rely upon his having a right to conduct a medical practice on the premises leased to him, if parking was limited thereto, since the board had already determined the need for more spaces. The right mentioned in the agreement was the right he would have had after the action contemplated by the parties had been taken, and, as the trial court intimated, if the authorities had prohibited parking on the adjoining lot or lots, and thus forced him to discontinue his practice, he would have had the right to abandon the lease and recover moneys paid thereunder.

Argument is made, as well, by appellant that the building was incomplete and untenantable and that the trial court erred in excluding testimony relating thereto. The lease, however, describes the term thereof as follows:

"beginning on the 1st day of July, 1955, or if the premises are not then completed, for a term beginning the first day of *occupancy*, and ending the 30th day of June, 1960, or ending 5 years from and after the first day of occupancy."

It is clear that no particular state of completion is required by the terms of this lease. The trial court concluded that "the property, under the proof, for all intents and purposes was completed when this lease was signed and * * * the prospective ten-

ant was to take the property as it was on that date." In so holding, we find no error.

Under the view we have taken of this case, there is no need for discussion of additional arguments made by appellant.

The judgment is affirmed. Costs to appellees.

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

OBRECHT *v.* NATIONAL GYPSUM COMPANY.

SAME *v.* DIRECTOR OF CONSERVATION.

1. NAVIGABLE WATERS—BEDS OF GREAT LAKES.

The Supreme Court, equally with the legislative and executive departments, is one of the sworn guardians of the State's duty and responsibility as trustee of the portion of the beds of the Great Lakes within the State's boundaries.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 56 Am Jur, Waters § 52.
[3, 4] 56 Am Jur, Wharves § 33.
[6] 56 Am Jur, Waters § 197.
[7] 56 Am Jur, Waters §§ 216, 217.
[8] 56 Am Jur, Waters § 450.
[9] 56 Am Jur, Waters § 471.
[10] 56 Am Jur, Wharves § 5.
[11] 39 Am Jur, Nuisances § 44.
[12–14] 39 Am Jur, Nuisances § 5, § 53 *et seq.*; 56 Am Jur, Waters § 405 *et seq.*; 56 Am Jur, Wharves § 11.

2. SAME—GREAT LAKES—SUBMERGED LANDS—ALIENATION.

No part of the beds of the Great Lakes belonging to the State can be alienated or otherwise devoted to private use except as there be a due finding that a given parcel of submerged land be conveyed in the improvement of the interest thus held or that the disposition may be made without detriment to the public interests in the lands remaining.

3. SAME—GREAT LAKES—SUBMERGED LANDS—RIPARIAN OWNERS—WHARFAGE.

The public title and right to submerged lands forming the part of the beds of the Great Lakes within the State's boundaries is supreme against a riparian owner's right of wharfage.

4. SAME—GREAT LAKES—RIPARIAN OWNERS—WHARFAGE—CONSENT.

A riparian owner along the shore of the Great Lakes may exercise the right of wharfage only with the regulatory assent of the State.

5. SAME—GREAT LAKES—RIPARIAN OWNER—WHARF.

A riparian owner who entered upon the bed of the waters of the Great Lakes and built a wharf following an erroneous decree of a circuit court in that no assent had been given by the State effected an entry upon and unlawful detention of State property.

6. SAME—STATES—RIPARIAN OWNERS.

A State has constitutional power to insist that its natural advantages shall remain unimpaired and, as against a riparian owner along a navigable body of water, retain what it has and give no one a reason for its will.

7. SAME—RIPARIAN OWNER—WHARF—PROTECTION OF THE PUBLIC.

A riparian proprietor is entitled to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public.

8. SAME—STATES.

Public property, such as lands under navigable waters, cannot be placed entirely beyond the direction and control of the State.

9. SAME—PUBLIC POLICY.

The public policy of this State with respect to submerged lands under navigable waters is that they may be disposed of only when the department of conservation determines that such

lands have no substantial public value for hunting, fishing, swimming, pleasure boating, or navigation and that the general public interest will not be impaired by such disposition (CLS 1956, § 322.702, as amended by PA 1958, No 94).

10. SAME—GREAT LAKES—RIPARIAN OWNERS—WHARF—STATES.
A riparian owner of land along the shores of the Great Lakes may not wharf out to deep water navigable by large ocean-going boats except in compliance with State regulatory measures.

11. NUISANCE—CONSIDERATION OF LOCALITY AND SURROUNDINGS.
The locality and surroundings of the challenged operation or thing become an important factor in arriving at proper judicial decision of existence or nonexistence of an actionable nuisance.

12. SAME—WHARF TO NAVIGABLE WATER—DAMAGES.
The construction of a wharf upwards of 1,000 feet long and dredging of channel out to deep navigable water for use by large boats carrying gypsum rock, an otherwise lawful industrial operation, pursuant to provisional permit by department of conservation, near the center of an area devoted to summer cottage use and now beyond judicial abatement, subjected the defendant to payment of such damages as plaintiffs may be able to prove.

13. SAME—DAMAGES—WHARF TO NAVIGABLE WATER—SUMMER COTTAGE OWNERS—PURPRESTURE.
Noise, dust, smoke, pollution of air and water as result of defendant's construction of wharf from its shore front upwards of 1,000 feet long and dredging of channel out to deep navigable water are items of damage to nearby summer cottage owners unable now to abate the nuisance created by defendant's purpresture.

14. NAVIGABLE WATERS—GREAT LAKES—WHARF—SUMMER COTTAGES—EQUITY.
Wharf which was constructed out to deep navigable water in the midst of an area devoted to private summer cottage use along shore of Great Lakes is not now ordered removed, but operable subject to the will of the State and such decretal provisions for control of its use as equity may decide, on new testimony, to impose.

Appeals from Iosco; Dehnke (Herman), J. Submitted April 5, 1960. (Docket Nos. 1, 2, Calendar Nos. 47,917, 47,984.) Decided September 16, 1960.

Bill by Malvern F. Obrecht, Arthur L. Johnson, Rev. Fr. Robert Neuman, and others against National Gypsum Company, a Delaware corporation, to enjoin as public and private nuisance the construction of a loading dock and the dredging of lake bottom to make a turning basin and a channel to navigable water. The State of Michigan intervened as party plaintiff.

Bill by Malvern F. Obrecht, Rev. Fr. Robert Neuman, and others against Gerald E. Eddy, Director of Michigan Department of Conservation, and the Michigan Department of Conservation to enjoin proposed sale of submerged lands to National Gypsum Company, which corporation intervened as party defendant.

Decrees entered denying relief prayed, imposing certain provisions for construction and operation of loading dock, and retaining jurisdiction for purpose of abating any future nuisance. Plaintiffs appeal. State of Michigan appeals as intervening plaintiff and Michigan Department of Conservation and its director cross-appeal as defendants. Cases heard together on appeal.

Reversed, with no injunctive abatement of facilities, construction of which were completed pending appeal, but with order that continued existence be provisional upon the will of the State. Remanded for further decretal provisions as to control of operations and for determination of and award of damages to neighboring property owners.

Smith & Brooker, for plaintiffs.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for intervening plaintiff State of Michigan, and for cross-appealing defendants Michigan Department of Conservation and its director.

John R. Watkins (*Finck & Huber, Elmer E. Fink* and *William L. Rieth,* of counsel), for defendant.

Amici Curiae:

Goetz & Goetz & Foley (*Thomas J. Foley,* of counsel), for intervenors Dunbar & Sullivan Dredging Co., and The River & Harbor Improvement Association.

Victor G. Hanson, for intervenor The Maritime Trades Department of the AFL-CIO.

BLACK, J. The last great frontiers of Michigan's public domain lie submerged between her thousands of miles of shore line and the navigable boundaries which, historically, have separated and now separate Michigan from Indiana, Illinois, Wisconsin, Ontario and Ohio.* Now that the St. Lawrence Seaway is making of the Great Lakes an "Eighth Sea," the courts of these inland coastal States may well brace themselves for a series of new questions having to do with the nature and alienability of sovereign title to such domain and the inevitable collision of riparian rights—claimed by the common law—with the sovereign responsibility as permanent trustee thereof. These cases become a notable forerunner.

* For definition of such boundaries, see the first article of Michigan's Constitution (1908).

National Gypsum Company, defendant in No. 47,917 and intervener in No. 47,984, is engaged in Iosco county in the business of mining and transporting gypsum rock. Its mining operations are carried on several miles inland from Saginaw bay, which is one of the great if comparatively shallow arms of Lake Huron. Until recently transportation of such product, from the company's quarries to processing plants, was accomplished exclusively by rail. Now, by completed marine installations and operations the threat of which gave rise to this litigation, a substantial part of its product is transported to such processing plants by modern lake steamers. These steamers, unlike the lighter vessels of an earlier day, draw 20 to 22 feet of water when loaded. Thus a riparian's common-law right of wharfage "to the channel" becomes affected, as in the present cases, by a new fact.

In 1956 National Gypsum acquired title to 600 feet of property fronting east on Tawas bay, one of the shallower reaches of Saginaw bay, with a view toward transporting its mined product to marine facilities for Great Lakes shipment. The company's original plan, submitted in its first application to the United States corps of engineers, was that of constructing over the water a long aerial tramway of steel, supported by steel and concrete piers or bents water-spaced 200 feet apart. The tramway as planned was to extend from the shore line 6,000 feet east, into and over the bay, to an elevated "loading tower." It was designed to carry a belt conveyor system leading from the company's rail and rock storage facilities (on the west side of highway US–23) to such "loading tower," from which steamers were to be loaded by means of a transverse shuttle belt conveyor. The plan, incidentally, called for a minimal clearance of the aerial structure, above water, of 30 feet.

Such plan, having received due approval of the corps of engineers, was abandoned by the company because "it was out of the realm of economics from a capital installation cost." Another application to the corps of engineers was thereupon made and granted. Such grant gave assent so far as the Federal government is concerned to the construction of a massive and permanent loading dock, extending some 1,076 feet easterly into the bay from the shore of the company's property, and the dredging of more than a mile of deep channel leading westward from the deeper waters of the bay to and on both sides of such dock. The dock was constructed, and the dredging operations were completed, after the chancellor's decision was given below in favor of National Gypsum. A part of the dredging was apparently done before entry of decrees. The dock and channel are now in steady use for marine-transportational purposes.

The installation, of which plaintiffs bitterly complain, carries a similarly designed belt conveyor system which extends under the highway from the mentioned rail and storage facilities to such loading dock. Passage by boat along the shore is restricted to the always fluctuating distance between the water's edge and the first of 7 great piers or cells supporting the superstructure of the dock. The present overhead clearance beneath the conveyor gallery (the gallery extends from a concrete crib near the shore to the first of such piers) for such passage is 12 feet and 6 inches.

In furtherance of its altered plans the company sought legislation authorizing sale to it, by the department of conservation, of certain of the submerged land lying opposite its mentioned shore property. See PA 1957, No 176. The enacted bill,

quoted as to section 1 in the margin,[1] provides for quit-claim conveyance to the company by the State of a submerged parcel which extends—800 feet eastward from the shore—the north and south boundaries of the company's shore property.[2] However, the loading dock as actually constructed extends into the water 276 feet more than the 800-foot distance fixed by the description set forth in the act. This fact, which is not disputed, points up the principal question with which the Court is faced in both cases. Such question may be stated this way: May a riparian proprietor of Michigan Great Lakes frontage, having obtained due permit from the United States corps of engineers,[3] of right and regardless of leave

1 "Sec. 1. The department of conservation of the State of Michigan is hereby authorized and directed to convey to the National Gypsum Company, upon receipt of the consideration of $4,000 or the amount of the value of said lands as determined by the appraisal of the State tax commission which is hereby authorized and directed to make such appraisal, whichever is the greater, all the right, title and interest of the State of Michigan, except all oil and gas contained therein, in the unpatented overflowed and lake bottom lands of Tawas bay, Lake Huron, belonging to the State of Michigan or held in trust by it, lying easterly of fractional section 2, township 21 north, range 7 east, in Iosco county, Michigan, and lying within an area described as follows:" (here follows a proper description of the 600 by 800-foot submerged parcel which lies opposite the National Gypsum frontage).

2 On account of a temporary injunction obtained against the State department of conservation, no conveyance in pursuance of this Act has been executed. National Gypsum is not pressing the department, at present, for such conveyance. It relies on the asserted right of riparian wharfage.

3 The reader will understand that permission given by the corps of engineers to dredge and construct has no effect upon the separate right and duty of the riparial State to protect and conserve the submerged lands of which it is public trustee. Here the preamble of the permit, issued to National Gypsum by the corps of engineers, refers directly to *Cummings* v. *Chicago*, 188 US 410 (23 S Ct 472, 47 L ed 525), and recites as follows:

"It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION."

of the State construct a permanent dock or wharf extending with or without accessory dredging into the waters of the lake a sufficient distance—whatever that distance may be—to reach lake steamer draft depths? The company asserts such right in these cases, regardless of effect of or want of conveyance under said Act No 176, and so justifies its dredging operations as well as construction and utilization of the loading dock. The plaintiffs and the attorney general categorically deny such right. In addition the plaintiffs, all being nearby riparian cottagers and home owners, insist that the dock and the company's use thereof, for the purposes of its design, now constitute and will constitute an actionable and abatable nuisance.

For alleged want of a clearly defined legislative policy the primary question seems to have been one of considerable difficulty when these cases were heard by the chancellor. Before signature of decrees (July 21, 1958), however, the legal situation had changed to one of definite certainty. Following enactment of the submerged lands act of 1953 (67 Stat 29, 43 USC [1958 ed], §§ 1301–1315), by which the United States relinquished to the coastal States its remaining rights, if any, in all lands lying beneath navigable waters within State boundaries (for recent resume of such act and its purposes see *United States* v. *Louisiana,* 363 US 1 [80 S Ct 961, 4 L ed 2d 1025], and *United States* v. *Florida,* 363 US 121 [80 S Ct 961, 1026, 4 L ed 2d 1096]), the legislature of Michi-

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The opinion of *Cummings* concludes (p 431) as follows:

"The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the State government. The secretary of war, acting under the authority conferred by congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

gan passed the Great Lakes submerged lands act of 1955 (CLS 1956, § 322.701 *et seq.*, Stat Ann 1958 Rev § 13.700 [1] *et seq.*). The act of 1955, as amended by PA 1958, No 94 (Stat Ann 1959 Cum Supp §§ 13.700[2]–13.700[6], 13.700[10]), authorized the department of conservation to convey or lease, subject to specific limitations provided therein, "the unpatented lake bottom lands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the State of Michigan or held in trust by it." By the amendment of 1958, the legislature added a new section 10, providing as follows:

"Sec. 10. Any person who excavates or fills, or in any manner alters or modifies any of the land subject to the provisions of this act without the approval of the department shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $1,000 or imprisoned not more than 1 year, or both such fine and imprisonment. Lands, the use of which are so changed, shall not be sold to any person convicted under this section at less than fair cash market value."

The chancellor's opinion, on strength of which the appealed decrees in these cases were entered, was filed April 8, 1958. The amendatory act (No 94 aforesaid) was passed 6 days later. The legislature ordered that it become effective July 1, 1958. July 16, 1958, Dunbar & Sullivan Dredging Company, having theretofore contracted with National Gypsum to dredge the desired deep water channel, filed with the department of conservation an application for approval of such dredging operations. July 30, 1958, National Gypsum filed with the department its separate application for such approval, and also for approval of its then-under-construction dock and marine conveyor facilities. The latter application,

having made due reference to said section 10, concludes as follows:

"Your petitioner prays that the department of conservation grant to your petitioner, its servants, agents, and employees the approval of the department permitting the completion of the dredging described as shown in the application for a permit from the United States corps of engineers attached hereto and the completion of the construction of the shiploading facility as described therein, all in accordance with the permit granted by the United States corps of engineers.

"The foregoing petition is made (1) without prejudice to any of its rights in law or in equity, (2) without in any way acknowledging the validity of PA 1958, No 94, (3) without admitting that the activities of the petitioner herein, its agents and servants, in any way violate the provisions or are subject to the provisions of the act, and (4) without in any way waiving, forfeiting or making any election with respect to any of its rights in any statutes of the State of Michigan or at common law as a riparian owner of land adjacent to the shores of Lake Huron or its right to contest the constitutionality of said act and statutes."

The department ordered a public hearing of both applications, which hearing was conducted at Lansing July 30, 1958. The "Statement of Proceedings" of such hearing, submitted to us by supplemental appendix, shows that the present litigation was thoroughly reviewed, and that the director (of the department of conservation) did on the occasion make careful effort to compose the differences of the contending parties, including the State, without prejudice to their respective legal rights. At conclusion of such hearing the department authorized issuance of a provisional permit to National Gypsum for completion of the dredging and construction projects, reciting in the permit a long series of "no

prejudice" stipulations. The permit was dated August 12, 1958. It authorized the company to proceed at legal risk and concluded with these paragraphs:

"That should the legislature of the State of Michigan by law require any change, modification or alteration of said facilities, or should require the securing of different or additional permits for the continuing use and operation of said facilities, the National Gypsum Company or its successors and assigns shall forthwith comply with the requirement of said law or laws and upon its failure so to do, this permit shall be null and void.

"All of the above provisions to be incorporated in said permit shall be without prejudice to the rights of all parties involved to pursue their remedies through the courts."

Thereupon the company proceeded immediately to dredge, construct, and operate according to its second plan. Plaintiffs and the attorney general have meanwhile prosecuted these appeals.

The first of these suits (in point of time but not in the order of present entitlement) was filed by the plaintiff cottagers and home owners against the director and the department of conservation to obtain a decree declaring that the quoted act of 1957 is invalid and unconstitutional. A preliminary hearing was held July 15, 1957, as a result of which the chancellor authorized a temporary injunction. The effect of such injunction was to restrain dredging or construction by National Gypsum. At the same time National Gypsum was authorized to intervene as a defendant. This first suit was not brought to hearing or determination until the second suit, now to be outlined, was heard and decided.

The second suit was instituted December 23, 1957, by substantially the same parties plaintiff against National Gypsum Company as defendant. In the meantime the company had changed its construction

plans, as noted above. This second bill alleges that the threatened dock construction and auxiliary dredging operations would, unless stopped, constitute a public as well as private nuisance. Allegation was made that the action of the waves and shore currents would, the dock being constructed, slowly starve the beach front of sand on one side of the dock and build an excessive and abnormal beach of sand on the other; that the close-to-shore loading of steamers would pollute the water and the air of the same area with dust, oil and other objectionable matter and, in general, that the whole operation would destroy or impair the value and enjoyment of plaintiffs' nearby property and affect adversely the healthful and recreational advantages of the lake front for a considerable distance each way.

The attorney general intervened in this second suit. He contended and now contends that the department of conservation has no right to convey, according to the act of 1957, for want of formal (legislative or departmental) determination that conveyance to private use of the submerged lands described in the act "would cause no injury to the public trust." He insists further that the company has illegally appropriated to its own use more than a mile of submerged State land extending into the bay and that the dock as constructed, if not presently abatable according to the view of equity, should be allowed to remain "without right and only at the sufferance of the State."

First: The Riparian Right Considered Against the Public Right.

The greatest burden of an appellate court—usually—is that of searching, sifting, and stating the facts of reviewable moment. With the facts assembled and known for what they are, the legal jugular of

the case invariably becomes exposed for definitive and precedential treatment.[4] It is so here. More words are required for presentation of the determinative facts than for pronouncement of the law to be applied.

This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of 5 Great Lakes. Long ago we committed ourselves (see *State* v. *Lake St. Clair Fishing & Shooting Club,* 127 Mich 580, 594, 595; *State* v. *Venice of America Land Co.,* 160 Mich 680, 702; *Nedtweg* v. *Wallace,* 237 Mich 14, 21, 24, 34) to the universally accepted rules of such trusteeship as announced by the supreme court in *Illinois Central R. Co.* v. *Illinois,* 146 US 387 (13 S Ct 110, 36 L ed 1018). That exhaustively reasoned decision may be read with profit as Michigan approaches, again as in white pine days, the impending construction and utilization, as instruments of maritime commerce, of more deep water docks and piers along her lake-bound shores. Turning to pages 453 through 460 of the report, and reading those pages in conjunction with our quoted act of 1955 as amended in 1958, it will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts (see *State* v. *Lake St. Clair Fishing & Shooting Club* and *Nedtweg* v. *Wallace, supra*), can be alienated or otherwise devoted to private use in the absence of due finding of 1 of 2 exceptional

[4] Repeated here (from *Ruediger* v. *Klink,* 346 Mich 357, 371) are these postulates of Mr. Justice Cardozo:

"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."

reasons for such alienation or devotion to nonpublic use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed "in the improvement of the interest thus held" (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made "without detriment to the public interests in the lands and waters remaining." Instances where the legislature has directly and specially pursued its exceptional and conceded authority in such regard may be found on examination of PA 1954, No 41 (Stat Ann 1958 Rev § 13.790[181] *et seq.*) (authorizing conveyance to Detroit Edison Company of a marshy and rocky area opposite Harbor Beach); PA 1955 (1st Ex Sess), No 8 (Stat Ann 1958 Rev § 13.790[271] *et seq.*), (authorizing conveyance to the Abitibi Corporation of an area of filled lake bottom opposite Alpena); PA 1959, No 11 (authorizing conveyance to Consumers Power Company of an easement for specified purposes in and over certain submerged portions of Lake Michigan); PA 1959, No 31 (authorizing conveyance to Detroit Edison Company of a shallow and polluted portion of the bed of Lake Erie in Monroe county); and PA 1959, No 84 (CL 1948, §§ 254.141, 254.142) (authorizing conveyance, to the Mackinac county board of road commissioners, of an easement for construction of a bridge leading from one island to another in the Les Cheneaux group).

We agree with the attorney general that the public title and right is supreme as against National Gypsum's asserted right of wharfage, and hold that the latter may be exercised by the company only in accordance with the regulatory assent of the State.[5]

[5] If the company's allegation of supremacy—of the right of wharfage "to the channel"—is sound, would it not be possessed of right to

No such assent has been given and, for that reason alone, the chancellor erred in decreeing that National Gypsum might proceed with what in law has become, since entry of such decrees, an entry upon and unlawful detention of State property.

The same issue—of conflict of riparian rights with public rights—came to determination in *Hudson County Water Co.* v. *McCarter,* 209 US 349 (28 S Ct 529, 52 L ed 828, 14 Ann Cas 560). There the defendant riparian proprietor (Hudson County Water Co.) sought to draw water from the Passaic river, in New Jersey, for transportation by pipe line to Staten Island in the State of New York. New Jersey objected, assigning as superior the public right. New Jersey was upheld. The court, speaking through Mr. Justice Holmes, reasoned to its decree of affirmance as follows (p 356):

"This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. * * * The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

The supreme court held further in this case that a State has constitutional power to insist that its

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extend the dock (assuming Federal consent as in the case of the proposed aerial tramway) a total of 6,000 feet eastward from the shore? Would not every riparian of Great Lakes shallows have a similar right?

natural advantages shall remain unimpaired, and that when that State "finds itself in possession of what all will admit to be a great public good," it may as against such asserted claim of a riparian retain what it has "and give no one a reason for its will." This is good law for the cases before us, and we adopt it.

The supreme court held, in the *Illinois Central Case* (pp 445, 446), and we now hold, that:

"The riparian proprietor is entitled, among other rights, as held in *Yates* v. *Milwaukee,* 10 Wall (77 US) 497, 504 (19 L ed 984), to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public."

The reason for this rule appears later in the report, starting on page 453 and carrying on to page 454. The reason:

"The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public prop-

erty, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State."

No one (riparian proprietors included) has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes—adjacent to Michigan—unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands. Indeed, and aside from the common law as expounded in *Illinois Central,* the legislature bids us construe its design and purpose "so as to preserve and protect the interests of the general public" in such submerged lands and as authorizing the sale, lease, exchange or other disposition of such submerged lands when and only when it is "determined by the department of conservation that such lands have no substantial public value for hunting, fishing, swimming, pleasure boating or navigation and that the general public interest will not be impaired by such sales, lease or other disposition." See PA 1955, No 247, § 2, as amended by PA 1958, No 94 (CLS 1956, § 322.702, as amended [Stat Ann 1959 Cum Supp § 13.700(2)]). For want of such determination the decrees below were unfounded, and so they must be reversed.

In the cases before us Michigan's great natural resource, providing as it does general public enjoyment of the pure blue waters of these incomparable inland seas, is subtly threatened by a projected rule of the common law—the riparian right to wharf out. We recognize the rule and the right, yet hold them subject to reasonable regulation by the State. In effect and in sum, this Court is asked by National

Gypsum and recent intervening parties[6] to grant such rule an untrammeled legal beachhead on this limited part of Tawas bay. Convinced that any such grant would open our shoal waters and renowned miles of sandy beaches to ruthless and uncontrolled exploitation, we are not so inclined.

Second: The Question of Nuisance.

Nothing in the law of nuisance is better settled than this rule: that the locality and surroundings of the challenged operation or thing become an important factor in arriving at proper judicial decision of existence or nonexistence of an actionable nuisance. That which would be actionable or abatable in one place or locality might not be such in another. The oft-quoted observation of the supreme court (*Village of Euclid* v. *Ambler Realty Co.*, 272 US 365, 388 [47 S Ct 114, 71 L ed 303, 54 ALR 1016]) comes to mind here: "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

Turning to the facts we find that, prior to National Gypsum's "invasion" (as it was termed below) the entire bay front, extending at least 4 miles southwesterly from the lower outskirts of Tawas City and including the immediate area in question, was devoted exclusively or substantially so to full-time and summer-time living in cottages and homes situated in a beautifully wooded sector lying between the continuous sand beach of the bay and highway US 23. At this point the highway extends along a "ridge" overlooking Saginaw bay—through the trees—and paralleling the beach at distances varying from 400 to 1,200 feet. The slope from the highway

[6] Dunbar & Sullivan Dredging Co., The River and Harbor Improvement Association, and the Maritime Trades Department of the AFL–CIO.

to the beach is for the most part gradual, making in all an ideal region for the quiet enjoyment of cottage and summer life on one of the scenic arms of Lake Huron.

Now, with the dredging done and the dock constructed near the approximate center of this sector, we are persuaded by the record that National Gypsum has moved an otherwise lawful industrial operation into an area constituting the wrong place for it. In so doing it has actionably offended the personal and property rights of these plaintiffs and, the *"fait"* being *"accompli"* now beyond judicial abatement, has subjected itself to payment of damages to such of these plaintiffs as may on remand be able to prove same.[7]

The testimony submitted before the chancellor was predictive, that is, the plaintiffs and their witnesses deposed largely to opinions that the planned operations of National Gypsum would, if permitted, create an abatable nuisance as charged; whereas witnesses for National Gypsum deposed to contrary opinions, the purport thereof being that all such fears were groundless in that the company could and would prevent objectionable noises; could and would prevent pollution of the air by dust and pollution of the water by bilge and other foul discharges from incoming, outgoing, and moored ships, and that its proposed method of dock construction would not cause changes of the beaches in the vicinity.

Now, since these cases must be disposed of on remand, new testimony based on the actual experience of the past 18 to 24 months should be of greater worth than that shown in the present record.

[7] For a general statement of the measure and elements of damages which, assuming satisfactory proof is submitted in support thereof, are recoverable in cases where an unabatable and actionable nuisance is of permanent nature, see 39 Am Jur, Nuisances, §§ 134 through 137, pp 395–400, and additions to text appearing in the 1960 pocket supplement, pp 56–58.

Have objectionable noises emanated from the belts and conveyor machinery, and from the moored ships themselves, during loading operations? Has there been an offensive discharge of smoke, bilge water, and other forms of pollution (of air and water) from the moored ships? Is the beach front changing, or beginning to change, on account of the dredged-out area and the effect of the dock on the action of waves and shore currents? Does the conveyor operation discharge gypsum dust which in some degree affects the comfort and enjoyment of nearby cottage life and beach recreation? Does the dock and the loading operation tend to destroy view and so affect, actionably, the value and enjoyment of plaintiffs' property?

These and other questions of like relevance are serious. They deserve testimonial exploration on the basis of *what is,* rather than what the witnesses expected—in early 1958—*would be.* So far, National Gypsum having proceeded to construct and operate a purpresture in an area theretofore devoted to detached private enjoyment of home and bay front, these plaintiffs have established a *prima facie* case of actionable nuisance. So, if it is shown on remand that the company's operations have destroyed in provable degree the comfortable, peaceful, and quiet occupation of any nearby home or cottage, the right of the plaintiff owner to monetary relief will be upheld by the successor chancellor.

They, these plaintiffs, were "there first." As the chancellor, having posed the initial question "Who was here first," observed in his opinion:

"As to point 'a', it is clear that plaintiffs have the best of the argument, and are entitled to the benefit of all that has been said in the decisions against avoidable or unnecessary interference with the enjoyment of their property or anything which will tend to lessen values. Quite naturally, they feel

that the defendant is an invader of their domain and their privacy, and should be relegated to some other method of getting its gypsum rock on shipboard."

SUMMARY: Equity cannot now abate that which, originally, should have been enjoined. Such a decree would amount to outright destruction and loss of valuable property constituting an even greater wrong than that which the company has perpetrated. The dock may remain existent and operable but subject always to the will of the State as provided in the quoted portion of the provisional permit of August 12, 1958, and subject further to such decretal provisions for control of its use as equity may decide on new testimony to impose.

The decrees below are reversed and the cases are remanded to the Iosco county circuit court for further proceedings to be conducted by the successor chancellor in accordance with this opinion. Plaintiffs and the intervening State will have costs.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, and SOURIS, JJ., concurred.

KAVANAGH, J., did not sit.

McLOUTH STEEL CORPORATION *v.* CORPORATION & SECURITIES COMMISSION.

This case is controlled by *Detroit Edison Company* v. *Corporation & Securities Commission,* 361 Mich 150.

Appeal from Corporation Tax Appeal Board. Submitted April 8, 1960. (Docket No. 37, Calendar No. 48,487.) Decided September 16, 1960.

McLouth Steel Corporation, a Michigan corporation, protested and appealed the redetermination of its annual franchise fee by the Michigan Corporation and Securities Commission. Amount of claimed deficiency increased by the appeal board. Plaintiff appeals. Reversed and remanded.

Dickinson, Wright, McKean & Cudlip (*William B. Cudlip, T. Donald Wade,* and *Ernest Getz,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for defendant.

Per Curiam. The decisive question in this case is governed by the majority decision in the case of the *Detroit Edison Company* v. *Corporation & Securities Commission,* 361 Mich 150.

The decision of the appeal board in the instant case is reversed, set aside and held for naught, and the case is remanded for further proceedings consistent with the majority opinion in the *Detroit Edison Company* v. *Corporation & Securities Commission.* No costs, a public question being involved.

Dethmers, C. J., and Carr, Kelly, Smith, Black, Edwards, and Kavanagh, JJ., concurred.

Souris, J., did not sit.

HARDEN *v.* WIDOVICH.

1. APPEAL AND ERROR — REMAND — NONCOMPLIANCE WITH COURT RULES — APPENDIX — ASSESSMENT OF DAMAGES.

The Supreme Court approves the recommendation of circuit court on remand that appellant be assessed $800 damages for his failure to comply with court rules relative to preparation of appendix on appeal, violations of such court rule being so widespread as to require at least such limited enforcement in this case, where at least 40 hours of extra work was necessarily required of appellee's counsel (Court Rules No 67, No 70, § 5 [1945]).

2. SAME—APPENDIX—VIOLATION OF COURT RULE—PUNITIVE DAMAGES.

The Supreme Court approves recommendation of circuit court on remand from Supreme Court that punitive damages authorized by court rule not be imposed in view of the good reputation of appellant's counsel in this case (Court Rule No 70, § 5 [1945]).

Appeal from Monroe; Weipert, Jr. (William J.), J. Submitted April 12, 1960. (Docket No. 44, Calendar No. 48,086.) Decided June 6, 1960. Report submitted August 22, 1960. Approved September 15, 1960. Supplemental opinion filed September 26, 1960.

On remand from Supreme Court for investigation, recommendation, and report to the Supreme Court pursuant to Court Rule No 70, § 5 (1945). See 359 Mich 566, 571.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur, Appeal and Error § 768.

Kelley & Kelley, for plaintiffs-appellees.

Meisner & Meisner (*Ivan I. Meisner* and *Thomas L. Poindexter,* of counsel), for defendant-appellant.

PER CURIAM. Pursuant to the reference back to the circuit court ordered by this Court on June 6, 1960, the following report was received from the circuit court for the county of Monroe:

"Recommendation and Report to the Supreme Court Under Court Rule No 70, § 5 (1945).

"On June 7, 1960, this circuit court entered the following order:

" 'On reading and filing the opinion of the Michigan Supreme Court dated June 6, 1960, deciding the appeal taken to said Court from the verdict and judgment of this court by the defendant herein, said verdict and judgment having been affirmed by the Supreme Court, and the matter referred back to this court for investigation, recommendation, and report to the Supreme Court under Court Rule No 70, § 5 (1945), as amended;*

" 'It appearing from the opinion of the Supreme Court that

" 'The appellees have charged appellant with violation of Court Rule No 67 (1945),† requiring the appellant to make a statement of facts to be presented without argument or bias and in such manner as to fairly present the same (section 2), and, in addition, to include in his appendix all parts of the record which should be considered by the Court in order fairly to judge the issues on appeal from the standpoint of both appellant and appellee (section 6). As a result of appellant's alleged failure in these respects, appellees assert that they have been put to considerable time and expense in the

* See 347 Mich xxviii, xxx.
† See 347 Mich xxii; 355 Mich xiv.

preparation of an additional appendix and in correcting appellant's statement of facts in order to make a fair presentation thereof.

"'It is ordered that plaintiffs-appellees present their contentions as aforesaid in writing to this court by June 15, 1960, with copy to opposing counsel by said date, and that defendant-appellant present any answer thereto in writing on or before June 20, 1960. If said matters are covered in the Supreme Court briefs counsel may if desired present copies of the same with such supplementary materials as may be required.

"'Hearing is hereby scheduled for Tuesday, June 21, 1960, at 4 p.m.'

"Oral argument before this court being waived by the attorneys, briefs were submitted and have been fully considered. The court has likewise studied each appellate brief and appendix in detail, with transcript of the testimony taken at the trial.

"Preliminary to that study, the court read through appellant's appendix and brief as originally filed in the Supreme Court. Appellant's appendix is so truncated as to make the case almost unrecognizable to the original trier of the facts. There can be no question that at least 75% of appellee's appendix of 136 pages was made necessary—not merely 'desirable', but necessary in the interests of justice—by appellant's failure to comply with Court Rule No 67 (1945), as amended.

"To reduce a week-long trial that produced a transcript of 509 pages to an appendix of 63 pages (the size of appellant's exclusive of pleadings; and perhaps a sixth of that consists of asterisks denoting omissions) and fairly lay before the appellate court an 'against the great weight of the evidence' assignment of error, any lawyer should know to be a virtual impossibility. Counsel for appellant did not accomplish the virtually impossible—or come anywhere near it. The deficiency had to be made good either by each justice poring over the official transcript, available only in a single copy—more than a 'vir-

tual' impossibility, if the Supreme Court is to decide more than a few cases per term—or by counsel for appellees. A lawyer's elementary duty to his client required the latter.

" 'Where only a portion of the testimony or exhibits is included in the appendix, there must also be included therein all other testimony and exhibits relating to the same subject matter and to the credibility thereof.' Court Rule No 67, § 6 (1945), as amended.* It is found that this requirement was disregarded in the extreme.

"Counsel for appellant urge that their brief's almost complete omission of page references to the appendix should not be considered at this time, because Justice SMITH's opinion does not specifically mention it. The reference to Court Rule No 67, however, is considered reference enough. The labor to which counsel for appellees was put by this additional disregard of elementary fairness in presentation was prodigious. Before counsel could safely say that a particular statement of fact was wholly without record support, combing of the voluminous transcript was required. Many instances have been demonstrated, where appellees were put to this needless and onerous task of proving negatives; many more, where partial statements of appellant required first documentation and then counterdocumentation.

"Contrary to the rule, appellant's statement of facts is not 'clear,' 'concise' or 'chronological.' It does not 'fairly present the facts, both favorable and unfavorable.' It makes no 'appropriate indication of those facts which are undisputed and those which are in controversy.'

"Counsel for appellant state that they advised their client to abandon the 'weight of evidence' assignment of error because of the expense of presentation. They add: 'However, Mr. Widovich insisted on presenting both questions. Shortage of funds was one of the major factors in preparing the record.

* See 355 Mich xiv.

Since a large amount of money had already been expended in investigation by detectives and for the transcript, counsel could not in good faith refuse to present all questions.' This the trial court believes, but it obviously cannot repeal the appellate rules. Fairness to *both* sides requires their enforcement.

"Counsel for appellees has supported by affidavit his claim for the following award of damages:

" 'At the very least, plaintiffs' counsel has devoted 200 hours to the preparation, checking and filing of plaintiffs' appendix and brief. Of the 200 hours, a minimum of at least 100 hours was spent, as absolutely necessary, in the correction of defendant's appendix and brief, by the preparation of the plaintiffs' appendix, arrangements for printing and the like, including the correction of defendant's statement of facts, the printing of the counterstatement of facts, and the checking and correction of page references, and the lack of page references, in defendant's argument. Plaintiffs submit that the usual, prevailing, fair charge for such services is at the rate of $25 per hour. In addition to the services rendered, plaintiffs estimate that telephone calls to the printer, and mileage, involved another $20, minimum. Also, in order to correct just one of defendant's false assertions, to-wit: that 'one of the witnesses lived in a distant town' (defendant's brief, page 18), plaintiffs expended the sum of $25 for certified copies of the plat of Leedy's Gardens, attached to and made a part of plaintiffs' appendix.' . . . .

" 'Wherefore, plaintiffs seek an award of damages from defendant, in accordance with the provisions of Court Rule No 70 (1945), for the following, in addition to the judgment for money damages previously awarded plus interest and costs in both courts, as follows:

Attorney fees	$2,500
Other expenses	45
10% of award of money damages ..	1,800
Total	$4,345'

"Recommendation

"It is found that a minimum of 40 hours extra work was necessarily required by counsel for appellees by reason of appellant's failure to comply with the appellate rules.

"An award of damages under Court Rule No 70 (1945), as amended,* is recommended, for the above, based on the Monroe County Bar Association minimum fee schedule for office work, $20 per hour, in the amount of $800.

"That the foregoing is far from unreasonable is the more apparent when it is considered that to require experienced and able counsel, capable of producing the craftsman's product of appellees' appendix and brief, to work at minimum bar rates, is not very full measure of justice to that counsel or his client. It is hardly 'punitive' to the other side. Moreover, had counsel for appellant made such unnecessary by complying with the court rules, since they were not the trial counsel they would certainly have required even more time, chargeable to appellant, to do the same work.

"Together with printing expenses which appellees will recover as regular taxable costs, the above suffices to make appellees whole. It is 'an amount equivalent to *actual* damages and expense incurred by the opposing party, including reasonable attorney's fees.' Court Rule No 70, § 5 (emphasis supplied).

"Although it is true that the quoted rule includes the foregoing as specific components of 'punitive damage,' the additional provision of Court Rule No 70 for 'an added amount not exceeding 10%' of the original judgment is more clearly punitive in nature. Whether such should be imposed in addition (appellees ask the full 10%, or $1,800), occasions the trial court more difficulty in reaching a recommendation. Considerations such as the prior record of counsel in the Supreme Court, the extent to which

* See 347 Mich xxviii, xxx.

widespread violation of the rules may require vigorous enforcement, are involved in the ultimate determination.

"The trial court would prefer not to make a recommendation thereon; assuming that such is required, however, and for whatever help it may be, the court believes that bad faith of counsel in the obvious and morally reprehensible sense has not been established. The good reputation of counsel for appellant has been considered. The trial court does find 'the existence of wilful or reckless disregard of the rules, or violations so widespread as to impeach other reasonable explanation,' requiring the $800 damage award recommended. (Quotation from Justice SMITH'S opinion in *Greenough* v. *Greenough*, 354 Mich 508, at 527.) It is believed, however, that an award of more damages than necessary to make appellees whole ($800) is not required by the circumstances of this case, and such is not recommended. Nor does the trial court find necessary or recommend any further or additional disciplinary action.

"The presentations of counsel submitted to the trial court are also filed herewith.

"Respectfully submitted,
/s/ WILLIAM J. WEIPERT, JR.
Circuit Judge,
38th Judicial Circuit,
Monroe, Michigan

"Dated: August 19, 1960."

Upon receipt of the foregoing, and upon consideration thereof, the above recommendation was adopted and approved by this Court upon September 15, 1960, and the same was ordered printed in full in the Michigan Reports. The clerk will issue the necessary orders in implementation thereof.

OCTOBER TERM, 1960.

KELEMAN *v.* LANE.

BOUNDARIES—ADVERSE POSSESSION—FINDING OF COURT—EVIDENCE.

Finding of trial court that plaintiffs had established adverse user for more than 15 years of entire triangular tract of land between the true boundary line and fixed boundary line some 4 feet east at base of triangle *held,* supported by evidence, hence, plaintiffs were entitled to award of damages of $250 by reason of erection of fence and demolition of their portion of double garage which had been built over the boundary and used by the parties and their predecessors in title.

Appeal from Kalamazoo; Sweet (Lucien F.), J. Submitted June 9, 1960. (Docket No. 51, Calendar No. 47,495.) Decided October 10, 1960.

Bill by Steve Keleman and Anna Keleman against Russell Lane and Louise Lane to quiet title to strip of land adjoining residential properties. Decree for plaintiffs. Defendants appeal. Affirmed.

Eric V. Brown, for plaintiffs.

Charles A. Pratt, for defendants.

KELLY, J. Plaintiffs and defendants are adjoining residential property owners in the city of Kalamazoo.

Defendants had a survey made of their property (December, 1955) and on June 14, 1956, erected a

REFERENCES FOR POINTS IN HEADNOTES

1 Am Jur, Adverse Possession §§ 246–249.

fence on the survey line and began to tear down a double garage that was on both sides of the surveyed boundary line.

Plaintiffs filed (June, 1956) a bill of complaint to quiet title and sought an injunction, claiming title by adverse possession and an easement by prescription over a portion of the driveway on defendants' land.

After hearing testimony of 8 witnesses, the chancellor filed an opinion (January 7, 1957) finding as follows:

"Involved in this action is a triangular piece of land with its apex at a point which is the northeast corner of plaintiffs' property and the northwest corner of defendants' property according to the descriptions contained in the records of their respective titles. The western side of the triangular piece in dispute runs along the true boundary line as set forth in the description contained on plaintiffs' deed which is a metes and bounds description. The easterly side of the triangular piece is the boundary line which had been recognized and used by the parties and their predecessors in title since some time prior to 1931, and which will hereinafter be referred to as the fixed boundary line.

"The record shows that this fixed boundary line was agreed upon between the parties and their predecessors in title as extending from the northeast corner of plaintiffs' property which is marked by an iron stake along a straight line passing through the center of a double garage which had been upon the premises since some time prior to 1931 and extending through said garage to the rear property line, or southerly property line. The dimension of the southerly line of this triangular piece does not appear in the record, but at a point approximately 60 feet south of the apex where the garage was located the width of the disputed triangular piece is 4 feet.

"Located some 60 feet south of the northern boundary of the properties of the parties was a double

garage. Since some time prior to 1931 and until the acts of the defendants precipitated this suit the easterly half of this garage had been used and had been considered to be the property of the defendants and their predecessors in title, while the westerly half of the garage had been used and considered to be the property of the plaintiffs and their predecessors in title. The driveway to the garage consisted of a 5-foot strip of dirt or gravel the easterly boundary of which extended from the stake hereinabove mentioned at the northeast corner of plaintiffs' property and the northwest corner of defendants' property to the center post of said double garage with a branch off from the southerly end thereof into the easterly half of the garage. * * *

"In their bill of complaint the plaintiffs make the following allegation:

" '7. That for upwards of 15 years, the respective parties and their predecessors in title have recognized a stake at the northerly line of said premises as marking the north end of the common line between said premises. That said plaintiffs and their predecessors in title have occupied exclusively, hostilely, adversely, continuously, openly, notoriously, and without dispute or disagreement, the whole of the land west of a line extending in a southerly direction from said stake through the center post of said garage and extended southerly therefrom to the southerly boundary of said properties.'

"A consideration of all of the evidence presented in this case leads to the conclusion that this allegation is a true statement of fact and the court so finds. * * *

"It is the conclusion and finding of this court that plaintiffs have been damaged by reason of the erection of the fence and the demolition of their portion of the double garage to the extent of $250; and defendants are liable therefor."

Appellants claim the court erred in deciding "that the facts presented by plaintiffs constituted an ad-

verse user in the plaintiffs or their predecessors in title" and "that plaintiffs had been damaged to the extent of $250."

The evidence introduced supported the chancellor's finding and decree.

Affirmed. Costs to appellees.

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

In re CRITCHELL ESTATE.

PETITION OF PERLICH.

APPEAL OF MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY.

1. APPEAL AND ERROR—PROBATE COURT—CIRCUIT COURT—QUESTIONS REVIEWABLE.

   Issues sought to be raised on appeal from the probate court to the circuit court were not before the latter court if an appeal was taken thereto without right to do so (CL 1948, § 701.36).

2. EXECUTORS AND ADMINISTRATORS—REOPENING ESTATE—RIGHT OF APPEAL.

   An administrator of an estate who is appointed after petition filed to reopen estate that has once been probated has no interest in the estate or in its assets aside from the status given him by the order reopening the estate and appointing him as administrator, hence, he has no right to appeal from such order as he is not an aggrieved person (CL 1948, § 701.36).

REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur, Appeal and Error § 146.
[2] 2 Am Jur, Appeal and Error § 183.
[3] 2 Am Jur, Appeal and Error § 152.
[4] 2 Am Jur, Appeal and Error § 171.
[5, 6] 2 Am Jur, Appeal and Error § 161.
[7] 3 Am Jur, Appeal and Error § 813.

3. APPEAL AND ERROR—PROBATE COURT—AGGRIEVED PERSON.
   A "person aggrieved" within meaning of statute relating to appeals from probate court to the circuit court means a person who has some interest of a pecuniary nature in the outcome of the case, not a mere possibility arising from some unknown and future contingency (CL 1948, § 701.36).

4. SAME—PROBATE COURT—AGGRIEVED PERSON—WIDOW.
   Widow of decedent was not an aggrieved party entitled to appeal from order reopening estate of decedent, where petition filed did not seek to reach assets which had been distributed in probate proceedings theretofore completed but merely to enable petitioner to bring an action against the estate and if judgment were recovered against it to seek enforcement against the insurance company in accordance with the terms of its policy (CL 1948, § 701.36).

5. SAME—PROBATE COURT—AGGRIEVED PERSON—INSURER UNDER AUTOMOBILE INSURANCE POLICY.
   The insurer under an automobile insurance policy issued to person now deceased is not a "person aggrieved" as the term is used in probate code provision relative to appeals to the circuit court from an order of the probate court reopening an estate of a deceased person and appointing an administrator (CL 1948, § 701.36).

6. SAME—PROBATE COURT—AGGRIEVED PERSON—DEBTOR OF ESTATE.
   A debtor of an estate is not "aggrieved" by appointment of a representative of the estate within meaning of statutory provisions governing appeals in probate, and is not entitled to a review of the proceedings appointing such a representative, when sued on the asserted obligation (CL 1948, § 701.36).

7. SAME—PROBATE COURT—AGGRIEVED PERSON—CIRCUIT COURT—JURISDICTION.
   The circuit court was without jurisdiction to proceed to a determination, where appeal to it from probate court had been taken by parties who were not aggrieved by order reopening estate of decedent (CL 1948, § 701.36).

EDWARDS, KAVANAGH, and SOURIS, JJ., dissenting.

Appeal from Gogebic; Brennan (Leo J.), J., presiding. Submitted April 7, 1960. (Docket No. 29, Calendar No. 47,779.) Decided October 10, 1960. Rehearing denied December 1, 1960.

In the matter of the estate of Perry Long Critchell, deceased, Frank T. Perlich, a claimant, petitioned to reopen administration for purpose of instituting suit on automobile negligence claim and reaching insurance coverage. Petition granted and administrator *de bonis non* appointed. In circuit court the motion of Robert A. Burns, administrator, Ethelyn Critchell, widow and heir-at-law, and Michigan Mutual Liability Insurance Company, insurer, for judgment was denied and their appeal to circuit court was dismissed, from which order they appeal. Affirmed.

Humphrey & Humphrey, for estate.

Theodore G. Albert and *Peter E. Bradt,* for claimant.

KAVANAGH, J. (*dissenting*). Appellants seek relief from this Court from the circuit court's denial of a motion for judgment and the granting of appellee's motion to dismiss in the circuit court for the county of Gogebic. The principal issue is whether or not the probate court had jurisdiction to reopen the estate of Perry Long Critchell, deceased, and appoint a second administrator.

The facts in the case are practically undisputed. Frank T. Perlich, sheriff of Gogebic county, on March 20, 1954, was a passenger in a State-owned Michigan State police car driven by State Trooper Perry Long Critchell. This car was involved in an accident on highway US–27 in Crawford county, Michigan, which resulted in the death of Critchell and in injuries to Perlich. Michigan Mutual Liability Insurance Company insured the State of Michigan on this particular vehicle. On March 30, 1954, Perlich's attorney wrote the insurance company with reference to the claim of Perlich. The record discloses a series of negotiations between Perlich's at-

torney and the insurance company from that time until August, 1954. Perlich himself was confined in a hospital at Grayling, Michigan, until June 8, 1954. Critchell's widow, on April 24, 1954, was appointed administratrix in the estate of Perry Long Critchell, deceased. Proof of publication with reference to claims was filed May 15, 1954, and an order closing hearing on claims, was entered June 29th. Subsequently, a final account was filed, proof of publication with reference to the final account was made on July 19th and an order allowing the account and assigning the residue was entered on August 10, 1954.

On February 23, 1957, almost 3 years after the accident, Perlich petitioned for reopening of the Perry Long Critchell estate, representing himself as being interested in said estate and making the petition as a claimant with an unliquidated claim action against the administrator and estate of Perry Long Critchell, deceased, as a result of damages sustained by him growing out of the vehicular collision occurring on March 20, 1954. Petitioner further represented that the insurance policy constituted an after-discovered asset by which the claim of the petitioner might be paid. Petitioner further represented that he had no knowledge or information with respect to the previous administration of the estate.

Attorneys for Ethelyn Critchell, heir and widow of said deceased, on March 14, 1957, moved the court to deny any petition for the reopening of said estate for the reason that the probate court was without jurisdiction, that complete administration of decedent's estate had been made, and the administrator discharged. A similar motion was made by Michigan Mutual Liability Insurance Company for the same reasons, alleging that its interest in the proceeding was that it might be required to defend the administrator of the estate, if any, in connection with any claim which the creditor might have. On the same

date Perlich filed a claim against the estate for $124,768.

On March 15, 1957, the probate judge entered an order reopening the estate and appointing Robert A. Burns as administrator with all the powers and duties of an administrator *de bonis non*. Robert A. Burns qualified by filing the requisite bond, and letters of administration were issued to him on March 16, 1957.

On March 29, 1957, Burns, administrator, Ethelyn Critchell, widow of said deceased, and Michigan Mutual Liability Insurance Company appealed to the circuit court for the county of Gogebic the probate court's order reopening said estate and appointing the second administrator, claiming that the probate court had no jurisdiction in law to make such an order. Subsequently, a motion for judgment was filed on behalf of the appellants and a motion to dismiss the appeal was filed by Perlich.

The Gogebic county circuit court, on April 7, 1958, found that the appellants are not aggrieved persons within the scope and meaning of CL 1948, § 701.36 (Stat Ann 1943 Rev § 27.3178[36]), since they had no pecuniary interest in the outcome of the case, and ordered that the motion for judgment be denied, the motion to dismiss granted, and the order of the probate court for the county of Gogebic affirmed. Michigan Mutual Liability Insurance Company, Ethelyn Critchell, and Robert A. Burns, administrator of the estate, appeal to this Court for relief from the circuit court order of April 7, 1958.

The controlling question we have presented is: Did the Gogebic county probate court have jurisdiction to appoint a second administrator and reopen the estate 2 years and 6 months after the closing of the estate and discharge of the original administratrix, for the purpose of permitting a creditor to file

a contingent claim and have an administrator to sue in circuit court?

It is admitted by Perlich that while in the hospital at Grayling, Michigan, he was visited by insurance company adjusters, who discussed his claim with him, and that correspondence was had by his attorney with the insurance company. Admittedly, CL 1948, § 704.56 (Stat Ann 1959 Cum Supp § 27.3178 [307]), reads as follows:

"After allowance of the final acount and entry of order for distribution, the fiduciary shall make distribution, taking receipts for the same, and upon filing such receipts and the receipts showing payment of the inheritance tax or the issuance of an order determining that no tax is payable, he may be discharged and his bondsmen released.

"The court may, upon petition having been filed after the closing of an estate, cause the same to be reopened for the purpose of administering after-discovered assets or to complete the administration of the same in case said estate was closed without being fully administered by the fiduciary or court, or for the correction of typographical errors, omissions, or misdescription of property contained in any order or record in said estate, and for any of these purposes may appoint a successor fiduciary: *Provided, however, That the failure of a claimant to file a claim against said estate during the original administration thereof shall not be a cause for reopening the same or for the appointment of a successor fiduciary.*" (Emphasis added.)

It is apparent, therefore, that if Perlich is a claimant, as he represents himself to be in his petition to have the estate reopened, with an unliquidated claim action against the administrator of the estate, then the probate court had no jurisdiction to enter such an order reopening the estate.

It is argued by the appellee that the insurance was an after-discovered asset of the estate, and since the

estate was closed without notice to Frank T. Perlich, who was a known beneficiary of this asset of the estate, it was not binding on him. By whom the asset was after-discovered is hard to determine. Certainly not by the insurance company; it well knew of the policy. Certainly not by the Critchell estate; they knew the policy existed. Claimant Perlich knew of the existence of the policy of insurance, personally talked with the insurance adjusters, and employed an attorney to represent him and carry on negotiations with the insurance company. To whom, then, did this "after-discovery" apply? We must reach the conclusion that there was no after-discovery; that Perlich and his attorney slept on their rights for 2–1/2 years; and that they failed to institute a suit when there was a fiduciary to sue and to file a claim against the estate during the original probate proceedings. Surely the administratrix had no obligation, under the statute or otherwise, to advise Perlich as to his rights and beg him to institute suit. For aught she knew, Perlich had decided for reasons of his own that he did not intend to sue the estate. Perhaps the administratrix didn't believe her husband was negligent or grossly negligent and that consequently Perlich had no claim. Perlich had retained a lawyer within 10 days after his accident; had discussed with the insurance company settlement of his claim; and, so far as administratrix knew, had perhaps abandoned his claim. It is stretching the imagination to presume that any reasonable person who feels he has a claim against an estate in the amount of $124,768 would sleep on his rights for 2–1/2 years after the estate was closed before attempting to protect those rights. Certainly, if this was an after-discovered asset within the meaning of the statute, the persons who had so discovered it are not made known to this Court.

Mr. Justice CARR in *In re Koss Estate,* 340 Mich 185, speaking for this Court, said (p 192):

"In probate matters involving the settlement of estates litigants are entitled to prompt action and the statutes and court rules were designed for that purpose."

This Court in *Lawrence* v. *DeBoer,* 273 Mich 172, in considering the statute limiting the time during which claims against deceased persons may be filed, said (pp 177, 178):

"This statute has been construed with strictness, its purpose being to secure the speedy settlement of estates in the probate court."

In *Young* v. *Moore* (ED Mich), 127 F Supp 265, a case involving almost the identical facts of the instant case, except that in the *Young* v. *Moore Case* action was not brought until 10 months after the estate was closed, Judge Picard, in analyzing the Michigan probate code, said (p 268):

"Prior to 1939, by express statutory provision, claims not presented to the commissioners on claims (or to the probate court if no commissioners appointed) within the time limited by the court were forever barred. See CL 1929, § 15687, *Coughlin* v. *Wineman,* 260 Mich 469; *In re Estate of Jeffers,* 272 Mich 127; *In re Thayer's Estate,* 210 Mich 696. This is such a claim since all claims, with exceptions not here pertinent must be so presented under CL 1929, § 15685. See, also, *In re Sullivan's Estate,* 165 Mich 585; *Patrick* v. *Howard,* 47 Mich 40; *In re Chamberlain's Estate,* 298 Mich 278.

"But in 1939, the laws relating to the administration of estates were codified and certain changes made, among them a provision permitting establishment of claims in court of general jurisdiction was added, CL 1948, § 708.22 (Stat Ann 1943 Rev § 27.3178 [432]). See *In re Chamberlain's Estate,*

supra. At the same time the express provision in CL 1929, § 15687, barring claims not presented within the limit was omitted. But under the new code the probate court is still required to fix a date for filing and hearing claims, CL 1948, § 708.2 (Stat Ann 1943 Rev § 27.3178 [412]), and CL 1948, § 708.18 (Stat Ann 1943 Rev § 27.3178 [428]), provides that a tardy claim may be filed if presented within 18 months after original filing date for administration of the estate and *before the estate is closed.* * * *

"We also direct attention to the fact that the probate code does have a provision protecting unliquidated claims such as in the case at bar. All claimant must do is to start suit and give notice to the probate court. From that moment on no part of the estate is distributed but is held pending result of the unliquidated claim action. Then when such claim is established against the estate of a decedent the clerk of the court where judgment is obtained must certify that judgment to the probate court and its effect shall be the same as all other approved claims of the same class, CL 1948, § 708.22 (Stat Ann 1943 Rev § 27.3178 [432])."

Mr. Justice BLACK in *Melvin* v. *Reading,* 346 Mich 348, said (p 353):

"Reading between the lines, it establishes all too clearly that somnolent negotiations and slumber on rights to exclusion of other causes have left plaintiff in position where she has no pending estate against which to file claim and no fiduciary to sue.

"Judge Picard's carefully considered opinion in *Young* v. *Moore,* 127 F Supp 265, discloses similar slumber and consequent mournful result. His view of Michigan law in that case, which we adopt, save only as presently noted, leads to reluctant conclusion that there is no equity on the face of this bill.

"The right to file claim or suit based on an obligation of a decedent accruing in his lifetime, whether it sound in tort or otherwise, is provided for and limited by the probate code."

Justice CARR in his opinion in the instant case writes:

"The circuit court sustained the claim of appellee and granted the motion to dismiss. In accordance therewith an order was entered denying appellants' motion for judgment. In view of the manner of disposition of the controversy no finding was made with reference to the alleged invalidity of the probate court order."

The opinon and order of the circuit judge, filed April 7, 1958, is set out in full on pages 36a and 37a of appellants' brief and appendix on appeal. The second last paragraph of that order reads as follows:

"It is ordered that the motion for judgment be denied, the motion to dismiss, granted, and the said order of the probate court for the county of Gogebic, filed March 15, 1957, be and the same is hereby affirmed, without costs."

Justice CARR further states:

"As before noted, all assets of the Critchell estate, other than the insurance policy in question at this time, were disposed of in accordance with the orders of the probate court. The appellee in this proceeding, Frank T. Perlich, did not seek in his petition for the appointment of an administrator to reach property that had already been assigned or distributed. Rather, the sole purpose was to enable him to bring action against the estate and in the event of recovery of a judgment to seek enforcement against the insurance company in accordance with the terms of its policy. In such policy appellant Ethelyn Critchell has no interest, and there is no attempt to reach what she has heretofore received."

No such representations are found in the petition to reopen the estate, except to say in paragraph 6 thereof, as shown in appellants' appendix, on page 12a, "that the estate of Perry Long Critchell, de-

ceased, has liability-insured protection and the claim of your petitioner against said estate will not prejudice the legatees or distributees who have acted in reliance of such closing of said estate."

The claim of Frank T. Perlich is set forth in its entirety on pages 17a and 18a of appellants' appendix, the last paragraph of which reads in part as follows:

"Wherefore, Frank T. Perlich, claimant, claims damages against the estate of Perry Long Critchell in the amount of $124,768."

The brief and appendix of appellee contains excerpts from the insurance policy. On page 7b the following is set forth under indorsement (C):

"The limits of liability for coverage A are to be $25,000 each person and $100,000 each accident except for the following vehicles:

"(State police vehicles not excepted)."

In answer to the argument the widow, Ethelyn Critchell, has no pecuniary interest in said estate which would authorize her to take an appeal to the circuit court, it is to be noted, under the original assignment of residue, she received an undivided 1/3 interest in the real and personal estate of her deceased husband. If the claim of Frank T. Perlich were allowed, the widow would be liable pro rata for her 1/3 share of the estate over the $25,000 limit of the insurance policy, in accordance with CL 1948, § 708.29 *et seq.* (Stat Ann 1943 Rev § 27.3178 [439] *et seq.*). See *Schutz* v. *Read,* 284 Mich 548. If the insurance company became insolvent in the interim, clearly the widow's 1/3 share of the estate could be taken for the purpose of payment of the judgment.

It is argued that the new administrator, Mr. Burns, has no interest in the estate and, therefore, is not an aggrieved party. The decision of this

Court in *In re Estate of Trankla,* 321 Mich 478, is alleged to be in point. In *Trankla* a vacancy occurred in a trusteeship under a will by reason of the death of 1 of the 3 trustees. The 2 surviving trustees petitioned the probate court for Kent county to appoint one Michael Leonard as successor trustee. The petition alleged that the members of the family desired the appointment of Mr. Leonard. It further set forth a provision of the will which requested the probate court to give all due consideration to the wishes expressed by the immediate members of the family in regard to a successor trustee. At the probate court hearing a member of the Grand Rapids bar was named as successor trustee by the probate court. A timely appeal was taken to the circuit court by one of the surviving trustees and by the son and daughter of the testator. The circuit court held that the order appointing the member of the Grand Rapids bar without regard to the wishes of the testator's family, the surviving trustees and the beneficiaries of the trust, and the desire of the testator as set forth in his last will and testament, was made capriciously and arbitrarily and constituted an abuse of discretion by the probate judge. The circuit court set aside the order appointing the member of the Grand Rapids bar and remanded the case to the probate court with the direction that Mr. Leonard be appointed. The member of the Grand Rapids bar who had been appointed successor trustee by the probate court appealed to this Court. Justice BUTZEL, after citing several Michigan cases and some from outside the State, said (p 483):

"that the appellant has no such direct pecuniary interest in the subject-matter of this case as to constitute him an aggrieved person entitled to appeal."

Citing *In re More's Estate,* 179 Mich 237, 244, in support of this position, Justice BUTZEL quoted the following language from the opinion in that case:

"'In legal acceptation a party is aggrieved by a judgment or decree when it operates on his rights in property or bears directly upon his interest.'"

The *Trankla Case* is distinguishable from the instant case. Here Mr. Burns has not been removed, but is the acting administrator with the obligation to protect the estate against claims when they are not properly presented in accordance with law.

In *In re McNamara's Estate,* 148 Mich 346, this Court cited *Lothrop* v. *Conely,* 39 Mich 757, and said (p 348):

"If the special administrator has the duty to defend against the claim, he certainly has the right to follow the case to the circuit and obtain a review if desired."

The duty and responsibility of any administrator is the preservation of the assets of the estate. Administrator Burns was charged with this duty in the same manner as all other administrators. He, therefore, had an interest which justified the appeal.

In view of the holding that the administrator and the widow are aggrieved parties within the meaning of the applicable appeal statute, it becomes unnecessary to discuss the position of the insurance company.

The statute prohibits the probate court doing what it attempted to do here. CL 1948, § 704.56 (Stat Ann 1959 Cum Supp § 27.3178 [307]), provides in part:

"Provided, however, That the failure of a claimant to file a claim against said estate during the original administration thereof *shall not be a cause for reopening the same or for the appointment of a successor fiduciary.*" (Emphasis added.)

We conclude that the probate court lacked authority to reopen the Critchell estate and appoint a second administrator, and that appellants are proper persons to question the orders of the probate court on appeal.

The order of the circuit court denying the motion for judgment should be reversed, the order granting the motion to dismiss should be reversed, and the case should be remanded to the Gogebic county circuit court for the entry of an order vacating and holding for naught the order of the Gogebic county probate court entered on March 15, 1957, reopening the estate of Perry Long Critchell, deceased, and the granting of letters of administration on March 16, 1957. Appellants should have costs.

EDWARDS and SOURIS, JJ., concurred with KAVANAGH, J.

CARR, J. This matter comes before the Court on appeal from an order of the circuit court of Gogebic county dismissing an appeal from the probate court of said county, and a companion order denying appellants' motion for judgment. It is the claim of Frank T. Perlich, appellee herein, that on the 20th day of March, 1954, he was injured in a traffic accident occurring on US–27 in Crawford county. At the time Mr. Perlich was sheriff of Gogebic county and was riding in a State-owned car driven by Perry Long Critchell, a sergeant of the Michigan State police. It is further claimed that the officers were on a law-enforcement mission and that the automobile driven by Sergeant Critchell was covered as to its operations by an insurance policy issued to the State by the appellant Michigan Mutual Liability Insurance Company.

Sergeant Critchell sustained injuries in the accident which resulted in his death, and Mr. Perlich

was hospitalized for a period of 79 days as a result of the injuries suffered by him. Appellee claimed that the accident in question was caused by negligence on the part of Sergeant Critchell and through his attorney negotiations were entered into with the Michigan Mutual Liability Insurance Company (hereinafter referred to as the insurance company) in an attempt to procure a settlement for claimed damages. Apparently such negotiations did not result in definite action. In the meantime Sergeant Critchell's estate was probated in Gogebic county. An assignment of the property interests to the widow and other heirs was entered, and the administratrix appointed by the court was discharged on August 10, 1954.

Subsequently, following the failure to reach a settlement as a result of the negotiations with the insurance company, Mr. Perlich, asserting his claim against the Critchell estate, filed a petition in the probate court for the appointment of an administrator. It is his claim that as a result of such petition he learned for the first time of the probate proceedings that had been taken. Thereupon he filed a petition asking that the proceedings be reopened in order to permit him to file his claim, and that an administrator might be appointed against whom suit could be instituted. As the basis for such petition he alleged that no notice was given to him of the prior probate proceedings in Gogebic county, that the insurance company acted on behalf of the estate in the negotiations above mentioned, and that the asserted liability on the part of the estate to himself was a known fact. Apparently it was his theory, or that of his counsel, that the failure to give him notice on the basis of his alleged cause of action against the estate in effect amounted to a lack of due process in that he was thereby deprived of his right to file his claim in such proceeding. He further

asserted as the basis for his petition that the insurance policy was an asset of the estate, and that it was not listed or otherwise treated as such. The judge of probate granted the petition and appointed Robert A. Burns, who had acted as attorney for the Critchell estate, as administrator. Mr. Burns duly qualified as such.

From the order of the probate court, administrator Burns, Ethelyn Critchell, the widow of Sergeant Critchell, and the insurance company in question appealed to the circuit court. In that forum counsel for appellants moved for judgment setting aside the order of the probate court on the ground that it was entered without jurisdiction. Counsel for appellee Perlich moved that the appeal be dismissed, asserting as the basis thereof that none of the 3 appellants was an aggrieved person, or party, within the meaning of the statute (CL 1948, § 701.36 [Stat Ann 1943 Rev § 27.3178(36)]). The circuit court sustained the claim of appellee and granted the motion to dismiss. In accordance therewith an order was entered denying appellants' motion for judgment. In view of the manner of disposition of the controversy no finding was made with reference to the alleged invalidity of the probate court order. If the appeal was taken without right to do so, the issues sought to be raised by appellants were not before the court. An appeal to this Court has been prosecuted on the theory that the circuit judge was in error in granting the motion to dismiss and in refusing to enter judgment on behalf of the appellants.

The question before us for determination is whether the appellants, or any of them, may maintain the claimed right to appeal from the probate court order. Insofar as administrator Burns is concerned we think it obvious that the question must be answered in the negative. In effect, Mr. Burns is

seeking to assail the order under which he was appointed as administrator of the estate. Aside from the status given him by such order he has no interest in the estate or in its assets.

The decision of this Court in *In re Estate of Trankla,* 321 Mich 478, is in point. In that case a petition was filed in the probate court of Kent county for the appointment of a successor trustee to act under the will of Charles Trankla. The petition indicated specifically the individual whom it was desired to have appointed. The probate court, however, did not make the appointment as requested but selected for the position a member of the Kent county bar, an attorney of experience and high standing in his profession. From such order an appeal was taken to the circuit court of the county by one of the surviving trustees and by the son and daughter of the testator. The circuit court reversed the probate court order and from such order of reversal the trustee appointed by the judge of probate undertook to appeal to this Court. It was held that he was not an "aggrieved person" within the meaning of the statute, and that other questions raised in the case did not require consideration. Accordingly the judgment of the circuit court was affirmed.

In reaching such conclusion the Court cited with approval prior decisions recognizing the basic rule that in order to appeal one must have an interest in the subject matter of the litigation. Among other decisions the Court referred to *In re Estate of Matt Miller,* 274 Mich 190, 194, where it was said:

"To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency. This is the general rule."

See, also, *Butts* v. *Ruthven,* 292 Mich 602, and *In re Wood's Estate,* 299 Mich 635, the opinions in which

discussed the question at issue and recognized the rule to be as above stated.

Counsel for appellants have called attention to *In re Draime,* 356 Mich 368. Involved there were provisions of the probate code relating to adoption proceedings. It appears that a petition had been filed seeking the adoption of a 3-year-old child, a ward of the probate court. Said court entered an order placing the child in the home of the petitioners where he remained for nearly 2 years. No question was raised as to the suitability of the would-be adopting parents nor with reference to their home, but the probate court denied the petition for adoption and committed the child to the custody of the Michigan Children's Institute for the reason that the petitioners did not wish to adopt another child, a sister of the boy whose custody for the period indicated had been granted to them. It was held that the petitioners were entitled to appeal from the order and the decision of the circuit judge based on a contrary conclusion was reversed. We think it apparent that different considerations must be applied in an adoption case than in one in which pecuniary rights and interests are involved. In the case at bar questions analogous to those in the *Draime Case,* and in the preceding case of *In re Snyder,* 328 Mich 277, are not involved. The parties to the controversy now before us are concerned wholly with pecuniary questions and, in consequence, had no right to appeal to the circuit court unless they possessed an interest, or interests, of such nature.

As before noted, all assets of the Critchell estate, other than the insurance policy in question at this time, were disposed of in accordance with the orders of the probate court. The appellee in this proceeding, Frank T. Perlich, did not seek in his petition for the appointment of an administrator to reach property that had already been assigned or distributed.

Rather, the sole purpose was to enable him to bring action against the estate and in the event of recovery of a judgment to seek enforcement against the insurance company in accordance with the terms of its policy. In such policy appellant Ethelyn Critchell has no interest, and there is no attempt to reach what she has heretofore received.

In *Melvin* v. *Reading,* 346 Mich 348, to which counsel for appellants have directed our attention, the proceeding brought by plaintiff was of a wholly different nature than is the instant case. There a bill in equity was filed seeking judgment against the heirs and distributees of an estate which had been probated in a somewhat summary manner. Here Mrs. Critchell is not a party to the present proceeding. She has no interest therein either pecuniary or otherwise and cannot be said to have been aggrieved by the order of the probate court appointing Mr. Burns as administrator for the purposes of the petition filed by the appellee.

This brings us to the question as to the status of the insurance company. It is in the position of assailing the order from which it took an appeal to the circuit court in order to protect itself from possible liability under the policy issued to the State of Michigan. It has no interest otherwise, and obviously no interest in the assets of the estate of which disposition has been made in the prior proceeding. Its status is that of a debtor. In other words, if action is brought against the administrator for damages, and judgment is obtained, such judgment may perhaps be enforced in accordance with the terms of the policy. The provisions of the statute of Michigan permitting such enforcement for the benefit of a judgment creditor of the insured rest on the theory of a debtor-creditor arrangement.

The question at issue is whether a possible debtor of the estate can be said to be aggrieved by an order

of the probate court appointing an administrator of the estate against whom an action may be brought. The Michigan decisions above referred to suggest the conclusion that the insurance company, being merely a possible debtor, does not have such an interest as entitled it to appeal from the order in question here. Such has been the holding in other States. In *In re Estate of Hardy* v. *Minneapolis & St. L. R. Co.*, 35 Minn 193 (28 NW 219), an administratrix appointed by a probate court brought an action against the defendant railway company to recover damages for the alleged wrongful killing of her intestate. The company undertook to appeal from the order of the probate court appointing the administratrix. The district court to which such appeal was taken dismissed it on the ground that an appeal could be taken only "by a party aggrieved." In sustaining the action of the district court the supreme court of Minnesota said, in part, with reference to the meaning of the term "party aggrieved":

"This does not include a mere debtor of the estate. It refers to one who, as heir, devisee, legatee, or creditor, has what may be called a 'legal interest' in the assets of the estate, and their due administration. A mere debtor of a decedent's estate may have a personal preference as to who shall be appointed administrator, but in law that is a question in which he has no interest, and therefore its determination in one way or another cannot aggrieve him in any legal sense. His simple duty is to pay his debt to the administrator, whoever he may be. How the estate is administered, or by whom, is nothing to him. The case of one against whom an administrator has a right of action under the statute cited cannot stand upon any different footing."

Of like import is *City of Bridgeport* v. *Steiber*, 143 Conn 720 (126 A2d 823). In that case the plaintiffs undertook to appeal from a decree of a probate

court which appointed an administrator of the estate of one absent for more than 7 years and presumptively dead. Said appeal was predicated on the proposition that suits had been brought against the plaintiffs claiming damages for personal injury sustained by the alleged decedent because of the failure of the city of Bridgeport to properly maintain its public highways, and also on the theory of negligence on the part of another. On appeal to the superior court a motion was made to dismiss for want of jurisdiction on the theory that the appellants were not aggrieved by the decree from which they sought to appeal. In sustaining the order of the superior court the supreme court of the State said, in part (pp 722, 723):

"Appeals to the superior court from decrees of probate courts are authorized by section 7071 of the general statutes.* Under that section such an appeal may be taken only by a person aggrieved by the order or decree appealed from. If the appeal is taken by a person who is not 'aggrieved,' the court to which it is taken is without jurisdiction to hear it. *O'Leary* v. *McGuinness,* 140 Conn 80, 83 (98 A2d 660); *Weidlich* v. *First National Bank & Trust Co.,* 139 Conn 652, 656 (96 A2d 547). To be aggrieved by a probate decree admitting will to probate or appointing an administrator, a person must have a legally protected interest in the estate which has been adversely affected by the decree. *Williams* v. *Houck,* 143 Conn 433, 438 (123 A2d 177); *O'Leary* v. *McGuinness, supra.* It must appear, moreover, that the interest which is adversely affected is a direct interest in the subject matter of the decree appealed. *Williams* v. *Houck, supra,* 437; *Weidlich* v. *First National Bank & Trust Co., supra.* * * *

"In the present case, the plaintiffs have no legally protected interest in the estate of Graham or in the appointment of an administrator thereon. The de-

* See Conn Gen Stat (1958 Rev), § 45-288.—REPORTER.

cree does not adjudicate any issue against them. It does not determine as against them that they are liable for damages to the estate. That question will have to be decided in actions brought against them by the administrator. Their right to make their defenses in those actions is in no way affected by the appointment of the administrator. The contention of the plaintiffs is that the interest which was adversely affected by the decree appealed from was their right to be protected from having claims made against them in court. The place for them to assert that right to protection is in the court in which they will be sued. It is not the function of the probate court to decide whether they are entitled to such protection, and the decree appealed from does not decide that question.

"In short, the plaintiffs have no interest in Graham's estate, nor is any interest of theirs directly affected adversely by the decree appointing the administrator. It follows that they are not 'aggrieved' by the decree in the sense in which that word is used in section 7071 and, therefore, that the superior court could not take jurisdiction of their appeal."

In *Berry* v. *Smith,* 85 Ga App 710 (70 SE2d 62), a petition was filed in a court of jurisdiction for an appointment of an administrator of the estate of Berry, the petitioner claiming a cause of action against Berry for damages because of personal injuries resulting from a traffic accident. The Trinity Universal Insurance Company had issued a policy of insurance to Berry containing a public liability provision, and filed a caveat challenging the right of the moving party to seek the appointment of an administrator. The widow of the deceased likewise filed a caveat claiming that the petitioner was not a creditor and that there was no property upon which administration could be had. The court of original jurisdiction upheld the contention of Mrs. Berry that there was no estate to be administered, and

dismissed the application filed by plaintiff Smith. An appeal was taken to the superior court of the county which concluded that the insurance company's caveat was not well-founded, and that the order sustaining the motion to dismiss on behalf of Mrs. Berry should be reversed. The court of appeals of the State rejected the claim of the insurance company that it had a substantial interest to protect and hence was entitled to appeal the order. In taking such action it was said (pp 713, 714):

"Since mere apprehension of suit by an administrator, when appointed, will not authorize a person to appear as a party in the court of ordinary (*Augusta & Summerville R. Co.* v. *Peacock,* 56 Ga 146), it follows that a company which will be bound to defend a suit, if filed, against an administrator, when appointed, just as it would have been bound to defend a suit for the same cause of action against deceased had he lived, does not have any interest in the estate, but is a mere interloper; and the trial court properly sustained the petitioner's demurrer to the company's caveat, since it has no right to be heard on any contention."

Citing prior decisions the court further held that the petitioner was entitled to seek the appointment of an administrator, and that the potential liability of an insurer is an asset of the estate. The order of the superior court was, in consequence, sustained.

In *Persky* v. *Greever* (Tex Civ App), 202 SW2d 303, the court of civil appeals of the State of Texas held that:

"A debtor of an estate is not 'aggrieved' by appointment of a representative of the estate within meaning of statutory provisions governing appeals in probate, and is not entitled to a review of the proceedings appointing such a representative, when sued on the asserted obligation." (Syllabus 4.)

We are in accord with the holding of the circuit judge that none of the appellants was "aggrieved" within the meaning of the applicable Michigan statute, above cited, by the order of the probate court of Gogebic county appointing Mr. Burns as administrator of the estate for the reasons and purposes set forth by appellee in his petition for such appointment. Counsel have suggested that under the ruling of the circuit court there was no one in the instant case who could have appealed. Whether such statement is correct or otherwise does not require consideration. In any event, inability of others to appeal furnishes no support for a claim on the part of the appellants that they should be accorded such right. It may be noted that an analogous situation existed in *In re Estate of Trankla, supra.*

Appellee's motion to dismiss the appeal was properly granted and, in consequence, the circuit court was without jurisdiction to proceed to a determination of the controversy on the merits. *City of Bridgeport* v. *Steiber, supra.* In consequence appellants' motion for judgment was properly denied. The orders of the circuit court are affirmed, with costs to appellee.

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

BLACK, J., did not sit.

TOWNSHIP OF SUPERIOR *v.* TOWNSHIP OF YPSILANTI.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—FINDINGS OF TRIAL COURT.

   The Supreme Court hears and considers chancery cases *de novo* on record on appeal but gives considerable weight to the findings of the trial judge since he is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court.

2. SAME—CHANCERY CASES—FINDINGS OF TRIAL COURT.

   The Supreme Court does not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, the Court reaches the conclusion that had it been in the position of the trial judge it would have arrived at a different decision.

3. TOWNSHIPS—SCOPE OF CONTRACTS—WATER AND SEWAGE FACILITIES.

   Finding of trial court that contracts between plaintiff and defendant townships and between each township and private defendant relative to water supply and sewage facilities were not limited to specific area *held,* erroneous, where each of the contracts specified area covered in general vicinity of land once occupied by temporary governmental housing units in connection with Federal government's wartime efforts.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—JURISDICTION.

   Claim of defendant developer in suit by plaintiff township against defendant township that trial court had no jurisdiction to adjudicate as to contract rights between defendants and to relieve

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur, Appeal and Error § 912.
Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses. 111 ALR 742.
[3, 5] 12 Am Jur, Contracts § 314.
[4] 14 Am Jur, Courts § 191.

defendant township of obligations to defendant developer *held,* untenable under record presented.

5. WAR—DEMOLITION OF TEMPORARY HOUSING UNITS—TOWNSHIPS. Decree setting forth rights of plaintiff and defendant townships and of defendant developer of tract located in both townships which defendant township had purchased from Federal government and which established program for orderly demolition of wartime temporary governmental housing units and establishment of replacement housing facilities and for financing of water and sewage facilities is affirmed except for modification limiting area involved.

Appeal from Washtenaw; Robinson (Thomas N.), J., presiding. Submitted January 7, 1960. (Docket No. 27, Calendar No. 48,255.) Decided October 10, 1960.

Bill by Township of Superior against the Township of Ypsilanti, Washtenaw County, Michigan, and Stephen Lanyi, Fred Gattegno, and Ernest Landry, copartners now doing business as Willow Woods Development Company, to resolve disputes arising from contracts, for injunctive relief, and to establish rights in respect to lands, water mains, and sewers in former emergency temporary housing areas developed by Federal government and disposed of for permanent development. Decree for plaintiff. Defendant Willow Woods Development Company appeals. Affirmed as modified.

William R. Kelley and *Maurice A. Merritt,* for plaintiff.

Burke, Burke & Ryan, for defendant Willow Woods Development Company.

KAVANAGH, J. Plaintiff township of Superior, Washtenaw county, Michigan, filed this action

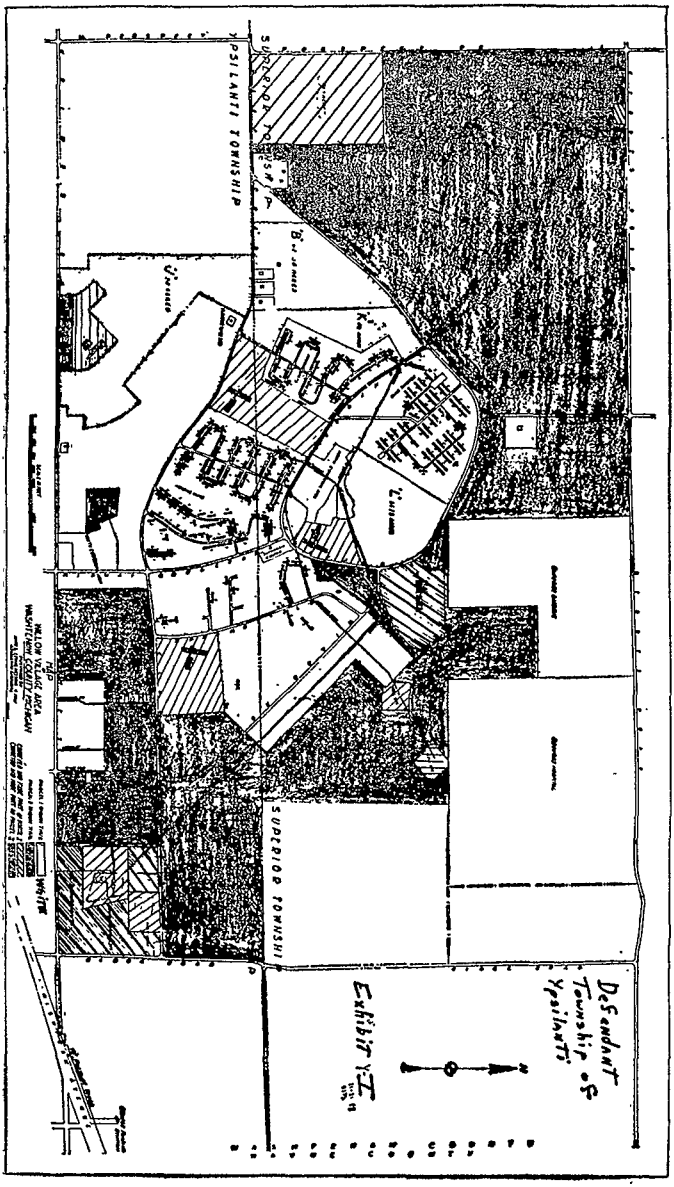
against defendants township of Ypsilanti and Willow Woods Development Company, a copartnership, seeking to enjoin certain actions by the defendants. Plaintiff also sought to establish the ownership of certain lands and appurtenances and to determine the rights of the parties under several contracts previously entered into by them.

The United States government, in 1942, pursuant to condemnation proceedings, obtained title to the land in dispute, designated as parcel 1 and parcel 2 in defendant township of Ypsilanti's trial exhibit Y–1.[1] Thereafter, on part of parcel 1, the United States government caused to be erected wartime governmental housing units in connection with its wartime effort. Further, as a part of the development of this project, water and sewer installations were made, and streets and roadways into and out of the project were developed by the Federal government and used by the public but never dedicated. These water and sewer facilities were owned and operated by the governmental agency in charge of the housing units.

On October 29, 1954, the United States government conveyed to Ypsilanti township the parcel referred to as parcel 1, under the authority of the provisions of the so-called "Lanham act," being a Federal statute,[2] and the provisions of CLS 1956, §§ 125.731, 125.732 (Stat Ann 1958 Rev §§ 5.4091, 5.4092). It is to be noted that almost 50% of the area involved in parcel 1 is located in Ypsilanti township and the remainder in Superior township. New housing units have been constructed in both townships. Parcel 1 contains, in addition to the housing units, a

[1] See attached map. Parcel 1 is the white area, parcel 2 is black.

[2] 54 Stat, ch 862, p 1125, as amended. See 42 USC (1958 ed), § 1501 *et seq.*, and particularly, as to disposal of housing, § 1581 *et seq.*—REPORTER.


YPSILANTI TOWNSHIP
SUPERIOR TOWNSHIP
Defendant
Township of
Ypsilanti
Exhibit Y-I

sanitary land fill, well and pump house, and water tank sites.

Parcel 2, consisting of 965 acres of vacant land surrounding parcel 1, is likewise located partly in Superior township and partly in Ypsilanti township. The government constructed a sewage disposal plant on parcel 2.

On October 30, 1954, Ypsilanti township passed a resolution expressing its intention to purchase parcel 2 from the United States government. Ypsilanti township obtained an option from the United States government to purchase parcel 2, which option was to expire on or before April 30, 1955.

On March 31, 1955, Ypsilanti township entered into a contract with the Willow Development Company, a copartnership, the predecessor of Willow Woods Development Company, under the terms of which Willow Development Company purchased all of parcels 1 and 2. It is to be noted, however, that Ypsilanti township expressly reserved easements over parcel 2 as follows:

"But reserving to the seller herein easements along the water mains to and from the wells and pump sites as now located, said easements to be retained by the seller until such time as the location of said mains may be changed or the mains may be abandoned."

This contract further provided for a schedule under which the approximately 600 acres known as parcel 1 were to be conveyed. The last 200 acres were to be conveyed on or before July 1, 1958. Ypsilanti township further agreed to exercise its option to purchase parcel 2 forthwith and to convey the same to Willow Development Company immediately upon receipt of the same. The Willow Development Company agreed to construct sufficient houses of the minimum type permitted so as to house those tenants in possession of the temporary housing as of Novem-

ber 1, 1954, who were able, willing, and qualified to purchase. These houses were to be built so that they could be occupied as the tenants vacated the temporary housing in accordance with the demolition schedule. This contract further provided that all construction of water and sewer installations, mains, pumps, and appurtenances would be installed at the cost of purchaser subject to the general supervision and control of Ypsilanti township water and sewer department. The contract also provided for conveyance of all right, title, and interest in and to any portion of the installations lying within public rights-of-way or within easements created for such installations, at such times as the installations were made. Certain other provisions with reference to the contracts will be given later in this opinion.

On April 5, 1955, the defendant Ypsilanti township exercised its option to purchase parcel 2.

Before Ypsilanti township could acquire title to any of the property owned by the United States government, it was necessary that Superior township waive the requirements of the Lanham act, which required demolition of Willow Village on or before January 1, 1955. Superior township protested the action of Ypsilanti township in acquiring that portion of parcel 2 located in Superior township without prior notice to Superior township in accordance with the terms of the waiver of Superior township dated October 8, 1954. On August 5, 1955, as a result of the protest of Superior township, a contract was entered into between the plaintiff Superior township and Ypsilanti township. On the same day a contract was entered into between plaintiff Superior township and Willow Development Company. On September 26, 1955, a contract between the defendant Ypsilanti township and Willow Development Company was executed. This contract recited:

"The instant agreement is an amended contract of sale and replaces an agreement between the parties hereto dated the 31st of March, 1955."

By deed dated the 30th day of June, 1955, the United States government conveyed to Ypsilanti township the land and appurtenances designated as parcel 2.

All of the area in parcel 2 which Ypsilanti township contracted with Willow Development Company to convey has been conveyed. As to parcel 1, most of those portions which had been cleared of the housing by Ypsilanti township have now been conveyed to Willow Woods Development Company.

The demolition dates and times of conveyances have been modified by agreement and have been extended from time to time upon the request of Superior township and with the agreement of both defendants.

The contractual provision for a 40-acre parcel to be used for community housing was not exercised by Ypsilanti township pursuant to its rights thereunder. Plaintiff Superior township made demand on Ypsilanti township for approximately 20 acres to be set aside for community rental housing and specified a particular tract of land for that purpose. Ypsilanti township refused to convey the particular tract demanded, but as a result of negotiations Willow Woods Development Company offered to Superior township a choice of 3 tracts of land for development for low-cost rental housing. From that time on negotiations were carried on directly between Willow Woods Development Company and Superior township. Superior township selected the tract which is shown on the attached map as 21.67 acres* for rental housing. Pursuant to these negotiations Superior township was given an option to purchase

* This tract is indicated by diagonal lines adjacent to and easterly of the white area with a curved boundary in the central portion of the map.—REPORTER.

the 21.67 acres. When it attempted to exercise its option, Willow Woods Development Company refused to convey the parcel covered by the option, claiming that the option, and the plaintiff's exercise thereof, was an *ultra vires* act, not having been authorized by the qualified electors of the township. Superior township filed this action to settle its rights and obtain the relief prayed.

On the trial it was agreed that Superior township had notified Ypsilanti township it had taken over the water and sewer facilities in Superior township, and that it had established its own department and passed an ordinance covering the operation of its water and sewer department in Superior township.

It was agreed between the 2 townships that, for the purposes of the lawsuit, the sewage disposal plant involved had an average maximum flow of 1,750,000 gallons per day measured upon an annual basis. It was further agreed between the 2 townships that the estimated average daily flow from the area formerly owned by the government which lies in Superior township, when fully developed as a residential area, would be approximately 1,200,000 gallons per day, measured upon an annual basis. It was further agreed between the 2 townships that the anticipated gallonage from the balance of the area lying within Superior township, bounded on the north by Geddes road and on the west by Prospect road and on the east by the township line, would be an average of 875,000 gallons per day, measured upon an annual basis, when fully developed as a residential area.

The 2 townships agreed that the rate to be charged Superior township by Ypsilanti township for sewage disposal service would be the bulk rate as measured by the total gallonage as shown by individual water meters of Superior township users.

It was also agreed that at the time of trial there was no debt service charge being made to any users in Ypsilanti township and that therefore none was applicable to any sewage service by Ypsilanti township for Superior township.

The questions of law concern primarily the sewer and water facilities in Superior township and the respective rights of the parties thereto arising out of the various contracts among them, such as their present ownership, their present and future operations, rights of access thereto, and future expansion and extension thereof.

The trial court took the position that the contractual relationship of the parties must be interpreted in the light of the purpose that all sought to accomplish from the beginning—the orderly demolition of the government housing and the substitution of new housing for those dispossessed by such demolition. This was the purpose of the Federal government, of the authorities in both townships, and the design pursued among all parties to the respective contracts.

The trial court further took the position that the pleadings, the pretrial statement, and the exhibits, particularly the contracts themselves, disclosed that all parties contracted with reference to the possibility that Superior township would take over the operation of the sewer and water systems located within its boundaries and that their respective contractual rights would be affected accordingly in that contingency. All the parties understood that the various contracts between them contemplated 2 separate and distinct sets of circumstances which the several contracts dealt with accordingly:

(1) Those circumstances occasioned by the continued operation of the facilities in Superior township by the township of Ypsilanti only; and

(2) Those circumstances occasioned by the taking over of such operation in Superior township by the township itself.

The trial court found that after a period during which Ypsilanti township operated the facilities, the township of Superior did take over such operation.

The trial court further found the rights of defendants in the sewer and water facilities did not rest on the contract of March 31, 1955, but rather on the contract of August 5, 1955, between Superior township and Willow Development Company, which made specific reference to the rights of the respective parties in relation to the sewer and water lines. Under this contract Willow Development Company, with full knowledge of the agreement of the same date between Superior and Ypsilanti townships, contracted with plaintiff Superior township covering their agreement as to possible future ownership, maintenance and operation of the sewer and water lines as conveyed or to be conveyed to Superior township by Ypsilanti township.

On September 26, 1955, in a contract between defendants which replaced an agreement between them dated March 31, 1955, defendants clearly recognized the future status of the sewer and water mains in the event Superior township took them over. The various contracts indicated that it was not, nor had it ever been, the intention of either of the parties defendant to deal with lands in Superior township in such a way as to interfere with the governmental powers and duties of Superior township. The provisions recognized Superior's constitutional and statutory inherent power to serve its residents from water and sewer mains within its boundaries by acquiring sewage disposal plants and waterworks. The trial court quoted in its opinion the following provisions from the contract of August 5, 1955, between Ypsilanti township and Superior township:

"Ypsilanti township agrees to supply water and sewer services to Superior township for the area bounded on the north by Geddes road and on the west by Prospect road. Superior township retains the right to decide whether or not it will maintain and operate these services within the Superior township portion of this area. * * * If Superior township does not so elect to operate and maintain the said water and sewer installations, Ypsilanti township will own, operate and maintain the mains and provide services at the same rate applicable in Ypsilanti township. * * * At such time as Superior township assumes maintenance and operation of the mains they will be conveyed to Superior township without cost. Upon request and upon the conclusion of proper financial arrangements therefor, Ypsilanti township agrees to serve lands other than those included within the present government owned area with sewage disposal services and to expand the capacity of its sewage disposal plant not to exceed 50% of its maximum present capacity."

The trial court again made reference to the contract between Superior township and Willow Development Company dated August 5, 1955, and quoted therefrom the following:

"The party of the first part (Willow Woods Development Company) further agrees that in the event the party of the second part (Superior township) owns, maintains, and operates sewer and water lines in that portion of the above referred to area in Superior township, then all tie-ins and connections to said sewer and water mains will be made by separate agreement with Superior township."

The trial court again made reference to the contract between the defendants dated September 26, 1955, and quoted in part as follows:

"If Superior township assumes the operation and maintenance of said mains within Superior township

the purchaser will make the necessary arrangements with Superior township authorities. * * * All right, title and interest in and to any portion of said installations (water and sewer) lying within public rights-of-way or within easements created for such installations shall, without further compensation, be transferred to the seller, free and clear of any liens or other encumbrances, which transfer shall be accomplished by appropriate bills of sale at such time as the installations are made. However, if Superior township shall decide to assume the operation and maintenance of the water and sewer mains within Superior township, then title to such mains shall be transferred by the purchaser (Willow Woods Development Company) to Superior township."

The trial court then found as follows:

"In this view of these contracts it follows that the sewer and water facilities in Superior township described in these exhibits became, when Superior township notified the township of Ypsilanti in the spring of 1958, that it had taken them over, the property of Superior township to all intents and purposes. All lateral lines located in the presently owned village area in Superior township thus become the immediate property of and are subject to be operated and maintained by Superior township, as well also as the well sites and water storage tank located in Superior township, subject only to their proper transfer for the consideration set forth in exhibit A and as therein provided. Superior township had at that time notified the township of Ypsilanti that it had taken over the sewer and water system and passed an ordinance governing the operations of its own sewer and water department. The use and maintenance of these facilities under such department and their operation under such ordinance was thereafter subject only to such limitations as were provided in such contracts.

"From this it follows that Ypsilanti township, subject only to such limitations as are provided in said

contracts, is not obligated under its contract with Willow Woods (exhibit C) to furnish sewer and water facilities, or to permit tie-ins to its sewer and water mains in or from any lands in Superior township, such having now become the obligation of Superior township, and as such requiring only the application of such reasonable regulations and restrictions as may be exercised under its lawful police power.

"This finding carries with it a denial of the conclusions presented as issues of fact and law in argument by defendant Willow Woods Development Company. These appear to arise out of a belief that even though it had agreed to be governed by the changed conditions following the exercise by Superior township of its choice to maintain its own sewer and water department that Ypsilanti township was also obligated under its agreements to such defendant relative to such service in the same manner as would have been the case in the event that such choice was not made by Superior township. However, the defendant Willow Woods Development Company had only such rights as were agreed upon between it and Ypsilanti township before Superior township made its election. Willow Woods Development Company now has, following the action by Superior township, only such rights as it now obtains under the lawful regulations of Superior township.

"Under this view it follows that the rights of Superior township cover the water lines as they now exist and are governed by the easements hereinafter mentioned pertaining thereto. Such rights are not confined in their exercise only to such time as Willow Woods Development Company should decide to plat further portions of the former government controlled area, and formally dedicates rights-of-way pursuant to such plats as it may dedicate in the future. Such rights are not confined to and do not exist only for the purpose of repairing, locating, and maintaining said lines only while serving the temporary housing units in existence as of the time

Superior township took over, and until they are demolished. These lines are not, simply because originally designed and planned exclusively for the governmental area, for that reason now to be confined for use only to that area, none of the agreements of the parties justifying such construction, express or implied. Such rights of Superior township are not limited only to the alterations and relocations made by Willow Woods Development Company; they do not entitle Willow Woods Development Company to have its area served without additional cost for expansion, if expansion be required, as provided by contract and hereinafter discussed. Willow Woods Development Company does not have any prior right to services from the presently established plant before these services are permitted to expand beyond the formerly governmentally controlled area.

"The right of Superior township to maintain and operate these facilities carries with it the right of access thereto for such purpose in any part of the township of Superior, within the limitation of its contract with Ypsilanti township, including both that portion not occupied by government housing, as well as that so occupied now and when the operation was maintained by the Federal government.

"No terms can be found in any of the documents presented to this court, whether in the deeds by the Federal government to Ypsilanti township, or in the deeds or land contracts existing between Ypsilanti township as grantor and vendor and Willow Woods Development Company as grantee and vendee relative to the absolute ownership of the sewer lines and mains. All references to said water and sewer lines and mains are to operation, maintenance, tie-in easement and right-of-way. The contract between the Ypsilanti township and Superior township refers to services, extended if so decided by Superior township, beyond the area formerly owned by the government authority and into other areas of Superior township. All the contracts among the parties contemplate the acquisition, ownership, and

operation of the facilities by Superior township, and in no respect limit their use within any particular area limits. Any such limitation is contained only as to the action of Ypsilanti township during such period as Superior township failed to act and only while services were furnished by Ypsilanti township, and then only in respect to such services. If the parties had desired at the time of the making of such contracts, to provide that Superior township would be limited to the extent Ypsilanti township was limited by its agreement, such desire should have been expressed in such contract. Instead, the language used indicated that if Superior township took over, all future rights of the parties would be governed by such circumstance. There would have been no occasion for any contract defining Superior township's rights in such event, if the parties actually contemplated that Superior township was merely taking over a sewage and water system that it could not use, except to carry out commitments of Ypsilanti township, and that was to be of no other use to it whatsoever when and if it acquired the ownership of the system, set up its own department, and passed its own ordinance.

"It is imperative by reason of the situation created by the parties themselves in their respective contracts that performance be such as to carry out the obvious intention of all the parties that Superior township be endowed with the facilities it required, and contracted for, to effect the very purpose sought, *viz:* the furnishing of water and sewer services to Superior township in order that new housing could replace that sought to be demolished, not only in the formerly operated governmental area, now owned by Willow Woods Development Company, but in any portion of Superior township where such replacement was desirable. In order that Superior township may properly use what it has thus received, an access to it must be supplied. In view of the fact that it is a matter of right created by contract, there is no occasion for a resort to condemnation proceed-

ings, as has been suggested. No use need be made of other existing sources of access, if there are such, for the same reason.

"Ypsilanti township shall therefore convey to Superior township easements over and under all and any land in Superior township heretofore or presently owned by Ypsilanti township for the purpose of permitting Superior township to operate, service, maintain and tie into all water supply and water and sewage disposal transmission mains, pumps, and ducts, which easements are determined herein to be as follows: Over the most direct and convenient way from the extremities of the water and sewer mains, lines and facilities through the lands conveyed to Willow Woods Development Company to other lands in Superior township. Should Ypsilanti and Superior townships be unable to agree on the exact location of such easements, they shall be fixed by the court on proper application therefor. Such easements, however, shall be established, in any event, with due regard to the effect such location may have on current plats of the governmental area that may have been filed prior to the date on which Superior township assumed the operation of the lines and while same were operated by Ypsilanti township in that area.

"Defendant Willow Woods contends that the township of Ypsilanti is not obligated under its contract of August 5, 1955, with Superior township (exhibit A) prior to the township of Ypsilanti's conveyance of land to the defendant Willow Woods, and quotes from such contract the following limitation:

" 'This agreement shall only be effective between the parties hereto upon the termination of the legal cause now existing between them in the circuit court for Washtenaw county, and shall only be effective upon conveyance of land to the Willow Development Company in accordance with a contract between Willow Development Company and the township of Ypsilanti.'

"However, the statement of facts prepared at the pretrial statement contains the following language:

" 'By deed dated August 8, 1955, the defendant Ypsilanti township conveyed to the Willow Development Company, the land heretofore referred to and generally known as parcel 2, which deed is recorded in liber 708, page 117 through 130, being defendant's exhibit W–6';

"also:

" 'All of the area in parcel 2, which Ypsilanti township contracted with Willow Development Company to convey, has been conveyed. As to parcel 1, most of those portions which have been cleared by Ypsilanti township of the housing, have now been conveyed to Willow Development Company, but there remains to be conveyed portions of parcel 1 which have not been cleared of the temporary housing as well as some cleared land.'

"These statements show compliance with the condition precedent as to the conveyance of land provided for in exhibit A, and in no way justify any claim that by virtue of other provisions contained in exhibit A, or other contracts, or by reason of any other facts and circumstances disclosed on this record Ypsilanti township is not required to furnish water and sewer services for the area bounded on the north by Geddes road and on the west by Prospect road, even when Superior township has concluded proper financial arrangements for the expansion of the sewage disposal plant up to 50% of its present maximum capacity. No such issue is presented by defendant Ypsilanti township, the actual grantor in the deeds of conveyance covering the land. No language appears anywhere in any of the contracts that by strained or unstrained construction justifies the claim that Superior township would exercise no rights with respect to the water and sewer mains in Superior township, or be entitled to sewer and water services in the area outside of the original governmental area, until all of the temporary housing units erected on parcel 1 were demolished and all of the raw land was

conveyed by Ypsilanti township to Willow Woods Development Company.

"One of the limitations in the contract between Ypsilanti township and Superior township (exhibit A) pertains to the conclusion of proper financial arrangements to provide for the expansion of the sewage disposal plant located in Ypsilanti township recently serving the entire Willow Village area.

"All parties plaintiff and defendant agree that such proper financial arrangements must be defined and have presented their respective plans for adjudication by the court as to what constitutes 'proper financial arrangements.' Both townships and Willow Woods have submitted proposed plans, all of which contain points of conflict and areas of disagreement, as well as impractical suggestions that appear to be based on conjecture, estimates based on insufficient information or lack of full consideration concerning essential factors. As indicated herein any obligation Ypsilanti township had to Willow Woods Development Company was transferred by contract to Superior township upon its establishment of its own sewer and water system. 'Proper financial arrangement,' therefore, need only be such as concerns Ypsilanti and Superior townships.

"It would appear that the only suitable financial arrangement that can be made under the circumstances is for Superior township to pay the amount needed in cash at the time the present capacity of the sewage disposal facility anticipated for use is reached. For the purposes of this lawsuit, it is agreed that the maximum capacity of the present sewage disposal plant located in the southeast corner of exhibit Y–1 is an average daily maximum flow measured upon an annual basis of 1,750,000 gallons per day; and that the estimated daily flow measured upon an annual basis from the area formerly owned by the government which lies in Superior township when fully developed as a residential area will be approximately 1,200,000 gallons per day; that the anticipated gallonage from the balance of the area

lying within Superior township bounded on the north by Geddes road and on the west by Prospect and on the east by the township line will be an average of 875,000 gallons per day measured upon an annual basis when fully developed as a residential area. In establishing a plan that covers the phrase, 'suitable financial arrangements' the amount of sewage coming out of Superior township to be treated by Ypsilanti township must be determined on the basis of such figures in terms of specific gallonage. The existing sewage disposal plant, therefore, will not be sufficient to properly treat the entire area required to be serviced to its full capacity without expanding the capacity thereof to provide for sewage in excess of 1,200,000 gallons. The township of Ypsilanti should not be obligated to process any sewage from Superior township in excess of 1,200,000 gallons per day, except as stated upon payment in full by Superior township of the cost of such facility expansion necessary to accommodate such excess.

"Superior township at a time in the future when the daily sewage flow reaches 1,000,000 gallons as determined by meters and by the engineers of either of these parties may then elect to have the capacity of said plant increased to a point not exceeding 875,000 gallons in addition to the 1,200,000 gallons required by the present contract. Superior township shall notify Ypsilanti township of such election and of the extent to which it so desires to expand the capacity of said plant. Thereupon, engineers for each of said townships shall present to both of said townships their estimated cost for whatever expansion is desired. Superior township shall then place the total amount of said estimate in escrow for said planned expansion. As soon as the contract has been let for the expansion, said sum shall be paid to Ypsilanti township. The expanded plant shall belong to Ypsilanti township, except that the expanded capacity requested by it shall be reserved for Superior township. In the event Superior township does not make its election to expand

said sewage plant, it shall be precluded from issuing tap-in permits to the lines running into the Ypsilanti township sewage disposal plant to such extent as to increase the flowage to the plant to more than 1,200,000 gallons.

"The cost of such expansion shall not be repaid by Ypsilanti township to Superior township, inasmuch as the expansion for the amount allocated to Superior township will be made only for the benefit of Superior township.

"The above and foregoing shall constitute 'suitable financial arrangements.'

"It is noted that such expansion as herein provided may not be necessary if Superior township is obliged to use other expanded sewage disposal facilities than those presently contemplated. The scope of the expansion that may be appropriate at the time it is needed may be greater or less. It might in the future be more economical or otherwise suitable for both parties to build a new facility or facilities, or to make other arrangements than those now contemplated. It is not possible at this time to estimate costs several years hence or at any time in the future, and the decree to be entered herein may provide that the parties may by a supplemental mutual agreement, if such should be required, substitute another or different plan; otherwise, the plan herein set forth shall be conclusive as to their respective rights in such respect.

"The present attitude of the State department of public health is not an issue in this case. No party hereto should be permitted to use it to borrow trouble. Such attitude is not at this time anything definite. Long before this proposed regulation of the State board of health shall have any effect on the planned expansion, such issue may have been determined in such manner as to eliminate the necessity for dealing with it in this controversy. If not resolved, if, as, and when Superior township requires such expansion, it necessarily follows that no financial plan capable of enforcement, including construc-

tion and use of an expanded plant could be presented. It cannot be assumed that the parties contracted for something impossible of performance, contrary to public policy, or in violation of law.

"Until demolition has been completed, the housing now in operation in Superior township is the responsibility of Ypsilanti township under its present contractual obligation. It, therefore, must as it collects rentals for services to such housing, continue such responsibility, there being nothing inherent in the current situation as a practical matter to interfere with such operation. Its obligation, therefore, will be as a customer of Superior township during such operation, and it will be required only to submit to such regulations as are lawfully imposed as a customer of Superior township by virtue of its contractual obligation and obligations imposed by law.

"Counsel for Willow Woods Development Company and the township of Superior are negotiating with reference to settlement of matters pertaining to option in this lawsuit, exhibit W–3 (D), and pertaining to the sale of lands described therein to Superior township and expect to resolve such issue amicably. If unable to agree and the issue must be presented to the court for final determination, proofs are to be submitted in support of the claim of the parties as to the purchase price which the option called for. The issue as to the validity of the option and the purchase price to be paid therefor is, therefore, left for further determination by the court; but if agreement is reached as here indicated, provision therefor may be made in the decree to be entered pursuant to this opinion.

"Ypsilanti township already has under its jurisdiction the maintenance and operation of a water system that supplies only Willow Run Village, supplying the portion located in Ypsilanti township, as well as that located in Superior township. The wells and storage tanks are located in Superior township. The ownership of utility lines lying in Superior township being in Superior township, in accordance

with this finding, as a practical matter the installation of several valves at the township line between Ypsilanti and Superior townships, the court is informed, will permit the complete severance from the present village of that portion lying in Ypsilanti township. The Ypsilanti township portion may be serviced from the water system supplying the rest of Ypsilanti township, and the Superior township portion may be serviced from the existing village water system. This measure will also enable Superior township to have immediately and completely jurisdiction of a water system adequate to care for a large amount of expansion in addition to the village operation. With the transfer to Superior township of the water system, Ypsilanti township no longer has a continuing obligation to supply water to Superior township. In view of Superior township's present ownership and control over all water lines, wells and storage tank facilities in Superior township, since Superior township's establishment of its own sewer and water system, the contracted obligation to supply water to Superior township is fulfilled.

"All sewage from Superior township, as herein specified, including that from the village, shall be taken at the township line and processed by Ypsilanti township with the qualification, however, that Superior township is obliged to continue uninterrupted water and sewage service to the Superior portion of the former government housing in the village in order to permit Ypsilanti township to maintain its obligation of maintaining the village operation until the village has been demolished. The rate to be charged to Superior township by Ypsilanti township for such sewage disposal service shall be the bulk rate as measured by the total gallonage as shown by individual water meters of Superior township users, under the provisions of ordinance No 11 of Ypsilanti township, as amended.

"If extension of time is required for any equitable reason not now indicated to the court for demolition of the housing now in use in Superior township be-

yond the agreed date of March 1, 1958, the court at the time of the entry of decree herein will extend such time to such date as may be reasonable and proper to permit the carrying out of the provisions of the decree."

Following the filing of the opinion of the trial court, objections to the proposed decree were presented by the Willow Woods Development Company. The objections assert that the findings of fact and decree purport to relieve defendant Ypsilanti township from its contractual obligations to defendant Willow Woods Development Company in that the trial court had no jurisdiction to adjudicate on the contractual rights as between Ypsilanti township and Willow Woods Development Company, since defendant Ypsilanti township had not asked relief with respect to its contractual obligation to the other defendant. Willow Woods Development Company further claims no prayer for relief had ever been filed or served on it, and no opportunity had been given either defendant to file written pleadings raising issues of law and fact as between the defendants, or to present proofs on such issues. Further objections were made that the findings and proposed decree were ambiguous in that said findings were made "subject only to such limitations as are provided in said contracts," which qualification fails to clarify or adjudicate the rights of defendant Willow Woods Development Company and the obligations of Ypsilanti township. The objections also stated that if Ypsilanti township's contractual obligation to the defendant Willow Woods Development Company was in any way changed by the assumption by Superior township of sewer and water lines, such obligation should not be thereby terminated but merely transferred to the township of Superior for the bene-

fit of defendant Willow Woods Development Company.

All the objections to the proposed decree were denied and a decree in accordance with the opinion of the trial court was filed. Motion for rehearing and to reconsider and vacate the decree was denied.

Only Willow Woods Development Company appeals, raising the same questions of law and fact as were stated by it in its objections to the decree of the lower court.

We hear and consider chancery cases *de novo* on the record on appeal. *Osten-Sacken* v. *Steiner,* 356 Mich 468; *Futernick* v. *Cutler,* 356 Mich 33; *A & C Engineering Co.* v. *Atherholt,* 355 Mich 677; *Straith* v. *Straith,* 355 Mich 267; *Ball* v. *Sweeney,* 354 Mich 616. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. This is primarily because the trial judge is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. We do not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, we reach the conclusion that had we been in the position of the trial judge we would have arrived at a different decision.

An examination of the record in this case discloses we are in complete accord with the opinion and decree of the trial court with respect to his findings of fact with one exception. This exception is the following finding:

"All the contracts among the parties contemplate the acquisition, ownership and operation of the facilities by Superior township, and in no respect limit their use within any particular area limits."

All the contracts refer to an area bounded on the north by Geddes road, on the west by Prospect road, and on the south and east by the township lines. The position of plaintiff Superior township itself at the pretrial hearing and during the trial indicates that this was its interpretation of the several contracts.

Had the parties desired to permit Superior township to use the sewer and water facilities in the area beyond that covered by the contracts, unquestionably they would have so provided. We feel that the use of those facilities should be limited to the area covered by the contracts themselves. We are not dealing with township rights, but rights under contract.

We have examined the allegations of error and find that appellant Willow Woods Development Company has failed to present any convincing legal argument to support its position.

We feel that the learned trial judge accomplished a remarkable piece of work in examining the large number of contracts and exhibits and in construing them so as to carry out the intention of the parties, which was the orderly demolition of the government housing and the substitution of new housing for those dispossessed by such demolition. It was intended to re-establish in the respective townships as rapidly as possible the operation by both townships of their sewer and water systems and a return to normalcy after the disrupting war years. The rights and duties of all concerned have been adequately and properly protected. It is to be noted that the limitation hereinafter provided for is not to be construed as dealing with the normal statutory rights of townships to own and operate sewer and water facilities but is a limitation growing out of the several contracts.

The decree of the lower court is affirmed except as to paragraph 3 thereof. Paragraph 3 is hereby limited to the area of Superior township covered by the contracts, bounded on the north by Geddes road, on the west by Prospect road, and on the south and east by the township lines. If the financial arrangements provided in the original decree under paragraph 5 thereof would be affected by this limitation, the matter will be referred back to the trial court, upon petition of the interested parties, for an amendment of the decree in accordance with this limitation.

Plaintiff shall have costs.

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

SMITH, J., did not sit.

MASON *v.* VOGUE KNITTING CORPORATION.

1. FRAUD—RECORD—KNITTING MACHINES.

Record supported findings of trial court in opinion denying defendants' motion to dismiss action for fraud in sale of knitting machine as to ease of learning how to operate machine, instruction promised to be given, time necessary to earn amount necessary to finance the purchase, number of machines already sold and to be sold in the area, selection of garments permitted, and excessive production over market.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 24 Am Jur, Fraud and Deceit § 278 *et seq.*
[3] 13 Am Jur, Corporations § 1088.

2. SAME—EVIDENCE—KNITTING MACHINE.

Evidence presented in knitting machine purchaser's action for fraud against vendor corporation and its directors *held,* to sustain trial court's findings of actionable misrepresentation by defendants upon denial of their motion to dismiss and sufficient to present issue of fraud to jury.

3. CORPORATIONS—DIRECTORS—SALES—FRAUD.

The delegation of corporation's sales campaign to a representative of the corporation does not absolve the directors from responsibility for public misrepresentations made to plaintiff purchaser incident to sale of the corporation's product (CL 1948, § 450.47).

Appeal from Kent; Souter (Dale), J. Submitted June 9, 1960. (Docket No. 38, Calendar No. 48,438.) Decided October 10, 1960. Rehearing denied December 1, 1960.

Case by Howard Mason against Vogue Knitting Corporation, a Michigan corporation, Henry Booke and others for fraud and deceit in sale of home-operated knitting machines. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Dilley & Dilley (*Robert W. Dilley,* of counsel), for plaintiff.

Alexander, Cholette, Buchanan, Perkins & Conklin (*Grant J. Gruel,* of counsel), for defendants.

Joseph W. Louisell and *Milton S. Landau* (*Ivan E. Barris,* of counsel), for defendants on application for rehearing.

KELLY, J. Plaintiff originally brought this action in his own right and as assignee of 22 other alleged aggrieved persons. Prior to commencement of trial, the court decreed that a severance would be granted on motion of defendants and that the only case for determination was the cause of action of plaintiff Howard Mason.

This case was originally brought against defendants on 2 counts. The first count was an action of assumpsit. Count 2 was an action of trespass on the case for fraud and deceit. After the close

of defendants' proofs, plaintiff was granted a discontinuance on the assumpsit count and the case was submitted to the jury on only count 2 of the declaration containing the allegations of fraud.

At the close of plaintiff's proofs a motion was made to dismiss defendant Jack Stone on the basis that the undisputed evidence in the case showed he was neither an officer, director, nor stockholder of the corporation. This motion was granted by the court. From this order dismissing defendant Stone there is no appeal.

The jury returned a verdict in favor of plaintiff against Henry Booke and Vogue Knitting Corporation only. The jury found in favor of defendant Joyce Booke, and plaintiff does not appeal that verdict.

Appellants present 2 questions: (1) Did the evidence of fraud or misrepresentation present an issue of fact for the jury? (2) Did the evidence establish that defendant Booke participated in the alleged acts of misrepresentation or fraud, or participated in, was a party to, or acquiesced in the alleged misrepresentation or alleged fraud of the salesman Blackall?

Appellant Henry Booke was secretary, treasurer, and owner of 51% of the stock of appellant Vogue Knitting Corporation from the beginning of that corporation until February, 1958. The company had 3 directors, 2 of whom were appellant Henry Booke and Mrs. Booke.

Appellants' salesman Blackall placed the following advertisement in the Greenville Daily News:

"MRS. HOUSEWIFE!

"Interested in Making $15 to $25 Per Week?

"Do you have 10 to 15 hours per week to spare in working at home. Experience in sewing, knitting and reading patterns helpful but not necessary. If

you are interested in knowing more about this work at home—mail us your name, address and telephone number. Box R64, Galewood Branch, Grand Rapids, 4 Mich."

Appellee lives in Greenville and his wife answered the advertisement. Salesman Blackall visited the appellee and his wife at their home.

Appellant Booke testified that the salesman was not authorized to insert the advertisement in the Greenville paper as his company did not advertise in newspapers, but he also stated that he did not think the advertisement was improper and that it did not deviate in copy from post cards he had authorized to be used.

Plaintiff introduced testimony that he purchased the knitting machine after representations were made:

1. That the machine was simple and easy to operate and could be quickly learned;

2. As to production time on specific garments exhibited by the salesman and illustrated in a notebook;

3. That earnings from the operation of the machine would, from the very beginning, be more than sufficient to meet the installment payments of about $22 per month to a finance company from which plaintiff and his wife expected to borrow the money to pay for the machine;

4. That there was an inexhaustible market for handknit garments;

5. That other ladies residing in the Greenville area were at that time operating knitting machines purchased from defendant Vogue and earning from $15 to $25 a week by working only 2 to 3 hours a day;

6. That not to exceed a dozen machines would be sold in the Greenville area;

7. That Mrs. Mason would be able to make $15 to $25 a week by working 2 to 3 hours a day on the Vogue machine;

8. That a branch office of Vogue Knitting Corporation would very shortly be opened in Greenville, so that Mrs. Mason could obtain her instructions in the use of the machine, buy yarn and other supplies and sell back the production on her machine without the necessity of having to drive to Grand Rapids;

9. That defendant Vogue Knitting Corporation would at all times offer Mrs. Mason a variety of garments, any one of which she could make and resell to defendant Vogue;

10. That Mrs. Mason would be given unlimited, free instruction at times convenient to her.

Defendant Vogue Knitting Corporation received approximately $340 from appellee and agreed in writing to repurchase from plaintiff for a period of 5 years all garments knitted upon the machine which conformed with specifications prescribed by defendant Vogue.

In denying defendants' motion for judgment of no cause of action notwithstanding the verdict of the jury, the court filed a written opinion. The record sustains the following finding of the court:

"1. The operation of the machine was moderately difficult to learn.

"2. The earnings derived by Mrs. Mason from the operation of the machine were never at any time up to the minimum of $15 per week which she was told she would be able to earn. Nor were they at any time sufficient to enable her to make a finance company payment of $22 a month, except for the first month of operation, when according to her testimony she operated her machine from 25 to 30 hours per week.

"3. There was creditable evidence from which the jury could have concluded that Mrs. Mason was above average in ability to operate this machine, and that she applied herself to its operation with considerably more diligence than was necessary, according to the sales presentations, in order to produce an income of $15 per week.

"4. There were not ladies residing in the Greenville area at the time the Masons bought their machine who were earning $15 to $25 a week by the operation of the machine, except one lady, called as a witness by defendants, who resided in Belding (7 miles south of Greenville) who manufactured garments never authorized for repurchase by Vogue and sold them to outside persons in Chicago and elsewhere.

"5. Contrary to the representation made to the Masons that not to exceed a dozen machines would be sold in the Greenville area, the proofs were uncontradicted that approximately 50 machines were sold in that area. It was claimed by the plaintiff that this resulted in such excessive production of knitted garments as to destroy whatever market there might otherwise have been in the Greenville area for those garments, and in the opinion of the court, the jury would have been justified in accepting that conclusion.

"6. The plaintiff's proofs were also uncontradicted upon the point that defendant Vogue never at any time authorized the manufacture and repurchase of more than 2 garments, namely, the slipperette (exhibit 2) and the puppet mitten (exhibit 8), and these were offered successively so that there was never at any time an alternative or choice of garments which Mrs. Mason could make and resell to defendant Vogue.

"7. There was creditable evidence that the production time stated on page 12 of the salesmen's notebook (exhibit 3) as to sweaters and stoles illustrated on page 4 was considerably less than production time actually required.

"8. There was also creditable evidence that defendant Vogue did not supply the instruction in the operation of the machine which it promised.

"9. There was also creditable testimony from which the jury could have concluded that defendant Vogue was unreasonable and captious in application of its specifications as to knit goods submitted to it for repurchase, and that specifications were changed without notice to Mrs. Mason.

"10. There was ample basis upon which the jury could have concluded that it was not physically possible for an operator of one of these machines to make $15 a week, operating her machine 2 to 3 hours per day, in the manufacture and resale to defendant Vogue of the slipperette and puppet mitten. In this connection it must be borne in mind that under the terms of the contract between defendant Vogue and the plaintiff, the plaintiff and his wife were not required to discover their own sales outlets, but were entitled to rely solely upon the repurchase terms of that contract.

"11. Regarding the matter of a branch office of defendant Vogue being opened in Greenville, the proofs were inconclusive, it appearing that shortly after Mr. and Mrs. Mason bought their machine an office was opened in Greenville but remained open only 1 day and was then closed and never again reopened."

There was sufficient evidence of fraud or misrepresentation to present an issue of fact to the jury.

Appellants contend that even though this was true there was not sufficient evidence "that defendant Henry Booke participated in, was a party to, or acquiesced in the alleged misrepresentation or alleged fraud of the salesman Blackall."

Directors' responsibilities are set forth in CL 1948, § 450.47 (Stat Ann § 21.47) as follows:

"The directors of every corporation, and each of them, in the management of the business, affairs,

and property of the corporation, and in the selection, supervision and control of its committees and of the officers and agents of the corporation, shall give the attention and exercise the vigilance, diligence, care and skill, that prudent men use in like or similar circumstances."

Appellant Booke testified that he left the responsibility of directing the sales campaign to one Mr. Rosenbaum. We held in *Martin* v. *Hardy,* 251 Mich 413, 417:

"They committed the management to George Drach, who was well experienced in the business and in whose ability and integrity they were justified in placing unlimited confidence. But that fact did not absolve them from responsibility. It was still their duty to exercise a general supervision over his managment."

We, also, commented upon directors' responsibility in *Springman Paper Products Co.* v. *Detroit Ignition Co.,* 236 Mich 90, 98, 99, as follows:

"As its directors, they are presumed to have knowledge of its business and direct its policy. If they knew, ought to have known, or by the exercise of ordinary diligence in their official positions might have known of the publication of this prospectus and its contents, they are not necessarily immune because not shown to have personally participated in its issue."

In denying the motion for judgment notwithstanding the verdict, the trial court stated:

"While defendant Booke denied any knowledge of the newspaper advertisement, exhibit 1, and of the oral representations claimed by the plaintiff to have been made by defendant Vogue's salesman, Ralph Blackall, he admitted responsibility for the post card, exhibits 15 and 16, and for the salesman's notebook, exhibit 3. The representations made by all

4 media were essentially the same. * * * Having set or approved the tone or theme of the selling campaign by the post cards and the salesman's notebook, he was hardly in a position to complain if this theme was carried to prospective customers residing in this part of the State by means additional to those which he had directly and personally ratified."

We agree with the trial court, and affirm the judgment entered in the circuit court. Costs to appellee.

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

PATCHAK v. TOWNSHIP OF LANSING.

1. MUNICIPAL CORPORATIONS—ZONING ORDINANCES—POLICE POWER.
   Municipal zoning ordinances, when reasonable in their provisions, are a valid exercise of the police power.

2. SAME—ZONING ORDINANCES—REASONABLENESS.
   The reasonableness of a municipal zoning ordinance is recognized as the test of its legality.

3. SAME—ZONING ORDINANCES—REASONABLENESS.
   Each case involving the determination of the reasonableness of the application of a municipal zoning ordinance must be determined on the basis of its own facts and circumstances.

REFERENCES FOR POINTS IN HEADNOTES

[1, 8] 58 Am Jur, Zoning § 18.
[2] 58 Am Jur, Zoning §§ 21, 22.
[3] 58 Am Jur, Zoning § 22.
[4] 58 Am Jur, Zoning § 256.
[5] 58 Am Jur, Zoning § 141.
[6] 58 Am Jur, Zoning § 209.
[7] 58 Am Jur, Zoning § 155.
[9] 58 Am Jur, Zoning § 19.
[10] 58 Am Jur, Zoning § 151.

4. SAME — ZONING ORDINANCES — BURDEN OF ESTABLISHING INVALIDITY.

The presumption of validity attends municipal zoning ordinances and the burden of proof as to their invalidity or unreasonableness of their application is on one challenging such ordinance to establish his claim.

5. SAME—ZONING ORDINANCES—TRAILER CAMPS—VALUE—BURDEN OF PROOF—EVIDENCE.

Plaintiff trailer camp operator who merely showed that 10-acre portion of 15-acre tract would be more valuable if trailer camp was permitted thereon than uses allowed did not sustain burden of proof that zoning ordinance which did not permit trailer parks in his area was invalid as to 10-acre tract, hence, he is not permitted to extend his pre-existing 5-acre camp to cover more of his tract.

6. SAME—ZONING—NOTICE.

The purchaser of property is chargeable with knowledge of the zoning in effect when the property was purchased.

7. SAME—ZONING—NONCONFORMING USE.

The purchaser of property which had been zoned before the purchase has no greater right to use the property for a nonconforming use than his vendor had.

8. SAME—PROPERTY—POLICE POWER—PUBLIC HEALTH, MORALS, SAFETY, AND WELFARE.

Property is held subject to right of government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote public health, morals, safety, and welfare.

9. SAME—REGULATIONS—PROPERTY.

Municipal regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable.

10. TOWNSHIPS—ZONING ORDINANCES—TRAILER CAMPS.

Record presented in suit by owner of 15-acre tract of land on 5 acres of which a trailer camp was located before *held*, not to disclose that adoption of township zoning ordinance which made trailer camp use of such land a nonconforming use was so patently unreasonable and arbitrary as to be unconstitutional and void as to 10-acre portion of parcel which had never been used as a trailer park (Lansing Township Ordinance No 8).

Appeal from Ingham; Hughes (Sam Street), J. Submitted September 21, 1960. (Docket No. 55, Calendar No. 48,283.) Decided October 12, 1960. Rehearing denied December 1, 1960.

Bill by Alexander P. Patchak and Stella C. Patchak, doing business as Riverview Trailer Park, against the Township of Lansing to declare zoning ordinance void as to them. City of Lansing, a municipal corporation, intervened as party defendant upon annexation of affected area. Decree for plaintiffs. Intervening defendant appeals. Reversed and remanded for dismissal.

Leo A. Farhat (*James E. Burns,* of counsel), for plaintiffs.

Joseph Lavey, City Attorney (*Claude J. Marshall,* of counsel), for intervening defendant.

KAVANAGH, J. Once again we are cast in the role of a glorified zoning board. Defendant city of Lansing has appealed from a decree of the Ingham county circuit court, in chancery, in which the court held that ordinance No 8 of the township of Lansing as applied to plaintiffs' 15 acres was void; that the action of the township board in refusing to rezone the 15 acres was arbitrary, capricious, and confiscatory; that the reasonable and proper use of the property was for a trailer camp park; and that the entire 15 acres could be developed and modernized as such, continuing its nonconforming use subject to certain restrictions.

Plaintiffs' predecessor in title, on October 5, 1942, owning 15 acres of land on the south side of West Mt. Hope avenue in the township of Lansing, made application to the Michigan department of health for a permit to construct and operate a trailer coach park of 4 acres located at 3407 West Mt. Hope avenue. The annual license fee of $25 was paid.

In September, 1943, the then owner, Mr. Hause, filed an application to operate a trailer coach park and add to the existing facilities. No acreage was given. The following year an application to operate a trailer park of 2 acres was filed by Mr. Hause and license was approved on October 12, 1944. An application was made by Mr. Hause in the fall of 1945 for a trailer coach park of 3 acres.

The township board of the township of Lansing adopted its zoning ordinance No 8, which became effective throughout the township on October 26, 1945. The property now owned by the appellees, then owned by Mr. Hause, and most of the surrounding land, was, by ordinance No 8, zoned "D" small farms and agriculture. The ordinance placed trailer camps in "E" apartment-shop zone.

In September, 1946, ordinance No 8 being operative, the owner, Mr. Hause, again made an application to operate a trailer park of 2 acres and alter existing facilities. License fee of $25 was paid. Mr. Hause made application each year thereafter up to the sale of the property on October 23, 1953, to appellees, who thereafter made applications to the Michigan department of health for the year 1954 and following years up to the time of the trial.

During all the years the trailer park was operated, only the north 5 acres was actually used as a trailer coach park. The license fee paid each year was $25. The acreage was designated as 5 acres or less for all years 1942 through 1957, except 1947, 1953, 1955, and 1956, when the acreage was designated as 15 acres in the application, and in the years 1943, 1949, and 1954, when no acreage was given in the applications.

During the year 1954, after Hause had sold the premises on October 23, 1953, to appellees, the township of Lansing amended zoning ordinance No 8, removing trailer parks from "E" apartment-shop

zone and placing trailer coach parks in "G" light industrial zone, and requiring the location of such sites to be approved by the township planning commission, board of appeals and township board.

In May, 1956, appellees made application to have their property, being 15 acres, rezoned from "D" to "G." Their application being denied, appellees took steps under the provisions of ordinance No 8 and amendments thereto to expand their trailer coach park to the full 15 acres. Being denied that right, they instituted the present suit on November 7, 1956.

On July 30, 1958, the property became a part of the city of Lansing following annexation proceedings. The written opinion of the trial court was filed June 3, 1958. In this opinion the trial court found, as a matter of fact, that the proofs showed no trailers had been located on the south 10 acres. It further found little, if any, use had been made of the south 10 acres; that it had remained as an open space—like a country backyard—to the trailer park; and that some incidental drainage and other minor uses of the land closest to the trailer park had been made. The trial court further stated in its opinion:

"That it could be an unreasonable use of police power for the government of Lansing township to restrict the plaintiffs to the north 5 acres under all the facts and circumstances shown to exist in relation to the lands of plaintiffs."

The court further found:

"The area was farm land when the trailer park was built about 1943. It was the same all around the trailer park in 1945 when the ordinance was adopted. It is the same today except some of the areas to the west, northeast and east have been subdivided."

The court went on to say:

"That the work permitted to be done under this holding, is improvement, modernization, and development of an existing trailer park and not an extension of said park. The zoning classification of "D" small farms is not set aside by this court. The plaintiffs' north 10 acres will remain, even when fully developed, as a nonconforming use."

The court then set forth some restrictions under which it could be used.

On July 24, 1958, following the filing of the opinion, plaintiffs made a motion for rehearing, alleging that to comply with the requirements of the court's opinion would deprive plaintiffs of any use whatsoever of the south 5 acres of their property, and to limit its use by set-backs from the lot lines, in the fashion the court suggested, would cost plaintiffs $32,000. Plaintiffs asked that the opinion be changed.

Oral hearings were had on the motion for rehearing, and on other motions presented, on February 2, 1959. The trial court admitted he had become confused in drafting his original opinion and described the limitation to the north 10 acres a mistake and authorized its correction in the decree, so that plaintiffs could use their entire 15 acres as a nonconforming use. It is impossible to tell what reasons the court had for holding the ordinance void as to the 15 acres, except from the following language it might be inferred that, contrary to his previous findings of fact, he now was finding as a matter of law a nonconforming use as to the 15 acres:

"That it shall be nonconforming in the zoning as it now is or was at the time of the trial, and that whatever the zoning is shall remain. The trailer park will be permitted to stay as a nonconforming use. * * *

"The evidence indicated in some instances away back years ago the whole parcel was considered as a trailer park, even though they never built back from Mt. Hope, perhaps the north 5 acres, and when they went down to pay the fee, when Mr. McKim was in office, sometimes it said 10 acres and sometimes 15 acres."

Appellees made no attempt to show, and do not now argue, that Lansing township zoning ordinance No 8 as an ordinance is unconstitutional and void, contending only that it was unconstitutional and void as applied to their land.

Justice CARR said in *Anderson* v. *City of Holland,* 344 Mich 706, 709:

"The legal principle is firmly established that zoning ordinances, when reasonable in their provisions, are a valid exercise of the police power. *Village of Euclid* v. *Ambler Realty Company,* 272 US 365 (47 S Ct 114, 71 L ed 303, 54 ALR 1016); *Austin* v. *Older,* 283 Mich 667. The reasonableness of such an ordinance is recognized as the test of its legality. *Hitchman* v. *Township of Oakland,* 329 Mich 331. In the application of the test indicated it necessarily follows that each case of this character must be determined on the basis of its own facts and circumstances. *Senefsky* v. *City of Huntington Woods,* 307 Mich 728 (149 ALR 1433). It must also be borne in mind that the presumption of validity attends zoning regulations, and that the burden of proof is on one challenging such an ordinance to establish his claim. *Portage Township* v. *Full Salvation Union,* 318 Mich 693; *Northwood Properties Company* v. *Royal Oak City Inspector,* 325 Mich 419."

It is the duty of plaintiffs, who challenged the zoning classification, to show by competent evidence that the regulation has no substantial relation to public health, morals, safety, or general welfare.

A reading of the entire record clearly shows plaintiffs produced no evidence to this effect. They merely claim the property is more valuable as a trailer coach park than it would be under the classification given it. This is not the test. Mr. Justice SMITH, in *Brae Burn, Inc.*, v. *City of Bloomfield Hills,* 350 Mich 425, said (pp 433, 434):

"Disparity in values between residential and commercial uses will always exist. In the leading case of *Village of Euclid* v. *Ambler Realty Company,* 272 US 365 (47 S Ct 114, 71 L ed 303, 54 ALR 1016), Mr. Justice Sutherland, in upholding the ordinance, noted that the property involved was worth about $10,000 per acre for industrial use, as compared with $2,500 per acre for residential use. If such a showing serves to invalidate an ordinance the efforts of our people to determine their living conditions will be hopeless. To avoid 'confiscation' in this sense (the obtaining of the highest dollar for one particular lot) will result in confiscation of far greater scope in property values in the municipality as a whole due to its inability to control its growth and development. It must be stressed that we are not, on this record (as we pointed out in *Anderson* v. *City of Holland,* 344 Mich 706, 710) 'dealing with a situation in which the property involved is unsuitable for residential purposes and has little or no value if so restricted.' In such case the issue of confiscation is properly before us. See Yokley's discussion (1 Yokley, Zoning Law and Practice [2d ed], pp 47, 48) of our *Fenner* v. *City of Muskegon* case, 331 Mich 732."

In this instance we do not have a case where the land was not suitable to the purpose of the classification. It is not a question of unsuitability for residential or any other purposes except small farms and agriculture. Clearly, the south 10 acres and all of the surrounding territory were, at the time the ordinance was adopted in 1945, suitable for the

uses enumerated under class "D".* The entire area, west, south, and east, was composed of small farms. This situation existed at the time the zoning ordinance was adopted in 1945. The plaintiffs were chargeable with the knowledge of the zoning when they purchased the property in 1953. The purchasers had no greater right to use the property for a nonconforming use than their seller had. *Stevens* v. *Township of Royal Oak,* 342 Mich 105. Plaintiffs' right to use the north 5 acres as a nonconforming use has never been disputed and is not involved in this lawsuit.

Competent evidence was introduced by defendants to show that in 1945 it was good planning and zoning to classify this property as "D" small farms and agriculture. No evidence to the contrary was introduced by plaintiffs. New residential subdivisions have been developed to the north, west and south of the property. The developers, no doubt, relied upon the fact that the 5-acre nonconforming use would not be expanded to their detriment.

The only argument of plaintiffs appears to be that the township zoning prohibited them from using the 15 acres for what they considered to be its best

* Class "D" permitted the following uses:
(1) Any use permitted in the "A" residential zone.
(2) Agriculture or farming.
(3) Private stables.
(4) Greenhouses if they are not used for conducting retail business.
(5) Churches.
(6) Hospitals.
(7) Veterinary hospitals and clinics.
(8) Cemeteries.
(9) Airport or landing field.
(10) Accessory buildings and uses customarily incident to any of the above uses.
(11) Mining of natural resources.
(12) Provided that nothing in the foregoing exceptions shall prohibit the retail disposition of agricultural produce grown upon the premises; nursery and greenhouse stock grown upon the premises may also be retailed provided that no separate retail store, stockroom or display unit is erected, constructed, installed, or maintained for such purpose.

use and, therefore, made the zoning arbitrary and unreasonable.

In *Austin* v. *Older,* 283 Mich 667, 677, this Court quoted with approval the following language from *State* v. *Hillman,* 110 Conn 92, 105, 106 (147 A 294):

"'All property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community, or so that it may promote its health, morals, safety, and welfare. * * * Regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable. * * * Courts will not hold laws, ordinances, or regulations adopted under sanction of law to be unconstitutional unless they are clearly unreasonable, destructive, or confiscatory.'"

Clearly, this record discloses a failure on the part of plaintiffs and appellees to carry their burden of proof—that the classification is unreasonable tested by these established principles. It is clear from this record that the township had a right to plan its future growth and development and it had authority to act. In the presence of the presumption of constitutionality and in the absence of contrary proof, we cannot say from this record that the classification was so patently unreasonable and arbitrary as to be unconstitutional and void.

The only other question is whether or not the nonconforming provisions of Lansing township ordinance No 8 applies to and covers the entire 15 acres now owned by appellees. The record discloses, and the trial court found as a fact, that the trailer park was in operation only on a portion of the north 5 acres of the land in question at the time of adoption of the ordinance. The court further found as a matter of fact that no more than the north 5 acres was ever used for a trailer park. While it is true

the 1947 application indicated the acreage as 15, it is apparent the applicants were not seeking a license for the 15 acres since the fee paid was $25. The applicable statutory language* provided in part as follows:

"Sec. 5. Upon presenting his application, together with all plans and specifications hereinbefore enumerated or prescribed by the State health commissioner, the applicant shall pay to the person authorized to accept his application *a license fee equal to $25 for each 10 acres, or fraction thereof,* of land to be used as a site, lot, field, or tract of land upon which a trailer coach park will be constructed or altered, operated and maintained and take a receipt therefor." (Emphasis supplied.)

It is clear, then, that no application was sought and no license was given for the 15 acres. No nonconforming use was proven as to the south 10 acres. The trial court erred in finding the ordinance unconstitutional and void as to this portion of the parcel.

The decree entered by the trial court is hereby reversed and remanded for the entry of a decree dismissing the bill of complaint. Appellant shall have costs.

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

* CL 1948, § 125.755 (Stat Ann 1957 Cum Supp § 5.278[5]) repealed by PA 1959, No 243.

JOHNSON *v.* MICHIGAN PAROLE BOARD.

MANDAMUS—MOOT QUESTION—SENTENCE.

Mandamus to compel allowance of time on sentence which petitioner had been imprisoned under his original sentence is not granted, where he has already been discharged from prison by reason of completion of sentence imposed less special good time, the question being moot.

Original mandamus by Paul Johnson against Michigan Parole Board to compel credit allowance for time during which he was incarcerated. Submitted July 5, 1960. (Calendar No. 48,816.) Writ denied October 12, 1960.

Paul Johnson, in propria persona.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Perry A. Maynard* and *Daniel J. O'Hara,* Assistant Attorneys General, for defendant.

PER CURIAM. Plaintiff's petition for a writ of mandamus having been granted, an order to show cause why a peremptory writ of mandamus should not issue commanding defendant to rescind its order declaring 10 months of plaintiff's original sentence as "dead time" was entered on June 8, 1960, and the case docketed for assignment in the June, 1960, term of Court.

REFERENCES FOR POINTS IN HEADNOTES

34 Am Jur, Mandamus § 60.

Plaintiff having completed the sentence imposed, less special good time, was discharged from the penal institution on August 17, 1960.

The question presented in this appeal is, therefore, moot and the writ of mandamus denied.

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

PAPP *v.* BROWNLEE.

BANKRUPTCY—TENANTS BY ENTIRETIES—LAND CONTRACT.

Interest of bankrupt and his wife in land contract in property to which they had held title as tenants by the entireties was not to the advantage of the bankrupt's creditors, by reason of the sale under land contract payable to them as husband and wife or survivor, since their interest is nonseverable (CL 1948, § 557.81).

Appeal from Wayne; Bowles (George E.), J. Submitted June 8, 1960. (Docket No. 16, Calendar No. 48,167.) Decided October 12, 1960.

Bill by Leo Papp, trustee in the matter of James Elias, bankrupt, against Harold Brownlee, Irene Brownlee and Stefanos Stratos, in his effort to marshall assets of bankrupt's estate, to reach sums due on land contract entered into by bankrupt and wife. Bill dismissed. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

6 Am Jur, Bankruptcy § 883.

Estate by the entirety as an asset in bankruptcy. 47 ALR 437.

Leo Papp, in propria persona.

James A. Jameson, for defendant Stratos.

KELLY, J. Plaintiff and appellant's bill of complaint (filed August 19, 1958) alleged that he is the duly appointed and qualified trustee in the matter of James Elias, bankrupt; that the bankrupt and his wife are the record titleholders of real estate in Belleville, Michigan; that defendants purchased said real estate from the bankrupt and his wife by means of a land contract; that the interest of the bankrupt and his wife as vendors of said real estate is regarded as personalty by operation of law, and plaintiff prayed that the court order defendants to pay the proceeds from said land contract to plaintiff.

After being denied the relief sought, plaintiff appeals to this Court stating:

"*A vendor's interest in a land contract is personalty.* While the real estate in question was originally owned in fee simple by the bankrupt James Elias and his spouse, Olga Elias, subsequently thereto they held nothing but a naked title in the nature of a security for the balance of the purchase price after they had sold the property on land contract. Through the operation of 'equitable conversion' the interest of the vendors in the land contract became personalty and as such is divisible between the husband and wife because there is no entireties property in personalty."

Appellees contend that the United States district court, sitting in bankruptcy, could not adjudicate with respect to the real estate in question owned by bankrupt and his wife as tenants by the entireties because bankrupt's wife did not file separate petition and schedule, or otherwise join with him in the bankruptcy proceedings.

In *Moore* v. *Van Goosen,* 250 Mich 67, we said (p 70):

"Plaintiff urges that the (defendants') vendors' interest in the land contract, exchanged for material for the building, was personalty, citing *Detroit Trust Co.* v. *Baker,* 230 Mich 551; *Bowen* v. *Lansing,* 129 Mich 117 (57 LRA 643, 95 Am St Rep 427), in which the evidence not showing otherwise, it is presumed their interests were equal, and that therefore the one-half interest of the bankrupt, so exchanged, may be reached by creditors. Defendants sold entirety property. They took back a contract to themselves as vendors and as tenants by the entirety. Their contract interest was held in the same manner and subject to the same law as the land itself, and the change from the holding in fee to an interest as vendors was without advantage to creditors. *Dickey* v. *Converse,* 117 Mich 449 (72 Am St Rep 568); *Detroit & Security Trust Co.* v. *Kramer,* 247 Mich 468."

Also, in *Battjes Fuel & Building Material Co.* v. *Milanowski,* 236 Mich 622, 624, we held:

"PA 1925, No 126 (CL 1948, § 557.81 [Stat Ann 1957 Rev § 26.191]), provides that in case a contract for the sale of property owned by husband and wife as tenants by the entirety is entered into by them as vendors, then all payments, together with interest, unless otherwise expressly stated in the contract, shall, after the death of either, be payable to the survivor, and all rights in and under the contract shall vest in the survivor. This statute recognizes a nonseverable interest of husband and wife in such a contract with full rights to the survivor. This negatives any right of the husband to a determinable moiety under judicial holding, so long as the contract stands unimpeached for fraud. The husband could not, in any proceeding known to the law, have judgment determining and separating his interest, and

what he cannot have, his creditor, in his place, cannot secure."

Affirmed. Costs to appellees.

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

WALTANEN *v.* WIITALA.

1. AUTOMOBILES—PASSENGERS—DRIVING UNDER INFLUENCE OF INTOXICATING LIQUOR—ASSUMPTION OF RISK.

   Plaintiff passenger as a matter of law assumed the risk of injury, where in the pattern of previous conduct and after several hours spent in the consumption of liquor after defendant host was under the influence of intoxicating liquor, plaintiff entered defendant's car and was injured when the vehicle went out of control at a curve while defendant, although driving at an excessive speed, was also engaged in tuning in the car radio.

2. NEGLIGENCE—WILFUL AND WANTON MISCONDUCT—ASSUMPTION OF RISK.

   Assumption of risk is a defense to negligence whether it be ordinary negligence or such negligence plus a wilful and wanton disregard for public safety which go to make up the statutory gross negligence or wilful and wanton misconduct required under the guest passenger act (CLS 1956, § 257.401).

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic §§ 792, 793.
Guest's knowledge that automobile driver has been drinking as precluding recovery, under guest statutes or equivalent common-law rule. 15 ALR2d 1165.

[2] 5A Am Jur, Automobiles and Highway Traffic § 788.
Assumption of risk as available in action based on automobile guest statute. 44 ALR2d 1342.

[3] 38 Am Jur, Negligence § 178.
Wanton or wilful misconduct by person killed or injured as defense to an action based on wanton or wilful misconduct of defendant. 41 ALR 1379.

[4] 53 Am Jur, Trial § 305.

3. SAME—CONTRIBUTORY NEGLIGENCE.
An actor whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the actor's safety is a contributing cause of the actor's bodily harm.

4. CONSTITUTIONAL LAW—JURY TRIAL.
A litigant has a constitutional right not to have a question go to the jury, where the evidence is such that as a matter of law no recovery may be had.

BLACK, J., dissenting.

Appeal from Houghton; Brennan (Leo J.), J. Submitted June 10, 1960. (Docket No. 46, Calendar No. 48,502.) Decided October 13, 1960.

Case by Felix Waltanen against Wilmer Wilho Wiitala for personal injuries sustained while passenger in defendant's automobile. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Wisti & Jaaskelainen, for plaintiff.

Wright & Zinn, for defendant.

SMITH, J. The point here is a narrow one. It has to do with a directed verdict by the trial judge upon the ground of assumption of risk.

The suit arises out of an automobile accident. The plaintiff, Felix Waltanen, was a passenger in a car driven by his friend, defendant Wilmer Wiitala. The ride during which the accident occurred followed an evening of drinking, and followed, as well, a pattern of conduct that had been established for some time. Plaintiff's statement of facts tells us that, during the spring and summer of 1956, the young men (another friend, Wesley Maki, was included) made a practice of going out together in the evenings in the pursuit of pleasure and ex-

citement: "They frequented bars and taverns and had a mutual interest in the pursuit of female companionship."

On the evening in question, plaintiff and Mr. Maki started drinking about 9:30 p.m. in a bar in Toivola, Michigan. They enjoyed beer and whiskey together until about 11 p.m., when they were joined by defendant. The 3 friends then drank beer and rum and cokes. Towards closing time they "were downing them real fast." As plaintiff put it, "We were just putting them down the hatch," trying to beat the clock. When the waitress told them it was closing time they ordered more drinks, 2, or maybe 3, of rum and coke. They left about 2:30 a.m. with a case of 24 bottles of beer. Defendant drove them to a gasoline station nearby, where they met other friends, and the beer was drunk. Defendant does not remember having anything to drink at the filling station. Other testimony credited him with from 2 to 4 or 5 bottles.

The friends now left the station. Shortly after they left it, defendant increased the speed of the car. Just prior to the accident he was driving at a speed of from 95 to 100 miles per hour, steering with one hand, tuning the car radio with the other, and looking down at the radio. They approached a gradual curve. This particular stretch of the road was wavy and rather bumpy. The right wheels of the automobile left the pavement. In regaining the pavement, the automobile rolled over, and skidded 171 feet on its top. Plaintiff was injured. At the conclusion of all the testimony the court ruled that plaintiff had assumed the risk as a matter of law and could recover nothing.

Plaintiff's appeal argues that the jury should have been permitted to pass upon the question of assumption of risk, stating that "all of the Michigan cases which have been involved with the question of the

legal defense of assumption of the risk appear to have been jury questions," citing several cases, including *Davis* v. *Hollowell,* 326 Mich 673 (15 ALR2d 1160). In the *Davis Case* we did approve the sending of the case to the jury, but the facts were not as extreme as those of this case. Here, in the trial court's words, the plaintiff entered defendant's car "with full knowledge of the driver's past record of careless and reckless conduct in the operation of his motor vehicle." What happened on the night in question, up to the time of the accident, was merely a repetition of what had been going on every Saturday night for some time, getting "pretty well lit," driving around the area at speeds up to 85 miles per hour, often while adjusting the radio, all without objection by plaintiff. Moreover, plaintiff knew when defendant first entered the bar that night that defendant was under the influence of liquor,[1] a condition that could not have improved, with respect to sobriety, as the evening wore on and more drinks were consumed. Despite these circumstances, and plaintiff's knowledge of defendant's driving habits upon previous Saturday nights, plaintiff re-entered defendant's car at the filling station and drove with him. He obviously assumed the risk of what happened. There is nothing peculiar about the doctrine of assumption of risk as regards a court's direction of a verdict with respect to it upon defendant's motion. Here, as elsewhere in the law, the question is simply whether or not, taking that view of the evidence most favorable to plaintiff, reasonable men could differ in respect of the question. *Dalton* v.

[1] Plaintiff testified as follows:

"*Q.* Now, you mentioned when you used the words 'good spirits' as describing how Mr. Wiitala felt when he came into the K & K bar. Will you tell what you mean?

"*A.* Good spirits; what I refer to is kind of like feeling good when a person drinks lots, they get in a kind of a happy mood. That's what I mean by high spirits. That's my way of saying it. I mean feeling good."

Grand Trunk Western R. Co., 350 Mich 479; *Glinski* v. *Szylling*, 358 Mich 182. Upon the facts before us, we agree with the trial judge, we have a very clear case. Verdict was properly directed.

There is a suggestion by plaintiff that assumption of risk is not a defense to wanton and gross negligence, but no reason in principle why it should not be is argued by plaintiff. It is true in *Teeter* v. *Pugsley*, 319 Mich 508, 510, there is a statement that: "In view of the rule stated in *Gibbard* v. *Cursan*, 225 Mich 311, 320, defendant's claim of error with respect to contributory negligence and assumption of risk must be denied." The statement, however, contains an error. There is no "rule" stated in the *Gibbard Case* concerning assumption of risk. We made this clear later, in *Davis* v. *Hollowell*, 326 Mich 673 (15 ALR2d 1160), in sending an assumption of risk question to the jury. The *Gibbard Case*, we pointed out, *Id.* at p 681, "contained no reference or circumstance pertaining to assumed or incurred risk."

Assumption of risk, of course, is a defense to negligence, whether it be ordinary "mere" negligence, or such negligence "plus a wilful and wanton disregard for public safety,"[2] which go to make up the statutory "gross negligence or wilful and wanton misconduct" required under the guest passenger act.[3] *Volenti non fit injuria.* Whether the defendant's conduct was reckless or merely casually negligent is immaterial, for the gist of the defense is that the plaintiff took his chances. See 4 Restatement, Torts, § 893. Here the individualism of the common law is once more at work. See Bohlen, Voluntary Assumption of Risk, 20 Harv L Rev 14.

There is an overlap between the defenses of contributory negligence and assumption of risk. But

2 *Stevens* v. *Stevens*, 355 Mich 363, 372.
3 CLS 1956, § 257.401 (Stat Ann 1952 Rev § 9.2101).

they are distinct—they respond to different considerations and they are different in application. Thus the habitual baseball enthusiast who is, one day, injured by a batted ball, has doubtless assumed this particular risk of injury but could not reasonably be held to have been guilty of contributory negligence in going to the ball game.[4] Should the facts before us be so analyzed as to constitute contributory negligence, plaintiff's case is not advanced, for, although "mere" contributory negligence is not a defense to wanton conduct,[5] nevertheless wanton conduct on the part of the plaintiff will be a defense to wanton conduct on the part of the defendant. The Restatement of Torts puts the principle in these words: "An actor whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the actor's safety is a contributing cause of the actor's bodily harm."[6] In the case before us the same knowledge of past and present excesses that justified holding plaintiff to have assumed the risk, justifies holding him to be in reckless disregard of his own safety, all as a matter of law. As we pointed out in *Glinski* v. *Szylling, supra,* just as there is a constitutional right to trial by jury[7] there is also a constitutional right not to have a question go to the jury under certain circumstances, of which this case is another example.

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[4] See Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U of Pa L Rev 629, 633.

[5] See cases cited in *Sun Oil Company* v. *Seamon,* 349 Mich 387.

[6] 2 Restatement, Torts, § 503(2). See, also, Chief Justice GRANT'S dictum in *Redson* v. *Michigan Central R. Co.,* 120 Mich 671, 672, wherein he hypothesizes an injury to the train crew (who had been charged with wanton conduct) arising out of plaintiff's wanton conduct. He then goes on to state the law applicable in these terms:

"It would then be gross negligence against gross negligence, wilful misconduct against wilful misconduct, and intent against intent; and in such case the law leaves both parties where they have placed themselves, and gives recovery to neither."

[7] See Const 1908, art 2, § 13.—REPORTER.

Since the court's decision was squarely placed upon the ground of assumption of risk as a matter of law it is unnecessary to discuss other aspects of the case.

Affirmed. Costs to appellee.

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

BLACK, J. (*dissenting*). Building obiter on this sweeping dictum—

"Assumption of risk, of course, is a defense to negligence, whether it be ordinary 'mere' negligence, or such negligence 'plus a wilful and wanton disregard for public safety,' which go to make up the statutory 'gross negligence or wilful and wanton misconduct' required under the guest passenger act";

the Court affirms another judgment entered on motion in a jury-tried negligence case. Holding that the testimony presents a jury question of liability, I must dissent.

The quoted declaration is too broad, either for textbook or the case before us. The citations proffered in support (*Stevens* v. *Stevens*, 355 Mich 363, and CLS 1956, § 257.401 [Stat Ann 1952 Rev § 9.2101]) arguably war upon it.[1] And our remaining precedents (*Gibbard* v. *Cursan*, 225 Mich 311; *Teeter* v. *Pugsley*, 319 Mich 508; *Davis* v. *Hollowell*, 326 Mich 673 [15 ALR2d 1160]) flatly deny its application to a case where, as here, the plaintiff guest has made out a case of causally connected wilful and wanton misconduct.

[1] *Stevens*, construing and applying the statute in corresponding circumstances of mutual intoxication and similar high speed (90 to 95 miles per hour), holds without reservation that it—the statute—imposes liability where the driver's conduct "manifests a high degree of danger, a manifest probability that harm will result therefrom, and an utter disregard of the probable consequences" (p 371).

The defense of assumption of risk originated from the contractual relation of master and servant. When judges use the expression in tort actions brought under conventional guest-host statutes, they employ it loosely for what it really is—contributory fault of equal degree. It is a "form of negligence" (see quotation from Restatement below) some courts have brought forth to meet that situation in guest-host cases where the guest is said to be equally at fault with the host. So far, however, and I submit the cited Michigan cases as proof,[2] this Court has properly refused to say that a plaintiff guest can, legally, assume the risk of reckless and wanton, or wilful and wanton, misconduct. We do apply Restatement's rule (2 Torts, § 482, subsection 2, p 1262), but that doctrine is not a matter of assumption of risk at all. It is one of contributory misconduct occasioned by the unreasonably reckless exposure of oneself to injury, and it would be a rare case where application thereof could or should be made as a matter of law. All this finds support in Restatement's "comment," quoted and applied in *Davis, supra,* at page 680, *viz*:

"The plaintiff is not barred even by that form of negligence which is called voluntary assumption of the risk. In order that the plaintiff's conduct may bar him from recovery, it is necessary that he not only know of the defendant's reckless conduct, but

[2] Note, in *Davis*, the placing in quotation marks of the expression "assumption of risk" (p 680) and the Court's care in confining the issue to one of unreasonably "reckless exposure" instead of the uncertainties of that which belongs properly in the law of master and servant. The writer of American Jurisprudence tells us (35 Am Jur, Master and Servant, § 293, p 715) what all scholars and quasi-scholars know:

"Few subjects of the law have a more obscure and complicated terminology than that appertaining to the doctrine of assumption of risk. Even the most casual investigation discloses a perplexing and often quite unintelligible array of propositions. Commentators usually have concluded that a reconciliation of all the statements relating to the subject is an impossible task."

also realize the gravity of the risk involved therein so that he is not only unreasonable but reckless in exposing himself to it."

If we are to graft the defense of assumption of risk into the root or stem of the general law of negligence, may not the next defendant motorist, when sued by the risk-assuming guest passenger riding in another car, employ it in bar—equally with the host driver? (Perhaps, though, in such instance, the defense will enter court under a new label, say "imputed negligence" arising from "joint enterprise," lately considered in *Sherman* v. *Korff*, 353 Mich 387 [14 NCCA3d 149].) Where a guest is killed in causal circumstances as now confront us, will not his representatives and dependent beneficiaries be held as having vicariously "assumed the risk" of that which forms the basis of their complaint? Would not the present majority opinion be one for reversal, rather than affirmance, if Mr. Waltanen had been killed that Saturday night and had left a widow and several little children as such risk-assumers? My answer is that this Court, itself, is assuming some unconsidered risks with the handing down of these opinions.

I prefer to follow those decisions, harmonizing as they do with *Davis*, to which the annotator refers (15 ALR2d 1165, 1172) as applying the doctrine of "comparative misconduct":

"Thus, while the cases are uniform in denying recovery, in a proper case, where the guest has knowledge that the driver has been drinking, they are not uniform in the rationale of their conclusion. Some courts hold that the act of the guest in riding with the driver under such circumstances constitutes contributory negligence barring recovery. Other cases state that contributory negligence is no defense to such actions but apply the doctrine of assumption of risk. While in other jurisdictions, it has been held

that if the misconduct of the plaintiff was of an approximately equal degree to that of the defendant or substantially contributed to the subsequent accident, the guest is barred from recovery. The latter defense is referred to in this annotation as the 'comparative misconduct' doctrine."

Validity of this motion for directed verdict should be tested by ascertaining whether, on favorable view, Mr. Waltanen should have anticipated—and acted in time to avoid—"the aggravated tortious conduct herein complained of" (quotation from *Davis,* p 681); in other words whether as a matter of law he was equally at fault with Mr. Wiitala. From that postulate I proceed to point out that the defendant driver assuredly was guilty of causative "aggravated tortious conduct" and that no guest—sober or suffering the Schenley shakes—should be held (by judge distinguished from jury) as having recklessly exposed himself to the incredible combination of additional reckless acts such driver performed after his car left the Phillips gas station.[3] The previous occasions of driving (while guest and host were intoxicated) at foolhardy rates of speed, produced a top pace of 75 to 85 miles per hour. This particular evening the causative rate was stepped up to 95 to 100 miles per hour; an increase of velocity

[3] Plaintiff testified:
"*Q.* Now, after you left the parking lot, would you tell us how Mr. Wiitala was driving?
"*A.* Well, his driving was O. K. first, Andrew—I mean Mr. Wisti—and then he started driving fast as we were near where the accident happened.
"*Q.* About how fast would you estimate he was traveling just prior to the accident?
"*A.* I would say about 95, and maybe 100, miles an hour.
"*Q.* Now, would you describe what happened?
"*A.* Well, Mr. Wiitala was tuning the car radio and he had his left hand on the steering wheel and was looking down at the car radio and he was tuning in this hillbilly station on Saturday night, and he was looking at the car radio.
"*Q.* Then what happened?
"*A.* That's what caused him to lose control of the car."

to approximately 150 feet per second. And it was *not* shown by the defendant burden-bearer[4] (or by any witness for that matter) that he attempted, on any occasion prior to leaving the Phillips station that final night, to do what in combination made up the immediate cause of this tragic accident, that is, attempt to drive at 95 to 100 miles per hour with one hand while the other hand and his gaze were—momentarily even—concentrated on the radio mechanism.

Does this not bring into play the same reasoning which, in *Davis,* held the real question to be one of fact? *Davis* concludes (p 681):

"While it is common knowledge that one who operates a motor vehicle after drinking liquor is more apt to be negligent than one who has not imbibed, it does not follow that wilful and wanton misconduct on his part is always foreseeable so that one who enters it will have recklessly subjected himself to the aggravated tortious conduct herein complained of. The rule, advocated by defendants that reckless exposure of oneself to risk would bar recovery, would not be applicable to the facts of the instant case. Viewing the testimony in the light most favorable to the plaintiff, she had no reason to anticipate the conduct that occurred. There was not sufficient indication of physical or mental incapacity on the part of defendant Douglas which would forewarn of the events that transpired."

In this case I would scrape off the opaque and not-yet-hardened word-varnish some judges have ap-

[4] The stipulated joint appendix shows that the affirmative defense of "assumption of risk" did not appear in this case until defendant moved for a directed verdict. Defendant did not plead the defense, either as assumed risk or unreasonably reckless exposure to known and anticipatory dangers, and no mention or suggestion thereof appears in the trial judge's detailed and comprehensive pretrial summary. That defendant should have pleaded the defense, in some form, as required by Court Rule No 23, § 3 (1945), appears clearly from the recent annotation entitled "Necessity and manner of pleading assumption of risk as a defense" (59 ALR2d 239).

plied uniformly over the expression "assumption of risk" and the rule Restatement ("Torts-Negligence") treats in chapter 17 ("Contributory Negligence") under the heading "Reckless Conduct."[5] The former has no place in negligence cases such as confront us here. In essence, it continues in effect from legal start to legal finish (through care and want of care of both parties) of a contractual relationship. The latter is a solidly established precept of the common law of such torts as are committed in the course of noncontracted relations. No statute gave it life, and no legislatively prescribed rule—of highway safety or otherwise—has enlarged its limited application. Its defensive scope has never been broadened—in this State at least—to the rubbery and never accurately definable doctrine of assumed risk. It is available to a defendant guilty of causally reckless misconduct when, and only when that defendant—bearing the burden, I repeat—is able to prove that the plaintiff did know from previous experience or plain threat that he would be apt to misconduct himself as causally shown; that the plaintiff realized the gravity of the risk involved therein, and that such plaintiff was both unreasonable and reckless in exposing himself to such misconduct. This is not "assumption of risk." It is, when proven, contributory fault of equal degree. And the question of presence or absence of such contributory fault is, from its very specifications, a natural one for jury determination.

I would reverse and remand for new trial.

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[5] 2 Restatement, Torts, § 482, p 1261.—REPORTER.

CAVANAGH *v.* CALHOUN COUNTY BOARD OF CANVASSERS.

1. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY OF ONE CITY TO ANOTHER.

   There must be approval by a majority vote favorable to annexation of unpopulated territory in city of less than 15,000 population to another city other than fractional parts of platted subdivision lots located at the common boundary and such majority must be of the entire city and in each of them to accomplish the annexation (CLS 1956, § 117.9).

2. COSTS—ANNEXATION—CITIES.

   No costs are allowed in suit to determine validity of annexation of territory by one city from territory of another city (CLS 1956, § 117.9).

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted October 11, 1960. (Docket No. 55, Calendar No. 48,549.) Decided October 31, 1960. Opinion filed November 2, 1960.

Certiorari by Howard W. Cavanagh, a registered elector residing in Battle Creek, against the Calhoun County Board of Canvassers to review determination that annexation proposal failed to pass. City of Springfield, a municipal corporation, intervened as party defendant. Judgment for plaintiff. Intervening defendant appeals. On appeal City of Battle Creek, a municipal corporation, intervenes as party plaintiff, Paul L. Adams, Attorney General, and

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REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations § 30.
Power to extend boundaries of municipal corporation. 64 ALR 1335.
[2] 14 Am Jur, Costs § 22.

James M. Hare, Secretary of State, intervene as parties defendant. Reversed and remanded for dismissal of writ.

Allen, Allen & Scatterday (*John M. Allen,* of counsel) and *Ford, Kriekard & Brown,* for plaintiff.

R. W. Harbert, Jr., for intervening plaintiff City of Battle Creek.

Joseph V. Wilcox (*George R. Sidwell,* of counsel), for intervening defendant City of Springfield.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *G. Douglas Clapperton,* Assistant Attorney General, for intervening defendant Attorney General.

PER CURIAM. Plaintiff Cavanagh sued out certiorari in the Calhoun circuit to review a determination by the Calhoun county board of canvassers that an election purposed toward annexation of certain territory* in the home-rule city of Springfield (a city "of 15,000 or less"), to the adjacent home-rule city of Battle Creek, failed to carry for want of a majority vote of the qualified electors of Springfield. The circuit court reversed the board's determination. Its judgment is here for review on application and grant of leave.

The case calls for interpretation and application of section 9 of the so-called home-rule city act of 1909, as amended (CLS 1956, § 117.9 [Stat Ann 1959 Cum Supp § 5.2088]). The section, italicized according to stressed points made by the contending parties, reads now as it read when the annexation proceeding was instituted by petition in 1959:

* No part of such territory "consists of fractional parts of platted subdivision lots," within the exception appearing in the final sentence of presently quoted section 9.

"Sec. 9. 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, however, That when a territory is proposed to be incorporated as a city only the residents of the territory to be incorporated shall vote on the question of incorporation: Provided further, That when a petition signed by the State by the appropriate agency designated by the State administrative board which holds the record legal title to the entire area of the land in the territory adjacent to the city to be annexed, is filed with the governing body of said city and with the township board of the township in which such territory is situated, such annexation may be accomplished by the affirmative majority vote of the governing body of such city and the approval of the township board of such township. Any 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: *Provided, however, That territory may be attached or detached to or from cities having a population of 15,000 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.* 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. *If no qualified electors reside in the territory proposed to be annexed or detached at the time of filing said petition with the clerk of the board of supervisors, as provided in section 8 of this act, and if a majority of the electors voting in the district to be affected as herein defined, voting collectively, are in favor of the proposed change of boundaries, then such territory shall become a part of the corporate territory of the city or shall be detached therefrom, as the case may be.* Where the territory proposed to be annexed to any city is adjacent to said city and consists of a park or vacant property located in a township and owned by the city annexing the same, and there is no one residing thereon, such territory may be annexed to said city solely by resolution of the city council of said city or in any case where the territory proposed to be annexed is adjacent to said city and consists of fractional parts of platted subdivision lots, located in an adjoining city, village, or township, such annexation may also be accomplished by the affirmative majority vote of the legislative body of such city and the approval of the legislative body of such adjoining city, village or township: Provided further, That as an alternate method, where there are no qualified electors residing in the territory proposed to be annexed to said city, other than the person or persons petitioning, a petition signed by a person or persons, firms, corporations, the United States government, or the State or any of its subdivisions who collectively hold the record legal title to more than 1/2 of the area of the land in the territory to be annexed is filed with the city council of said city and with the township board of the township in which such territory is situated, such annexation may be accomplished by the affirma-

tive majority vote of the city council of such city and the approval of the township board of such township: Provided further, That at least 10 days prior to the approval by the township board, the township treasurer shall notify, personally or by registered mail with return receipt demanded, the owners of all real property in the territory to be annexed as shown on the assessment rolls of the township at the last known address on file with the township treasurer. *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 as hereinbefore specifically provided, where the territory proposed to be annexed is adjacent to a city and consists of fractional parts of platted subdivision lots, located in an adjoining city.*"

Springfield states, fairly and comprehensively, the decisive question:

"Where, under the provisions of the Michigan home-rule act, PA 1909, No 279, § 9, as amended, the territory to be affected by a proposed annexation by a city lies in a city of 15,000 or less population, must the proposition to annex such territory receive a majority vote of the qualified electors of the city in which the territory lies, voting separately and *not* cumulatively with the qualified electors of the would-be annexing city?"

Plaintiff Cavanagh and intervener Battle Creek insist that the question should be answered in the negative. They rely particularly on the sentence italicized above commencing "If no qualified electors reside." Springfield and the attorney general, intervening, insist that the question should be answered in the affirmative. They emphasize the first and third portions italicized above.

The presented question is new. Its solution receives no aid from previously reported decisions in

which this lengthy, much amended and manifestly abstruse section of the act of 1909 has been considered. We are persuaded, on review of the briefs and arguments of the parties, that the attorney general's advice to the local board of canvassers (upon which the board acted) was right, and that he has construed section 9 properly for the purposes of current decision. He ruled (memorandum opinion No. M-571, dated July 30, 1959) that the final sentence of the section controls this annexation proceeding, saying:

"The last sentence, above quoted, deals exclusively with annexation of territory from one city to another. It does not provide that the vote of the cities affected shall be a collective vote of the 2 cities, but requires a vote by the voters of the *entire* cities affected. The intent of the legislature is clear that each city must vote separately on the question; otherwise the phrase 'entire cities' would be meaningless.

"It is therefore my opinion that where no voters reside in the territory to be annexed, the vote in each city must be counted separately from that in the other city, and that there must be a majority in each city favorable to annexation, in order to accomplish it."

Reversed and remanded for entry of order dismissing the writ. No costs.

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

CITY OF MADISON HEIGHTS *v.* TWELVE TOWNS RELIEF DRAINS DRAINAGE BOARD.

1. JUDGMENT—PARTIES—INTERVENTION.

A governmental unit, such as plaintiff city, which had been granted leave to intervene in an earlier case reviewing the validity of a large intercommunity drainage system, is considered as an intervening party bound by the adjudication made therein as to tentative apportionment of costs notwithstanding it filed no further pleadings than petition to intervene as a party defendant along with the drainage board and concurred in brief filed by principal defendants.

2. SAME—PARTIES—RES JUDICATA.

A determination, made by the trial court in an earlier proceeding in which plaintiff herein was an intervening defendant, approving formula used for apportioning costs of drain but from which no appeal was taken, although it might have been, was determinative of the issue.

3. DRAINS—APPORTIONMENT OF COSTS—JUDICIAL REVIEW.

Parties affected by order apportioning costs of drain have but 1 opportunity for judicial review of the drainage board's apportionment, a right limited by statute to certiorari brought within 20 days after filing final order of apportionment (CLS 1956, § 280.483).

Appeal from Oakland; Beer (William John), J. Submitted June 9, 1960. (Docket No. 36, Calendar No. 48,659.) Decided December 1, 1960. Rehearing denied January 9, 1961. Application for certiorari filed in the Supreme Court of the United States March 29, 1961.

Certiorari by the City of Madison Heights, a municipal corporation, against the Drainage Board for

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 30A Am Jur, Judgments § 396.
[3] 17A Am Jur, Drains and Sewers § 88.

the Twelve Towns Relief Drains, Daniel W. Barry, its chairman, and Delos Hamlin and Robert Y. Moore, members, challenging validity of apportionment of costs for drain construction. Determination of board, as it applied to allocation of costs to plaintiff city, quashed. Defendants appeal. Reversed and remanded for dismissal of writ.

H. Eugene Field (*Harry N. Dell,* of counsel), for plaintiff.

Norman R. Barnard, Oakland County Corporation Counsel, *Charles A. Davis* and *Robert P. Allen,* Assistants Corporation Counsel (*Claude H. Stevens,* of counsel), for defendants.

DETHMERS, C. J. Background information is to be found in this Court's opinion in the combined cases of cities of *Southfield* and of *Troy* v. *Drainage Board,* 357 Mich 59. The petition for establishment of the system of relief drains, therein involved, was signed for a number of cities and townships, including the township of Royal Oak. Since then, but during pendency of those suits, that township was reduced in size by the incorporation, out of a portion of its territory, of the city of Madison Heights, plaintiff herein. After that city's incorporation it filed petitions for leave to intervene in those suits as party defendant, and orders entered accordingly. After that it filed no pleadings therein. At the opening of the trial, however, its attorney stated, in open court, that he might or might not be present at all times but that he would have no objections to the trial proceeding in his absence. On the appeal here in those cases the city attorney of plaintiff herein was listed in the appendices as one of the attorneys, and he noted his concurrence in the brief filed therein for the principal defendants.

At the conclusion of the trial court's opinion in those 2 cases appears language, not contained in its decrees, as follows:

"That further notice be given the public corporations constituting the Twelve Towns System prior to the hearing of objections to the tentative apportionments, and the making of the 'final order of apportionment.' "

The trial court's decrees, however, contained the following:

"That the tentative apportionment of cost of the Twelve Towns Relief Drains among the several public corporations, as set forth in resolution of the drainage board adopted on September 25, 1957, was not an abuse of the discretion lodged in the drainage board and that there was nothing illegal in the method used in arriving at such apportionments."

As may be gathered from that decretal provision, the drainage board, before trial and decision in those cases, had made a computation and tentative apportionment of the costs of the drain among the several units of government involved, including this plaintiff, on the basis of a definite formula. From that provision of the decrees, approving the same, no appeals were taken nor was any question about the same raised on the appeal by any of the parties.

After our decision in those cases, because of increased cost estimates attending the delay occasioned by that litigation, the drainage board caused a new statement to be prepared computing the drain costs and apportioning the same among the several units on the basis of the same formula previously approved by the mentioned decrees. Because certain changes had occurred in the interim in municipal and highway areas affected, the percentage of the cost apportioned, in the new statement, to plaintiff was decreased from the 6.338+% in the first tentative ap-

portionment to 6.048+% in the latter. This new apportionment was adopted, tentatively, by the board, which set a date of hearing thereon. At that hearing plaintiff alone objected to the apportionment. Its objection was directed only to the formula used as a basis for apportionment. The board determined that the objection was not well founded and confirmed the tentative apportionment.

Plaintiff brought certiorari in circuit court. That court sustained plaintiff's contention that the formula employed by the board was invalid, particularly because, as the court found, it did not comply with statutory requirements (PA 1956, No 40, § 468 [CLS 1956, § 280.468, as amended by PA 1957, No 37, Stat Ann 1960 Rev § 11.1468]) that the apportionment shall be made on the basis of benefits to accrue to plaintiff and the other affected governmental units and of the extent to which plaintiff and the others contribute to the conditions making the drain necessary.

Defendant drainage board appeals here, contending, *inter alia,* that the decisions in *Southfield* and *Troy* are *res judicata* of the legality of the formula used by the board, which is the sole object of attack by plaintiff in this case.

Plaintiff rejects defendant's claim of *res judicata* on the ground that it was not a party to nor an intervenor in the *Southfield* and *Troy Cases* because it filed no formal pleadings therein after the court had granted it leave to intervene. The extent of plaintiff's participation in the cases, as above noted, persuades us that plaintiff must be considered to have been an intervening party. Plaintiff says that it and other units had no lawful right to intervene. There is no support for this in the holding in *City of Grand Rapids* v. *Consumers Power Co.,* 216 Mich 409, that one who is a taxpayer of a city and consumer of electricity is not, by reason of such facts, one possessed

of "an interest in the litigation" brought by the city against defendant utility to enforce certain rates for electricity, such as to entitle him to intervene. Here, as appears clearly enough from plaintiff's petition to intervene, plaintiff did have an interest in the litigation, alleging that it was a matter of vital interest to it that the drainage system be constructed with all possible speed, that the health, welfare, and safety of its citizens were involved because of the inadequacy of existing drains, that it would be bearing a large portion of the costs of the new drain and therefore had a direct interest in the litigation and that it wished to intervene so it might assert its rights in the suit, ostensibly, to have the drains constructed as by the defendant drainage board proposed. Its interests were thus identified with those of the defendant drainage board, warranting its intervention as a party defendant, but at the same time, particularly as relates to apportionment by the board of the costs of the drain, plaintiff had an interest in which it was not represented by the board as the taxpayer was held to have been represented by the city or city attorney in *City of Grand Rapids* v. *Consumers Power Co., supra.* We hold that plaintiff could be and was an intervenor in the *Southfield-Troy Cases* and is bound by the decisions therein.

Plaintiff further denies defendants' claim of *res judicata* on the ground that this Court did not approve the formula here involved in our opinion and decision in *Southfield-Troy.* It was so approved by the trial court. Appeal might have been taken from that holding but was not. It was not reversed by this Court and, therefore, remains determinative of the issue. The statement in the trial court's opinion, not contained in its decrees, that further notice should be given to the units involved prior to holding a hearing on objections to the tentative apportionment and making it final, in no wise diminishes

the effectiveness of the decretal provision upholding the legality of the apportionment formula. Hearing on the first tentative apportionment had been set before the *Southfield-Troy* suits but had been enjoined therein. The trial court's reference, in its opinion, to a hearing to be held on objections to the tentative apportionment no doubt was made in recognition of the fact that such hearing had been enjoined and, hence, still needed to be held and also, perhaps, of the further fact that changes might have occurred since such enjoining, as they did, in cost estimates and areas affected, requiring a new computation and tentative apportionment and a hearing thereon. Nothing in this entitled plaintiff to 2 judicial determinations of the validity of the apportionment formula.

Plaintiff points to the provisions of CLS 1956, § 280.483 (Stat Ann 1960 Rev § 11.1483), which reads:

"Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order."

It urges that this language expressly permits plaintiff to bring certiorari within 20 days after the final order of apportionment, which was made since the 2 cases were disposed of here. We do not view that language as a grant but rather as a limitation on the right to certiorari. Be that as it may, no more can be said of the statute than that it evidences a legislative intent that affected parties should have 1 opportunity for judicial review of the board's apportionment. There is nothing in the statute, nor in common sense or a regard for fairness or due process, calling for 2 such opportunities concerning the same question, that being, here, the validity of the apportionment formula.

Reversed and remanded with directions to enter an order dismissing. Costs to defendants.

CARR, KELLY, SMITH, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

SOVEREIGN *v.* SOVEREIGN.

1. EQUITY—JURISDICTION—CUSTODY OF CHILDREN—ATTORNEY FEES FOR WIFE.

   A court of equity in the exercise of its inherent jurisdiction in a proceeding to determine the custody of children between parents who were not divorced, has the power to make an award to the wife for attorney fees and expenses of suit to the end that she may be afforded opportunity for a fair presentation of her case.

2. SAME—JURISDICTION—CUSTODY OF CHILDREN—ATTORNEY FEES—EXPENSES.

   A mother is entitled to be heard in any proceeding instituted for the purpose of fixing the custody of her minor child as the court is primarily concerned with the best interests of such child, and where the mother is without resources to present her case properly, the court, incidental to the exercise of its inherent jurisdiction in such cases, may make an award to the wife to cover such attorney fees and expenses as may be deemed fair and reasonable under all the circumstances of the case.

Appeal from Bay; Louis (David R.), J. Submitted October 4, 1960. (Docket No. 4, Calendar No. 48,391.) Decided December 1, 1960.

Petition by Will F. Sovereign against Mary K. Sovereign, originally for annulment, amended to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 19 Am Jur, Equity § 152.

ask determination of custody of child independent of any other proceeding. Following appeal in this Court (354 Mich 65) decree for plaintiff entered. No costs allowed defendant wife, who appeals. Reversed and remanded for determination of propriety for cost allowance and amount thereof.

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

Irving M. Hart, for defendant.

CARR, J. In divorce proceedings instituted by Mary K. Sovereign, defendant in the instant proceeding, a decree granted to the husband on his cross-bill was reversed and set aside by this Court in *Sovereign* v. *Sovereign,* 347 Mich 205. Subsequently thereto the husband, under date of February 18, 1957, filed a petition to annul the marriage, asking also that the custody of the minor child of the parties be granted to him and that the court determine property rights. Motion to dismiss was interposed, based in part on the determination of the prior divorce action. Thereafter the petition was amended in such manner as to delete the prayer for annulment of the marriage and for determination of property rights, petitioner expressly asking that the petition be treated as one addressed to the court seeking a determination of rights of custody of the child without reference to other questions. The motion to dismiss was granted by the trial court, the circuit judge being of the opinion that he was without authority to determine such question of custody.

From the order so entered petitioner appealed to this Court which determined (*Sovereign* v. *Sovereign,* 354 Mich 65) that the situation presented was of such character that the circuit court possessed

jurisdiction by virtue of its inherent chancery powers, there being no specific statutory remedy available. The proceeding was accordingly remanded to the circuit court for hearing on the petition. Following the introduction of some proofs before the circuit judge the parties entered into a stipulation on the basis of which a decree was entered granting to the petitioner the custody of the minor child pending arrival at the age of 18 years or until the further order of the court, with certain rights of visitation to defendant. It appears from the record that the child whose custody was in question had lived with petitioner for approximately 2 years prior to the hearing.

In the course of the proceeding counsel for Mrs. Sovereign moved the court for an order for the allowance of expense money and attorney fees to enable her to properly present her claims. The motion was denied and the trial court subsequently refused to make provision in the final order or decree entered for expense money, including an attorney fee. The reason for such refusal was indicated in the following provision in said decree:

"And this court doth further find, order, adjudge and decree, that it has no authority to order any attorney fees, or expenses of suit for the benefit of counsel for Mary K. Sovereign, and therefore makes no provision therefor."

From such provision of the decree defendant has appealed, asserting in substance that the trial judge was in error in concluding that he did not have authority to enter an order for attorney fees and expenses. Such claim presents the sole question at issue before this Court.

Counsel for petitioner asserts that the circuit judge was right in concluding that he had no authority to make an order of the nature sought,

Reliance is placed on the fact that there is no provision of statute or of court rule authorizing the payment of an attorney fee or expenses in a proceeding involving solely the matter of custody of a minor child, or children, of parents who have separated, without termination of the marital relation. In the instant proceeding, however, as appears from the decision of this Court above cited (354 Mich 65) the jurisdiction of the circuit court to hear and determine the matter of custody of the child of the parties was not based on statute or rule but, rather, on the inherent general power of a court of equity, not inconsistent with pertinent constitutional provisions and the statutes of the State relating to the care and protection of minor children. In consequence the question before us is whether the making of the order sought on behalf of defendant may be regarded as properly embraced in, and incidental to, the exercise of jurisdiction over the proceeding to determine custody.

In support of their contention counsel for petitioner have cited *Finlay* v. *Finlay,* 240 NY 429 (148 NE 624, 40 ALR 937). In that case the father of minor children brought an action against his wife in a New York court to obtain custody of said children. It appears that the husband and wife were separated, and that petitioner was living in Missouri. In determining whether such action would lie the court of appeals of New York discussed at some length the question of jurisdiction in an action brought solely to determine the custody of infant children irrespective of statute, concluding that such custody was to be regulated either under writ of habeas corpus* or by petition to the chancellor. It was declared that the latter remedy was not one by suit, and that the chancellor in acting thereon did

* See *In re Knott,* 162 Mich 10.

not proceed upon the theory that a petitioner had a cause of action against the other parent but acted solely as *parens patriae* to determine the best interests of the child, or children, concerned. It was held that the plaintiff in his complaint had not properly invoked the paternal jurisdiction of the court and had failed to show whether the divided custody sought would be for the best interests of the minor children or would operate to their detriment, and that, in consequence, the order of the appellate division of the trial court denying a motion for judgment on the pleadings should be reversed. The question of the allowance of expenses and attorney fee for the benefit of a mother of minor children whose custody is at issue, and who becomes a party to the proceeding, was not discussed.

Counsel for petitioner also rely on the holding of the supreme court of Nebraska in *Timmerman* v. *Timmerman,* 163 Neb 704 (81 NW2d 135, 65 ALR2d 1372). In that case the plaintiff wife brought suit seeking a divorce, custody of a minor child, and other relief applicable to divorce actions. The validity of the marriage was challenged by defendant's cross-petition. Defendant sought a decree declaring the marriage between the parties null and void, and further asking the right to custody of a minor child of the parties. Subsequent proceedings established that there was no valid marriage and that, in consequence, the child in question was born out of wedlock. It was held that under provisions of the Nebraska statute pertaining to the situation the court was empowered to determine the question of paternity. In entering its order the trial court had made provision for the support of the child, and had allowed an attorney's fee. The supreme court of the State concluded that such fee was improper, there being no authority of statute therefor. The court in its opinion cited with approval a statement

made in a prior decision to the effect that recovery of attorneys' fees and expenses depend on statute or on a uniform course of procedure.

It will be noted that the Nebraska case did not involve the invoking of the inherent jurisdiction of a court of equity in proceedings involving the custody of minor children, and not inconsistent with the constitution, or the statute law of the State. The Nebraska court determined the matter before it by reference to statutory provisions, and in substance held that the attorney fee allowed in the trial court was improper because not so authorized. The case may not be regarded as directly in point in the situation now presented to this Court.

This proceeding is one of first impression in Michigan and, in consequence, this Court has not spoken directly on the issue involved in the appeal. In somewhat analogous situations, however, it has been held that a court of equity may make an award for attorney fees and expenses of suit to the end that a wife may be afforded opportunity for a fair presentation of her case. In *Webb* v. *Wayne Circuit Judge,* 144 Mich 674, the plaintiff brought suit against his wife to have a marriage declared void. The wife sought relief by way of alimony, temporary and permanent, and a decree of divorce. Upon petition, and after hearing, the court made an order for the payment to defendant of a solicitor's fee. Plaintiff did not comply with the order and the court refused to proceed until it had been obeyed. Mandamus was instituted in this Court to compel the circuit judge to proceed with the hearing. In denying the writ it was said:

"Relator contends that the court had no jurisdiction to make the order for expenses of defendant, because the provisions of CL 1897, § 8628, have no

application to proceedings under CL 1897, § 8618.*; It is also contended that the court has no discretion in the premises, because the answer of defendant, in substance and effect, admits the invalidity of the marriage.

"It is true that the statute does not in terms empower the court to require the husband to pay money to the wife to enable her to carry on a suit like this one. Neither does it in terms embrace the subject of allowances for her support. The power to grant allowances, however, has been held to be incident to divorce cases. *Goldsmith* v. *Goldsmith,* 6 Mich 285; *Ross* v. *Ross,* 47 Mich 185; *Haines* v. *Haines,* 35 Mich 138. The reason asserted in *Goldsmith* v. *Goldsmith, supra,* and in *Story* v. *Story,* Walk Ch (Mich) 421, for the exercise of this power, is that, without this power in the court, the wife who should have no separate property of her own would be without the requisite means of prosecuting or defending the suit and of supporting herself in the meantime. The same reasoning applies, with equal force, in cases like the present. The power of the court below to make the order is affirmed. The brief for relator admits that, if the court had jurisdiction to make the order, it was and is in force."

In *Goldsmith* v. *Goldsmith,* 6 Mich 285, cited in the *Webb Case,* the question at issue was the power of the Court to allow temporary alimony pending proceedings for a divorce. Objection thereto was made on the ground that there was no statutory authority therefor. In rejecting the claim, it was said:

"The power to allow temporary alimony pending proceedings for a divorce, and to compel the husband to furnish the wife with pecuniary means to defend or prosecute the suit on her behalf, is incident to divorce cases. It is necessary to the ends of justice. Without this power in the court, the wife that should

* Currently, CLS 1956, § 552.13 (Stat Ann 1957 Rev § 25.93), and CL 1948, § 552.3 (Stat Ann 1957 Rev § 25.83), respectively.—REPORTER.

have no separate property of her own, would be without the requisite means of prosecuting or defending the suit, and of supporting herself in the meantime. The statute relative to divorces says: "The court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency,' but makes no mention of temporary alimony. So far as the statute goes, it is only confirmatory of the common law, which had been acted upon by our courts before we had any statutory provisions on the subject. *Story* v. *Story,* Walk Ch 421."

In *Gard* v. *Gard,* 204 Mich 255 (11 ALR 923), the plaintiff brought suit to annul a marriage on the ground of fraud by which, as it was claimed, he was induced to go through a marriage ceremony with the defendant. A decree for plaintiff was entered, and the defendant appealed. On the basis of the proofs in the case the decree of annulment was affirmed. It was held further that defendant had the right to appeal to this Court and an allowance by way of attorney fees in the sum of $200 was made to her.

We think the reasoning of these decisions support the claim of appellant that the circuit court in the instant proceeding had authority, if the factual situation fairly indicated that she was equitably entitled thereto, to grant her request for an attorney fee and for expenses. Such authority may be considered as implied from the nature of the proceeding. In any proceeding instituted for the purpose of fixing the custody of a minor child, a proceeding in which the trial court is primarily concerned with the best interests of such child, the mother is entitled to be heard. It would scarcely be consistent with ordinary principles of equity and justice to hold that in such a proceeding instituted by a father of the minor child, or children, he alone is concerned. Whether we regard the proceeding as adversary in nature, or

otherwise, the practical situation is unchanged. Petitioner in the instant case obviously recognized the right of defendant to be heard and to present facts for the consideration of the court to the end that a proper determination might be reached. If under such circumstances a wife is unable because of lack of resources of her own to properly present her claim and to assist the court in the protection of the rights of her minor child, we conclude that the court has the authority, incidental to jurisdiction to hear and determine the matter of custody, to make such an award to cover attorney fees and expenses as may be deemed fair and reasonable under all the circumstances of the case. The prior decisions of this Court, above cited, tend, by analogy, to support such conclusion.

Whether such an order should in fact be made, and if so the amount thereof, are questions primarily for the determination of the trial judge. An order will accordingly enter remanding the proceeding to the circuit court for a decision as to the propriety of an order of the character sought and, if the issue is decided in favor of defendant, the fixing of the amount thereof. The decree as entered will be amended in accordance with this opinion, and defendant may have costs on the appeal.

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

AXENFIELD *v.* VIRTUE FURNITURE COMPANY.

1. SALES—RESCISSION—TIME.
   One seeking to rescind a sale and recover consideration paid must act with reasonable promptness after discovering the facts and what is a reasonable time depends on the circumstances of the particular case.
2. SAME—RESCISSION—EQUITY.
   A seller of household furniture will not be permitted to defeat the buyer's right to rescind on ground of delay unless it would be inequitable to deny it.
3. APPEAL AND ERROR—CIRCUIT COURT—COURT OF COMMON PLEAS—GREAT WEIGHT OF EVIDENCE.
   The circuit court on appeal from the common pleas court does not try the case *de novo* and, where there is credible evidence to support the finding of the common pleas judge, his judgment will not be set aside since it is not against the great weight of the evidence.

Appeal from Wayne; Targonski (Victor), J. Submitted October 11, 1960. (Docket No. 53, Calendar No. 48,591.) Decided December 1, 1960. Rehearing denied January 9, 1961.

Case by Myron Axenfield against Virtue Furniture Company, a copartnership composed of Harry L. Mandell and Lillian B. Mandell, to recover, upon rescission, sums paid on furniture. Judgment for plaintiff in common pleas court and circuit court. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 46 Am Jur, Sales § 764.
Time for rescission by purchaser of chattel for fraud or breach of warranty. 72 ALR 726.
[3] 3 Am Jur, Appeal and Error §§ 817, 895.

Joel W. Josephson (*Donald S. Wexler,* of counsel), for plaintiff.

Gabriel Glantz, for defendant.

KELLY, J. Plaintiff filed his declaration alleging that on or about March 15, 1958, he purchased household furniture and furnishings in the amount of $1,655.21 from defendant furniture company; that defendant on the first day of April, 1958, delivered floor samples which had been used and soiled in the display rooms of defendant; that when plaintiff complained defendant "did attempt to clean, renovate and revarnish such furniture and furnishings but was unable to do so"; that on June 9, 1958, plaintiff "rescinded the entire contract of sale, requesting the return of his money from the defendant and tendering back all of the furnishings and furniture delivered to him by the defendant."

Defendant answered, stating:

"That all of the said merchandise delivered to plaintiff at said time was exactly the same merchandise which plaintiff had selected at the place of business of defendants. * * * That the plaintiff asked the defendants for certain service on said merchandise, which the defendants provided and that after said services had been furnished on 2 occasions, the plaintiff and his wife signed receipts stating that said services had been rendered to the complete satisfaction of each of them."

Common pleas court judge, Hon. David C. Vokes, awarded judgment for the sum paid for the furniture ($1,655.21), and the circuit court of Wayne county, on appeal, affirmed the judgment of the lower court.

Defendant appeals solely on the ground that plaintiff was barred from relief because he did not rescind until June, 1958. This defense was not urged in the trial of the case before the common pleas court.

Only a portion of the furniture ordered was delivered to plaintiff on or about April 1, 1958. The balance of the furniture did not arrive at defendant's store until about May 15, 1958.

Within a few days after delivery of the furniture, plaintiff noticed it was defective and twice called defendant concerning same. On each occasion a service man was sent out, and on each occasion plaintiff or his wife signed a service slip. Plaintiff stated he did so because the service man needed it to get paid and he figured it was the best that could be done. He also said the repair man told him: " 'You have to expect it (defects) in production line furniture.' "

In *Gothe* v. *Kakis,* 257 Mich 364, 368, we said:

"A defrauded party who seeks to rescind must act with reasonable promptness after discovering the facts. What is a reasonable time depends on the circumstances of the particular case. *Cornell* v. *Crane,* 113 Mich 460. This defense will not be permitted to defeat the right to rescind unless it would be inequitable to deny it."

In *Ladney* v. *Termes Steel Co.,* 359 Mich 228, we affirmed the circuit judge's statement of the following principle:

" 'It should be borne in mind at the outset that the present appellate practice does not provide for a trial *de novo,* as was the case formerly, but that this court sits only as a court of review to determine whether the judgment in the lower court is lawful. Not being engaged in a trial *de novo,* this court does not determine where the preponderance of evidence lies, and the only question which can be determined is whether or not the judgment below was clearly against the great weight of the evidence. Before a judgment of a lower court can be reversed, it must clearly appear that there was no substantial credible evidence to sustain the judgment. The mere fact

that this court might have reached a different conclusion from the same proof is not the test and cannot be the basis for reversing the conclusion reached by the lower court.' "

The record discloses there was substantial credible evidence to sustain the judgment, and further discloses that the judgment below was not against the great weight of the evidence.

Affirmed. Costs to appellee.

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

ROLL *v.* CITY OF TROY.

1. EQUITY—EVIDENCE—APPROVAL OF PLAT.

Decree granting relief to plaintiff property owners against city to compel latter to approve a plat notwithstanding it did not comply with city's zoning ordinance limiting minimum size of lots in area in which plaintiffs' plat was located to 30,000 square feet each, is reversed and case remanded, where decree was entered before proofs were taken.

2. COSTS—PUBLIC QUESTION—APPROVAL OF PLAT.

No costs are allowed in suit by owners of a plat to compel defendant city to approve it, a public question being involved.

Appeal from Oakland; Beer (William John), J. Submitted October 12, 1960. (Docket No. 65, Calendar No. 48,547.) Decided December 1, 1960.

REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Equity § 408.
[2] 14 Am Jur, Costs § 22.

Bill by Orville J. Roll and Cecilia Roll 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. On motion following pretrial hearing decree entered for plaintiffs. Defendant appeals. Reversed and remanded for taking of proofs.

Malcolm M. Heber, for plaintiffs.

Burke & Osgood, for defendant.

KELLY, J. Plaintiffs and appellees submitted to appellant city a proposed subdivision plat containing lots 15,000 square feet in area. Approval of their plat was refused because of the city zoning ordinance requiring that each lot must have a minimum of 30,000 square feet.

Application was made to amend the zoning ordinance to reduce the lot size requirement to 15,000 square feet and such amendment was approved by defendant city's planning commission, but denied by the city commission.

Plaintiffs filed their bill of complaint (August 25, 1959) in the circuit court for the county of Oakland, in chancery, alleging that the land was economically suited for development only if divided into building sites of not more than 15,000 square feet in area; that the zoning of the property of a minimum lot size of 30,000 square feet is unrealistic and that the zoning classification was established at a time when the property had no permanent sanitary sewage disposal facilities available; that the defendant's refusal to approve plaintiffs' plat is unreasonable, arbitrary, and capricious for the reason that said city has zoned the bulk of the property in the surrounding area adjacent to plaintiffs' land for lot sizes of 15,000 square feet; that such action on the part of

defendant city is arbitrary, unreasonable, and capricious and has no connection with the public health, safety, morals, or general welfare.

Defendant and appellant, city of Troy, filed its answer (September 16, 1959) denying plaintiffs' allegations. We quote from appellant's brief as follows:

"The zoning ordinance is formulated on the basis of the concept of the so-called 'neighborhood unit.' It should be noted that the neighborhood units are much smaller in the southeast corner of the city and larger in the northwest corner. This type of comprehensive zoning plan makes available to the residents of the city and to any newcomers, a variety of lot sizes; thus, the individual may select according to his taste, desires and economic ability. The lot sizes range from 7,500 square-foot lots in the southeast corner, to 30,000 square-foot lots in the northwest corner. A fundamental purpose of zoning is the preservation of the character of a neighborhood. An examination of defendant's exhibit 'D' indicates that the subject property lies in the middle of the west one-half of section 18 in the city of Troy. Abutting the subject parcel to the south is Meadowlane subdivision, which is fully improved with residences on an average lot area of 31,000 square feet. To the south of, and extending to Wattles road is Pinehill subdivision. This subdivision is entirely built up with residences on lot areas averaging 35,000 square feet. To the north of the subject parcel lies Countryside Estates subdivision. This subdivision is improved with residences on lot sizes averaging 50,000 square feet. * * *

"It cannot be too strongly emphasized that the zoning of the subject parcel constitutes an integral part of a comprehensive zoning plan. In Michigan, the creation of a master plan is a proper exercise of the police powers by a municipality."

No proofs were taken in this case. The transcript of proceedings discloses that during the morning of

September 15, 1959, the court discussed the problem with counsel and adjourned the morning session with the statement: "We will recess at this time and reconvene at 2 o'clock and at that time the court will prepare the pretrial statement."

When the court reconvened at 2 p.m. on the same day, the court dictated a pretrial statement, which was later typed, and filed the following September 23d. The court said that "the pretrial statement may show that experts on each side may not exceed 4 in number."

At the conclusion of the dictation of the pretrial statement, plaintiff moved "for a decree upon the pleadings and the opening statement of counsel and the pretrial statement." Defendant moved that such motion be denied.

The court recessed until 4 p.m. on the same day (September 15, 1959), at which time the court ruled:

"The plaintiffs may have a decree in accordance with their motion and there must be reserved therein in suitable language, the proviso in connection with the establishment of adequate sewer facilities."

On October 30, 1959, defendant filed a motion for rehearing, which motion was denied on November 17th.

The court erred in denying defendant's motion for a rehearing and an opportunity to offer its proofs.

Defendant and appellant's prayer for relief, namely: That the decree be set aside, is granted and the case is remanded to take proofs.

Reversed and remanded. No costs, a public question being involved.

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

NABOZNY *v.* HAMIL.

1. NEGLIGENCE—QUESTION FOR JURY—DIRECTED VERDICT.
   Generally, the question of negligence is a question of fact for the jury, but where the facts are not in dispute and the negligence of defendant is crystal clear, it is proper to direct a verdict for plaintiff on the issue of liability.

2. AUTOMOBILES—NEGLIGENCE—AUTOMATIC GEARSHIFT.
   Defendant motorist was negligent as a matter of law where injuries to plaintiff in parallel parked truck ahead of defendant resulted from twice striking the truck because she had left motor running and the car with automatic shift in gear and let her foot slip from brake pedal to the accelerator pedal as she reached over to close right front door upon departure of her young son from the car.

BLACK and KAVANAGH, JJ., dissenting.

Appeal from Oakland; Beer (William John), J. Submitted June 9, 1960. (Docket No. 31, Calendar No. 48,437.) Decided December 1, 1960.

Case by Theodore A. Nabozny against Robert Hamil and Betty Hamil for personal injuries sustained when defendants' automobile was inadvertently started from parked position and struck delivery truck. Directed verdict of negligence, resulting in verdict and judgment for plaintiff. Defendants appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence §§ 344, 345; 53 Am Jur, Trial § 385 *et seq.*

[2] 5A Am Jur, Automobiles and Highway Traffic § 414.

Earl C. Opperthauser, for plaintiff.

Howlett, Hartman & Beier (*William B. Hartman,* of counsel), for defendants.

BLACK, J. (*dissenting*). This Court in recent years* has reaffirmed devotion to Mr. Justice COOLEY's enduring aphorism that, "As a general rule, it cannot be doubted that the question of negligence is a question of fact and not of law." (*Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99, 118.) The question of negligence in the case before us comes within that rule, and so I vote to reverse this judgment for plaintiff, same having been entered upon determination by the court that the defendant driver was guilty of actionable negligence.

The stated general rule was considered at length by Mr. Justice COOLEY in his timelessly dependable workbook of torts. Quoted as follows, from 3 Cooley on Torts (4th ed), § 481, p 389, is that portion of the text which gives the author's principal reasons for the view that the defendant's negligence (as claimed by the plaintiff) is usually a question for the jury:

"The question will often be, does the defendant appear to have exercised the degree of care which a reasonable man would be expected to exercise under like circumstances? To such a question a man of

* *Clark* v. *Shefferly,* 346 Mich 332, 335–337; *Olman* v. *Vandawater,* 347 Mich 112, 116, 117; *Kaminski* v. *Grand Trunk W. R. Co.,* 347 Mich 417, 420, 421; *Barron* v. *City of Detroit,* 348 Mich 213, 217, 218; *Davis* v. *New York Central R. Co.,* 348 Mich 262, 268, 269, 274; *Hopkins* v. *Lake,* 348 Mich 382, 396, 397; *Normand* v. *Thomas Theatre Corporation,* 349 Mich 50, 56; *Sun Oil Co. v. Seamon,* 349 Mich 387, 403; *Taylor* v. *Butcher,* 349 Mich 581, 585; *Steger* v. *Blanchard,* 350 Mich 579, 587; *Ware* v. *Nelson,* 351 Mich 390, 397; *Murphy* v. *Roux,* 352 Mich 97, 101; *McKenzie* v. *Nelson,* 353 Mich 59, 61; *Gilson* v. *Bronkhorst,* 353 Mich 148, 151; *Cole* v. *Barber,* 353 Mich 427, 430; *Landon* v. *Shepherd,* 353 Mich 500, 508; *Booth* v. *Bond,* 354 Mich 561, 570; *American Airlines, Inc.,* v. *Shell Oil Company, Inc.,* 355 Mich 151, 154; *Murchie* v. *Standard Oil Company,* 355 Mich 550, 557; *Churukian* v. *LaGest,* 357 Mich 173, 179; *Stillwell* v. *Grubaugh,* 357 Mich 344, 352, 357.

exceeding cautious temperament might respond that he did not; another more sanguine and bold might say he did; and by the side of one or the other of these would the rest of the community range themselves, each person largely affected by temperament and perhaps by his own experience, but firmly maintaining that rule to be a proper one which now, on a retrospective examination of the facts, seems to him to be such.

"If the judge, in such a case, were to pass upon negligence as a question of law, he must, in doing so, be endeavoring to enforce a rule of a variable nature, which must take its final coloring from the experience, training, and temperament of the judge himself; a rule which his predecessors might not have accepted, and which his successor may reject, and upon which a court of review may reverse his action, not because the facts are differently regarded, but because judges are men and men are different."

True it is that judges "are different," and true it has always been that a jury ordinarily is better qualified than one man to judge, upon the presented evidence, whether a want of due care has been shown. Turning (again as in *Barron* and *Normand, supra*) to the first and now memorable instances when the Federal supreme court determined that the precepts of COOLEY—recorded in *Van Steinburg*—should be followed in the courts of the United States (*Sioux City & Pacific R. Co.* v. *Stout,* 84 US 657, 663, 664 [21 L ed 745]; *Grand Trunk R. Co.* v. *Ives,* 144 US 408, 417 [12 S Ct 679, 36 L ed 485]), we find complete uniformity of viewpoint that the trial judge has no right to instruct that a party at bar has been shown guilty of negligence unless the judge is able to say that his opinion is also the opinion that *all* reasonable men would entertain of the question.* *Stout* says (pp 663, 664):

* "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or

"It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what

not, the determination of the matter is for the jury. It is only where the facts are such that *all* reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." (Quotation from *Ives,* p 417 of report, citing numerous authorities including *Van Steinburg* and other early Michigan cases.) This test, that *all* reasonable minds must reach the same conclusion before the question of negligence may be considered an exclusive question of law, is the Michigan test. See assembly of Michigan cases in *Scharman* v. *Bay County Bridge Commission,* 158 Mich 77, 83, and *Beach* v. *City of St. Joseph,* 192 Mich 296, 301.

is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. *This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does 1 man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.*" (Emphasis supplied by the present writer.)

In the case before us, as we shall presently see, the Court is called upon to apply its judgment to the question of want of due care of a motorist while using a modern appliance of motordom, the automatic transmission. Are judges supposed to know more about the proper manner of performing one's common-law duty in these circumstances than are jurors? I find direct answer in *Ashman* v. *Flint & P.M.R. Co.*, 90 Mich 567. There the question was one of want of care of a railroad switchman whose act of pulling a "pin," with knowledge that a nearby "frog" (in the track) was open and unblocked, resulted in personal injury and suit against his employer. The Court said (pp 574, 575):

"A jury of 12 men, drawn from the body of the people, and from all the avocations of life, would be

more likely to have among its members men familiar with switching or braking upon railroads than would the bench, composed of men whose whole lives have generally been devoted to 1 subject,—the study and practice of law; and among these 12 men might quite frequently be found men who had been switchmen or brakemen. When the inquiry arises in any case what an ordinarily prudent man would have done under given circumstances, the judgment of 12 men is obviously better than the judgment of 1, as the experience in life of 12 men must have been, collectively, more varied and extensive than that of any 1 man, however learned in the law he may be; and how men ordinarily act in the presence of danger, or to avoid it, can be better settled by 12 men than 1 man, because their united experiences are brought to bear upon the question, and each has the benefit of the experience of all of them in arriving at a fair, true, and just conclusion."

I have examined the testimonial facts, shown in the case before us, with the foregoing rules in mind. Such facts are properly stated, with favor due to the defendant driver, in the brief of her counsel as follows:

"On October 18, 1957, the defendant, Betty Hamil, driving her husband's 1956 model Buick automobile with automatic transmission, parked on Nine Mile road in the city of Oak Park immediately behind a Ward Baking Company truck occupied and operated by the plaintiff. Mrs. Hamil's small son got out of the car on the right side to go to a barber shop and failed to close the car door. Mrs. Hamil, as was her custom when making a short stop, left the transmission in the 'Drive' position and held her foot on the brake. As she reached across to close the right hand car door, her foot slipped off the brake pedal and engaged the accelerator causing the car to go forward into collision with the rear end of the truck."

To these facts I would add that the collision resulted in serious injury to plaintiff, attested by a damage-verdict and judgment in his favor for $30,000.

Do we have a right to say that Mrs. Hamil's conduct, giving it the most favorable construction it will bear under her testimony,* was such that *all* men and women of reasonable minds would conclude that she was negligent? Would not *some* reasonable men and women disagree upon the answer? Would not the answer of reasonable men and women depend in whole or in part upon the knowledge or want of knowledge they might have of driving modern automobiles; upon their experience or want of experience with a similarly unintentional application of engine power and, generally, upon their own habits of comparative caution or inattention in like circumstances?

Suppose, by way of illustrative hypothesis, that Mrs. Hamil's little 5-year old (remaining temporarily in the car after his mother brought it to a stop at the curb) had suddenly, by accident or childish design, depressed the accelerator with similar tragic result. Would we be as quick then to approve an instructed verdict against the mother? Should the mother—as a matter of law—have foreseen and prevented either the result of her own acts as testified or the hypothetically stated act of her son? Are we not holding now, for every case where the defendant driver's foot slips from brake to accelerator (when, say, his car is stopped for traffic signal and pedestrian passage), that he is guilty of actionable negligence by the common law—*as a matter of law?*

* Such is our rightful assay: "the most favorable construction that can possibly be given to such testimony" (*Gibbons* v. *Farwell*, 63 Mich 344, 348 [6 Am St Rep 301]).

To me these unanswered questions admit of but one conclusion; that we have no right to affirm that *all* reasonable men and women would agree that Mrs. Hamil was actionably at fault.

If the writer were a member of a duly seated jury, rather than a judge called upon to decide a legal question, he probably would vote to hold Mrs. Hamil guilty of negligence. But that conviction would in all likelihood enter the juryroom as a result of the experience of having driven "dynaflow" equipped Buick automobiles steadily since Buick offered to the public such distinctive feature of transmission of power; an experience which—sooner or later—is bound to teach that special caution should be observed whenever the car is stopped with idling engine connected to the rear wheels by that which really does "dynaflow" when the accelerator is intentionally or accidentally depressed.

Other driver-jurors, the experience of whom has been that of "straight-stick" driving or that of use of other types of automatic transmissions with somewhat dissimilar-from-Buick positions of brake and accelerator pedals, might reasonably reach another conclusion, that of so unusual and unforeseen a train of circumstances—in the unique case at bar—as to suggest pure accident rather than negligence. All of this tends to establish that the case is one where neither the trial judge below, nor our membership here, could or may of right draw upon that "experience, training and temperament of the judge himself" to determine validity of this motion for peremptory instruction. So say the cited governing authorities, applied here as they should be.

Always present, when trial and appellate judges weigh motions for instructed findings in common-law negligence cases, is the subliminal temptation to employ one's own critical opinion of what the accused party should or should not have done in the situa-

tion where he has acted or failed to act. The temptation should be resisted to the utmost save only when the judge is willing to set his signature to an opinion that *all* reasonable men (and women now that we have them seated as jurors) would agree with his conclusion of actionable negligence, or contributory negligence, as the case may be. This is especially so where the negligence, if any, consists of violation of one's duty to exercise due care, according to the common law, distinguished from proven violation of a safety statute. And it is doubly so when the judge considers peremptory conviction of a *defendant* when the latter is charged with actionable negligence.

So far, in the course of present writing, the case has been considered by the standards we apply when the *defendant,* not bearing the burden of proof, moves for an instructed verdict. As it comes here, however, this plaintiff's case is measurably different. Without motion by the plaintiff burden bearer for an instructed verdict of liability,* the trial judge assumed to instruct that the *defendants* stood at his bar convicted of actionable negligence. He did not state the nature or specifications of the negligence found by him, and so we do not have the benefit of his reasoning toward or identification of whatever irresistible inference he drew—as a matter of law—from the oral evidence. The case, then, is one where the trial judge has usurped the jury function

* The transcript shows no motion by either party for an instructed verdict, and no discussion which might lead to conclusion that such a motion was made at chambers without record thereof. To avoid misunderstanding, however, I make note of the fact that plaintiff included, in his requests to charge, the following:

"3. Inasmuch as there is evidence that the defendant, Betty Hamil, was guilty of negligence as a matter of law and there is no evidence that the plaintiff, Theodore A. Nabozny, was guilty of any negligence which could have been the proximate cause of this accident, there is no question of liability in this case for you to decide. You, therefore, shall confine your deliberations to the question of damages."

by drawing from the frailties of oral proof an affirmative inference he preferred over other arguable inferences; an inference the plaintiff was required to establish by the rules of burden and preponderance. Noting that he was not the trier of fact, I find error.

At this point I advert to plaintiff's pleaded theory of recovery; that Mrs. Hamil was guilty of causal violation of statute in that she drove at a speed greater than would permit her to bring defendants' car to a stop within the assured clear distance ahead. Having erroneously pleaded and presented his case that way and having erroneously urged the same theory of recovery here, may plaintiff recover *by right of law* distinguished from jury verdict on some not-yet-identified common-law theory? Mr. Justice CHAMPLIN, writing in *Thomas* v. *Chicago & G.T.R. Co.,* 86 Mich 496, 500, gave this answer:

"We have always required the party alleging negligence, for which he seeks to recover for an injury caused thereby, to state in his declaration the duty and the neglect of duty upon which he relies, and held that he must be confined in his proof and recovery to the allegations in his declaration. He is not permitted to allege negligence under the circumstances stated in his declaration, and recover for negligence not stated."

Turning from this to the question whether Mrs. Hamil was guilty of causal negligence by the common law, certain questions arise which of right should be settled in a jury room. Should Mrs. Hamil have placed the shift lever in "neutral" before leaning over to close the door? Should she have stopped the engine? Did she exercise the care or want of care of "the great mass of mankind" (*Sonsmith* v. *Pere Marquette R. Co.,* 173 Mich 57, 90; *Barron* v. *City of Detroit,* 348 Mich 213, 217) when she placed her foot on the brake and leaned over to close the

door? Was she, as a credible or incredible witness, able to relate with pinpoint accuracy just how her foot happened to slip from brake to accelerator? Should she have foreseen the possibility or probability of that which ensued as she undertook, with her foot presumptively (on favorable view) secure against the brake pedal, to lean over and close the right-hand car door?

There is only one answer to these questions. It is that the trial judge drew upon his own "experience, training and temperament" as the sole basis for decision to instruct this verdict of absolute liability.

The pivotal subject matter being negligence and causation *according to the common law,* our established rule is that the trial judge must say whether negligence *may* be inferred from the oral evidence and, if so, that the jury must say whether negligence *ought* to be inferred therefrom (*Carver* v. *Detroit & Saline Plank Road Co.*, 61 Mich 584, 591; *Kaminski* v. *Grand Trunk W. R. Co.*, 347 Mich 417, 419, 420). This rule was laid down, of course, for cases turning upon the common law; the plaintiff bearing as here the burden of proof of negligence and causation. When in such cases the *defendant* moves for an instructed verdict he stands properly on the right to urge that the party bearing the burden of persuation, granting that party everything under the rule of favorable view, has failed as a matter of law to support such burden; whereas when the *plaintiff* moves his burden is that of persuading the judge that the presented case has been proven so convincingly that no questions, including those of credibility and identity of the inference or inferences which *ought* to be drawn from the testimony, are left for consideration of the jury. Which is to say that it takes something more (such as an admission of liability under Court Rule No 23, § 8 [1945]) to

justify directing a verdict (of liability) for the *plaintiff* in a common-law negligence case.

In Michigan, heretofore, the trial judge has had no right or power to take such questions from the jury and decide them in favor of the party bearing the burden of persuasion. Now, however, relying on an interlocutory and unreviewed one-judge decision of a *trial* court of New York based on that State's "modern" summary judgment practice (*Cacciato* v. *Leatherman,* 23 Misc 2d 550 [200 NYS2d 152]), and a case of adjudged causal violation—by the *plaintiff* burden-bearer—of a traffic safety *statute* and due approval of a granted motion for directed verdict made by the *defendant* (*Churukian* v. *LaGest,* 357 Mich 173, 179), our majority lightly casts aside these matured doctrines. Following quotation of *Churukian* my Brothers make their 16-point turnabout this way:

"We believe this language equally applicable to the factual record presented by the present case even though the verdict was directed for the plaintiff rather than the defendants.*";

and support themselves solely by this footnote:

"*For discussion of the legal principles involved in directing verdict for a plaintiff, see 3 Cooley on Torts (4th ed), § 481; Sunderland, Directing a Verdict for the Party having the Burden of Proof, 11 Mich L Rev 198; Smith, The Power of the Judge to Direct a Verdict, 24 Columbia L Rev 111."

(I make parenthetical note, at this point, that the complete and accurate title of the last-mentioned reference is "The Power of the Judge to Direct a Verdict: Sec. 457-a of the New York Civil Practice Act.")

For the first time in the recorded history of this Court, we behold a majority decision approving the direction of a verdict for the plaintiff in a case where

that plaintiff is entitled to recover, if at all, solely on account of actionable negligence he must prove according to the common law.* The case marks, too, our second majority vote—this year—to approve a directed verdict for the party bearing the burden of proving that which, by the common law, provides the sole basis of his case or defense (see *Waltanen* v. *Wiitala,* 361 Mich 504). I must dissent again, stating reasons per requirement (Const 1908, art 7, § 7), as follows:

A State court decision, supported by no precedent whatever in the State of its origin and opposed by a settled rule of substance prevailing in that State for nearly 80 years (the reference is to *Woodin* v. *Durfee,* 46 Mich 424, reversing a judgment for the plaintiff on directed verdict),† should not be made upon offhand references to treatises and decisions which, strained at very best, do but reflect repealed and now uncertain law in one other State. These references I shall consider in order, noting, to avoid misunderstanding, that the ensuing discussion is applied solely to a case turning upon the presence or absence of actionable negligence at common law.

First: By quotation appearing in the forepart of this opinion (see previous quotation thereof to the same point in *Kaminski* v. *Grand Trunk W. R. Co., supra*) the present writer continues to rely upon Judge COOLEY'S reasoning and pointed epigram—

* Consider this rule (approved in *Carver, supra,* p 592):

"There is, in every case, a preliminary question, which is one of law, *viz.,* whether there is any evidence on which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

† "A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment. If they return what he thinks is a perverse verdict, he may set it aside and order a new trial; but he cannot take upon himself their functions as was done here." (*Woodin,* p 427.)

"judges are men and men are different" (3 Cooley on Torts (4th ed), § 481, p 389). My respected Brethren refer now to the same section as supporting their view that this instructed verdict—for a *plaintiff*—was quite all right.

I speak now in terms of gentle restraint. The reader will find nothing, anywhere in said section 481, tending to disclose "the legal principles involved in directing verdict for a plaintiff." He will find, in that section, unanswerable reason for repudiation of the practice (in common-law negligence cases). Quoted—again for emphasis—is the conclusion of the subject as it appears in the identified section (p 389):

"If the judge, in such a case, were to pass upon negligence as a question of law, he must, in doing so, be endeavoring to enforce a rule of a variable nature, which must take its final coloring from the experience, training, and temperament of the judge himself; a rule which his predecessor might not have accepted, and which his successor may reject, and upon which a court of review may reverse his action, not because the facts are differently regarded, but because judges are men and men are different."

Second: Turn now to majority reliance on Professor Sunderland's paper headed "Directing a Verdict for the Party Having the Burden of Proof" (11 Mich L Rev 198). Here we find the authorities collected and divided into 3 classes:

"Class 1. Cases which hold that the party carrying the burden of proof cannot avail himself of a motion for a directed verdict in his favor."

"Class 2. Cases holding that the party carrying the burden of proof cannot obtain the direction of a verdict in his favor when his case rests in whole or in part upon oral evidence, but that such a direction may be based upon written evidence."

"Class 3. Cases in which it has been held that a verdict may be directed in favor of the party having the burden of the issue irrespective of the character of the evidence."

Classes 1 and 2, it is perceived, portray Michigan's unequivocal position that the party carrying the burden of proof is not entitled to an instructed verdict where his case or defense depends on oral proof. To such point the first 2 text paragraphs of class 1 are quoted without comment (they provide all comment necessary) as follows:

"These [cases] are almost all expressly grounded upon the proposition that a fact cannot be assumed to be proved merely because there is uncontroverted evidence in support of it, for the reason that there are 2 elements present in all evidence, namely, the facts shown and the credibility of the witnesses who testify to them. Although no issue be raised upon the facts directly, through failure to deny, yet this cannot be deemed an admission that the witnesses who so testified are worthy of belief.

"This doctrine is expressed in forcible language by the Supreme Court of Michigan, in *Woodin* v. *Durfee* [*supra,* 427], as follows: 'A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment.' And in *Charleston Insurance & Trust Co.* v. *Corner* [2 Gill (Md) 410, 426, 427], the supreme court of Maryland was equally outspoken in announcing the same rule, saying: 'The instructions asked by the appellee, who was plaintiff below, were not based on an assumed state of facts, to be submitted to the consideration of the jury. They were moved, it would seem, in the confidence, that as the evidence was uncontradicted, the jury could not do otherwise than find the facts accordingly. * * * Doubtless the jury would have found these facts according to the testimony, but the sufficiency of the evidence to satisfy the jury, or the cir-

cumstance, that it is all on one side, does not authorize the court to direct the jury, that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right, to weigh the credibility of the evidence'."

Third: The third and last reference made by my Brothers is to the paper appearing in 24 Columbia L Rev 111. All that need be said about this paper is that it was built upon and around a provision of the New York civil practice act, reading:

"The judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence."

The writer of such paper extols the New York statute. He believes, manifestly, that juries are not to be trusted. Here is his summary (p 124):

"It was to avoid this kind of situation that section 457-a was passed. Under that section, the court may direct a verdict if it would set aside a contrary verdict as against the weight of evidence. In a word, it is a new device, born of legislation this time, to prevent the rendition of unreasonable verdicts. Just as the evolution of jury control passed from the attaint to the fine, from the fine to the demurrer, from the demurrer to the new trial, from the new trial to the directed verdict where there was not more than a *scintilla* of evidence, so by statute the legislature has now carried to its logical end the idea of keeping the jury within the bounds of reasonableness."

The New York statute was, indeed, a "new device"; tried but now discarded. And Michigan has *never* seen fit to place the like of it in her statute books or rules of court. This New York statute no longer reads as it did when Professor Smith wrote, above, its design to keep juries "within the bounds of rea-

sonableness" (a task for the self-anointed, to be sure). It reads, now, with better sense:

"The court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence." (Annual Practice of New York, Matthew-Bender 1960, § 457-a, Clevenger.)

Of course, our majority has a perfect right—being of such will—to utilize a discarded statute of another State and its professorial touch of 1924 in silent opposition to our own rule; a rule which originated over the signatures of Justices COOLEY, CAMPBELL, MARSTON, and GRAVES in *Woodin* v. *Durfee, supra;* a rule which but recently was unanimously characterized as having been written into "The leading case in Michigan [*Woodin*] which has often been quoted" (*Baldwin* v. *Nall,* 323 Mich 25, 29; present Justices DETHMERS and CARR concurring).

The writer, too, has another perfect right—that of dissent. *Woodin* has been quoted and continuously followed by this Court (*Hughes* v. *John Hancock Mutual Life Ins. Co.,* 351 Mich 302, 308; *Rogers* v. *City of Detroit,* 340 Mich 291, 297; *Cebulak* v. *Lewis,* 320 Mich 710, 718, 719 (5 ALR2d 186); *Cuttle* v. *Concordia Mutual Fire Ins. Co.,* 295 Mich 514, 519; *Green* v. *Detroit United Railway,* 210 Mich 119, 125; *Rotter* v. *Detroit United Railway,* 205 Mich 212, 230; *Crampton* v. *Crampton,* 205 Mich 233, 241; *Schweitzer* v. *Bird,* 204 Mich 333, 341, 342). Its doctrine was, in *Cuttle* v. *Concordia, supra,* developed this way (p 519):

"Uncontradicted testimony may be disentitled to conclusiveness because, from lapse of time or other circumstances, it may be inferred that the memory of the witness is imperfect as to the facts to which he testified, or that he recollects what he professes to have forgotten.";

and in *Crampton* v. *Crampton* (p 241):

"We have held that a jury may disbelieve the most positive evidence even when it stands uncontradicted; and the court cannot take from them their right of judgment. If they return what the court thinks is a perverse verdict, the court may set it aside, and order a new trial. *Woodin* v. *Durfee,* 46 Mich 424.

"Referring to the case last cited, Chief Justice BROOKE, speaking for the court in *Yonkus* v. *McKay,* 186 Mich 203, 211 (Ann Cas 1917E, 458), said:

" 'The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.'

"In *Brand* v. *Johnrowe,* 60 Mich 210, referring to *Woodin* v. *Durfee, supra,* this Court held that the testimony of a certain witness was for the judgment of the jury, as they had the right to disbelieve the positive evidence given by him, and find from circumstances outside of his testimony a different state of facts."

Responsibility for the mischief of today's smoothly varnished departure, from our rule that a party bearing the burden of proof "cannot be allowed to assume that he has made out his case,"* is something I do not care to share. Once these opinions are released, thoughtful members of the profession will discern immediately another neoteric constriction of the right of a civil litigant to jury hearing and determination of his case or defense. Will the defendant in each jury-tried common-law negligence case, even though by court rule he now bears the burden of

* In *Pickel* v. *Isgrigg* (D Ind), 6 Fed 676 (handed down at the same time *Woodin* was released), the court put in these words the rule to which Michigan has adhered until now: "The evidence of a party, upon the affirmation side of an issue of fact before a jury, may be demurred to by the adverse party under certain conditions. The party upon whom the burden of the issue rests is not permitted to demur to the evidence of the other party, *for he cannot be allowed to assume that he has made out his case.*"

proving contributory negligence, not be enabled (as easily and conveniently as before) to move for a verdict by edict that contributory negligence has been established as a matter of law? Are we not witnessing, now, partial dismemberment of the original right of a jury in common-law cases to "disbelieve the most positive evidence, even when it stands uncontradicted" (*Woodin, supra*); to find in such case that "the memory of the witness is imperfect" on account of "lapse of time or other circumstances" (*Cuttle, supra*), or to "find [in such cases] from circumstances outside of his testimony a different state of facts" (*Crampton, supra*)? What about the never-easy-to-expose case of collusion between the plaintiff and the defendant when the latter is safely and fully insured, and what about the corresponding instance of sympathy of such a defendant for his victim and the human tendency toward "shading" of the defensive testimony? Which is to suggest that the invisible defendants of Michigan should be heard before we take this not-fully-considered step.

I make no allusion to Mrs. Hamil in latter regard. It appears from the transcript that she tried, fairly and honestly, to recall and coherently describe what happened, in a manifestly unanticipated split second, as she reached over to close the right-hand door with her foot on the brake pedal.* I do make allusion to the hundreds of future cases which, not coming to this Court at all, are bound to be affected (in law office as well as courtroom) by Nabozny's new rule that the trial judge may direct a verdict for the plaintiff when the triable charge against the defendant is actionable negligence by the common law and he, the judge, is satisfied by the standards of his own "experience, training and temperament" that such

* The transcript shows that the defendants are insured to the extent of $10,000 only as against this $30,000 judgment.

charge has been proved so thoroughly as to justify his taking over from the jury.

Turning now to another phase of the majority opinion. My Brothers have summoned, to the support of this instructed verdict, the most *unfavorable* (to defendants) portion of the testimony below, the purport of which is that defendants' car hit the truck occupied by plaintiff a second time. This, paraphrasing Mr. Justice VOELKER in *Shaw* v. *Bashore,* 353 Mich 31, 37, is "favorable view" with a vengeance, but solely from the burden-bearer's side. It is, by like token, more of that kind of "mere lip service" (of the principles anounced in *Van Steinburg*) Judge Martin noted with scorn in *Patterson* v. *Pennsylvania R. Co.* (CCA 6), 238 F2d 645, 650.

Until now, no hint or claim has been made that Mrs. Hamil intentionally, or recklessly, or negligently, propelled her car a *second* time into the other vehicle. If her car did strike the truck a second time the presently indicated inference is that Mrs. Hamil hurriedly and frantically stabbed—with her foot—at the brake pedal, only to hit the accelerator again in the excitement of an emergency caused by her previous negligent or nonnegligent conduct. Such emergency may or may not have been due to a want of due care on the part of Mrs. Hamil. It was plaintiff's burden to establish the affirmative on that score; not our duty to do so by calling up proof unfavorable to his opponents.

Mrs. Hamil was *not* guilty of having driven in violation of the "assured clear distance" rule (this is the exclusive charge plaintiff makes against Mrs. Hamil in his brief.)* She was not even "driving"

*"No person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured, clear distance ahead." PA 1949, No 300, § 627, as amended by PA 1957, No 190, and PA 1959, No 76 (CLS 1956, § 257.627, as amended [Stat Ann 1960 Rev § 27.627]).

within meaning of that rule when the causative events took place. Her car was stopped, at the curb. It suddenly shot forward. What happened was non-actionable accident by the common law or actionable negligence by the common law. Once this is understood thoroughly, the legal cobwebs should disappear from the case at bar.

No statute or so-called "rule of safety" requires that a driver place the transmission of his car in "neutral" when the car is stopped with the engine running. No statute or rule commands that the transmission lever be moved to "neutral" when (with the motor running and the car stopped), the driver moves, slightly, from his or her normal driving position. No statute or rule pronounces it negligence, or presumptive negligence, to do or attempt to do what Mrs. Hamil related. The common law indeed may impose a duty or duties in such regard with respect to which a properly instructed jury probably would find in the affirmative. This plaintiff nevertheless bore the burden of persuasion of liability. He should be put to that burden before a jury, principally for the sake of preserving precedentwise the pricelessly precious and ever-slyly beset right of trial by jury. If, then, the jury should return what to the trial judge is "a perverse verdict," he may proceed as authorized by *Woodin*.

My Brothers say they can conceive of no inference which would lead any "reasonable" person to arrive at conclusion other than that Mrs. Hamil was actionably negligent. I answer that the proper inference, drawn of course on favorable view, is that Mrs. Hamil carefully put her foot on the brake pedal to prevent movement of the car and that her foot, despite such care, slipped accidentally from the pedal to the accelerator. Such is the way Judges COOLEY, CAMPBELL, MARSTON and GRAVES (all supposedly "reasonable" persons) would from their con-

sistent writings have looked upon this instructed verdict, and such is the way the supreme court would now look upon it assuming as we should that the well-reasoned opinions of *Stout* and *Ives** (quoted above) stand as good law in the national supreme court building.

I would reverse and remand for new trial.

KAVANAGH, J., concurred with BLACK, J.

EDWARDS, J. The facts relevant to the issue of negligence in this case were related at trial by defendant Mrs. Hamil:

"*Q.* What kind of car was it you were driving on this particular day?

"*A.* A 1956 Buick. * * *

"*Q.* What kind of a shift did this car have? * * *

"*A.* Automatic. I am not very well acquainted with cars but it has an automatic gearshift, is that what you mean? * * *

"*Q.* Now, on the day in question, you took your little boy to the barber shop?

"*A.* My son, yes sir. * * *

"*Q.* You pulled up on Nine Mile road behind a Ward Baking Company truck?

"*A.* Yes, sir.

"*Q.* How much room was there between the back of the truck and your car?

"*A.* Whatever distance there is between cars in a parking space, as far as I can remember I was

* "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative signifiance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs." (*Ives*, p 417.)

parked in the parking space directly behind the truck.

"*Q.* What happened when you let your little boy out?

"*A.* He hadn't closed the door and I believe I reached over to close the door and when I did my foot slipped from the brake onto the accelerator and caused my car to move.

"*Q.* Was the car in driving position when you did that?

"*A.* Yes, sir.

"*Q.* Did you have a parking brake in your car?

"*A.* A parking brake? There was a foot brake and an emergency brake.

"*Q.* Did you put your emergency brake on?

"*A.* No.

"*Q.* You had your foot on the brake pedal and you say your foot slipped off the brake pedal?

"*A.* From the brake pedal onto the accelerator.

"*Q.* And what happened?

"*A.* My car moved forward.

"*Q.* Would you say it moved forward rapidly?

"*A.* I couldn't tell you how fast it was. * * *

"*Q.* What happened, did your car move forward slowly or did it move forward fast?

"*A.* I don't know, I have no idea, it must have gone fast, it happened very fast but as far as the speed of my car is concerned, I have no idea.

"*Q.* Did your car hit the truck?

"*A.* Yes, sir.

"*Q.* What happened to the truck, when you car hit it?

"*A.* I don't know, I really couldn't tell you, it happened so fast. I know after the accident I could see the truck had moved, but during the accident I couldn't tell.

"*Q.* Did you hit the truck the second time?

"*A.* I guess I did. I have heard testimony here how my car bounced back and forth.

"*Q.* From the time you started out until you hit the truck, did you put your foot on the brake?

"*A.* After may foot slipped from the brake onto the accelerator, in the motion of reaching over I don't see how I could get my foot back.

"*Q.* What position was your body in at the time?

"*A.* I imagine I was reaching for the door and before I got myself upright, it happened.

"*Q.* The car shot forward so fast you didn't have an opportunity to change your position?

"*A.* That is right. * * *

"*Q.* Were you issued a violation ticket as a result of this accident?

"*A.* Yes, sir.

"*Q.* How did you plead in court?

"*A.* I pleaded guilty.

"*Q.* To what charge?

"*A.* Driving without due care and caution."

Plaintiff, who was injured in this accident, was the driver of the parked bread truck which Mrs. Hamil's car struck.

Three independent witnesses also testified to seeing 2 separate impacts. The undisputed testimony of 1 of them follows:

"*A.* First we saw the—I saw the bread truck drive up and stop. There were 2 men in the truck. One seemed to be standing on the running board while the other, I think he was driving while the other was delivering bread, and the truck stopped and shortly after this lady came up in her Buick behind the truck and she let a little boy out and I believe that the little boy was clear of the car but forgot to shut the car door and in reaching over to shut the car door, I don't know what happened, but the car shot forward and hit the truck ahead of it and then it seemed to slightly bounce back and then shot forward again and hit the truck again up onto the sidewalk.

"*Q.* Did you see Mr. Nabozny at that time?

"*A.* Yes.

"*Q.* Where was he?

"*A.* He was near the front of the truck, not behind the wheel but in the truck.

"*Q.* What happened to Mr. Nabozny, as far as you saw?

"*A.* I could see him being shot backward and forwards.

"*Q.* What happened the second time the car hit the truck?

"*A.* I believe that was still going on, I could see him bounce back and forth against the racks."

At the completion of testimony, the trial judge instructed the jury that defendant was guilty of negligence which was the proximate cause of this accident and submitted the issue of damages for jury consideration.*

We agree with Mr. Justice BLACK that generally the question of negligence is a question of fact for the jury. *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99; *Ohman* v. *Vandawater,* 347 Mich 112; *Kaminski* v. *Grand Trunk Western R. Co.,* 347 Mich 417; *Normand* v. *Thomas Theatre Corporation,* 349 Mich 50; *American Airlines, Inc.,* v. *Shell Oil Company, Inc.,* 355 Mich 151.

On this record, however, we believe there were no facts in dispute and the negligence of defendant was crystal clear. In such instances this Court has held that negligence or contributory negligence was established as a matter of law. *Morrison* v. *Demogala,* 336 Mich 298; *Lewis* v. *Yund,* 339 Mich 441; *Churukian* v. *LaGest,* 357 Mich 173.

In this last case the Court said (p 179):

"This Court has in recent years frequently reiterated that it must be a very clear case to justify a trial judge in taking a negligence action from the jury on grounds of contributory negligence. *Kaminski* v. *Grand Trunk Western R. Co.,* 347 Mich 417; *Ware* v. *Nelson,* 351 Mich 390.

* On remarkably similar facts, a New York court recently granted a plaintiff summary judgment on the issue of liability. *Cacciato* v. *Leatherman,* 23 Misc2d 550 (200 NYS2d 152).

"See, also, *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99.

"This seems to us to be such a case."

We believe this language equally applicable to the factual record presented by the present case even though the verdict was directed for the plaintiff rather than the defendants.* It should be noted that there is no issue of credibility posed by this case. And we can conceive of no inference which could be drawn from the undisputed facts which would lead any reasonable person to arrive at any other conclusion as to defendant's conduct than that reached by the trial judge.

As to appellants' second question, taking the judge's charge as a whole, we find no prejudicial error.

Affirmed. Costs to appellee.

DETHMERS, C. J., and CARR, KELLY, SMITH, and SOURIS, JJ., concurred with EDWARDS, J.

* For discussion of the legal principles involved in directing verdict for a plaintiff, see 3 Cooley on Torts (4th ed), § 481; Sunderland, Directing a Verdict for the Party having the Burden of Proof, 11 Mich L Rev 198; Smith, The Power of the Judge to Direct a Verdict, 24 Columbia L Rev 111.

BALCAIN *v.* SECRETARY OF STATE.

1. LICENSES — AUTOMOBILES — OPERATORS — RESTORATION — JUDGMENT—JUDICIAL REVIEW.

   A circuit court of this State does not have jurisdiction to hear and determine any meritorious question on petition for restoration of motor vehicle operator's license which had been suspended because a certified abstract of court record of an unappealed judgment rendered against petitioner in the province of Ontario had been filed with the secretary of State, there being no judicial review provided for such suspension although such review was accorded by statute for suspensions for other reasons; petitioner having a remedy for assertion of his claim the judgment was void in the courts of Ontario (CLS 1956, §§ 257.65, 257.323, 257.504, 257.504a, 257.512, 257.513).

2. COSTS—CONSTRUCTION OF STATUTES—RESTORATION OF OPERATOR'S LICENSE.

   No costs are allowed in proceeding by petitioner against the secretary of State for restoration of his automobile operator's license involving construction of various provisions of the motor vehicle code (CLS 1956, §§ 257.65, 257.323, 257.504, 257.504a, 257.512, 257.513).

Appeal from Wayne; Gilmore (Horace W.), J. Submitted October 4, 1960. (Docket No. 7, Calendar No. 48,595.) Decided December 1, 1960.

Joseph Balcain filed his petition against James M. Hare, Secretary of State, for restoration of license to operate a motor vehicle, his license being denied because of the certification of an unpaid judg-

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 139.
[2] 14 Am Jur, Costs § 23.

ment against him in Ontario. Petition denied. Plaintiff appeals. Affirmed.

Earl D. Leader and *J. Leon Katz,* for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *James B. Saunders,* Assistant Attorney General, for defendant.

PER CURIAM. Involved are 3 sections of chapter 5[1] of the Michigan vehicle code, CLS 1956, §§ 257.504a, 257.512, 257.513 (Stat Ann 1960 Rev §§ 9.2204[1], 9.2212, 9.2213). We shall refer to them by section numbers as they appear in the supplement of 1956. They read:

"Sec. 504a. Any person whose license, registration or operating privilege shall have been suspended or revoked by the secretary of State under section 504[2] of this act, may apply to the circuit court of the county in which such person is a resident for the restoration of the license, registration or operating privilege. Such application shall show that the vehicle is needed in order to enable such person to engage in gainful work or occupation. The court shall have jurisdiction to order, under such terms and conditions as the court shall prescribe, the restoration of the license, registration or operating privilege in any such case in which the equities of the situation justify the issuance of any such order."

"Sec. 512. The secretary of State upon receipt of a certified abstract of court record of a judgment rendered in this State or any other State shall forthwith suspend the license and registration and any nonresident's operating privilege of any person

1 Chapter 5 is known as the "Financial Responsibility Act."

2 CLS 1956, § 257.504 (Stat Ann 1960 Rev § 9.2204), which provides for suspension on failure to establish responsibility after interim report of accident.—REPORTER.

against whom such judgment was rendered, except as hereinafter otherwise provided in section 515."[3]

"Sec. 513. (a) Such license, registration and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed unless and until such judgment is satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exception stated in section 515 of this chapter.

"(b) A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this chapter.

"(c) Judgments shall be deemed to be satisfied in full under this section if not renewed prior to the expiration of the statute of limitations."

Proceeding under said section 504a, appellant Balcain petitioned the Wayne circuit court for an order requiring issuance to him, by the secretary of State, of a motor vehicle operator's license. From an order denying such petition Mr. Balcain appeals on granted leave.

The question is whether, considering the purpose of said chapter 5 and particularly the quoted sections thereof, we may and should force the circuit court to go behind statutory action of the secretary of State for the purpose of determining validity of an unsatisfied judgment; which judgment has been certified to that officer under said section 512.[4]

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[3] "State" as employed in this section, includes the Dominion of Canada (CLS 1956, § 257.65 [Stat Ann 1960 Rev § 9.1865]). The parties agree that Ontario reciprocally provides like protection, in favor of citizens of Michigan, when her subjects actionably cause injuries and damages while they are using our highways.

[4] The judgment in question ($4,844.10 in total amount) was entered against Mr. Balcain in favor of 2 Ontario plaintiffs (Sophie Eisner and Emily Zdura) for damages suffered when a motor vehicle driven by Mr. Balcain struck plaintiff Eisner. The locus of the

Mr. Balcain insists that the proceedings leading up to entry of the judgment against him are fatally defective under Ontario law and that the action of the secretary of State, taken thereon, denies him due process. The attorney general contends, *contra,* that the judgment is valid under Ontario law. He contends further that the secretary of State is not required to determine validity of a judgment which has been certified to him under section 512, and contends generally that plaintiff has no right to seek relief in the courts of Michigan without having appealed unsuccessfully for such relief to the court whose judgment he assails.

Section 504a provides an equitable remedy in favor of those whose operating privileges have been suspended or revoked under preceding section 504; whereas Mr. Balcain's operating privileges were suspended, and remain now in suspension, under sections 512 and 513. See to the point OAG Oct. 10, 1955, No. 2322. The code provides no judicial remedy when a person's operating privileges have been suspended and remain suspended under sections 512 and 513. If confirmation of such conclusion were necessary, preceding section 323 of the code would provide it (CLS 1956, § 257.323, as amended by PA 1958, No 113 [Stat Ann 1960 Rev § 9.2023]).[5]

To conclude: Whether Mr. Balcain has some other remedy in the courts of Michigan we need not determine. He has none under the vehicle code. That he has one in the courts of Ontario, for relief against what he says is a void judgment, is conceded. The circuit court in these circumstances rightfully denied Mr. Balcain's statutory petition. It conferred no

accident was Hamilton, Ontario. The court entering such judgment was the supreme court of Ontario, sitting at Hamilton.

[5] This section, providing for confirming, modifying, or setting aside orders of suspension, revocation, or denial of license, specifically excepts suspension under the financial responsibility act.—REPORTER.

jurisdiction on the court to hear and determine any meritorious question.

Affirmed. No costs.

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

YEARSLEY *v.* CITY BANK.

NEGLIGENCE—POLISHED FLOOR—EVIDENCE OF UNUSUAL CONDITION.

Plaintiff, customer of defendant bank, who had the misfortune of an accident by fracturing her foot when she slipped on polished floor as she was about to leave the bank, failed to prove some actionable element of negligence charged in that she failed to show there was an unusual condition which caused her fall.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted October 5, 1960. (Docket No. 16, Calendar No. 48,500.) Decided December 1, 1960.

Case by Evelyn Yearsley against City Bank, a Michigan corporation, for injuries suffered in fall on polished tile floor. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Mansfield, DeWitt & Sulzbach, for plaintiff.

Ward, Plunkett & Cooney, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

38 Am Jur, Negligence §§ 102, 136.

Liability of proprietor of store, office, or similar business premises for fall on floor made slippery by waxing or oiling. 63 ALR2d 591.

PER CURIAM. Plaintiff, "a middle-aged lady," entered the Oak Park branch of the defendant bank to transact business. She walked to a service table, where she filled out a deposit slip. She then walked to a teller's window. Her business having been transacted, plaintiff turned and walked some 12 to 15 steps toward the doorway; intending to leave the bank. At this point she slipped and fell, suffering a fractured foot.

Suing the bank for negligence, plaintiff charged such negligence as follows:

"4. That the said defendant corporation did fail in its duty to maintain such reasonably safe conditions at the aforementioned branch bank located at 13701 Nine Mile road, Oak Park, Michigan by

"(a) Using as a basic material on its floors in the above mentioned building, a foreign and exotic material which was and is extremely smooth and glossy, when it knew or ought to have known that there were and are several materials as readily or more readily available which would have provided a much safer flooring material, and that said defendant corporation did fail to use such safer materials when it knew or ought to have known that such flooring materials created a latent and potential, though totally unnecessary danger to the general public, including plaintiff, who would be using and walking upon the above-mentioned floors, thus maintaining a dangerous instrumentality.

"(b) In negligently selecting and retaining employees who would polish or allow to be polished the above-mentioned flooring materials to such an extent that the said floors became extremely glossy, slippery and dangerous to the general public and customers which defendant corporation knew would traverse said floors, thereby creating or allowing to be created a dangerous nuisance."

Her counsel outlines the claimed proof of negligence thus:

"Up to the time she fell, Mrs. Yearsley had made only casual observation of the condition of the floor, watching only where she was going. After falling, she observed the floor to be very slippery, shiny, and highly polished. Both she and her son testified, to this effect, as to the condition of the floor."

At close of the proofs the trial judge directed a verdict for defendant, holding that there was no proof of negligence as charged. Plaintiff, appealing, relies particularly on certain language appearing in *Hulett* v. *Great Atlantic & Pacific Tea Co.*, 299 Mich 59, specifically that portion of the opinion which appears on pages 66 and 67 of the report. She emphasizes the quotation from *Galarno* v. *Great Atlantic & Pacific Tea Co.*, 260 Mich 113 (quoted in the margin*), and argues for reversal this way:

"Change the word 'oiled' to 'polished' and you have exactly the same situation in the case at bar as in the *Hulett* and *Galarno* cases. Plaintiff's testimony is that the floor was so highly polished that it caused her to slip and fall. Whether the floor was improperly polished, whether there was an unusual condition and whether the polishing was done in a proper manner is clearly a question for the jury."

Judge Fitzgerald was right in holding that plaintiff showed no unusual condition of the construction or surface of the floor in the area of her fall; also that she showed no variation of surface conditions as between such area and other portions of the public quarters of the bank over which she had walked and others were walking. The case is governed by views recorded in *Bisceglia* v. *Cunningham Drug*

*"Conceding that it is not negligence *per se* to have an oiled floor in a store (*Narregang* v. *Great Atlantic & Pacific Tea Co.*, 224 Mich 178) or to apply oil to a floor if it is done in a proper manner so it is not in different condition from that usual with oiled floors, there is evidence here of an unusual condition, such an accumulation of oil where plaintiff fell, as to ruin not only her outer garments but her underclothing as well. This is evidence of negligence, and sustains the verdict."

Stores, 350 Mich 159, 162 and *Nash* v. *Lewis,* 352 Mich 488.

The proof established only that plaintiff suffered the misfortune of an accident. Always, in these cases, the plaintiff bears the burden of proving some actionable element of the negligence charged by him against the defendant. If there was an "unusual condition" which caused plaintiff's fall, she could and should have proved it. She did not.

Judgment affirmed, with costs to defendant.

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

CARTER *v.* GENERAL MOTORS CORPORATION.

1. WORKMEN'S COMPENSATION—PARANOID SCHIZOPHRENIA.

Workmen's compensation benefits are payable for incapacity to work because of an employee's paranoid schizophrenia arising out of and in the course of employment, and while the disability arose from conditions not unusual as to fellow employees, the employment situation did aggravate a pre-existing condition.

REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 58 Am Jur, Workmen's Compensation § 250.
Workmen's compensation—mental state or nervous condition following accident or injury as compensable, or factor in determining amount or duration of period of compensation. 86 ALR 961.
[2] 58 Am Jur, Workmen's Compensation § 198.
[3] 58 Am Jur, Workmen's Compensation § 482.
[4] 58 Am Jur, Workmen's Compensation § 532.
[5] 58 Am Jur, Workmen's Compensation § 534.
[7] 58 Am Jur, Workmen's Compensation § 197.
[8] 58 Am Jur, Workmen's Compensation § 461.
[9] 58 Am Jur, Workmen's Compensation § 283.
[10] 58 Am Jur, Workmen's Compensation § 543.

2. SAME—PARANOID SCHIZOPHRENIA—PROXIMATE CAUSE—EMOTIONAL PRESSURES.

An employee's paranoid schizophrenia which resulted from emotional pressures encountered by him daily in the performance of his work arising from his inability to maintain the established production rate of assembly line activity in the manner prescribed constituted a compensable psychosis.

3. SAME—DECISION OF APPEAL BOARD.

A decision of the majority of the 3-member workmen's compensation appeal board is within the statutory mandate that the "decision of a majority of the board shall be the decision of the board", where one member made an award to plaintiff on the ground he was entitled thereto under one part of the workmen's compensation act, another member under another part of the act, and third member denied relief altogether (CLS 1956, § 408.11).

4. SAME—PROXIMATE CAUSE—COMPENSABLE DISABILITY.

The Supreme Court will not uphold the decision of the workmen's compensation appeal board awarding any compensation unless satisfied that there is competent evidence to uphold the board's finding of causal connection made by a majority of the board and that the plaintiff suffered a disability compensable under the act (CL 1948, § 413.12).

5. SAME — ASSEMBLY LINE WORKER — PARANOID SCHIZOPHRENIA — PROXIMATE CAUSE — FINDING OF APPEAL BOARD — EVIDENCE.

Plaintiff assembly line employee *held*, to have established a basis for a finding of causal connection between his employment and total disability due to paranoid schizophrenia by expert opinion of his treating physician, a specialist in the field of psychiatry, a factual determination binding upon the Supreme Court since there was competent evidence to support it (CL 1948, § 413.12).

6. SAME—MENTAL INJURY.

An employee who is unable to work because of a mental injury caused by his employment is not to be treated differently, so far as workmen's compensation benefits are concerned, than a worker disabled because of a physical injury caused by his employment.

7. SAME—PERSONAL INJURY—SINGLE EVENT.

It is unnecessary to prove that a mental injury is due to a single fortuitous event in order to be compensable under the workmen's compensation act (CLS 1956, § 412.1).

8. SAME—EXISTENCE OR EXTENT OF INJURY—FINDING OF FACT—EVIDENCE.

The existence or extent of an injury or disability is a finding of fact by the workmen's compensation appeal board and will not be disturbed, where supported by competent evidence (CLS 1956, § 412.1).

9. SAME—CONTINUING COMPENSATION—PARANOID SCHIZOPHRENIA.

An award of continuing workmen's compensation benefits should not be made for employee who had sustained a period of disability due to paranoid schizophrenic condition after symptoms thereof have disappeared and he may return to employment other than that to which his personality configuration makes him more susceptible than others to psychotic breakdowns.

10. COSTS—WORKMEN'S COMPENSATION—PARANOID SCHIZOPHRENIA.

No costs are allowed on appeal from award of workmen's compensation to plaintiff employee who had developed a paranoid schizophrenic condition while engaged in assembly line work, where such compensation is ordered terminated upon the cessation of symptoms so that he could engage in other types of employment.

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

Appeal from Workmen's Compensation Appeal Board. Submitted January 6, 1960. (Docket No. 20, Calendar No. 48,117.) Decided December 1, 1960.

James Carter filed his application for compensation from General Motors Corporation, Chevrolet Gear & Axle Division, because of psychosis resulting from tension engendered on production line machine job. Award to plaintiff. Defendant appeals. Modified and affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Donald W. Loria* and *LuVerne Conway,* of counsel), for plaintiff.

Henry M. Hogan (*G. W. Gloster, E. H. Reynolds, Stuart McCallum* and *D. A. Knapp,* of counsel), for defendant.

SOURIS, J. Ordinarily, compensation under our workmen's compensation act* is awarded for incapacity to work because of the crushing of a hand or foot, the inhalation of silicotic dust, or other similar injury arising out of and in the course of employment. Benefits are not awarded for the injury as such, but rather for the loss of earning capacity. Hence, even this Michigan Court, years ago, recognized the right of a claimant under the act to compensation for loss of such earning capacity caused by a mental or emotional disability resulting from a physical injury to claimant or even resulting from observing a physical injury to a fellow employee of claimant. In due course we shall examine the authorities so holding, including decisions of this Court made venerable by age and by the compelling logic of their reasoning, for it is upon those past decisions of this Court that our decision in this case is firmly planted. Our decision is that workmen's compensation benefits are payable for incapacity to work because of a claimant's paranoid schizophrenia arising out of and in the course of employment.

Plaintiff had worked as a machine operator for defendant, General Motors Corporation, with intermittent layoffs, since 1953. On October 8, 1956, he was recalled to work after a 5-month layoff and worked for 4 days on a "brace job" and then was transferred on October 12th to a "hub job". This operation required him to take a hub assembly (consisting of a case and cover) from a nearby fellow employee's table to his own workbench, remove burrs with a file and grind out holes in the assembly with a drill, and place the assembly on a conveyor belt. Plaintiff was unable to keep up with the pace of the job unless he took 2 assemblies at a time to his workbench, and he feared another layoff should he prove

* CL 1948 and CLS 1956, § 411.1 *et seq.* (Stat Ann 1950 Rev and Stat Ann 1957 Cum Supp § 17.141 *et seq.*).

unable satisfactorily to do the work. He was instructed repeatedly by his foreman not to take 2 assemblies at a time because the assembly parts became mixed up on the conveyor belt when he did so. However, plaintiff continued having trouble "getting on to the job" as it was supposed to be performed. Thus, when he took only 1 hub assembly at a time, he fell behind; when he fell behind, he took 2 assemblies; but, when he took 2 assemblies, he got the assemblies mixed up and was berated by the foreman.

We are told that the dilemma in which plaintiff found himself resulted on October 24, 1956, in an emotional collapse variously described as paranoid schizophrenia and schizophrenic reaction residual type. He was subsequently hospitalized for a period of 1 month, during which time he received shock therapy. In July of 1957 he filed an application for hearing and adjustment of claim for compensation under the workmen's compensation act.

It should be noted that there is not involved in this case a psychosis resulting from a single fortuitous event nor is there involved a psychosis resulting from a direct physical blow to plaintiff's body. Instead, there is involved a psychosis claimed to be the result of emotional pressures encountered by plaintiff daily in the performance of his work.

The referee entered an award of workmen's compensation for a disability described as "traumatic neurosis, traumatic psychosis, functional disability and sequelae thereof". The workmen's compensation appeal board, by a divided vote, affirmed the award for total disability from October 24, 1956, until January 7, 1957, plus reimbursement for medical and hospital care. The appeal board, in addition, allowed to plaintiff continuing compensation from and after January 7, 1957.

Pertinent quotations from the 3 opinions filed by members of the appeal board follow:

(1) Chairman McLaughlin:

"Plaintiff sustained a personal injury arising out of and in the course of employment and due to causes and conditions characteristic of and peculiar to the business of his employer. * * * As the result of the injury plaintiff has been totally disabled since October 24, 1956, from doing the work he was performing for defendant prior to that date. Plaintiff cannot safely be subjected to pressures or strains. He is not able to perform work which is highly competitive or requires a certain production rate. Plaintiff is and has been since October 24, 1956, disabled from earning full wages at the work in which he was last subjected to the conditions resulting in disability."

(2) Member Storie:

"The disability is due to an aggravation of a preexisting condition by more than one nonfortuitous event. I hold the disability is compensable under the provisions of part 2 of the workmen's compensation act and concur with Chairman McLaughlin in granting compensation."

(3) Member Ryan:

"I do not agree that the plaintiff's disability is due to causes and conditions characteristic of and peculiar to the defendant's business. * * *

"There is nothing in this case identifiable as an occupational risk.

"The job was a simple job and the foreman's instructions were even simpler. Nothing more emanated from the employment.

"The disability arose out of the plaintiff's own feelings and misapprehension and from within himself completely."

The order of the appeal board is attacked, among other reasons, because no 2 members of the 3-member board found plaintiff's disability compensable under the same section of the act. Nevertheless, the de-

cision of 2 of the 3 members of the board was that plaintiff suffered a compensable injury. Section 11 of chapter 1A of the act creating the workmen's compensation appeal board (CLS 1956, § 408.11 [Stat Ann 1959 Cum Supp, § 17.6(17)]) provides that the "decision of a majority of the board shall be the decision of the board". It is not unusual for members of a body performing a judicial function to arrive at the same conclusion via diverse reasoning. (See, for example, *Samels* v. *Goodyear Tire & Rubber Co.*, 317 Mich 149, where 6 justices of this Court voted to affirm an award of compensation, 3 justices grounding their decision on part 2 and 3 justices on part 7.) The decision of the board is within the statutory mandate.

However, in order to uphold the board's decision awarding *any* compensation, this Court must be satisfied, first, that there is competent evidence to uphold the finding of causal connection made by a majority of the board, and second, that plaintiff suffered a disability which is compensable under the act.

As to the first point, the only medical testimony offered is that of the treating physician. He testified as follows:

"The patient saw himself as in an impossible situation in which he couldn't win. He couldn't please the foreman operating the machine in his job the way he was. If he attempted to do it the foreman's way he would fall behind in his work and the men on the line would complain and the foreman would get after him for this. So he really felt himself caught in an impossible situation which had no solution. * * *

"My feeling is that Mr. Carter showed some evidence of instability earlier in his life. Namely, this episode in the service where he went absent without leave relatively frequently and was discharged for that reason. That apparently subsequent to this he

was able to make a fairly satisfactory adjustment, but that he managed to avoid situations wherein he felt trapped. For instance, he mentioned that on his construction job he was all over, that he worked in many different places. And apparently in his experience with General Motors, too, he was never on a job where he felt he could not meet the demands of the job. Now, I feel that here we had an unhappy combination of circumstances, that after a period of a layoff the man comes into a new job which for somebody, I think with the relative inflexibility of personality that this man had, required some adaptation. So that already he was working in a new position with which he was not familiar and he found himself in a—as I believe I described it before, in what to him was an impossible situation. Namely, that he could not meet the foreman's demands and stay on the work and doing it the way the foreman wanted him to do, and on the other hand, if he did keep up, then his job was threatened in that fashion. So that he actually felt that the job which he had described to his wife as liking very much was threatened in either way. We frequently see a situation of this type where the person feels himself trapped in a situation that has no solution, at least to them, precipitating a schizophrenic breakdown. And I think the indications are that this is what occurred here. * * *

"I think that he has had the personality predisposition towards the development of this illness for a number of years. This is what usually happens, but then this is the straw that breaks the camel's back, and they develop the actual psychosis in which they are out of touch with reality. Now, we have no reason to believe that he was before out of touch with reality."

This was competent expert opinion testimony, upon which the board could and did base a finding of causal connection. Such a factual determination is binding upon this Court, there being competent evi-

dence to support it. *McVicar* v. *Harper Hospital*, 313 Mich 48; *Redfern* v. *Sparks-Withington Co.*, 353 Mich 286; and CL 1948, § 413.12 (Stat Ann 1950 Rev § 17.186). It may be noted that the defendant offered no medical testimony to rebut that given in behalf of claimant by Dr. Lawrence P. Tourkow, a specialist in the field of psychiatry and psychiatric consultant to the public schools and the board of health of the city of Highland Park. The record discloses that Dr. Tourkow's professional qualifications as an expert witness were not challenged by defendant.

The second point, whether or not plaintiff suffered a disability compensable under the act, presents a more difficult question. This Court has previously held that emotional disabilities are compensable under the act. *Klein* v. *Len H. Darling Co.*, 217 Mich 485; *Karwacki* v. *General Motors Corporation*, 293 Mich 355; *Hayes* v. *Detroit Steel Casting Co.*, 328 Mich 609; and *Redfern* v. *Sparks-Withington Co.*, *supra*. Whether the cause of such emotional disability is a direct physical injury (*Redfern* v. *Sparks-Withington Co.*) or a mental shock (*Klein* v. *Len H. Darling Co.*), we have held the disability compensable. What distinguishes the case at bar from our other decisions which recognize the compensability of such disabilities is that this plaintiff's disability was caused by neither a single *physical* injury to plaintiff nor by a single mental shock to him. Instead, his disability was caused by emotional pressures produced by production line employment not shown by him to be unusual in any respect,—that is, not shown by him to be any different from the emotional pressures encountered by his fellow workers in similar employment. As noted above, the finding of causal relationship between plaintiff's disability and the pressures of his employment was supported by the evidence. The question then becomes, must industry, under our laws, bear the economic burden of

such disability? Implicit in the question as stated is the further question: Is a worker unable to work because of a mental injury caused by his employment to be treated differently from a worker unable to work because of a physical injury caused by his employment? Our answer may be found in this Court's prior decisions and in the decisions of other courts in other jurisdictions with comparable laws which have considered the problem.

We make no claim that it is universaly held that a mental disorder which is precipitated solely by a mental stimulus, as opposed to a physical impact, is considered a compensable personal injury. There are those jurisdictions in which no nervous disorder is compensable. For example, *Star Publishing Co.* v. *Jackson,* 115 Ind App 221 (58 NE2d 202), was a 1944 Indiana case involving a linotype operator who developed a recurring spasm in his left hand. Diagnosed, and proved, as an occupational neurosis caused by the antagonistic relationship between the claimant and his foreman, this disability was held not compensable. See, also, *McGill Manufacturing Company, Inc.,* v. *Dodd,* 116 Ind App 66 (59 NE2d 899), for a similar holding.

In New Jersey, a stenographer was called an "idiot" by a coworker when she misunderstood what she was supposed to do. This incident upset her, and she was subsequently treated for a nervous disorder. Her petition was dismissed by a referee in a proceeding under the New Jersey workmen's compensation act, for the following reason:

"I am satisfied that the petitioner did not meet with an accident arising out of and in the course of her employment; in fact, there was not one iota of testimony to even suggest an *accidental occurrence.*" *Voss* v. *Prudential Insurance Co.,* 14 NJ Misc 791 (187 A 334). (Emphasis supplied.)

The referee's reason for denying compensation is inapplicable in Michigan in the light of our recent holdings in *Sheppard* v. *Michigan National Bank,* 348 Mich 577, and *Coombe* v. *Penegor,* 348 Mich 635. The following holding by the appellate division of the supreme court in New York may be distinguished in the same manner:

"The record here discloses that claimant became angry which resulted in an emotional strain and superimposed upon a pre-existing mental condition resulted in the claimant's disability.

"It may be logically argued that claimant here is just as disabled as someone suffering from a physical disability. This we do not dispute but it does not, at present, constitute *an accident as defined by the workmen's compensation law.* It is not within our province to decide otherwise." *Chernin* v. *Progress Service Co.,* 9 App Div 2d 170, 172 (192 NYS2d 758). (Emphasis supplied.)

In Nebraska, whose statute requires violence to the physical structure of the body, compensation was denied to an elevator operator for shock occasioned by seeing a passenger killed. *Bekeleski* v. *O. F. Neal Co.,* 141 Neb 657 (4 NW2d 741).

In Texas, however, where an injury is defined as damage or harm to the physical structure of the body, compensation was allowed a structural steel and iron worker whose anxiety state, which prevented him from doing his regular work, was precipitated by a "psychic trauma", *viz.,* fright occasioned by the collapse of a scaffold, 8 stories up, from which his coworker thereon fell to his death. The court said damage to the nervous system constituted damage to the physical structure of his body, since the physical structure no longer functioned properly due to the nervous system disorder. *Bailey* v. *American General Insurance Co.,* 154 Tex 430 (279 SW2d 315). In any event, neither the Nebraska case nor the

Texas case turned on the *cause* of the damage to the nervous system. Both were primarily concerned with the result, due to their peculiar statutory definitions. In the Texas case, however, that a mental stimulus caused the disability was not considered a bar, and that is the significant point with respect to the case at hand.

This was true as well in West Virginia in 1935. A miner became lost, and remained alone in the mine until found 7 days later. For several weeks thereafter he couldn't return to work as a result of shock and exhaustion. Compensation was affirmed in *Montgomery* v. *State Compensation Commission,* 116 W Va 44 (178 SE 425).

Another case with a purely nonphysical impact stimulus involved a young lady who was frightened by the flash from a short circuited motor and fainted. She returned to work, but some weeks later when she saw the fellow worker who had caught her when she first fainted, she fainted again. She could not thereafter return to work because of this neurosis, and an award of compensation was affirmed, notwithstanding the fact that she was merely frightened without physical contact or harm. *Burlington Mills Corp.* v. *Hagood,* 177 Va 204 (13 SE2d 291).

The Massachusetts court allowed recovery for paralysis of an employee's left side caused solely by fright when lightning struck machines near which she was sitting while eating lunch. *Charon's Case,* 321 Mass 694 (75 NE2d 511). Construing statutory language comparable to our own,* the court said (pp 696, 697):

"This statute does not in terms or by implication exclude an injury causally connected with the employment merely because the injury was not occa-

* CLS 1956, § 412.1 (Stat Ann 1959 Cum Supp § 17.151).

sioned by physical impact or the application of some form of external violence to the body. * * *

"The principle enunciated in the *Spade Case* [*Spade* v. *Lynn & Boston R. Co.,* 168 Mass 285 (47 NE 88, 60 Am St Rep 393, 38 LRA 512), a common-law negligence action for damages] cannot be extended to cases arising under the workmen's compensation act. The present proceeding is not one brought for an assessment of damages for pain and suffering due to a personal injury as was the *Spade Case,* but is a proceeding created by our statutes enacted for the purpose of ameliorating the economic plight of an employee injured in the course of and on account of his employment, or of his dependents if death ensues from his injury, by imposing upon industry the obligation to pay to him weekly payments at rates based upon his wages during the period he is disabled or, if his injuries were fatal, to his dependents in the amounts and during the period prescribed by the act. Ordinarily compensation is awarded for incapacity to earn and not for the injury as such. [Cases cited.] Liability to make payments is not based upon negligence of the employer, and negligence of the employee not amounting to serious and wilful misconduct is no bar to an award of compensation. [Cases cited.] The amount of payments is fixed by the workmen's compensation act and is different from the measure of damages prevailing at common law. [Cases cited.] The special reasons assigned in the *Spade Case* for denying recovery have no application to workmen's compensation cases. The weight of authority even in jurisdictions where compensation is limited to personal injury caused by accident is to the effect that a personal injury due entirely to nervous shock, fright or terror is a compensable injury. [Cases cited, including *Monk* v. *Charcoal Iron Co. of America,* 246 Mich 193.]"

There is Michigan precedent also, long established precedent at that. It was in January of 1920 that Otto Klein died. Just a few weeks earlier he had let

a piece of machinery slip from his hands. It fell to the floor below, striking a fellow employee. Though the injury to his coworker was not serious, Otto Klein thought he had caused his death. The mental and nervous shock caused by this accident to his fellow employee, at his hands, resulted in a neurotic condition, causing Mr. Klein's death. His injury and death were held compensable notwithstanding that (as this Court said in *La Veck* v. *Parke, Davis & Co.*, 190 Mich 604, 605 [LRA1916D, 1277]) no "visible accident occurred and no event causing external violence to applicant's body" occurred. *Klein* v. *Len H. Darling Co., supra.* The philosophy expressed by Justice WEIST, concurring (p 495), is worth repeating here:

"At first I was inclined to disagree with Mr. Justice MOORE, but upon reflection I am convinced he is right. An accident happened in which the deceased was an actor, and the shock to him was so acute, and so depressed his vital forces as to kill him. We must not overlook man's nervous system and mental make-up and their intimate relation to his vital forces.

"This man died because his vital forces could not meet and withstand the acute depression occasioned by what he had done in the course of his employment. The injury to him was no less real, and fatal in its consequences, than a mortal wound. 'Accidents', within the comprehension of the workmen's compensation law, include all accidents actionable at law and all former nonactionable accidents, except in case of intentional and wilful misconduct on the part of the employee."

In 1943, in *Rainko* v. *Webster-Eisenlohr, Inc.*, 306 Mich 328, this Court said that it is not necessary to establish physical injury resulting in outward evidence of violence or trauma to justify an award of compensation. Plaintiff was one of 30 women victims of "mass hysteria" caused by an odor from gas-

oline vapor of less than toxic concentration in the area where the women worked in a cigar factory. The women collapsed, one after another, and plaintiff was left with dizzy spells, nausea, rash, hyperactive reflexes, an epigastric tenderness, anemia, and loss of weight. The Court sustained an award of compensation.

This Court's most recent statement respecting compensability of a neurotic condition may be found in *Redfern* v. *Sparks-Withington Co., supra,* at p 299:

"In this State, the rule is well established by a line of authority dating from 1922 that where occupationally-incurred injury to the body and/or shock to the nervous system produces a neurosis resulting in disability or death, it is compensable."

In *Redfern,* plaintiff while at work was struck on the back by a steel weight and was thereafter disabled from working by what the medical witnesses described as "conversion hysteria". There was no organic cause for her loss of feeling and strength in her right hand and arm, swelling and pain in the right shoulder and neck area, and general fatigue. Compensation was allowed.

It would be well to note that, in the case at bar, although there was no evidence of psychosis prior to October, 1956, the expert testimony did indicate that plaintiff had a personality disorder all his life and that he had a predisposition to the development of a schizophrenic process.

There was also evidence that the plaintiff had been examined in the emergency room of the Highland Park General Hospital 4 days before the last day he worked, and that his condition at that time was described as "bronchial asthma and anxiety". An exhibit submitted by the defendant was a report from a doctor examining the claimant just prior to October

24, 1956, wherein Mr. Carter was advised to take a leave of absence for 2 or more weeks because of a severe state of anxiety and tension. It would appear, therefore, that the series of events in the instant case served to aggravate a pre-existing latent mental disturbance. That such is not a bar to compensation may best be pointed out by quoting from the Court's opinion in *Karwacki* v. *General Motors Corporation, supra,* from pp 356 and 357:

"The testimony * * * supports the finding of the department that the accidental injury aggravated a pre-existing latent mental disturbance, resulting in a disabling condition. The result is comparable to situations wherein an accidental injury has aggravated and precipitated a pre-existing latent physical ailment, resulting in disability. Awards of compensation in such cases have been sustained in a multitude of instances."

Appellant contends that there was no single event which precipitated plaintiff's psychotic breakdown and that, therefore, there can be no award of compensation under part 2 of the act. Appellant recognizes that for an award under part 2, no longer is it necessary to find an "accident" or a fortuitous event, citing *Sheppard* v. *Michigan National Bank, supra,* and *Coombe* v. *Penegor, supra,* but appellant further states that it appears from these cases that part 2 applies only to single event injuries. However, it does *not* appear from the *Sheppard* and *Coombe* cases that injuries not attributable to a single event are not covered by part 2.

This Court in the past has sustained an award of compensation under part 2 where the physical injury was not occasioned by a single event. In *La Veck* v. *Parke, Davis & Co.,* 190 Mich 604 (LRA 1916D, 1277), the plaintiff's paralysis was attributed to a cerebral hemorrhage caused by prolonged work

in a heated kitchen. In affirming an award, the Court said, at p 610:

"According to the testimony of some of the physicians that result could be traced to the unusual hours of work and the unusual conditions. It was an unexpected consequence from *the continued work in the excessively warm room.*" (Emphasis supplied.)

Further, to relegate the applicability of part 2 solely to single event injuries, would be to ignore express statutory language referring to multiple event injuries. Section 1 of part 2 (CLS 1956, § 412.1 [Stat Ann 1959 Cum Supp § 17.151]), provides for a "'date of injury' * * * in the case of an injury not attributable to a single event", evidencing a legislative intent that such injuries should be compensable.

The case at bar involves a series of mental stimuli or events—the pressure of his job and the pressure of his foreman—which caused an injury or disability under the act, causal connection in fact having been found by the board, supported by competent evidence. We find further that Mr. Carter's disabling psychosis resulting from emotional pressures encountered by him daily in his work is compensable under part 2 of the act. Such conclusion renders unnecessary any discussion of the applicability of part 7 to the facts of this case.

Appellant further contests the portion of the appeal board's order awarding continuing compensation based on its finding of a continuing disability. The existence or extent of an injury or disability is a finding of fact and will not be disturbed where supported by competent evidence. *Finch* v. *Ford Motor Co.,* 321 Mich 469, *Walding* v. *General Motors Corporation,* 352 Mich 372. The testimony of the only medical witness was to the effect that the plaintiff could be employed again, but not on this same type of

job, where it is necessary to keep up with a production line.

If there were testimony that claimant's inability to work on a production line was caused by the paranoid schizophrenic condition for which we have held he is entitled to compensation benefits, he would be entitled to continuing payment of such benefits. However, Dr. Tourkow testified that as of September 11, 1957, Mr. Carter no longer showed any symptoms of paranoid schizophrenia or other psychosis. He testified that Mr. Carter should not be employed again in production work, not because of his paranoid schizophrenia, but for the same reason he should not have been employed in such work in the first place: Mr. Carter has a personality configuration that makes him more susceptible than others to psychotic breakdowns when subjected to pressures such as are encountered in production line employment. Under the circumstances, we find no evidence to support the appeal board's award continuing compensation benefits beyond September 11, 1957.

The order of the appeal board should have terminated payment of benefits to Mr. Carter on September 11, 1957, and upon remand to the appeal board it shall be so modified. In all other respects the order is affirmed. No costs.

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

KELLY, J. (*dissenting*). Justice SOURIS affirms the workmen's compensation appeal board under part 2 of the act,* and states: "Such conclusion renders unnecessary any discussion of the applicability of part 7 to the facts of this case."

* CL 1948 and CLS 1956, § 411.1 *et seq.* (Stat Ann 1950 Rev and Stat Ann 1957 Cum Supp § 17.141 *et seq.*).

James H. McLaughlin, chairman of the workmen's compensation appeal board, found that defendant's foreman was "riding" and "wrangling" with plaintiff, and that plaintiff was entitled to receive compensation under part 7 of the act, stating:

"Plaintiff sustained a personal injury arising out of and in the course of employment and due to causes and conditions characteristic of and peculiar to the business of his employer. The conditions of plaintiff's employment involved a hazard greater and different from that to which the public is generally exposed."

Commissioner Storie decided plaintiff was entitled to an award under part 2 and repudiated Chairman McLaughlin's finding under part 7, stating:

"Such finding by Chairman McLaughlin was predicated to a large extent on conditions which he finds were created by the 'wrangling' between the foreman and the plaintiff. I do not agree with Chairman McLaughlin. * * *

"The tempo of the burring job was faster than plaintiff had been accustomed, however, when weighed in the light of employment in general I must conclude as did Member Ryan that there was nothing about the burring job which could be said to create causes and conditions which were characteristic of and peculiar to the business of the defendant employer. * * * Compared to employment in general within manufacturing establishments this was a relatively simple task that required no unusual lifting, turning or twisting. When weighed in the test of involving a hazard greater and different from that to be found in employment in general then a holding of causes and conditions characteristic of and peculiar to this employer's business must fail. Since there is no showing that there were 'causes and conditions characteristic of and peculiar to the business of the employer' I hold plaintiff's claim is not compensable

under the provisions of part 7 of the workmen's compensation act."

Commissioner Ryan in his opinion stated:

"The plaintiff's medical testimony indicates that he has had, for many years, a personality predisposition to the development of a schizophrenic psychosis. He started working on the job in question on October 12, 1956. It was an ordinary job. There was nothing about it that presented any special or distinguishing hazard of mental strain. The difficulty that developed grew out of his refusal to comply with specific and reasonable instructions from his foreman. He felt that he could do the work faster by doing it in his way although the record does not indicate why his way would be faster. His psychosis commenced on about the 5th day with the complete breakdown following on about the 10th day. It clearly was related by way of precipitation to his feeling that he could not keep up his work and follow his foreman's instructions.

"Chairman McLaughlin grants compensation under part 7. Section 1 of that part defines personal injury to '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.'

"The accepted test of compensability under part 7 has been whether or not the conditions of employment result in a hazard which distinguishes it in character from the general run of occupations. * * *

"In this case there was no special or distinguishing hazard or anything out of the ordinary in the way of duty-risk insofar as the plaintiff's job was concerned. All that emanated from the job was the giving of simple instructions by the foreman to the plaintiff for the performance of a simple job. I do not agree that the plaintiff's disability is due to

causes and conditions characteristic of and peculiar to the defendant's business.

"Member Storie grants compensation under part 2. He is in accord with me in finding that the plaintiff's disability is not due to causes and conditions characteristic of and peculiar to the business of the employer but he grants compensation under part 2 with the finding that the disability arose out of and in the course of the employment. I disagree with the latter finding. I do not believe that the injury arose out of the employment. * * *

"I do not believe that the plaintiff's disability arose out of his employment because of the total picture presented by the following considerations:

"There is nothing in this case identifiable as an occupational risk.

"The job was a simple job and the foreman's instructions were even simpler. Nothing more emanated from the employment.

"The disability arose out of the plaintiff's own feelings and misapprehension and from within himself completely. * * *

"Nevertheless, compensation is being granted and a more extreme case is not apt to be encountered. I do not believe that workmen's compensation was ever intended to cover this kind of a situation."

Defendant's position is set forth in its brief as follows:

"It would seem to us that if the plaintiff is to recover in this case he would have to meet the requirements of part 7. There is no one thing or event which is claimed in this case. This can be seen from the testimony and from the application for compensation. * * *

"The testimony does not indicate that plaintiff's disability is due to causes and conditions peculiar to his employment. His disability is due to and arises out of his mental condition. * * *

"The plaintiff's job was a simple one, and the instructions were simple also. There was no special

and distinguishing hazard on plaintiff's job. It is very apparent that the plaintiff had a very unrealistic attitude towards his job due to his personality disorder. We do not think that there should be liability in cases where an employee, by reason of his delusions, should feel trapped or feel insecure in his job. This could lead to liability in cases where the disability results from conditions which are built up in the mind of the employee. An employee might brood over not getting a raise, feeling that his boss did not like him, and could get compensation despite the fact that this may not be the true situation.

"We also contend that the workmen's compensation appeal board by majority opinion has made a finding of fact in this case that there is no liability under part 7.

"Under section 12, part 3, of the workmen's compensation law (CL 1948, § 413.12 [Stat Ann 1950 Rev § 17.186]), such findings of fact are conclusive. * * *

"Liability under part 2, which is found by Member Storie, seems to be based on the premise that the unusual result of the occupation is an injury under part 2. We would say that the unusual result, if there is one, would be caused by the condition of plaintiff's mind and not by his occupation. We say again, however, that there being no single event alleged or found by the workmen's compensation appeal board that part 2 does not apply. Plaintiff's claim is predicated entirely on the conditions of his job. An injury under either part 2 or part 7 must arise out of and in the course of the employment."

Part 7, § 1, subd c (CL 1948, § 417.1 [Stat Ann 1950 Rev § 17.220]), reads:

"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. Ordinary diseases of life to which the public is generally exposed outside

of the employment shall not be compensable: Provided, however, That a hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and promptly reported to the employer."

Justice SOURIS refers to decisions from Michigan and from other jurisdictions to sustain his opinion. An analysis of these cited cases discloses that while they sustain the compensability of emotional disability, in each instance there was some precipitating factor as disclosed by the following:

Plaintiff's husband's death resulted from shock caused by dropping an object on a fellow employee, knocking said fellow employee unconscious (*Klein* v. *Len H. Darling Co.,* 217 Mich 485); plaintiff became emotionally disabled after a piece of hot metal entered his glove (*Karwacki* v. *General Motors Corporation,* 293 Mich 355); plaintiff, after suffering the loss of an eye by an occupational injury, developed a post traumatic neurosis and was unable to work (*Hayes* v. *Detroit Steel Casting Co.,* 328 Mich 609); plaintiff was injured when a 15- to 20-pound steel weight struck her between her shoulder blades and she subsequently suffered conversion hysteria (*Redfern* v. *Sparks-Withington Co.,* 353 Mich 286); plaintiff and 30 other employees suffered mass hysteria caused by an odor of gasoline vapor, after which plaintiff was unable to work because of dizziness (*Rainko* v. *Webster-Eisenlohr, Inc.,* 306 Mich 328); plaintiff's husband died from shock and excitement and overexertion in attempting to pull a fire from a boiler in order to prevent an explosion (*Monk* v. *Charcoal Iron Co. of America,* 246 Mich 193); plaintiff tried to lift a 25-pound tray of cards and suffered an injury when she attempted to yank it free (*Sheppard* v. *Michigan National Bank,* 348 Mich 577);

plaintiff suffered an injury when he exerted great effort to tighten a load binder (*Coombe* v. *Penegor*, 348 Mich 635).

The final Michigan case cited by Mr. Justice SOURIS, *La Veck* v. *Parke, Davis & Co.*, 190 Mich 604 (LRA1916D, 1277), is the only case where there was not an overt act or a direct physical injury leading to neurosis. In this case claimant was awarded compensation for a cerebral hemorrhage induced by heat and overexertion. The court held that since evidence that tends to sustain a determination of the industrial accident board is not subject to review, in appellate proceedings, on writ of certiorari to review the award of compensation for paralysis that resulted from heat and excessive exertion rupturing a small blood vessel of the brain (claimant having suffered from arteriosclerosis for 2 years prior to his injury), the question whether it was caused by an accident arising out of or in the course of claimant's employment was for the lower tribunal and would not be reversed unless a total lack of evidence upon that issue was disclosed.

Justice SOURIS cites 4 decisions from other jurisdictions to sustain his opinion, and the following briefing of the facts in those cases, I believe, discloses they are dissimilar to the facts in our present appeal. Plaintiff-claimant's fellow worker fell off a scaffold to his death and plaintiff, who was almost killed, was subsequently unable to work at heights (*Bailey* v. *American General Insurance Co.*, 154 Texas 430 [279 SW2d 315]); plaintiff suffered a traumatic neurosis and could no longer work, her neurosis being caused from fright when a short circuit from a motor caused a flash (*Burlington Mills Corp.* v. *Hagood*, 177 Va 204 [13 SE2d 291]); plaintiff suffered paralysis caused solely from fright when lightning struck the building and blew out 3 motors near a

machine at which she was sitting (*Charon's Case,* 321 Mass 694 [75 NE2d 511]).

The final of the 4 out-State decisions Justice SOURIS cites (*Montgomery* v. *State Compensation Commissioner,* 116 W Va 44 [178 SE 425]) dealt with a miner who became lost in a mine and thereafter suffered shock and exhaustion. In granting compensation the West Virginia court stated (pp 46, 47):

"It is clear that the term 'personal injury' as used in the workmen's compensation act of this State contemplates and includes the result of unusual exposure, shock, exhaustion, and other conditions not of traumatic origin provided that they are attributable to a specific and definite event arising in the course of and resulting from the employment. We think therefore that the condition in which Montgomery found himself as a consequence of getting lost in the mine is an injury within the meaning of the compensation act inasmuch as it is attributable to a specific and definite event."

Justice SOURIS, after stating that:

"What distinguishes the case at bar from our other decisions which recognize the compensability of such disabilities is that this plaintiff's disability was caused by neither a single *physical* injury to plaintiff nor by a single mental shock to him. Instead, his disability was caused by emotional pressures produced by production line employment not shown by him to be unusual in any respect,—that is, not shown by him to be any different from the emotional pressures encountered by his fellow workers in similar employment. As noted above, the finding of causal relationship between plaintiff's disability and the pressures of his employment was supported by the evidence. The question then becomes, must industry, under our laws, bear the economic burden of such disability?"

answers the question by saying:

"We make no claim that it is universally held that a mental disorder which is precipitated solely by a mental stimulus, as opposed to a physical impact, is considered a compensable personal injury. There are those jurisdictions in which no nervous disorder is compensable."

and he cites and briefly quotes from Indiana, New Jersey, and New York decisions.

I quote more completely from the Indiana and New York decisions. In *McGill Manufacturing Company, Inc.*, v. *Dodd,* 116 Ind App 66 (59 NE2d 899), it was held (syllabi):

"A condition diagnosed as spastica torticollis, commonly known as wryneck, and which was a neurosis, was not incidental to the work of claimant who was engaged in operating a bore-grinding machine, for a neurosis is an ailment to which the general public is exposed outside such employment."

"The occupational diseases act was not intended to provide general health insurance to the workman, but to compensate him for disability resulting only from a disease incidental to the character of the business in which he is employed and having its origin in a risk connected with the employment, and to exclude from the protection of the act workmen suffering from diseases arising out of a hazard to which workmen would have been equally exposed outside their employment and independent of the relation of employer and employee."

"The occupational diseases act does not extend its protection to those workmen who suffer from outward manifestations and symptoms of many possible vagaries and aberrations of the human mind which, although having some causal connection with an employment are, nevertheless, ills all human flesh is heir to, unless, in such cases, the causative inducing

the mental condition be an intervening occupational disease, as defined by the act."

In *Chernin* v. *Progress Service Co., Inc.,* 9 App Div 2d 170 (192 NYS2d 758), a cab driver hit a pedestrian but did not suffer any physical injury to himself. However, he suffered a mental disorder and sought compensation. The New York court held (p 172):

"The question here is novel as it apparently has not heretofore been decided by the courts. Larson on Workmen's Compensation Law has little text on the subject but cites a New Jersey case, *Voss* v. *Prudential Insurance Co.,* 14 NJ Misc 791 (187 A 334), where a stenographer was called an 'idiot' by a coworker, became upset thereby and subsequently was treated for a nervous spell. That court determined there was no accident arising out of and in the course of her employment.

"While it may accurately be claimed the facts would be sufficient to sustain the board if the injury were of a physical nature, we find the present facts not compensable under the law. Heart cases come closest to the present situation where a pre-existing condition was aggravated but there has always been a physical reaction—damage to the heart—as distinguished from mental. Furthermore, the rule in heart cases has been extended with great liberality, but the happening of some external event in connection with the work and causing the heart condition has been required. *Lesnik* v. *National Carloading Corp.,* 285 App Div 649, 651 (140 NYS2d 907), affirmed 309 NY 958 (132 NE2d 326).

"We find nothing in the law that connotes purely excessive emotions—anger, grief or other mental feelings—unaccompanied by physical force or exertion can be the basis of an accident. The record here discloses that claimant became angry which resulted in an emotional strain and superimposed upon a pre-existing mental condition resulted in the claimant's disability.

"It may logically be argued that claimant here is just as disabled as someone suffering from a physical disability. This we do not dispute but it does not, at present, constitute an accident as defined by the workmen's compensation law. It is not within our province to decide otherwise.

"The board in their memorandum decision conceded there was no 'physical hurt' but the findings conclude he became emotionally disturbed as the result of questions by the police and that due to the emotional episode and psychological trauma he sustained an exaggeration of a pre-existing emotional disorder which resulted in schizophrenia, paranoid type.

"For the reason herein stated, the finding of the board that it was an accidental injury within the provisions of the workmen's compensation law should be reversed and the claim dismissed."

Justice SOURIS refers to *Klein* v. *Len H. Darling Co., supra,* as Michigan precedent and quotes the concurring opinion of Justice WIEST. The following sentence in Justice WIEST's opinion (p 495) clearly distinguishes the *Klein Case* from our present appeal:

"An accident happened in which the deceased was an actor, and the shock to him was so acute, and so depressed his vital forces as to kill him."

Karwacki v. *General Motors Corporation, supra,* is cited to establish that "a pre-existing latent mental disturbance" is not a bar to compensation, but the *Karwacki Case* is not similar to the instant case as is disclosed by the following statement in the opinion:

"The testimony * * * supports the finding of the department that the accidental injury aggravated a pre-existing latent mental disturbance, resulting in a disabling condition."

In deciding this appeal we cannot forget the fact that a majority of the commission found there was no accident and plaintiff, while performing a simple job comparable to others employed, suffered a mental breakdown because he could not adequately perform that simple job.

Sheppard v. *Michigan National Bank* and *Coombe* v. *Penegor, supra,* are majored in Justice SOURIS' opinion with the statement that it does not appear "that injuries not attributable to a single event are not covered by part 2." I do not believe either of these cases is of compelling weight, because in both cases there was a single precipitating event and in neither case did we have a plaintiff that possessed such a mentality as to cause him to lose all control of himself without any accidental or unusual event.

Redfern v. *Sparks-Withington Co., supra,* is referred to as this Court's most recent statement respecting compensability of a neurotic condition. Suffice to say, in a 5-to-3 decision we held that a neurosis developing from an injury is compensable if directly caused thereby and not collateral thereto. There was no injury or comparable facts in this present appeal.

Defendant submits 2 questions in its statement of questions involved:

"1. Is the plaintiff's disability the result of a personal injury arising out of and in the course of his employment under either part 2 or part 7 of the Michigan workmen's compensation law?"

My answer to question No. 1 is "No."

"2. Is there any competent evidence in the record to sustain the finding of the workmen's compensation appeal board that the plaintiff is entitled to continuing compensation?"

The hearing referee (James A. Broderick) found "that said defendant pay compensation at the rate of $36 per week for total disability to said employee from October 24, 1956, to January 7, 1957, inclusive; and, that said defendant shall reimburse said employee $863.27 for medical and hospital care."

Appellee's position on this point is set forth in his brief as follows:

"The undisputed medical testimony accepted by the appeal board relative to disability was presented by the treating physician, Dr. Tourkow: Plaintiff should not be employed on a job which is highly competitive. He should be placed upon a job where he would have to maintain a certain rate of production. He certainly would not be employable in piece work. The type of job that Dr. Tourkow felt that the plaintiff would be able to handle would be a job where he would be able to function at his own level of production without having to push himself. Dr. Tourkow testified that plaintiff was well motivated toward working; that plaintiff actually wanted to work but that he would advise very strongly against anything which would resemble the competitive situation which produced plaintiff's psychotic break. * * *

"The plaintiff has been able to do a certain amount of casual farm labor, but that is a far cry from a competitive production-line job. Because of the very nature of plaintiff's disability, the plaintiff himself is incapable of making a reliable judgment as to his own capacity. * * *

"The plaintiff's right to compensation for a disability does not depend upon his being totally disabled from doing *any* work but on his being disabled from earning full wages in the work in which he was last subjected to the conditions resulting in his disability. * * *

"The appeal board has made a finding of fact, a finding based on uncontradicted testimony. Defendant should not now be permitted to circumvent the

appeal board's finding on this or any other factual issue."

The 3 members of the board filed lengthy opinions but only briefly referred to continuing disability.

Chairman McLaughlin found:

"Plaintiff contends that he did sustain such an injury and that he is entitled to compensation beyond January 7, 1957, and until further order of the department.

"We find as follows: Prior to October, 1956, plaintiff had a personality configuration which made him particularly susceptible to the development of a schizophrenic psychosis. Nevertheless plaintiff had suffered no mental breakdown and had not been out of touch with reality prior to October 24, 1956. There was no psychosis before such date. * * * The date of injury and date of disablement is October 24, 1956. As the result of the injury plaintiff has been totally disabled since October 24, 1956, from doing the work he was performing for defendant prior to that date. * * *

"The award of the hearing referee shall be modified to thus provide for continuing compensation from and after January 7, 1957, the date on which the referee stopped compensation."

Commissioner Storie stated:

"The record is void of any showing of other 'events' which could reasonably be held to have been the precipitating cause of plaintiff's disability. It is evident that this well-qualified medical witness is of the opinion that the events created by and encountered during the course of the employment could have been 'the straw that breaks the camel's back' in the instant case. We then clearly have a disability and an unexpected result that arose out of and in the course of this employee's employment with defendant company. * * *

"From the proofs presented it would be mere speculation for us to hold that plaintiff would have been disabled because of the pre-existing condition even though he had not been employed by defendant company. There are no suggested reasons for plaintiff's mental breakdown other than those which did occur during the course of his employment. * * * Since plaintiff's capacity to earn cannot be measured against his incapacity the continuing award entered by the hearing referee is proper."

As hereinbefore noted, Commissioner Ryan found that plaintiff was not entitled to compensation.

Plaintiff's exhibit 1 was a statement of Dr. Warner to the president of Local 235, under date of January 29, 1957, in which he said:

"Mr. James Carter was hospitalized at St. Clair Hospital from 10–27–56 to 11–23–56. During his hospitalization he was treated for a nervous disorder which we have not been able to diagnose. He was given a thorough physical examination and was found to be in excellent condition. * * *

"Our last contact with him was on January 21st, and he was physically fit to return to his employment."

Dr. Tourkow referred to the St. Clair Hospital diagnosis as follows:

"Well, actually, this was the diagnosis they arrived at at St. Clair Hospital, was paranoiac schizophrenia, and it certainly would be in keeping with these progressively developing feelings that the foreman was persecuting him, you see. Right now I don't see any evidence of paranoid schizophrenia *per se*. I do see some very minimal left over of a schizophrenic process, but really if you didn't know that the person had had this before, you wouldn't make a diagnosis solely on the symptoms. So this is why I used the term 'in remission' in my present diagnosis. In remission means that he's now not psychotic, he's not showing any symptoms right now."

The record discloses that plaintiff had this personality disorder all his life. He proved that he could not adjust to rules or regulations while in the army, but repeatedly went absent without leave.

I agree with appellant's statement that: "The testimony does not indicate that plaintiff's disability is due to causes and conditions peculiar to his employment. His disability is due to and arises out of his mental condition." And, I also agree with appellant that the answer to its question No. 2 should be "No," and conclude that the decision of the workmen's compensation appeal board should be reversed.

The award should be reversed. No costs.

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

DAHLEM *v.* HACKLEY UNION NATIONAL BANK & TRUST COMPANY.

1. NEGLIGENCE—OFFICE BUILDING REST ROOM—FLOOR LEVELS—SELF-CLOSING DOOR.

   The negligence of defendant office building owner in maintaining women's rest room with a floor level some 6 inches higher than that of corridor and with access gained through a heavy, self-closing door which opened out into the corridor *held*, a question for the jury.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence §§ 102, 134, 136.
Liability of proprietor of store, office, or similar business premises for injury from fall on one-step change in floor level. 65 ALR2d 471.
[2] 38 Am Jur, Negligence § 348.
[3] 3 Am Jur, Appeal and Error § 1003.
[4] 38 Am Jur, Negligence § 371.
[5] 38 Am Jur, Negligence § 351.

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—OFFICE BUILDING REST ROOM—FLOOR LEVELS—SELF-CLOSING DOOR.

Whether defendant sustained its burden of proof on issue of contributory negligence of plaintiff, a 75-year-old lady with impaired vision in 1 eye, whose hip was fractured when she fell into women's rest room in defendant's office building, *held*, a matter for jury under evidence showing she was unfamiliar with the situation, had unlocked the door with key procured from her physician's employee, and tripped on the step to higher level immediately inside the door and was pushed to the floor by the self-closing door.

3. APPEAL AND ERROR—NEW TRIAL—PREJUDICIAL ERROR.

The error which calls for a new jury trial is one of such significance as to have prejudiced the result, one without which the Supreme Court can say that the result might well have been different.

4. NEGLIGENCE—OFFICE BUILDING REST ROOM—INSTRUCTIONS—SELF-CLOSING DOOR.

Instruction in action by patient of physician whose office was located in defendant's office building that included statement "she was propelled inward by the door, thereby causing her to fall" was not without evidentiary support, where plaintiff had testified that she had unlocked the heavy door, opened it sufficiently to enter the rest room, caught her foot on the 6-inch step up to the higher floor level, and was pushed in as the door closed behind her and locked itself.

5. DAMAGES — SUBSEQUENT HOSPITALIZATION — NERVOUSNESS — PROXIMATE CAUSE.

Question as to whether a second hospitalization of plaintiff some 8 months following fracture of hip as she fell while entering rest room in defendant's office building *held*, to have been properly considered by jury in determining damages under instructions that her extremely nervous condition which had necessitated the second hospitalization was due to the injury rather than her concern about a settlement in the case.

Appeal from Muskegon; Fox (Noel P.), J. Submitted October 5, 1960. (Docket No. 21, Calendar No. 48,687.) Decided December 1, 1960.

Case by Lucy C. Dahlem against Hackley Union National Bank & Trust Company for injuries resulting from fall in rest room of office building. Verdict

and judgment for plaintiff. Defendant appeals. Affirmed.

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

Alexander, Cholette, Buchanan, Perkins & Conklin (*Edward D. Wells,* of counsel), for defendant.

CARR, J. On September 13, 1957, plaintiff sustained injuries, including a fractured hip, as a result of a fall in an office building owned and operated by defendant in the city of Muskegon. It is undisputed that plaintiff was lawfully in said building, having gone there for the purpose of consulting a physician who was a tenant of the defendant. Desiring to use the facilities of the women's rest room in the building, plaintiff was furnished a key thereto by an employee of the physician in whose office she was waiting at the time, and was informed as to the location of said room, the entrance to which was gained through a door which swung out into the hallway. It appears that said door was equipped with a spring which caused it to close after having been opened. In close proximity to the door, approximately 2–3/4 inches therefrom, within the rest room, was a step 5 or 6 inches high between the level of the corridor and that of the rest room facilities.

At the time in question plaintiff was of the age of 75 years. She was possessed of normal vision in one eye, with limited vision in the other. In accordance with the directions given to her she opened the door to the rest room and entered, sustaining in so doing the fall resulting in the injuries for which she brought the present action to recover damages. Her calls for assistance were heard, her plight discovered, and she was duly hospitalized and treated.

It was the claim of the plaintiff as set forth in her declaration, and in proofs introduced in her behalf on the trial, that the said rest room and particularly the entrance thereto was not maintained by defendant in a reasonably safe condition for use by persons lawfully upon said premises, that the raised floor of the rest room was so close to the door as to constitute a dangerous condition, that attention thereto was not called by warning signs nor by contrasting colors, and that the door, because of the spring causing it to close when opened, presented an additional hazard. Defendant by answer denied that plaintiff's injuries resulted from negligence on its part, and affirmatively pleaded that plaintiff was guilty of contributory negligence in failing to make proper observations and otherwise to use ordinary care for her own safety. At the conclusion of plaintiff's proofs on the trial counsel for defendant moved for a directed verdict, which motion was renewed at the conclusion of the testimony and denied. The jury returned a verdict in plaintiff's favor in the sum of $10,028.73. A motion for a new trial was submitted and denied. Defendant has appealed asserting that the trial judge was in error in refusing to grant the motions for a directed verdict in its favor, and that there was prejudicial error in submitting the issues in the case to the jury.

As a witness in her own behalf plaintiff testified on the trial as to the reason why she was in defendant's office building on the day in question, and with reference to her attempt to enter the rest room. Her version as to how the accident occurred is indicated in the following excerpt from her testimony:

"*Q.* Have you gone back to the bank since, within the past few days, to refresh your memory concerning it?

"*A.* I never saw it, you know.

"Q. Well, you saw this door, didn't you?
"A. I saw that door.
"Q. Well, will you tell the jury what happened when you proceeded to the rest room on the fourth floor of the Hackley Bank?
"A. I opened the door as she said—it's kind of a heavy door.
"Q. How did you open the door?
"A. Well, it swings out.
"Q. Did you have to use a key first?
"A. Yes, I put in the key and turned it with my right hand and pulled the door open and walked in. I never got in.
"Q. What happened?
"A. Well, something happened, I went in head first and the door closed behind me, it felt to me somebody was pushing it, I don't know, I screamed and screamed when I struck that floor.
"Q. As you proceeded into the rest room, what happened?
"A. Well, I didn't proceed in.
"Q. Did you start in?
"A. Well, I started, and that step, I caught my foot, there's a 6-inch step there, I found that out when I went up and looked at it—
"Q. You found it out later?
"A. Yes, I found it out.
"Q. But what happened to your foot as you proceeded into the rest room on September 13th?
"A. I don't know. When the girls picked me up, I must have been knocked unconscious, Mr. Sorensen, because when the girls picked me up I still had the idea of going to the toilet.
"Q. I want to go back with you, if you will, to the point where you are entering the rest room. What about the door? Did you say you opened the door with a key with your right hand and you pulled the door open with your left?
"A. Well, it's a pretty heavy door, I just pulled it open enough to go in.

"*Q.* Enough to get in?

"*A.* I started all right, but don't you have to walk into a place? I went in head first.

"*Q.* Why did you go in head first?

"*A.* Because something caught my foot.

"*Q.* Something caught your foot?

"*A.* Yes.

"*Q.* Did anything happen behind you at all?

"*A.* The door—the door slammed behind me, that slammed as I was falling and I thought that I was caught in there.

"*Q.* So, you say something caught your foot and you went into the rest room, the door slamming behind you, is that correct?

"*A.* That's right. * * *

"*Mr. Sorensen:* As you started to walk into the rest room, were you watching where you were going?

"*A.* Well, of course I was watching. How do you suppose I got to be 75 years old without watching where I was going?

"*Q.* It's important that we get to this day, Mrs. Dahlem. As you started to walk into the rest room, were you watching?

"*A.* Of course, I was watching.

"*Q.* Did you look ahead of you?

"*A.* I always look ahead of me, I don't have to look down, I can see.

"*Q.* As you proceeded into the rest room, did you see that step?

"*A.* No, I didn't see any step. If I had, I wouldn't have fallen.

"*Q.* And you say that you fell to the floor in the rest room?

"*A.* Yes."

On behalf of defendant testimony was offered on the trial indicating, as it is claimed, that the rest room and the entrance thereto were constructed and maintained in a reasonable manner, not inconsistent with ordinary methods of constructing and caring for facilities of like nature. It is insisted that the

5- or 6-inch step between the level of the floor of the corridor and that of the rest room did not result in the existence of an inherently dangerous condition, and that the failure to post a warning notice directing attention to the difference in level was not negligence. On behalf of plaintiff it is argued that the combination of physical features resulted in a situation dangerous to one not familiar with the premises, and that because of the different tenants to whom offices in the building were rented, including particularly physicians, defendant was charged with notice that persons not possessing normal physical capacity in all respects would have occasion to use the premises.

Plaintiff's testimony indicates that she was not previously familiar with the situation with which she was confronted on the day in question, that the door was somewhat heavy, that she pulled it open enough to enter the rest room, that as she did so the door closed behind her, that it felt to her as though somebody was pushing it, that something caught her foot, and that she fell. It is undisputed that the door automatically locked behind her, a witness for defendant testifying to the fact that she unlocked it after hearing plaintiff scream.

Counsel for appellant have cited *Garrett* v. *W. S. Butterfield Theatres, Inc.*, 261 Mich 262. In denying recovery there to the plaintiff who fell on a step in a rest room, it was said:

"Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it."

Assuming that the difference in level between the corridor floor and the rest room floor is not in and of itself evidence of negligence, it is apparent that in the instant case we are concerned with certain other factors relating to the matter at issue. Particularly involved is the construction of the door which plaintiff's testimony would indicate was of such weight that she opened it merely to a width that permitted her to enter. If, as she claimed, she felt that someone was pressing against the door and against her as she undertook to enter the rest room, no explanation is available other than that the spring which was designed to close the door was operating with sufficient force to push it against her. We have in this respect a condition that she could scarcely be expected to anticipate. There was nothing to warn her that the door automatically closed. The extent to which the operation of the door entered into the accident was a matter for consideration by the trier of the facts. The same observation may be made with reference to the effect of the proximity of the step to the door when closed. Applying the rule suggested in the *Garrett Case, supra,* we think it must be said that there were conditions here present that required submitting to the jury the issue as to defendant's negligence.

Was plaintiff guilty of contributory negligence as a matter of law? Her testimony, above quoted in part, indicates what she did and, likewise, what she failed to discover as she undertook to enter the rest room. Under the situation presented by this record whether defendant sustained the burden of showing that her conduct was such as to constitute contributory negligence was a matter for the jury. *Torma* v. *Montgomery Ward & Company,* 336 Mich 468, and prior decisions there cited.

Jones v. *Michigan Racing Association,* 346 Mich 648, cited by counsel for appellant, is distinguishable

on the facts. There the plaintiff, seeking to recover damages for personal injuries sustained by him on defendant's premises, saw the situation by which he was confronted, recognized or should have recognized the danger in proceeding, and apparently proceeded in disregard of his own safety. Such is not the situation in the case at bar and the trial judge was not in error in leaving to the jury the question as to plaintiff's alleged contributory negligence.

In charging the jury the trial judge stated the claims of the respective parties with reference to the matters in dispute. Considered in its entirety we think that it was a full and fair presentation of the principles by which the jury was bound in arriving at its verdict. We find no reversible error and conclude from the entire record that the trial was fairly conducted. As said in *Rouse* v. *Gross,* 357 Mich 475, 481:

"Reversal for new trial does not follow automatically from a showing of error in the course of a generally fair trial. There probably never was, and never will be, a perfectly conducted jury trial. The error which calls for a new jury trial is one of such significance as to have prejudiced the result. *Miskiewicz* v. *Smolenski,* 249 Mich 63; *Sheehan* v. *Dalrymple,* 19 Mich 239. It must be one without which we can say that the result might well have been different."

Appellant insists that the court erred in stating to the jury that:

"The plaintiff asserts that as she sought to enter the rest room, her foot caught on the step and she was propelled inward by the door, thereby causing her to fall, injuring herself and suffering the damages for which she complains."

Counsel claim that there was no evidence that the closing of the door caused plaintiff to fall. However,

the testimony of plaintiff, above quoted, indicates that her person was subjected to some pressure as she was about to enter the rest room, and it is a matter of fair inference from undisputed proofs that such pressure could have come only from the door in the process of its being closed by the spring. The jury was entitled to consider plaintiff's testimony in this respect, and it may not be said that the charge as given was confusing or materially objectionable.

As before indicated, plaintiff was hospitalized, because of her broken hip, on September 13, 1957. She was discharged November 17th following. On May 15, 1958, her physician caused her to be sent to the hospital again because of extreme nervous agitation on her part. She was released on June 2d thereafter. It was a matter of dispute on the trial as to the precise connection between the later condition to which plaintiff was subjected and the accident resulting in the hip fracture. Under the charge to the jury, if it found the state of agitation and nervous condition to be the proximate result of plaintiff's injury, and if negligence on the part of defendant was determined to be the proximate cause of such injury, the subsequent condition may have been considered in awarding compensation to plaintiff. The jury was further charged that if the subsequent condition in question resulted only from her concern about a settlement in the case then damages could not be awarded therefor. Under the proofs we think the question was one for determination by the jury and that no error was committed in submitting it accordingly.

Other questions raised do not require specific mention. As indicated, we find that the case was fairly tried and that under the testimony offered by the parties the factual issues were for determination by

the jury. Our attention is called to no reversible error, and the judgment is affirmed.

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

WRIGHT *v.* DELRAY CONNECTING RAILROAD COMPANY.

1. RAILROADS—NEGLIGENCE—SWITCHING OPERATIONS—COAL CAR INSPECTOR.

   Defendant railroad's negligence in switching cars onto tracks of plaintiff's employer where plaintiff car inspector was on top of empty coal cars to see if they were in condition for use by his employer *held,* question for jury, where switching activities were performed at irregular intervals and no warning was given to plaintiff while performing a part of the regular procedure that had been adopted by his employer.

2. SAME — NEGLIGENCE — SWITCHING OPERATIONS — WARNING — PROXIMATE CAUSE — COAL CAR INSPECTOR.

   Finding of jury that defendant railroad was negligent in conducting switching operations on tracks of plaintiff's employer without warning plaintiff coal car inspector, whose inspection was an operation regularly conducted for the employer and one requiring the presence of employees which should have been anticipated by the defendant, and that such negligence was a proximate cause of plaintiff's injuries *held,* supported by proofs adduced.

REFERENCES FOR POINTS IN HEADNOTES

[1] 44 Am Jur, Railroads § 441.
[2] 44 Am Jur, Railroads § 628.
[3, 6, 7] 3 Am Jur, Appeal and Error § 886.
[4] 38 Am Jur, Negligence § 192.
[5] 44 Am Jur, Railroads § 478.
[8] 15 Am Jur, Damages § 198.
Compensation from other source as precluding or reducing recovery against one responsible for personal injury or death. 95 ALR 575.
[9] 15 Am Jur, Damages § 382.
[10] 15 Am Jur, Damages § 206.

3. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.

The testimony must be construed as strongly as reasonably possible in favor of the plaintiff in determining whether or not defendant's motion for a directed verdict should have been granted, even though some of the plaintiff's own testimony may not be altogether consistent with other testimony given by him.

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ANTICIPATION OF NEGLIGENCE.

Contributory negligence cannot be imputed to a plaintiff for failure to anticipate negligent acts of a defendant.

5. RAILROADS—SWITCHING OPERATIONS—COAL CAR INSPECTOR—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff coal car inspector was guilty of negligence in placing himself where he could be dislodged and injured when defendant railroad switched cars into tracks on premises of plaintiff's employer *held*, a matter for jury determination, since plaintiff was not bound to anticipate negligence on part of defendant and there was testimony that warning to him of danger came too late.

6. APPEAL AND ERROR—DIRECTED VERDICT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The Supreme Court is limited to deciding whether plaintiff was shown by the proofs to have been guilty of contributory negligence as a matter of law, where one ground of asserted error was the denial of motion for directed verdict on the ground plaintiff was guilty of contributory negligence as a matter of law.

7. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Each case involving questions of negligence or contributory negligence must be judged on appeal on its own merits in accordance with applicable principles of law.

8. EVIDENCE—OPENING STATEMENT.

It was not prejudicial error for trial court to overrule objection to the introduction of testimony as to amount plaintiff had received from his employer for injuries received during employment because of defendant railroad's alleged negligence, where the receipt of workmen's compensation had been mentioned by counsel for both parties in their opening statements without objection.

9. TRIAL—INSTRUCTIONS—OPENING STATEMENT—EVIDENCE.

Trial court did not commit error by charging jury that plaintiff

would, if he recovered a judgment against third party tortfeasor, be required to repay his employer's workmen's compensation insurer the amount he had received from it, but that such amount had nothing to do with the determination of the question of liability and should be disregarded, where the fact of payment of such compensation had been noted in opening statements as well as in the proofs and closing argument of defendant's counsel.

10. DAMAGES—EXCESSIVE VERDICT—LOSS OF EARNINGS—PAIN AND SUFFERING.

Verdict of $125,000 to 52-year-old man who was completely disabled by injuries negligently inflicted by defendant railroad *held,* within range of proofs showing large loss of earnings, pain and suffering, hospital and medical expense, and it does not appear that anything occurred in the course of the trial to create prejudice or bias on the part of the jury, nor that any such feeling entered into the determination as to the amount of recovery, hence, new trial may not be granted because of alleged excessive verdict.

Appeal from Wayne; Souris (Theodore), J. Submitted October 11, 1960. (Docket No. 52, Calendar No. 48,491.) Decided December 1, 1960.

Case by Lawrence A. Wright against Delray Connecting Railroad Company, a Michigan corporation, for injuries sustained while engaged in inspection work when thrown from coal car by railroad switching operations. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Richard G. Eubank, for plaintiff.

Butzel, Eaman, Long, Gust & Kennedy (*A. D. Connor,* of counsel), for defendant.

CARR, J. On November 16, 1953, and for some time prior thereto, plaintiff was employed by Semet Solvay Division of Allied Chemical Corporation as a locomotive crane helper. Among his duties was the

inspection of empty hopper cars to determine if they could properly be loaded with coal which in the ordinary course of business was brought in by boat and unloaded at the employer's place of business. The switching of cars in the area was done by the defendant in the instant case whose duty it was to remove empty cars from the vicinity of coke ovens and place them in position to be loaded from the coal pile beside the track.

On the day in question plaintiff was undertaking to inspect empty coal cars for the purpose of ascertaining if they were in condition to be filled with coal. The top of said cars was approximately 11 feet above the ground and plaintiff climbed up a ladder to the top of one of the cars which he was required to inspect. It is a fair inference from the proofs that defendant brought to the section of the track where plaintiff was working, from time to time, empty coal cars to be inspected and loaded. While at the top of the car that he was inspecting, such an operation was conducted by defendant, the employees of which released the cars that were being moved from the control of the switching locomotive and allowed them to roll along the track toward the standing cars which plaintiff was inspecting. An impact occurred as a result of such method of operation, and plaintiff was thrown or caused to fall to the ground. The injuries received by him in the accident were serious and resulted in total disability for employment.

It was the claim of the plaintiff in his declaration and in his proofs on the trial that the defendant was negligent in releasing the cars that were being moved from the control of the locomotive and permitting them to run into the cars that plaintiff was inspecting, and was also negligent in failing to give him seasonable and timely warning of such action. On behalf of the defendant it was contended that the switching operation was conducted in the usual man-

ner, that plaintiff knew or should have known that empty cars might be brought in at any time to be inspected and loaded at the coal pile, that he put himself in a position of danger by standing on the ledge at the top of the car that he was inspecting, or walking along it, which ledge was approximately 5″ wide with a somewhat rounded or sloping outer edge, that he disregarded signals given by the operator of the crane who observed defendant's operation and realized that it was dangerous to plaintiff's safety, and that because of his acts and failure of reasonable precautions for his own safety plaintiff was guilty of contributory negligence barring recovery.

At the conclusion of plaintiff's proofs motion for a directed verdict was made by defendant, and denied. It was subsequently renewed, with like result. The case was submitted to the jury which returned a verdict in favor of the plaintiff in the sum of $125,000. Motion for new trial was denied, and defendant has appealed claiming in substance that the proofs were insufficient to support a finding that it was guilty of negligence constituting a proximate cause of the accident, that plaintiff was guilty of contributory negligence as a matter of law, that, in consequence, the trial court was in error in denying the motions for a directed verdict, and that prejudicial error, requiring reversal, occurred in the course of the trial.

Were the proofs in the case of such character as to render the question of defendant's negligence an issue of fact for determination by the jury? As is ordinarily the situation in a case of this nature, the witnesses for the respective parties were not altogether in accord in their testimony. No claim is made, however, that defendant's employees warned plaintiff of the approach of the empty coal cars. Apparently it was assumed that he would keep watch for such movement and act in such manner as to avoid injury. Switching operations of the character

in question were performed at irregular intervals. On behalf of plaintiff it was claimed on the trial that he thought that warning would be given to him by defendant's employees in the event that empty cars being switched to the vicinity of the coal pile were released by the locomotive and permitted to roll against the standing cars that were being inspected.

Under the circumstances disclosed by the record it must be said that it was a question of fact for the jury to determine if defendant was guilty of negligence in conducting the switching operation in the manner indicated, or negligent, in view of such method, in failing to give plaintiff warning. The inspection of the empty cars before loading was a part of the regular procedure observed by Semet Solvay in its operations. The presence of employees engaged in such work should have been anticipated. It may not be said that the proofs were insufficient to support the finding of the jury as to defendant's negligence and that such negligence was a proximate cause of the injuries sustained by plaintiff.

This brings us to the more serious question as to whether the plaintiff was guilty of contributory negligence as a matter of law. Counsel for defendant assert on this appeal that plaintiff failed to exercise reasonable precautions for his own safety, and rely on testimony that he was working with his back to the oncoming cars, that he failed to seasonably heed the attempts of his fellow employee to warn him of the danger, and that he had negligently placed himself in a perilous position on the ledge of the coal car that he was inspecting. Reliance is placed on the testimony of defendant's witnesses to the effect that plaintiff appeared to be walking along such ledge. Such a claim is at variance with the testimony of plaintiff who denied that he was performing his inspection duties by walking along the ledge in ques-

tion. The following excerpts from his testimony fairly indicate the nature of his claims:

"*Q.* And what happened then?

"*A.* Then I just got up on the top. I couldn't see in from the side to see whether there was anything in it or not and I just got up on the top and I just got up on the railing there so I could look down in the car; and just as I got up on it there I stepped over just about 1 or 2 steps, just far enough that I could see into the center of that car. That's when Jackowenko started blowing the whistle and he kept blowing the whistle. I turned around to look to see what he was blowing for. I thought maybe he was ready then to shift that car out so I couldn't make it out until I happened to look clear around back of me and here come them cars in on top of these other ones.

"*Q.* You saw them coming?

"*A.* Sir?

"*Q.* You saw them coming?

"*A.* Yes.

"*Q.* About how far away were they away from the first car when you first saw them?

"*A.* Well, they was about approximately a half a car length off maybe less.

"*Q.* What did you do?

"*A.* Well, I didn't have a chance to do anything. I was figuring on going back to the corner and go down the ladder or get inside of it.

"*Q.* You say you didn't have time to do anything?

"*A.* No.

"*Q.* Did you have any estimate as to how fast those cars were going?

"*A.* I think they were traveling around 15 or 20 miles an hour, anyhow.

"*Q.* What were you able to do after you saw the cars coming?

"*A.* Nothing.

"*Q.* What happened?

"*A.* Well, the cars hit together, banged together, and they bumped the whole string of cars, moved the whole string of them.

"*Q.* And what happened then?

"*A.* And it knocked me up in the air and I came back down and hit the top of the railing, bounced off there, and went down on to the ground, which is about 15 feet, anyhow."

Later in the course of the trial plaintiff, recalled to the stand as a witness in his own behalf, testified as follows:

"*Q.* Now, at the time that the cut of cars struck the cut of cars that you were on I would like to have you tell us specifically just where you were with relation to the ground, the top of the car, the end of the car, and the rail.

"*A.* I was right at the end of the car where the ladder is.

"*Q.* I will take one of these little models. You had climbed up the ladder at the end of the car?

"*A.* That is right.

"*Q.* Now, at the end of the car there is a rail that runs acrossways?

"*A.* That is true.

"*Q.* How far were you from that end rail?

"*A.* I had my one foot on that end because when I got up on it I put one foot back to the corner of the box or the car.

"*Q.* That would be the corner where the 2 ladders are?

"*A.* Yes.

"*Q.* And where did you put your other?

"*A.* Then I took the other and stepped out along that rail to get my balance.

"*Q.* You did that?

"*A.* If it wasn't far enough I stuck another foot out there further to balance myself.

"*Q.* Still leaving your first foot on the corner?

"*A.* That is right. That's where I had my foot.

"*Q.* From that point were you able to see down into the center of the middle hopper?

"*A.* I didn't have a chance to look down in there at that time.

"*Q.* You were hit at that time, that point?
"*A.* That is when the accident occurred.
"*Q.* Had you climbed up the rail or had you stepped over from the previous car?
"*A.* No, sir; I climbed up the ladder."

In determining whether the motion for a directed verdict in defendant's favor should have been granted the testimony must be construed as strongly as reasonably possible in favor of the plaintiff. This is true although some of his statements on the witness stand were not altogether consistent with other testimony given by him. *Yampolsky* v. *Smith,* 320 Mich 647. Under the disputed proofs it was a question of fact for determination by the jury as to plaintiff's position at the time of the accident. It must be borne in mind also, at least under his version as to the manner in which the accident happened, that he did not merely fall from the top of the coal car. It is not disputed that the accident happened because of the moving cars striking those that were standing still on the track. It is, likewise, true that plaintiff was not required to anticipate a negligent act on the part of the defendant. In *Winckowski* v. *Dodge,* 183 Mich 303, 312, it was said:

"Contributory negligence cannot be imputed to a plaintiff for failure to anticipate negligent acts of a defendant—no one need anticipate an unlawful act. In *Gilbert* v. *Burque,* 72 NH 521 (57 A 927), this thought is thus expressed:

" 'Where the position of the plaintiff who was run into by a vehicle going in the opposite direction was not dangerous, until the other traveler's act rendered it so, he is not chargeable with negligence as a matter of law because he did not see defendant or because he failed to anticipate that he would suddenly turn to the left, or because he did not instantly resort to some self-protecting expedient.' "

Whether plaintiff in the instant case was, as a matter of fact, guilty of negligence that contributed to his accident and injuries was for the jury to determine. It may not be said that the record does not support the finding made thereon. This Court is limited to deciding whether plaintiff was shown by the proofs to have been guilty of contributory negligence as a matter of law. Counsel have called attention to *Dahlerup* v. *Grand Trunk Western R. Co.*, 319 Mich 96. The factual situation there involved, however, was materially different than that presented under plaintiff's version of the facts in the instant case. There plaintiff deliberately placed himself in such position as to be in danger of being struck by cars being moved on the defendant's railroad. An analogous situation was presented in the prior case of *Wexel* v. *Grand Rapids & Indiana R. Co.*, 190 Mich 469, also cited, in which a directed verdict for defendant was sustained by this Court. Each case of this character must be judged on its own merits in accordance with applicable principles of law. We conclude that the trial court was not in error in denying defendant's motions for a directed verdict and in submitting to the jury the determination of the questions of negligence.

It appears from the record that plaintiff, following his injuries, was paid workmen's compensation by the employer's insurer. It is claimed that the trial judge committed reversible error in overruling an objection to a question as to the amount of compensation that had been received by plaintiff prior to the trial. The record before us suggests that some agreement was reached by counsel in consultation with the trial judge in chambers with reference to the matter of workmen's compensation and the position of the insurance company with reference thereto. Counsel for plaintiff in his opening statement to the jury referred to the insurance company

as a "concealed plaintiff" and further stated, apparently without objection on the part of defendant, that the total amount paid to date, including medical and hospital bills, was $9,684.45. Counsel for defendant in his opening statement referred to the fact that plaintiff had received workmen's compensation because of his injuries, further stating that plaintiff would continue to receive it for a number of years.

The question to which counsel for defendant specifically objected went solely to the amount that had been paid up to the date of the trial. As noted, counsel for plaintiff had already stated that amount in his opening remarks to the jury. In other words, the matter was already before the jury, and no objection was made to the opening statement. The specific agreement made between counsel at the outset of the trial with reference to the manner in which the workmen's compensation question should be handled is not set forth in the record, but it may be assumed that what was said and done without objection was within the scope of such agreement. Under the circumstances disclosed by the record we do not think that defendant is in position to claim that it was prejudiced by the action of the trial court in overruling the objection to the question, propounded to a witness on the trial, as to the amount paid to date by the insurance company.

In view of the fact that the matter of compensation had been brought before the jury, the trial court was not in error in charging that the plaintiff would, in the event of his recovery of a judgment, be required to repay to the insurance company the amount so received. This was in substance a statement of the law with reference to the matter.* The jury was further charged that the amount of such payments

* See CLS 1956, § 413.15 (Stat Ann 1960 Rev § 17.189).—REPORTER.

should have nothing to do with the determination of the question of liability and should be disregarded. It may be noted also that the trial judge repeated in the charge the amount of the payment to date, namely $9,684.45, which was in accord with the statement of counsel to the jury at the opening of the trial, and with the testimony.

It may be noted further that in his closing argument to the jury the attorney representing defendant on the trial referred to the matter of workmen's compensation payments, stating in substance that plaintiff had received such payments for nearly 6 years and under the law would receive them for an additional 10 years at the rate of $30 per week. The insurance company was called the "silent plaintiff" and the jury was told that the company would get the "first money back if the verdict should go to the plaintiff". Apparently counsel was emphasizing the fact that plaintiff had his rights under the workmen's compensation act and would, if payments were continued, receive a total amount of $24,000. The trial judge was requested by counsel for defendant to charge the jury accordingly. Apparently the matter of workmen's compensation payments was relied on by counsel for the purpose of emphasizing that plaintiff would receive the amount referred to in the event that the jury did not decide in his favor in the pending case.

It is also argued that the amount of the verdict was excessive. At the time of the accident the plaintiff was approximately 52 years of age. He was, as the medical proofs indicated, completely disabled. Damages based on loss of earnings for his probable expectancy of life were large. He also underwent pain and suffering, and expense for medical and hospital bills. While the verdict was in fact a sizeable one, it was within the range of the proofs. It does not appear that anything occurred in the course of

the trial to create prejudice or bias on the part of the jury, nor that any such feeling entered into the determination as to the amount of recovery. Such being the situation, a new trial may not be granted for the reason urged.

The judgment rendered in the trial court is affirmed.

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

SOURIS, J., did not sit.

KNARIAN v. SOUTH HAVEN SAND COMPANY.

1. AUTOMOBILES—PROXIMATE CAUSE—INSTRUCTION.

   Definition of proximate cause *held,* proper in action arising from collision between pickup truck in which plaintiff was a passenger and defendant's car traveling in opposite direction at 6:30 p.m. in mid-December that proximate cause must be the real cause, the actual cause and without intervening cause to assist in bringing the injury about and that it was the natural and proper consequence of the negligence of the defendants and that it was foreseeable by them under the circumstances.

2. SAME—INSTRUCTIONS—NEGLIGENCE—ASSURED CLEAR DISTANCE—SUDDEN EMERGENCY—OBSERVATION.

   The trial court's instructions relative to negligence, assured clear distance, sudden emergency, and duty to observe, wherein the jury was directed to apply the "reasonably prudent person" test in determining whether or not defendant was negligent

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 1100.
[2] 5A Am Jur, Automobiles and Highway Traffic § 1094.
[3] 5A Am Jur, Automobiles and Highway Traffic § 1013.

held, without reversible error and to have been justified by facts in action arising from collision between pickup truck in which plaintiff was a passenger and defendant's car traveling in opposite direction at 6:30 p.m. in mid-December (PA 1949, No 300, § 627, as amended by PA 1957, No 190).

3. SAME—INSTRUCTIONS—GREAT WEIGHT OF EVIDENCE.

Record presented in action arising from collision between vehicles proceeding in opposite directions at 6:30 p.m. in mid-December *held,* to have required presentation of case to jury, and to show that the court did not invade the province of the jury, that the jury was properly instructed, and that its verdict was not contrary to law or the great weight of evidence.

Appeal from Van Buren; Mosier (Carl D.), J. Submitted June 8, 1960. (Docket No. 29, Calendar No. 48,497.) Decided December 1, 1960.

Case by Zvart Knarian against South Haven Sand Company, a Michigan corporation, and Billy R. Fisk for injuries sustained in automobile collision. Verdict and judgment for plaintiff against defendant Fisk, who appeals. Affirmed.

Eugene Field, for plaintiff.

McAuliffe & Harbert (*J. W. McAuliffe,* of counsel) and *Luther I. Daines,* for defendant Fisk.

KELLY, J. Plaintiff was injured on December 13, 1957, when the truck in which she was riding skidded while passing defendant South Haven Sand Company's parked double bottom trailer unit and collided with a Chrysler automobile driven by defendant Fisk.

A jury found defendant Fisk was negligent and assessed damages. It also found defendant South Haven Sand Company was not negligent. Motion for new trial was denied.

Defendant Fisk appeals, claiming the verdict is contrary to law and the great weight of the evidence

and that the court erred in instructing the jury and in denying defendant's motion for directed verdict.

At the time of collision (about 6:30 p.m.) plaintiff was a passenger in a Chevrolet pickup truck operated by her adult son, traveling east on highway M-43 (a paved highway, 20 feet wide), and was going from her home in South Haven to spend the weekend with her children in Kalamazoo.

Plaintiff could give no information as to how the collision occurred, testifying she had no recollection of any of the events subsequent to her departure from South Haven.

The son, who lives in Kalamazoo, had traveled from Kalamazoo to South Haven on highway M-43 in the afternoon of that day, and at a point a little over a mile west of Glendale he observed 2 trailers hitched together which stood with their left wheels on the pavement and their right wheels on the berm. At that time there were snow banks that had been created along the highway and it appeared that the trailers were close to the snow banks on the south side of the highway.

A police officer who investigated after the collision testified: "The trailers were parked on the south side of M-43. The left wheels were 5 feet 6 inches south from the center line."

Plaintiff's son testified that he and his mother left South Haven about 6 p.m.; that the weather and roads were clear and that he drove at a speed of about 40 miles per hour; that as he came over the crest of a hill he could see the trailers some 500 or 600 feet to the east, parked as they were when he passed them in the afternoon; that he reduced his speed as he approached the trailers but increased his speed to pass; that as his truck was passing the rear of the trailers he observed oncoming lights which he thought were far enough away to give him ample time to pass; that he was regaining his posi-

tion on the right hand side of the road when his truck hit an icy patch that had formed around the trailers and the truck started to skid with the rear sliding to the left; that his left front wheel had passed the center line when the skid started; that when the skid started the lights of the approaching car were still several hundred feet away; that to stop the skid he turned his front wheels to the left and took his foot off the accelerator; that he was still skidding at the moment of impact, and while he had the front part of his truck over on the south side of the road where it belonged, the rear end was over the center line in defendant's lane; that his truck was 17 feet long and he estimated the distance from the start of the skid to point of collision as 100 feet.

From the testimony of those who made investigation after the collision, we conclude:

(1) Defendant's Chrysler came to rest facing southeasterly across from the front or east end of the parked trailers;

(2) The Chevrolet pickup was 140 feet east of the Chrysler with the left rear wheels 2 feet 8 inches north of the center line and the box of the pickup was 26 feet south of the pickup and a spare tire was out in the field 200 feet away;

(3) There were no skidmarks at the scene of the accident;

(4) After the collision the pickup skidded 40 feet 10 inches and the Chrysler traveled 99 feet 2 inches;

(5) The rear wheels and the rear end of the truck were badly damaged; there was damage to the rear of the cab immediately back of the left door, and the frame was bent;

(6) The bumper of the Chrysler was not damaged to any degree, but the left front of the car was damaged.

The collision threw plaintiff from the truck to the highway, breaking her neck and causing other injuries requiring extensive hospitalization.

Gordon Castle, 27-year old acquaintance and friend of defendant Fisk, was called as a witness by plaintiff. He testified he had accompanied defendant in his car as they left Paw Paw to attend a basketball game at Bangor. The night was clear and the pavement was wet but not slippery; that he sat in the front seat next to the right window; that while driving west on M-43 he observed "a string of flares on the south side of the road down ahead of us, as far as I could see, probably a mile when we first seen them. * * * There was a line of them (flares) pretty well around that truck because they showed up plain when we came in view"; that he saw the headlights of an approaching car as it came over the crest of a hill in the eastbound lane; that he would estimate the flares to be "between an eighth and a quarter of a mile" from the crest of the hill; that the driver of the car he was riding in and the driver of the approaching car dimmed their lights; that when he was 200 to 300 feet away he could see the trailers as the approaching car swung out to pass them; that the approaching car's lights disappeared as the car appeared to pass the trailers and that he next saw the truck 25 to 30 feet away sliding, facing south, and coming broadside toward the car in which he was riding.

On direct examination, Castle stated he did not look at the speedometer, but estimated defendant was traveling 50 to 55 miles per hour, and on cross examination stated that when he observed the flares "it felt to me like he (defendant) let up on the gas."

Defendant denied he saw the lights of the truck approaching him, stating that the first he knew that the Chevrolet pickup was on the road was when it was in front of him only 60 to 70 feet away. As to

what happened from the time he saw the flares is set forth in the following direct examination of defendant:

"*Q.* Have you an opinion as to the speed at which you were traveling after you left Glendale?

"*A.* At approximately 50 mile an hour.

"*Q.* Did you continue that speed as you approached the flares?

"*A.* Not after noticing the flares. I lessened the acceleration at that time.

"*Q.* You lifted your foot off the accelerator?

"*A.* Yes.

"*Q.* And what was the effect of that?

"*A.* As to speed?

"*Q.* Yes.

"*A.* I expect that I slowed down, maybe 10 or 15 miles an hour. I don't know how long it takes to do that. I had plenty of time, I was a long ways away from the flares at that time.

"*Q.* And did you proceed along until you got closer to the flares?

"*A.* Yes, sir.

"*Q.* Have you any opinion any time prior to the moment just before the collision that you reached a speed any lower than 30, 35 miles an hour?

"*A.* No, I don't. I doubt that I did.

"*Q.* As you approached the flares, did you reach a point at any time where you could identify any part, the nature of the vehicles which they surrounded?

"*A.* No, I never did identify them as being trailers.

* * *

"*Q.* Did you observe the approach of the Knarian car, the lights of the Knarian car while it was behind the parked trailers and the flares?

"*A.* I did not, not that I recollect.

"*Q.* Not that you could identify as lights of an approaching automobile?

"*A.* No.

"*Q.* Did you at any time see a light which you now understand was from the Knarian car?

"*A.* Yes, I did.

"*Q.* And what did you see?

"*A.* I merely saw a flash of light. Apparently, it was near the trailers or near these flares. It went across from the north to the south.

"*Q.* You saw a flash of light that went across from the north to the south?

"*A.* Yes. What I saw was what I thought was 1 light. At no time did I see 2 lights.

"*Q.* But you did see a light which seemed to be turning from the north to the south?

"*A.* Yes, like a flashlight in your hand.

"*Q.* And at that time did you form any opinion of what it was?

"*A.* A flashlight.

"*Q.* You thought it was a flashlight?

"*A.* Yes. * * *

"*Q.* Now, at the time that you saw that light, which appeared to you to be a flashlight, did you continue the location of the trailers at about that same speed of 30, 35 miles an hour?

"*A.* I would say I slowed up more at that time. I don't know exactly what speed I was going at the time I saw the flash of light but when I did see that I did slow up after that also. * * *

"*Q.* Have you any idea as to what your lowest speed was prior to the accident?

"*A.* I would expect probably 30 to 35.

"*Q.* Then, would you say when you first took your foot off the accelerator when you came in sight of the flares that your car did not at that time slow to the lowest rate?

"*A.* No, I would say it hadn't."

The cross examination of defendant follows in part:

"*Q.* When did you first commence to slow, sir?

"*A.* When the flares came into vision.

"*Q.* And to what extent was it? Was it a full withdrawal of your foot from the accelerator?

"*A.* No, I would say no. I was some distance from the flares at that time.

"*Q.* Is it possible that you might have continued on at the same general rate of speed?

"*A.* Probably 40, 45. It was just a gradual slowdown.

"*Q.* What did you testify to in response to Mr. McAuliffe's question as to what you did when you saw the flashlight?

"*A.* I slowed down then.

"*Q.* And how did you slow down this time?

"*A.* I took all of the acceleration from the car.

"*Q.* You did?

"*A.* Yes.

"*Q.* That time you removed your foot completely?

"*A.* Yes.

"*Q.* And that's when you saw the flashlight?

"*A.* Yes.

"*Q.* And at that time you could have been 300 feet or less from the trailers?

"*A.* Yes.

"*Q.* When you removed your foot completely from the gas station [pedal ?], did that cause your car to perceptibly cease its forward motion?

"*A.* No.

"*Q.* It didn't?

"*A.* No.

"*Q.* Doesn't it usually do that when you suddenly withdraw acceleration?

"*A.* It's not sudden by any means. It's an automatic transmission. * * *

"*Q.* Was there, when removing your foot completely from the accelerator, a sudden cessation in the forward motion of your vehicle?

"*A.* Well, normal.

"*Q.* That's what I want to know, what was normal to you?

"*A.* I wouldn't know how to answer that, sir.

"*Q.* But that was the point at which you completely removed your foot from the accelerator?
"*A.* Yes, sir.
"*Q.* Upon sight of the flashlight?
"*A.* Yes.
"*Q.* What effect did it have in your car?
"*A.* The car? * * *
"*Q.* But you know what you felt?
"*A.* No, not at that time.
"*Q.* Now, do you know what that caused to your speed?
"*A.* Do I know what?
"*Q.* After having removed your foot completely from the accelerator, what did that do to the speed of your automobile?
"*A.* I don't know.
"*Q.* You don't know how fast it was going then?
"*A.* From then on, no. I never reaccelerated then after that, though.
"*Q.* Then you don't know how fast your car was going from the time you removed your foot from the accelerator?
"*A.* No, I had other things to watch.
"*Q.* Did you tell Mr. McAuliffe you were going 30, 35 mile an hour?
"*A.* Approximately 30, 35 mile an hour, yes. * * *
"*Q.* Do you or don't you know?
"*A.* I don't know."

Defendant's wife was riding in the front seat between defendant and Mr. Castle, and when called as a witness in defendant's behalf testified that she noticed the flares when they were quite a ways away and called attention to same, and "wondered what was the matter out front." When asked whether her husband slowed down after noticing the flares, she answered: "As we approached the flares he slowed down." On cross examination she admitted that when she had been questioned previously under oath as to what her husband did after she saw the

flares and commented on them that she answered: "Nothing, as far as I could truthfully say. I wouldn't say that he slowed up or applied his brakes, either. I don't—he may have taken his foot off the accelerator, I don't know." She testified that she did not see the lights of the approaching automobile, did not see a light coming around the flares, and did not see the truck until it was "right in front of us * * * only the moment before we hit it."

Mrs. Charlotte Castle and 3 girls were riding in the back seat. Mrs. Castle testified that she paid no attention to the road and first realized there was danger when she looked up and saw the truck immediately in front of their car.

The 3 girls in the back seat testified as follows:

Judith Ann Smith: Heard Mrs. Fisk say, "Bill, look out" and she looked up and the truck was "right across in front of us"; hit the truck immediately after that; had not noticed anything prior to that time about the speed of the car in which she was riding.

Connie Bradley: Riding in rear seat, talking, and did not notice the flares; heard Mrs. Fisk say " 'Bill,' or something like that" and looked up and saw the "dark object in front of us"; that at that moment she felt a sensation that the driver had taken his foot off the accelerator.

Kaye Lynn Mikle: Riding in the back seat and paying no attention to the road until "I heard somebody say something, and I can't remember exactly what it was, to the effect that there was a truck ahead of us"; that she looked up and the truck was in front of us and we hit it within a second.

Officer Charles E. Spawr testified that he questioned defendant at the scene of the accident as to what occurred and he said: "From my accident report, I would say that he was going 50 mile per hour, proceeding west on M-43 and observing this other

vehicle, the 1955 Chevrolet pickup, he had applied his brakes and was skidding just prior to the accident, impact."

The court in its instructions to the jury briefly, but properly, outlined plaintiff's and defendant's positions as follows:

"As to defendant Fisk, the plaintiff claims defendant Fisk was negligent, driving at a rate of speed that was excessive under the conditions existing immediately before the collision; that defendant Fisk did not keep a proper lookout of conditions existing on the highway, failed to apply his brakes or slow his motor vehicle or turn to the right to avoid a collision and that these duties were within the power of defendant Fisk to do. For these damages, the plaintiff claims this, that the defendants are guilty of negligence and that their negligence are a proximate cause of the collision and the damages to the plaintiff. * * *

"The defendant denies that he was driving at an improper or excessive rate of speed and defendant contends that he had his car under control at all times until the collision, and he maintains he was keeping a lookout to see what was on the road or in his lane of traffic, and the defendant contends—denies he was guilty of any negligence, and he maintains the impact between the automobile in which the plaintiff was a passenger and defendant Fisk's automobile took place on his, the defendant's, side of the road."

The court warned the jury that the fact "there was an accident and the plaintiff was injured, standing alone does not entitle the plaintiff to damages"; that the burden was upon plaintiff to prove defendant's negligence, and that said negligence was the proximate cause of the accident.

The court clearly defined "proximate cause" stating it must be "the real cause, the actual cause, no cause intervening to assist in bringing the injury

about. In order to constitute proximate cause, it must appear that the accident was the natural and proper consequence of the negligent or wrongful act of the defendants, or either of them, and that it should have been foreseen by them in the light of the attending circumstances."

The court instructed on negligence as follows:

"Now, I have spoken of negligence. The declaration, the suit brought by the plaintiff is based upon allegations of negligence. I shall define that for you. By negligence is meant the doing or omitting to do a thing which a reasonably prudent person would not have done or would not have omitted to do under like or similar circumstances. It has been defined as a failure to observe for the protection of others such care, precaution and vigilance as the circumstances justly demand and the want of which causes the injury."

The court instructed the jury in regard to assured clear distance ahead and sudden emergency, as follows:

"Now, we have in Michigan a motor vehicle code which defines, which I might call the rule of the road, and some of the motor vehicle provisions are applicable in this case and I will read some of them to you.

" 'Any person driving a [motor] vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured, clear distance ahead.'*

"Now, the assured clear distance ahead means that space in the direction of moving wherein objects can

* CLS 1956, § 257.627, as amended by PA 1957, No 190 (Stat Ann 1957 Cum Supp § 9.2327).—REPORTER.

be seen by the driver and that part of such space as can be traveled by the vehicle under the circumstances existing with reasonable safety to persons and property. It is not enough that the driver be able to begin to stop within the range of his vision or that he use his diligence to stop after discerning an object. The law makes no allowance for delays in action. He must upon discovering an object perform the manual acts necessary to avoid striking such object. The assured clear distance ahead is limited to that traveled portion of the highway that can be seen and observed by the operator of the vehicle and if the same is limited by a brow of a hill or curve or by darkness, then such assured clear distance ahead extends to such limit of vision. Any person who operates a motor vehicle at such rate of speed that same cannot be stopped within the assured clear distance ahead is guilty of negligence as a matter of law.

"Every person operating an automobile must use that degree of care which a reasonably prudent person with ordinary experience would exercise under the same or similar conditions. He or she is bound to exercise care in proportion to the dangers and risks of the highway, commensurate to the dangers naturally incident to the use of such vehicle. In some situations greater care is required than in other situations and a person is required to use such care as is commensurate with the circumstances and conditions, having in mind the weather conditions, time of day or night, the frequency or infrequency of travel of traffic on the highway, and all the surrounding circumstances and conditions attending the time and place of the accident. He is obliged to take notice of the conditions before him and if it is apparent by reason of some particular method or procedure there may be risk or danger, it is his duty to adopt some safer method if with care and prudence he may do so. He may meet perils at any point of the street and he must keep a proper lookout for them and keep his machine under such con-

trol which will enable him to avoid a collision with any other person, use proper care and caution. * * *

"The defendant Fisk in his defense claims under the rule relating to what we speak of as an emergency. An emergency is a sudden and unexpected happening that cannot be reasonably anticipated. A sudden emergency, which is brought on by negligence is a part of the negligence which produced the emergency and such emergency does not relieve the negligent driver who brought on the emergency by his negligence from responsibility therefor. When one is required to act suddenly in the face of imminent danger, the law does not require him to exercise the same degree of care as if he had had time for deliberation and full exercise of judgment, and under such circumstances, he is not required to exercise the care which on careful consideration of the circumstances after the accident it might appear he might have used to avoid the injury. If a person, through no fault on his part, is suddenly placed in a position of peril, the law makes allowance for fright, lack of judgment, excitement, provided the person invoking that rule is not guilty of negligence in placing himself in such a position of peril."

That the jury should apply the "reasonably prudent person" test in determining whether or not defendant was negligent, is further evident from the following excerpt from the court's instructions:

"Every person operating an automobile must use that degree of care which a reasonably prudent person with ordinary experience would exercise under the same or similar conditions."

The court instructed the jury in regard to the duty of looking ahead and observing, as follows:

"You are instructed that it is the duty of drivers of cars to look ahead and see all persons, vehicles, or other obstructions in the line of his vision, and in case of an accident, he will be conclusively presumed to have seen what he should have seen and

that he could have seen in the proper performance and discharge of this duty."

This instruction should have held defendant responsible for seeing that which a reasonably prudent person, exercising due care, should have seen. We do not believe, however, that this instruction was so misleading as to constitute reversible error considering the entire charge, and, particularly, the charge that "every person operating an automobile must use that degree of care which a reasonably prudent person with ordinary experience would exercise under the same or similar conditions."

Appellant claims the court should not have instructed as to the assured clear distance ahead rule because "this rule has no application upon the facts in the instant case."

The facts in the instant case justified the court in instructing on the assured clear distance doctrine or rule. We have considered all of appellant's claimed errors in regard to the court's instructions and find no reversible error.

The court instructed the jury: "It's not for the court to determine or even indicate any opinion concerning the facts in this case. This is solely in the field and the duty of the jury. The credibility of the witnesses is a matter entirely for you to decide." The record discloses that the court was presented with evidence that required a jury verdict; that the court did not invade the province of the jury; that the jury was properly instructed, and the verdict was not contrary to law or the great weight of the evidence.

Affirmed. Costs to appellee.

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

In re LANGLOIS ESTATE.

1. WILLS—UNDUE INFLUENCE—ACTS OF KINDNESS—OPPORTUNITY.

   Undue influence sufficient to vitiate the will of a mentally competent testator may not be inferred from acts of kindness or from existence of opportunity, but must be proved.

2. SAME—UNDUE INFLUENCE.

   Influences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution, although such will would not have been made but for such influence, so long as the testator's choice is his own and not that of another; that influence, to avoid a will, must be such as prevented testator from doing as he pleased with his property.

3. SAME—DISINHERITANCE OF ADULT CHILDREN.

   Claim of contestants, testator's children, that jury had no particular reason to infer it was natural for him to disinherit them and leave virtually his entire estate to woman with whom he had lived adulterously off and on and that his relations with his children were always cordial *held*, untenable, where there was no direct evidence that his relation with proponent was adulterous and testator had made provision in his insurance policies for his children who were adults of middle age living with their families in their own homes.

REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills §§ 360, 387, 388.
[2] 57 Am Jur, Wills § 361.
[3] 57 Am Jur, Wills §§ 445–447.
[4] 57 Am Jur, Wills § 435.
[5] 57 Am Jur, Wills § 453.

4. SAME—UNDUE INFLUENCE—EVIDENCE—SUSPICION.
Undue influence may be shown by indirect and circumstantial evidence, but it must be evidence of probative force beyond mere suspicion.

5. SAME—UNDUE INFLUENCE—EVIDENCE.
Record in will contest *held,* devoid of testimony that would justify submitting to a jury the question of undue influence by proponent to whom the bulk of estate had been left under will disinheriting testator's middle-aged children.

Appeal from Muskegon; Fox (Noel P.), J. Submitted October 5, 1960. (Docket No. 22, Calendar No. 48,423.) Decided December 1, 1960.

In the matter of the estate of Archie Langlois, deceased, Ann Forton presented will for probate. Objections were filed by deceased's children, Melvin T. Langlois, Fern Balock, and Anna Esdale. Contest resulted in special findings of mental competency and absence of fraud, but a special finding of undue influence. Verdict and judgment of disallowance. Plaintiff proponent appeals. Reversed and remanded with order to admit will to probate.

Smedley & Spaniola, for plaintiffs.

John S. White, for defendants.

KELLY, J. Proponent of the will requested submission of the following special questions:

"1. Was Archie Langlois mentally incompetent to make a will on August 30, 1957?"

"2. Was the signature of Archie Langlois obtained through fraud?"

"3. Was the will of Archie Langlois the result of undue influence?"

The jury answered questions 1 and 2 with a "No" and answered "Yes" to question 3 and, also, found

that the writing purporting to be the last will and testament of Archie Langlois is not in fact and does not constitute the last will and testament of said deceased.

Proponent's motion for judgment notwithstanding verdict was denied, and judgment was entered that "said instrument be not allowed as the last will and testament of Archie Langlois, deceased."

Appellant claims: (1) The court should have taken from the jury the question of undue influence; and (2) The special finding of the jury as to undue influence was contrary to the evidence.

Langlois was hospitalized on July 27, 1957, and remained in the hospital until August 30, 1957, the date he executed his will. He died the following November 23d. He was 68 years of age at time of death. Referring to the hospitalization period (July 27th to August 30th), appellees state: "The key facts from which contestants infer undue influence occur during this period."

In *In re Carlson's Estate,* 218 Mich 262, we dealt with a case where the jury returned a verdict against the will and answered special questions, finding that testatrix was mentally competent but that the will was the result of undue influence. On motion, proponent had judgment *non obstante veredicto.* In affirming the court, we said (p 264):

"The verdict of the jury may be considered as ending the contest as to the mental competency of the testatrix, and we will consider the question of whether there was evidence to go to the jury upon the issue of undue influence, and upon this we must have in mind the fact that the testatrix was mentally competent to make the will."

Appellees concede:

"The only issue in this case is sufficiency of evidence to create a jury question of undue influence

and to sustain the jury's verdict vitiating the will on that ground. Contestants recognize that will contests often tempt juries to remake wills in the teeth of a testator's actual intent. Contestants concede a careful analysis of evidence is necessary. Nevertheless, the test should be the same for all cases on appeal from denial of judgment notwithstanding the jury verdict."

The record sustains the conclusion that the will was contested on the grounds of mental incompetency. The jury determined that testator was mentally competent and appellant and proponent claims: "An attack on a will on the ground of mental incapacity negatives and dispenses with the question of undue influence."

Appellees, however, state:

"Contestants, on the other hand, say that evidence of Langlois' mental condition is highly relevant on the issue of undue influence. * * * *It is reasonable to say that less evidence of undue influence should be required on this appeal in view of the unusual susceptibility of the testator.*"

Appellant states: "Sixteen witnesses and not a word of force, coercion, et cetera, or anything that could be accepted as evidence of undue influence at any time, before, after, or at the *time* the will was executed, which is the *time* that counts."

Appellees endeavor to sustain the jury's decision of undue influence by opportunity, as evidenced by their statement that:

"Certainly Ann Forton had the opportunity to influence Langlois. She visited him 3 times a day for about 6 weeks in Mercy Hospital. Her son, Jim, was there about every week day. * * *

"Over a period of years Langlois lived with Ann Forton from 1/3 to 1/2 the time. The jury could infer this relationship was adulterous."

In this regard there was no direct evidence which would sustain the fact that the relationship was adulterous.

This Court has definitely established that undue influence may not be inferred from acts of kindness —it must be proved. *In re Lacroix's Estate,* 265 Mich 59. Also, we dealt with the question of opportunity in *In re Hayes' Estate,* 255 Mich 338, and in *In re Jennings' Estate,* 335 Mich 241.

In the *Hayes Case, supra,* Hayes willed his estate in excess of $190,000, to proponent, R. Ellen Green, "to whom he referred in his will as 'my friend, who has lived in my home for many years.'" The Court said (pp 343, 345):

"A careful review of this record does not disclose any other testimony tending to establish contestants' claims of undue influence or delusions. The most that can be said of this record is that by reason of their close relationship in the same household proponent had the opportunity to attempt to exercise any undue influence. This is not sufficient. *In re Carlson's Estate,* 218 Mich 262; *Hoagland* v. *Reedy,* 237 Mich 691. * * *

"Appellants stress the fact that Miss Green accompanied testator to the attorney's office. We think this circumstance is of no importance. For years these two seem to have been quite constantly together."

We quote from the *Jennings Case, supra* (pp 247, 248), as follows:

"Influences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution, although such will would

not have been made but for such influence, so long as the testator's choice is his own and not that of another; that influence, to avoid a will, must be such as prevented testator from doing as he pleased with his property. Applying these tests, we find nothing in the record to establish that the will in question was the result of undue influence on defendant's part or that it did not represent the free judgment and discretion of testator in the disposition of his property."

Appellees endeavor to sustain undue influence by stating:

"There is no particular reason for the jury to infer it was 'natural' for Archie Langlois to disinherit his children, the contestants, and leave virtually his entire estate to Ann Forton, with whom he had lived adulterously off and on. Langlois' relation with his children was always cordial."

Appellees' claim is not tenable. Testator made provision for his children as beneficiaries in his insurance policies. Testator's children were adults of middle age, living with their families in their own homes, and the following from our decision in *In re Bulthuis' Estate,* 232 Mich 129, 139, is applicable:

"Deceased was under no legal or moral obligations to leave any of her property to any one of the parties to this action. They were adults of middle age, living their own lives with their families in their own homes, apparently in comfortable circumstances. No ill health or other misfortunes are shown to have befallen any of them especially appealing to her bounty. She could make such disposition of it as she saw fit. She had the legal right to bestow her bounty where and as she desired, to favorites in her own family or to others. No question is raised as to her mental competency to do so. The only direct evidence of any effort by Henry to influence her in making her will contrary to her wishes was dis-

regarded by her when she made this will while living in his home. The circumstances shown do not in our opinion have inferential probative force beyond mere suspicion. They furnish no legal basis for an ultimate inference that deceased's free agency was destroyed to the point where she was under such restraint and compulsion that it can be found by a preponderance of evidence this will was not dictated by her as she of her own will concluded she desired it to be."

Appellees endeavor (we believe desperately) to sustain the jury's verdict of undue influence by stating:

"With respect to the actual preparation and execution of the will on August 30, 1957 (or before), the jury could have disbelieved much of the testimony of Ann Forton and Attorney Linck—in fact, could have inferred from their testimony that Ann Forton dominated Langlois and forced her will upon the testator, something attempted to be hidden on trial of the case. * * *

"The first important point with respect to credibility on this appeal is the great divergence between the testimony of most other witnesses and that of Ann Forton and Linck on the subject of Langlois' mental condition at Mercy Hospital. Although Ann Forton was with Langlois much of each day and Linck was there several times, neither admitted any mental infirmity in Archie Langlois."

Nothing in this record sustains appellees' conclusion, which is based only on suspicion rather than fact. In *In re Fay's Estate,* 197 Mich 675, 686, 687, we stated:

"Unquestionably undue influence may be shown by indirect and circumstantial evidence, but it must be evidence of probative force beyond mere suspicion, and we do not think it can be fairly said as a matter of law that the incidents urged raise inferences that deceased's free agency was destroyed and he acted

under such coercion, compulsion, or constraint that the will did not truly proceed from him according to his wishes, which is the test of undue influence. *In re Williams' Estate,* 185 Mich 97.

"As before intimated, it cannot be said that testator's disposition of his property was so contrary to natural justice as to raise the inference it was against his own judgment and desire. If of testamentary capacity, he had absolute right to dispose of his estate as he chose, even to the total exclusion of his heirs or to give it to any one of them whom he preferred."

The record is devoid of testimony that would justify submitting to a jury the question of undue influence. Appellant's request that: "The judgment of the circuit court should be reversed, and case remanded for entry of judgment for proponents, sustaining the will in its entirety, and for remand thereafter to the probate court with directions to admit the will to probate" is granted.

Reversed. Costs to appellant.

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

SCHIMKE *v.* SCOTT.

1. FRAUD—DEPOSITION.

Reception in evidence of deposition of person to whom defendants had related details as to how they had defrauded plaintiff when they sold her their business of making articles from plaster and distributorship of certain paints *held,* not reversible error in suit for rescission and recovery of sum paid therefor.

2. SAME—SALE OF BUSINESS—COURT'S COMMENT ON DEFENDANT HUSBAND'S FAILURE TO TAKE STAND.

Record in suit to rescind contract for sale of business of making articles from plaster and distributorship of certain paints *held,* to sustain trial court's finding that plaintiff had clearly established defendants, husband and wife, had fraudulently induced plaintiff to purchase the business and that trial court's comments relative to the defendant husband's failure to testify either to deny statements attributed to him or to corroborate his wife's testimony were merely an additional reason for finding for plaintiff.

3. SAME—RESTORATION—ALLOWANCE FOR NONRESTORED ITEMS.

The right to rescind a contract because it was fraudulently induced required the defrauded party to restore what he or she has received, with allowance for any part that cannot be restored.

Appeal from Muskegon; Beers (Henry L.), J. Submitted October 12, 1960. (Docket No. 75, Calendar No. 48,420.) Decided December 1, 1960.

Bill by Margaret Schimke against James W. Scott and Ruth Scott, doing business as Scott's Plaster-

REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur, Depositions § 123.
[2] 24 Am Jur, Fraud and Deceit § 279.
[3] 46 Am Jur, Sales § 775.

craft, to rescind sale of business and recover purchase price paid therefor. Decree for plaintiff. Defendants appeal. Affirmed.

Alexis J. Rogoski and *Robert Bunker Rogoski,* for plaintiff.

Schmidt, Smith, Howlett & Halliday, for defendants.

KELLY, J. Plaintiff filed her bill of complaint (April 24, 1956) to rescind a contract for the sale of a business and to recover money paid.

The circuit judge for the county of Muskegon entered a decree (August 10, 1959) finding that "plaintiff has clearly established by the evidence that the defendants made false and fraudulent representations to induce the plaintiff to purchase from them the business known as 'Scott's Plastercraft' " and that plaintiff was entitled to recover $5,180 from defendants.

In November, 1954, defendants (husband and wife) were engaged, at Coopersville, Michigan, in the business of making certain articles from plaster, called plastercraft, under the business name of "Scott's Plastercraft," and were the distributors of "Helen's Rainbow Paints."

Plaintiff testified she went to defendants' home to purchase plastercraft items for a church bazaar and that defendant Ruth Scott informed her that ill health required her to dispose of the business and move to California; that she had a volume of business as she was known all over the State of Michigan; that for $5,000 she would sell to plaintiff the fixtures, molds, tools, supplies, trade secrets, list of customers, and everything belonging to and being the entire business of Scott's Plastercraft.

Plaintiff testified that on November 15, 1954 (1–1/2 weeks after her first visit), she went back to defendants' home and made the initial payment of $3,500; that defendant Ruth Scott informed her that both her husband and herself had agreed that plaintiff had lost $600 worth of business by her delay in consummating the purchase; that at the time plaintiff made the payment of $3,500 she remarked that she would have to make a go of the business because of the size of her investment and defendant Ruth Scott replied, " 'Oh, you will have no one competing with you.' "

Plaintiff made the final payment of $1,500 on November 26, 1954, and received from defendants personal property and equipment represented to have a value of $800, the Scotts' secret formula for making plastercraft, and what purported to be a complete list of customers.

Plaintiff started her suit for fraud after reading an article in the Muskegon Chronicle (April 5, 1956) that the defendants, Mr. and Mrs. Scott, were manufacturing plaster figurines and other novelties in their new building north of Coopersville, that "they manufacture 1,000 articles themselves, and also handle another 500 from outside sources" and that the business was a continuation of the business defendants had started 12 years before in their home.

Plaintiff introduced testimony to sustain her allegations of fraud in the bill of complaint that:

"The defendants had no intention of discontinuing the business of Scott's Plastercraft by reason of the ill health of the defendant, Ruth Scott, or for any other reason; that the business and assets of Scott's Plastercraft had little, if any, intrinsic value, and any value to a purchaser thereof would be dependent upon defendant's turning over to the purchaser the trade secrets, lists of customers, discontinuing business, and actually referring to the purchaser

prospective purchasers of the products of the business; that the defendants actually turned over to the plaintiff only a partial list of the customers of the business, and withheld and concealed from plaintiff other assets of the business to which she became entitled by the purchase agreement; that defendants never actually discontinued such business except for a brief period while they were on a trip to California; that defendants never intended to refer to plaintiff any of their customers, or to do anything to promote plaintiff's business, and that defendants never referred any of their customers to plaintiff, but, as plaintiff is informed and believes, immediately after their return from the aforesaid trip, resumed business in the same manner and even to a greater extent with their former customers; and that defendants made no effort to have the plaintiff made the distributing agent for Helen's Rainbow Paints, and never intended to make any such effort."

Defendants denied all of plaintiff's claims of fraud and claimed that the business known as Scott's Plastercraft was the sole and separate business of defendant Ruth Scott and that the business of distributing paint for Helen's Rainbow Paints was the sole and separate business of defendant James Scott; that James Scott was present while some of the negotiations were transpiring between plaintiff and defendant Ruth Scott but did not participate in such negotiations; that defendant Ruth Scott did not encourage plaintiff to purchase the business but, in fact, attempted to discourage her and deliberately set the price at $5,000 thinking plaintiff would refuse to proceed further; that there was no effort made to sell the business "but that plaintiff negotiated to be taught the skill of defendant Ruth Scott in preparing figurines, plaques and novelties from plaster, to acquire molds and equipment which were used at defendants' home to conduct the business and to se-

cure access to certain of defendant Ruth Scott's customers."

Appellants present the question: "Was the deposition of Helen Pfleider properly received as evidence in this matter?" and call attention to the court's reference to this deposition in its opinion as follows:

"The defendants' contention is further refuted by the testimony of one Helen Pfleider, whose deposition is on file and was introduced in evidence. Witness Pfleider is a manufacturer of paints used in decorating the merchandise sold by the defendants. She testifies that very shortly following this sale she had a booth at a national hobby show, that both defendants occupied this booth with her during the show, and that they discussed the sale they had just made of their business to the plaintiff. She testifies that Mr. Scott and Mrs. Scott told her that while they had sold the business to the plaintiff and had promised not to continue in the business, that they nevertheless intended to do so, and she states that they were elated over the deal they had made and also the fact that they had apparently misinformed the plaintiff as to the proper method of making these products. I will quote only one answer in the deposition as follows:

"'While they told us they had promised not to make figurines, they were continually taking orders during this show, showing samples of their plaster and taking orders for them. This they did in our booth at this national trade show very openly. Mr. and Mrs. Scott told my husband and I and our daughter, Marlys, that Mrs. Schimke had come with $3,000 cash and they had just kept on insisting until they got $5,000 cash for the business and Mr. Scott said he hadn't turned over all the customers to her as he had promised and he expected to continue doing a good business. I think the reason for his bragging was that he wanted to assure us that he would continue with a good figurine business thus enabling him to sell lots of our paints.'"

Appellants claim that the deposition was so filled with incompetent matter, improper conclusions, baseless accusations, and deliberate falsehood that it had no probative value, and further state:

"The written interrogatories taken of Helen Pfleider had little, if any, more probative value than would an affidavit. As a practical matter, it was impossible for counsel for the defendants to anticipate what the responses of the witness might be. It was the duty of the plaintiff to reduce the deposition to proper form at the time of submission of it to the court for consideration. It was not the duty of the defendants, when faced by a glorified affidavit, to go to the expense of taking a more formal deposition to counteract the effect of the affidavit."

We see no reversible error in the introduction in evidence of the deposition of Helen Pfleider.

Appellants claim the court erred in considering the failure of defendant James Scott to testify, as evidenced by the following from the court's opinion:

"It seems to me significant that during the entire trial of this case the defendant Mr. Scott sat at the counsel table and assisted counsel in the trial of this case, that many of the allegations of fraud relating to conversations had between the parties, to statements made by both Mr. and Mrs. Scott, and other testimony relating to the entire transaction include Mr. Scott as an active participant yet he did not take the witness stand to testify either to deny any of the statements attributed to him or to corroborate his wife's testimony. No testimony or evidence was offered that Mr. Scott is in ill health and that taking the witness stand would be too much of a physical strain for him or anything of that kind. No excuse for his not testifying is offered. The only legitimate inference I can draw therefrom is that his failure to testify is because he could not truthfully deny the charges plaintiff makes."

Defendants claim there was adequate explanation in the record for not placing Mr. Scott on the stand; that if plaintiff's counsel was so certain that Mr. Scott was a participant in the so-called fraud he could have called Mr. Scott to the stand as his own witness, and "furthermore, in making his analysis, the trial court has obviously overlooked the rule of law that the burden is upon the plaintiff to prove her case by a preponderance of the evidence."

The record sustains the court's finding "that plaintiff has clearly established by the evidence that the defendants made false and fraudulent representations to induce the plaintiff to purchase", and we conclude that the comments as regards defendant James Scott's failure to testify were merely an additional reason for the finding for the plaintiff.

Appellants also question the decree because plaintiff did not and could not place defendants *in statu quo* before seeking to rescind the contract. The decree provided:

"Plaintiff is in a position to place the defendants *in statu quo* except as to her inability to return to them certain articles which were broken in transit and certain other articles which were sold by plaintiff prior to her discovery of the fraud, and that an allowance of $800 therefor would be more than ample; that defendants jointly received from plaintiff the sum of $5,000 and jointly they should be required to return that amount to her less the aforesaid sum of $800; and that as of the date hereof, plaintiff is entitled to recover from the defendants the sum of $5,180, being the sum of $4,200 with interest thereon at the rate of 5% per annum from the date upon which plaintiff paid to defendants the purchase price of the business."

The right to rescind requires the defrauded party to restore what he or she has received, with allowance for any part that cannot be restored. See *Kundel*

v. *Portz,* 301 Mich 195, and *Zadel* v. *Simon,* 221 Mich. 180. Also *Richardson* v. *Messina,* 361 Mich 364, 369.

We find no reason for reversing the decree. Affirmed, with costs to appellee.

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

In re BEITER ESTATE.

HAMPTON *v.* PEARSALL.

1. WILLS—MENTAL COMPETENCY.
   A person has competency to make a will where he has sufficient mental capacity to understand the extent and value of his property, persons who are the natural objects of his bounty, how he wants to dispose of it, and to keep those facts in his mind long enough to dictate his will without prompting from others.

2. SAME—MENTAL COMPETENCY—EXECUTION BY MARK.
   Evidence presented in a will contest *held,* to have justified jury's verdict upholding the will in that testatrix had sufficient mental capacity to make it, where evidence shows she had consulted with her attorney before experiencing the first of several strokes resulting in loss of speech and paralysis of her right side, the will was drawn in accordance with her instructions and, aside from specific bequests to friends, left a trust for her incompetent son; and while it was executed after she became ill, the attorney obtained the opinion of her physician and a neurologist that she was then mentally competent and after it was ascertained from her when will was read to her that certain changes were necessary and were made, her assent indicated by a nod of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills § 64.
[2] 57 Am Jur, Wills § 134.

the head, the will was executed by mark with the assistance of her nurse.

Appeal from Oakland; Adams (Clark J.), J. Submitted October 4, 1960. (Docket No. 6, Calendar No. 47,923.) Decided December 1, 1960.

In the matter of the estate of Mary E. Beiter, deceased, Verne C. Hampton, the proposed executor, presented will for probate upon which contest was entered by Adolphus O. Pearsall and Milton F. Cooney, coguardian of Philip Danielson, mentally incompetent. Verdict and judgment admitting will to probate. Defendant contestants appeal. Affirmed.

Verne C. Hampton, named executor, plaintiff.

Milton F. Cooney, for defendants.

SMITH, J. This is a will contest. It is asserted that, as a matter of law, the testatrix was not possessed of the mental capacity to execute a valid will.

The charge made arises out of Mrs. Beiter's (the testatrix's) condition at the time of execution of the will in July of 1953. She had suffered a severe stroke in November of 1952. Some 3 months later she suffered another and had remained under the care of private nurses in St. Joseph's Hospital, in Pontiac, until she died in January of 1956.

About a month prior to her first stroke, however, she had discussed with an attorney of Pontiac, Mr. Hampton, the provisions of her will. Among other provisions, she wanted her incompetent son to be well cared for. She wanted certain war bonds to go to certain people. Her fur coat was to go to one friend, her sewing machine to another. A trust (she did not use that word) was to be created for the care of her son, and the names of trustees were dis-

cussed. Mr. Hampton was to handle the estate. Other points were discussed but it is unnecessary to recite them here. Obviously the lady was aware of the problems confronting her and sought an orderly arrangement of her affairs. Two additional conferences, in fact, were had with her counsel, Mr. Hampton.

The will, however, was not drawn nor presented to her until after her illness, on July 30, 1953, to be exact. At this time she was partially paralyzed. She was diagnosed as having suffered a "cerebral hemorrhage with right hemiplegia." A portion of the brain had been damaged, or blocked off, by the hemorrhage, causing a paralysis of the right side of her body and the left side of her face, as well as a loss of ability to speak, all of which conditions persisted until her death. She was unable to speak words, except perhaps "yes" and "no," and she made her wants known by responding affirmatively or negatively (a nod or shake of head and making "this sound that sounded like 'yes' or 'no'") to questions framed so as to elicit such a response.

Mr. Hampton prepared her will in accordance with her wishes as previously expressed to him. In view of her condition he took considerable care in respect of its execution. Her regular physician was asked if she were competent. He replied, "I told him [Mr. Hampton] that I thought she was, but rather than trust to my own judgment, I thought perhaps we should call in a neurologist, one who is familiar with the results of this sort of illness which she had and get his opinion as to whether or not he felt she was mentally competent." Accordingly Dr. Gates, a specialist, was consulted, and it was his opinion "that she could well understand what she was proposing to do."

The will, accordingly, was prepared in accordance with her previously expressed wishes and read to

her in the presence of another Pontiac attorney and 2 nurses. At 2 points in the reading of the will, Mrs. Beiter shook her head. She was dissatisfied with certain bequests. After questioning to ascertain her wishes, certain changes were made to which she assented. Mrs. Stewart (one of the nurses) then placed a pen in her hand and guided it to form an "X". It is this will, so executed, that is challenged by the coguardians of the incompetent son. The will contest, tried before court and jury in the Oakland county circuit court, resulted in a verdict sustaining the will.

Appellants' attack centers upon the proposition that the testatrix could not (at the time of the execution of the will) "express her thoughts concerning a will; and further, could not and did not dictate her will without prompting from others." Reliance is placed upon *Spratt* v. *Spratt,* 76 Mich 384, where this language of "prompting" and "dictating" is found. There the court, in speaking of the testator, said that he had sufficient capacity to make a will if, at the time he executed the will, he "had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep those facts in his mind long enough to dictate his will without prompting from others." *Id.* at 391, 392.

All of this, as sound today as when written, in no way impeaches the validity of what was here done. The testatrix had, indeed, dictated the disposition of her property, making clear in a series of conferences just what she wanted done with it. And, so far as prompting is concerned, the record before us is clear that it was she, and not some other, who was doing the prompting at the time of the execution, haltingly and crudely, it is true, but nonetheless effectively. Our general rule as to competence was

well put in *In re Walker's Estate,* 270 Mich 33, 37, in these terms:

"In general the requisite is that the testator must at the time of making his will have sufficient mentality to enable him to know what property he possesses and of which he is making a testamentary disposition, to consider and know who are the natural objects of his bounty, and to understand what the disposition is that he is making of his property by his will."

We find nothing in the record indicating a lack of competence. Contestants' principal argument hinges on the allegation that Mrs. Beiter could not "dictate" her will, meaning, apparently, in the manner a businessman dictates a letter to his secretary. The law is not so narrow. What is required is no more than understanding and communication. Both were here present. Fluency is not the test.

The jury verdict was well justified on the record and the contestants' motions for directed verdict and new trial were properly denied. Affirmed. Costs to appellee.

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

FOTHERGILL *v.* McKAY PRESS.

1. FRAUDS, STATUTE OF—CONTRACT PERFORMABLE WITHIN A YEAR.
   An oral contract which may, according to its terms, be performed within a year, is not within the statute of frauds (CL 1948, § 566.132).

2. SAME—ORAL CONTRACT OF EMPLOYMENT—TERMINATION.
   An oral contract of employment, subject to termination by either party upon 6-months' notice, *held,* a contract performable within a year, hence, not within the statute of frauds, the permission to terminate being a part of the agreement itself (CL 1948, § 566.132).

3. SAME—ORAL CONTRACTS—MEMORANDUM.
   A memorandum of an oral contract upon performance of which the parties had previously entered is no less a memorandum satisfying the statute of frauds because it purports to be the complete proposed contract between the parties (CL 1948, § 566.132).

4. CONTRACTS—WAIVER.
   The waiver of a provision in a contract is a matter of intent.

5. SAME—REDELIVERY OF MEMORANDUM—WAIVER.
   Redelivery of memorandum of an oral contract of employment, executed by the employer and presented to the employee some year and a half after employment relation had been entered into *held,* waived by employer, where employee continued in

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REFERENCES FOR POINTS IN HEADNOTES

[1] 49 Am Jur, Statute of Frauds § 25.
Statute of frauds as applicable to contracts performable within one year. 129 ALR 534.
[2] 49 Am Jur, Statute of Frauds § 33.
[3] 49 Am Jur, Statute of Frauds § 321.
[4] 12 Am Jur, Contracts § 354.
[5] 12 Am Jur, Contracts § 355.

same duties for 2 years after memorandum was presented without anything having been said about his failure to make redelivery.

Appeal from Midland; Holbrook (Donald E.), J. Submitted June 7, 1960. (Docket No. 6, Calendar No. 48,171.) Decided December 1, 1960.

Action by Alfred J. Fothergill against McKay Press, a copartnership, for salary due on employment contract. Judgment for defendant at conclusion of plaintiff's proofs. Plaintiff appeals. Reversed and remanded.

Francis & Wetmore (*James W. Baker, John E. Riecker* and *Floyd E. Wetmore,* of counsel), for plaintiff.

Currie & Currie, for defendant.

BLACK, J. (*concurring*). In *Warner* v. *Texas & Pacific R. Co.* (1896), 164 US 418 (17 S Ct 147, 41 L ed 495), the supreme court had occasion to review generally the authoritative history of this particular provision of the statute of frauds.* The following conclusion was reached (pp 422, 423):

"It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

* CL 1948, § 566.132, subd (1) (Stat Ann 1953 Rev § 26.922, subd [1]).—REPORTER.

"The several States of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England."

Since submission of this case of Fothergill, Mr. Justice KAVANAGH has called attention to that line of Michigan cases, starting with *Smalley* v. *Mitchell* (1896), 110 Mich 650, which in steady seriation discloses Michigan's alignment with the foregoing settled construction of such statutory provision. *Smalley* states the rule this way (p 652):

"The mere fact that the contract may or may not be performed within the year does not bring it within the statute. The rule is that if, by any possibility, it is capable of being completed within a year, it is not within the statute, though the parties may have intended and thought it probable that it would extend over a longer period, and though it does so extend."*

I agree, then, solely on strength of Mr. Fothergill's actual right (as against defendant's motion for directed verdict) to recover for breach of a valid *oral* contract the parties agreed might be terminated on 6-months' notice, that the judgment of the circuit court should be reversed. There is more to be said, however, if we are to be fair to the trial judge.

This plaintiff did not urge below the true ground for his presently apparent right of recovery, that is, breach of an oral contract which, by its terms, was terminable at will of either party on the giving of notice of less than a year's time. Neither did he cite below (nor here for that matter) a single authority to the point of such right. Instead, plaintiff

* For our most recent quotation-applications of this rule see *Epstean* v. *Mintz*, 226 Mich 660, 667; *Caplis* v. *Monroe*, 228 Mich 586, 591; *Adolph* v. *Cookware Company of America*, 283 Mich 561, 568.

planted in the trial court (as here) his theory of recovery on affirmative answers to these questions:

"1. Did plaintiff's exhibit 1 satisfy the requirements of the statute of frauds, as a 'memorandum' of a contract, where the writing, signed by the defendant, was not delivered back to defendant with plaintiff's signature?

"The lower court answered 'No'.

"Plaintiff and appellant contends the answer should be 'Yes'.

"2. Did the contract of employment between plaintiff and defendant (as evidenced by plaintiff's exhibit 1) satisfy the requirement of mutuality?

"The lower court answered 'No'.

"Plaintiff and appellant contends the answer should be 'Yes'."*

Thus was Judge Holbrook left to ferret out and brief the right of plaintiff's case, and thus was he led to belief (as was the present writer on first impression of the case) that the rule of *Wilkinson* v. *Heavenrich,* 58 Mich 574 (55 Am Rep 708) called for holding that the agreement of the parties was wanting of mutuality in that Mr. Fothergill was never bound to do that which formed the consideration for defendant's promise.

Nevertheless, all this considered, it is clear that plaintiff did make out, *as against defendant's motion for directed verdict made at close of his proofs,* an apparent case for recovery of the amount he would have earned—during the orally and validly agreed termination period—had defendant given him the stipulated notice of termination. This put the de-

* The statement of "issues," appearing in the opinion of Mr. Justice SMITH, varies from this in that it includes subtopical quotations appearing in the body of plaintiff's brief. The above is a correct transcript of that which appears per Court Rule No 67 (1945) "on the first page" of plaintiff's brief.

fendant partnership to its pleaded defenses and required denial of its motion for peremptory verdict.

I concur in reversal and remand for new trial.

SMITH, J. In any case (such as this) where one man has worked for another in apparent harmony over a period of years, he who would resist further performance in accordance with the terms of the agreement they have lived under, or damages in lieu thereof, on the ground of noncompliance with the statute of frauds, has a heavy burden of persuasion to carry. We are not persuaded that it has been carried.

There is no need to re-state all of the facts. It is important, however, to note (according to the view of the testimony favorable to the plaintiff, against whom a motion for a "directed verdict" was granted) that plaintiff Fothergill originally worked for defendant under the terms of a verbal understanding reached in December of 1953. As plaintiff testified, "It was all understood verbally although it wasn't in writing." The understanding included an escape clause: Either party might terminate the relationship upon 6-months' notice. Fothergill testified: "I was coming to another country, I had my wife and family to think of, I thought I had a 6-month period, give me an opportunity to look for another job if worse came to worse." In March of 1955, Fothergill was tendered what was captioned an "Agreement." It purported on its face to be "in confirmation of a verbal agreement made in December, 1953, and in consideration of the mutual covenants herein." It contained the above described 6-months' termination clause. It had already been signed on behalf of McKay Press, and it was requested that after Fothergill had signed, and at his convenience, it be returned to them. Fothergill signed it, he testified, after about 3 weeks, but the

agreement, thus signed, was never returned to McKay, as requested, although the record is silent as to any insistence by McKay that it actually be returned to them or that they regarded its nondelivery as important.[1] The legality of Fothergill's discharge in 1957, in asserted violation of the 6-months' clause, is the issue presented. Defendant was successful below, as above indicated.

The appellant raises the following issues (accepted "for purposes of argument"[2] by appellee):

"1. Did plaintiff's exhibit 1 satisfy the requirements of the statute of frauds, as a 'memorandum' of a contract, where the writing, signed by the defendant, was not delivered back to defendant with plaintiff's signature? * * *

"(1) Was plaintiff's exhibit 1 a 'memorandum'? * * *

"(2) Did plaintiff's failure to sign the memorandum in the presence of defendant's manager impair the sufficiency of that writing as evidence of the 1953 employment contract? * * *

"(3) Did plaintiff's failure to deliver or return the memorandum to defendant destroy the memorandum's value as evidence of the 1953 employment contract?"

"2. Did the contract of employment between plaintiff and defendant, as evidenced by plaintiff's exhibit 1, satisfy the requirement of mutuality?"

The issue presented in this case is whether or not the contract of employment is enforceable. McKay

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[1] Fothergill described the situation in this way:

"I didn't think for one minute I couldn't depend on that contract. I didn't have to go any further with it. It was forgotten and it was never brought to the attention of Mr. Hopkins, or vice versa. He never asked me and I never brought it up either."

[2] McKay Press states the questions involved as follows:

"Defendant and appellee considers that the questions involved are—first, was there a valid oral agreement? and second, was there a valid written agreement? However, for purposes of argument, appellee accepts appellant's statement of questions involved and will discuss in that order."

Press says that it is for a 5-year term (with this view the trial court agreed)[3] and requires a note or memorandum thereof for enforceability, since it is not in writing. It denies that a valid note or memorandum exists. Fothergill, on the other hand, asserts that such note or memorandum is found in the "Agreement" signed by both parties.

Underlying the controversy, then, is this issue, as phrased to us by the appellee: Was the alleged con-

3 "*By the Court:* * * * Now, as to the oral agreement being possible of performance within 1 year, there are numerous cases which state an agreement to take care of a person for lifetime, or of an open-end lease cancelable by 6-months' notice, and other similar agreements, are possible of performance within the year and therefore not within the statute. But there is no Michigan case, as the court can find, on the point where a greater length period is mentioned than the 1-year period, when the cancelable notice or termination notice provides less than a year, whereby the Supreme Court has ruled that that is within the statute also. However, it would appear to the court that the same analogy should apply to a case of this kind of employment as would apply to a lease. A written lease for more than 1 year must be in writing. The court does not believe that the provision therein for cancelation by notice of less than 1-year's notice would carry it within the purview, or without the purview of the statute. 49 Am Jur, Statute of Frauds, § 33, pp 393, 394, states as follows:

"'It is the general rule that the fact that either of the parties may have an option to put an end to a contract within a year does not take it out of the operation of the statute if, independent of the exercise of such a power, the agreement cannot be performed within a year. The fact that the contract may be terminated or further performance rendered impossible does not take it out of the statute. To be discharged from liability under a contract is not to perform it; when once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than a year. Furthermore, it cannot be said that the agreement would be fully performed by its termination under the option, but rather that in such an event, the performance of the agreement was frustrated.' Then it goes on and says: 'Of course, if no definite time for the duration of the contract is fixed and it may be terminated at will or by a certain notice, which will permit of its termination within a year, it is not within the statute.' So, that is directly the court interpretation of the law as to a lease. In other words, if it is an open end, if it is an indeterminate period of time, possible of completion within the year, then it is without the statute, but if it is a period of time mentioned in the lease, or in the contract for employment of more than 1 year, then it cannot be completed within the year and the courts have construed it to mean that the contract has been frustrated by the act of one party, or the other party, legally within the terms of the agreement."

tract "herein declared upon * * * for a term of 5 years and not capable of complete performance within a period of 1 year, hence void under the statute of frauds"? Absent such issue the note or memorandum question does not arise. The validity of the oral agreement is basic to the positions of both parties, indeed, it is of the essence of the controversy itself.

This is the question that must first be faced by any court considering the note or memorandum issue. It was considered, and ruled upon, by the trial court and must and will be considered and ruled upon by such court upon remand. It cannot be avoided. It is implicit in the issues presented and we will consider it.

It is suggested to us that the case is controlled by *Wilkinson* v. *Heavenrich,* 58 Mich 574 (55 Am Rep 708). We cannot agree. The *Wilkinson Case* is completely inapplicable on its facts and thus without value as precedent. Wilkinson went to work under an attempted (but defective) bilateral written contract purporting to prescribe an unconditional 3-year term of employment. He, however, had made no such commitment. As the court put it (p 576): "Mr. Wilkinson was not bound to stay 3 years, and Heavenrich Bros. & Company could not be bound to keep him 3 years." In addition, no note or memorandum was ever executed by both parties. Here, on the other hand, the trier of the facts would be justified in finding that Fothergill went to work under an oral contract fully descriptive of the mutual duties and obligations of the parties, for a period of time terminable upon 6-months' notice by either party, expressive of which either a later written contract, or memorandum thereof, had been executed by both parties. The language quoted from *Wilkinson* has legal significance only in respect of the material facts concerning which it was uttered. It is law only as

to those facts. It cannot control decision here, however apt it may be within its proper context.

As we construe the trial court's opinion, it is not denied that an oral agreement had, in fact, been reached. The difficulty with the oral agreement was thought to be that it was offensive (as regards enforceability) to the statute of frauds. Upon the assumption that it was a 5-year contract of employment it was, of course, unless there was "some note or memorandum thereof * * * in writing and signed by the party to be charged therewith."[4] But we have noted the escape clause, providing for termination at any time upon 6-months' notice. Is a contract for a maximum of 5 years, but terminable by either party upon 6-months' notice, the same contract (respecting its term) as an unqualified, unconditional 5-year contract? If it is the former, it will be noted that this is not the situation where one of the parties is relieved of his duty of performance by operation of law, arising out of some contingency despite and independently of the terms of the agreement. Rather, in the words of the New York court,[5] the permission (to terminate) is a part of the agreement itself. "The contract could be performed in either of 2 ways: 1. By performance according to its terms without exercising the option. 2. By performance according to its terms until June and then exercising the option. By either mode the contract would be fulfilled in a sense originally contemplated by the parties, and by neither would performance be frustrated, because the contract would be executed in a way that the parties agreed that it might be executed. The contingency did not defeat the contract, but simply advanced the period of fulfillment." With this holding should be considered, with other related

[4] CL 1948, § 566.132 (Stat Ann 1953 Rev § 26.922).

[5] *Blake* v. *Voight*, 134 NY 69, 72, 73 (31 NE 256, 30 Am St Rep 622).

authority, our decision in *Sax* v. *Detroit, G. H. & M. R. Co.*, 125 Mich 252 (84 Am St Rep 572), where the plaintiff testified that the agreement was to give him a permanent position during his lifetime, so long as he should perform his duties to the satisfaction of the company, and it was held that such contract need not be in writing, since it might have been performed according to its terms within a year. The above citations are merely representative of the authorities.[6] The determination thus to be made, in the light of all of the facts and circumstances, is basic to decision in this case and the textual material bearing thereon quoted by the trial judge is incomplete and insufficient to answer the questions presented. If the contract may, according to its terms, be performed within a year no statute of frauds question arises.

Should, however, the determination be made that the statute of frauds does in fact apply, a further question will be presented. This pertains to the memorandum allegedly made. It will be recalled that over a year after Fothergill's entry upon his duties a writing was prepared, and tendered him, entitled "Agreement." This, Fothergill testified, was represented to him to be a memorandum of the oral agreement formerly reached. It named and identified the parties, and specified the duration of employment, duties, and salary to be paid. The favorable view of the evidence is that it was signed by both parties. Why was this instrument not a sufficient memorandum to answer the requirement of the statute? Appellee argues, in part, that it "was not a memorandum but rather represented a proposed

[6] Analogous in principle to the voluntary-termination contract here under consideration are those cases involving lifetime contracts. *Smalley* v. *Mitchell*, 110 Mich 650; *Adolph* v. *Cookware Company of America*, 283 Mich 561. Such have been held not within the statute of frauds since, in view of the uncertainties of human life, they may be performed fully, in accordance with their terms, within 1 year.

contract between the parties, complete in all respects." This circumstance, if true, would only add to its strength as a memorandum, not detract therefrom. Normally a memorandum need be only that. It is sufficient if the obligations of each party may be determined from it. It need not have the minutiae of a contract. Mr. Justice Cardozo refers to it as a "token,"[7] and so, indeed, it is. But it is no less a token because it purports to be more.

So far as the problem of delivery-back of the "Agreement" has any bearing upon any aspect of the case, this request was apparently made on behalf of McKay Press when the "Agreement" was tendered to plaintiff. "Mr. Hopkin's" plaintiff testified, "told me if I wanted to sign it any time and then hang on to it and then hand it back to him, fine." But Fothergill did not return it. He signed it and then, he says, "I put it in my drawer at home; it was never spoken to about by Mr. Hopkins, McKay Press or myself, never brought up until now."

Assuming, then, that delivery-back of the "Agreement" was relevant for some purpose, and assuming, as well, that it was the expressed intent that the "Agreement" was to have no legal force and effect without delivery-back, was failure to deliver-back fatal to its legal efficacy, or was there a waiver by McKay Press of redelivery? Waiver, of course, is a matter of intent, and will be so determined by the trier of the facts, but it is pertinent to observe that Fothergill worked for McKay Press about 1-1/2 years before, and for approximately 2 years after, the "Agreement" was tendered him, performing substantially the same duties throughout, and not one word was said to him about his failure to make redelivery. He was entitled to assume, and the defendant was equally entitled to assume, that the working

[7] *N.E.D. Holding Company, Inc.*, v. *McKinley*, 246 NY 40, 45 (157 NE 923).

terms and conditions were mutually understood and satisfactory and that the condition of the redelivery (if, in truth, it was a condition) had been waived. A party may not hold his peace as to an omission which his mere reminder could cure, accepting in silence, without complaint or objection, another's performance of prescribed duties despite the omission, and thereby fashion a trap to be sprung upon his apparently satisfactory cocontractor at an opportune moment.

Reversed and remanded. Costs to appellant.

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

HARRISON *v.* LAKEY FOUNDRY COMPANY.

WORKMEN'S COMPENSATION—LEG INJURY—SILICOSIS—WAGE-EARNING CAPACITY.

Plaintiff workman who sustained a leg injury resulting in total and partial disability for which he was paid workmen's compensation and who later sustained total disability because of silicosis, was not entitled to an award of workmen's compensation on yet later claim made for total disability due to leg injury during the period covered by the award for disability due to silicosis, since he had not suffered 2 losses of wage-earning capacity during the period of time involved (CL 1948, § 411.1 *et seq.*, as amended).

SMITH, KAVANAGH, and SOURIS, JJ., dissenting.

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Workmen's Compensation §§ 295, 296.

Workmen's compensation: Computation of compensation as affected by compensation allowed for previous injury. 96 ALR 1080.

Appeal from Workmen's Compensation Appeal Board. Submitted June 10, 1960. (Docket No. 47, Calendar No. 48,672.) Decided December 1, 1960.

Ford Harrison presented his claim against Lakey Foundry Corporation for continuing compensation for leg injuries following payment for disability because of occupational disease. Compensation denied. Plaintiff appeals. Affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Benjamin Marcus,* of counsel), for plaintiff.

Joseph T. Riley, for defendant.

CARR, J. The finding of facts in this case as made by the referee and approved by a majority of the members of the appeal board is supported by competent testimony. In May, 1949, plaintiff, while in the employ of defendant, sustained an injury involving a fracture of both legs. He was paid compensation on a voluntary basis for varying periods of total and partial disability, and in December of 1953 an award was entered by the workmen's compensation appeal board in accordance with the payments that had been made. At that time, however, plaintiff was working for defendant in favored employment and his earnings were in excess of his wages at the time of his injury.

In December of 1953 it was discovered that plaintiff was suffering from silicosis which prevented his further employment. He received compensation at the rate of $34 per week, and applications for lump-sum advance payments were granted by the department, so that prior to the filing of the application in the instant proceeding plaintiff had received the maximum amount of $10,500 because of the disability resulting from silicosis.

In September of 1958 plaintiff filed an application for an award of compensation because of disability claimed to have resulted from the 1949 injury. Such application was based on the theory that he was entitled to receive compensation because of the disability resulting from the injured legs during the same period of time that he was receiving the award based on the finding of silicosis and the total disability resulting therefrom. This claim presents the issue in the case, that is, whether plaintiff is entitled to compensation because of the 1949 injuries during the period of time for which he was compensated for total disability resulting from the condition discovered in 1953. This involves a question of statutory construction. Does the workmen's compensation act* entitle plaintiff to the award which he claims?

The referee entered an order denying the award sought and the majority of the appeal board, one commissioner dissenting, affirmed. In rendering its decision the appeal board pointed out that plaintiff had not suffered 2 losses of wage-earning capacity during the period of time involved in the case. Obviously such was the situation. Under the provisions of the statute plaintiff's claim was not well-founded. The controlling language of the compensation act does not permit such an award.

The order of the appeal board should be affirmed.

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

SMITH, J. (*dissenting*). The defendant Lakey Foundry Corporation has phrased the question well. It is as follows:

"We know of no greater disability than total disability and we do not believe there can be any greater

*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.*]).

form of disability than total disability. The way we understand plaintiff's contentions is that he had concurring total disabilities. The statute (CL 1948, § 412.9 [Stat Ann 1947 Cum Supp § 17.159]) speaks of total incapacity for work resulting from the injury and there is an admitted holding by the appeal board that plaintiff was totally disabled from the May, 1949, injury. This total disability continued. * * *

"Plaintiff has been found to be totally disabled from the May, 1949, injury. Plaintiff cannot be totally disabled more than once. The statute fixes maximums for total disability and plaintiff has received the maximum for total disability."

Here we consider once again the "windfall" doctrine.[1] Shortly put it is simply this: that if industrial disablement is suffered by one who has been theretofore disabled, and is drawing compensation therefor, no compensation need be paid for both disablements, but only for one. If anyone else had suffered the same disability, compensation would have been paid. But because the victim here is hurt twice the employer need pay but once. Hence it is said the employer gets a "windfall" at the expense of the injured workman. Only statutory command the most compelling, the most unequivocal, could justify a result so at variance with the act's beneficent purposes. But the command is not there. If it is to be inserted into the act, it is we who must read it in. It will be judge-made law. I reject it.

There are not many cases on the point. The older cases, it seems fair to say, denied compensation. An early Michigan case, *O'Brien* v. *Albert A. Albrecht Co.*, 206 Mich 101 (6 ALR 1257), was among the number. It was a part of the many harsh interpretations of the act going to make up Michigan's "bad

[1] See 20 La L Rev 109 (1959).

eminence"[2] in the field of compensation law. We need not analyze once more these ancient errors.

The problem arises in many ways. There may be an award for amputations to be paid concurrently with the payment of award for prior-incurred disability (the *Jones Case*[3]). There may be an award for a prior disability to be paid concurrently with an award arising from an occupational disease (this case). There may be 2 successive accidents involved, or 2 successive occupational diseases, or other combinations of disease or injury. The principle involved in all is the same, namely, the application of the windfall doctrine. The *Jones Case* presents merely one phase of the application of a basic principle, and possibly the simplest, since in it (having a schedule award) we do not grapple with what the appeal board here describes as a second wage loss which "completely enveloped the first." But it is a complete *non sequitur* to argue that since the *Jones Case* involved a concurrent schedule award plus a disability award, therefore, concurrent disability and occupational disease awards before us are illegal.

Upon what theory may compensation be denied one who has suffered an industrial disability because of his employment? Let no one imagine that there is a specific statutory bar to the payment of compensation for the second injury. The statute itself does not in terms cover the problem. The defendant resists payment in reliance upon the following statute:[4]

"While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be

[2] Dean Emeritus Roscoe Pound, quoted in dissent, *Mack* v. *Reo Motors, Inc.*, 345 Mich 268, 281.

[3] *Jones* v. *Cutler Oil Co.*, 356 Mich 487.

[4] CL 1948, § 412.9 (Stat Ann 1947 Cum Supp § 17.159).

paid as hereinafter provided, to the injured employee, a weekly compensation of 66-2/3% of his average weekly wages, but not more than" [here follow dollar amounts scaled according to number of dependents].

Does the above, as defendant argues, mean that "the maximum payable *for any and all injuries*" shall be only so much? If so, only the first accident need be paid for. The next is free. Or does it, as plaintiff argues, mean that "the maximum payable *for any one injury*" shall be as specified? If this is its meaning, then no covered disability shall be without compensation, whether it runs concurrently with another or not.

This, it will be noted, is a case that cannot be answered by the argument that the legislature has spoken and that it is our duty to wait for the legislature to make changes. Here the legislature has not spoken. There is a gap in the statute. We must fill it in. It begs the question to say that the legislature has spoken either way.

The answer as to our choice of interpretations will be found, not in any single phrase of the act but in the intent of the legislature, clearly discernible from our past determinations thereof. It was almost a quarter-century ago when we wrote,[5] unanimously, that:

"Its [the workmen's compensation act] enactment marked the crystallization into a legislative enactment of the economic fact that the ultimate consumer pays for the compensation of injured employees in the increased cost of the product. It aims at compensation, not damages. It is wholly substitutional in character and displaces the common-law liability for negligence. It should be administered substantially as insurance of a social character. Claimant had no action in law or in equity against his employ-

[5] *Hebert* v. *Ford Motor Co.*, 285 Mich 607, 610.

er. Proceedings under the workmen's compensation act are purely statutory,—administrative, not judicial,—inquisitorial, not contentious,—disposed of, not by litigation and ultimate judgment, but summarily. Most of the difficulties now encountered in the administration of the workmen's compensation act arise from injudicious attempts, sometimes acquiesced in, to engraft upon the workmen's compensation act common-law theories at variance with its spirit and intent."

The intent of the act, as above described, is that the cost of the product must bear the expense not only of the inanimate machinery worn out in its production but that of human expenditure as well. Expenses of repair and replacement of machinery were always passed on to the consumer. But prior to the passage of the workmen's compensation acts the injured workman was left to bear his own loss alone, save as he was able to establish that the negligence of his employer caused the injury, and here he was met by the baleful trio of assumption of risk, contributory negligence, and the fellow-servant rule.

I cannot, consonant with the intent of the act, assume that such a disability as we here consider, arising out of and in the course of employment, and otherwise compensable, is to be free of liability because compensation is also being paid for another disability. It is an odd perversion of logic and experience (and, we repeat, unwarranted in the language or the intent of the compensation act) to argue that the onset of silicosis in some way cured the leg condition, or relieved the employer from liability for the leg injuries. The cost of a product may be reckoned in terms of one injury or several. There is no warrant for restricting the cost to a portion, only, of the injuries suffered. To do so may cheapen the cost to the ultimate consumer, but it is a cheapening dearly bought in terms of human values and

wholly inconsistent with the intent of the act. If, indeed, there is no compensation payable for this injury, has the employee lost also his common-law remedy for the injury? If he has, a constitutional problem of real magnitude may be faced. If he has not, then we have, at long last, come full circle and once more the common-law courts will face injured workmen and the pernicious trinity which gave rise to the compensation acts in the first place: assumption of risk, contributory negligence, and the fellow-servant doctrine.

We observed heretofore that certain of the earlier rulings on this issue were largely restrictive. Such, however, was not the result of all, here or abroad, nor is it the result of the more modern cases. In addition to the cases cited in *Jones* v. *Cutler Oil, supra,* holding that the maximum in the statutes pertained only to one injury, see, also, *Asplund Construction Co.* v. *State Industrial Commission* (1939), 185 Okla 171 (90 P2d 642); and *Bethlehem Steel Co.* v. *Dempsey* (1956), 94 Ga App 408 (94 SE2d 749). In all of these cases, of course, there are minor statutory differences between their acts and our own. In none, however, is the difference one of substance as regards our problem. In the latter case, for example, we find no real difference in the statute. The applicable Georgia statute will be placed side by side with our own so that the necessary comparisons may be made:

Georgia	Michigan
"When the incapacity to work resulting from an injury is total, the employer shall pay or cause to be paid, as hereinafter provided for,	"While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided,
to the employee during such total incapacity	to the injured employee,
a weekly compensation equal to ***	a weekly compensation equal to ***
but not more than ***."	but not more than ***."
Code of Ga Ann § 114–404.	CL 1948, § 412.9 (Stat Ann 1947 Cum Supp § 17.159).

The court held as follows with respect to the proper interpretation of the quoted section (p 409):

"Code, § 114–404 deals with the amount of compensation allowable for an injury and the maximum compensation allowable in each case; it does not set forth the amount of compensation allowable to an employee from all injuries and in all cases involving that employee. Therefore, in view of what has been said above, and in view of the fact that the act is to be liberally construed in order to effect its general purpose, *Van Treeck* v. *Travelers Ins. Co.*, 157 Ga 204 (121 SE 215); *Austin Brothers Bridge Co.* v. *Whitmire,* 31 Ga App 560 (121 SE 345), this court must hold that the limit referred to in Code, § 114–404 is the limit for which compensation may be paid as the result of one injury and not the limit that an employee can draw regardless of the number of injuries he may be unfortunate enough to suffer."

The gist of the matter is this: A man, even one legally defined as "totally disabled," may acquire, develop, and sell on the market whatever rudimentary skills remain in him. In modern times we encourage his so doing, seeking to avoid, so far as possible, the aid of public or private charity. In short, rehabilitation is fostered. Should a man so courageous be again disabled, I find nothing in the act saying that he shall not receive concurrent compensation.[6] To me the answer is that he has concurrent injuries. They were incurred in the manufacture of the product. That the product should bear such losses is the basic principle of compensation law.

The order should be reversed and remanded for further proceedings not inconsistent herewith. Costs to appellant.

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[6] We note that the total of payments for both injuries ($21 for the leg injury, plus $34 for the silicosis) would be less than the wage he received either at the time of the first injury ($60.80 in 1949) or the subsequent disablement ($76.40 in 1953).

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

EDWARDS, J. (*concurring*). This appeal suggests to us that the Michigan workmen's compensation act provides for the concurrent payment of 2 workmen's compensation total disability awards to the same person, covering the same weeks of disability, provided that it be shown that he is suffering from 2 separate disabilities, either of which would occasion total disability.

The majority of the workmen's compensation appeal board held to the contrary. The majority opinion said:

"The question is whether or not the plaintiff's disability from his 1949 injury can be compensated during the concurrent period of time for which he has been compensated for total disability due to his 1953 injury. Plaintiff's average weekly wage at the time of his 1949 injury was $60.80. His maximum compensation rate was $21 a week. His average weekly wage at the time of second injury is reported as $76.40 and his compensation rate has been $34 a week. * * * In this case the plaintiff's earnings at the time of the second injury were substantially greater than his earnings at the time of his first injury. His second earnings during the time of their continuance completely substituted for his right to compensation for his first injury. Insofar as wage-earning capacity is concerned he did not have 2 wage-earning capacities to lose as his second loss completely enveloped the first.

"The plaintiff has suffered 2 injuries. He is totally disabled by reason of each injury independent of the other. However he has not suffered, compensation wise, 2 losses of wage-earning capacity during the period of time herein involved. The award of Referee Weber is, therefore, affirmed.

"The plaintiff is, of course, entitled to further medical care for his 1949 injury to the extent that it is medically advisable that he receive it."

This reasoning seems wholly in accordance with the language, limitations and intent of the workmen's compensation act. The section dealing with total disability* provides in its first sentence for a dollar

* "Sec. 9 (a) While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 66-2/3% of his average weekly wages, but not more than $33 if such injured employee has no dependents; $36 per week if 1 dependent; $40 if 2 dependents; $45 if 3 dependents; $51 if 4 dependents and $57 if 5 or more dependents. Weekly payments shall in no event be less than $18 if there are no dependents; $20 if 1 dependent; $22 if 2 dependents; $24 if 3 dependents; $26 if 4 dependents; and $28 if 5 or more dependents, and in no case shall the period covered by such compensation be greater than 500 weeks from the date of injury, nor shall the total compensation exceed an amount equal to 500 times the total weekly amount payable under this section 9, except for permanent and total disability as defined in sections 8a and 10, when the compensation shall be paid for the duration of such permanent and total disability: Provided, That the conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury, and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time. Any permanently and totally disabled person as defined in sections 8a and 10 who, on or after June 25, 1955, is entitled to receive payments of workmen's compensation under this act in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability and for a lesser number of weeks than the duration of such permanent and total disability shall after the effective date of this amendatory act receive weekly, without application, from the second injury fund, an amount equal to the difference between what he is now receiving per week and the amount per week now provided for permanent and total disability with appropriate application of the provisions of paragraphs (b), (c), (d) and (e) of this section since the date of injury. Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability according to the full rate provided in the schedule of benefits.

"(b) For the purposes of this section and of section 10, dependency shall be determined as follows:

"The following persons shall be conclusively presumed to be dependent for support upon an injured employee:

"1. The wife of an injured employee living with such employee as such wife at the time of the injury.

"2. A child under the age of 16 years, or over said age, if physically or mentally incapacitated from earning, living with his parent at the time of the injury of such parent.

"(c) In all other cases questions of dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury. No person shall be considered a dependent unless he or she is a member of the family of the injured employee, or

ceiling on the weekly compensation to be paid "while the incapacity for work resulting from the injury is total." It also expresses the compensation to be paid in terms of percentage of the employee's weekly wage, with added increments for each dependent, and with the total to be reduced when a dependent reached 21. The section also provides for supplementation of the weekly compensation by the second injury fund when the sum due from the particular employer is deemed too low. The benefits under the act are thus related to the employee's disability, to his previous earnings and to the needs of his family, rather than constituting a specific sum of the nature of tort damages. This concept is illustrated further in CLS 1956, § 412.10 (Stat Ann 1960 Rev § 17.160), dealing with partial incapacity:

"The amounts specified in this cause are all subject to the same limitations as to maximum and minimum as above stated. In case of the loss of 1 member while compensation is being paid for the loss of another member, compensation shall be paid for the loss of the second member for the period herein provided, payments to begin at the conclusion of the payments for the first member."

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unless such person bears to such injured employee the relation of husband or wife, or lineal descendant, or ancestor or brother or sister. Except as to those conclusively presumed to be dependents, no person shall be deemed a dependent who receives less than 1/2 of his support from an injured employee.

"(d) Weekly payments to any injured employee shall be reduced by the additional amount provided for any dependent child or husband or wife or other dependent when such child either reaches the age of 21 years or after becoming 16 ceases for a period of 6 months to receive more than 1/2 of his support from such injured employee, if at such time he or she is neither physically nor mentally incapacitated from earning, or when such husband or wife shall be divorced by final decree from his or her injured spouse, or when such child, husband or wife, or other dependent shall be deceased.

"(e) No increase in payments shall be made for increased numbers of dependents not so dependent at the time of the injury of an employee." CLS 1956, § 412.9 (Stat Ann 1960 Rev § 17.159).

It is also illustrated in CL 1948, § 412.11 (Stat Ann 1960 Rev § 17.161), which provides:

"The compensation payable, when added to his wage earning capacity after the injury in the same or another employment, shall not exceed his average weekly earnings at the time of such injury."

It is still further illustrated by CL 1948, § 412.12 (Stat Ann 1960 Rev § 17.162), which provides that death terminates all liability from pre-existing injuries as to the individual's estate, and conditions further compensation upon the existence of dependents:

"The death of the injured employee prior to the expiration of the period within which he would receive such weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:"

While I recognize that none of these sections specifically interdicts the ingenious argument which appellant's counsel has propounded to us, they do serve to illustrate that the interpretation he urges would be fundamentally inconsistent with the nature of the act.

Larson, in dealing with the underlying concept of workmen's compensation, uses these words in contrasting it to tort damages:

"In compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power.

"For this reason, some classes of injuries which result in verdicts of thousands of dollars at common law produce no award whatever under a compensation statute. For example, while common-law verdicts of great size are common for facial disfigure-

ment, it is usually held that, in the absence of an express provision making disfigurement compensable, no allowance can be made for it. More than half of the States now have such express provisions, but, significantly, the basis in most instances is still the argument that a repellent appearance may diminish the claimant's chances of obtaining and holding employment. Similarly, impairment or destruction of sexual potency is not in itself a basis for an award, and, presumably the same result would apply to such an injury as destruction of childbearing capacity in a woman.

"The limitation of compensation to 'disability' also runs consistently through all questions of elements of damage. To take a familiar example: there is no place in compensation law for damages on account of pain and suffering, however dreadful they may be. So also in death benefit cases, compensation law refuses to recognize such items as loss of consortium or conscious suffering of the deceased in the interval preceding death.

"A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." 1 Larson, Workmen's Compensation Law, §§ 2.40, 2.50.

I agree with Mr. Justice CARR that the language of the workmen's compensation statute cannot, consistent with the legislative intent demonstrated in the scheme of the act, be interpreted as affording 2 awards for total disability for the same period of time.

WILSON *v.* FLINT BOARD OF EDUCATION.

1. STATUTES—CONSTRUCTION.

   A statute enacted to reduce the large turnover in the teaching profession is interpreted against the background of the evils sought to be cured thereby.

2. SCHOOLS AND SCHOOL DISTRICTS — TEACHERS — PROBATIONARY PERIOD.

   The board of education of a school district may not require of a teacher a probationary period of more than 2 years but, for the benefit of a teacher, may grant a third year of probation (CL 1948, § 38.71 *et seq.*).

3. SAME—TEACHERS—PROBATIONARY STATUS—STATEMENT.

   A public school teacher who is on probationary status and not given a written statement before the close of either the first or second school years as to whether or not her work was satisfactory is accorded a conclusive statutory presumption that the work is satisfactory (CL 1948, § 38.71 *et seq.*).

4. SAME—TEACHERS—PROBATIONARY PERIOD—TENURE STATUS.

   A public school teacher, who has satisfactorily completed the probationary period, is entitled to the status of tenure, and may not be dismissed save for reasonable and just cause (CL 1948, § 38.71 *et seq.*).

5. SAME—TEACHERS—TENURE STATUS.

   A public school teacher who has acquired tenure status is entitled to a proper hearing by the board of education of a school district on the merits after specific charges shall have been furnished the teacher, all in accordance with provisions of the teachers' tenure act (CL 1948, § 38.71 *et seq.*).

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur, Schools § 129.
Teachers' tenure statutes. 127 ALR 1298.
[2] 47 Am Jur, Schools § 130.
[3] 47 Am Jur, Schools § 133.
[4] 47 Am Jur, Schools § 139.
[5] 47 Am Jur, Schools § 140.

Appeal from State Tenure Commission. Submitted October 12, 1960. (Docket No. 66, Calendar No. 48,594.). Decided December 1, 1960.

Burnestyne Wilson sought review of action of the Board of Education of the City of Flint in terminating her services as teacher. Ordered remanded to school board for proper hearing on merits. Defendant appeals. Plaintiff cross-appeals. Attorney General intervenes. Affirmed.

White & Newblatt (*Charles W. White,* of counsel), for plaintiff.

Bellairs & Dean (*C. Rees Dean,* of counsel), for defendant.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Eugene Krasicky* and *Gerald J. O'Reilly,* Assistant Attorneys General, for intervenor.

SMITH, J. This case involves an interpretation of legislation relative to teachers' tenure, PA 1937 (Ex Sess), No 4, as amended,* those provisions having particularly to do with probation.

The first section of article 2 of the act (entitled "probationary period") provides as follows:

"All teachers during the first 2 school years of employment shall be deemed to be in a period of probation."

The second section provides that:

"No teacher shall be required to serve more than 1 probationary period in any 1 school district or institution: Provided, That a third year of probation

* CL 1948, § 38.71 *et seq.* (Stat Ann 1959 Rev § 15.1971 *et seq.*).

may be granted by the controlling board upon notice to the tenure commission."

It is further provided (in the third section), with respect to claimed unsatisfactory service, as follows:

"At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory: Provided, That failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory, and: Provided further, That any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified at least 60 days before the close of the school year that his services will be discontinued."

The statute above referred to, from which pertinent excerpts were quoted, represents Michigan's participation in a national movement directed towards the reduction of the large turnover in the teaching profession. A study in the Michigan Law Review* describes the problem in these terms:

"The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of nonresidence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of political

* Comment, 37 Mich L Rev 430–432.

dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies. The remedy for such abuses was sought in legislation designed to strip the school boards of their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees."

It is against this background of the evils sought to be cured by statutory enactment that we proceed to an interpretation thereof. The facts before us are not in dispute. On April 13, 1954, the board of education of the city of Flint (hereinafter referred to as the board) "adopted a policy requiring 3 years' probation for all new teachers in the Flint school system." Appellee was hired by the board as a probationary teacher and given a probationary contract for the "school year begining not earlier than Sept. 3, 1956, * * * and continuing until not later than June 14, 1957." No written statement as to the character of her work was furnished her at the conclusion of the school year. The same procedure was followed for a second year and, again, there was a failure to give her any written notification whatever as to the quality of her work, whether it was satisfactory or otherwise. Early in 1958 the appellee and all other second-year probationary teachers remaining under contract were placed upon a third-year probationary status by order of the board, and the State tenure commission so notified. Approximately 1 year later, on March 12, 1959, the superintendent informed the appellee that he "could not conscientiously recommend [her] for a tenure contract," and on March 24th she was notified of her discharge, effective June 12, 1959, at the end of the third year of the probationary period prescribed by the board. Hearing before the board having been

requested, such hearing was held upon June 3, 1959. The State tenure commission found as follows with respect to notice of, and hearing upon, the charges made against her:

"There may be a semblance of charges contained in a personnel record of evaluation which was used at the March 12th conference. We find the board erred in not giving her definite written charges and an opportunity to be fully heard. She did not have a full hearing, no stenographer was present, she did not have the opportunity to face the proponent of any charges."

Under date of June 17, 1959, she was notified of the board's adverse decision, and an appeal to the tenure commission was taken on July 15, 1959.* We here review the orders of the State tenure commission upon leave granted.

The basic problem facing us is the status of the appellee upon the date of the so-called discharge. We have made reference heretofore to the "policy" of the board to "require" 3 years of probation for a beginning teacher. But the State, also, has a policy as to beginning teachers, expressed in the teachers' tenure act. That policy is that the probationary period shall be not 3 years, but 2. "No teacher," says that statute, "shall be *required* to serve more than 1 probationary period," such period having been theretofore defined as of 2 years' duration. It is true that the board may "grant" a third year of probation to a teacher, but the language of a grant (as opposed to that of a requirement) makes clear that the third year is for the benefit of the teacher, who may not have satisfied the board fully but who may have shown promise nonetheless. Nowhere in such language is there any foundation for saying that a board

* The appeal was timely. CL 1948, § 38.121 (Stat Ann 1959 Rev § 15.2021).

may require, in all cases, 3 years of probation, and in so saying we need not adopt the State's suggestion that we have here simply a plan to benefit from a teacher's services for 3 years and then summarily to dismiss her.

Were appellee's services satisfactory during the probationary period provided by statute? There need be no extended discussion of this factor of the case. The policy of the State is not to leave a matter of such vital concern to all interested parties in the realm of debate. We have noted that the teacher was given no written statement before the close of either the first or the second school years as to whether or not her work was satisfactory. In this situation the statute is clear: such failure, it provides, "shall be considered as conclusive evidence" that the work is satisfactory.* The result of the above is that the teacher has satisfactorily completed the probationary period, is entitled to the status of tenure, and may not be dismissed save for reasonable and just cause, and then only in compliance with the provisions of the act.

The conclusions we have reached closely parallel those expressed in *La Shells* v. *Hench*, 98 Cal App 6, 12 (276 P 377, 379), where, in a similar situation involving year-to-year contracts the court held as follows:

"So far as the record shows, the board of trustees made no classification of teachers who had successfully taught for 2 years in the Tracy school, and who possessed otherwise the legal qualification to be classified as permanent teachers. This lack of the board to act, however, does not prevent the operation of the law in making such classification, and as the petitioner, under the law, was entitled to such classification, she must be so considered as classified, even though the board of trustees has failed to act,

* CL 1948, § 38.83 (Stat Ann 1959 Rev § 15.1983).

and at all times proceeded to enter into contracts purporting to limit the term of employment from year to year. To hold otherwise would be to decide that the provisions of the teachers' tenure act may be evaded by the expedient of using contracts reading for a yearly employment."

Under the view we have taken of the case it follows that the State tenure commission had jurisdiction of the matter and we need not pass upon its jurisdiction over probationers as such. We approve the commission's remand to the Flint school board. It will conduct a proper hearing on the merits after specific charges shall have been furnished the teacher, all in accordance with the provisions of the teachers' tenure act. Costs to appellee.

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

CALHOUN *v.* CALHOUN.

QUIETING TITLE—BURDEN OF PROOF—EVIDENCE.

Plaintiffs in suit to quiet title based on their claim of full performance by them of contract to purchase city house and lot *held,* not to have sustained their burden of proof, where they failed to show that the land contract had been executed by anyone holding at the time a legal or equitable interest in the premises.

Appeal from Jackson; Simpson (John), J. Submitted October 5, 1960. (Docket No. 25, Calendar No. 48,275.) Decided December 1, 1960.

Bill by Thomas H. Calhoun, Jr., and others against Wilbert Calhoun, testamentary executor of the estate of Thomas H. Calhoun, Sr., to quiet title. Bill dismissed. Plaintiffs appeal. Affirmed.

William F. Goler, for plaintiffs.

Rosenburg, Painter, Stanton & Bullen, for defendant.

PER CURIAM. Plaintiffs appeal from a decree dismissing their bill to quiet title. The case is here with a vague record of that which, in realty title matters, should not be difficult of certain proof by competent testimony.

REFERENCES FOR POINTS IN HEADNOTES

44 Am Jur, Quieting Title § 83.

The subject matter is a house and lot located on Argyle street in Jackson. Plaintiffs claim title thereto under—and solely by—an executory and allegedly paid land contract. The contract was executed by one Venton and wife, as vendors, to plaintiffs "Thomas H. Calhoun, Jr. and Fay Y. Calhoun, his wife," as vendees. The instrument bears date of January 14, 1944; recites a total sale consideration of $2,500; acknowledges a down payment of $500, and calls for instalment payments at the rate of $28 or more per month. No conveyance in fulfillment of such contract has ever been made.

The chancellor found, apparently from the visible difference of pens that were used in signing the words "Thomas H. Calhoun" and the word "Jr.", that the signature "Thomas H. Calhoun, Jr.", as it appears on the contract, was actually that of plaintiff's father, Thomas H. Calhoun. However, since there is no testimony either way tending to identify properly such signature, we shall assume as plaintiffs claim that the junior Mr. Calhoun, rather than the senior Mr. Calhoun, was one of the actual and intended vendees.

Whether Venton and wife ever at any time held an interest in the subject property was not shown. It was shown, by testimony of plaintiffs (which testimony the chancellor ruled was incompetent under the dead man's statute*), that plaintiffs made all of the payments as indorsed on the payment record of the contract. As against such competent or incompetent testimony (a question we need not decide) the chancellor found that, by the nature and fact of such indorsements, "Mr. Calhoun, Sr., made the payments on the land contract." This brings our attention to defendants' proof.

Defendant Wilbert Calhoun claims title to the property upon testimonial showing that the senior

* CL 1948, § 617.65 (Stat Ann § 27.914).—REPORTER.

Mr. Calhoun occupied the property as his home from the date of the land contract until the time of his death (September 14, 1955); that the record owners of the premises (one Van Scoter and wife) deeded the property to the senior Mr. Calhoun under date of April 11, 1952 (the deed making no reference to any outstanding land contract), and that the senior Mr. Calhoun validly devised such premises to him.

In this equity case issues of fact only are presented. Defendants have established legal title to the subject premises by due conveyance and devise. Plaintiffs have failed to show that the land contract, upon which they rely, was executed by any one holding at the time a legal or equitable interest in such premises. They bear the burden of proving that they did acquire and now do possess some interest, legal or equitable, therein. Such burden not having been met, the chancellor could do naught but dismiss their bill.

Affirmed. Costs to defendants.

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

INDEX.

ABATEMENT—See NUISANCE (2, 3); PLEADING (5).

ABSTRACT OF TITLE—See BROKERS (2).

ACCELERATOR—See AUTOMOBILES (12).

ACCEPTANCE—See CUSTOMS AND USAGES; NEGLIGENCE (1); TRIAL (1); WORK AND LABOR.

ACCIDENT—See DIVORCE (2); NEGLIGENCE (5).

ACCOUNTING.

1. Trial court's findings that defendant attorney had appropriated to himself corporate stock for which plaintiff and her son had ultimately given 2 real-estate and chattel mortgages to secure note given for purchase of such stock and as security for other loans and that defendant should account to plaintiff for sums paid on the note and for bonus thereon *held*, supported by evidence adduced in suit for accounting which showed there had been an overreaching on defendant's part which constituted a fraud upon all other parties concerned. *Kukla* v. *Perry*, 312.
2. Defendant attorney in suit for accounting was properly required to repay to plaintiff with interest the entire amount over and above sum actually paid in settlement of claim for income tax, where plaintiff had given him $6,000 and only $1,610.40 had been paid, and the alleged contingent fee contract had not been filed with treasury department as required, the defendant not being entitled to any fee where he represented that the entire sum was for tax settlement. *Id.* 313.
3. Provision of decree ordering rescission of contract whereby defendant attorney, as president, obligated defendant corporation to pay him rental on property hitherto purchased by the corporation and plaintiff notwithstanding cash loan made to corporation from plaintiff's relatives of more than sufficient to take care of corporate share of the contract *held*, not error in suit for accounting. *Id.*
4. Interest, except upon amount defendant had expended to cure default on contract which he had caused to be assigned to himself, was properly disallowed by trial court on an invalid assignment made by defendant attorney to himself while president of defendant corporation when rescission of the transaction was ordered in suit for accounting. *Id.*
5. Reimbursement of corporation by defendant attorney of entire salary he had voted himself after illegally acquiring control of the corporation involved in accounting suit by other stock-

ACCOUNTING—Continued.

holder *held*, proper, where defendant neither showed what the reasonable value of his services as president and treasurer would have been or that anyone else had participated in the decision to vote him a salary. *Id.*

6. Shares of stock defendant attorney acquired from plaintiff for a token consideration are ordered returned to plaintiff in her suit for accounting without repayment of the consideration, where the circumstances of defendant's acquisition thereof involved an overreaching by defendant. *Id.* 314.

ACQUIESCENCE—See BOUNDARIES (2).

ACTION—See MUNICIPAL CORPORATIONS (14); PLEADING (2, 7).

ADMINISTRATIVE CAPACITY—See SCHOOLS AND SCHOOL DISTRICTS (1).

ADMINISTRATIVE LAW.

1. Once a complainant has shown a lack of administrative due process it is utterly immaterial that there be fraud, bad faith, mendacity or deceit, or other misconduct charged. *Tireman-Joy-Chicago Improvement Association* v. *Chernick*, 211.
2. The combination of a delegation of broad powers to an administrative agency plus restricted review cannot be employed to prevent effective recourse to courts and since the judicial function cannot be discharged without a knowledge of the facts justifying the agency's statutory conclusion, the agency must set forth its reasons and facts justifying its determination. *Id.* 212.
3. It is not the function of the Supreme Court to act as a fact-finding commission but it is acutely sensitive to the capricious exercise of power that has been broadly granted to an administrative agency. *Id.*

See MUNICIPAL CORPORATIONS (13).

ADMISSIONS—See HOMICIDE (3).

ADVERSE POSSESSION.

1. One who claims possession of land adversely to the holders of record title need not have some notice of the claim recorded, cause the description thereof to be entered in their names on the tax rolls, erect a fence, or bring an earlier suit to quiet title, where the claim is based on adverse possession that is open and notorious for 38 years. *Golaher* v. *Hunting*, 78.
2. One who acquires title to land by adverse possession thereof need not make a public proclamation of his claim of title to the property in dispute or be estopped to assert claim of ownership. *Id.*

See BOUNDARIES (4, 5); QUIETING TITLE (1, 2); WITNESSES (2).

AFFIDAVIT—See BILLS AND NOTES (4); CONTRACTS (9); TRIAL (4).

AGGRAVATION OF PRE-EXISTING CONDITION—See WORKMEN'S COMPENSATION (1).

AGGRIEVED PERSON—See APPEAL AND ERROR (15–19).

ALLOWANCE FOR NONRESTORED ITEMS—See FRAUD (5).

ALTERNATIVE—See MUNICIPAL CORPORATIONS (3); STATUTES (4); WORDS AND PHRASES (1).

AMENDMENT—See APPEAL AND ERROR (8); PLEADING (1, 2).

AMOUNT OF REMUNERATION—See COSTS (9); UNEMPLOYMENT COMPENSATION (4).

ANCILLARY PROCEEDING—See GARNISHMENT.

AND—See WORDS AND PHRASES (2).

ANNEXATION—See COSTS (1, 10); MANDAMUS (1); MUNICIPAL CORPORATIONS (3–7, 24); STATUTES (4).

ANTICIPATION OF NEGLIGENCE—See NEGLIGENCE (9); RAILROADS (3).

ANNUAL PRIVILEGE FEE—See COURTS (6).

APPEAL AND ERROR.

1. The Supreme Court reviews *de novo*, as in a general chancery appeal, determinations involving mechanics' lien foreclosures, hence, the evidence must be examined and determination made as to whether findings of fact should be made that are different from those of the court below (CL 1948, § 570.27). *Moss* v. *Torosian*, 50.
2. The appeal from the Detroit common pleas court to the circuit court does not call for a trial *de novo* of a nonjury case in the latter court but permits review there, as in appeals to the Supreme Court, and reversal only upon a finding that the judgment below was against the clear preponderance of the evidence (CLS 1956, § 728.4). *LaHood* v. *Wieladt*, 99.
3. The circuit court's reversal of a judgment of the Detroit common pleas court in a nonjury case was reversible error, where the judgment reversed was not against the preponderance of the evidence (CLS 1956, § 728.4). *Id.*
4. Adequacy of amount of verdict for personal injuries is generally a matter for jury and Supreme Court will not substitute its judgment therefor unless verdict has been secured by improper methods, prejudice, or sympathy or is so inadequate as to shock the judicial conscience. *Teller* v. *George*, 118.
5. The Supreme Court will not interfere with trial court's denial of a new trial because of inadequacy of damages given a plaintiff unless the abuse of trial court's discretion is palpable, especially in the absence of claim that improper methods were used by counsel for either party in presenting case to jury by appeal to sympathy, bias, or prejudice. *Id.*
6. The Supreme Court does not have authority to review substantive questions presented on an appeal from the determination of the corporation tax appeal board that was not properly constituted in that deputies functioned for the State treasurer and auditor general without statutory authority so to do (CLS 1956, § 450.309). *Detroit Edison Company* v. *Corporation & Securities Commission*, 151.

APPEAL AND ERROR—Continued.

7. Findings of fact by a trial judge in a nonjury case, which are supported by a clear preponderance of the evidence will not be disturbed by the Supreme Court on review. *Attwood Brass Works* v. *Aero-Motive Manufacturing Co.*, 236.

8. The Supreme Court does not permit an amendment of a pleading on appeal, where the proposed amendment would avail nothing to the party proposing it, notwithstanding it has such power pursuant to court rule (Court Rule No 72 [1945]). *Id.*

9. A question as to whether or not a farm tractor is a "motor vehicle" within the meaning of the owner-liability statute is not open for appellate consideration, where neither raised nor considered in the trial court (CLS 1956, §§ 257.33, 257.401). *Citizens' Mutual Automobile Insurance Company* v. *Houtz*, 309.

10. Remand to circuit court in chancery is ordered for purpose of ascertaining damages sustained by plaintiff-appellee due to appellant's failure to print a sufficient appendix and exhibits, where prayer for such relief is made by appellee (Court Rule No 70, § 5). *Kukla* v. *Perry*, 314.

11. Case is remanded for determination of damages claimed by appellee because of inadequate compliance with court rule by appellants' appendix (Court Rule No 67, § 6 [1945], as amended). *Daley* v. *Gruber*, 358.

12. The Supreme Court approves the recommendation of circuit court on remand that appellant be assessed $800 damages for his failure to comply with court rules relative to preparation of appendix on appeal, violations of such court rule being so widespread as to require at least such limited enforcement in this case, where at least 40 hours of extra work was necessarily required of appellee's counsel (Court Rules No 67, No 70, § 5 [1945]). *Harden* v. *Widovich*, 422.

13. The Supreme Court approves recommendation of circuit court on remand from Supreme Court that punitive damages authorized by court rule not be imposed in view of the good reputation of appellant's counsel in this case (Court Rule No 70, § 5 [1945]). *Id.*

14. Issues sought to be raised on appeal from the probate court to the circuit court were not before the latter court if an appeal was taken thereto without right to do so (CL 1948, § 701.36). *In re Critchell Estate*, 432.

15. A "person aggrieved" within meaning of statute relating to appeals from probate court to circuit court means a person who has some interest of a pecuniary nature in the outcome of the case, not a mere possibility arising from some unkown and future contingency (CL 1948, § 701.36). *Id.* 433.

16. Widow of decedent was not an aggrieved party entitled to appeal from order reopening estate of decedent, where petition filed did not seek to reach assets which had been distributed in probate proceedings theretofore completed but merely to enable petitioner to bring an action against the estate and if judgment were recovered against it to seek enforcement against the insurance company in accordance with the terms of its policy (CL 1948, § 701.36). *Id.*

APPEAL AND ERROR—Continued.

17. The insurer under an automobile insurance policy issued to person now deceased is not a "person aggrieved" as the term is used in probate code provision relative to appeals to the circuit court from an order of the probate court reopening an estate of a deceased person and appointing an administrator (CL 1948, § 701.36). *Id.*

18. A debtor of an estate is not "aggrieved" by appointment of a representative of the estate within meaning of statutory provisions governing appeals in probate, and is not entitled to a review of the proceedings appointing such a representative, when sued on the asserted obligation (CL 1948, § 701.36). *Id.*

19. The circuit court was without jurisdiction to proceed to a determination, where appeal to it from probate court had been taken by parties who were not aggrieved by order reopening estate of decedent (CL 1948, § 701.36). *Id.*

20. The Supreme Court hears and considers chancery cases *de novo* on record on appeal but gives considerable weight to the findings of the trial judge since he is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court. *Township of Superior* v. *Township of Ypsilanti*, 456.

21. The Supreme Court does not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, the Court reaches the conclusion that had it been in the position of the trial judge it would have arrived at a different decision. *Id.*

22. Claim of defendant developer in suit by plaintiff township against defendant township that trial court had no jurisdiction to adjudicate as to contract rights between defendants and to relieve defendant township of obligations to defendant developer *held,* untenable under record presented. *Id.*

23. The circuit court on appeal from the common pleas court does not try the case *de novo* and, where there is credible evidence to support the finding of the common pleas judge, his judgment will not be set aside since it is not against the great weight of the evidence. *Axenfield* v. *Virtue Furniture Company,* 537.

24. The error which calls for a new jury trial is one of such significance as to have prejudiced the result, one without which the Supreme Court can say that the result might well have been different. *Dahlem* v. *Hackley Union National Bank & Trust Company*, 610.

25. The testimony must be construed as strongly as reasonably possible in favor of the plaintiff in determining whether or not defendant's motion for a directed verdict should have been granted, even though some of the plaintiff's own testimony may not be altogether consistent with other testimony given by him. *Wright* v. *Delray Connecting Railroad Company,* 620.

26. The Supreme Court is limited to deciding whether plaintiff was shown by the proofs to have been guilty of contributory negligence as a matter of law, where one ground of asserted error was the denial of motion for directed verdict on the ground

APPEAL AND ERROR—Continued.

plaintiff was guilty of contributory negligence as a matter of law. *Id.*.

27. Each case involving questions of negligence or contributory negligence must be judged on appeal on its own merits in accordance with applicable principles of law. *Id.*

See COSTS (3); EXECUTORS AND ADMINISTRATORS.

APPENDIX—See APPEAL AND ERROR (10–13).

APPOINTMENT—See APPEAL AND ERROR (18); EXECUTORS AND ADMINISTRATORS.

APPORTIONMENT—See DRAINS; JUDGMENT (4, 5).

APPROVAL—See COSTS (11); CUSTOMS AND USAGES; EQUITY (3); MUNICIPAL CORPORATIONS (24).

ARISING OUT OF EMPLOYMENT—See WORKMEN'S COMPENSATION (1).

ASSEMBLY LINE WORKER—See COSTS (13); WORKMEN'S COMPENSATION (2, 5).

ASSIGNMENT—See ACCOUNTING (4); BILLS AND NOTES (4).

ASSUMPTION OF RISK—See AUTOMOBILES (11); NEGLIGENCE (2).

ASSURED CLEAR DISTANCE—See AUTOMOBILES (14).

ATTORNEY AND CLIENT.

1. The inherent power of a Supreme Court to regulate the qualifications of persons permitted to practice law and to suspend or disbar an attorney for sufficient cause and jurisdiction to do so does not depend upon statute but the enactment of legislation for such purpose does not make the act unconstitutional (CL 1948, § 691.51 *et seq.*). *State Bar of Michigan* v. *City of Lansing*, 185.

2. The statute authorizing the creation of the State bar clearly intended to provide for an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of functions that in the final analysis, pertain to the judiciary (CL 1948, § 691.51 *et seq.*). *Id.* 186.

3. The rules and regulations concerning the State bar which have been adopted by the Supreme Court are consistent with the legislative purpose of the statute creating the State bar and, insofar as the rules pertain to the discipline, suspension, or disbarment of the members of the profession and the fixing of ethical standards to be observed in the practice of the law, they relate to the public welfare and protection and are within the scope of the inherent power of the judiciary (CL 1948, § 691.51 *et seq.*). *Id.*

4. The State bar, as organized pursuant to statute creating it, is a public, not a private, agency subject to direct control of the State and is, in effect, a governmental agency whose property is exempt from taxation (CL 1948, § 691.51 *et seq.*). *Id.*

ATTORNEY AND CLIENT—Continued.

5. Testimony of attorneys, with whom it is claimed plaintiff had consulted before engaging counsel who represented him at the trial, should be restricted to the fact as to whether a consultation was held. *Turner* v. *Cotham*, 200.
6. The attorney who assumes the double position of purchaser and confidential legal adviser is bound to observe the utmost good faith towards the party with whom he is dealing. *Kukla* v. *Perry*, 311.
7. The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of highest trust and confidence. *Id.* 312.
8. The burden is on the attorney to show full information and freedom from restraint on the part of the client in all dealings between the attorney and client. *Id.*
9. A transaction between an attorney and his client will be set aside if the attorney cannot produce evidence which puts the transaction beyond reasonable controversy or question. *Id.*
10. Overreaching by an attorney in his dealings with a client cannot be condoned. *Id.* 314.

See ACCOUNTING (1–3, 6); PARTNERSHIP (2); WILLS (7).

ATTORNEY FEES—See EQUITY (1, 2).

ATTORNEY GENERAL.

The attorney general is an ex-officio member of the corporation tax appeal board and the deputy attorney general and assistant attorneys general are empowered by statute to act for the attorney general as a member of such board (CLS 1956, §§ 14.35, 450.309). *Detroit Edison Company* v. *Corporation & Securities Commission*, 151.

See CRIMINAL LAW (2); TAXATION (8).

AUDITOR GENERAL—See TAXATION (8, 9).

AUTOMATIC EQUIPMENT—See SALES (1, 2, 5).

AUTOMATIC GEARSHIFT—See AUTOMOBILES (12).

AUTOMOBILES.

1. Finding of trial court for plaintiff administratrix of estate of deceased pedestrian in her action against defendant motorist on question of latter's negligence and contributory negligence of deceased *held*, not contrary to the preponderance of the evidence, where trial court chose to believe testimony given at trial of a disinterested witness rather than a previous statement taken and prepared by a claims adjuster for defendant's insurer or defendant's own testimony. *Gabrish* v. *Morse*, 39.
2. Each case of gross negligence or wilful and wanton misconduct under the guest act must be determined upon the basis of the facts involved in the case (CLS 1956, § 257.401). *Turner* v. *Cotham*, 198.

AUTOMOBILES—Continued.

3. Wilful and wanton misconduct under the guest act arises where there is knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another with ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand and the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another (CLS 1956, § 257.401). *Id.*

4. Excessive speed, unless accompanied by wilful and wanton misconduct, is insufficient to impose liability under the so-called guest act (CLS 1956, § 257.401). *Id.* 199.

5. The mere fact that the guest passenger gave the driver warnings which were not heeded does not, standing alone, constitute wilful and wanton misconduct (CLS 1956, § 257.401). *Id.*

6. Excessive speed and driver's failure to heed the warnings of his guest passenger, each of which, standing alone, are insufficient to constitute wilful and wanton misconduct under the guest act are proper objects, in addition to other circumstances, for consideration by a jury in arriving at its determination (CLS 1956, § 257.401). *Id.*

7. The state of mind of the driver is obviously involved in every action in which a guest passenger alleges there has been gross negligence or wilful and wanton misconduct by the driver and such matter is necessarily a matter of inference from the facts in each case (CLS 1956, § 257.401). *Id.*

8. The acts necessary to constitute wilful and wanton misconduct under the guest act are of a different quality than those comprising mere negligence, although acts of ordinary negligence may be included (CLS 1956, § 257.401). *Id.*

9. Evidence presented in guest passenger's action against host motorist who lost control of his car while engaged in overtaking 2 cars going in the same direction *held,* to have presented a jury question as to whether defendant was guilty of wilful and wanton misconduct (CLS 1956, § 257.401). *Id.*

10. Plaintiffs who proved negligence of operator of farm tractor and that it was being driven by such operator with the express or implied consent or knowledge of defendant owner made out a case against such owner without proof of liability under the doctrine of *respondeat superior,* it being assumed the tractor was a motor vehicle within the public-protective scope of the owner-liability statute (CLS 1956, §§ 257.33, 257.401). *Citizens' Mutual Automobile Insurance Company* v. *Houtz,* 309.

11. Plaintiff passenger as a matter of law assumed the risk of injury, where in the pattern of previous conduct and after several hours spent in the consumption of liquor after defendant host was under the influence of intoxicating liquor, plaintiff entered defendant's car and was injured when the vehicle went out of control at a curve while defendant, although driving at an excessive speed, was also engaged in tuning in the car radio. *Waltanen* v. *Wiitala,* 504.

AUTOMOBILES—Continued.

12. Defendant motorist was negligent as a matter of law where injuries to plaintiff in parallel parked truck ahead of defendant resulted from twice striking the truck because she had left motor running and the car with automatic shift in gear and let her foot slip from brake pedal to the accelerator pedal as she reached over to close right front door upon departure of her young son from the car. *Nabozny* v. *Hamil*, 544.

13. Definition of proximate cause *held*, proper in action arising from collision between pickup truck in which plaintiff was a passenger and defendant's car traveling in opposite direction at 6:30 p.m. in mid-December that proximate cause must be the real cause, the actual cause and without intervening cause to assist in bringing the injury about and that it was the natural and proper consequence of the negligence of the defendants and that it was foreseeable by them under the circumstances. *Knarian* v. *South Haven Sand Company*, 631.

14. The trial court's instructions relative to negligence, assured clear distance, sudden emergency, and duty to observe, wherein the jury was directed to apply the "reasonably prudent person" test in determining whether or not defendant was negligent *held*, without reversible error and to have been justified by facts in action arising from collision between pickup truck in which plaintiff was a passenger and defendant's car traveling in opposite direction at 6:30 p.m. in mid-December (PA 1949, No 300, § 627, as amended by PA 1957, No 190). *Id.*

15. Record presented in action arising from collision between vehicles proceeding in opposite directions at 6:30 p.m. in mid-December *held*, to have required presentation of case to jury, and to show that the court did not invade the province of the jury, that the jury was properly instructed, and that its verdict was not contrary to law or the great weight of evidence. *Id.* 632.

See APPEAL AND ERROR (17); COSTS (5, 12); DAMAGES (2); DIVORCE (2); INSURANCE; JUDGMENT (1); LICENSES; MASTER AND SERVANT; NEW TRIAL (3); WITNESSES (1).

BAD FAITH—See ADMINISTRATIVE LAW (1).

BANKRUPTCY.

Interest of bankrupt and his wife in land contract in property to which they had held title as tenants by the entireties was not to the advantage of the bankrupt's creditors, by reason of the sale under land contract payable to them as husband and wife or survivor, since their interest is nonsèverable (CL 1948, § 557.81). *Papp* v. *Brownlee*, 501.

BANKS AND BANKING—See NEGLIGENCE (5).

BARRIERS—See HIGHWAYS AND STREETS.

BENEFICIARY—See CHARITIES (2).

BIAS—See APPEAL AND ERROR (5); DAMAGES (6).

BILLS AND NOTES.

1. A party who acquires a promissory note after default thereon by the maker is not a holder in due course and is subject to the defenses of absence or failure of consideration, should they be established in whole or in part (CL 1948, §§ 439.30, 439.54). *Richardson* v. *Messina*, 364.
2. The interlineation in a promissory note that payments were "to start 1 month after *all* equipment is operating" constituted a condition precedent to liability on the note. *Id.* 365.
3. A payee of a negotiable instrument who takes as a mere promisee, not as a purchaser or as a holder in due course, may properly be confronted with the defense that there has been a material breach of performance undertaken (CL 1948, § 439-.60). *Greenberg* v. *Glattke*, 387.
4. Payee of a negotiable instrument who might be found to be a mere promisee and not a holder in due course, because he failed to assign an account *held*, not entitled to summary judgment under record in which affidavit opposing motion for summary judgment disclosed his agreement to make such an assignment (CL 1948, § 439.60). *Id.*

See SALES (1, 2).

BLOOD TRANSFUSION—See DAMAGES (1).

BOARD OF ZONING APPEALS—See COSTS (6); LANDLORD AND TENANT (2); MUNICIPAL CORPORATIONS (9–14).

BOATING—See NAVIGABLE WATERS (9).

BONUS—See ACCOUNTING (1).

BOUNDARIES.

1. Long established occupational lines are not to be disturbed by recent surveys. *Daley* v. *Gruber*, 358.
2. Courts will "imply" agreement from conduct of the parties, where there has been a settled boundary acquiesced in by both over a long period of time. *Id.*
3. A boundary line between property conveyed by a common owner of the property on both sides thereof and upon which other descriptions were dependent for their location, not being subject to disturbance as between the grantees of the common owner by reason of acquiescence, will likewise control the dependent descriptions. *Id.*
4. Finding of trial court of lack of adverse possession by defendants of strip of land the subject of a boundary dispute *held*, not contrary to the preponderance of the evidence. *Id.*
5. Finding of trial court that plaintiffs had established adverse user for more than 15 years of entire triangular tract of land between the true boundary line and fixed boundary line some 4 feet east at base of triangle *held*, supported by evidence, hence, plaintiffs were entitled to award of damages of $250 by reason of erection of fence and demolition of their portion of double garage which had been built over the boundary and used by the parties and their predecessors in title. *Keleman* v. *Lane*, 429.

See MUNICIPAL CORPORATIONS (4).

BRAKES—See AUTOMOBILES (12).

BROKERS.

1. Real-estate broker was not entitled to commission for sale of defendants' real estate, where commission was to be paid only upon consummation of the sale and purchasers failed to complete the sale within time provided by the agreement. *Cunningham* v. *Garber*, 90.
2. Agreement providing for consummation of purchase of defendants' real estate within 30 days after abstract of title was delivered, if marketable title could be conveyed, was not ambiguous, hence, court was justified in determining as a matter of law that plaintiff real-estate broker was not entitled to commission, where purchasers failed to complete sale within the 30-day period. *Id.*

BURDEN OF PROOF—See ATTORNEY AND CLIENT (8); CORPORATIONS (3); MUNICIPAL CORPORATIONS (2, 18, 19); QUIETING TITLE (3); TAXATION (4).

BUSES—See WITNESSES (1).

CAR-WASHING EQUIPMENT—See SALES (1, 5).

CAUSE OF ACTION—See PLEADING (7, 8).

CERTIFICATE OF GOOD STANDING—See COURTS (6).

CERTIORARI—See COSTS (1); DRAINS; MUNICIPAL CORPORATIONS (6).

CHANCERY CASES—See APPEAL AND ERROR (20, 21).

CHANGE OF TERMS—See CONTRACTS (5).

CHARACTER WITNESSES—See CRIMINAL LAW (1).

CHARITIES.

1. The fact that entrusted assets might be dissipated and thereby thwart the intent of the donor or donors of a charity, an argument advanced for granting immunity from liability for the negligence of agents and employees of a charity, no longer has compelling effect in view of changes in the law and in the organization and mores of community life, and the tendency of immunity to foster neglect and of liability to induce care and caution, and the tendency toward social distribution of losses. *Parker* v. *Port Huron Hospital*, 1.
2. The idea that the beneficiary of a charity, such as a patient in a hospital, waives any right of recourse for a negligent wrong done him is entirely fictional. *Id.* 2.
3. The old rule of charitable immunity from liability for the negligence of charity's agents no longer applies in view of the fact that today charity is a large-scale operation with salaries, costs, and other expenses similar to business generally and should pay its way. *Id.*

See COURTS (2); HOSPITALS (1); TORTS.

CHARTERS—See MUNICIPAL CORPORATIONS (8).

CHATTEL MORTGAGES—See ACCOUNTING (1).

CHOATENESS—See LIENS.

CIRCUIT COURT—See APPEAL AND ERROR (2, 3, 14, 15, 17, 19, 23); COSTS (1); LANDLORD AND TENANT (1); LICENSES.

CITIES—See COSTS (10); MUNICIPAL CORPORATIONS (24).

CLAIMS ADJUSTER—See AUTOMOBILES (1).

CLOSING ARGUMENT—See TRIAL (5).

COAL CAR INSPECTOR—See RAILROADS.

COMMENT ON FAILURE TO TAKE STAND—See FRAUD (4).

COMMERCIAL USE—See COVENANTS (2–5).

COMMISSION—See BROKERS.

COMMON COUNTS—See LANDLORD AND TENANT (1).

COMMON LAW—See NEGLIGENCE (1); TRIAL (1).

COMMON OWNER—See BOUNDARIES (3); COVENANTS (1, 2).

COMMON PLEAS COURT—See APPEAL AND ERROR (2, 3); LANDLORD AND TENANT (1).

COMPANIONSHIP—See DEATH (2).

COMPENSATION—See OFFICERS.

COMPUTATION OF TAX—See TAXATION (7, 9).

CONDITIONAL SALES—See SALES (1, 5).

CONDITION PRECEDENT—See BILLS AND NOTES (2).

CONDITIONS—See DIVORCE (5); MUNICIPAL CORPORATIONS (8).

CONDONATION—See ATTORNEY AND CLIENT (10); DIVORCE (5).

CONFRONTATION OF WITNESSES—See CRIMINAL LAW (2).

CONJUGAL RIGHTS—See DIVORCE (1).

CONSENT—See AUTOMOBILES (10); NAVIGABLE WATERS (4, 5).

CONSERVATION DEPARTMENT—See NAVIGABLE WATERS (9).

CONSIDERATION—See ACCOUNTING (6); BILLS AND NOTES (1); CONTRACTS (2, 4); SALES (2, 6).

CONSTITUTIONAL LAW.

1. Any attempt to vest courts with legislative authority would be invalid in view of the recognized division of powers between the different departments of government. *Goethal* v. *Kent County Supervisors*, 105.

2. Courts may determine what are the corporate limits of a municipality already established, determine whether what is claimed by the municipal authority to be the corporate limits

CONSTITUTIONAL LAW—Continued.

is so or not, and inquire whether the legislative authority has exceeded the powers with which it is invested but a court may not determine whether or not certain territory should be annexed to a municipal corporation as that would be a conferral of legislative power upon the courts that is unconstitutional. *Id.*

3. A litigant has a constitutional right not to have a question go to the jury, where the evidence is such that as a matter of law no recovery may be had. *Waltanen* v. *Wiitala,* 505.

See ATTORNEY AND CLIENT (1); CONTRACTS (9); CORPORATIONS (2); MUNICIPAL CORPORATIONS (4); STATUTES (8); TAXATION (6).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (6, 7, 9); SALES (5).

CONSTRUCTION OF STATUTES—See COSTS (1, 2, 12); DEATH (1); STATUTES (2, 3, 5–7, 9–11); TAXATION (5).

CONSULTATION—See ATTORNEY AND CLIENT (5).

CONSUMER—See TAXATION (1).

CONSUMMATION OF PURCHASE—See BROKERS.

CONTINUING COMPENSATION—See WORKMEN'S COMPENSATION (9).

CONTRACTS.

1. A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover for the performance that he has rendered thereunder or its value. *Kukla* v. *Perry,* 312.
2. Defendant attorney who exacted written promise from mortgagors to purchase their insurance in connection with their business from defendant's insurance agency, not being severable, so tainted the agreement as to render void the entire consideration he furnished and rendered promises involved in the agreement unenforceable (CL 1948, § 514.9a). *Id.*
3. A provision of a contract that is void by reason of statute prohibiting a creditor from insisting that debtor procure insurance from a particular insurance agent or insurer renders the entire contract void unless such provision is severable (CL 1948, § 514.9a). *Id.*
4. If any part of a consideration is void the whole consideration is void as public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. *Id.*
5. It is necessary to determine first what the terms of a contract are in order to recognize a change in the terms. *Davis* v. *Kramer Bros. Freight Lines, Inc.,* 371.
6. The meaning of a word used in a contract must be ascertained in the light of all of the relevant circumstances, not excluding, where helpful, the experience of courts and linguists, and including the meanings accepted by the parties. *Id.*

CONTRACTS—Continued.

7. Words used in contracts are not necessarily transparent and unchanging but may vary greatly in color and content according to the circumstances and the time in which used. *Id.*

8. A practical interpretation of the terms of a contract by the parties is admissible as an aid in the determination of the meaning to be given legal effect, but a one-sided, self-serving interpretation by one party without acquiescence by the other party is ineffective to establish such practical interpretation. *Id.*

9. Motion to dismiss truck lessor's action against lessee for sums claimed to be due under contract of lease *held*, to have been improperly granted, where plaintiff's counter affidavit controverted defendant's interpretation of the contract (Const 1908, art 2, § 13; Court Rule No 18, § 3 [1945]). *Id.* 372.

10. The waiver of a provision in a contract is a matter of intent. *Fothergill* v. *McKay Press*, 666.

11. Redelivery of memorandum of an oral contract of employment, executed by the employer and presented to the employee some year and a half after employment relation had been entered into *held*, waived by employer, where employee continued in same duties for 2 years after memorandum was presented without anything having been said about his failure to make redelivery. *Id.*

See ACCOUNTING (3); APPEAL AND ERROR (22); BROKERS (1); CORPORATIONS (3); COURTS (3); FRAUD (4); FRAUDS, STATUTE OF; INNKEEPERS; LIMITATION OF ACTIONS (1); PLEADING (7); QUIETING TITLE (3); SALES (5); SCHOOLS AND SCHOOL DISTRICTS (2); TOWNSHIPS (1).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (26, 27); AUTOMOBILES (1); NEGLIGENCE (3, 7, 9); RAILROADS (3).

CONVALESCENT HOME—See COVENANTS (4, 5).

CORPORATION AND SECURITIES COMMISSION—See COURTS (6); TAXATION (8).

CORPORATIONS.

1. A corporation may not be created by a special act of the legislature (Const 1908, art 12, §§ 1, 2). *State Bar of Michigan* v. *City of Lansing*, 185.

2. A corporation, as the term is used in the Constitution, includes associations having any of the powers or privileges of corporations not possessed by individuals or partnerships (Const 1908, art 12, § 2). *Id.*

3. A fiduciary relation exists between a corporation and its officers and directors and the latter may deal with the corporation only in good faith with all the material facts made known to the other directors, and the burden of proving the fairness of any contract between a corporation and a director thereof is upon the party asserting its validity. *Kukla* v. *Perry*, 313.

4. The delegation of corporation's sales campaign to a representative of the corporation does not absolve the directors

CORPORATIONS—Continued.

from responsibility for public misrepresentations made to plaintiff purchaser incident to sale of the corporation's product (CL 1948, § 450.47). *Mason* v. *Vogue Knitting Corporation*, 482.

See ACCOUNTING (1, 3–6); COURTS (6); FRAUD (2); STATUTES (8).

CORPORATION TAX APPEAL BOARD—See APPEAL AND ERROR (6); ATTORNEY GENERAL; COSTS (3); TAXATION (8, 9).

CORRIDORS—See NEGLIGENCE (6).

COSTS.

1. No costs are allowed on certiorari reviewing action of circuit court granting mandamus to require submission to electorate of matter of annexation of townships' territory to city, questions of statutory interpretation being involved. *Goethal* v. *Kent County Supervisors*, 106.
2. No costs are allowed in suit for declaratory judgment by parties who had paid a use tax, where questions of statutory construction were involved (CL 1948, § 205.91 *et seq.*, as amended). *Romeo Homes, Inc.*, v. *Commissioner of Revenue*, 130.
3. No costs are allowed on appeal from the corporation tax appeal board, where a public question was involved (CLS 1956, § 450.309). *Detroit Edison Company* v. *Corporation & Securities Commission*, 151.
4. No costs are allowed in State bar's suit for declaration of rights as to its liability for property taxes, a public question being involved (CL 1948, § 691.51 *et seq.*). *State Bar of Michigan* v. *City of Lansing*. 186.
5. No costs are allowed upon reversal of judgment and remand for new trial in guest passenger's action against host motorist, where new trial not restricted to amount of plaintiff's damage is given, since neither party has prevailed (CLS 1956, § 257-.401). *Turner* v. *Cotham*, 200.
6. No costs are allowed in suit to determine validity of variance of city zoning ordinance by board of zoning appeals, a public question being involved (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7). *Tireman-Joy-Chicago Improvement Association* v. *Chernick*, 213.
7. Costs are awarded appellee in suit to enjoin unfair labor practices upon affirmance of decree by BLACK and KAVANAGH, JJ., and notwithstanding appellants would have prevailed under opinion concurred in by SMITH, EDWARDS, and SOURIS, JJ. *Haenlein* v. *Saginaw Building Trades Council A. F. L.*, 263.
8. No costs are allowed in suit to determine priority of Federal tax liens over other liens, where neither side has prevailed in full (26 USCA, §§ 6321–6323; CL 1948, § 211.521). *Union Central Life Insurance Company* v. *Peters*, 283.
9. No costs are allowed in proceeding to determine whether or not plaintiffs who became self-employed during period of lay-

COSTS—Continued.

off were entitled to unemployment compensation benefits irrespective of amount of remuneration received, a public question being involved (CL 1948, § 421.1 *et seq.*; CLS 1956, §§ 421.28, 421.29, 421.48). *Bolles* v. *Employment Security Commission*, 379.

10. No costs are allowed in suit to determine validity of annexation of territory by one city from territory of another city (CLS 1956, § 117.9). *Cavanagh* v. *Calhoun County Board of Canvassers*, 516.

11. No costs are allowed in suit by owners of a plat to compel defendant city to approve it, a public question being involved. *Roll* v. *City of Troy*, 540.

12. No costs are allowed in proceeding by petitioner against the secretary of State for restoration of his automobile operator's license involving construction of various provisions of the motor vehicle code (CLS 1956, §§ 257.65, 257.323, 257.504, 257.504a, 257.512, 257.513). *Balcain* v. *Secretary of State*, 570.

13. No costs are allowed on appeal from award of workmen's compensation to plaintiff employee who had developed a paranoid schizophrenic condition while engaged in assembly line work, where such compensation is ordered terminated upon the cessation of symptoms so that he could engage in other types of employment. *Carter* v. *General Motors Corporation*, 579.

COURT OF CLAIMS—See COURTS (6).

COURT OF COMMON PLEAS—See APPEAL AND ERROR (23).

COURT RULES—See APPEAL AND ERROR (8, 11–13); CONTRACTS (9); PLEADING (5, 6); TRIAL (1, 4).

COURTS.

1. The rule of *stare decisis* establishes uniformity, certainty, and stability in the law, but it was never intended to perpetuate error or to prevent the consideration of rules of law to be applied to the ever-changing business, economic, and political life of a community. *Parker* v. *Port Huron Hospital*, 1.

2. The exception to the rule of *respondeat superior* that the beneficiary of the services of a charitable organization may not recover from it for damages resulting from negligence of an employee or agent of the charity, having been placed in the law by the Supreme Court, may be changed by the Court on the ground that it was an erroneous conclusion that put it there. *Id.*

3. Determination of a question as to plaintiff's right to tenure as principal in defendant school district for period of contract now expired is made notwithstanding it is patently moot, since it is a matter of public importance. *Street* v. *Ferndale Board of Education*, 82.

4. Former decision of the Supreme Court of this State is not of controlling significance in passing on an appeal, where situation to which rules there applied differs materially from the situation here involved. *Cass County Park Trustees* v. *Wendt*, 247.

COURTS—Continued.

5. It is the duty of a State supreme court to follow current decisions of the supreme court of the United States upon decisive Federal questions. *Union Central Life Insurance Company* v. *Peters,* 283.

6. The court of claims has jurisdiction to determine claim against State by corporation for alleged overpayment of annual privilege fee, paid under protest, where corporation and securities commission had rescinded its redetermination of such fee, withheld repayment of the payment, declined to proceed with redetermination as provided by statute thereby preventing completion of the administrative process as to such tax, and declined to give the corporation an unqualified certificate of good standing, essential to financing operations (CLS 1956, §§ 450.82, 450.304, 450.305, 450.309, 450.310). *Detroit Edison Company* v. *State,* 290.

See ADMINISTRATIVE LAW (2); ATTORNEY AND CLIENT (1); CONSTITUTIONAL LAW (1, 2); DRAINS; INJUNCTION; LABOR RELATIONS (1, 2); MUNICIPAL CORPORATIONS (4–6, 13, 14).

COVENANTS.

1. A reciprocal negative easement arises when the common owner of land in making grants of lots therein includes some affirmative or negative restriction for the benefit of the land retained evidencing a scheme or intent that the entire tract should be similarly treated, and once the plan is effectively put into operation the burden placed upon the land conveyed is, by operation of law, reciprocally placed upon the land retained and the purchasers relying upon the restriction thereby assured that the plan will be completely achieved. *Lanski* v. *Montealegre,* 44.

2. The restriction in plaintiffs' lots in private summer resort subdivision against commercial use, imposed by the common owner, *held,* to have effected a reciprocal negative easement, notwithstanding such common owner conducted on his retained lot the sale of lots or rental of cottages, a water supply system, and a garbage pickup service for it and other areas adjacent to the subdivision, such latter incidental services helping to make the area more desirable for the purpose used. *Id.*

3. Commercial activity, as used in covenants, in deeds, includes any type of business or activity which is carried on for a profit. *Id.* 45.

4. Operation of a convalescent home for profit open to the public that can afford to pay *held,* to constitute a commercial use of property subject to restriction against such use by reciprocal negative easement imposed by common owner of the subdivision in which defendants' lot was located. *Id.*

5. Claim of laches *held,* without foundation in suit by owners of lots in subdivision which had been subjected to a reciprocal negative easement against use for commercial purposes by common owner, and no proscribed commercial activity took place until the establishment of convalescent home by defendants the year before suit was commenced. *Id.*

CREDIBILITY—See APPEAL AND ERROR (20); DIVORCE (4); EVIDENCE (1).

CRIMINAL LAW.

1. Any character witness, in a prosecution for crime, regardless of his official position may be questioned for the purpose of showing any particular interest he may have in the one for whom he testifies and for the purpose of bringing out the basis for his expressed opinion without prejudicing the defendant. *People* v. *King*, 141.

2. It was not error in prosecution of justice of the peace for failure to turn over court records to successor in office for prosecution to read to jury, without calling the attorney general to the stand, a letter from the attorney general to the auditor general relative to such transfer of records, where the letter which had been examined by defendant when his successor made demand for the records was thus presented to jury for the sole purpose of illustrating the nature and circumstances of the discussion between the parties at the time of the demand and not for the purpose of showing what the law was (CL 1948, § 750.480). *People* v. *Jackson*, 390.

See HOMICIDE.

CROSS-EXAMINATION—See HOMICIDE (2).

CURVES—See AUTOMOBILES (11).

CUSTODY OF CHILDREN—See EQUITY (1, 2).

CUSTOMS AND USAGES.

Evidence adduced in nonjury action whereby plaintiff sought recovery for cost of special tooling incident to the production by it of parts for hydraulic pump assembly *held*, to show that plaintiff recognized trade custom that it would not be entitled to recover until samples of production parts had been approved. *Attwood Brass Works* v. *Aero-Motive Manufacturing Co.*, 236.

See WORK AND LABOR.

DAMAGES.

1. Verdict of $20,000 against hospital in administrator's action for negligence resulting in death of 31-year-old mother of 4 children *held*, not excessive, where it appears she lived 13 days following transfusion of mismatched blood after hysterectomy and suffered much pain. *Parker* v. *Port Huron Hospital*, 3.

2. Award of $4,000 to plaintiff administratrix of estate of deceased pedestrian who had lived some 26 hours after being hit by defendant's car *held*, not shocking or excessive, where there is testimony that decedent had been conscious, responded to commands and spoke, and that she groaned and thrashed about. *Gabrish* v. *Morse*, 40.

3. A defendant in an action for personal injuries is entitled to have the jury, once it has found him liable at all, give deliberate consideration to the amount of the damage that plaintiff sustained and where such consideration is not given by the jury the defendant is entitled to a new trial. *Turner* v. *Cotham*, 199.

DAMAGES—Continued.

4. The hitherto adopted rule for measure of damages suffered through the death of a minor child, his probable wages less the cost of his keep, is overruled. *Wycko* v. *Gnodtke,* 331.
5. Question as to whether a second hospitalization of plaintiff some 8 months following fracture of hip as she fell while entering rest room in defendant's office building *held,* to have been properly considered by jury in determining damages under instructions that her extremely nervous condition which had necessitated the second hospitalization was due to the injury rather than her concern about a settlement in the case. *Dahlem* v. *Hackley Union National Bank & Trust Company,* 610.
6. Verdict of $125,000 to 52-year-old man who was completely disabled by injuries negligently inflicted by defendant railroad *held,* within range of proofs showing large loss of earnings, pain and suffering, hospital and medical expense, and it does not appear that anything occurred in the course of the trial to create prejudice or bias on the part of the jury, nor that any such feeling entered into the determination as to the amount of recovery, hence, new trial may not be granted because of alleged excessive verdict. *Wright* v. *Delray Connecting Railroad Company,* 621.

See APPEAL AND ERROR (4, 5, 10–13); BOUNDARIES (5); COSTS (5); DEATH (3, 4); LABOR RELATIONS (3); NEW TRIAL; NUISANCE (2, 3).

DEATH.

1. The wrongful death act is remedial in character and should be construed liberally in favor of its beneficiaries (CL 1948, §§ 691.581–691.583). *Wycko* v. *Gnodtke,* 331.
2. The pecuniary value of a human life is a compound of many elements, including mutual society and protection, companionship (CL 1948, §§ 691.581–691.583). *Id.*
3. Recovery of damages under the death act for the death of a minor is limited to pecuniary losses, including the child's wage-profit capability (CL 1948, §§ 691.581–691.583). *Id.*
4. Trial court's order of remittitur from jury's verdict of $14,979.50 for death of 14-year-old boy, of all in excess of $8,479.50, including $979.50 funeral and burial expenses *held,* error, as the verdict of $14,000 was not so patently oppressive as to indicate prejudice, the remittitur being occasioned by application of the child-labor standard of pecuniary loss, an outmoded fiction (CL 1948, §§ 691.581–691.583). *Id.* 332.

See DAMAGES (1, 4).

DEBTORS—See APPEAL AND ERROR (18).

DECLARATION—See PLEADING (3).

DECLARATORY JUDGMENT—See COSTS (2, 4).

DEFAULT—See BILLS AND NOTES (1); LABOR RELATIONS (3).

DEFENSES—See BILLS AND NOTES (1, 3, 4); PLEADING (9); TRIAL (4).

DELAY—See SALES (7).

DELEGATION OF POWER—See TAXATION (7).

DEMAND—See CRIMINAL LAW (2).

DEMOTION—See SCHOOLS AND SCHOOL DISTRICTS (2).

DEMURRER—See PLEADING (5).

DE NOVO REVIEW—See APPEAL AND ERROR (20, 23); DIVORCE (4).

DENTAL BILLS—See NEW TRIAL (2).

DEPENDENT DESCRIPTIONS—See BOUNDARIES (3).

DEPOSITION—See FRAUD (3).

DEPUTIES AND ASSISTANTS—See APPEAL AND ERROR (6); ATTORNEY GENERAL; TAXATION (9).

DESCRIPTIONS—See BOUNDARIES (3).

DETROIT—See APPEAL AND ERROR (2); COSTS (6); MUNICIPAL CORPORATIONS (8, 10–12, 14).

DIRECTED VERDICT—See APPEAL AND ERROR (25, 26); AUTOMOBILES (12); NEGLIGENCE (4).

DIRECTORS—See CORPORATIONS (3, 4).

DISABILITY—See WORKMEN'S COMPENSATION (4).

DISBARMENT—See ATTORNEY AND CLIENT (1, 3).

DISCIPLINE—See ATTORNEY AND CLIENT (1, 3).

DISCRETION OF COURT—See APPEAL AND ERROR (5); LABOR RELATIONS (3); NEW TRIAL (1); PLEADING (1).

DISINHERITANCE OF CHILDREN—See WILLS (3, 5).

DISQUALIFICATION FOR BENEFITS—See UNEMPLOYMENT COMPENSATION (3, 4).

DISSOLUTION—See LANDLORD AND TENANT (1); PARTNERSHIP (2).

DISTRIBUTORSHIP—See FRAUD (3).

DIVORCE.

1. Plaintiff physician in suit for divorce *held*, not to have substantiated his claim of extreme cruelty by proofs adduced with respect to false accusations by defendant wife of his marital infidelity or as to denial of conjugal rights. *Molnar v. Molnar*, 54.

2. Decree of divorce was properly awarded to plaintiff wife on ground of extreme cruelty of husband, where there was testimony that he falsely accused her of misconduct with other men, was irritable and abusive in his manner toward her, was discourteous to her relatives and friends, neglected her when she was confined in a hospital after an automobile accident, and objected to her getting proper treatments to alleviate her

DIVORCE—Continued.

physical condition, told her he did not care for her, threatened her with physical violence, did not entertain proper respect for her and did not have confidence in her, extreme cruelty not being confined to physical violence. *Keenan* v. *Keenan*, 123.

3. Grievances to justify a decree of divorce on the ground of extreme cruelty may be mental or physical, if they are of a sufficiently aggravated nature. *Id.*

4. A divorce case is heard *de novo* on appeal, but especial consideration is given to findings of the circuit court that are largely based upon the credibility of witnesses. *Id.*

5. A claim of condonation in defense of a suit for divorce on the ground of extreme cruelty is not made effectual merely because no new misconduct constituting a cause for divorce is shown to have occurred subsequent to the alleged condonation, but it is necessary that the conditions upon which the condonation was granted should have been complied with by the offending party. *Id.*

DOORS—See NEGLIGENCE (6–8).

DRAINS.

Parties affected by order apportioning costs of drain have but 1 opportunity for judicial review of the drainage board's apportionment, a right limited by statute to certiorari brought within 20 days after filing final order of apportionment (CLS 1956, § 280.483). *City of Madison Heights* v. *Twelve Towns Relief Drains Drainage Board*, 522.

See JUDGMENT (4, 5).

DRIVING UNDER INFLUENCE OF INTOXICATING LIQUOR—See AUTOMOBILES (11).

DUE PROCESS—See ADMINISTRATIVE LAW (1); MUNICIPAL CORPORATIONS (9).

DUST—See NUISANCE (3).

DYNAMITE—See INNKEEPERS; LIMITATION OF ACTIONS (2).

EDUCATION, BOARD OF—See SCHOOLS AND SCHOOL DISTRICTS (7).

EMERGENCY—See AUTOMOBILES (14).

EMOTIONAL PRESSURES—See WORKMEN'S COMPENSATION (2).

EMPLOYMENT SECURITY ACT—See UNEMPLOYMENT COMPENSATION (1, 2).

EQUITY.

1. A court of equity in the exercise of its inherent jurisdiction in a proceeding to determine the custody of children between parents who were not divorced, has the power to make an award to the wife for attorney fees and expenses of suit to the end that she may be afforded opportunity for a fair presentation of her case. *Sovereign* v. *Sovereign*, 528.

EQUITY—Continued.

2. A mother is entitled to be heard in any proceeding instituted for the purpose of fixing the custody of her minor child as the court is primarily concerned with the best interests of such child, and where the mother is without resources to present her case properly, the court, incidental to the exercise of its inherent jurisdiction in such cases, may make an award to the wife to cover such attorney fees and expenses as may be deemed fair and reasonable under all the circumstances of the case. *Id.*

3. Decree granting relief to plaintiff property owners against city to compel latter to approve a plat notwithstanding it did not comply with city's zoning ordinance limiting minimum size of lots in area in which plaintiffs' plat was located to 30,000 square feet each, is reversed and case remanded, where decree was entered before proofs were taken. *Roll* v. *City of Troy*, 540.

See NAVIGABLE WATERS (11); QUIETING TITLE; SALES (7).

ESTATES OF DECEDENTS—See APPEAL AND ERROR (16–18); AUTOMOBILES (1); DAMAGES (2); EXECUTORS AND ADMINISTRATORS; WITNESSES (1).

ESTOPPEL—See ADVERSE POSSESSION (2).

EVIDENCE.

1. A prior statement of a witness that is introduced for impeachment purposes bears solely upon the credibility of the witness and may not be considered for the purpose of establishing the substantive truth of such prior statements. *Gabrish* v. *Morse*, 40.

2. It was not prejudicial error for trial court to overrule objection to the introduction of testimony as to amount plaintiff had received from his employer for injuries received during employment because of defendant railroad's alleged negligence, where the receipt of workmen's compensation had been mentioned by counsel for both parties in their opening statements without objection. *Wright* v. *Delray Connecting Railroad Company*, 620.

See ACCOUNTING (1); APPEAL AND ERROR (1–3, 7, 20, 23, 25, 26); ATTORNEY AND CLIENT (5, 9); AUTOMOBILES (1, 15); BOUNDARIES (4, 5); CONSTITUTIONAL LAW (3); CUSTOMS AND USAGES; DAMAGES (6); DIVORCE (2); EQUITY (3); FRAUD (2, 3); HOMICIDE (1, 4, 8); HOSPITALS (2); LANDLORD AND TENANT (2, 4); MECHANICS' LIENS; MUNICIPAL CORPORATIONS (2, 19); NAVIGABLE WATERS (11); NEGLIGENCE (4, 5, 7); NUISANCE (1, 2); PLEADING (9); QUIETING TITLE (2, 3); RAILROADS (2); SALES (5); TRIAL (5); WILLS (4, 5, 7); WORK AND LABOR; WORKMEN'S COMPENSATION (4, 5, 8).

EXCESSIVE SPEED—See AUTOMOBILES (4, 6).

EXCESSIVE VERDICT—See DAMAGES (6).

EXECUTION BY MARK—See WILLS (7).

EXECUTION OF INSTRUMENTS—See LANDLORD AND TENANT (1); PARTNERSHIP (2).

EXECUTORS AND ADMINISTRATORS.

An administrator of an estate who is appointed after petition filed to reopen estate that has once been probated has no interest in the estate or in its assets aside from the status given him by the order reopening the estate and appointing him as administrator, hence, he has no right to appeal from such order as he is not an aggrieved person (CL 1948, § 701.36). *In re Critchell Estate*, 432.

See APPEAL AND ERROR (17, 18); AUTOMOBILES (1); DAMAGES (1, 2); HOSPITALS (2); WITNESSES (1).

EXEMPTIONS—See TAXATION (2–5).

EXHAUSTION OF UNION REMEDIES—See INJUNCTION; LABOR RELATIONS (1, 2).

EX-OFFICIO SERVICES—See OFFICERS.

EXPENSES—See EQUITY (2).

EXPLOSIONS—See INNKEEPERS; LIMITATION OF ACTIONS (2).

EXTREME CRUELTY—See DIVORCE (1–3, 5).

FAILURE OF CONSIDERATION—See BILLS AND NOTES (1, 4); SALES (2).

FAILURE OF EITHER PARTY TO PREVAIL—See COSTS (5, 8).

FAILURE TO HEED WARNING—See AUTOMOBILES (5, 6).

FALSE ACCUSATIONS OF INFIDELITY—See DIVORCE (1, 2).

FARM TRACTORS—See APPEAL AND ERROR (9); AUTOMOBILES (10).

FEDERAL QUESTION—See COURTS (5).

FEES—See ACCOUNTING (2).

FENCES—See ADVERSE POSSESSION (1); BOUNDARIES (5); JUDGMENT (3).

FIDUCIARY—See ATTORNEY AND CLIENT (7).

FILING—See PARTNERSHIP (2).

FIRST-DEGREE MURDER—See HOMICIDE (8).

FISHING—See NAVIGABLE WATERS (9).

FLOOR LEVELS—See NEGLIGENCE (6–8).

FLOORS—See NEGLIGENCE (5).

FORECLOSURES—See APPEAL AND ERROR (1).

FORESEEABLE CONSEQUENCES—See AUTOMOBILES (13).

FRAUD.

1. Record supported findings of trial court in opinion denying defendants' motion to dismiss action for fraud in sale of knitting machine as to ease of learning how to operate machine, instruction promised to be given, time necessary to earn amount necessary to finance the purchase, number of machines already sold and to be sold in the area, selection of garments permitted, and excessive production over market. *Mason* v. *Vogue Knitting Corporation*, 481.
2. Evidence presented in knitting machine purchaser's action for fraud against vendor corporation and its directors *held*, to sustain trial court's findings of actionable misrepresentation by defendants upon denial of their motion to dismiss and sufficient to present issue of fraud to jury. *Id.* 482.
3. Reception in evidence of deposition of person to whom defendants had related details as to how they had defrauded plaintiff when they sold her their business of making articles from plaster and distributorship of certain paints *held*, not reversible error in suit for rescission and recovery of sum paid therefor. *Schimke* v. *Scott*, 654.
4. Record in suit to rescind contract for sale of business of making articles from plaster and distributorship of certain paints *held*, to sustain trial court's finding that plaintiff had clearly established defendants, husband and wife, had fraudulently induced plaintiff to purchase the business and that trial court's comments relative to the defendant husband's failure to testify either to deny statements attributed to him or to corroborate his wife's testimony were merely an additional reason for finding for plaintiff. *Id.*
5. The right to rescind a contract because it was fraudulently induced required the defrauded party to restore what he or she has received, with allowance for any part that cannot be restored. *Id.*

See ADMINISTRATIVE LAW (1); CORPORATIONS (4); LABOR RELATIONS (3).

FRAUDS, STATUTE OF.

1. An oral contract which may, according to its terms, be performed within a year, is not within the statute of frauds (CL 1948, § 566.132). *Fothergill* v. *McKay Press*, 666.
2. An oral contract of employment, subject to termination by either party upon 6-months' notice, *held*, a contract performable within a year, hence, not within the statute of frauds, the permission to terminate being a part of the agreement itself (CL 1948, § 566.132). *Id.*
3. A memorandum of an oral contract upon performance of which the parties had previously entered is no less a memorandum satisfying the statute of frauds because it purports to be the complete proposed contract between the parties (CL 1948, § 566.132). *Id.*

FUNERAL EXPENSES—See DEATH (4).

FURNITURE—See SALES (7).

GARAGE—See BOUNDARIES (5); QUIETING TITLE (2).

GARBAGE PICKUP SERVICE—See COVENANTS (2).

GARNISHMENT.

A garnishment proceeding is ancillary to the main action against the principal defendant. *Rodgers* v. *Mikolajczak,* 62.

See JUDGMENT (1, 2).

GENERAL WELFARE—See MUNICIPAL CORPORATIONS (22).

GOOD FAITH—See ATTORNEY AND CLIENT (6); CORPORATIONS (3); HOMICIDE (6).

GREAT LAKES—See NAVIGABLE WATERS (1–5, 10, 11).

GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (23); AUTOMOBILES (15).

GROSS NEGLIGENCE—See AUTOMOBILES (2).

GUEST ACT—See AUTOMOBILES (2–9); COSTS (5); NEW TRIAL (3).

GUESTS—See INNKEEPERS; LIMITATION OF ACTIONS (2).

GYPSUM—See NUISANCE (2).

HARDSHIP—See MUNICIPAL CORPORATIONS (9, 10).

HEARING—See SCHOOLS AND SCHOOL DISTRICTS (7); TRIAL (1).

HIGHWAYS AND STREETS.

The title owner of land subject to public user for highway purposes of a highway contiguously bordering a nonprivate navigable lake may not erect a barrier in such a manner as to interfere with public passage between the highway and lake, where it appears the public authorities have need of the area between the water and the traveled portion of the highway to maintain protection for the highway against the action of the lake. *Cass County Park Trustees* v. *Wendt,* 247.

See JUDGMENT (3); WITNESSES (1).

HIP INJURY—See DAMAGES (5); NEGLIGENCE (7).

HOLDER IN DUE COURSE—See BILLS AND NOTES (1, 3).

HOME RULE—See MUNICIPAL CORPORATIONS (4).

HOMICIDE.

1. Verdict of murder in the second degree *held,* supported by evidence presented in prosecution for homicide (CL 1948, §§ 750.316, 750.317). *People v. King,* 140.
2. The asking by the trial judge of questions which had the purpose of clarifying matters the prosecutor and defendant's counsel had brought out by their inquires so that the jury might have as clear a picture as possible of what had occurred and the general situation involved in prosecution for homicide *held,* not to have made the judge assume the rule of a prosecutor nor to have amounted to cross-examination (CL 1948, §§ 750.316, 750.317). *Id.*

HOMICIDE—Continued.

3. Inquiry by trial judge in prosecution for homicide as to whether certain statements and admissions by defendant had been voluntarily made to State police lieutenant *held,* not to have prejudiced defendant (CL 1948, §§ 750.316, 750.317). *Id.*

4. Questions put to witnesses by the trial judge which indicate the trial judge followed the testimony closely and exercised his prerogatives on the trial to insure a proper presentation of the case to the jury *held,* not to have prejudiced defendant in prosecution for homicide (CL 1948, §§ 750.316, 750.317). *Id.* 141.

5. Claim that defendant in prosecution for homicide was prejudiced by injection of an element of sympathy into case by inquiring of victim's widow with reference to the number of children in the family *held,* not tenable, since the inquiry was obviously directed to bringing out the situation existing at the home and who were present there when the victim was killed (CL 1948, §§ 750.316, 750.317). *Id.*

6. Reversible error was not committed by permitting inquiries of witnesses to show that defendant in prosecution for homicide and his hunting companions left the county where homicide occurred shortly after victim was killed and without notifying local authorities as to what had taken place, since facts of such nature had a bearing on the good faith of defendant in claiming self-defense (CL 1948, §§ 750.316, 750.317). *Id.*

7. Remarks of trial court to defense counsel in prosecution for homicide that his objection to testimony of witness on ground it lacked responsiveness was open only to prosecutor who was then examining the witness *held,* not to have constituted disparaging treatment of such counsel prejudicial to defendant (CL 1948, §§ 750.316, 750.317). *Id.*

8. Reference to first-degree murder when defining second-degree murder and manslaughter after reminding jury that verdict of first-degree murder could not be brought in under the proofs *held,* not prejudicial to defendant who had interposed defense of self-defense and whose conviction of second-degree murder was sustained by the proofs (CL 1948, §§ 750.316, 750.317). *Id.*

9. Sentence of 20 to 30 years for second-degree murder is permitted by statute, hence, claim that it was excessive is without merit (CL 1948, § 750.317). *Id.* 142.

HOSPITALS.

1. A charitable, nonprofit hospital corporation is no longer immune from liability to patients for the negligence of its agents and servants from the time of filing the opinion overruling the previous bench-made rule of law by which such corporations were granted immunity. *Parker* v. *Port Huron Hospital,* 2.

2. Admission of testimony in action by plaintiff husband, individually and as administrator of the estate of his wife who died in the defendant nonprofit charitable corporation's hospital

HOSPITALS—Continued.

because of the negligence of a laboratory technician and of other employees and doctors, *held*, proper, when allegations of error are considered in the light of the complete theory of plaintiff's case and not restricted to the negligence of the laboratory technician. *Id.*

See DAMAGES (5, 6); PLEADING (3, 4).

HOUSING UNITS—See TOWNSHIPS (1); WAR.

HUNTING—See NAVIGABLE WATERS (9).

HUSBAND AND WIFE—See HOSPITALS (2).

HYDRAULIC PUMP ASSEMBLY—See CUSTOMS AND USAGES; WORK AND LABOR.

HYSTERECTOMY—See DAMAGES (1).

ILLEGAL CONTRACT—See CONTRACTS (1–3).

IMPEACHMENT—See EVIDENCE (1).

IMPLIED AGREEMENT—See BOUNDARIES (2).

IMPLIED CONTRACTS—See INNKEEPERS; LIMITATION OF ACTIONS (1).

IMPLIED WAIVER—See CHARITIES (2).

IMPLIED WARRANTY—See SALES (2–4).

INADEQUACY OF DAMAGES—See APPEAL AND ERROR (5); NEW TRIAL (1).

INCOME TAX SETTLEMENT—See ACCOUNTING (2).

INCORPORATION—See MUNICIPAL CORPORATIONS (7).

INFANTS—See DAMAGES (4); DEATH (4).

INFERENCE—See AUTOMOBILES (7).

INFIDELITY—See DIVORCE (2).

INJUNCTION.

Portion of plaintiff's bill to enjoin use of union funds for political purposes failed to state a cause of action, since the right to relief was dependent on his union membership or right thereto and such right had not been alleged in that there was no allegation of exhaustion of available intraunion remedies or futility of an attempt to do so before seeking redress in courts. *Knox* v. *Local 900, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO)*, 257.

See COSTS (7); LABOR RELATIONS (3).

INNKEEPERS.

An action by a paying guest against an innkeeper for personal injuries due to explosion of dynamite by a former disgruntled guest who had been evicted cannot be predicated on contract

INNKEEPERS—Continued.

liability under theory of implied warranty. *Baatz* v. *Smith* (*Royston* v. *Same, Middleton* v. *Same*), 69.

See LIMITATION OF ACTIONS (2).

INSTRUCTIONS—See AUTOMOBILES (13–15); DAMAGES (5); NEGLIGENCE (8); TRIAL (5).

INSURANCE.

The liability of an insurer under an automobile insurance policy to third persons is not greater than that of the insured and would be subject to limitation of such liability in the policy. *Rodgers* v. *Mikolajczak*, 62.

See APPEAL AND ERROR (16, 17); AUTOMOBILES (1); CONTRACTS (2, 3); JUDGMENT (1); MASTER AND SERVANT; NEGLIGENCE (1); TRIAL (1, 5); WILLS (3).

INTENT—See ATTORNEY AND CLIENT (2); CONTRACTS (10); STATUTES (3, 5, 7); TAXATION (2); UNEMPLOYMENT COMPENSATION (1, 2).

INTEREST—See ACCOUNTING (2, 4).

INTERSTATE COMMERCE—See LABOR RELATIONS (3); TAXATION (6).

INTERVENTION—See JUDGMENT (4).

INTOXICATING LIQUORS—See AUTOMOBILES (11).

JUDGMENT.

1. Two determinations controlling issue as to plaintiff's status when raised in garnishment proceedings against insurer under policy excluding coverage of employees, which had been made in principal case are (1) its general verdict for plaintiff on question of fact as to whether or not plaintiff was an employee of principal defendant's decedent at time plaintiff was injured when a passenger in decedent's truck and (2) jury resolution that plaintiff was then an employee in response to special question in harmony with its general verdict for plaintiff. *Rodgers* v. *Mikolajczak*, 61.
2. An unappealed judgment in action against principal defendant became conclusive of the plaintiff's status in the principal case and is equally conclusive in subsequent garnishment proceeding. *Id.* 62.
3. Determination made in suit by property owners against board of county road commissioners that public roadway bordering lake had been established by user, followed by property owners erecting a fence on lake side of road which plaintiffs herein, the county park trustees, and the former defendant sought to have removed, *held*, to have definitely disposed of the main issues involved in instant suit. *Cass County Park Trustees* v. *Wendt*, 247.
4. A governmental unit, such as plaintiff city, which had been granted leave to intervene in an earlier case reviewing the validity of a large intercommunity drainage system, is con-

JUDGMENT—Continued.

sidered as an intervening party bound by the adjudication made therein as to tentative apportionment of costs notwithstanding it filed no further pleadings than petition to intervene as a party defendant along with the drainage board and concurred in brief filed by principal defendants. *City of Madison Heights* v. *Twelve Towns Relief Drains Drainage Board*, 522.

5. A determination, made by the trial court in an earlier proceeding in which plaintiff herein was an intervening defendant, approving formula used for apportioning costs of drain but from which no appeal was taken, although it might have been, was determinative of the issue. *Id.*

See APPEAL AND ERROR (2, 3); LICENSES; NEW TRIAL (3); PLEADING (9).

JUDICIAL REVIEW—See ADMINISTRATIVE LAW (2); DRAINS; LICENSES; MUNICIPAL CORPORATIONS (9, 11, 13, 14).

JUDICIARY—See ATTORNEY AND CLIENT (3).

JURISDICTION—See APPEAL AND ERROR (19, 22); COURTS (6); EQUITY (1, 2); LABOR RELATIONS (3); LICENSES; PLEADING (5); QUIETING TITLE (1); SCHOOLS AND SCHOOL DISTRICTS (3).

JURY—See CONSTITUTIONAL LAW (3).

JUSTICE OF THE PEACE—See CRIMINAL LAW (2).

KINDNESS—See WILLS (1).

KNITTING MACHINES—See FRAUD (1, 2).

LABORATORY TECHNICIAN—See HOSPITALS (2).

LABOR RELATIONS.

1. A union member who is aggrieved by acts of the union must exhaust his remedies within the framework of the union before coming into court. *Knox* v. *Local 900, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO)*, 257.

2. Bill by union member to compel his reinstatement within the defendant union, which failed to allege exhaustion of intraunion remedies available to him, was properly dismissed, since redress in the courts is not available until there has been exhaustion of such remedies or futility of an attempt to do so is shown. *Id.*

3. Decree enjoining certain illegal and unfair labor practices and holding appellants liable in substantial damages is affirmed per BLACK and KAVANAGH, JJ., on ground that default of appellants had been regularly entered and no motion to set it aside had been timely filed and no fraud was claimed or shown and per DETHMERS, C. J., and CARR and KELLY, JJ., on ground that trial court had not abused his authority in proceeding to trial without appellants having been present or represented thereat or in denying their motion to set aside the decree and grant a rehearing and because claim trial court

LABOR RELATIONS—Continued.

lacked jurisdiction in that plaintiff was engaged in interstate commerce had not been properly pleaded and was not substantiated at the trial was without merit. *Haenlein* v. *Saginaw Building Trades Council, A.F.L.*, 263.

See COSTS (7).

LACHES—See COVENANTS (5).

LAKES—See HIGHWAYS AND STREETS; JUDGMENT (3).

LAND CONTRACT—See BANKRUPTCY; QUIETING TITLE (3).

LANDLORD AND TENANT.

1. Appellant, former partner of partnership which had executed original lease but had ceased doing business as partnership before second lease was executed by other former partner and evidence of such disassociation was sufficient to cause common pleas court judge to hold appellant not liable was improperly subjected to liability for rent under second lease by circuit court on its review, as appellant was neither liable as a tenant holding over as there was a new lease, nor liable under the common counts. *LaHood* v. *Wieladt*, 100.
2. Evidence of proceedings of city board of zoning appeals with reference to granting of waiver as to off-street parking requirements for medical clinics was properly received in landlord's action against physician tenant for rent due on new building after acquisition of adjoining lot for parking purposes, as such testimony bore directly upon the enforceability of the lease according to its terms, one of which stipulated the lease was conditional upon the tenant having the right to conduct a medical office at the premises. *Zaino* v. *Olson*, 394.
3. Tenant of medical clinic *held*, entitled to use of additional lot purchased to provide off-street parking facilities as required by city zoning ordinance, under lease giving him right to abandon lease if he were forced to discontinue his practice there for insufficient parking facilities. *Id.*
4. It was not error to exclude testimony relative to completeness and tenantability of new medical clinic building in landlord's nonjury action for rent, where lease provided term should begin on a given date or, if not then completed, on the first day of occupancy, and trial court concluded the property was proved to have been completed and the prospective tenant was to take the property as it was on the date the lease was executed. *Id.*

See ACCOUNTING (3); PARTNERSHIP (2).

LANSING—See TOWNSHIPS (2).

LEASE—See CONTRACTS (9); LANDLORD AND TENANT (1, 2, 4); PARTNERSHIP (2).

LEG INJURY—See WORKMEN'S COMPENSATION (10).

LEGISLATIVE ACQUIESCENCE—See STATUTES (10).

LEGISLATURE—See CONSTITUTIONAL LAW (1, 2); MUNICIPAL CORPORATIONS (4); STATUTES (1).

LICENSES.

A circuit court of this State does not have jurisdiction to hear and determine any meritorious question on petition for restoration of motor vehicle operator's license which had been suspended because a certified abstract of court record of an unappealed judgment rendered against petitioner in the province of Ontario had been filed with the secretary of State, there being no judicial review provided for such suspension although such review was accorded by statute for suspensions for other reasons; petitioner having a remedy for assertion of his claim the judgment was void in the courts of Ontario (CLS 1956, §§ 257.65, 257.323, 257.504, 257.504a, 257.512, 257.513). *Balcain* v. *Secretary of State*, 570.

See COSTS (12).

LIENS.

The test of choateness as applied to a properly recorded business lien, or other lien created by operation of local law and duly recorded, if record is required, means that the business lien will receive preference over a Federal tax lien only to the extent of the fixed amount thereof as of due recordation of the competing Federal lien (26 USCA, §§ 6321–6323; CL 1948, § 211.521). *Union Central Life Insurance Company* v. *Peters*, 283.

See COSTS (8); MECHANICS' LIENS; RECORDS; TAXATION (10).

LIMITATION OF ACTIONS.

1. The 3-year statute limiting the time within which an action for injuries to the person may be brought applies to all actions to recover for an injury to the person whether based upon implied contract or tort (CLS 1956, § 609.13, subd 2). *Baatz* v. *Smith (Royston* v. *Same, Middleton* v. *Same)*, 68.
2. Actions by plaintiffs, paying guests at defendants' hotel, for personal injuries sustained when dynamite was exploded by a former disgruntled, evicted guest were barred by statute of limitations, where commenced over 4 years following the time when the actions accrued (CLS 1956, § 609.13, subd 2). *Id.* 69.

LIMITATIONS—See INSURANCE.

LIMITED NEW TRIAL—See NEW TRIAL (2).

LOSS OF EARNINGS—See DAMAGES (6).

LOYALTY—See ATTORNEY AND CLIENT (7).

MANDAMUS.

1. Mandamus was the proper procedure to use by party seeking to compel the submission of proposals to the electorate in areas for which petitions had been filed for annexation to a city. *Goethal* v. *Kent County Supervisors*, 104.
2. Mandamus to compel allowance of time on sentence which petitioner had been imprisoned under his original sentence is not granted, where he has already been discharged from

MANDAMUS—Continued.

prison by reason of completion of sentence imposed less special good time, the question being moot. *Johnson* v. *Michigan Parole Board*, 500.

See COSTS (1); MUNICIPAL CORPORATIONS (6).

MANSLAUGHTER—See HOMICIDE (8).

MANUFACTURERS—See CUSTOMS AND USAGES; FRAUD (3, 4); WORK AND LABOR.

MARKETABLE TITLE—See BROKERS (2).

MASTER AND SERVANT.

The term "acting employee" was correctly defined to jury incident to submission to it of special question in principal action as to whether plaintiff at time of injury was an employee of defendant well digger in that such term excluded one who is an employee but not then engaged in working for his employer but including an employee then engaged in his actual work or preparing for that work or doing incidents of that work, where plaintiff, at time of injury, was being transported in principal defendant's truck insured under garnishee's policy excluding coverage of injuries to employees (CL 1948, § 618.39). *Rodgers* v. *Mikolajczak*, 61.

See JUDGMENT (1); NEGLIGENCE (1).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (1, 2).

MAXIMUM PRICE—See MECHANICS' LIENS.

MECHANICS' LIENS.

Findings of fact in mechanics' lien foreclosure proceeding that there was no maximum price on roof repair job undertaken by plaintiff at defendants' request, that there was no poor workmanship by plaintiff necessitating additional repair work, and that a balance was due plaintiff, having been substantiated by the record, are not disturbed, where the trial judge heard the witnesses and was able to observe their demeanor and comportment as they gave their conflicting testimony. *Moss* v. *Torosian*, 50.

See APPEAL AND ERROR (1).

MEDICAL CLINIC—See LANDLORD AND TENANT (2-4).

MEDICAL EXPENSE—See DAMAGES (6).

MEMORANDUM—See CONTRACTS (11); FRAUDS, STATUTE OF (3).

MENTAL COMPETENCY—See WILLS (6, 7).

MENTAL INJURY—See WORKMEN'S COMPENSATION (6).

MINORS—See DAMAGES (4); DEATH (4).

MODIFICATION OF DECREE—See WAR.

MOOT QUESTION—See COURTS (3); MANDAMUS (2).

MORTGAGES—See ACCOUNTING (1); TAXATION (10).

MOTHER—See DAMAGES (1).

MOTION TO DISMISS—See CONTRACTS (9); FRAUD (1, 2); PLEADING (3, 5, 6, 8); TRIAL (1, 4).

MUNICIPAL CORPORATIONS.

1. The fact that areas in city in which trailer parks are permitted are already being used for other purposes does not serve to render zoning ordinance a ban on trailer parks altogether. *June* v. *City of Lincoln Park*, 95.
2. Plaintiff owners of 10-acre triangular tract of property within defendant city *held*, under evidence adduced, to have failed to sustain their burden of establishing that city's zoning ordinance was invalid as applied to such property by restricting it to residence use in which trailer parks are not permitted, where one side abuts a residential area, another is separated from a residential area by a railroad, and third side abuts area devoted to industrial purposes. *Id.*
3. Statute providing that proceeding to annex territory to a city could be commenced by petitions signed by 1% of the population of the territory affected thereby, with a minimum number of 100, with not less than 10 from each city, villiage, or township affected by the proposed change or in lieu thereof that signatures of owners of record legal title of 1/2 of the area annexed would suffice where there are less than 10 persons qualified to sign the petition living in the unincorporated territory is construed as providing for permitting, not requiring, the use of the alternative method where there are less than 10 persons qualified in area proposed to be annexed (CL 1948, § 117.6, as last amended by PA 1957, No 210). *Goethal* v. *Kent County Supervisors*, 105.
4. The power to provide for the incorporation of municipalities, annexation to, and changes of boundaries thereof rests entirely in the legislature, not the courts, subject to provisions of the Constitution designed to afford the rights and privileges of home-rule government. *Id.*
5. Whether or not circumstances exist that justify or make it desirable for annexation to a city to take place is not a question which courts may determine. *Id.*
6. The board of supervisors may not reject petitions to annex territory to a city, where the petitions were duly submitted to it and contain a sufficient number of valid signatures on each petition, merely because a majority of the board disapproved of the results which might follow and on certiorari to review action of circuit court in granting mandamus to compel submission of the matter of annexation to the electorate, and the courts are likewise without power to reject such petitions (CL 1948, § 117.6, as last amended by PA 1957, No 210). *Id.*
7. Proviso of home-rule act limiting manner in which annexation proceedings might be conducted on petitions filed less than 2 years following petitions relative to same or some of the territory involved theretofore does not apply to bar annexation proceedings commenced less than 2 years after petitions had

MUNICIPAL CORPORATIONS—Continued.

been filed to incorporate township as a city (CLS 1956, § 117.8). *Id.* 106.

8. War veteran's claim for salary alleged to be due from defendant city was barred by reason of noncompliance with charter provision requiring that unliquidated claim be presented to common council as a conditon precedent to bringing an action thereon (Detroit Charter, title 6, chap 7, § 11). *Lenz* v. *City of Detroit*, 166.

9. Finding of unnecessary hardship by city board of zoning appeals in the application of city zoning ordinance to defendants' tracts of 15 lots without a disclosure of facts by the board which supported its determination *held*, a denial of due process in suit by property owners to review board's decision (CL 1948, § 125.581 *et seq.*, as amended; Detroit Zoning Ordinance [1957], § 20.7). *Tireman-Joy-Chicago Improvement Association* v. *Chernick*, 211.

10. The broad grant of authority to the board of zoning appeals to authorize variances where the literal enforcement of the ordinance would result in unnecessary hardship or involve practical difficulties may result in arbitrary action if the board does not set forth its reasons and facts upon which it bases its finding for a variance (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7). *Id.*

11. The provision of city's zoning ordinance that the decision of the board of zoning appeals shall be final insofar as it involves discretion or the finding of facts would preclude a court from making a meaningful review if the finding made by the board is not accompanied by a full disclosure on the record of the facts relied upon for the board's findings (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7.) *Id.* 212.

12. A city board of zoning appeals must state the grounds upon which it justifies the granting of a variance the extent and detail of the disclosure not being capable of precise delineation (CL 1948, § 125.581 *et seq.*; Detroit Zoning Ordinance [1957], § 20.7). *Id.*

13. Neither a State legislature nor a municipal council has authority to divest courts of their inherent power to review the action of a board of zoning appeals or other zoning administrative board, in order to determine whether the administrative action unlawfully impairs personal or property rights. *Id.*

14. The provision of a city zoning ordinance that the decision of the board of zoning appeals "shall not become final until the expiration of 5 days from the date of entry of such order unless the board shall find the immediate effect of such order is necessary" does not limit the time for bringing an action in court for the purpose of determining the validity of the board's action (Detroit Zoning Ordinance [1957], § 20.7). *Id.*

15. Municipal zoning ordinances, when reasonable in their provisions, are a valid exercise of the police power. *Patchak* v. *Township of Lansing*, 489.

16. The reasonableness of a municipal zoning ordinance is recognized as the test of its legality. *Id.*

MUNICIPAL CORPORATIONS—Continued.

17. Each case involving the determination of the reasonableness of the application of a municipal zoning ordinance must be determined on the basis of its own facts and circumstances. *Id.*

18. The presumption of validity attends municipal zoning ordinances and the burden of proof as to their invalidity or unreasonableness of their application is on one challenging such ordinance to establish his claim. *Id.* 490.

19. Plaintiff trailer camp operator who merely showed that a 10-acre portion of 15-acre tract would be more valuable if trailer camp was permitted thereon than uses allowed did not sustain burden of proof that zoning ordinance which did not permit trailer parks in his area was invalid as to 10-acre tract, hence, he is not permitted to extend his pre-existing 5-acre camp to cover more of his tract. *Id.*

20. The purchaser of property is chargeable with knowledge of the zoning in effect when the property was purchased. *Id.*

21. The purchaser of property which had been zoned before the purchase has no greater right to use the property for a nonconforming use than his vendor had. *Id.*

22. Property is held subject to right of government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote public health, morals, safety, and welfare. *Id.*

23. Municipal regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable. *Id.*

24. There must be approval by a majority vote favorable to annexation of unpopulated territory in one city to another city other than fractional parts of platted subdivision lots located at the common boundary and such majority must be of the entire city and in each of them to accomplish the annexation (CLS 1956, § 117.9). *Cavanagh* v. *Calhoun County Board of Canvassers*, 516.

See CONSTITUTIONAL LAW (2); COSTS (1, 6, 10); EQUITY (3); JUDGMENT (4); MANDAMUS (1); STATUTES (4).

MURDER—See HOMICIDE (1, 8, 9).

NAVIGABLE WATERS.

1. The Supreme Court, equally with the legislative and executive departments, is one of the sworn guardians of the State's duty and responsibility as trustee of the portion of the beds of the Great Lakes within the State's boundaries. *Obrecht* v. *National Gypsum Company* (*Same* v. *Director of Conservation*), 399.

2. No part of the beds of the Great Lakes belonging to the State can be alienated or otherwise devoted to private use except as there be a due finding that a given parcel of submerged land be conveyed in the improvement of the interest thus held or that the disposition may be made without detriment to the public interests in the lands remaining. *Id.* 400.

3. The public title and right to submerged lands forming the part of the beds of the Great Lakes within the State's bound-

NAVIGABLE WATERS—Continued.

aries is supreme against a riparian owner's right of wharfage. *Id.*

4. A riparian owner along the shore of the Great Lakes may exercise the right of wharfage only with the regulatory assent of the State. *Id.*

5. A riparian owner who entered upon the bed of the waters of the Great Lakes and built a wharf following an erroneous decree of a circuit court in that no assent had been given by the State effected an entry upon and unlawful detention of State property. *Id.*

6. A State has constitutional power to insist that its natural advantages shall remain unimpaired and, as against a riparian owner along a navigable body of water, retain what it has and give no one a reason for its will. *Id.*

7. A riparian proprietor is entitled to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. *Id.*

8. Public property, such as lands under navigable waters, cannot be placed entirely beyond the direction and control of the State. *Id.*

9. The public policy of this State with respect to submerged lands under navigable waters is that they may be disposed of only when the department of conservation determines that such lands have no substantial public value for hunting, fishing, swimming, pleasure boating, or navigation and that the general public interest will not be impaired by such disposition (CLS 1956, § 322.702, as amended by PA 1958, No 94). *Id.*

10. A riparian owner of land along the shores of the Great Lakes may not wharf out to deep water navigable by large ocean-going boats except in compliance with State regulatory measures. *Id.* 401.

11. Wharf which was constructed out to deep navigable water in the midst of an area devoted to private summer cottage use along shore of Great Lakes is not now ordered removed, but operable subject to the will of the State and such decretal provisions for control of its use as equity may decide, on new testimony, to impose. *Id.*

See HIGHWAYS AND STREETS; NUISANCE (2, 3).

NEGLIGENCE.

1. Plaintiff's acceptance of payments voluntarily made by defendant's insurance carrier under the workmen's compensation act does not bar plaintiff from seeking damages for common-law negligence for injuries due to an explosion if plaintiff was not in fact an employee of the defendant (CL 1948, § 416.1). *Chaffee* v. *Stenger*, 57.

2. Assumption of risk is a defense to negligence whether it be ordinary negligence or such negligence plus a wilful and wanton disregard for public safety which go to make up the statutory gross negligence or wilful and wanton misconduct

NEGLIGENCE—Continued.

required under the guest passenger act (CLS 1956 § 257.401). *Waltanen* v. *Wiitala*, 504.

3. An actor whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the actor's safety is a contributing cause of the actor's bodily harm. *Id.* 505.
4. Generally, the question of negligence is a question of fact for the jury, but where the facts are not in dispute and the negligence of defendant is crystal clear, it is proper to direct a verdict for plaintiff on the issue of liability. *Nabozny* v. *Hamil*, 544.
5. Plaintiff, customer of defendant bank, who had the misfortune of an accident by fracturing her foot when she slipped on polished floor as she was about to leave the bank, failed to prove some actionable element of negligence charged in that she failed to show there was an unusual condition which caused her fall. *Yearsley* v. *City Bank*, 574.
6. The negligence of defendant office building owner in maintaining women's rest room with a floor level some 6 inches higher than that of corridor and with access gained through a heavy, self-closing door which opened out into the corridor *held*, a question for the jury. *Dahlem* v. *Hackley Union National Bank & Trust Company*, 609.
7. Whether defendant sustained its burden of proof on issue of contributory negligence of plaintiff, a 75-year-old lady with impaired vision in 1 eye, whose hip was fractured when she fell into women's rest room in defendant's office building, *held*, a matter for jury under evidence showing she was unfamiliar with the situation, had unlocked the door with key procured from her physician's employee, and tripped on the step to higher level immediately inside the door and was pushed to the floor by the self-closing door. *Id.* 610.
8. Instruction in action by patient of physician whose office was located in defendant's office building that included statement "she was propelled inward by the door, thereby causing her to fall" was not without evidentiary support, where plaintiff had testified that she had unlocked the heavy door, opened it sufficiently to enter the rest room, caught her foot on the 6-inch step up to the higher floor level, and was pushed in as the door closed behind her and locked itself. *Id.*
9. Contributory negligence cannot be imputed to a plaintiff for failure to anticipate negligent acts of a defendant. *Wright* v. *Delray Connecting Railroad Company*, 620.

See APPEAL AND ERROR (27); AUTOMOBILES (1, 8, 10, 12, 14); CHARITIES; COURTS (2); DAMAGES (1, 6); EVIDENCE (2); HOSPITALS; NEW TRIAL (2); PLEADING (3, 4); RAILROADS; TRIAL (2).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES (3, 4).

NERVOUSNESS—See DAMAGES (5).

NEUROLOGIST—See WILLS (7).

NEW TRIAL.

1. Trial court did not err in denying plaintiff's motion for new trial on ground of inadequate damages, where it does not appear to have abused large measure of discretion in matter of granting new trials. *Teller* v. *George*, 118.
2. Trial court was not in error in denying new trial limited as to damages in action for negligent injuries, where jury had rendered a verdict for plaintiff of $1,500, there were undisputed items of damage of $1,072.95, and jury accepted plaintiff's claims as to past and future dental bills but limited the amount awarded for pain and suffering, there being no claim that the amount of the award had been affected by improper methods, prejudice, or sympathy. *Id.*
3. A new trial, not restricted to issue of damages, is granted in guest passenger's action against host motorist, where trial court had granted defendant's motion for judgment *non obstante veredicto*, and a question for the jury was presented as to whether defendant was guilty of wilful and wanton misconduct, and jury had not given deliberate consideration to the matter of amount of the damage that the plaintiff sustained (CLS 1956, § 257.401). *Turner* v. *Cotham*, 200.

See APPEAL AND ERROR (2, 3, 24); COSTS (5); DAMAGES (3).

NOISE—See NUISANCE (3).

NONCONFORMING USE—See MUNICIPAL CORPORATIONS (21); TOWNSHIPS (2).

NONJURY CASE—See APPEAL AND ERROR (2, 3, 7); AUTOMOBILES (1); CUSTOMS AND USAGES; LANDLORD AND TENANT (4); SALES (1); WITNESSES (1).

NOTICE—See MUNICIPAL CORPORATIONS (20).

NUISANCE.

1. The locality and surroundings of the challenged operation or thing become an important factor in arriving at proper judicial decision of existence or nonexistence of an actionable nuisance. *Obrecht* v. *National Gypsum Company* (*Same* v. *Director of Conservation*), 401.
2. The construction of a wharf upwards of 1,000 feet long and dredging of channel out to deep navigable water for use by large boats carrying gypsum rock, an otherwise lawful industrial operation, pursuant to provisional permit by department of conservation, near the center of an area devoted to summer cottage use and now beyond judicial abatement, subjected the defendant to payment of such damages as plaintiffs may be able to prove. *Id.*
3. Noise, dust, smoke, pollution of air and water as result of defendant's construction of wharf from its shore front upwards of 1,000 feet long and dredging of channel out to deep navigable water are items of damage to nearby summer cottage owners unable now to abate the nuisance created by defendant's purpresture. *Id.*

NURSES—See PLEADING (3); WILLS (7).

OBSERVATION—See AUTOMOBILES (14).

OCCUPATIONAL DISEASE—See WORKMEN'S COMPENSATION (7).

OCCUPATIONAL LINES—See BOUNDARIES (1).

OFFICE BUILDING—See DAMAGES (5); NEGLIGENCE (6–8).

OFFICERS.

Ex-officio services are those imposed by law upon a public officer by virtue of his office, relating to public interests as contradistinguished from those relating to private interests; and for which no remuneration is allowed. *Detroit Edison Company* v. *Corporation & Securities Commission*, 151.

See ACCOUNTING (5); CORPORATIONS (3); CRIMINAL LAW.

ONTARIO—See LICENSES.

OPENING STATEMENT—See EVIDENCE (2); TRIAL (5).

OPERATORS—See COSTS (12); LICENSES.

OPINION—See CRIMINAL LAW (2); HOSPITALS (1).

OPPORTUNITY—See WILLS (1).

OR—See TAXATION (5); WORDS AND PHRASES (2).

ORAL CONTRACTS—See CONTRACTS (11); FRAUDS, STATUTE OF.

ORDINANCES—See COSTS (6); EQUITY (3); LANDLORD AND TENANT (3); MUNICIPAL CORPORATIONS (1, 2, 9–12, 14–19); TOWNSHIPS (2).

OVERREACHING—See ACCOUNTING (1, 6); ATTORNEY AND CLIENT (10).

OVERTAKING CARS—See AUTOMOBILES (9).

OWNER LIABILITY—See APPEAL AND ERROR (9); AUTOMOBILES (10).

PAIN AND SUFFERING—See DAMAGES (1, 2, 6); NEW TRIAL (2).

PAINTS—See FRAUD (3).

PARALYSIS—See WILLS (7).

PARANOID SCHIZOPHRENIA—See COSTS (13); WORKMEN'S COMPENSATION (1, 2, 5, 9).

PARENT AND CHILD—See EQUITY (1); WILLS (3, 7).

PARKING—See LANDLORD AND TENANT (2, 3).

PARK TRUSTEES—See JUDGMENT (3).

PARTIAL DISABILITY—See WORKMEN'S COMPENSATION (10).

PARTIES—See JUDGMENT (3–5).

PARTNERSHIP.

1. The power of one partner to bind another person, as partner, in an obligation to a third person requires the continuance of

PARTNERSHIP—Continued.

the existence of the partnership at the time the obligation is incurred (CL 1948, § 449.9). *LaHood* v. *Wieladt*, 99.

2. Appellant, former partner, was not estopped to deny liability under renewal lease which was executed by other partner after partners had ceased doing business as a partnership, where appellant had specifically declined to sign the new lease when lessor approached him, and lessor's attorney struck appellant's name from lease, although no partnership dissolution certificate had been filed (CL 1948, § 449.9). *Id.*

See LANDLORD AND TENANT (1).

PASSENGERS—See AUTOMOBILES (5–7, 9, 11, 13, 14); COSTS (5); JUDGMENT (1); MASTER AND SERVANT; NEW TRIAL (3).

PATIENTS—See HOSPITALS (1).

PAYEE AS MERE PROMISEE—See BILLS AND NOTES (3).

PAYMENT—See COURTS (6); NEGLIGENCE (1); TRIAL (1).

PECUNIARY VALUE—See DEATH (2).

PEDESTRIANS—See AUTOMOBILES (1); DAMAGES (2); WITNESSES (1).

PERFORMANCE—See FRAUDS, STATUTE OF (1, 2); QUIETING TITLE (3).

PERSONAL INJURIES—See APPEAL AND ERROR (4); DAMAGES (3); INNKEEPERS; LIMITATION OF ACTIONS; WORKMEN'S COMPENSATION (7).

PETITIONS—See MANDAMUS (1); MUNICIPAL CORPORATIONS (3, 6, 7).

PHYSICAL VIOLENCE—See DIVORCE (2).

PHYSICIANS AND SURGEONS—See DIVORCE (1); HOSPITALS (2); PLEADING (3); WILLS (7).

PLASTER ARTICLES—See FRAUD (3).

PLATS—See COSTS (11); EQUITY (3).

PLEADING.

1. Broad discretion rests in the trial court with reference to amendments and unless it can be shown that an abuse of the sound judgment and discretion vested in the trial judge has taken place, the Supreme Court ordinarily will not disturb the exercise of such discretion. *Parker* v. *Port Huron Hospital*, 2.
2. An amendment to plaintiff's declaration was properly allowed by the trial court, where it did not create a new cause of action and did not surprise or prejudice defendant. *Id.*
3. Motion to dismiss plaintiff's declaration in action for negligent treatment was properly granted as to defendant hospital, where allegation that it had failed "to employ competently

PLEADING—Continued.

trained nurses, physicians, surgeons, interns, and other employees" was not supported by pleaded facts showing that any of the hospital's employees was incompetent or that plaintiff was injured because of the incompetence of any such employee; and the pleading affirmatively averred that defendant corporation, not the hospital, had employed the physician and the surgeon involved. *Stann* v. *Ford Motor Company*, 225.

4. The general assertion that defendants failed to exercise ordinary and reasonable care and skill in the treatment of plaintiff is insufficient to advise the defendant hospital as to plaintiff's claims with reference to any acts of negligence on its part. *Id.*

5. A motion to dismiss for failure to state a cause of action comprehends all objections formerly raised by demurrer, pleas in abatement, or pleas to the jurisdiction (Court Rule No 18 [1945]). *Davis* v. *Kramer Bros. Freight Lines, Inc.*, 371.

6. All facts well pleaded must be taken as true for the purposes of a motion to dismiss such pleading for failure to state a cause of action (Court Rule No 18 [1945]). *Id.* 372.

7. A declaration which properly alleged the making of a contract, its breach, and damages flowing therefrom would state a cause of action. *Id.*

8. A cause of action, for purposes of a motion to dismiss a declaration, means merely the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant. *Id.*

9. A plaintiff's statement of a cause of action must not be confused with a plaintiff's right to judgment since the latter depends upon proof adduced and upon what defenses can be established against the cause of action asserted. *Id.*

See APPEAL AND ERROR (8); JUDGMENT (4); LABOR RELATIONS (3).

POLICEMAN—See HOMICIDE (3).

POLICE POWER—See MUNICIPAL CORPORATIONS (15, 22).

POLISHED FLOOR—See NEGLIGENCE (5).

POLITICAL ACTIVITIES—See INJUNCTION.

POLLUTION OF AIR AND WATER—See NUISANCE (3).

POSSESSION—See QUIETING TITLE (1).

POWERS—See CORPORATIONS (2).

PRACTICAL INTERPRETATION—See CONTRACTS (8).

PRECEDENTS—See COURTS (4, 5).

PREFABRICATED HOUSES—See TAXATION (1, 3, 5, 6).

PREFERENCE—See LIENS; TAXATION (10).

PREJUDICE—See APPEAL AND ERROR (4, 5, 24); CRIMINAL LAW (1); DAMAGES (6); DEATH (4); HOMICIDE (3–5, 7); NEW TRIAL (2); PLEADING (2); TRIAL (1); WILLS (2).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (2, 3, 7); AUTOMOBILES (1); BOUNDARIES (4); WORK AND LABOR.

PRESENTATION OF CLAIMS—See MUNICIPAL CORPORATIONS (8).

PRESIDENT—See ACCOUNTING (3–5).

PRESUMPTIONS—See MUNICIPAL CORPORATIONS (18); SCHOOLS AND SCHOOL DISTRICTS (5).

PRINCIPAL AND AGENT—See CHARITIES (1, 3).

PRIORITY—See COSTS (8).

PRIOR STATEMENT—See AUTOMOBILES (1); EVIDENCE (1).

PROBATE COURT—See APPEAL AND ERROR (14–19).

PROBATIONARY STATUS—See SCHOOLS AND SCHOOL DISTRICTS (4–6).

PRODUCTION PARTS—See CUSTOMS AND USAGES; WORK AND LABOR.

PROFIT—See COVENANTS (3, 4).

PROPERTY—See ATTORNEY AND CLIENT (4); COSTS (4); MUNICIPAL CORPORATIONS (22, 23).

PROSPECTIVE CHANGE OF LIABILITY—See HOSPITALS (1).

PROTEST—See COURTS (6).

PROXIMATE CAUSE—See AUTOMOBILES (13); DAMAGES (5); RAILROADS (2); WORKMEN'S COMPENSATION (1, 2, 4, 5).

PSYCHIATRIST—See WORKMEN'S COMPENSATION (5).

PSYCHOSIS—See WORKMEN'S COMPENSATION (2, 9).

PUBLIC HEALTH—See MUNICIPAL CORPORATIONS (22).

PUBLIC POLICY—See CONTRACTS (4); NAVIGABLE WATERS (9).

PUBLIC PROCLAMATION—See ADVERSE POSSESSION (2).

PUBLIC QUESTION—See COSTS (3, 4, 6, 9, 11); COURTS (3).

PUBLIC SAFETY—See MUNICIPAL CORPORATIONS (22).

PUBLIC WELFARE—See ATTORNEY AND CLIENT (3).

PUMPS—See WORK AND LABOR.

PUNITIVE DAMAGES—See APPEAL AND ERROR (13).

PURPRESTURE—See NUISANCE (3).

QUASI-JUDICIAL DUTIES—See TAXATION (8).

QUESTION FOR TRIER OF FACTS—See APPEAL AND ERROR (4); AUTOMOBILES (6, 9); DAMAGES (3); FRAUD (2); NEGLIGENCE (4, 6, 7); NEW TRIAL (3); RAILROADS (1); TRIAL (1).

QUESTIONS BY TRIAL JUDGE—See HOMICIDE (2–4).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (6, 9, 14, 22).

QUIETING TITLE.

1. Chancery court properly exercised jurisdiction in suit to quiet title to 18-foot strip of land to which defendants had record title but to which plaintiffs claimed title by adverse possession, where defendants disputed plaintiffs' title only as to a part of the tract. *Golaher* v. *Hunting*, 78.
2. Evidence in suit to quiet title to 18-foot strip of land upon which plaintiffs had erected a garage and used adversely to holders of record title for 38 years, which was sufficient to satisfy the trial judge that plaintiffs had title to the entire tract instead of only the south end thereof *held*, not such as to indicate the trial court was in error. *Id.* 79.
3. Plaintiffs in suit to quiet title based on their claim of full performance by them of contract to purchase city house and lot *held*, not to have sustained their burden of proof, where they failed to show that the land contract had been executed by anyone holding at the time a legal or equitable interest in the premises. *Calhoun* v. *Calhoun*, 698.

See WITNESSES (2).

RADIO—See AUTOMOBILES (11).

RAILROADS.

1. Defendant railroad's negligence in switching cars onto tracks of plaintiff's employer where plaintiff car inspector was on top of empty coal cars to see if they were in condition for use by his employer *held*, question for jury, where switching activities were performed at irregular intervals and no warning was given to plaintiff while performing a part of the regular procedure that had been adopted by his employer. *Wright* v. *Delray Connecting Railroad Company*, 619.
2. Finding of jury that defendant railroad was negligent in conducting switching operations on tracks of plaintiff's employer without warning plaintiff coal car inspector, whose inspection was regularly conducted for the employer and one requiring the presence of employees which should have been anticipated by the defendant, and that such negligence was a proximate cause of plaintiff's injuries *held*, supported by proofs adduced. *Id.*
3. Whether plaintiff coal car inspector was guilty of negligence in placing himself where he could be dislodged and injured when defendant railroad switched cars into tracks on premises of plaintiff's employer *held*, a matter for jury determination, since plaintiff was not bound to anticipate negligence on part of defendant and there was testimony that warning to him of danger came too late. *Id.* 620.

See DAMAGES (6); MUNICIPAL CORPORATIONS (2).

RECIPROCAL NEGATIVE EASEMENT—See COVENANTS (1, 2, 4, 5).

RECORD—See APPEAL AND ERROR (20–22); FRAUD (1); MECHANICS' LIENS.

RECORDING—See ADVERSE POSSESSION (1); LIENS; QUIETING TITLE (2); TAXATION (10).

RECORDS.

United States tax liens, to be valid, must be filed in accordance with the law of the State where the property subject to the lien is situated and in the office in which the filing of notices is authorized by State law (26 USCA, §§ 6321–6323; CL 1948, § 211.521). *Union Central Life Insurance Company* v. *Peters*, 283.

See BILLS AND NOTES (4); FRAUD (4); WILLS (5).

REDELIVERY—See CONTRACTS (11).

REDETERMINATION OF TAX—See COURTS (6).

REGISTER OF DEEDS—See TAXATION (10).

REGULATION OF ATTORNEYS—See ATTORNEY AND CLIENT (1).

REHEARING—See LABOR RELATIONS (3).

REINSTATEMENT—See LABOR RELATIONS (2).

REMAND—See APPEAL AND ERROR (10–12).

REMARKS OF TRIAL COURT—See HOMICIDE (7).

REMITTITUR—See DEATH (4).

RENEWAL LEASE—See LANDLORD AND TENANT (1); PARTNERSHIP (2).

RENT—See LANDLORD AND TENANT (1, 2, 4).

REOPENING ESTATE—See APPEAL AND ERROR (16, 17, 19); EXECUTORS AND ADMINISTRATORS.

RESCISSION—See ACCOUNTING (3, 4); CONTRACTS (1); FRAUD (3–5); SALES (5–7).

RESIDENCE—See MUNICIPAL CORPORATIONS (2).

RES JUDICATA—See JUDGMENT (2–5).

RESPONDEAT SUPERIOR—See AUTOMOBILES (10); COURTS (2).

RESTORATION—See COSTS (12); FRAUD (5); LICENSES.

REST ROOM—See DAMAGES (5); NEGLIGENCE (6–8).

RIPARIAN OWNERS—See NAVIGABLE WATERS (3–7, 10).

ROAD COMMISSIONERS, BOARD OF COUNTY—See JUDGMENT (3).

ROOF REPAIR—See MECHANICS' LIENS.

RULES AND REGULATIONS—See ATTORNEY AND CLIENT (3).

SALARY—See ACCOUNTING (5); MUNICIPAL CORPORATIONS (8); SCHOOLS AND SCHOOL DISTRICTS (2, 3).

SALES.

1. Trial judge's finding in nonjury case that there was a warranty of fitness as to automatic car-washing equipment for which conditional sales promissory note had been given *held*, correct in action brought on the note (CL 1948, § 440.15). *Richardson* v. *Messina*, 365.
2. Equipment sold as automatic in its operation is impliedly warranted to be automatic and a failure of automatic operation involves a failure of consideration for note given in payment for the purchase (CL 1948, § 440.15). *Id.*
3. A seller's disavowal of warranties, other than those specified, if any, is not inconsistent with a warranty of fitness implied by law. *Id.*
4. A vendor who desires to avoid that warranty which the law implies must incorporate it in his contract or insert therein a warranty which will exclude all others (CL 1948, § 440.15). *Id.*
5. The requirement of redelivery of material purchased under conditional sales contract as to automatic car-washing equipment which failed to function automatically, in order to effect rescission must be construed reasonably and, as so construed, rescission was properly found to have been effected under evidence adduced (CL 1948, § 440.15). *Id.*
6. One seeking to rescind a sale and recover consideration paid must act with reasonable promptness after discovering the facts and what is a reasonable time depends on the circumstances of the particular case. *Axenfield* v. *Virtue Furniture Company*, 537.
7. A seller of household furniture will not be permitted to defeat the buyer's right to rescind on ground of delay unless it would be inequitable to deny it. *Id.*

See CORPORATIONS (4); FRAUD (4).

SCHIZOPHRENIA—See COSTS (13); WORKMEN'S COMPENSATION (1, 2, 5, 9).

SCHOOL PRINCIPAL—See COURTS (3); SCHOOLS AND SCHOOL DISTRICTS (2, 3).

SCHOOLS AND SCHOOL DISTRICTS.

1. The teacher tenure act explicitly provides that tenure is not acquired in administrative capacities when expressly excluded by contract (CL 1948, § 38.91). *Street* v. *Ferndale Board of Education*, 82.
2. Plaintiff who was hired as a teacher under a contract vesting the superintendent of schools of the defendant district with discretion to assign and transfer him and withholding tenure in the capacity of principal, and who was subsequently designated as principal, was not *demoted*, as the term is used in the teacher tenure act, by a later designation as a visiting teacher, where his salary was not reduced (CL 1948, §§ 38.74, 38.91). *Id.*

SCHOOLS AND SCHOOL DISTRICTS—Continued.

3. The State tenure commission had no jurisdiction over controversy between plaintiff who had no tenure as a principal, but who had been hired as a teacher, and who, after serving as a principal for 5 months, was reassigned to a teaching position at same salary he had had as principal, hence, his petition to the commission should have been dismissed (CL 1948, §§ 38.74, 38.91). *Id.*
4. The board of education of a school district may not require of a teacher a probationary period of more than 2 years but, for the benefit of a teacher, may grant a third year of probation (CL 1948, § 38.71 *et seq.*). *Wilson* v. *Flint Board of Education*, 691.
5. A public school teacher who is on probationary status and not given a written statement before the close of either the first or second school years as to whether or not her work was satisfactory is accorded a conclusive statutory presumption that the work is satisfactory (CL 1948, § 38.71 *et seq.*). *Id.*
6. A public school teacher, who has satisfactorily completed the probationary period, is entitled to the status of tenure, and may not be dismissed save for reasonable and just cause (CL 1948, § 38.71 *et seq.*). *Id.*
7. A public school teacher who has acquired tenure status is entitled to a proper hearing by the board of education of a school district on the merits after specific charges shall have been furnished the teacher, all in accordance with provisions of the teachers' tenure act (CL 1948, § 38.71 *et seq.*). *Id.*

SECOND-DEGREE MURDER—See HOMICIDE (1, 8, 9).

SECRETARY OF STATE—See COSTS (12); LICENSES.

SELF-CLOSING DOOR—See NEGLIGENCE (6–8).

SELF-DEALING—See ACCOUNTING (3).

SELF-DEFENSE—See HOMICIDE (6, 8).

SELF-EMPLOYMENT—See COSTS (9); UNEMPLOYMENT COMPENSATION (3, 4).

SENTENCE—See HOMICIDE (9); MANDAMUS (2).

SEPARATION OF POWERS—See CONSTITUTIONAL LAW (1).

SEWAGE FACILITIES—See TOWNSHIPS (1); WAR.

SIGNATURES—See MUNICIPAL CORPORATIONS (3, 6).

SILICOSIS—See WORKMEN'S COMPENSATION (10).

SINGLE EVENT—See WORKMEN'S COMPENSATION (7).

SKILL—See ATTORNEY AND CLIENT (7).

SMOKE—See NUISANCE (3).

SPECIAL ACTS—See CORPORATIONS (1).

SPECIAL QUESTION—See JUDGMENT (1); MASTER AND SERVANT; TRIAL (2).

SPECIAL TOOLING—See CUSTOMS AND USAGES; WORK AND LABOR.

SPECIFIC BEQUESTS—See WILLS (7).

SPEED—See AUTOMOBILES (4, 6).

STARE DECISIS—See COURTS (1).

STATE BAR—See ATTORNEY AND CLIENT (2–4); COSTS (4); STATUTES (8).

STATE OF MIND—See AUTOMOBILES (7).

STATES—See COURTS (5); NAVIGABLE WATERS (5, 6, 8, 10); RECORDS.

STATE TENURE COMMISSION—See SCHOOLS AND SCHOOL DISTRICTS (3).

STATE TREASURER—See TAXATION (8, 9).

STATUTES.

1. The function of the Supreme Court is to apply a statute's clear language, the matter of whether or not application of the statute works an injustice being a policy question for legislative determination and control. *Baatz* v. *Smith (Royston* v. *Same, Middleton* v. *Same),* 68.
2. Unambiguous statutory language may not be disregarded by the interpreter thereof in deference to what he determines to be and invokes as the spirit of the statute. *Street* v. *Ferndale Board of Education,* 82.
3. The legislative intent must be gathered from the language used in a statute, if possible, and such language should be given its ordinary meaning unless a different interpretation is indicated. *Goethal* v. *Kent County Supervisors,* 104.
4. A statute which provided an alternative procedure for annexation to cities under certain circumstances is not construed as requiring the use of a particular alternative in the absence of language making it mandatory to do so. *Id.*
5. The legislative intent of a statute must be ascertained from the language used therein, given its ordinary significance, and with due regard to the form of the expression and where the intent is plain there is no room for construction, the Court being bound by the expressed intent. *Romeo Homes, Inc.,* v. *Commissioner of Revenue,* 128.
6. A statutory provision that is in dispute must be read in the light of the general purpose of the act and in conjunction with pertinent provisions thereof. *Id.* 129.
7. The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, that construction should be adopted. *Id.*

STATUTES—Continued.

8. It is assumed that the legislature knew of restrictions imposed upon it with respect to creating corporations by special act when it enacted the statute creating the State bar (CL 1948, § 691.51 *et seq.*). *State Bar of Michigan* v. *City of Lansing*, 185.

9. If a statute is of such a character that it is subject to differing interpretations one of which would result in the act being held unconstitutional and the other permitting its being upheld as valid, the latter alternative will be accepted. *Id.* 186.

10. A legislature legislates by legislating, not by doing nothing, not by keeping silent, by acquiescing in interpretations of statutes made. *Wycko* v. *Gnodtke*, 331.

11. A statute enacted to reduce the large turnover in the teaching profession is interpreted against the background of the evils sought to be cured thereby. *Wilson* v. *Flint Board of Education*, 691.

See ADMINISTRATIVE LAW (2); APPEAL AND ERROR (1–3, 6, 9, 15–19); ATTORNEY AND CLIENT (1–4); ATTORNEY GENERAL; AUTOMOBILES (2–10, 14); BANKRUPTCY; BILLS AND NOTES (1, 3, 4); CONTRACTS (2, 3); CORPORATIONS (1, 4); COSTS (1–6, 8–10, 12); COURTS (6); CRIMINAL LAW (2); DEATH; DRAINS; EXECUTORS AND ADMINISTRATORS; FRAUDS, STATUTE OF; HOMICIDE; LICENSES; LIENS; LIMITATION OF ACTIONS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS (3, 6, 7, 9–12, 24); NAVIGABLE WATERS (9); NEGLIGENCE (1, 2); NEW TRIAL (3); PARTNERSHIP; RECORDS; SALES (1, 2, 4, 5); SCHOOLS AND SCHOOL DISTRICTS; TAXATION (1, 3, 5, 6, 8–10); TRIAL (1, 2); UNEMPLOYMENT COMPENSATION; WITNESSES; WORKMEN'S COMPENSATION.

STOCK AND STOCKHOLDERS—See ACCOUNTING (1, 6).

SUBDIVISION—See COVENANTS (2, 5).

SUBMERGED LANDS—See NAVIGABLE WATERS (1–3, 5, 8, 9).

SUMMARY JUDGMENT—See BILLS AND NOTES (4).

SUMMER COTTAGES—See NAVIGABLE WATERS (11); NUISANCE (2, 3).

SUMMER RESORT SUBDIVISION—See COVENANTS (2).

SUPERINTENDENT OF SCHOOLS—See SCHOOLS AND SCHOOL DISTRICTS (2).

SUPERVISORS, BOARD OF—See MUNICIPAL CORPORATIONS (6).

SUPREME COURT—See ADMINISTRATIVE LAW (3); APPEAL AND ERROR (1, 2, 4–8, 12, 20, 21, 24, 26); ATTORNEY AND CLIENT (1–3); COURTS (2, 4); NAVIGABLE WATERS (1); PLEADING (1); STATUTES (1); WORKMEN'S COMPENSATION (4, 5).

SUPREME COURT OF THE UNITED STATES—See COURTS (5).

SURPRISE—See PLEADING (2).

SURVEYS—See BOUNDARIES (1).

SUSPENSION—See LICENSES.

SUSPICION—See WILLS (4).

SWIMMING—See NAVIGABLE WATERS (9).

SWITCHING OPERATIONS—See RAILROADS.

SYMPATHY—See APPEAL AND ERROR (4, 5); HOMICIDE (5); NEW TRIAL (2).

TAXATION.

1. The word "consumer", as used in the use tax act, includes a person who acquires tangible personal property when engaged in the business of constructing, altering, repairing, or improving the real estate of others who are not exempt, hence, includes the purchaser of prefabricated houses who installs them (CLS 1956, § 205.92). *Romeo Homes, Inc.*, v. *Commissioner of Revenue*, 129.
2. An exemption from a tax may not be allowed unless the legislative intent to grant it clearly appears. *Id.*
3. The purchase of prefabricated houses from the manufacturer thereof in another State, delivery to a site in this State, and erection for sale to private individuals was not exempt from the use tax act, since it was not within the categories specifically exempted from such tax (CLS 1956, §§ 205.92, 205.94). *Id.*
4. Exemptions from general tax measures are not favored and the burden rests on one asserting the right thereto to establish his claim. *Id.*
5. Provision of use tax act exempting "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 fulfillment of a single contract within the exempt classifications (naming them)" did not exempt purchases of prefabricated houses by corporation from manufacturer in another State which were erected and sold to private individuals in this State who were not in the exempted classifications, the word *or* not being construed disjunctively to intend an exemption of that which precedes it without regard to that which follows (CLS 1956, § 205.94). *Id.*
6. The imposition of the use tax upon prefabricated houses purchased out of the State, brought in here and erected and then sold to nonexempt purchasers, is not a tax in conflict with the interstate commerce clause (US Const, art 1, § 8[3]; CL 1948, § 205.91 *et seq.*, as amended). *Id.* 130.
7. Generally judicial or quasi-judicial duties of an officer relating to the computation of a tax cannot be delegated in the absence of express statutory authorization so to delegate. *Detroit Edison Company* v. *Corporation & Securities Commission*, 150.
8. An appeal from the corporation and securities commission to the corporation tax appeal board, a statutory board consisting

TAXATION—Continued.

of the attorney general, State treasurer, and auditor general, imposed a duty upon the latter 3 officers that was quasi-judicial in nature (CLS 1956, § 450.309). *Id.* 151.

9. The State treasurer and auditor general must personally act as members of the corporation tax appeal board, since they are designated as members thereof without statutory authority having been conferred upon their respective deputies to exercise the quasi-judicial discretion involved in a recomputation of the tax upon a corporation (CLS 1956, § 450.309). *Id.*

10. Amount mortgagees paid in local taxes previously levied against the mortgaged property but paid after Federal tax lien had been recorded in office of the register of deeds is not accorded preference over such Federal tax lien (26 USCA, §§ 6321–6323; CL 1948, § 211.521). *Union Central Life Insurance Company* v. *Peters*, 283.

See ATTORNEY AND CLIENT (4); COSTS (4, 8); COURTS (6); LIENS; RECORDS.

TAX ROLLS—See ADVERSE POSSESSION (1).

TEACHERS—See SCHOOLS AND SCHOOL DISTRICTS (3–7); STATUTES (11).

TEACHER TENURE—See COURTS (3); SCHOOLS AND SCHOOL DISTRICTS (1, 6, 7).

TENANTS BY ENTIRETIES—See BANKRUPTCY.

THIRD PARTIES—See PARTNERSHIP (1).

THIRD PARTY TORT-FEASOR—See TRIAL (5).

TIME—See BROKERS; FRAUDS, STATUTE OF (1); LABOR RELATIONS (3); MANDAMUS (2); MUNICIPAL CORPORATIONS (7, 14); SALES (6).

TITLE—See ADVERSE POSSESSION; BANKRUPTCY; QUIETING TITLE (1, 2); WITNESSES (2).

TORTS.

Charity is generally no defense in an action for a tortious injury. *Parker* v. *Port Huron Hospital*, 1.

See LIMITATION OF ACTIONS (1).

TOTAL DISABILITY—See WORKMEN'S COMPENSATION (10).

TOWNSHIPS.

1. Finding of trial court that contracts between plaintiff and defendant townships and between each township and private defendant relative to water supply and sewage facilities were not limited to specific area *held*, erroneous, where each of the contracts specified area covered in general vicinity of land once occupied by temporary governmental housing units in connection with Federal government's wartime efforts. *Township of Superior* v. *Township of Ypsilanti*, 456.

TOWNSHIPS—Continued.

2. Record presented in suit by owner of 15-acre tract of land on 5 acres of which a trailer camp was located before *held*, not to disclose that adoption of township zoning ordinance which made trailer camp use of such land a nonconforming use was so patently unreasonable and arbitrary as to be unconstitutional and void as to 10-acre portion of parcel which had never been used as a trailer park (Lansing Township Ordinance No 8). *Patchak* v. *Township of Lansing*, 490.

See APPEAL AND ERROR (22); COSTS (1); WAR.

TRAILER PARKS—See MUNICIPAL CORPORATIONS (1, 2, 19); TOWNSHIPS (2).

TRANSFUSION OF MISMATCHED BLOOD—See DAMAGES (1).

TREASURER—See ACCOUNTING (5).

TRIAL.

1. The granting of defendant's motion to dismiss plaintiff's action for common-law negligence due to injuries received from an explosion was error, where the issue as to whether plaintiff was or was not an employee of defendant was a disputed issue of fact at the hearing on the motion to dismiss, and plaintiff sought determination of such issue by a jury, there having been a voluntary weekly payment of 10 checks by defendant's workmen's compensation insurer and acceptance thereof by plaintiff, and the pertinent court rule providing for a denial of such motion without prejudice (CL 1948, § 416.1; Court Rule No 18 [1945]). *Chaffee* v. *Stenger*, 57.
2. Special question which was determinative of plaintiff's relation with defendant well digger either as, or as not, latter's employee was properly given to jury, where such determination was controlling on the main issue of liability for negligent injuries (CL 1948, § 618.39). *Rodgers* v. *Mikolajczak*, 62.
3. It must be assumed that a jury's verdict is reached after full and deliberate consideration of the proofs as to disputed facts submitted to it, unless the contrary appears. *Teller* v. *George*, 118.
4. Whether or not a defendant's defenses are ample is not a matter that is triable upon affidavits upon a motion to dismiss (Court Rule No 18 [1945]). *Davis* v. *Kramer Bros. Freight Lines, Inc.*, 372.
5. Trial court did not commit error by charging jury that plaintiff would, if he recovered a judgment against third party tortfeasor, be required to repay his employer's workmen's compensation insurer the amount he had received from it, but that such amount had nothing to do with the determination of the question of liability and should be disregarded, where the fact of payment of such compensation had been noted in opening statements as well as in the proofs and closing argument of defendant's counsel. *Wright* v. *Delray Connecting Railroad Company*, 620.

TRUCKS—See AUTOMOBILES (12–14); CONTRACTS (9); JUDGMENT (1); MASTER AND SERVANT.

TRUSTS—See WILLS (7).

TURNING OVER COURT RECORDS TO SUCCESSOR IN OFFICE —See CRIMINAL LAW (2).

UNAMBIGUOUS LANGUAGE—See STATUTES (2).

UNDUE INFLUENCE—See WILLS (1, 2, 4, 5).

UNEMPLOYMENT COMPENSATION.

1. The intent of the employment security act is not to supply anyone a supplemental income but rather to furnish protection against the hazard of involuntary unemployment through the systematic accumulation of funds during employment to be disbursed to the involuntarily unemployed in times of need, to maintain purchasing power and to limit the serious social consequences of relief assistance (CL 1948, § 421.2). *Bolles v. Employment Security Commission*, 378.
2. The employment security act was not intended to place a premium on idleness, to stifle initiative, or to penalize a laid-off worker's attempt to make his time economically productive (CL 1948, § 421.1 *et seq.*, as amended). *Id.*
3. The mere fact that an employee who has been laid off from his customary employment enters into self-employment in some occupation from which a living is customarily derived would not alone be sufficient to disqualify him from receiving benefits under the act irrespective of the amount earned at the self-employment (CLS 1956, §§ 421.27[c], 421.28, 421.29). *Id.*
4. Two employees of motor manufacturer who were laid off from their jobs after having become qualified to receive unemployment benefits under the employment security act were not disqualified from receiving such benefits by reason of the fact that they opened a watch repair shop and each received an average of perhaps $1 a day, where they registered and were available for work, unsuccessfully sought other employment, and eventually returned to work for their employer (CL 1948, § 421.1 *et seq.*, as amended; CLS 1956, §§ 421.28, 421.29, 421.48). *Id.*

See COSTS (9).

UNFAIR LABOR PRACTICES—See LABOR RELATIONS (3).

UNIONS—See INJUNCTION; LABOR RELATIONS (3).

UNITED STATES—See COSTS (8); COURTS (5); LIENS; RECORDS; TAXATION (10); TOWNSHIPS (1); WAR.

UNNECESSARY HARDSHIP—See MUNICIPAL CORPORATIONS (9, 10).

UNUSUAL CONDITION—See NEGLIGENCE (5).

USE TAX—See COSTS (2); TAXATION (1, 3, 5, 6).

VALUE—See MUNICIPAL CORPORATIONS (19).

VARIANCES—See COSTS (6); MUNICIPAL CORPORATIONS (10, 12).

VERDICTS AND FINDINGS—See ADMINISTRATIVE LAW (2, 3); APPEAL AND ERROR (1, 2, 7, 20, 21, 23); AUTOMOBILES (15); BOUNDARIES (4, 5); DEATH (4); FRAUD (1, 2, 4); MECHANICS' LIENS; MUNICIPAL CORPORATIONS (9–12); NAVIGABLE WATERS (2); NEW TRIAL (2); RAILROADS (2); TOWNSHIPS (1); TRIAL (3); WILLS (7); WORK AND LABOR; WORKMEN'S COMPENSATION (5, 8).

VISION—See NEGLIGENCE (7).

VISITING TEACHER—See SCHOOLS AND SCHOOL DISTRICTS (2).

WAGE-EARNING CAPACITY—See WORKMEN'S COMPENSATION (10).

WAIVER—See CHARITIES (2); CONTRACTS (10, 11); LANDLORD AND TENANT (2).

WAR.

Decree setting forth rights of plaintiff and defendant townships and of defendant developer of tract located in both townships which defendant township had purchased from Federal government and which established program for orderly demolition of wartime temporary governmental housing units and establishment of replacement housing facilities and for financing of water and sewage facilities is affirmed except for modification limiting area involved. *Township of Superior* v. *Township of Ypsilanti*, 457.

See TOWNSHIPS (1).

WARNING—See AUTOMOBILES (5, 6); RAILROADS.

WARRANTY—See SALES (1–4).

WAR VETERAN—See MUNICIPAL CORPORATIONS (8).

WATCH REPAIR SHOP—See UNEMPLOYMENT COMPENSATION (4).

WATER—See TOWNSHIPS (1); WAR.

WATERS AND WATERCOURSES—See HIGHWAYS AND STREETS; JUDGMENT (3).

WATER SUPPLY—See COVENANTS (2).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (23); AUTOMOBILES (15).

WELL DIGGER—See MASTER AND SERVANT.

WHARF—See NAVIGABLE WATERS (3–5, 7, 10, 11); NUISANCE (2, 3).

WIDOW—See APPEAL AND ERROR (16).

WILFUL AND WANTON MISCONDUCT—See AUTOMOBILES (2–9); NEGLIGENCE (2); NEW TRIAL (3).

WILLS.

1. Undue influence sufficient to vitiate the will of a mentally competent testator may not be inferred from acts of kindness or from existence of opportunity, but must be proved. *In re Langlois Estate*, 646.

WILLS—Continued.

2. Influences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution, although such will would not have been made but for such influence, so long as the testator's choice is his own and not that of another; that influence, to avoid a will, must be such as prevented testator from doing as he pleased with his property. *Id.*

3. Claim of contestants, testator's children, that jury had no particular reason to infer it was natural for him to disinherit them and leave virtually his entire estate to woman with whom he had lived adulterously off and on and that his relations with his children were always cordial *held,* untenable, where there was no direct evidence that his relation with proponent was adulterous and testator had made provision in his insurance policies for his children who were adults of middle age living with their families in their own homes. *Id.*

4. Undue influence may be shown by indirect and circumstantial evidence, but it must be evidence of probative force beyond mere suspicion. *Id.* 647.

5. Record in will contest *held,* devoid of testimony that would justify submitting to a jury the question of undue influence by proponent to whom the bulk of estate had been left under will disinheriting testator's middle-aged children. *Id.*

6. A person has competency to make a will where he has sufficient mental capacity to understand the extent and value of his property, persons who are the natural objects of his bounty, how he wants to dispose of it, and to keep those facts in his mind long enough to dictate his will without prompting from others. *In re Beiter Estate* (*Hampton* v. *Pearsall*), 661.

7. Evidence presented in a will contest *held,* to have justified jury's verdict upholding the will in that testatrix had sufficient mental capacity to make it, where evidence shows she had consulted with her attorney before experiencing the first of several strokes resulting in loss of speech and paralysis of her right side, the will was drawn in accordance with her instructions and, aside from specific bequests to friends, left a trust for her incompetent son; and while it was executed after she became ill, the attorney obtained the opinion of her physician and a neurologist that she was then mentally competent and after it was ascertained from her when will was read to her that certain changes were necessary and were made, her assent indicated by a nod of the head, the will was executed by mark with the assistance of her nurse. *Id.*

WITNESSES.

1. Testimony of defendant motorist in action by administratrix of estate of deceased pedestrian as to direction of latter's travel in street after alighting from a bus when hit by defendant was properly disregarded by trial court in nonjury

WITNESSES—Continued.

case as a matter equally within the knowledge of deceased (CL 1948, § 617.65). *Gabrish* v. *Morse*, 39.

2. Reversible error was not committed in suit to quiet title to 18-foot strip of land by plaintiffs who claimed title by adverse possession by reason of their testimony as to matters which may have been equally within the knowledge of defendants' now deceased predecessor in title against whom plaintiffs' possession was adverse, where there was ample proof and corroboration of such adverse possession presented by disinterested witnesses (CL 1948, § 617.65). *Golaher* v. *Hunting*, 78.

See APPEAL AND ERROR (20); CRIMINAL LAW (1); DIVORCE (4); FRAUD (4); MECHANICS' LIENS.

WORDS AND PHRASES.

1. The term "alternative" means an opportunity for choice between 2 things, courses, or propositions, either of which may be chosen, but not both. *Goethal* v. *Kent County Supervisors*, 104.

2. The words "or" and "and" are not to be treated as interchangeable and are to be followed when their accurate reading does not render the sense dubious, but their strict meaning is more readily departed from than that of other words and one is read in place of the other in deference to the meaning of the context. *Romeo Homes, Inc.*, v. *Commissioner of Revenue*, 130.

See CONTRACTS (7).

WORK AND LABOR.

Finding of trial court in nonjury action to recover for work done and materials furnished defendant by reason of special tooling required to manufacture certain parts for defendant who had an order for a hydraulic pump assembly, that plaintiff had not shown that it had produced parts as a result of such special tooling which were acceptable, hence, not entitled to recover under an admitted custom of the trade *held*, not against the preponderance of the evidence. *Attwood Brass Works* v. *Aero-Motive Manufacturing Co.*, 236.

WORKMANSHIP—See MECHANICS' LIENS.

WORKMEN'S COMPENSATION.

1. Workmen's compensation benefits are payable for incapacity to work because of an employee's paranoid schizophrenia arising out of and in the course of employment, and while the disability arose from conditions not unusual as to fellow employees, the employment situation did aggravate a pre-existing condition. *Carter* v. *General Motors Corporation*, 577.

2. An employee's paranoid schizophrenia which resulted from emotional pressures encountered by him daily in the performance of his work arising from his inability to maintain the established production rate of assembly line activity in the manner prescribed constituted a compensable psychosis. *Id.* 578.

3. A decision of the majority of the 3-member workmen's compensation appeal board is within the statutory mandate that

WORKMEN'S COMPENSATION—Continued.

the "decision of a majority of the board shall be the decision of the board", where one member made an award to plaintiff on the ground he was entitled thereto under one part of the workmen's compensation act, another member under another part of the act, and third member denied relief altogether (CLS 1956, § 408.11). *Id.*

4. The Supreme Court will not uphold the decision of the workmen's compensation appeal board awarding any compensation unless satisfied that there is competent evidence to uphold the board's finding of causal connection made by a majority of the board and that the plaintiff suffered a disability compensable under the act (CL 1948, § 413.12). *Id.*

5. *Plaintiff assembly line employee held, to have established a* basis for a finding of causal connection between his employment and total disability due to paranoid schizophrenia by expert opinion of his treating physician, a specialist in the field of psychiatry, a factual determination binding upon the Supreme Court since there was competent evidence to support it (CL 1948, § 413.12). *Id.*

6. An employee who is unable to work because of a mental injury caused by his employment is not to be treated differently, so far as workmen's compensation benefits are concerned, than a worker disabled because of a physical injury caused by his employment. *Id.*

7. It is unnecessary to prove that a mental injury is due to a single fortuitous event in order to be compensable under the workmen's compensation act (CLS 1956, § 412.1). *Id.*

8. The existence or extent of an injury or disability is a finding of fact by the workmen's compensation appeal board and will not be disturbed, where supported by competent evidence (CLS 1956, § 412.1). *Id.* 579.

9. An award of continuing workmen's compensation benefits should not be made for employee who had sustained a period of disability due to paranoid schizophrenic condition after symptoms thereof have disappeared and he may return to employment other than that to which his personality configuration makes him more susceptible than others to psychotic breakdowns. *Id.*

10. Plaintiff workman who sustained a leg injury resulting in total and partial disability for which he was paid workmen's compensation and who later sustained total disability because of silicosis, was not entitled to an award of workmen's compensation on yet later claim made for total disability due to leg injury during the period covered by the award for disability due to silicosis, since he had not suffered 2 losses of wage-earning capacity during the period of time involved (CL 1948, § 411.1 *et seq.*, as amended). *Harrison* v. *Lakey Foundry Company*, 677.

See COSTS (13); EVIDENCE (2); NEGLIGENCE (1); TRIAL (1, 5).

WORKMEN'S COMPENSATION APPEAL BOARD—See WORKMEN'S COMPENSATION (3–5, 8).

ZONING—See COSTS (6); EQUITY (3); LANDLORD AND TENANT (2, 3); MUNICIPAL CORPORATIONS (1, 2, 9–21).