MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

NOVEMBER 27, 1953 TO FEBRUARY 18, 1954

HIRAM C. BOND
STATE REPORTER

VOL. 338

FIRST EDITION

ROCHESTER, NEW YORK
LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1954

Copyright 1954, by Owen J. Cleary, Secretary of State for the State of Michigan.

SUPREME COURT.

CHIEF JUSTICES.

	TERM EXPIRES
JOHN R. DETHMERS, HOLLAND,[1]	Dec. 31, 1953
HENRY M. BUTZEL, DETROIT,[2]	Dec. 31, 1955

ASSOCIATE JUSTICES.

CLARK J. ADAMS, PONTIAC,[1]	Dec. 31, 1953
HENRY M. BUTZEL, DETROIT,[1]	Dec. 31, 1955
LELAND W. CARR, LANSING, ...	Dec. 31, 1955
GEORGE E. BUSHNELL, DETROIT, ...	Dec. 31, 1957
EDWARD M. SHARPE, BAY CITY, ...	Dec. 31, 1957
EMERSON R. BOYLES, CHARLOTTE, ...	Dec. 31, 1959
NEIL E. REID, MOUNT CLEMENS, ...	Dec. 31, 1959
JOHN R. DETHMERS, HOLLAND,[2]	Dec. 31, 1961
HARRY F. KELLY, DETROIT,[2]	Dec. 31, 1961

CLERK—HUGH H. CARPENTER, LANSING.

CRIER—DON M. CHILDS, LANSING.

ATTORNEY GENERAL—FRANK G. MILLARD, FLINT.

SOLICITOR GENERAL—EDMUND E. SHEPHERD, EAST LANSING.

[1] To December 31, 1953.

[2] From January 1, 1954.

CIRCUIT JUDGES.

1.	CHARLES O. ARCH,	HILLSDALE.
2.	THOMAS N. ROBINSON,	BENTON HARBOR.
3.	JOHN V. BRENNAN, VINCENT M. BRENNAN, MILES N. CULEHAN, FRANK B. FERGUSON, FRANK FITZGERALD, NEAL FITZGERALD,[2] IRA W. JAYNE, THOMAS F. MAHER, ADOLPH F. MARSCHNER,	DETROIT.
	GUY A. MILLER,[1]	DEARBORN.
4.	JOSEPH A. MOYNIHAN, GEORGE B. MURPHY, THOMAS J. MURPHY,	DETROIT.
	LILA M. NEUENFELT,	DEARBORN.
	CHESTER P. O'HARA,	GROSSE POINTE.
5.	ROBERT M. TOMS, ARTHUR R. WEBSTER, CLYDE I. WEBSTER, CARL M. WEIDEMAN,	DETROIT.
	HARRY D. BOARDMAN, JOHN SIMPSON,	JACKSON.
6.	ARCHIE D. McDONALD,	HASTINGS.
	FRANK L. DOTY,	PONTIAC.
	GEORGE B. HARTRICK,	ROYAL OAK.
7.	H. RUSSEL HOLLAND,	PONTIAC.
	PHILIP ELLIOTT, PAUL V. GADOLA, STEPHEN J. ROTH,	FLINT.
8.	MORRIS K. DAVIS,	STANTON.
9.	RAYMOND W. FOX, LUCIEN F. SWEET,	KALAMAZOO.
10.	EUGENE S. HUFF, JAMES E. O'NEILL,	SAGINAW.
11.	HERBERT W. RUNNELS,[1]	SAULT STE. MARIE
	RICHARD W. NEBEL,[2]	MUNISING.
12.	LEO J. BRENNAN,	L'ANSE.
13.	CHARLES L. BROWN,	TRAVERSE CITY.
14.	HENRY L. BEERS,[2] NOEL P. FOX,	MUSKEGON.

[1] To December 31, 1953.
[2] From January 1, 1954.

15.	THEO T. JACOBS,[1]	STURGIS.
	MARK S. ANDREWS,[2]	COLDWATER.
16.	ALTON H. NOE, JAMES E. SPIER,	MOUNT CLEMENS.
17.	WILLIAM B. BROWN,[1] FRED N. SEARL,[2] DALE SOUTER, LEONARD D. VERDIER,	GRAND RAPIDS.
18.	KARL K. LEIBRAND,[1] DAVID R. LOUIS,[2]	BAY CITY.
19.	MAX E. NEAL,	MANISTEE.
20.	RAYMOND L. SMITH,	HOLLAND.
21.	DONALD E. HOLBROOK,	CLARE.
22.	JAMES R. BREAKEY, JR.,	ANN ARBOR.
23.	HERMAN DEHNKE,	HARRISVILLE.
24.	XENOPHON A. BOOMHOWER,[1] ARTHUR M. BACH,[2]	BAD AXE.
25.	GLENN W. JACKSON,	GLADSTONE.
26.	PHILIP J. GLENNIE,	ALPENA.
27.	EARL C. PUGSLEY,	HART.
28.	HOWARD L. CAMPBELL,	CADILLAC.
29.	PAUL R. CASH,	ALMA.
30.	LOUIS E. COASH, CHARLES H. HAYDEN, MARVIN J. SALMON,	LANSING.
31.	EUGENE F. BLACK,[3]	PORT HURON.
	EDWARD T. KANE,	ALGONAC.
	SHIRLEY STEWART,[1]	PORT HURON.
32.	THOMAS J. LANDERS,	IRONWOOD.
33.	EDWARD H. FENLON,	PETOSKEY.
34.	JOHN C. SHAFFER,	GLADWIN.
35.	WILLIS L. LYONS,[1]	HOWELL.
	MICHAEL CARLAND,[2]	OWOSSO.
36.	CARL D. MOSIER,	DOWAGIAC.
37.	BLAINE W. HATCH,	MARSHALL.
	HAROLD E. STEINBACHER,	BATTLE CREEK.
38.	CLAYTON C. GOLDEN,	MONROE.
39.	HENRY I. BOURNS,[1] REX B. MARTIN,[2]	ADRIAN.
40.	JOHN G. LIBBERS,[4]	LAPEER.
	TIMOTHY C. QUINN,[5]	CARO.

[1] To December 31, 1953.
[2] From January 1, 1954.
[3] Appointed January 11, 1954, qualified February 16, 1954, vice Duncan J. McColl who had been elected April 6, 1953 but had died July 6, 1953.
[4] To April 23, 1953.
[5] Elected April 6, 1953, qualified April 23, 1953.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

JOSEPH A. GILLIS,
GERALD W. GROAT,
O. Z. IDE,
PAUL E. KRAUSE,
MARTHA W. GRIFFITHS,[1]
GEORGE MURPHY,
JOHN P. O'HARA,[2]
JOHN A. RICCA,
JOHN P. SCALLEN,
FRANK G. SCHEMANSKE,
W. MCKAY SKILLMAN,

GEORGE T. MURPHY,
JOHN D. WATTS,
} TRAFFIC AND ORDINANCE DIVISION.

SUPERIOR COURT OF GRAND RAPIDS, THADDEUS B. TAYLOR.

[1] To December 31, 1953.
[2] From January 1, 1954.

JUDICIAL CIRCUITS.

COUNTIES.	CIRCUITS.	COUNTIES.	CIRCUITS.	COUNTIES.	CIRCUITS.
Alcona	23	Gratiot	29	Missaukee	28
Alger	11	Hillsdale	1	Monroe	38
Allegan	20	Houghton	12	Montcalm	8
Alpena	26	Huron	24	Montmorency	26
Antrim	13	Ingham	30	Muskegon	14
Arenac	34	Ionia	8	Newaygo	27
Baraga	12	Iosco	23	Oakland	6
Barry	5	Iron	25	Oceana	27
Bay	18	Isabella	21	Ogemaw	34
Benzie	28	Jackson	4	Ontonagon	32
Berrien	2	Kalamazoo	9	Osceola	19
Branch	15	Kalkaska	28	Oscoda	23
Calhoun	37	Kent	17	Otsego	34
Cass	36	Keweenaw	12	Ottawa	20
Charlevoix	13	Lake	19	Presque Isle	26
Cheboygan	33	Lapeer	40	Roscommon	34
Chippewa	11	Leelanau	13	Saginaw	10
Clare	21	Lenawee	39	St. Clair	31
Clinton	29	Livingston	35	St. Joseph	15
Crawford	34	Luce	11	Sanilac	24
Delta	25	Mackinac	33	Schoolcraft	11
Dickinson	25	Macomb	16	Shiawassee	35
Eaton	5	Manistee	19	Tuscola	40
Emmet	33	Marquette	25	Van Buren	36
Genesee	7	Mason	19	Washtenaw	22
Gladwin	34	Mecosta	27	Wayne	3
Gogebic	32	Menominee	25	Wexford	28
Grand Traverse	13	Midland	21		

TABLE OF CASES REPORTED.

	Page
Adkins *v.* Rives Plating Corporation	265
Adler, Fertel *v.*	689
Airseal Insulating & Roofing Company, Weersing *v.*	400
Allen *v.* State Highway Commissioner	407
Allen Electric Company, Le Vasseur *v.*	121
Ames, Bramer *v.*	226
Ann Arbor Bank *v.* Weber	341
Appeal of Polate	567
Arnold Home, Inc., *v.* Labor Mediation Board	315
Arrow Sheet Metal Works, Inc., *v.* Bryant & Detwiler Company	68
Asta *v.* Department of Revenue	505
Attorney General, *ex rel.* State Banking Commissioner, *v.* National Bank of Detroit	610
Beattie, Department of Revenue *v.*	347
Bedford *v.* Tetzlaff	102
Beech Lanes, Incorporated, Case *v.*	631
Bender, Escher *v.*	1
Bishop of Lansing, Darmody *v.*	473
Boerner *v.* Szabo	41
Borg *v.* Thomas	669
Borseth *v.* City of Lansing	53
Boter *v.* Boter	187
Bramer *v.* Ames	226
Briggs Manufacturing Company, Zdero *v.*	549
Brown *v.* Brown	492
Bryant & Detwiler Company, Arrow Sheet Metal Works, Inc., *v.*	68

PAGE

Buckenhizer, Schelbe *v.* 601
Burkhardt, White *v.* 235
Burton, Howard *v.* 178
———, Simpson *v.* 178
———, Thomas *v.* 178

Case *v.* Beech Lanes, Incorporated 631
Chapple's Estate, *In re* 246
Chicago, Milwaukee, St. Paul & Pacific Railroad Company *v.* Public Service Commission 9
City of Detroit, Routhier *v.* 449
——— Grand Rapids, Ripperger *v.* 682
——— Lansing, Borseth *v.* 53
Coleman, Hayes *v.* 371
Conservation Department, McGregor *v.* 93
Cozadd *v.* Healy 157

Darmody *v.* Bishop of Lansing 473
Dennis *v.* Wilford 297
Department of Conservation, McGregor *v.* 93
——— Revenue, Asta *v.* 505
——— ——— *v.* Beattie 347
——— ———, Garavaglia *v.* 467
DePolo *v.* Greig 703
Detroit (City of), Routhier *v.* 449
Detroit Mayor, Lenz *v.* 383
Detroit Motion Picture Projectionists, International Alliance, Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, Havens *v.* 418
DeWaters' Estate, *In re* 457
Dolgy's Estate, *In re* 567

Ebert *v.* Prudential Insurance Company of America 320
Escher *v.* Bender 1
Estate of Chapple, *In re* 246

PAGE

Estate of DeWaters, *In re* 457
——— Dolgy, *In re* 567
——— Glashagen, Faber *v.* 240
——— Renz, *In re* 347
——— Ryerson, *In re* 641
Evening News Association, Noth *v.* 359
Ever Krisp Food Products Company *v.* New Amsterdam Casualty Company 210

Faber *v.* Glashagen's Estate 240
Fertel *v.* Adler 689
Fries *v.* Kalamazoo Stove & Furnace Company 65
Fry (Lloyd A.) Roofing Company *v.* Public Service Commission 544
Fuhrmann, Trevor *v.* 219

Garavaglia *v.* Department of Revenue 467
Garvit *v.* Krebs 256
Gillespie, Rutledge *v.* 335
Glashagen's Estate, Faber *v.* 240
Goodwin, Vanderwall *v.* 109
Grand Rapids (City of), Ripperger *v.* 682
Greig, DePolo *v.* 703
Grewal, Mitchell *v.* 81

Hammitt *v.* Straley 587
Hartwick *v.* Sanilac Drain Commissioner 624
Havens *v.* Detroit Motion Picture Projectionists, International Alliance, Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada 418
Hayes *v.* Coleman 371
Healy, Cozadd *v.* 157
Hertz Driveurself Stations, Inc., People *v.* 139
Hoffman *v.* Stickney 478
Hofweber, Mitchell *v.* 81
Hollingsworth, People *v.* 161

PAGE

Holt *v.* Stofflet 115
Howard *v.* Burton 178
Hyma *v.* Lee 31

In re Chapple's Estate 246
——— DeWaters' Estate 457
——— Dolgy's Estate 567
——— Renz' Estate 347
——— Rudnik 577
——— Ryerson's Estate 641
——— Spencer 50
Irishman's (The) Lot, Inc., *v.* Secretary of State 662
Irvine, Prudential Insurance Company of America *v.* 18

James *v.* Milks 555
Johnson, Muskegon Lumber & Fuel Company *v.* 655
Jones *v.* Wasama 50
Judd *v.* Vollmer 581

Kalamazoo College, Trull *v.* 246
Kalamazoo Stove & Furnace Company, Fries *v.* 65
Kellar *v.* United Metal Products Company 651
Kern *v.* Schaar 637
Krebs, Garvit *v.* 256
Kren *v.* Rubin 288

Labor Mediation Board, Arnold Home, Inc., *v.* 315
Lahey's (W. P.), Inc., Muth *v.* 513
Lansing (City of), Borseth *v.* 53
Lee, Hyma *v.* 31
Lenz *v.* Mayor of Detroit 383
Le Vasseur *v.* Allen Electric Company 121
Lewis *v.* Lewis 197
Lint, Taylor *v.* 673
Lloyd A. Fry Roofing Company *v.* Public Service Commission 544
Louzon, People *v.* 146

PAGE
Mayor of Detroit, Lenz *v.* 383
McGregor *v.* Conservation Department 93
McKenzie *v.* Sternicki 487
Milks, James *v.* 555
Mitchell *v.* Grewal 81
——— *v.* Hofweber 81
Morrish *v.* Morrish 261
Mosley, People *v.* 559
Muskegon County Building Authority, Rude *v.* 363
Muskegon Lumber & Fuel Company *v.* Johnson 655
Muth *v.* W. P. Lahey's, Inc. 513

National Bank of Detroit, Attorney General, *ex rel.* State Banking Commissioner, *v.* 610
New Amsterdam Casualty Company, Ever Krisp Food Products Company *v.* 210
Nichols *v.* State Administrative Board 617
Noth *v.* Evening News Association 359

Pell, State *v.* 641
People *v.* Hertz Driveurself Stations, Inc. 139
——— *v.* Hollingsworth 161
——— *v.* Louzon 146
——— *v.* Mosley 559
——— *v.* Wolfe 525
Polander *v.* Polander 646
Polate's Appeal 567
Pratt *v.* Valliquette 397
Prudential Insurance Company of America, Ebert *v.* 320
——— *v.* Irvine 18
Public Service Commission, Chicago, Milwaukee, St. Paul & Pacific Railroad Company *v.* 9
———, Lloyd A. Fry Roofing Company *v.* 544
———, White *v.* 282

Reitz *v.* Reitz 309

PAGE

Renz' Estate, *In re* 347
Reuter *v.* Reuter 46
Revenue Department, Asta *v.* 505
——— *v.* Beattie 347
———, Garavaglia *v.* 467
Rhoades, Sauer *v.* 679
Ripperger *v.* City of Grand Rapids 682
Rives Plating Corporation, Adkins *v.* 265
Routhier *v.* City of Detroit 449
Rubin, Kren *v.* 288
Rude *v.* Muskegon County Building Authority 363
Rudnik, *In re* 577
Rutledge *v.* Gillespie 335
Ryerson's Estate, *In re* 641

Sanilac Drain Commissioner, Hartwick *v.* 624
Sauer *v.* Rhoades 679
Schaar, Kern *v.* 637
Schaibly *v.* Vinton 191
Schelbe *v.* Buckenhizer 601
Secretary of State, The Irishman's Lot, Inc., *v.* 662
———, Williams *v.* 202
Simpson *v.* Burton 178
Skrzycki, Wallace *v.* 164
Spencer, *In re* 50
State *v.* Pell 641
State Administrative Board, Nichols *v.* 617
State Banking Commissioner (Attorney General, *ex rel.*) *v.* National Bank of Detroit ... 610
State Highway Commissioner, Allen *v.* 407
Sternicki, McKenzie *v.* 487
Stickney, Hoffman *v.* 478
Stofflet, Holt *v.* 115
Straley, Hammitt *v.* 587
Szabo, Boerner *v.* 41

Taylor *v.* Lint 673

PAGE

Tetzlaff, Bedford *v.* 102
The Irishman's Lot, Inc., *v.* Secretary of State 662
Thomas, Borg *v.* 669
——— *v.* Burton 178
Tomlinson *v.* Tomlinson 274
Trevor *v.* Fuhrmann 219
Trull *v.* Kalamazoo College 246

United Metal Products Company, Kellar *v.* 651

Valliquette, Pratt *v.* 397
Vanderwall *v.* Goodwin 109
Vinton, Schaibly *v.* 191
Vollmer, Judd *v.* 581

Wallace *v.* Skrzycki 164
Wasama, Jones *v.* 50
Weber, Ann Arbor Bank *v.* 341
Webster *v.* Webster 644
Weersing *v.* Airseal Insulating & Roofing Company 400
White *v.* Burkhardt 235
——— *v.* Public Service Commission 282
Wilford, Dennis *v.* 297
Williams *v.* Secretary of State 202
Wolfe, People *v.* 525
W. P. Lahey's, Inc., Muth *v.* 513

Zdero *v.* Briggs Manufacturing Company 549

TABLE OF CASES CITED.

PAGE

Acorn Iron Works, Inc., *v.* State Board of Tax Administration, 295 Mich 143 ..... 470, 471
Adams *v.* W. E. Wood Co., 203 Mich 673 272
Alabama Public Service Commission *v.* Southern R. Co., 341 US 341 16
Allcock *v.* Rogers, [1918] House of Lords, 11 BWCC 149 137
Allen *v.* Rogers, 246 Mich 501 415
Allen (People, *ex rel.*) *v.* Kent Circuit Judge, 37 Mich 474 .. 665, 666
Allor *v.* Wayne County Auditors, 43 Mich 76 666
Anderson *v.* Kearly, 312 Mich 566 230
Anderson National Bank *v.* Luckett, 321 US 233 613–615
Appleford *v.* Kimmel, 297 Mich 8 ..... 273, 405
Arnested *v.* McNicholas, 223 Mich 488 ..... 125, 126, 129, 135
Attorney General *v.* First National Bank of Bay City, 192 Mich 640 613–615
———, *ex rel.* Dingeman, *v.* Lacy, 180 Mich 329 ..... 665, 667
———, ——— Eaves, *v.* State Bridge Commission, 277 Mich 373 620
——— (People, *ex rel.*) *v.* Welch's Estate, 235 Mich 555 .. 461, 466
Auditor General *v.* Bassett's Estate, 246 Mich 440 461
Avery *v.* Ionia County Supervisors, 71 Mich 538 ..... 78, 79

Baker *v.* Costello, 300 Mich 686 171
Baldwin *v.* Escanaba Liquor Dealers' Association, 165 Mich 98 ..... 423, 438
Ballinger *v.* Smith, 328 Mich 23 208
Barnard *v.* Huff, 252 Mich 258 107
Barnesly *v.* Powel, 1 Ves Sr (Eng) 284 295
Bartos *v.* Czerwinski, 323 Mich 87 8
Bathke *v.* City of Traverse City, 308 Mich 1 376
Batterson *v.* Chicago & Grand Trunk R. Co., 53 Mich 125 306
Battjes Fuel & Building Material Co. *v.* Milanowski, 236 Mich 622 658
Baumgarten *v.* Tasco, 312 Mich 161 174–177
Bederin *v.* Ex-Cell-O Corporation, 311 Mich 334 98
Bedolfe *v.* Bedolfe, 71 Wash 60 201
Behr *v.* Baker, 257 Mich 487 278
Bernhard *v.* Bank of America National Trust & Savings Association, 19 Cal2d 807 710
Besh *v.* Mutual Benefit Health & Accident Association, 304 Mich 343 ..... 330, 333
Betker *v.* Ide, 335 Mich 291 356
Bigelow *v.* Old Dominion Copper Mining & Smelting Co., 225 US 111 ..... 710, 711
Bingham *v.* Board of Supervisors, 127 Wis 344 667
Bischoff *v.* County of Wayne, 320 Mich 376 ..... 392, 393, 395
Bitonti *v.* Wayne County Auditors, 311 Mich 322 630

PAGE

Bobowski, *In re*, 313 Mich 521 579
Bond *v.* Pontiac, O. & P. A. Railroad Co., 62 Mich 643 381
Booth *v.* Krug, 268 Ill 487 253
Borden's Farm Products Company, Inc., *v.* Baldwin, 293 US 194 668
Bourne *v.* Muskegon Circuit Judge, 327 Mich 175 366
Bowers *v.* City of Muskegon, 305 Mich 676 413
Bowmaster *v.* William H. DePree Company, 252 Mich 505 .. 375, 376
Bredeweg *v.* Boyce, 322 Mich 298 171
Brennan *v.* United Hatters of North America, Local 17, 73 NJL 729 438
Brod *v.* Detroit Life Insurance Company, 253 Mich 545 331
Brody *v.* Crozier, 242 Mich 660 106
Brookhouse *v.* Brookhouse, 286 Mich 151 264
Brown *v.* Brown, 335 Mich 511 502
——— *v.* Lehman, 141 Pa Super 467 426
——— *v.* Lynch, 1 Paige (NY) 147 295
——— *v.* Stevens, 136 Mich 311 523
Bryant, *In re* Petition of, 323 Mich 424 208
Buchel *v.* Williams, 273 Mich 132 ..... 375, 376
Bunde *v.* Finley, 224 Mich 634 5
Burch *v.* Barendsen, 192 Mich 369 661
Burchill *v.* Hermsmeyer (Tex Civ App), 262 SW 511 40
Burk *v.* Amos, 262 Mich 332 681
——— *v.* Burk, 222 Mich 149 251
Burleson *v.* Langdon, 174 Minn 264 224
Burson *v.* Huntington, 21 Mich 415 243
Burt *v.* Detroit, Grand Haven & Milwaukee Railway Company, 262 Mich 204 456
Burton *v.* Burton, 332 Mich 326 556
Butrick *v.* Snyder, 236 Mich 300 485

Call *v.* O'Harrow, 51 Mich 98 5
Cameron *v.* International Alliance of Theatrical Stage Employes and Moving Picture Operators, 118 NJ Eq 11 ..... 438, 444–446
——— *v.* Smith, 171 Mich 333 681
Campbell *v.* Osterland, 283 Mich 175 195
——— *v.* Rukamp, 260 Mich 43 695
Candler *v.* Heigho, 208 Mich 115 37
Carlisle *v.* Parker, 38 Del 83 660
Carner *v.* Sears, Roebuck & Company, 337 Mich 219 ..... 403, 406
Carpenter *v.* Herpolsheimer's Co., 278 Mich 697 518
Carroll *v.* Local 269, International Brotherhood of Electrical Workers, 133 NJ Eq 144 ..... 423, 438, 447
Carrothers *v.* French, 309 Mich 340 195
Caswell *v.* Stearns, 257 Mich 461 ..... 243, 245
Cawood *v.* Earl Paige & Co., 239 Mich 485 234
Chadwick *v.* Chadwick, 275 Mich 226 201
Chamski *v.* Wayne County Board of Auditors, 288 Mich 238 667
Chicago, Milwaukee, St. Paul & P. R. Co. *v.* Board of Railroad Commissioners, 126 Mont 568, cert den, 346 US 823 16
Chicago & North Western R. Co. *v.* Public Service Commission, 329 Mich 432 13
Chrysler *v.* Blue Arrow Transport Lines, 295 Mich 606 127
City of Chicago *v.* Payne, 160 Ill App 641 34
——— Edwardsville *v.* Jenkins, 376 Ill 327 687
——— Grand Rapids *v.* Crocker, 219 Mich 178 207

PAGE

City of Harrison *v.* Braswell, 209 Ark 1094 687
——— Pontiac *v.* Simonton, 271 Mich 647 623
Clark *v.* Naufel, 328 Mich 249 713
Clark, Mason & Co. *v.* Parker, Webb & Co., 131 Mich 139 224
Clarke (Ohio, *ex rel.*) *v.* Deckebach, 274 US 392 668
Clifton *v.* Kroger Grocery & Baking Co., 217 Mich 462 126
Coca Cola Company *v.* Pepsi-Cola Company, 36 Del 124 710
Cochran *v.* Pinto, 333 Mich 91 523
——— *v.* Street, 1 Wash (Va) 79 ..... 452, 453
Cogan *v.* Ebden, 1 Burr 383 (97 Eng Rep 361) 453
Collins *v.* International Alliance of Theatrical Stage Employes & Moving Picture Operators, 119 NJ Eq 230 ..... 444, 447
Colonial Brick Co. *v.* Zimmerman, 255 Mich 655 695
Colonial Theatrical Enterprises *v.* Sage, 255 Mich 160 120
Comben *v.* Belleville Stone Co., 59 NJL 226 307
Conant *v.* Stone, 176 Mich 654 251
Conklin *v.* Industrial Transport, Inc., 312 Mich 250 403
Connor *v.* Stanley, 72 Cal 556 39
Cook *v.* Vineyard, 291 Mich 375 376
Cooklin *v.* Cooklin, 260 Mich 69 558
Cook's (Harry) Case, 243 Mass 572 124
Coolsaet *v.* Veblen, 55 SD 485 681
C. O. Porter Machinery Co. *v.* Coleman, 329 Mich 8 634
Corey *v.* Hartel, 216 Mich 675 523
Corfeld *v.* Douglas Houghton Hotel Company, 324 Mich 459 523
Corrie *v.* Corrie, 42 Mich 509 200
Craig *v.* Crossman, 209 Mich 462 120
Cromie *v.* Florez, Inc., 317 Mich 516 67
Cronkhite *v.* Dickerson, 51 Mich 177 382
Cullen *v.* O'Hara, 4 Mich 132 676

Dades *v.* Central Mutual Auto Insurance Co., 263 Mich 260 671
Dalsimer's Estate, *In re*, 167 App Div 365, 217 NY 608 357
Daniel *v.* Murray Corporation of America, 326 Mich 1 ..... 126–128, 138, 286
Dann *v.* Cudney, 13 Mich 239 119
Dasovich *v.* Longacre, 324 Mich 62 455
Davis *v.* Belmont Creamery Co., 281 Mich 165 ..... 232, 456
——— *v.* Michigan Central Railroad Company, 147 Mich 479 378
Deane *v.* Rex Oil & Gas Co., 325 Mich 625 8
DeLand *v.* Fidelity Health & Accident Mutual Insurance Company, 325 Mich 9 325
Delbusso *v.* American Cement Plaster Co., 165 Mich 318 306
Delfosse *v.* Bresnaham, 305 Mich 621 174–176
Delnay *v.* Woodruff, 244 Mich 456 8
Demars *v.* Glen Manfg. Co., 67 NH 404 307
Dennis *v.* Sinclair Lumber & Fuel Co., 242 Mich 89 127
Dent *v.* Ford Motor Company, 275 Mich 39 405
Detroit International Bridge Company *v.* Corporation Tax Appeal Board, 287 US 295 667
Detroit Trust Co. *v.* Agozzinio, 280 Mich 402 239
Detzur *v.* B. Stroh Brewing Co., 119 Mich 282 503
Dickerson *v.* Colgrove, 100 US 578 119
Diehl *v.* Zanger, 39 Mich 601 5
Diggs *v.* State Board of Embalmers and Funeral Directors, 321 Mich 508 ..... 510, 511

PAGE

Dikeman *v.* Arnold, 83 Mich 218 383
Dingeman (Attorney General, *ex rel.*) *v.* Lacy, 180 Mich 329..665, 667
Dobranski *v.* Lincoln Mutual Casualty Company, 275 Mich 1 ... 661
Dodge Brothers, *In re,* 241 Mich 665 470
Dogariu *v.* Dogariu, 306 Mich 392 ..... 27, 29
Donohue *v.* Vosper, 189 Mich 78 477
Dotson *v.* International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators, 34 Cal2d 362..427, 430, 445–447
Douzeff *v.* Soneff, 330 Mich 295 681
Drysdale *v.* P. J. Christy Land Co., 248 Mich 184 108
Durand *v.* Dyson, 271 Ill 382 540
Dyson *v.* City of Detroit, 333 Mich 116 ..... 392, 394, 406

Eaves (Attorney General, *ex rel.*) *v.* State Bridge Commission, 277 Mich 373 620
Edwardsville (City of) *v.* Jenkins, 376 Ill 327 687
Emery *v.* Fowler, 39 Me 326 710
Emma Silver Mining Co. (Limited) *v.* Emma Silver Mining Co. of N. Y., 7 F 401 709
Eplett *v.* Great Lakes Engineering Works, 289 Mich 197 67
Equitable Trust Co. *v.* Fisher, 301 Mich 66 ..... 244, 245
Erickson *v.* Borchardt, 177 Minn 381 224
Esling *v.* City National Bank & Trust Company of Battle Creek, 278 Mich 571 ..... 352, 354
Estate of Dalsimer, *In re,* 167 App Div 365, 217 NY 608 357
——— Griffin, *In re,* 309 Mich 376 ..... 244, 245
——— Jorgenson, *In re,* 321 Mich 594 ..... 574, 575
——— Kenealy, *In re,* 336 Mich 657 186
——— Kutsche, *In re,* 268 Mich 659 461
——— Martz, *In re,* 318 Mich 293 251
——— Meredith, *In re,* 275 Mich 278 681
——— Rackham, *In re,* 329 Mich 493 ..... 356, 357, 461
——— Rehfeld, *In re,* 198 Mich 249 356
——— Rendell, *In re,* 244 Mich 197 251
——— Renz, *In re,* 338 Mich 347 ..... 462, 463
——— Sorter, *In re,* 314 Mich 488 454
——— Svitojus, *In re,* 296 Mich 19 677
Exo *v.* Detroit Automobile Inter-Insurance Exchange, 259 Mich 578 217
Ex parte Corliss, 16 ND 470 666
——— Shockley, 17 F2d 133 612
——— Worcester County National Bank, 279 US 347 613–615

Favorite *v.* Kalamazoo State Hospital, 238 Mich 566 126
Fawcett *v.* Department of Labor and Industry, 282 Mich 489 .. 395
F. A. Wolf Brick Co. *v.* Lonyo, 132 Mich 162 5
Faxton *v.* Faxon, 28 Mich 159 119
Fields *v.* G. M. Brass & Aluminum Foundry Company, 332 Mich 113 272
Finley *v.* Union Joint Stock Land Bank of Detroit, 281 Mich 214 366
First National Bank in St. Louis *v.* Missouri, 263 US 640 .. 612–615
First National Bank of Bay City *v.* Attorney General, 244 US 416 613–615
First National Bank of Ovid *v.* Steel, 136 Mich 588 38
Fisher *v.* Gardnier, 183 Mich 660 250

PAGE

Fisk *v.* Fisk, 328 Mich 570 553
Fitzcharles *v.* Mayer, 284 Mich 122 232
Fitzpatrick *v.* Liquor Control Commission, 316 Mich 83 668
Floyd *v.* Roberts, 335 Mich 696 554
Forest City Steel & Iron Co. *v.* Detroit & Toledo Shore Line Railroad Co., 154 Mich 182 712
Forman *v.* New York Life Insurance Company, 267 Mich 426 .. 331
Frary *v.* Grand Rapids Taxicab Co., 227 Mich 445 523
Fredericks, *In re,* 285 Mich 262 393–395
Froman *v.* Banquet Barbecue, Inc., 284 Mich 44 271
Fruit Growers Package Co. *v.* Anderson, 323 Mich 169 634
Fulton Iron & Engine Works *v.* Township of Kimball, 52 Mich 146 380

Garb *v.* Garb, 382 Mich 305 190
Gardner-White Co. *v.* State Board of Tax Administration, 296 Mich 225 208
Gaw *v.* Gaw, 327 Mich 120 191
Gayden *v.* Arabais, 292 Mich 651 ..... 490, 491
German Alliance Ins. Co. *v.* Newbern, 25 Okla 489 217
Germania Savings Bank *v.* Jung, 18 NYS 709 660
Germiquet *v.* Hubbard, 327 Mich 225 ..... 172, 174, 176, 177
Gildea *v.* Warren, 173 Mich 28 5
Gillett *v.* Gillett, 269 Mich 364 190
Ginsberg *v.* Burroughs Adding Machine Co., 204 Mich 130 67
Gledhill *v.* Fisher & Company, 272 Mich 353 366
Gompers *v.* Bucks Stove & Range Company, 221 US 418 436
Goodfellow *v.* Civil Service Commission, 312 Mich 226 . 392, 394, 395
Good Health Dairy Products Corporation of Rochester *v.* Emery, 275 NY 14 710
Goudie *v.* Lakey Foundry & Machine Co., 327 Mich 138 272
Graham *v.* Somerville Construction Company, 336 Mich 359 286
——— *v.* Stanton, 177 Mass 321 574
——— *v.* United Trucking Service, Inc., 327 Mich 694 234
Grand Lodge, A.O.U.W., *v.* Child, 70 Mich 163 27
——— *v.* Kohler, 106 Mich 121 28
——— *v.* Noll, 90 Mich 37 28
Grand Rapids (City of) *v.* Crocker, 219 Mich 178 207
Grand Rapids Motor Coach Company *v.* Public Service Commission, 323 Mich 624 145
Grand Trunk Western Railroad Co. *v.* Lovejoy, 304 Mich 35 .. 558
Grant *v.* National Manufacturer & Plating Co., 258 Mich 453 . 185
Gray *v.* Elliott, 254 Mich 275 ..... 490, 491
Greene *v.* Anglemire, 77 Mich 168 5
Green's Hotel, Inc., *v.* Commercial Casualty Insurance Company, 4 NJ 517 ..... 214, 217
Greenwood *v.* Building Trades Council of Sacramento, California, 71 Cal App 159 446
Gregory *v.* Williams, 3 Mer (Eng) 582 295
Grevnin *v.* Collateral Liquidation, Inc., 302 Mich 274 554
Griffin's Estate, *In re,* 309 Mich 376 ..... 244, 245
Grigg *v.* Hanna, 283 Mich 443 676
Grimshaw *v.* Aske, 332 Mich 146 178
Gruen *v.* State Tax Commission, 35 Wash2d 1 622
Guerini Stone Co. *v.* P. J. Carlin Construction Co., 240 US 264 76, 79
Gurley *v.* St. Louis Transit Co. (Mo App), 259 SW 895 381

PAGE

Haggar *v.* Tanis, 320 Mich 295 403
Hagopian *v.* City of Highland Park, 313 Mich 608 98–102
Hall *v.* Hall, 307 Mich 502 264
——— *v.* Horak, 329 Mich 16 634
Hallett *v.* Hallett, 279 Mich 246 ..... 264, 314
——— *v.* Michigan Consolidated Gas Co., 298 Mich 582 277
Hallock *v.* Income Guaranty Company, 270 Mich 448 .. 330, 332, 333
Hammond *v.* Place, 116 Mich 628 623
Hampton *v.* Van Nest's Estate, 196 Mich 404 243
Hanlon *v.* Ten Hove, 235 Mich 227 6
Hanna *v.* McClave, 273 Mich 571 376
Hanover Fire Insurance Company of New York *v.* Furkas, 267 Mich 14 504
Harris *v.* Checker Cab Manufacturing Corporation, 333 Mich 66 271
——— *v.* Detroit Typographical Union, 144 Mich 422 441
Harrison (City of) *v.* Braswell, 209 Ark 1094 687
Harry Cook's Case, 243 Mass 572 124
Hart *v.* Hart, 266 Mich 564 201
Hartley *v.* Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, 283 Mich 201 554
Hay *v.* Hay, 317 Mich 370 253
Hayes *v.* Auditor General, 184 Mich 39 667
Heath (People, *ex rel.*) *v.* Kent Circuit Judge, 37 Mich 372 665
Heiman *v.* Kolle, 317 Mich 548 174–176
Henning *v.* McEuen, 332 Mich 104 ..... 554, 556
Herzberg *v.* Knight, 289 Mich 29 261
Hickman *v.* City of Detroit, 326 Mich 547 286
Hillman *v.* Schwenk, 68 Mich 297 677
Hoffman *v.* Michigan Home & Hospital Association, 128 Mich 323 ..... 328, 329
Hogue *v.* Wells, 180 Mich 19 160
Hohn *v.* Inter-State Casualty Company, 115 Mich 79 .. 327, 330, 333
Holley *v.* Farley, 289 Mich 676 195
Holt *v.* Stofflet, 334 Mich 272 117
Hopkinson *v.* Stocker, 116 Vt 98 453
Howe *v.* Webert, 332 Mich 84 554
Howland *v.* Local Union 306, UAW-CIO, 331 Mich 644. 439, 441, 448
Hughes *v.* Wayne Circuit Judge, 239 Mich 110 675
Hulett *v.* Great Atlantic & Pacific Tea Co., 299 Mich 59 . 518, 523
Humphries *v.* Complete Auto Transit, Inc., 305 Mich 188 503
Hunn *v.* Michigan Central R. Co., 78 Mich 513 308
Hutchins *v.* Lee, 1 Atk (Eng) 447 295
Huxley *v.* Rice, 40 Mich 73 295

In re Bobowski, 313 Mich 521 579
——— Dalsimer's Estate, 167 App Div 365, 217 NY 608 357
——— Dodge Brothers, 241 Mich 665 470
——— Fredericks, 285 Mich 262 393–395
——— Griffin's Estate, 309 Mich 376 ..... 244, 245
——— Jorgenson's Estate, 321 Mich 594 ..... 574, 575
——— Kenealy's Estate, 336 Mich 657 186
——— Kutsche's Estate, 268 Mich 659 461
——— Martz's Estate, 318 Mich 293 251
——— Meredith's Estate, 275 Mich 278 681

PAGE

In re New Jersey & New York R. Co., 12 NJ 281, app dis 346 US 868 ... 17
——— Petition of Bryant, 323 Mich 424 ... 208
——— Rackham's Estate, 329 Mich 493 ... 356, 357, 461
——— Rehfeld's Estate, 198 Mich 249 ... 356
——— Rendell's Estate, 244 Mich 197 ... 251
——— Renz' Estate, 338 Mich 347 ... 462, 463
——— Rudnik, 333 Mich 216 ... 579
——— Sorter's Estate, 314 Mich 488 ... 454
——— Svitojus' Estate, 296 Mich 19 ... 677
Interstate Construction Co. *v.* United States Fidelity & Guaranty Co., 207 Mich 265 ... 80
Ireland *v.* Ireland, 42 Hun (NY Sup) 212 ... 28
Irvine *v.* Irvine, 337 Mich 344 ... 19, 20

Jackson *v.* People, 9 Mich 111 ... 511
Jackson City Bank & Trust Company *v.* Blair, 333 Mich 399 ... 185
Jacobs *v.* Hagenbeck-Wallace Shows, 198 Mich 73 ... 130
Jacobson *v.* Massachusetts, 197 US 11 ... 540
Jakubiec *v.* Hasty, 337 Mich 205 ... 171, 172, 174, 177
James *v.* Marinship Corporation, 25 Cal2d 721 ... 426, 430, 435, 436, 445, 447
Jasper County *v.* Sparham, 125 Iowa 464 ... 543
J. B. Simpson, Inc., *v.* O'Hara, 277 Mich 55 ... 471
Jeffries *v.* Sheehan, 242 Mich 167 ... 7
Jesick *v.* Banfield, 286 Mich 440 ... 87
John A. Parks Company *v.* General Discount Corporation, 294 Mich 316 ... 366
John Hancock Mutual Life Insurance Co. *v.* Jedynak, 250 Mich 88 ... 26
Johnson *v.* Agricultural Life Insurance Co., 225 Mich 331 ... 30
Jones *v.* DeVries, 326 Mich 126 ... 92
——— *v.* Eastern Michigan Motorbuses, 287 Mich 619 ... 278
——— *v.* Water Commission of Detroit, 34 Mich 273 ... 686
Jorgenson's Estate, *In re*, 321 Mich 594 ... 574, 575

Kaczmarck *v.* La Perriere, 337 Mich 500 ... 29
Kane *v.* Kane, 241 Mich 96 ... 200
Kates *v.* Reading, 254 Mich 158 ... 667
Katz *v.* A. Kadans & Company, 232 NY 420 ... 125, 135, 136
Kelley *v.* Dodge, 334 Mich 499 ... 558
Kelly *v.* Dixie Fuel & Supply Company, 329 Mich 466 ... 287
Kenealy's Estate, *In re*, 336 Mich 657 ... 186
Kerns *v.* Lewis, 246 Mich 423 ... 261
Klawinski *v.* Lake Shore & Michigan Southern R. Co., 185 Mich 643 ... 123, 130–132, 134
Klumpp *v.* Klumpp, 289 Mich 97 ... 650
Knights of Maccabees of the World *v.* Sackett, 34 Mont 357 ... 28
Koeper *v.* Detroit Street Railway Commission, 222 Mich 464 ... 57
Kole *v.* Lampen, 191 Mich 156 ... 120
Konopka *v.* Jackson County Road Commission, 270 Mich 174 ... 126, 285, 286
Konstantine *v.* City of Dearborn, 280 Mich 310 ... 278
Kosiba *v.* Wayne County Board of Auditors, 320 Mich 322 ... 630
Krolik *v.* Curry, 148 Mich 214 ... 709, 713
Krueger *v.* Hayes Manfg. Co., 213 Mich 218 ... 67
Kruger *v.* Agnor, 321 Mich 131 ... 87

PAGE

Kuhn *v.* King, 330 Mich 49 523
Kunze *v.* Detroit Shade Tree Company, 192 Mich 435 .. 125, 126, 135, 137, 138
Kutsche's Estate, *In re*, 268 Mich 659 461

LaBarre *v.* Grand Trunk Western Railway Company, 133 Mich 192 377
Lagassee *v.* Quick, 273 Mich 295 260
Lamotte *v.* Boyce, 105 Mich 545 305
Lang *v.* Ginste, 333 Mich 108 ..... 484, 490
Lapachin *v.* Standard Oil Company, 268 Mich 477 574
LaPointe *v.* Chevrette, 264 Mich 482 307
Laverents *v.* City of Cheyenne, 67 Wyo 187 686
Lawrence *v.* Bartling & Dull Co., 255 Mich 580 523
——— *v.* State Tax Comm. of Miss., 286 US 276 668
Lee *v.* Clary, 38 Mich 223 239
Leisure *v.* Hicks, 336 Mich 148 596
Lepley *v.* Bryant, 336 Mich 224 232
Le Roy *v.* Collins, 165 Mich 380 600
Leser *v.* Smith, 212 Mich 558 238
Letherer *v.* United States Health & Accident Insurance Company, 145 Mich 310 330
Levchuk *v.* Krug Cement Products Company, 246 Mich 589 .. 124, 130, 133, 135
Levine *v.* Schonborn, 336 Mich 312 490
Lindsley *v.* Natural Carbonic Gas Co., 220 US 61 668
Longfellow *v.* City of Detroit, 302 Mich 542 455
Loughran *v.* Reynolds, 70 Cal App2d 241 712
Luteran *v.* Ford Motor Company, 313 Mich 487 128
Lyons *v.* Ford Motor Company, 330 Mich 684 286

MacKenzie *v.* Union Guardian Trust Co., 262 Mich 563 600
Mackie *v.* Mackie, 329 Mich 595 650
Madden's Case, 222 Mass 487 100
Mahon (R. C.) Company *v.* Department of Revenue, 306 Mich 660 ..... 470, 471
Maki *v.* Isle Royale Copper Co., 180 Mich 624 308
Malcolmson *v.* Scott, 56 Mich 459 596
Maliniemi *v.* Gronlund, 92 Mich 222 184
Malone *v.* Vining, 313 Mich 315 484
Mannix *v.* Tryon, 152 Cal 31 78
Manufacturers National Bank *v.* Schirmer, 303 Mich 598 ... 352, 354
Marciniak *v.* Sundeen, 278 Mich 407 195
Marine Company *v.* City of Milwaukee, 151 Wis 239 224
Marion *v.* Balsley, 195 Mich 51 5
Markoff *v.* Tournier, 229 Mich 571 239
Martin *v.* Civil Service Commission of the City of Detroit, 313 Mich 639 387
Martz's Estate, *In re*, 318 Mich 293 251
Marvin *v.* Solventol Chemical Products, Inc., 298 Mich 296 33
Maryland Casualty Co. *v.* United States, 32 F Supp 746 712
Mauch *v.* Bennett & Brown Lumber Co., 235 Mich 496 ..... 272, 273
May *v.* A. H. Powell Lumber Co., 335 Mich 420 99
Mayer *v.* Journeymen Stone-Cutters Association, 47 NJ Eq 519 . 446
——— *v.* Mayer, 266 Mich 241 314
Maynard *v.* Maynard, 329 Mich 247 264

PAGE

Mayo *v.* Great Lakes Greyhound Lines, 333 Mich 205 .. 428, 441, 554
McCrum *v.* Weil & Co., 125 Mich 297 518
McDermott *v.* W. T. Grant Co., 313 Mass 736 184
McDonald *v.* McDonald, 212 Ala 137 27
——— *v.* Michigan Central R. Co., 132 Mich 372 308
McGrain *v.* Bell, 248 Mich 523 486
McIntyre *v.* Farmers & Merchants' Bank, 115 Mich 255 .... 658, 660
McLellan *v.* Detroit File Works, 56 Mich 579 399
McNicol's Case, 215 Mass 497 138
Meehan *v.* Marion Manor Apartments, 305 Mich 262 405
Mellinger *v.* Prudential Insurance Company of America, 322 Mich 596 325
Menendez *v.* City of Detroit, 337 Mich 476 623
Merchants' National Bank of Chicago *v.* Detroit Knitting & Corset Works, 68 Mich 620 399
Meredith's Estate, *In re*, 275 Mich 278 681
Mestaer *v.* Gillespie, 11 Ves Jr (Eng) 621 295
Metzen *v.* State Board of Tax Administration, 301 Mich 532 ... 470
Meyers *v.* Meyers, 161 Mich 487 200
Michael *v.* Kircher, 335 Mich 566 653
Michaels *v.* Smith, 240 Mich 671 234
Michigan Allied Dairy Ass'n *v.* State Board of Tax Administration, 302 Mich 643 470
Miles *v.* Harkins, 335 Mich 453 675
Miller *v.* Miller, 320 Mich 43 650
——— *v.* Stevens, 224 Mich 626 695
Mitchell *v.* Mitchell, 333 Mich 441 ..... 279, 280
Modern Steel Structural Company *v.* English Construction Company, 129 Wis 31 78
Mogk *v.* Stroecker, 243 Mich 668 608
Mooradian *v.* Davis, 302 Mich 484 599
Moore *v.* Andrews, 203 Mich 219 160
——— *v.* DuBard, 318 Mich 578 676
——— *v.* Mandlebaum, 8 Mich 433 223
——— *v.* Manufacturers Sales Co., 335 Mich 606 ..... 708, 709
Mord *v.* New York Indemnity Co., 216 App Div (NY) 252 ... 217
Moreing *v.* Weber, 3 Cal App 14 78
Morgan *v.* Goddard, 239 Mich 174 80
Morris *v.* O'Neill, 239 Mich 663 695
Morse *v.* Port Huron & Detroit R. Co., 251 Mich 309 .. 124, 126, 135, 136
Mugler *v.* Kansas, 123 US 623 540
Muir *v.* Trustees of the Leake & Watts Orphan Asylum, 3 Barb Ch (NY) 477 677
Mulloy *v.* Wayne County Board of Supervisors, 246 Mich 632 665–667
Murphy *v.* Board of Education of the School District of the City of Flint, 314 Mich 226 287
——— *v.* California, 225 US 623 540
——— *v.* Michigan Trust Co., 221 Mich 243 222
Myers *v.* Myers, 143 Mich 32 200

National Bank of Detroit *v.* State Land Office Board, 300 Mich 240 630
Neada *v.* State Farm Life Insurance Co., 324 Mich 233 553
Negaunee National Bank *v.* LeBeau, 195 Mich 502 ..... 353, 355

PAGE

Nelson *v.* Country Club of Detroit, 329 Mich 479 .. 123, 130–132, 134
Neuval *v.* Cowell, 36 Cal 648 .. 78
New Jersey & New York R. Co., *In re*, 12 NJ 281 .. 17
New York Life Insurance Co. *v.* Cook, 237 Mich 303 .. 27
Nezworski *v.* Mazanec, 301 Mich 43 .. 518
Nichols *v.* Judge of Superior Court, 130 Mich 187 .. 666
North Star Line, Inc., *v.* City of Grand Rapids, 259 Mich 654 .. 417
Northwestern Upholstering Company *v.* First National Bank & Trust Company of Minneapolis, 193 Minn 333 .. 224
Noyes *v.* Butler Bros., 98 Minn 448 .. 78

Odinetz *v.* Budds, 315 Mich 512 .. 594
O'Donnell *v.* Liquor Control Commission, 288 Mich 377 .. 396
Ohio, *ex rel.* Clarke, *v.* Deckebach, 274 US 392 .. 668
O'Neil *v.* W. R. Spencer Grocer Co., 316 Mich 320 .. 99
Orso *v.* Great Lakes Engineering Works, 164 Mich 568 .. 308
Osborn *v.* Charlevoix Circuit Judge, 114 Mich 655 .. 543
Otto *v.* Hansen Wholesale Lumber Corporation, 331 Mich 37 .. 518
Oversmith *v.* Lake, 295 Mich 627 .. 498
Oxford *v.* Berry, 204 Mich 197 .. 597

Parks (John A.) Company *v.* General Discount Corporation, 294 Mich 316 .. 366
Passmore *v.* Estate of Passmore, 50 Mich 626 .. 196
Payne *v.* City of Racine, 217 Wis 550 .. 687
Pear *v.* Graham, 258 Mich 161 .. 278
Pearce *v.* Michigan Home & Training School, 231 Mich 536 .. 273
People *v.* Anderson, 321 Mich 533 .. 163
——— *v.* Banning, 329 Mich 1 .. 163, 164
——— *v.* Bellet, 99 Mich 151 .. 668
——— *v.* Bommarito, 309 Mich 139 .. 597
——— *v.* Bradovich, 305 Mich 329 .. 155
——— *v.* Brazee, 183 Mich 259 .. 667
——— *v.* Brockett, 195 Mich 169 .. 151
——— *v.* Burns, 5 Mich 114 .. 207
——— *v.* Cavanaugh, 246 Mich 680 .. 151
——— *v.* Clement, 127 Mich 130 .. 567
——— *v.* Crow, 304 Mich 529 .. 151
——— *v.* Czckay, 218 Mich 660 .. 564
——— *v.* Dudgeon, 229 Mich 26 .. 150, 151
——— *v.* Guertins, 224 Mich 8 .. 597
——— *v.* Hare, 57 Mich 505 .. 382, 564
——— *v.* Hertz Driveurself Stations, Inc., 338 Mich 139 .. 547
——— *v.* Hopper, 274 Mich 418 .. 537
——— *v.* Hunley, 313 Mich 688 .. 581
——— *v.* Licavoli, 245 Mich 202 .. 595, 597
——— *v.* Linde, 341 Ill 269 .. 540
——— *v.* Logie, 321 Mich 303 .. 566
——— *v.* Lynch, 29 Mich 274 .. 564
——— *v.* Moshier, 306 Mich 714 .. 152
——— *v.* Murn, 220 Mich 555 .. 537
——— *v.* Myers, 239 Mich 105 .. 581
——— *v.* O'Hara, 278 Mich 281 .. 566
——— *v.* Orlando, 305 Mich 686 .. 593, 595
——— *v.* Ormsby, 310 Mich 291 .. 597

PAGE

People *v.* Palm, 245 Mich 396 542
——— *v.* Piechowiak, 278 Mich 550 163
——— *v.* Pizzino, 313 Mich 97 454
——— *v.* Prestidge, 182 Mich 80 150–152
——— *v.* Rose, 268 Mich 529 155
——— *v.* Roxborough, 307 Mich 575 155
——— *v.* Shottey, 66 Mich 708 564
——— *v.* Stone, 293 Mich 658 163
——— *v.* Street, 288 Mich 406 163
——— *v.* Ward, 226 Mich 45 594
——— *v.* Wilson, 55 Mich 506 594
——— *v.* Zabijak, 285 Mich 164 565
———, *ex rel.* Allen, *v.* Kent Circuit Judge, 37 Mich 474 ... 665, 666
———, ——— Attorney General, *v.* Welch's Estate, 235 Mich 555 ..... 356, 461, 466
———, ——— Heath, *v.* Kent Circuit Judge, 37 Mich 372 ... 665
———, ——— Township of La Grange, *v.* State Treasurer, 24 Mich 468 395
Perine *v.* Standfield, 107 Mich 553 80
Perkins *v.* Vermont Hydro-Electric Corporation, 106 Vt 367 134
Peterson *v.* Jacobs, 303 Mich 329 239
Petition of Bryant, *In re,* 323 Mich 424 208
Phillips *v.* Fitzhugh Motor Company, 330 Mich 183 ..... 138, 286
——— *v.* Marten, 331 Mich 330 ..... 490, 491
Pickett *v.* Loggon, 14 Ves Jr (Eng) 215 295
Pickle *v.* Page, 252 NY 474 498
Pierce *v.* Underwood, 103 Mich 62 160
Pierce Oil Corp. *v.* City of Hope, 248 US 498 540
Pilgrim *v.* Menthen, 327 Mich 714 286
Pingree *v.* Pingree, 170 Mich 36 279
Poindexter *v.* Department of Conservation, 316 Mich 235 99
Polate *v.* Polate, 331 Mich 652 569
Polglaise *v.* Commonwealth, 114 Va 850 540
Pontiac (City of) *v.* Simonton, 271 Mich 647 623
Porter (C. O.) Machinery Co. *v.* Coleman, 329 Mich 8 634
Postal *v.* Home State Bank for Savings, 284 Mich 220 120
Potter *v.* Barry Circuit Judge, 156 Mich 183 564
Powell *v.* Pennsylvania, 127 US 678 540
Public Welfare Commission of Detroit *v.* Civil Service Commission, 289 Mich 101 395
Purdie *v.* Detroit Police Department Trial Board, 318 Mich 430 ..... 59, 60
Putnam *v.* Beechler, 299 Mich 552 272

Quist *v.* Western & Southern Life Insurance Co., 219 Mich 406 ..... 27, 29

Rackham's Estate, *In re,* 329 Mich 493 ..... 356, 357, 461
Ragon *v.* Toledo, Ann Arbor & N. M. R. Co., 97 Mich 265 306
Ralph *v.* MacMarr Stores, 103 Mont 421 524
Rasey *v.* Currey's Estate, 265 Mich 597 352–354
R. C. Mahon Company *v.* Department of Revenue, 306 Mich 660 ..... 470, 471
Rea *v.* Rea, 53 Mich 40 279
Reed *v.* Civil Service Commission, 301 Mich 137 510
——— *v.* Metropolitan Life Insurance Co., 269 Mich 26 30

PAGE

Reed *v.* Stockmeyer, 20 CCA 381 307
Reedy *v.* Goodin, 285 Mich 614 523
Rehfeld's Estate, *In re,* 198 Mich 249 356
Reid *v.* Durboraw (CCA), 272 F 99 28
——— *v.* Gooden, 282 Mich 495 600
Reiss *v.* Northway Motor & Manfg. Co., 201 Mich 90 272
Rendell's Estate, *In re,* 244 Mich 197 251
Renz' Estate, *In re,* 338 Mich 347 ..... 462, 463
Ressler *v.* O'Malley, 328 Mich 331 553
Rex Oil & Gas Co. *v.* Busk, 335 Mich 368 553
Rice *v.* Oregon Short Line R. Co., 33 Idaho 565 134
Rickabus *v.* Gott, 51 Mich 227 381
Rickard *v.* Bridgeman-Russell Co., 288 Mich 175 67
Riggs *v.* Riggs' Estate, 232 Mich 579 573
Riley *v.* Kohlenberg, 316 Mich 144 ..... 67, 271
Rives *v.* Fire Ass'n of Philadelphia (Tex Civ App), 77 SW 424 .. 217
Robinson *v.* Robinson, 275 Mich 420 314
Robison *v.* Miner, 68 Mich 549 541
Rohan *v.* Detroit Racing Association, 314 Mich 326 144
Rowe *v.* Rowe, 28 Mich 353 512
Rucker *v.* Michigan Smelting & Refining Co., 300 Mich 668 ..... 271, 273, 405
Rudnik, *In re,* 333 Mich 216 579
Rummel *v.* Dilworth, Porter & Co., 131 Pa 509 307
Russ *v.* City of Detroit, 333 Mich 505 456
Russell *v.* Musson, 240 Mich 631 249–252
Ryan *v.* City of Port Huron, 234 Mich 648 128–130
——— *v.* New York Central Railroad Co., 267 Mich 202 ..... 427, 553, 554

Saari *v.* George C. Dates & Associates, 311 Mich 624 553
Schlussel *v.* Commercial Casualty Insurance Co., 237 Mich 182 ..... 215, 216
Schneider *v.* Shepherd, 192 Mich 82 596
Schrier *v.* B & B Oil Co., 311 Mich 118 ..... 708, 709
Schudlich *v.* Yankee, 272 Mich 482 120
Schultz *v.* Frankfort Marine, Accident & Plate Glass Ins. Co., 151 Wis 537 504
Sebring *v.* Mawby, 251 Mich 628 234
Seibly *v.* Ingham Circuit Judge, 105 Mich 584 279
Seligman *v.* Estate of Ten Eyck, 53 Mich 285 244
——— *v.* Toledo Moving Pictures Operators Union, Local 228, 88 Ohio App 137 ..... 430, 435, 443
Servis *v.* Dorn, 76 NJ Eq 241 660
Shady View Beach Land Co. *v.* Summers, 255 Mich 6 108
Shaw *v.* First Baptist Church of Winona, 44 Minn 22 78
Shean *v.* United States Fidelity & Guaranty Company, 263 Mich 535 661
Shirts *v.* Phoenix Accident & Sick Benefit Association, 135 Mich 439 329
Shockley, *Ex parte,* 17 F2d 133 612
Short *v.* Van Dyke, 50 Minn 286 78
Simonelli *v.* Cassidy, 336 Mich 635 185
Simpson *v.* Burton, 328 Mich 557 ..... 180, 182, 184
——— *v.* Lee & Cady, 294 Mich 460 271
Simpson (J. B.), Inc., *v.* O'Hara, 277 Mich 55 471
Skrzycki *v.* Ritchie, 333 Mich 480 167

PAGE

Smith *v.* Eames, 3 Scammon (4 Ill) 76 452
Snyder *v.* Massachusetts, 291 US 97 155
Socony Vacuum Oil Co. *v.* Marvin, 313 Mich 528 260
Sorter's Estate, *In re*, 314 Mich 488 454
Stacey *v.* Emery, 97 US 642 595
Stanczuk *v.* Pfent, 231 Mich 689 672
Standard Accident Insurance Co. *v.* King Candy Co. (Tex Civ App), 221 SW2d 349 215
Standard Oil Co. *v.* Brukwinski, 242 Mich 29 672
Stansell *v.* American Radiator Co., 163 Mich 528 639
Starkstein *v.* Starkstein, 318 Mich 258 345
Starling *v.* Supreme Council Royal Templars of Temperance, 108 Mich 440 326
State *v.* Butts, 3 SD 577 539
——— *v.* Hall, 96 Vt 379 540
——— *v.* Hastings, 10 Wis 525 666
——— *v.* Stang Tank Line, 264 Wis 570 542
———, *ex rel.* Wayne Prosecuting Attorney, *v.* Martin, 314 Mich 317 597
——— Highway Commissioner *v.* Detroit City Controller, 331 Mich 337 ..... 621, 622
——— Treasurer *v.* Kaiser-Frazer Corporation, 326 Mich 715 .. 286
Staunton *v.* City of Detroit, 329 Mich 516 490
Steffes *v.* Ford Motor Co., 239 Mich 501 128–130
Stein *v.* McCarthy, 120 Wis 288 78
——— *v.* New York, 346 US 156 ..... 153, 154
Stephenson *v.* Golden, 279 Mich 710 293–296
Stevenson *v.* Aalto, 333 Mich 582 556
Steward *v.* Gold Medal Shows, 244 Ala 583 498
Stockley *v.* School District No. 1 of Portage Township, 231 Mich 523 ..... 123, 126, 135
Stone *v.* Cray, 89 NH 483 88
Stoney Creek Woolen Co. *v.* Smalley, 111 Mich 321 37
Stretz *v.* Zolkoski, 118 Misc (NY) 806 660
Strom-Johnson Construction Co. *v.* Riverview Furniture Store, 227 Mich 55 79
Stuart *v.* Stuart, 311 Mich 30 191
Sullivan *v.* Deiter, 86 Mich 404 382
——— *v.* Graham, 336 Mich 65 667
Sussex *v.* Snyder, 307 Mich 30 ..... 352, 354
Svitojus' Estate, *In re*, 296 Mich 19 677

Taylor *v.* Wayne Circuit Judge, 336 Mich 654 675
Tegels *v.* Kaiser-Frazer Corporation, 329 Mich 84 406
Terranova *v.* Cottrell Block Construction Co., 302 Mich 417 .. 554
Territory *v.* Lockwood, 3 Wall (70 US) 236 612
Thal *v.* Detroit Board of Education, 316 Mich 351 245
Thier *v.* Widdifield, 210 Mich 355 ..... 123, 130–132, 134
Thompson *v.* F. W. Woolworth Company, 100 Ind App 386 524
Thurber *v.* Battey, 105 Mich 718 253
Tobin *v.* Lake Shore & Michigan Southern R. Co., 192 Mich 549 .. 130
Tonnelier *v.* Westin, 302 Mich 213 253
Torma *v.* Montgomery Ward & Company, 336 Mich 468 .. 230, 519, 523
Townsend *v.* Gordon, 308 Mich 438 253

PAGE

Township of LaGrange (People, *ex rel.*) *v.* State Treasurer, 24 Mich 468 395
——— Warren *v.* Raymond, 291 Mich 426 394
Trafamczak *v.* Anys, 320 Mich 653 ..... 172, 174–177
Tribbett *v.* Village of Marcellus, 294 Mich 607 ..... 278, 668
Trombley *v.* Auditor General, 23 Mich 471 612
——— *v.* Trombley, 313 Mich 80 191
Tromley *v.* Lange, 236 Mich 240 695
Truax *v.* Raich, 239 US 33 ..... 423, 438
Tucker *v.* Rohrback, 13 Mich 73 600
Turner *v.* Fidelity & Casualty Company of New York, 112 Mich 425 ..... 326, 327

United States *v.* Horton, 86 F Supp 92 594

Valenti *v.* Mayer, 301 Mich 551 297
Vandenberg *v.* Prosek, 335 Mich 382 232
Vanden Bogert *v.* May, 334 Mich 606 553
Vannet *v.* Michigan Public Service Co., 289 Mich 212 634
Van't Hof *v.* Jemison, 291 Mich 385 222
Van Zanten *v.* National Casualty Company, 333 Mich 23 325
Vincent *v.* Van Blooys, 263 Mich 312 280
Von Hoffman *v.* City of Quincy, 71 US (4 Wall) 535 623
Vukich *v.* City of Detroit, 325 Mich 644 456

Waldref *v.* Waldref, 135 Minn 473 201
Walinske *v.* Detroit-Wayne Joint Building Authority, 325 Mich 562 367–369
Walker *v.* Conant, 65 Mich 194 225
——— *v.* ———, 69 Mich 321 225
——— *v.* Rebeuhr, 255 Mich 204 260
Walz *v.* Peninsular Fire Ins. Co., 221 Mich 326 712
——— *v.* Reliance Insurance Co. of Philadelphia, 221 Mich 345 712
Wardell *v.* Williams, 62 Mich 50 695
Warner *v.* Noble, 286 Mich 654 394
Warren Township *v.* Raymond, 291 Mich 426 394
Warsop *v.* Cole, 292 Mich 628 503
Watrous *v.* Conor, 266 Mich 397 233
Watson-Higgins Milling Co. *v.* Graczyk, 253 Mich 175 558
Weber *v.* Weber, 47 Mich 569 37
Weintraub *v.* H. B. Earhart, Incorporated, 273 Mich 668 224
Weiss *v.* Weiss, 174 Mich 431 200
Weller *v.* Cummins, 330 Mich 286 217
Westgate *v.* Adams, 293 Mich 559 681
Westlawn Cemetery Ass'n *v.* Wayne Circuit Judge, 238 Mich 119 672
Wheeler *v.* Equitable Life Assurance Society of the United States, 294 Mich 520 ..... 330, 332, 333
——— *v.* Wallace, 53 Mich 355 382
Whirl *v.* Reiner, 229 Mich 114 672
White *v.* Herpolsheimer Company, 327 Mich 462 455
Whitman *v.* Whitman, 286 Mich 458 264
Widman *v.* Murray Corporation of America, 245 Mich 332 .. 124, 126, 135, 136
Wilbur *v.* Stoepel, 82 Mich 344 ..... 243, 244

PAGE

Wiltse *v.* Borden's Farm Products Company of Michigan, 328 Mich 257 271
Wine *v.* Newcomb, Endicott & Co., 203 Mich 445 523
Wixson *v.* Haywood, 33 Mich 68 224
Wolf (F. A.) Brick Co. *v.* Lonyo, 132 Mich 162 5
Wolford *v.* Herrington, 74 Pa 311 295
Woodruff *v.* Hough, 91 US 596 78
Worcester County National Bank, *Ex parte*, 279 US 347 . 613–615

Yacobian *v.* Vartanian, 221 Mich 25 456
Young *v.* Peachy, 2 Atk (Eng) 254 295
——— *v.* Thendara, Inc., 328 Mich 42 639

Zak *v.* Gray, 324 Mich 522 600
Zoski *v.* Gaines, 271 Mich 1 280

LAWS CITED AND CONSTRUED.

CONSTITUTION OF THE UNITED STATES.

	PAGE
Art 1, § 9	510
Art 1, § 10	510, 622
Art 4, § 2(2)	345
Am 1	509
Am 5	438, 439
Am 14	438, 439, 509
——, § 1	276

UNITED STATES STATUTES.

	PAGE
12 USCA, § 36	612
26 USCA, § 12(b)	697
————, §§ 117(b), 117(c) (2)	697

UNITED STATES REGULATIONS.

	PAGE
Treasury department regulations, § 315.4	464
————————, § 315.21(a)	464
————————, §§ 315.45, 315.46	465

MICHIGAN CONSTITUTION 1908.

	PAGE
Art 2, § 1	276
——, § 9	622
——, § 12	346
——, § 15	540
——, § 16	154
Art 4, §§ 1, 2	57
Art 5, § 1	509
——, § 21	144, 509, 510
——, § 22	370
——, § 30	664
Art 7, § 4	276
——, § 5	276, 277
——, § 10	393
——, § 16	535
Art 8, § 10	367, 369, 370
——, § 27	413
——, § 28	413, 415, 417
Art 10, § 10	619, 621
——, § 11	621

COMPILED LAWS 1871.

	PAGE
§§ 4692, 4693	295

COMPILED LAWS 1915.

	PAGE
§§ 6043	107
8040	354, 356

COMPILED LAWS 1929.

	PAGE
§§ 1446–1464	666
8417	406
17374	579

COMPILED LAWS SUPPLEMENT 1940.

	PAGE
§§ 3663–4a, 3663–4b	471
11352–1	143

COMPILED LAWS 1948.

	PAGE
§§ 24.71 *et seq.*	538
35.402 *et seq.*	386, 395
123.241 *et seq.*	687
123.951 *et seq.*	365
123.958	365
123.961	368
125.401 *et seq.*	90
125.409	90
125.583a	87
125.585(d)	86, 87, 91
141.101 *et seq.*	684
141.121	684
145.1 *et seq.*	204
189.1	205
189.3	206
205.51 *et seq.*	469
205.91 *et seq.*	469
205.201	350, 358, 464
205.201 *et seq.*	461
205.221	351
205.501 *et seq.*	507
205.509(e)	510
211.351 *et seq.*	638
211.359	639
250.2	410
250.31	112
254.311 *et seq.*	620
256.29	169
257.614	193
257.621, 257.622	174
257.624	172–174
257.724	535
§§ 261 *et seq.*	626
272.2	627
338.703, 338.704	667
338.720	667
400.1 *et seq.*	643
400.34a	642
412.1	123, 286, 406
412.1 *et seq.*	97
413.12	67, 100, 270, 406
417.1 *et seq.*	97
428.101	245
435.251–435.254	664
439.1 *et seq.*	223
439.4	107
442.51 *et seq.*	399
449.25(2) (d)	677
450.8	695
451.101 *et seq.*	705
451.102, 451.103	694
451.105	694
451.120	705, 706, 710
451.121	694
462.26	11
475.1 *et seq.*	546
475.2	143
477.1	143
477.1 *et seq.*	141
479.1	143
487.34	612
487.703	355, 358
551.302	494
552.3–552.5	608

COMPILED LAWS 1948—Continued.

	PAGE
§§ 552.17	646
552.35	608
552.37	608
552.101	21, 24
552.301	647
557.81	658
566.1	245
566.106	294
566.132	633
601.14	276
609.1	5
609.13	574
613.35	59
617.53	297
617.65	23, 573
617.66	43, 44, 518
618.21	238
620.1	671
637.18 *et seq.*	599
637.26	599
637.28	599
691.541 *et seq.*	80
§§ 691.581, 691.582	479
691.581 *et seq.*	228
691.691 *et seq.*	213, 301, 374, 570
692.3	239
692.11	237
691.701	454
708.10	643
710.3	51
710.9	250, 251
722.541	497
728.4	653
750.425	561
750.498	409, 411, 418
764.13	599
764.15(d)	593, 599
766.2, 766.3	563
768.26	581
769.26	566
771.4	579
774.1	534

COMPILED LAWS SUPPLEMENT 1952.

	PAGE
§§ 35.351 *et seq.*	56
205.51	471
205.54	471, 472
205.54a, subd (g)	472
205.94	471
257.1 *et seq.*	530, 582
257.518	585
257.520(a)	585
257.520(b)	586
257.716	534
257.722	531
257.724	530, 531
257.726	538
423.23	316

MICHIGAN STATUTES ANNOTATED.

	PAGE
§§ 4.1222 *et seq.*	386, 395
5.1171–5.1189	666
5.2661 *et seq.*	687
6.1 *et seq.*	204
6.542	206
9.862	410
9.881	112
9.1446	169
19.21	245
19.41 *et seq.*	223
19.44	107
19.371 *et seq.*	399
§§ 19.741 *et seq.*	705
19.742, 19.743	694
19.745	694
19.760	705, 706, 710
19.761	694
20.25(2) (d)	677
21.8	695
22.45	11
22.531	143
22.532	143
22.548	143
22.548 *et seq.*	141

MICHIGAN STATUTES ANNOTATED—Continued.

	PAGE
§§ 22.566	143
25.83–25.85	608
25.97	646
25.111	608
25.113	608
25.192	494
25.211	647
25.311	497
26.191	658
26.1461 *et seq.*	213
27.34	276
27.593	5
27.420	518
27.605	574
27.765	59
27.902	297
27.914	23, 573
27.915	43, 44
§§ 27.1001	238
27.1223	239
27.1231	237
27.1351	671
27.1461 *et seq.*	301, 374, 570
27.1471	455
27.2261 *et seq.*	599
27.2269	599
27.2271	599
28.667	561
28.872	599
28.874(d)	593, 599
28.920, 28.921	563
28.1049	581
28.1096	566
28.1134	579
28.1192	534

MICHIGAN STATUTES ANNOTATED 1942 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 7.524, subd (b)	471
7.525	471

MICHIGAN STATUTES ANNOTATED 1943 REVISION.

	PAGE
§§ 23.303	355
27.3178 (420)	643

MICHIGAN STATUTES ANNOTATED 1949 REVISION.

	PAGE
§§ 5.2731 *et seq.*	684
5.2751	684
5.2771 *et seq.*	90
5.2779	90
5.2933(1)	87
5.2935(d)	86, 87, 91

MICHIGAN STATUTES ANNOTATED 1949 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 17.186	406
18.85(3), 18.85(4)	667
18.85(20)	667

MICHIGAN STATUTES ANNOTATED 1950 REVISION.

	PAGE
§§ 7.411 *et seq.*	570
7.521	471
7.521 *et seq.*	469
7.524	471, 472
7.555(1) *et seq.*	469
7.561	350, 358, 464
7.561 *et seq.*	461

MICHIGAN STATUTES ANNOTATED 1950 REVISION—Continued.

	PAGE
§§ 7.582	351
7.951 *et seq.*	638
7.959	639
16.401 *et seq.*	643
16.434(1)	642
17.151	123, 286, 406
17.151 *et seq.*	97
17.186	67, 100, 270
17.220 *et seq.*	97
17.454(25)	316

MICHIGAN STATUTES ANNOTATED 1951 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 5.301(1) *et seq.*	365
5.301(11)	368
6.1 *et seq.*	204
6.540	205
7.411(1) *et seq.*	507
7.411(9) (e)	510
7.521 *et seq.*	469
7.525, subd (g)	472
7.555(1) *et seq.*	469
7.555(4)	471
9.2375	410
9.2375(d)	409, 418
22.531 *et seq.*	546
23.762	612
25.131	21, 24
27.711, 27.712	479
27.711 *et seq.*	228
27.1461 *et seq.*	213, 301, 374, 570
27.3178(543)	51
27.3178(549)	250, 251
27.3654	653
28.766	409, 418
28.1134	579

MICHIGAN STATUTES ANNOTATED 1952 REVISION.

	PAGE
§§ 3.560(7) *et seq.*	538
4.1486(1) *et seq.*	56
9.1801 *et seq.*	530, 582
9.2218	585
9.2220(a)	585
9.2220(b)	586
9.2314	193
9.2321, 9.2322	174
9.2324	172–174
9.2327	233
9.2416	534
9.2422	531
9.2424	530, 531
9.2426	538
11.1 *et seq.*	626
11.111	627

MICHIGAN STATUTES ANNOTATED 1953 REVISION.

	PAGE
§§ 26.906	294
26.922	633
26.978(1)	245
26.1231 *et seq.*	80

MICHIGAN STATUTES ANNOTATED 1953 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 9.1361(1) *et seq.*	620
9.2701–9.2704	664

SESSION LAWS.

	PAGE
1883, Act 94	79
1897, Act 205, § 2	57, 58
1899, Act 188	461
1909, Act 248	354
——, Act 248, § 3	356
1912 (1st Ex Sess), Act 10, pt 2	97
——, ——, pt 7	97, 98, 100
——, ——, ——, § 1	97
1913, Act 334, § 2, div 9	409
1919, Act 224	57
1921, Act 207	86
1923, Act 213, ch 12, § 2	627
——, Act 220	705
——, Act 316	626
1925, Act 126	658
——, Act 351	204
——, Act 351, pt 4, ch 19, § 1	205, 206
——, ——, ——, ——, § 3	206
1927, Act 175, § 1, ch 14	534
——, Act 320	687
——, Act 390	666
1929, Act 200	399
——, Act 260, § 4	653
1931, Act 198	399
——, Act 200	206
1933, Act 94	684
——, ——, § 21	684
——, Act 167, § 4(a), (b)	471
——, Act 254, art 1, § 1 (i)	143, 144
——, ——, art 3, § 1 *et seq.*	141
1935, Act 13, § 20	706
1937, Act 296	80
——, Act 308	206
1939, Act 176, § 23	316
——, Act 311	667
——, Act 313	471
1941, Act 205	628
——, Act 210	684
——, Act 306	86, 91
1943, Act 88	538
——, Act 245	406
1944 (Ex Sess), Act 29	666
1945, Act 315	667
1947, Act 265	507
——, ——, § 9(b)	507
——, ——, § 9(d)	507
——, ——, § 9(e)	507, 509, 510
——, ——, § 9(f)	509
1948 (1st Ex Sess), Act 31	365, 366
——, ——, § 1	370
——, ——, § 4	369
——, ——, § 8	365
——, ——, § 11	368
1949, Act 90	538
——, Act 149	653
——, Act 177	350, 358
——, Act 230	316
——, Act 272	472
——, Act 300	530, 582
——, ——, ch 6	173
——, ——, § 520	585
——, ——, § 614	193
——, ——, §§ 621, 622	174
——, ——, § 624	173
——, ——, § 627	233
——, ——, § 675(d)	409, 410, 418
——, ——, § 716	534, 535, 537
——, ——, § 722	531, 535, 537
——, ——, § 722 (a), (b), (c)	531
——, ——, § 722(d)	532
——, ——, § 722(e)	532, 538
——, ——, § 722(f)	532, 537, 539

SESSION LAWS—Continued.

	PAGE
1949, Act 300, § 724	530, 531, 534, 535, 537, 542
——, ——, § 724(a)	532
——, ——, § 724(b)	533, 542
——, ——, § 724(c), (d)	534
——, ——, § 726	538
1951, Act 9	538
——, Act 47	409, 410, 418
——, Act 78	507, 509, 510
——, ——, § 9(e)	510
——, Act 213	205
1951, Act 263	56, 59
——, Act 263, § 2	56, 58
——, ——, § 2(a) (1), (2)	61
——, ——, § 5(b)	57–59
——, ——, § 5(c)	58, 59
1952, Act 13	530, 531, 534, 542
——, Act 14	534, 536
——, Act 214	620
1953, Act 66	664
——, Act 141	620, 621

WASHINGTON.

	PAGE
Constitution, Art 1, § 10	622

WYOMING.

	PAGE
Constitution, Art 16, § 11	687

CHARTERS.

	PAGE
Detroit City Charter, title 4, ch 2, §§ 18, 18a	392
Grand Rapids City Charter, title 8, § 33–1/2	685

ORDINANCES.

	PAGE
Detroit Zoning Ordinance No 171–D	85
———— ———— No 171–D, § 3.6	90
———— ———— No 171–D, § 20.7	86–91
East Lansing Traffic Ordinance No 26	414
Grand Rapids No 1340	684
———— No 1340, § 11	684, 685

MICHIGAN COURT RULES (1945).

	PAGE
No 8, § 7	671
No 17, § 10	557
No 23, § 2	558
No 24, § 1	553
No 27, § 4	671
No 28, § 1	671
No 32	344, 345
No 35, § 4	345
No 35, § 6	276, 278, 281
No 37, § 7	213
No 40	277, 280
No 41	277, 280
No 42	277, 280
No 47, § 3	186
No 48, § 1	675
No 77, as added in 1949	654

CIRCUIT COURT RULES.

PAGE

Third judicial circuit—Rule No 12 280
Washtenaw circuit court—Rule No 21 344

TEXTS CITED.

	PAGE
11 Am & Eng Enc Law (2d ed), pp 427, 428	119
12 Am Dec, pp 142, 143	452
2 Am Jur, Appeal and Error, § 31	681
4 Am Jur, p 510	224
10 Am Jur, p 524, § 3	394
12 Am Jur, p 353	439
13 Am Jur, Corporations, § 833	399
31 Am Jur, pp 843, 844	439
38 Am Jur, p 876, § 194	260
50 Am Jur, p 460, § 440	536
53 Am Jur, p 776	452
58 Am Jur, § 196, p 1047	89
58 Am Jur, Workmen's Compensation, § 209 *et seq.*	285
80 ALR 126	126, 135
104 ALR 955	112
110 ALR 22	278
142 ALR 885	138
149 ALR 14	330
168 ALR 20	88
Baldwin, Personal Injuries (2d ed), p 138, § 146	523
Bigelow on Estoppel (5th ed), p 570	119
2 Bouvier's Law Dictionary (Rawle's 3d Rev), p 2135	296
Broom's Legal Maxims (9th ed), pp 197, 207	296
Callaghan's Michigan Digest, Workmen's Compensation, § 68 *et seq.*	285
10 Callaghan's Michigan Pleading and Practice, § 73.15	597
Clark, The Practical Operation of Federal Discovery, "A Symposium on the Use of Depositions and Discovery Under the Federal Rules," (12 FRD 131–170)	277
19 CJ, p 343	200
19 CJ, p 348	201
65 CJ, pp 459–461	295
3 CJS, pp 77, 78	296
14 CJS, p 122, § 1	395
14 CJS, p 122, § 2a	394
36 CJS, pp 797, 798, § 15	543
37 CJS, pp 282, 283	39
37 CJS, p 297	38
58 CJS, p 929, § 23	224
82 CJS, § 889	536
2 Couch on Insurance, § 308, p 828	28
16 Cyc, pp 722, 723	119
16 Cyc, pp 759, 769	120
20 Cyc, p 13	37
29 Cyc, p 441	130

PAGE

31 Cyc, pp 1481, 1482 296
36 Cyc, p 1006 667
Endlich on the Interpretation of Statutes, § 295 208
Gleason & Otis on Inheritance Taxation (4th ed), p 876 466
2 Hale Pleas of the Crown (1st Am ed), p 386 296
Hill on Trustees, p 144 295
Honigman, Michigan Court Rules Annotated 277
Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), pp 93 to 173 285
Kaufman, Some Observations on Pretrial Examinations in Federal and State Courts (12 FRD 363–372) 277
1 Labatt on Master and Servant, § 271 306
28 LRA NS 337 217
Murrah, Pretrial Procedure, A Statement of its Essentials (14 FRD 417–446) 277
New Century Dictionary, "spiritualism" 34
Nims, Pretrial 277
1 Perry on Trusts and Trustees (6th ed), § 226 295
Pomeroy's Specific Performance (3d ed), p 375, § 144 295
Ragland, Discovery Before Trial 277
Report of Attorney General 1921, 1922, p 72 357
3 Restatement, Torts, p 502, § 700 498
3 Restatement, Torts, § 700g 498
4 Restatement, Torts, § 810 440
4 Restatement, Torts, § 810b 426
1 Spence's Equity Jurisprudence, p 511 295
2 Spence's Equity Jurisprudence, pp 194, 294 *et seq.* 295
1 Story Equity Jurisprudence (12th ed), §§ 330, 333 295
2 Story Equity Jurisprudence (12th ed), §§ 1254, 1265 295
Tiffany on Criminal Law (How 4th ed), p 92 594
Vanderbilt, Cases and Other Materials on Modern Procedure and Judicial Administration, pp 563–674 277
8 Wigmore on Evidence (3d ed), p 704 454
————, § 2196 196
2 Words and Phrases, p 169 134

OCTOBER TERM, 1953.*

ESCHER *v.* BENDER.

1. BOUNDARIES—ESTABLISHMENT BY ACQUIESCENCE.
   Boundary line between adjacent parcels of land, as established by a fence or other marker that is acquiesced in by the owners of the parcels, becomes the actual boundary line of the properties and will not be changed even though a subsequent survey shows error.

2. SAME—ACQUIESCENCE—CONVEYANCE.
   All land within a boundary line that has been established by acquiescence is included within the original description and passes with the property to which it has become attached.

3. SAME—ACQUIESCENCE—MARKERS.
   A boundary line may not be said to be established by acquiescence, where no fences, monuments or other man-made markers have been established.

4. ADVERSE POSSESSION—TITLE—MARKETABLE TITLE.
   Title established through adverse possession is free from encumbrance and of a character to assure quiet and peaceful enjoyment of the property by the owner, but it is not a marketable title of record until there has been a judicial determination of such title.

5. VENDOR AND PURCHASER—MARKETABLE TITLE.
   A title to real estate may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts,

---

* Continued from Volume 337.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 8 Am Jur, Boundaries §§ 80, 81.
[1–3] Establishment of boundary line by acquiescence. 69 ALR 1491; 113 ALR 432.
[4–6] 55 Am Jur, Vendor and Purchaser § 214.
[4–6] Title by adverse possession as marketable title. 57 ALR 1331, 1508.

would refuse to accept the title in the ordinary course of business; it being unnecessary that the title be actually bad in order to be unmarketable but only such a doubt or uncertainty as may reasonably form the basis of litigation.

6. SAME—RESCISSION—MISREPRESENTATION—MARKETABLE TITLE—ADVERSE POSSESSION.

Purchaser of tract of real estate was entitled to rescission on the basis of defendant's misrepresentation as to the amount of land to which he could give a marketable title of record, where title to a substantial portion of the land in area and value was claimed by him by adverse possession but such title had not been judicially determined.

Appeal from Lake; Neal (Max E.) J. Submitted October 13, 1953. (Docket No. 63, Calendar No. 45,952.) Decided November 27, 1953.

Bill by Meta Olga Escher against Joseph F. Bender to rescind sale and to have deed to plaintiff set aside. Decree for plaintiff. Defendant appeals. Affirmed.

Legatz & Lidke, for plaintiff.

Linsey, Shivel, Phelps & VanderWal, for defendant.

ADAMS, J. This is an action in chancery to set aside a conveyance of real estate on the ground that it was induced by the fraud, misrepresentation and mistake of the defendant.

Joseph F. Bender, defendant and appellant, owned lot 3, section 2, township of Sauble, Lake county, Michigan. Some years ago the land was used as a farm, but it now has greater value as a resort area because of its proximity to a number of lakes.

In 1951, Meta Olga Escher, plaintiff and appellee, became interested in purchasing the property as an investment. She viewed the area in company with

the defendant and 2 real estate brokers and was told the approximate boundaries of the lot. While the defendant had no survey, he told plaintiff that he knew the extent of his property and pointed out certain fences, trees, water channels and lake shores as marking the property lines. Plaintiff was told that the property had an extensive shore line on 3 lakes and that it included within its boundaries a trout creek for a distance of some 500 to 600 feet northeasterly from a bridge on the premises.

Plaintiff decided to purchase the property and on May 11, 1951, an agreement was executed, under the provisions of which defendant agreed to sell the property. The agreement provided for the delivery of certain instruments and moneys to an escrow agent who was authorized to complete the transaction upon the fulfillment of stated conditions and requirements, 1 of those conditions being that the defendant supply an abstract of title and tax history certified to date which when examined by a designated attorney would place "a good marketable title in the name of the first party."

The conditions of the escrow having been apparently complied with, defendant on June 6, 1951, conveyed the property by warranty deed to the plaintiff and the plaintiff paid to defendant the sum of $7,000 in cash and gave a mortgage and note for the unpaid balance of $7,000.

Thereafter, plaintiff employed a registered surveyor to survey the property in anticipation of its development as a summer resort area. The surveyor, working from the original government survey and a private survey made in 1908 and utilizing certain monuments located some distance from the property, established the boundary lines of the area as described in the conveyance. The survey indicated that the property had substantially the same frontage on one lake as represented by defendant, a

much lesser frontage on a second lake and none on the third. It also appeared from the survey that the description included considerably less of the trout stream than had been pointed out to the plaintiff prior to sale.

When plaintiff discovered that the survey did not include much of the land, and particularly the lake and river frontage, that she had been led to believe she had purchased from the defendant, she promptly gave written notice to the defendant that she was rescinding the purchase, tendered a deed of the property, and demanded the return of the down payment, mortgage and note. Upon defendant's refusal to set aside the transaction, plaintiff instituted this action alleging that because of the fraud, misrepresentation and mistake of the defendant, she had not received the property which defendant had agreed to convey to her.

Defendant, in his answer, alleged that the property was fenced on the north and east sides and on a part of the south side and that the remaining boundaries were marked by the shore line of lakes and channels. Further, that he and his predecessor in ownership had openly used the premises within such boundaries for a period of approximately 40 years without interference or objection from others and that, as a result of such acquiescence by adjacent property owners in the boundary lines as established and maintained, such fences and shore lines had become the legal boundary line of the premises known as lot 3, section 2, Sauble township, Lake county. It was the contention of the defendant, therefore, that having established the boundaries of the lot by acquiescence of adjacent land owners and having produced an abstract which showed a marketable title to the lot, he had fulfilled the requirements set forth in the sales agreement.

At the conclusion of the trial, the court found that defendant did not have marketable title of record to a substantial portion of the land purportedly conveyed to plaintiff and decreed that the conveyance be set aside because of misrepresentation and mistake. Defendant appeals.

When a boundary line between adjacent parcels of land is established by a fence or other marker and the line so established is acquiesced in by the owners of the adjacent parcels, it has been held that the line becomes the actual boundary line of the properties and will not be changed even though a subsequent survey shows error.

"Where coupled with acquiescence is the further fact that it has continued for the statutory period, such acquiescence for such statutory period* fixes the line. *Call* v. *O'Harrow,* 51 Mich 98; *Diehl* v. *Zanger,* 39 Mich 601; *Greene* v. *Anglemire,* 77 Mich 168; *F. H. Wolf Brick Co.* v. *Lonyo,* 132 Mich 162 (102 Am St Rep 412); *Marion* v. *Balsley,* 195 Mich 51. So in *Gildea* v. *Warren,* 173 Mich 28, the plaintiff had not been in possession of the premises for the statutory period. If the question of tacking was involved, she could not tack on the period of occupancy of her predecessors in title, but the fences had been acquiesced in for more than the statutory period and it was held that they fixed the line, and in *Bunde* v. *Finley,* 224 Mich 634, while the court held that defendant could not tack on the period of possession of his predecessor to his own in order to establish adverse possession, we at the same time sustained the following instruction:

" 'Where a fence has been treated and acquiesced in as the correct boundary line between adjacent owners for 15 years the boundary line ought not to be disturbed even if there were some variance from the true line, and a long established fence is better evidence of actual boundaries settled by practical

* See CL 1948, § 609.1 (Stat Ann § 27.593).—REPORTER.

location than a survey made after the monuments of the original survey have disappeared. And where a boundary line has been recognized and acquiesced in for 15 years it would not be disturbed by reason of new surveys.'

"The instant case falls within the line of cases last discussed. The testimony clearly establishes that for over 40 years the line claimed by defendant has been acquiesced in. On both sides of the line the respective parties have used to the line and no further; for many years a fence was maintained; in later years the business property has been used up to the line and, as we understand the record, improvements of some cost have been made by defendant. That the respective parties have acquiesced in the line for more than the statutory period is abundantly sustained by the proof. To restate the question of acquiescence, let us say: While acquiescence alone is not a defense, if acquiescence follows the resolving of a doubt as to where the line is or the settlement of a bona fide controversy, which settlement agreement contemplates an agreed line, and the monuments of such line are fixed and maintained thereafter such line so established and acquiesced in is the line, and the acquiescence need not continue for the statutory period; likewise where the line is acquiesced in for the statutory period it is also fixed." *Hanlon* v. *Ten Hove,* 235 Mich 227, 230 (46 ALR 788).

A boundary line having been established by acquiescence, all land within that boundary is included within the original description and passes with a conveyance of the property to which it has become attached.

"If the boundary line of lot 28 was never in dispute, and the fenced-in portion of lot 2 was but an encroachment, then plaintiff's right, if any, to the disputed strip rested upon prescription and not on a boundary line established by acquiescence. On the other hand, if the fence was placed in assertion of

the boundary line of lot 28, and encroached upon lot 2, and, for upward of 15 years, plaintiff and her predecessors in title claimed it was on the boundary line and used and occupied lot 28 up to such line, with the acquiescence of the owner of lot 2, then the boundary line between lot 28 and lot 2 is fixed, and the strip so occupied falls within the call for lot 28." *Jeffries* v. *Sheehan,* 242 Mich 167, 170.

We are of the opinion, however, that the rule establishing a boundary line through acquiescence of adjacent owners of land does not apply in the instant case. This is not an action between 2 property owners disputing ownership to a strip of land lying between their properties. No fences, monuments or other markers have been established along much of the claimed boundaries of the land that defendant says he owned.

We are here concerned with a determination of whether defendant, at the time of sale, had a marketable title of record to an unfenced area land not included within the survey of the premises described in defendant's deed. Defendant claims that he owned a sizeable area to the south of the lands included within the survey. That area is not bounded by a marker or fence placed there by an owner. Its boundaries are the natural shore line of the lakes and connecting channel. At 1 point the land in dispute extends approximately 1,000 feet south from the confines of the area as surveyed and testimony indicates that it has a value of some $8,000 to $9,000.

If defendant had title to this sizeable area of land, we believe that he acquired it by adverse possession and not by acquiescence in a boundary line established by the owners of the adjacent parcels.

By the terms of defendant's agreement to sell the premises, he was bound to convey to the plaintiff a good marketable title as shown by the abstract. Title established through adverse possession is free from

encumbrance and of a character to assure quiet and peaceful enjoyment of the property by the owner (*Delnay* v. *Woodruff*, 244 Mich 456), but it is not a marketable title of record until there has been a judicial determination of such title.

"To show a record title by adverse possession requires a suit and the recording of a decree.

"Where title by adverse possession as to land involved in option agreement was not of record, it was not a marketable title, since there was a substantial defect in the title." *Deane* v. *Rex Oil & Gas Co.* (syllabi), 325 Mich 625.

"A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render it unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation." *Bartos* v. *Czerwinski*, 323 Mich 87, 92.

The defendant has not quieted title to the property through the statutory proceedings available to him. There is nothing on public record at the present time which could be placed in an abstract to indicate defendant's ownership of the property outside of the boundaries established by the survey. While the record in this case discloses certain facts from which a court in proper proceedings might determine that the defendant had title to the property by adverse possession, nevertheless as of the moment such ownership must depend upon the testimony of those persons who have been in a position to observe the use of the property for a period of more than 15 years. Plaintiff did not bargain for that kind of title.

Defendant agreed to convey to the plaintiff a marketable title of record to a valuable parcel of real estate. It is clear from the record that he is unable to carry out that commitment. While there

is no showing that he intentionally misled the plaintiff, he was obviously mistaken when he told her that he had a good record title to the property. Plaintiff relied upon that information in making the purchase.

The conveyance should be set aside, the purchase money returned to plaintiff and the mortgage and note cancelled. The decree is affirmed, costs to plaintiff.

DETHMERS, C. J., and BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION.

1. RAILROADS—DISCONTINUANCE OF SERVICE.
   Each case involving discontinuance of service by a railroad must be decided on its own facts.

2. APPEAL AND ERROR—PUBLIC SERVICE COMMISSION—RAILROADS—DE NOVO REVIEW.
   The Supreme Court hears appeals from orders of the circuit court in review of orders of the public service commission regulating railroads as a chancery case, hence, determines the facts *de novo* and makes own determination of the equities.

3. RAILROADS—DISCONTINUANCE OF SERVICE—PUBLIC CONVENIENCE—OPERATING LOSS—BRANCH LINE.
   Plaintiff railroad *held,* entitled to discontinue passenger service

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 43 Am Jur, Public Utilities and Services § 229.
[3, 4] 44 Am Jur, Railroads §§ 366–370.
[3, 4] Right of railroad company to discontinue or reduce service on branch line or part of road which is unprofitable. 123 ALR 922.
[5] 14 Am Jur, Costs § 91.

on a 93-mile branch line, where public has virtually, but not completely, abandoned use of the line, even though a few people will be somewhat inconvenienced, and it appears that the branch has operated at a loss of from $53,304 in 1948 to $68,897 in 1951 and the railroad lost large sums in the State on intrastate business.

4. SAME—APPLICATION FOR REINSTATEMENT—CHANGE OF CONDITIONS. Decree permitting discontinuance of passenger service on a 93-mile branch line is ordered entered on condition that there may be made an application to reinstate such service or any other substitute service not entailing loss should conditions change.

5. COSTS—PUBLIC QUESTION—PUBLIC SERVICE COMMISSION—INTRASTATE TRAINS.

No costs are allowed on review of circuit court decree affirming order of the public service commission denying permission to discontinue passenger train service on an intrastate branch line, a public question being involved.

Appeal from Ingham; Hayden (Charles H.), J. Submitted June 9, 1953. (Docket No. 19, Calendar No. 45,789.) Decided November 27, 1953.

Bill by Chicago, Milwaukee, St. Paul & Pacific Railroad Company against Michigan Public Service Commission to review order of defendant refusing permission to discontinue the running of two trains. Order of the commission affirmed. Plaintiff appeals. Reversed and remanded to Michigan Public Service Commission.

Carson L. Taylor, Thomas H. Maguire, J. E. Goggin and *Ballard, Jennings, Fraser & Parsons*, for plaintiff.

Frank G. Millard, Attorney General, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara, Charles M. A. Martin* and *Robert A. Derengoski*, Assistants Attorney General, for defendant.

Butzel, J. The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a Wisconsin corporation, plaintiff herein, operates a large railroad system running through a number of States, including Michigan, where it is authorized to do business. It maintains a branch line 93 miles in length between Channing and Ontonagon, Michigan, which runs through several small settlements. Ontonagon, the northern terminal of the branch, has no other railroad facilities. Channing, the other terminal, is a connecting point with one of plaintiff's main roads whereby transportation may be had to other points and other railroads, and thus to all parts of the country. Plaintiff runs one passenger train, the Copper Country Limited, daily in each direction between Chicago, Illinois, and Champion, Michigan. Its route includes Channing, Michigan. At Champion, it is taken over by the Duluth, South Shore & Atlantic Railroad, which runs this same train between Calumet and Champion, Michigan. Since 1937, plaintiff has also run the Chippewa-Hiawatha, also known as trains No 14 and No 21, daily in each direction between Chicago and Ontonagon, Michigan, using the branch line between Channing and Ontonagon. Plaintiff petitioned the Michigan public service commission, defendant and appellee, for permission to discontinue the Chippewa-Hiawatha between Channing and Ontonagon. After hearings, the commission denied the petition, whereupon plaintiff appealed to the circuit court of Ingham county, Michigan, in accordance with statute, CL 1948, § 462.26 (Stat Ann § 22.45). The circuit court after further hearings entered a decree affirming the order of the commission and plaintiff has appealed to this Court.

The record shows that plaintiff has made efforts to build up its passenger business to Ontonagon, but possibly due to general conditions affecting the passenger business of so many railroads, as well as the

partial depletion of mines and forests in the particular areas and a decline in the population, the passenger business over the branch line has constantly decreased until it is now operated at a very large loss because of poor patronage. What particularly brought the question of discontinuance to a focus is the fact that between Channing and Ontonagon, the train frequently consists of a gasoline motor car, which also handles the mail, express and baggage business, and 1 passenger coach attached as a trailer, whereas between Milwaukee, Wisconsin, and Channing, it consists of a cafe lounge car, 2 to 5 passenger coaches (depending on seasonal demands), a mail car and express and baggage car, which are normally pulled by a diesel engine. Plaintiff has only 1 gasoline motor car available for this train and finds it necessary to periodically suspend its operation so that it can be inspected, serviced and repaired, whereupon steam power is used. The latter is much more costly, particularly because of the additional highly skilled employees required. The purchase of an additional gasoline motor car for use when the present one is out of service would involve an estimated expenditure at today's prices of approximately $170,000, almost a prohibitive amount when considered in the light of the very large losses plaintiff is being put to in the operation over the branch line at the present time. Even the addition of another gasoline motor car would not completely eliminate the use of steam power, because the latter may still become necessary in times of very bad weather or mechanical difficulties. Except for a few of the war years, there has been a steady decline in the number of passengers carried over the branch, so that in 1951, the average number of intrastate passengers carried in one direction was 1.9 per trip and 2.6 in the other direction, or a total of only 3.5 passengers per day for both trips. These figures

only included intrastate passengers, but in 1951 the average number of all passengers carried, both intra- and interstate was still only 8.8 a trip. Plaintiff lost $53,304 on the branch-line operation of trains No 14 and No 21 in 1948, and this amount has increased so that in 1951, it became $68,897. In determining this loss cognizance was taken of all passenger revenues, both inter- and intrastate, as well as express, mail and milk revenues, and of only out of pocket or relievable expenses, *i.e.,* those expenses which would be eliminated by the discontinuance of the branch-line service. Many expenses such as road-bed maintenance, depreciation of equipment and wages of station attendants were not included. The commission suggested that possibly fares could be increased and further economies be considered for the reduction of the losses. It is quite obvious that plaintiff would, in its own interest, bring about all economies possible. If the fares could be and were raised, in all probability such action would further discourage the modicum of patronage still left. In view of the sparse usage of the service involved we believe there has been a virtual, although not complete, abandonment of the use of the service involved by the public, rather than that plaintiff is seeking to abandon its use.

Discontinuance of the branch line was denied principally because there was no other public carrier serving Ontonagon and the communities between it and Channing. In *Chicago & North Western R. Co.* v. *Public Service Commission,* 329 Mich 432, there were other existing public services which provided travel with little inconvenience, and we, therefore, held that where substantial losses result from an operation, the test to be applied is whether such economic waste outweighs any public benefit or convenience.

There is some dispute in the present case as to the condition of the highways serving the communities involved. One witness, a county engineer, testified that almost every mile of road is kept open during the winter months. However, practically all of the highways are gravel surfaced and there is no doubt that during a severe winter the highways in places may heave up and break and in the springtime a motor car or truck might have some difficulties. It is too speculative to say what might happen. The public authorities should properly keep the roads in good condition. It is not unlikely that there might be motor service between the termini were there any demand for it. It is further shown that there is a very limited taxicab service available at Ontonagon, and also that since the time of the hearing before the commission a new tri-weekly permit has been issued to a new bus line running from Houghton to Ontonagon and Mass, Michigan, which is a short distance from Ontonagon on the branch line. Houghton is on one of the main lines of the Duluth, South Shore & Atlantic Railroad Company and is on the route of the Copper Country Limited. Sidnaw, located approximately midway between the termini of the branch, is also on one of the Duluth, South Shore & Atlantic's main lines, and passenger service is available from there to Champion, Michigan, which also connects with the Copper Country Limited. The testimony shows that the use of private motor cars has increased to such an extent today that the passenger business of railroads generally, including plaintiff, has materially suffered. Representatives of both the postal authorities and the express company testified that each of them would find some way of maintaining postal and express service to the communities along the branch if the branch line operations were discontinued.

Many of the witnesses sworn at the hearing to protest the discontinuance demonstrated that they made very little use of the service in question. In one instance a restaurateur said he had used it once a week to buy chicken and fish for his restaurant. Another, claiming necessity for continued operation, stated that he had used it only once in 4 years. Another testified that he made only sporadic use of it. Others used it more frequently, but not often. It seems an economic waste to force the continued operation over this branch under the circumstances. True, the discontinuance may inconvenience a few people, but that is no reason why plaintiff should continue to suffer such tremendous losses through the continuous decline in patronage as indicated. Even the opening of the Porcupine Mountains State Park, near Ontonagon, has not resulted in any material increase in passenger business, as the great majority of its visitors use private motor vehicles or some other means to reach it. The park manager testified that 116,000 people visited the park in 1950; that a travel count is taken of the cars; that in 1950, 11,000 people visited the ski areas; that he did not know how many people used the Chippewa-Hiawatha to reach the park, but that he did know that a few skiers had used it, probably 15 or 20 a year. There was considerable testimony regarding a new project which may or will be or has been subsidized by the government for a multimillion dollar copper mine development, the White Pine Mine, not far from the branch line, but the commission recognized that this was still in the planning stage and gave it no weight except to assume that if such a development were to be realized, increased traffic could be expected to accrue to plaintiff.

It would serve no useful purpose to further review the many cases cited in the briefs. Many cases hold that railroads operating an unprofitable branch of

an otherwise profitable line in the State must treat their intrastate passenger business as a whole, and cannot cast off the unprofitable part to the great inconvenience of the public when such loss is offset by their profitable lines. *Alabama Public Service Commission* v. *Southern R. Co.*, 341 US 341 (71 S Ct 762, 95 L ed 1002). However, such is not the case in Michigan, as far as plaintiff is concerned. Testimony shows that on its entire intrastate passenger business in Michigan plaintiff has been losing large sums each year for many years; in 1950, the amount was $312,029.

The Attorney General representing Michigan Public Service Commission stresses the very recent opinion in *Chicago, Milwaukee, St. Paul & P. R. Co.* v. *Board of Railroad Commissioners*, 126 Mont 568 (255 P2d 346), certiorari denied by the supreme court of the United States on October 12, 1953, see 346 US 823 (74 S Ct 40, 98 L ed —). In this case the supreme court of Montana reversed the decree of the district court permitting the discontinuance of 2 passenger trains running through Great Falls, Lewiston and Harlowtown, cities with comparatively large populations. By the recent census Great Falls has a population of 39,214, Lewiston, 6,573, and Harlowtown, 1,733. The 2 trains sought to be discontinued were run at a loss of $83,690 for the year. The opinion pointed out the additional factor that the express and mail service to these 3 cities would be adversely affected through such discontinuance. The court expressly stated that the facts in each case should be separately considered and from them the question is to be determined. In the instant case the late census gives the population of Ontonagon at 2,307, and of the other 9 stations on the branch line excluding Channing at 2,847. Channing has a population of 600.

Our attention is also directed to the very recent opinion in *Re New Jersey & New York R. Co.*, 12 NJ 281 (96 A2d 526), appeal dismissed by the supreme court of the United States, November 9, 1953, 346 US 868 (74 S Ct 123, 98 L ed —), where the majority of the court refused discontinuance. It was shown that the number of paying passengers on each trip of the train sought to be discontinued varied from 133 to 145 and there had been a monthly increase of 13% in the number of passengers carried, and that a part of the loss was due to the expenses of paying for rolling stock and other equipment and unusual expenses. We do not regard these cases as any authority when applied to the facts in the instant case. We shall not cite the large number of cases where discontinuance has been ordered. Each case must be decided on its own facts. We believe that the plaintiff is entitled to the relief prayed for.

The decree of the trial court is reversed and the case is remanded to the Michigan Public Service Commission to enter an order permitting the discontinuance of these 2 trains on condition, however, that an application to reinstate such passenger service or any other substitute service not entailing loss may be considered and appropriate order made should conditions change. Decree may be entered in accordance with this opinion. No costs are allowed, a public question being involved.

Dethmers, C. J., and Adams, Carr, Bushnell, Sharpe, Boyles, and Reid, JJ., concurred.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* IRVINE.

1. INSURANCE—DIVORCE—CHANGE OF BENEFICIARY.

   Man insured under a life insurance policy who was divorced by a decree terminating wife's rights in the insurance and giving insured the sole and exclusive right to the policy had the right thereafter to change the beneficiary but only in the manner provided for in the policy (CL 1948, § 552.101).

2. SAME—DIVORCE—REDESIGNATION OF WIFE AS BENEFICIARY.

   Divorced wife who remained the nominal beneficiary under group life insurance certificates *held*, not entitled to proceeds thereof, where evidence fails to show that insured had affirmatively redesignated her as beneficiary after the divorce in accordance with the terms of the policy (CL 1948, § 552.101).

3. SAME—CHANGE OF BENEFICIARY—SUBSTANTIAL COMPLIANCE WITH POLICY.

   There must be substantial compliance with the terms of an insurance policy in order that a change of beneficiary thereunder be effected.

4. SAME—DEATH OF INSURED—BENEFICIARY'S RIGHTS.

   The rights of the named beneficiary under an insurance policy cannot be affected by any act of the insurer subsequent to the death of the insured.

5. SAME—GROUP LIFE CERTIFICATES—DIVORCE—WIDOWS.

   Employee's widow was entitled to proceeds of group life insurance certificates, where employee had been divorced from named beneficiary without having affirmatively redesignated former wife or anyone else pursuant to terms of the policy (CL 1948, § 552.101).

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 29 Am Jur, Insurance §§ 1309, 1314 *et seq.*

[1–5] Divorce of insured and beneficiary as affecting the latter's right in life insurance. 52 ALR 386; 175 ALR 1220.

6. COSTS—INSURANCE—INTERPLEADER.

No costs are allowed either defendant widow or deceased insured's divorced wife in insurers' interpleader suit to determine right to proceeds of policies, where costs are allowed plaintiff insurers.

Appeal from Kent; Souter (Dale), J. Submitted June 5, 1953. (Docket No. 57, Calendar No. 45,866.) Decided November 27, 1953.

Bill of interpleader by the Prudential Insurance Company of America and Equitable Life Assurance Society of the United States against Doris D. Irvine, individually and as administratrix of the estate of Charles F. Irvine, deceased, Terry Lee Irvine and Marie E. Irvine to determine the right to proceeds of life insurance policy. Decree for defendant Marie E. Irvine. Defendants Doris D. and Terry Lee Irvine appeal. Reversed.

Floyd H. Skinner and *Alphonse Lewis, Jr.*, for defendants Doris D. and Terry Lee Irvine.

Linsey, Shivel, Phelps & Vander Wal, for defendant Marie E. Irvine.

BUTZEL, J. This is a bill of interpleader, brought by the Prudential Insurance Company and the Equitable Life Assurance Society of the United States, plaintiffs, against Doris D. Irvine, individually and as administratrix of the estate of Charles F. Irvine, deceased, Terry Lee Irvine, her son, and Marie E. Irvine, defendants, to determine who is entitled to the proceeds of a certain group life insurance policy which they had written on the life of Charles F. Irvine. Defendants Doris D. Irvine and Marie E. Irvine are the litigants in *Irvine* v. *Irvine*, 337 Mich 344, involving rights to real property. The attorneys for the respective defendants in this case have stip-

ulated that in deciding it we may also refer to the testimony in the *Irvine* v. *Irvine* case. The 2 cases were heard and decided by separate judges in the court below, but, since we hear chancery cases *de novo*, we have studied both records in order to arrive at a fuller understanding of the facts.

In the spring of 1947, Charles F. Irvine, as an employee of the Borden Company, applied for and obtained a group life insurance policy certificate from plaintiffs in the amount of $3,500. A group policy had been issued to the Borden Company. The certificate of insurance named "Marie E. Irvine—wife" as beneficiary. In September, 1947, Marie obtained a divorce from Charles, the decree providing in part that:

"It is further ordered, adjudged and decreed that all rights of either party in any policy or contract of life insurance, endowment or annuity upon the life of the other is hereby terminated and each party shall have the sole and exclusive right in any and all policies or contracts of life insurance, endowment or annuity upon his or her life."

Thereafter, on April 1, 1948, Charles, who at that time was a single man, increased the amount of this policy to $4,000, but he made no change whatsoever in his designation of beneficiary. In June of 1948, he married Doris D. Irvine. Some time prior to the divorce between Charles and Marie, Doris had given birth to Terry Lee, who was born out of wedlock, but whose paternity was acknowledged by Charles. Marie testified that she divorced Charles at his request, so that he might legitimatize the child. It may also be noted, however, that following her divorce from Charles, Marie married one James Kelly in May, 1948, although she later divorced him in July or August of the same year. The marital bliss of the marriage between Charles and Doris was apparent-

ly not long lived either for on August 23, 1948, Doris commenced a divorce suit against Charles. She obtained an interlocutory decree, but shortly before it would have become final she filed a petition to set it aside. She also obtained leave to amend her bill of complaint regarding property and alimony. During the summer of 1949, a reconciliation was effected between Doris and Charles and upon stipulation of the parties an order was entered on September 6, 1949, vacating the interlocutory decree and marital relations were resumed. However, some time in November of that year, Charles moved out again, and on January 20, 1950, Doris instituted suit for separate maintenance against him. This suit was dismissed in May, 1950, again upon stipulation of the parties, and they apparently remained together from then until he again left her the following July. He returned in November and remained with Doris from then until the time of his death on January 19, 1951. It appears that throughout his marriage to Doris, a rather close friendship was continued between Charles and Marie, and that during at least part of his last 2 absences from Doris he had been staying at Marie's home, as she produced memoranda of his payments to her for room and board during these intervals. There was also evidence that at the time of his death he was indebted to Marie in the sum of $1,500. He had never made any changes in the designation of beneficiary of the insurance.

Marie claims that Charles intentionally left her as the named beneficiary on the policy certificates and that shortly before his death he had, before witnesses, affirmatively designated her as beneficiary; that the provisions of CL 1948, § 552.101 (Stat Ann 1951 Cum Supp § 25.131), when coupled with his affirmative designation gives her the right to the insurance proceeds. Marie's daughter and son-in-

law, Helen and August Sipma, both testified to a meeting which they witnessed between Marie and Charles about 2 weeks before his death. The daughter testified that 1 evening about 2 weeks prior to Charles' death she and her husband had driven Marie over to the house where Charles was then living with Doris; that they parked in front of the house and Charles came out and got into the rear seat of the car (Marie, Helen and August remaining in the front seat); that after a short conversation in which Charles said that he was feeling "pretty punk" and afraid that he would have to go back to the hospital for more X-rays, he handed the insurance policy certificates to her mother saying:

"'I want you to have this, Marie,' he said, and 'You hang onto it,' he said, and 'You, Helen and Gus, I want you to be sure that you are witnessing the fact that I am giving this to your mother.'"

She testified that he also said:

"'If it is necessary,' he said, 'something should happen to me,' he said, 'I want you to fight for it, and be sure and hang onto it.'"

On redirect examination she testified:

"We lived only a block or 2 from him, and he talked about his insurance and the house and said he wanted mother to have those things. He said: 'I have never changed this and don't want it ever changed.' By 'this,' I mean the beneficiary. I heard him say that quite a while before his death when he would come down and help us. On those occasions he said he didn't want the beneficiary changed."

August Sipma's testimony was substantially the same as his wife's in all particulars. Marie also testified, over objection, to the meeting in the car in front of Charles' home. Her testimony was objected to as being equally within the knowledge of the de-

ceased, and therefore inadmissible under CL 1948, § 617.65 (Stat Ann § 27.914), but the trial judge held that the meeting was adequately proven without her testimony.

Doris contends that any rights which Marie might have had to the proceeds of the policy were terminated by the provisions of the decree of divorce (quoted *supra*) between her and Charles. Doris further claims that she is entitled to the insurance proceeds under the following provision of the policy:

"BENEFICIARY: Any part of the insurance for which there is no beneficiary designated by the employee or surviving at the death of the employee will be payable in a single sum to the first surviving class of the following classes of successive preference beneficiaries: The employee's (a) widow or widower; (b) surviving children; (c) surviving parents; (d) surviving brothers and sisters; (e) executors or administrators."

Regarding Marie's claim that subsequent to their divorce, Charles had affirmatively designated her as beneficiary of the policy, Doris contends that there was at most an intention to make Marie the beneficiary, but it was invalid and of no effect because not executed in accordance with the policy's conditions to the change of beneficiary, *i.e.*:

"Any employee may from time to time while insured hereunder change the beneficiary by a written request signed by the employee and filed with the employer, but such change shall take effect only upon its entry by the employer on the insurance records maintained by it in connection with the insurance under this policy."

The very possibility of such a meeting as was described by Helen and August Sipma was emphatically denied by Ronald Mosies, Doris' son by a prior marriage. He testified that Charles was very

ill for several months prior to his death; that during the last 2 months before his death was in bed most of the time; that since Charles was having spells he had watched over him very closely during this time and especially from the first of January on; that Charles was under his constant observance during all the evenings of January; that there was no way that Charles could have left the house during any of these evenings without his (Ronald's) knowledge; and that he knew that Charles did not go outside and meet anyone in a car parked in front of the house about 2 weeks before his death. The testimony was thus in sharp conflict on the point, but the trial judge found that the meeting took place as testified to by Helen and August Sipma.

The trial judge based his decision largely upon his construction of CL 1948, § 552.101 (Stat Ann 1951 Cum Supp § 25.131), which provides in part that:

"Hereafter every decree of divorce shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the husband in which she was named or designated as beneficiary, or to which she became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become, and unless otherwise ordered in said decree such policy or contract shall thereupon become and be payable to the estate of the husband or to such named beneficiary as he shall affirmatively designate."

It was the judge's opinion that under the terms of the statute the insurance became payable to the insured's estate or to such person as he might affirmatively designate, and that he had no right to construe the statute in such a manner as to require that the insured designate his choice of beneficiary in the manner provided in the policy, nor even to construe

the statute as requiring that the affirmative designation be in writing. He also pointed out that the provisions of the policy concern only the changing of the beneficiary, whereas the statute speaks of a designation. He held that any affirmative, unambiguous designation of beneficiary was sufficient under the statute, that the designation need not be in writing, and he decreed that Marie was entitled to the insurance proceeds, whereupon Doris brought this appeal.

The divorce decree, which followed the terms of the statute, terminated Marie's rights in the insurance and gave decedent the sole and exclusive right to the policy. He thereupon had a right to change the beneficiary as he saw fit, but only in the manner provided for in the policy. We deem the trial judge's distinction between designation and change of beneficiary as one without a substantial difference. Between the time that Marie's rights were terminated by decree and statute and the time of his death, insured had made no new designation of beneficiary by any kind of written instrument, as required by the insurance contract, which further provided that the written notice should be filed with the employer and take effect only upon its entry by the employer upon the insurance records maintained by it in connection with the insurance under its group policy. The wisdom of such a provision is amply demonstrated by the facts in the instant case. Some equities do favor Marie. She had been married to Charles for 16 years and it is claimed that she divorced him solely in order to allow him to legitimatize Doris' child, of whom he was the father. He remained on very friendly relations with Marie subsequent to their divorce. It is of further interest to note that at some time, not shown by the records, Charles took out 2 additional policies of $500 each, one payable to Terry Lee, the infant child, and the other to Marie. It is

a matter entirely of speculation whether he took the new policy out for Marie because he thought she had lost her right in the contested insurance through the divorce decree. There is testimony which, although controverted and coming from not wholly disinterested witnesses whom the trial judge believed, to the effect that prior to his death Charles handed the policy over to Marie and told her to fight for it. On the other hand, there is no testimony at all to show that he made even the slightest effort to properly designate or rename Marie as beneficiary after her right in the insurance had been terminated and the policy was vested solely in him. It is not even claimed by Marie that he was prevented from making such designation as he saw fit. We have had occasion to pass upon the question of whether the beneficiary can be changed without a compliance with the requirements of the policy. Marie relies largely upon *John Hancock Mutual Life Insurance Co.* v. *Jedynak,* 250 Mich 88, in which futile efforts were made by the insured to obtain the policy from her beneficiary so that a change of beneficiary might be indorsed thereon in accordance with the policy requirements. We held as follows:

"The insurance company in interpleading the claimants and paying the money into court confessed liability, waived defenses, and submitted the issues between the contesting claimants to decision in accord with equitable principles. Under the policies, the insured had a right to change the beneficiaries. It is well settled that if the insured wanted to change the beneficiaries and endeavored, in a writing signed by her, to accomplish such purpose, and was only prevented by the original beneficiary refusing to turn over the policy and the declination of the insurer to grant her written request without production of the policy, a court of equity will accomplish the clear purpose of the insured and frustrate contrary designs. The insurer has waived its rule requiring

production of the policy for indorsement of change of beneficiary, and Anna LeVera cannot, in equity and good conscience, invoke the waived rule in aid of her design to frustrate change of beneficiary.

"What we have said is amply supported by authority. See *Quist* v. *Western & Southern Life Insurance Co.,* 219 Mich 406, and authorities there cited; *New York Life Insurance Co.* v. *Cook,* 237 Mich 303, and, also, *McDonald* v. *McDonald,* 212 Ala 137 (102 So 38, 36 ALR 761), for a full discussion of the subject and annotation of authorities."

This follows the general rule that where a bona fide effort has been made by the insured to change beneficiary in accordance with the insurance contract, but through *no fault* of the insured this could not be done, the courts have stepped in and made an equitable disposition of the proceeds. Such, however, is not the case here. Decedent at all times had possession of his policy; he knew enough about the insurance so as to take out new policies, as well as to increase the amount. The question has been thoroughly and carefully discussed in *Dogariu* v. *Dogariu,* 306 Mich 392, 405, where many authorities are cited. In coming to our conclusion there, we stated:

"The above authorities establish the rule that where the policy of insurance provides the method and procedure for changing the designated beneficiary, there must be at least substantial compliance with such provisions to effect the change. The present case does not fall within the exception that the court will recognize a change of beneficiary where the insured has substantially complied with the policy's requirement, and completion is prevented by reason of the policy's being lost, mislaid or unobtainable. Such exception to the general rule is stated in *Quist* v. *Western & Southern Life Insurance Co.,* 219 Mich 406, 410, as follows:

" 'Excuses for not producing the policy or certificate have been recognized in this State. In *Grand*

Lodge, A.O.U.W., v. *Child*, 70 Mich 163, the certificate was lost. In *Grand Lodge, A.O.U.W.*, v. *Noll*, 90 Mich 37 (15 LRA 350, 30 Am St Rep 419), the certificate was lost or mislaid. In *Grand Lodge, A.O.U.W.*, v. *Kohler*, 106 Mich 121, the original beneficiary had the certificate in her custody and refused to deliver it.' * * *

"The payment of the proceeds of the policies into court in pursuance of stipulations and decrees of interpleader did not affect the claim of the widow as beneficiary, because her right to the insurance became absolute upon the death of her husband. *Knights of Maccabees of the World* v. *Sackett*, 34 Mont 357 (86 P 423, 115 Am St Rep 532); *Reid* v. *Durboraw* (CCA) 272 F 99; *Ireland* v. *Ireland*, 42 Hun (49 NY Sup), 212. In 2 Couch on Insurance, § 308, it is stated, p. 828:

" 'The rights of the named beneficiary vest at the instant of the insured's death, and cannot be affected by any subsequent act of the insurer.'

"One of the benefits of life insurance is that, in most instances, it is paid to the designated beneficiary with reasonable promptness after the death of the insured. To hold that, without substantial compliance with the provisions of the policy relative to change of beneficiary, an insured, by his will alone, could change such beneficiary, would open the door to possible fraud and irregularities and would create uncertainty tending to interfere with the customary practice of prompt payment. We are convinced that in the absence of a showing of substantial compliance with the policy's requirements, the will of the insured, standing alone, should not effect a change of beneficiary."

We are more convinced of the wisdom of this rule after the presentation of the very involved relationships between the parties in the instant case. We can readily appreciate the difficulties the circuit judge had, as they were shared by us.

The decree, so far as the rights of Marie are concerned, is reversed. With her eliminated there is no beneficiary designated, and, therefore, in accordance with the provisions of the policy hereinbefore quoted the insurance should be paid to Doris. Having already paid the insurance into court, plaintiffs are released from liability and allowed costs and attorneys' fees, as provided in the decree of the trial court, but the decree is otherwise reversed so as to provide that the insurance shall be payable to Doris as Charles' widow. No costs except to plaintiffs.

CARR, BUSHNELL, SHARPE, and REID, JJ., concurred with BUTZEL, J.

DETHMERS, C. J. (*concurring in part*). I concur in the result and agree with the reasoning in Mr. Justice BUTZEL'S opinion, except insofar as it predicates the holding that there was no effective change or designation of beneficiary in favor of Marie, after the decree of divorce, on noncompliance with insurance policy requirements relative to manner of making such change. It is my view that the policy provision in that regard was inserted for the sole benefit of the insurers, can be invoked by them alone, and is of no avail to Doris as against Marie to defeat an oral assignment of interest or change or designation of beneficiary in favor of Marie, made by assured in his lifetime, if it was otherwise valid and enforceable at law except for the policy provision. See *Kaczmarck* v. *La Perriere,* 337 Mich 500, and cases therein discussed; also, *Quist* v. *Western & Southern Life Insurance Co.,* 219 Mich 406. Not in point, it seems to me, is *Dogariu* v. *Dogariu,* 306 Mich 392, and cases therein considered, holding ineffective an attempt to change beneficiary by testamentary disposition contrary to policy provision because, as stated in the opinion therein, the rights of the named beneficiary

had taken effect at the moment of assured's death and could not thereafter be affected by the provisions of a will. The testator could not give by will what he did not possess at death. The situation in the instant case differs in that Marie claims a completed transaction in the nature of a gift *inter vivos* effective during assured's lifetime.

I concur in Mr. Justice BUTZEL's result, however, by concluding that, as a matter of fact, the transaction claimed by Marie, but denied by Doris, is not established by the record and, further, by holding that the testimony in that regard in behalf of Marie, if accepted as true, fails to establish that assured accomplished any legal change of rights in respect to either Marie or Doris, entirely aside from the mentioned provision of the policy, inasmuch as a mere intent or expression of intent by assured to effect a change would have been insufficient. *Reed* v. *Metropolitan Life Insurance Co.*, 269 Mich 26, and *Johnson* v. *Agricultural Life Insurance Co.*, 225 Mich 331.

ADAMS, J., concurred with DETHMERS, C. J.

BOYLES, J., did not sit.

HYMA *v.* LEE.

1. APPEAL AND ERROR—MOTION TO DISMISS—PLEADING—EVIDENCE.
   All material facts properly pleaded must be accepted as true on appeal from a motion to dismiss the declaration in an action at law.

2. PLEADING—CONSTRUCTION OF TERMS.
   Undefined terms in a pleading are assumed to be used therein in their ordinary significance.

3. WORDS AND PHRASES—SPIRITUALISM.
   "Spiritualism" is defined as the belief or doctrine that the spirits of the dead, surviving after the mortal life, can and do communicate with the living, especially through a person, such as a medium, particularly susceptible to their influence.

4. FRAUD—ELEMENTS—EVIDENCE.
   Actionable fraud is made out where it appears that defendant made a material representation that was false, which he then knew to be false or made it recklessly without any knowledge of its truth or as a positive assertion, made it with the intention that it should be relied on by plaintiff and was so relied on by plaintiff to his injury; it being necessary to prove each and all of such elements with a reasonable degree of certainty.

5. SAME—PROFIT.
   All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another, and irrespective of whether they actually profit therefrom or even sustain a loss.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 944.
[2] 41 Am Jur, Pleading § 69.
[4] 23 Am Jur, Fraud and Deceit § 20; 24 Am Jur, Fraud and Deceit § 278.
[5] 23 Am Jur, Fraud and Deceit § 184.
[7] Generally as to right to rely upon representations, see 23 Am Jur, Fraud and Deceit § 146.

6. SAME—PLEADING—COMMUNICATION WITH SPIRITS OF DECEASED PERSONS—TRUSTS.

Allegations that defendant represented to plaintiffs that she was a "medium" who communicated with the spirits of deceased persons but did not and knew that she did not have the power to do so and knew that plaintiffs were deceived by her representations in such respect with the intention that they would rely on her representations, knowing they were deeply religious and intensely interested in the mystical manifestations of religion, and that plaintiffs relied on such representations to their damage *held*, sufficient to aver actionable fraud; there being an averment of a relation of trust and confidence in the light of which defendant's acts are to be construed.

7. SAME—CONFIDENTIAL RELATIONS.

The right to rely on a full and truthful statement by a person bearing a confidential relation toward him is not limited to relations held fiduciary as a matter of law but extends to wherever the circumstances induce one party to repose trust and confidence in the other, as where confidence is induced by the personal friendship of the parties.

8. SAME—PLEADING—CHURCH—MEDIUM.

Averments of declaration in action for fraud *held*, insufficient to establish cause of action against church although sufficient to establish cause of action against individual defendant who claimed to be a "medium."

Appeal from Wayne; Marschner (Adolph F.), J. Submitted June 2, 1953. (Docket No. 9, Calendar No. 45,783.) Decided November 27, 1953.

Case by Albert Hyma and wife against Lillian Lee and Church of Christ of Detroit for damages resulting from fraudulent misrepresentations. Motion to dismiss the declaration granted. Plaintiffs appeal. Affirmed as to Church of Christ of Detroit. Reversed as to defendant Lee and remanded for further proceedings.

L. Edwin Wenger, for plaintiffs.

Edgar G. Braun (*Louis Rosenzweig,* of counsel), for defendants.

CARR, J. Plaintiffs brought this action to recover damages, claiming that they had been injured by misrepresentation, fraud and deceit, on the part of defendant Lee. Motion to dismiss the declaration was filed on the ground that plaintiffs' pleading was insufficient to allege a cause of action against either defendant. The motion was granted, the court being of the opinion that plaintiffs had not charged actionable fraud. From the order entered plaintiffs have appealed.

In determining the issue before us we have in mind the general rule that all material facts properly pleaded must be accepted as true. *Marvin* v. *Solventol Chemical Products, Inc.,* 298 Mich 296. The declaration avers that plaintiffs have for many years been interested in mystical manifestations of religion and have been believers in spiritualism; that the defendant Lillian Lee, hereinafter referred to as the defendant, claimed to be a medium and to have powers of communicating with the spirits of deceased persons; that plaintiffs believed such representations on the part of defendant; that they relied on the truth of the "voices" which defendant represented as emanating from the souls or spirits of departed persons; and that beginning with the year 1934 plaintiffs attended the church of which defendant was pastor, and also many meetings at her home.

Plaintiffs do not attempt to define, except by indirection, their conception of the term "spiritualism." It may be assumed that it is used in its ordinary significance. For the purposes of this case it may be defined as follows:

"The belief or doctrine that the spirits of the dead, surviving after the mortal life, can and do communicate with the living, esp. through a person (a medium) particularly susceptible to their influence."—New Century Dictionary.

"For the purposes of this case spiritualism may be defined as a belief in the power of some departed spirits to communicate with the living by means of mediums." *City of Chicago* v. *Payne,* 160 Ill App 641.

The pleading further sets forth that in the year 1937 plaintiffs were the owners of stock in a certain corporation which was in bad financial condition, that they were offered the sum of $2,700 for their stock, and that they consulted defendant to obtain guidance. Thereupon defendant, claiming to exercise her powers as a medium, informed plaintiffs that voices coming directly from God advised that great wealth would come from the corporation to the advantage of defendant's church and others of like character, and that plaintiffs should keep their investment until it reached a value of $250,000, at which time they should donate the sum of $200,000 to the church. Plaintiffs allege that they believed defendant's representation as to the source of the "voices" and retained the stock, which action resulted in a loss of the amount that they might have received for it at the time.

Plaintiffs further allege in their pleading that they were sincerely interested during the period from 1934 to 1948 in the spiritual manifestations of defendant and in assisting in her religious work, and that defendant by means of representations as to communications from the spirits of departed persons encouraged them to make investments in order that they might obtain money to be donated to the church of which she was pastor, as well as to the building of other churches. In 1947, as plaintiffs aver, defend-

ant informed them that she had received information through the "voices" that there was an oil pool under land that the plaintiffs owned, that they should contact an operator for the purpose of having a well put down, and that the spirits would indicate the center of the oil pool. Plaintiffs claim that they heard the "voices", and believed defendant's representations as to their source. In reliance thereon they invested the sum of $4,200 in an oil well which failed to produce.

Plaintiffs also claim that in September, 1947, they received a letter purporting to come from a person confined in a prison in Mexico. In accordance with the usual procedure followed in the so-called Spanish, or Mexican, prisoner hoax, the letter asserted that the writer was unjustly accused, that he had a key to a safety-deposit box containing property of great value, and that he had a draft for $25,000 drawn on a New York bank which, because of his imprisonment, he was unable to cash. The letter promised that if plaintiffs would deliver the sum of $8,500 to a designated agent of the writer, the draft would be turned over to them, together with the key to the safety-deposit box. Plaintiffs admit that they were skeptical concerning the letter, but that, having faith in the powers of defendant as a medium, they showed the letter to her. Thereupon defendant, as plaintiffs assert, purported to go into a trance and to have communication with the spirits of deceased persons, telling plaintiffs that she was informed thereby that the writer of the letter was telling the truth and that they should rely on his statements. Believing that defendant had actually communicated with the spirits and had been informed thereby as to the course that they should follow, they mortgaged their home and caused the sum of $8,500 to be delivered in accordance with the instructions set forth in the letter, thereby sustaining a loss of the amount so paid.

Paragraph 21 of the declaration, which seems to summarize plaintiffs' claims as to the fraudulent conduct of the defendant, reads as follows:

"That the said defendant Lillian Lee has at all times hereinbefore mentioned deceived the plaintiffs by representations that she is a means or 'medium' of communicating with the spirits of deceased persons; that the said defendant Lillian Lee, in fact did not communicate with the spirit of Thomas Carlyle as she represented to the plaintiffs, that the alleged 'voices' which she represented as coming from God were in fact manifestations of ventriloquism or mechanical devices; that the said Lillian Lee at all times knew that she did not have the power of communicating with the spirits of deceased persons and knew that the plaintiffs were deceived by her representations that she could communicate with the dead and that she made such representations with the intention that plaintiffs would rely on her representations knowing the plaintiffs were deeply religious and intensely interested in the mystical manifestations of religion."

From the language quoted, and from other averments in the declaration, plaintiffs' claim is clearly set forth that they relied on the representations of defendant, that they believed in good faith that on the occasions in question she had actually communicated with the spirits of departed persons and that the advice given, and followed, came from such spirits or from God, that defendant's representations in this respect were false, that defendant knew that such was the fact, that she also knew that plaintiffs because of their belief in spiritualism and their implicit faith in the "voices" would rely thereon, that her acts, conduct and words, were designed deliberately to induce them to take the action in each instance that resulted in injury to them, and that, as a result of defendant's misrepresentation, fraud and

deceit, they had been damaged. It is further averred that plaintiffs promised defendant that in the event they realized profits from the ventures referred to in the declaration they would make donations to the work of her church, and towards the founding of other churches of like character.

Are the facts pleaded sufficient to constitute a cause of action in plaintiffs' favor on the grounds claimed by them? In *Candler* v. *Heigho,* 208 Mich 115, the Court quoted with approval from 20 Cyc, p 13, as follows:

" 'The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.' "

The fact that defendant did not actually profit as a result of her alleged wrongful conduct is not of controlling importance. Whether she hoped to do so if plaintiffs' ventures proved successful is a matter of conjecture. In *Weber* v. *Weber,* 47 Mich 569, 571, it was said:

"A person cannot avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another."

The *Weber Case* was cited and followed in *Stoney Creek Woolen Co.* v. *Smalley,* 111 Mich 321, 324.

In *First National Bank of Ovid* v. *Steel,* 136 Mich 588, the question at issue was the sufficiency of the declaration which the trial court had dismissed on demurrer. The record in the case discloses that the defendants were directors of a certain corporation, and that as such they had participated in making a report to the State which indicated that said corporation was financially sound. It was the claim of the plaintiff that the representations so made were untrue, that the bank had relied thereon and purchased certain negotiable paper whereon the corporation was ostensibly liable, and that a loss was sustained in consequence of such misrepresentations and the reliance thereon. In holding that the averments of fact in the declaration were sufficient to set forth a cause of action against defendants, it was said:

"Defendants demur to the special counts on several grounds. They claim there is no such connection between their alleged fraud and plaintiff's loss as to create a cause of action. It is true that a fair construction of the declaration indicates that defendants took no part in making the contract which led to plaintiff's loss. But it does appear that the fraudulent representations of defendants were made for the purpose of inducing that contract, and did induce it. We think this indicates a sufficient connection on the part of defendants to make them liable."

In 37 CJS, p 297, decisions with reference to this phase of the case are summarized as follows:

"It is not essential to actionable fraud that the guilty party should derive any benefit from his misrepresentation or concealment, or that he should collude with another who does derive benefit. This rule applies even though defendant was himself a loser. The gravamen of the action is injury to plaintiff, not benefit to defendant."

Plaintiffs allege in substance that they trusted the defendant and that they had the utmost confidence in her claimed ability to communicate with the spirits of the departed. They make no claim that they relied on her personal judgment in financial matters. Neither does it appear that defendant represented that she had superior knowledge with reference to business transactions. The action is based on the theory that defendant falsely represented that the advice given to plaintiffs came directly from God to defendant, or from the spirits with which she claimed to be in communication. It is asserted that she misrepresented the source of the "voices", and that she did so deliberately with the intention of deceiving the plaintiffs and causing them to rely in each instance on the advice given, knowing that their belief in spiritualism would cause them to accept without question statements of purported facts that they believed came from the sources with which defendant pretended to be in contact. In view of the nature of the situation set forth in the declaration, we think it may fairly be said that the pleading avers a relation of trust and confidence, and that defendant's acts may properly be construed in the light of such relation. *Connor* v. *Stanley,* 72 Cal 556 (14 P 306, 1 Am St Rep 84).

In discussing the matter of confidential relations it is said in 37 CJS, pp 282, 283:

"The rule that one has the right to rely on a full and truthful statement by a person bearing a confidential relation toward him is not, however, limited to relations held fiduciary as a matter of law, but applies wherever the circumstances induced one party to repose trust and confidence in the other, as where confidence is induced by the personal friendship of the parties. The rule is especially applicable if one party knows that the other is relying on him

for a full and truthful statement of all facts, as where confidence is expressly reposed."

In *Burchill v. Hermsmeyer* (Tex Civ App), 262 SW 511, suit was brought to recover money claimed to have been paid by the plaintiff for certain oil stock. In the making of the purchase plaintiff apparently had relied on supposed revelations by the spirits of the departed, made through a spiritualistic medium, as to the existence of quantities of oil on the property involved. No connection was shown between defendants and the medium, and it was held that liability could not be imposed on the ground of false representations by the medium on whom plaintiff apparently relied. The language of the court's opinion suggests that had collusion between defendants and the medium been shown a different conclusion would follow. The question as to the possible liability on the part of the medium under such circumstances was not discussed. The conclusion would seem to logically follow that if one party to such collusion was guilty of tortious conduct, the other party would be equally guilty.

Our attention has been called to no decisions, either in this State or elsewhere, in which the facts alleged were similar to those here claimed. We think it must be said, however, that the declaration fairly sets forth the various elements of a cause of action based on misrepresentation, fraud and deceit. As above noted, liability on defendant's part is not precluded by the fact that she did not benefit from the transactions referred to by plaintiffs. The trial court was in error in granting the motion to dismiss as to defendant Lee. Insofar as the defendant church is concerned, the order of dismissal was correct. The averments of the declaration are insufficient to establish a cause of action as to it.

The order from which the appeal has been taken is affirmed as to the defendant church, and reversed as to defendant Lee. The cause is remanded for further proceedings. Plaintiffs may have costs against defendant Lee, and the other defendant may have its costs against plaintiffs.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

BOYLES, J., did not sit.

BOERNER *v.* SZABO.

REFORMATION OF INSTRUMENTS—QUIETING TITLE—MUTUAL MISTAKE—EVIDENCE.

Trial court's finding there had been a mutual mistake in the description of property conveyed by plaintiff's decedent to defendants whereby there was conveyed a total of 77 feet frontage of property rather than 52 feet and that defendants had intended to buy only the smaller amount *held,* supported by testimony in suit for reformation of deed and to quiet title to the 25 feet in plaintiff, including testimony elicited from defendants on cross-examination under the statute (CL 1948, § 617.66).

Appeal from Wayne; Murphy (Thomas J.), J. Submitted October 6, 1953. (Docket No. 3, Calendar No. 45,827.) Decided November 27, 1953.

REFERENCES FOR POINTS IN HEADNOTES

44 Am Jur, Quieting Title § 11 *et seq.;* 45 Am Jur, Reformation of Instruments § 46 *et seq.*

Bill by May M. Boerner, executrix of the estate of George H. Schmitt, deceased, against Alex Szabo and wife to reform a deed and to quiet title. Cross bill by defendants against plaintiff to require assignment of land contract and accounting. Decree for plaintiff. Defendants appeal. Affirmed.

Joseph A. Colombo (*Frederick D. Bartholomew*, of counsel), for plaintiff.

Henry Stone, for defendants.

REID, J. Plaintiff filed a bill of complaint for reformation of a warranty deed and to quiet title. From a decree for plaintiff, defendants appeal.

In 1919, decedent George H. Schmitt and his wife, Amanda Schmitt, executed a land contract as vendors to Mary Marek as vendee, covering 4 pieces of property, 2 of which faced on West End avenue and 2 on Springwells avenue, being separated in the rear by a small alley. Mary Marek occupied 1 of the homes on West End avenue known as 561 south West End avenue, and defendants occupied the home, 559 south West End avenue. The 2 houses are separated by a strip of ground about 3 feet wide.

Subsequent to that land contract, Mary Marek sold to defendants on another land contract, the residence occupied by defendants at 559 south West End avenue, Detroit. On April 29, 1944, Mary Marek, finding herself unable to continue the payments on her land contract with decedent and wife, caused her interest in that land contract to revert to decedent and wife, by executing an assignment of purchaser's interest in land contract together with a quitclaim deed to George H. Schmitt and Amanda Schmitt, his wife. Later in the same year, 1944, defendants were instructed to make the payments direct to decedent, George H. Schmitt, and decedent and wife allowed

defendants to continue to make their contract payments giving them credit for the payments that they had made to Mrs. Marek, which amounted to approximately $2,100.

On October 20, 1947, defendants completed their contract payments and a warranty deed was executed by decedent George H. Schmitt and his wife. The description was copied verbatim from the conveyance by the original purchaser, Mary Marek, to decedent and wife, which included 2 separate pieces of property and 2 separate houses, being at 561 south West End avenue and 559 south West End avenue in Detroit, and it is the claim of plaintiff that it was through error that the premises at 561 south West End avenue were included in the deed to defendants.

Defendants and appellants never collected any rents from nor paid any taxes on nor made repairs to nor exercised any rights or means of control over the property in dispute at 561 south West End avenue, Detroit, Michigan.

Defendants made an offer to purchase the property in dispute from decedent, George H. Schmitt.

Defendants claim in their testimony that they understood that the 77 feet total of land which was mentioned in their deed from decedent was correct. However, the total frontage of the premises at 559 south West End avenue was 52 feet and of the premises at 561 south West End avenue occupied by Schmitt was 25 feet.

Defendant Alex Szabo on cross-examination under the statute* testified as follows:

"*The Court:* Then in June, 1934 [1944?], you knew you were buying 2 houses, 559 and 561?

"*A.* I didn't know. I did not read that paper, the only thing is I had the assurance at that time. I

* See CL 1948, § 617.66 (Stat Ann § 27.915).—REPORTER.

couldn't read at that time, Schmitt and his wife assured us we will not lose our money.

"*The Court:* Schmitt talked to you, and you didn't know Schmitt was talking about 2 houses instead of 1, right?

"*A.* I didn't know.

"*The Court:* You thought it was only 1 house?

"*A.* I did not know, only we purchased 77 feet, that is all I know.

"*The Court:* One house or 2 houses?

"*A.* That the time I only know of one."

Defendant Mary Szabo on cross-examination under the statute* testified as follows:

"*Q.* After 2 or 3 years Mr. and Mrs. Schmitt sold to the Shols on land contract the property known as 561 south West End street?

"*Mr. Stone* [attorney for defendants]: Objected to, it is immaterial and incompetent.

"*The Court:* I think it is very material and very competent. In fact, it is the whole point at issue. You knew the Shols were either renting or buying?

"*A.* Yes they lived next door.

"*The Court:* You never collected rent from them?

"*A.* No.

"*The Court:* Or claimed to own it?

"*A.* No. I don't remember telling Shols I wanted to buy that house that I was sorry Schmitt sold it to Shols. When Colombo and Mrs. Boerner called they asked me to prove ownership of the property. They wanted to see what right I had living there, because they came prepared to throw me out. They wanted I should show proof and I was agreeable. I lived at 559. I showed them the abstract and deed. Mr. Colombo said the deed should be recorded, and about a week later I may have said to him I wished I could have bought the house at 561.

"*Q.* Didn't you go to his home a week after that?

"*A.* I did.

* See CL 1948, § 617.66 (Stat Ann § 27.915).—REPORTER.

"*Q.* What did you tell him?
"*A.* Asked him to explain the deed to me about the footage, that the deed seems to be 52 feet and there are 2 parcels of land, I was under the understanding there was 1 parcel, and later there are 2 parcels of land.
"*The Court:* Something wrong with the deed?
"*A.* Yes."

Mary Szabo later testified on direct examination by Mr. Stone:

"*Q.* Did you make that statement?
"*A.* I made it the way Mrs. Shol said; that I asked Schmitt if he would sell to me and he avoided the question, he covered it up that he was not ready to sell [referring to the premises at 561 south West End avenue]."

The trial court found that the defendants admitted they intended to buy only 1 house and never thought they were buying 2 houses, that the defendants paid taxes on 47 feet and that it is undisputed that they offered to buy the other house from Schmitt and that Mr. Schmitt would not give Mrs. Szabo any satisfactory answer about selling it. The court further found there was a mutual mistake in the description, as claimed by plaintiff.

The finding by the trial court is clearly sustained by the testimony taken in its entirety and finds support even in the cross-examination of each defendant. A careful reading of the entire record convinces us that the finding by the trial court was correct. The decree appealed from is affirmed, with costs to plaintiff.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

REUTER *v.* REUTER.

1. DIVORCE—DESERTION—JUSTIFICATION—EVIDENCE.

   Evidence presented on behalf of wife whose husband obtained decree of divorce on cross bill on ground of desertion *held*, not to have justified her abandonment of defendant and the home.

2. SAME—RECONCILIATION—EVIDENCE.

   Record in suit wherein husband was granted divorce on cross bill on ground of desertion *held*, not to justify upsetting of finding of trial court that defendant's efforts to persuade plaintiff to return to him were spurned by her, that she had never been willing to consider coming back and that her absence from the home had been against his wishes.

3. SAME—SUPPORT OF CHILD—ALIMONY—INCOME.

   Award to wife of $25 per week for support of infant child of the parties and $10 weekly as permanent alimony to her in suit for divorce was not inadequate or improper under all the circumstances, where it appears husband's net take-home pay was $103 per week and $50 per month on land contract on which the unpaid balance then due was only $1,000.

4. SAME—DIVISION OF PROPERTY—ATTORNEY FEES—DEBTS.

   Equal division of $12,000 worth of undisputed property of husband, at termination of 17 months of married life, at least half of which property had been given him by his parents *held*, not unjust to plaintiff wife, where decree had been

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur, Divorce and Separation § 87 *et seq.*

[1, 2] Separation within statute making separation a substantive ground for divorce. 51 ALR 763; 97 ALR 985; 111 ALR 867; 166 ALR 498.

Desertion as affected by element of remonstrance or resistance. 3 ALR 503.

[3, 4] 17 Am Jur, Divorce and Separation §§ 445, 596 *et seq.*

[3, 4] Earning capacity or prospective earnings of husband as basis of alimony. 6 ALR 192; 139 ALR 207.

awarded to husband on cross bill on ground of desertion, even if defendant had more than a contingent interest in gift of property valued at $42,000 from his parents; it appearing that defendant had paid plaintiff temporary alimony, her attorney some $750, over $1,000 in doctor and hospital expense for the child and some $500 in debts which she incurred when she deserted defendant.

5. SAME—COSTS.

No costs are allowed upon affirmance of decree of divorce granted husband, where wife appealed.

Appeal from Wayne; Weideman (Carl M.), J. Submitted October 6, 1953. (Docket No. 4, Calendar No. 45,867.) Decided November 27, 1953.

Bill by Maureen E. Reuter against J. Warren Reuter for divorce from bed and board. Cross bill by defendant against plaintiff for absolute divorce on ground of desertion and extreme cruelty. Decree for defendant on cross bill. Plaintiff appeals. Affirmed.

Edward N. Barnard, for plaintiff.

Moll, Desenberg, Purdy & Glover, for defendant.

DETHMERS, C. J. Plaintiff appeals from decree of divorce granted to defendant, contending that he did not make out a case for divorce on his cross bill charging extreme cruelty and desertion. After 17 months of married life plaintiff took the parties' infant child, together with their furniture and household effects, from their apartment and went to live with her parents without previous warning to defendant of such intention. For more than 2 years thereafter, until the filing of defendant's cross bill and up to the time of trial, she had not returned to him. She contends that her abandonment of home and husband was justified by his conduct. She testi-

fied in that regard that he beat her on 1 occasion and pushed her across the floor on another, that he had preferred being at his business rather than at home with her and frequently left her alone, and that there had been constant bickering between them over finances. He testified that the alleged beatings were "love pats" or, at most, scuffles in which he had intended no violence and inflicted no injury. The court found her claims in that regard exaggerated. Defendant claimed that plaintiff constantly voiced dissatisfaction with defendant, their home and social standing, nagged, and demanded that he procure a large, expensive home, another automobile, domestic help, better clothes for himself, et cetera, and that because these were not forthcoming she left him. We agree with the trial court that the incidents relied upon by plaintiff were insignificant and not sufficient to justify her abandonment of defendant and the home. Each claimed to have made attempts thereafter at reconciliation and each denied that the other had made genuine attempts at or evidenced any interest in reconciliation. The husband insisted that his efforts to persuade his wife to return to him were spurned by her, that she had never been willing to consider coming back and that her absence had been against his wishes. The court found in accord with the husband's version. We do not find that the record requires upsetting that finding and the consequent award of divorce for desertion.

The husband's net take-home pay was $103 per week. In September of 1951 he was receiving payments of $50 per month on a land contract on which the unpaid balance then due him was only $1,000. On that basis, after requiring defendant to pay $25 weekly for child support, the provision of the decree that he pay plaintiff $10 weekly as permanent alimony was not, as she contends, inadequate or improper under all the circumstances of the case.

Assets concerning which there is no dispute, owned by defendant at time of trial, consisted of approximately $12,000 in bonds, stock, bank accounts and a land contract. Under the decree plaintiff was awarded, as property settlement, the furniture and household effects and $5,000 in cash, and the remainder was awarded to defendant. When plaintiff deserted defendant she had incurred about $500 in debts, which he paid; after the separation the child became sick and defendant paid in excess of $1,000 for doctors and hospital care for him; defendant paid plaintiff's attorney $750 attorney fees and paid plaintiff temporary alimony throughout pendency of proceedings. Plaintiff complains that the award to her was grossly inadequate, claiming that, in addition to the above-mentioned assets, defendant owned other bonds and funds of a total value of $42,000, which the trial court did not take into account in making the award. She testified that said assets were a gift made by defendant's parents to him during the marriage and placed in the parties' safety-deposit box by the mother. Defendant testified that those assets were a gift from his father to his mother, in which he had but a contingent interest effective only in the event of her death. We are not persuaded by the record that defendant owned them as claimed by plaintiff nor that, if her claim in that regard were true, any injustice was done plaintiff in not awarding a portion thereof to plaintiff as a reward for desertion after only 17 months of married life, particularly in view of the equal division between the parties of what was undisputedly the property of defendant, at least half of which was given to him by his parents during the marriage.

Affirmed, without costs.

ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

In re SPENCER.

JONES *v.* WASAMA.

1. ADOPTION—RELEASE—CONSENT.

A release of a child for the purpose of adoption is something less than, but a part of, a consent given, in effect, by the signer of the release in conjunction with the licensed placement agency in whose favor the release was executed (CL 1948, § 710.3).

2. SAME—GUARDIAN AND WARD—CONSENT INCLUDES RELEASE.

The statutory authority conferred upon a guardian of the person of a child to consent to adoption of the child carries within it the implied and included authority to release the child for adoption (CL 1948, § 710.3).

3. SAME—RELEASE BY GUARDIAN—CONSENT BY LICENSED PLACEMENT AGENCY.

Consent to adoption of a child, executed by licensed placement agency to which duly appointed guardian of the child's person had released the child, was legally effective, where the agency's consent was executed after the release (CL 1948, § 710.3).

Appeal from Wayne; Brennan (Vincent M.) J. Submitted October 7, 1953. (Docket No. 20, Calendar No. 45,862.) Decided November 27, 1953.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 1 Am Jur, Adoption of Children § 25 *et seq.*

[1–3] Consent by public authority or by person other than parents having control of child as necessary to valid adoption of child. 104 ALR 1464.

Sufficiency of parent's consent to adoption of child. 24 ALR2d 1127.

Consent as affecting religion as a factor in adoption proceedings. 23 ALR2d 704.

In matter of Catherine Spencer, a minor. Rosella Jones, guardian *ad litem* of Louise Spencer, filed the petition praying that the minor adopted by Reynold Wasama and wife be restored to its natural mother. On trial in circuit court, the order of probate court denying petition was affirmed. Plaintiff appeals. Affirmed.

James M. Skillman, for plaintiff.

T. G. Daines, for defendants.

DETHMERS, C. J. Plaintiff appeals from an order of the circuit court confirming a probate court order for adoption and denying a petition to restore the adopted child to its natural parents. Others are urged, but the only meritorious question properly before us on the record is whether the provisions of CL 1948, § 710.3 (Stat Ann 1951 Cum Supp § 27.3178 [543]), have been complied with to accomplish a legal adoption when the release of child to a licensed placement agency for adoption was not executed by the mother, but by the father and the guardian of the person of the child duly appointed by the probate court for the purpose of consenting to adoption, and when the consent to adoption was not filed by the mother nor the guardian of the person of the child, but by the licensed placement agency to which the child had been released. Pertinent provisions of said section read as follows:

"Sec. 3. Consent to such adoption shall be filed:

"a. By the parents or the survivor or, in the case of a child born out of wedlock, the mother, * * *

"(2) Unless the child has been released for the purpose of adoption by the parents or surviving parent, or by the mother if the child is born out of wedlock, to a licensed child placement agency; * * *

"(3) Unless a guardian of the person of said child has been appointed, in which case said guardian shall execute said consent and court order therefor need not be first obtained; * * *

"c. By the duly authorized representative of the Michigan children's institute, or a placement agency licensed by the State to whom the child has been released, if said child has been so released;

"d. By the guardian of the person of said child if one has been appointed."

It is to be noted that the statute requires that a consent to adoption must be filed by parents unless, *inter alia,* a guardian of the person of the child has been appointed, in which case the consent, if any, shall be executed by such guardian. In the instant case the guardian of the person of the child, appointed by the probate court, executed a release but not a consent. Execution of a consent by the guardian would have constituted a complete consenting operation on her part, sufficient to fulfill the requirements of the statute. A release is something less than, but a part of, a consent given, in effect, by the signer of the release in conjunction with the agency in whose favor the release was executed. While the express terms of the statute provide for execution of a release only by parents, the statutory authority conferred upon a guardian to consent to adoption carries within it the implied and included authority to release for adoption. To say that parents may either execute a consent or release the child to an agency and leave it to the latter to give the consent, but that a guardian may go the whole route of consenting, but may not, by the process of giving a release, act in conjunction with such agency to effect a consent, flies in the face of the manifest legislative intent and plain meaning of the entire section.

The release by the guardian being valid under the statute, it follows that the subsequent consent

executed by the licensed placement agency to which the child had been released was likewise legally effective.

Affirmed, with costs to defendants.

ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

BORSETH *v.* CITY OF LANSING.

1. CONSTITUTIONAL LAW—SEPARATION OF POWERS—RE-EMPLOYMENT OF EX-SERVICEMEN.

   Statute relative to re-employment of ex-servicemen, which requires determinations as to whether the employee was still qualified to perform the duties of his position and whether it is feasible to re-employ him to be made by employing administrative officials and imposes upon the court the judicial function and duty, upon petition, to require compliance with the act is not unconstitutional as an improper delegation of executive functions to the courts (Const 1908, art 4, §§ 1, 2; PA 1951, No 263, §§ 2, 5).

2. SAME — SEPARATION OF POWERS — COURTS — ADMINISTRATIVE AGENCIES.

   The role of the judiciary in reviewing controversies as to whether an administrative agency has made determinations as required by law is not to substitute judicial judgment for administrative judgment but to inquire whether the administrative agency

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 11 Am Jur, Constitutional Law § 204; 14 Am Jur, Courts § 197.

[3, 4, 6–9, 11, 12] 12 Am Jur, Constitutional Law § 501; 56 Am Jur, Veterans and Veterans' Acts § 9 *et seq.*

[3, 4, 6–9, 11, 12] Re-employment of discharged servicemen. 167 ALR 124.

Constitutionality of State veterans' public employment preference laws. 161 ALR 494.

[5] 37 Am Jur, Municipal Corporations § 116.

[13] 14 Am Jur, Costs § 91.

has made the determination and, if so, to accept it if, and only if, it is supported by evidence and has a sufficient foundation (Const 1908, art 4, §§ 1, 2).

3. MUNICIPAL CORPORATIONS—PARTIES—RE-EMPLOYMENT OF VETERAN.
Defendant municipal board of police and fire commissioners was a necessary party to proceeding to compel it to re-employ plaintiff, an ex-serviceman, as a member of the police force, where the board was the employer, although not a separate legal entity under the act (CL 1948, § 613.35; PA 1951, No 263).

4. SAME—RIGHT OF EX-SERVICEMEN TO RE-EMPLOYMENT—WAIVER—CONDITIONS.
Ex-serviceman's right to re-employment as city policeman was not waived by virtue of fact that he had resigned rather than taken a leave of absence to perform military duty, where statute conferring right to re-employment did not make such right dependent upon manner of separation (PA 1951, No 263).

5. SAME—RESOLUTIONS—CHARTERS—STATUTES.
No municipal board resolution nor municipal charter provision may supersede a statutory provision conferring a right.

6. SAME—APPLICATION FOR RE-EMPLOYMENT.
Contention that plaintiff had not made a sufficient or proper application for re-employment as a city policeman *held,* without merit, where defendant board of police and fire commissioners did consider his informal application and determined not to reinstate him for an entirely different reason (PA 1951, No 263).

7. OFFICERS—RE-EMPLOYMENT OF EX-SERVICE PERSON AS PUBLIC EMPLOYEE.
A person who was holding a position as a public employee at time of entering into military service is presumed to have been qualified to hold such position, the lack of qualification to justify denial of statutory right to re-employment being confined to such as result from disability sustained during such service (PA 1951, No 263).

8. MUNICIPAL CORPORATIONS—RE-EMPLOYMENT OF EX-SERVICEMEN—QUALIFICATION—EVIDENCE.
Record in proceeding by ex-serviceman to compel municipal board of police and fire commissioners to re-employ him as a police officer *held,* to lack evidence that he was not still qualified and to establish that their refusal was for a different reason (PA 1951, No 263).

9. APPEAL AND ERROR—QUESTIONS REVIEWABLE—RE-EMPLOYMENT OF SERVICEMEN.

Defendant officers may not assert on appeal from order denying plaintiff a right to re-employment as a city policeman a reason not relied upon and administratively determined as a fact by defendant public employer previous to or at the time of its refusal to re-employ plaintiff (PA 1951, No 263).

10. SAME—QUESTIONS REVIEWABLE—STATEMENT OF REASONS AND GROUNDS FOR APPEAL—STATEMENT OF QUESTIONS INVOLVED.

A question not raised in appellants' statement of reasons and grounds for appeal nor in the statement of questions involved in their brief need not be determined by the Supreme Court.

11. MUNICIPAL CORPORATIONS—RE-EMPLOYMENT OF EX-SERVICEMEN.

Fact that plaintiff, an ex-serviceman, had resigned and withdrawn his contributions to pension fund before entering military service *held,* not to justify defendant municipal board of police and fire commissioners' refusal to re-employ him as a police officer, where it does not appear he was not still qualified or that it was not feasible for such defendant to do so and he offered reimbursement for contributions withdrawn (PA 1951, No 263).

12. SAME—RE-EMPLOYMENT OF EX-SERVICEMEN—CIRCUIT COURTS—JURISDICTION.

The circuit court had power to compel defendant board of police and fire commissioners to comply with statute requiring it to re-employ employees who had severed employment to perform military service if still qualified to serve in former capacity and if it were feasible to do so, where defendant board had not made such determinations nor determination that it had or had not other available employment for applicant no longer qualified to serve in former position (PA 1951, No 263).

13. COSTS—PUBLIC QUESTION—REINSTATEMENT OF EX-SERVICEMEN.

No costs are allowed in proceeding to compel reinstatement of former police officer to employment by defendant board of police and fire commissioners, a public question being involved (PA 1951, No 263).

Appeal from Ingham; Hayden (Charles H.), J. Submitted October 8, 1953. (Docket No. 32, Calendar No. 45,909.) Decided November 27, 1953.

Petition by James Borseth against City of Lansing, a municipal corporation, and its Board of Police and Fire Commissioners to compel reinstatement of plaintiff, now a military service veteran, as a member of the police force. From order requiring such reinstatement, defendants appeal. Affirmed.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Maurice M. Moule,* Assistant Attorney General, for plaintiff.

Charles P. Van Note, City Attorney, for defendant City of Lansing.

Pierce, Planck & Ramsey, for defendant Board of Police and Fire Commissioners.

DETHMERS, C. J. This is an appeal from a circuit court order requiring defendants to restore plaintiff to a position as policeman and to compensate him for loss of wages suffered by reason of their failure to do so immediately upon his application for reemployment. The order was entered under PA 1951, No 263 (CLS 1952, § 35.351 *et seq.;* Stat Ann 1952 Rev § 4.1486[1] *et seq.*), which provides for rights of public employees who enter the armed forces to reinstatement after relief from military duty.

Section 2 of the act provides, in part:

"(a) Any public employee who leaves a position * * * to perform military duty, * * * and who is relieved or discharged from such duty under honorable conditions, and makes application for reemployment within 90 days after he is relieved from military duty * * * shall—

"(1) If still qualified to perform the duties of such position, be restored to such position; * * *

"(2) If not qualified to perform the duties of such position by reason of disability sustained during

such service, such public employee shall be placed in such other position, the duties of which he is qualified to perform, * * *

"(b) * * * if it is determined that * * *

"(2) For any reason it is not feasible for such person to be restored to such department or agency, it shall be determined whether or not there is a position in any other department or agency of the same public employer for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto or less seniority than the employee returning from military service. In any case in which it is determined that there is such a position, such person shall be restored in service and appointed to such position by the department or agency in which such position exists."

Section 5(b) provides, in part:

"In case any public employer fails or refuses to comply with the provisions of this act, the circuit court for the district in which such public employer is located shall have power, upon filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employers' unlawful action."

Defendants contend that section 5(b) undertakes to impose an administrative function on the courts, in violation of Constitution 1908, art 4, §§ 1, 2, dividing the powers of government into 3 departments; citing *Koeper* v. *Detroit Street Railway Commission,* 222 Mich 464. Involved in that case was the veterans' preference act, PA 1897, No 205, as amended by PA 1919, No 224, section 2 of which provided that no veteran should be removed from his public employment, except after hearing before the circuit court and only upon its written order. This Court held that that

provision attempted to delegate an executive or administrative function to the judicial department of government and was, therefore, unconstitutional and void. The act provided for no determination of grounds for removal by any administrative agency, but placed sole responsibility for deciding whether such employee should be removed or not upon the court. This Court quoted with approval from the opinion of the trial judge, as follows:

"Said section 2 is unconstitutional, null and void in that no provision is made in said section or in the act itself specifically setting forth the causes based upon which the order of such removal, suspension and transfer may be made. There being no common standard for determination mentioned in the statute, no judicial question arising under the statute is presented to the court."

Distinguishable is the instant situation, in which section 2 of the act here involved specifically sets forth the conditions and circumstances under which re-employment is required, thus establishing a standard for determination, and in which section 5(c) thereof places on the employing administrative agency the responsibility for compliance with the requirements of section 2 and, hence, for determining, as provided in that section, the existence or absence of such conditions and circumstances. We do not agree with defendants that under section 5(b) the question thereafter before the circuit court is the same as the one previously before the public employer. Section 5(b) imposes upon the court the judicial function and duty, upon petition, to require compliance with the act. That is the sort of function constantly performed by courts. There is nothing in the act which specifically requires the court, in performing that duty, to reject the public employer's determinations and substitute and follow its own as

to whether the employee is still qualified to perform the duties of the position or whether it is feasible to restore him to employment. As already stated, those determinations are expressly required, by section 5(c), to be made by the administrative employing unit. Neither is there anything in the act requiring the court to abandon the general rule and practice, with which the legislature must be deemed to have been familiar, followed in the review of administrative decisions, namely, to decline to usurp administrative functions or to substitute judicial judgment for administrative judgment in the determination of facts, but to confine the judicial role to that of inquiry into whether the administrative agency made such determination as required by law and, if so, to accept it if, and only if, it is supported by evidence and has a sufficient foundation. That this properly comes within the province of the courts appears from *Purdie* v. *Detroit Police Department Trial Board,* 318 Mich 430, and cases therein cited. Section 5(b) is, therefore, not, as contended, unconstitutional.

The trial court did not err in denying a motion to dismiss as to defendant board on the ground that it is not a corporate legal entity under the city charter with capacity to sue and be sued. Defendants concede that CL 1948, § 613.35 (Stat Ann § 27.765), provides for service of process on unincorporated public boards where the right to bring suit against them is conferred by law, but contend that no right to sue defendant board is conferred by law. PA 1951, No 263, itself confers such right in providing that only the employer shall be deemed a necessary party respondent to any action such as this and in defining a "public employer" as any department, agency or instrumentality of any municipality employing a public employee in a position. Defendant board is such employer.

Defendants say that plaintiff waived his right to reinstatement because, at the time of his entry into military service, he resigned rather than to take a leave of absence as permitted under a resolution of defendant board and a provision of city charter. The statute does not make the right to its benefits dependent upon how a public employee separated himself from his employment to perform military duty. It simply applies its beneficent provisions to "any public employee who leaves a position * * * to perform military duty." That statutory language covers plaintiff's situation, regardless of whether he resigned or took leave of absence. No board resolution or city charter provision can supersede it.

Next, defendants urge that plaintiff did not make sufficient or proper application for re-employment in that he did not apply to defendant board formally, but only talked about it to the chief of police, and because such conversation occurred after plaintiff was permitted to leave military duty and remain at home, but before he received his honorable discharge. We think this without merit, especially in view of the fact that defendant board did consider his informal application and, on the basis thereof, determined not to reinstate him for an entirely different reason. Formal and seasonable application would have made no difference to the action of the board.

We come now to defendants' claim that they were not required under the act to re-employ plaintiff because he was not "still qualified to perform the duties of such position" and because it was "not feasible for such person to be restored." As previously stated, in considering that claim it is not our function to determine the facts, but, rather, to ascertain whether defendant board made such determination and, if so, whether there was a sufficient foundation for it and whether the finding was supported by evidence. *Purdie* v. *Detroit Police Department Trial*

Board, supra. The difficulty with defendants' position in this connection is that it is evident from the record that defendant board never determined that plaintiff was not "still qualified" or that it was "not feasible" to restore him, but refused to re-employ him for an altogether different reason. And with good reason did it refrain from determining that plaintiff was not "still qualified," as the record makes clear. Plaintiff testified that he was in good physical condition, had not been wounded or disabled in any way while in the armed service, and had never been disciplined or had any trouble or complaints about his work while serving as policeman. That testimony stands unrefuted, except as it may be considered assailed by that of the present chief of police, who testified that he had been a police inspector during the period of plaintiff's previous service and, as such, had never heard anything derogatory about plaintiff on the force, but that after plaintiff applied for reinstatement he (the new chief) "talked to some of the superior officers and they said he's a very good boy but a very poor policeman. * * * They said he was obstinate, he didn't like to accept orders * * * a captain told me * * * he was downright lazy." These criticisms related to plaintiff's 5-year service as policeman prior to his service in the armed forces for a year and a half. There is no testimony making those criticisms applicable to plaintiff or his qualifications to be a policeman after his return from military duty, nor is there any adverse testimony in that regard. There was, then, no foundation for or any evidence to support a determination, had it been made, that plaintiff was not "still qualified" to perform the duties of policeman upon his return from military service.

It is significant that in making qualification a prerequisite to reinstatement, section 2(a)(1) uses the term "If *still* qualified" and section 2(a)(2) reads

"If not qualified * * * by reason of disability sustained during such (military) service." This language presupposes from the fact that a public employee was holding his position, that he was qualified to perform its duties before entering military service, and is expressive of a legislative intent that a lack of qualification for the position, to be relied upon as the basis for refusal to re-employ, must be one occurring after leaving such position to enter the armed service and resulting from a disability sustained during such service. To hold otherwise would be to permit an employee's position to be prejudiced by the very fact of military service, and it was precisely this which the statute was designed to prevent. Evidence of a disqualification of that character is utterly lacking in this record. At all events, defendant board did not determine and did not predicate its refusal to re-employ on the grounds that plaintiff was not "still qualified." A board member testified that the refusal was not based on anything "personal about Mr. Borseth * * * or his service while a member of the force." Testimony of other board members was of the same tenor and established that their refusal was for a different reason altogether. Defendants may not assert on appeal here a reason not relied upon and administratively determined as a fact by defendant board previous to or at the time of its refusal to re-employ plaintiff.

What defendants now point to as constituting a determination by defendant board that it was not feasible to restore plaintiff consists, as disclosed by testimony of board members, of this: That defendant board had "taken the position * * * that it wasn't fair to the men on the force to reinstate a man that had severed connections, withdrew all his pension fund." In amplification, they admitted, in effect, that, if plaintiff had merely taken a leave of absence

and left his pension contributions in the fund when he entered the armed forces, they would have deemed it feasible to and he would have been re-employed upon his return; but they insisted that it would not be feasible and would be destructive of police department morale to reinstate a man who, instead, had resigned and withdrawn his pension contributions. The only material difference shown on the record between the 2 situations is the leaving of contributions in the pension fund in the former instance and their withdrawal in the latter. There is no evidence in the record, and there appears to have been none before defendant board, to support a determination that reinstatement after service in the armed forces would be more feasible and less destructive of morale in the former instance than in the latter. Furthermore, when plaintiff applied for reinstatement he offered, as subsequently required by the trial court, to return to the pension fund the sum he had withdrawn upon resignation. Defendants complain here that the statute does not authorize the court to require such reimbursement and thus remove the main prop from the position assumed by defendants. That question we need not determine inasmuch as it is not raised in defendants' statement of reasons and grounds for appeal or statement of questions involved in their brief. That plaintiff offered such reimbursement and that defendants did not accept it but now object to the court's requiring it, is eloquent, however, of the fact that in reality defendant board's refusal never was based on a determination that it would be unfeasible or destructive of morale to reinstate plaintiff solely because he had resigned and withdrawn his pension contributions (nor is there any foundation for or evidence to support such determination in this record). On the contrary, it is clear that defendant board has "taken the position" that policemen about to enter the armed serv-

ices ought to comply with the board's resolution adopted in that connection by taking a leave of absence from their jobs and from their pension contributions and refrain from resigning and withdrawing the contributions, and that failure to so comply merits refusal, despite the absence of any other justification recognized by the statute, of the re-employment guaranteed and required by State law.

It is to be noted, in addition, that when a determination is made by a public employer that it is not feasible to restore an employee to his former employment or that he is not still qualified for such position, the statute requires such employer to determine thereafter whether it has some other available position for which such employee is qualified and, if so, to assign him to it. Lack of evidence in the record to disclose that defendants followed such course of procedure also bespeaks a failure to have determined the statutory questions of nonqualification or nonfeasibility at all.

Defendants have failed to comply with the provisions of the statute and it is within the power of the circuit court to require it.

Affirmed, without costs, a public question being involved.

ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

FRIES *v.* KALAMAZOO STOVE & FURNACE COMPANY.

1. WORKMEN'S COMPENSATION—BURDEN OF PROOF.
   The burden of proving the right to workmen's compensation rests on the plaintiff.

2. SAME—BURDEN OF PROOF—EVIDENCE—INFERENCES.
   Plaintiff failed to sustain burden of proving right to workmen's compensation, where 2 inferences are equally possible and plausible from the evidence, 1 favorable and 1 adverse to the plaintiff.

3. SAME—DISABILITY—GUESS.
   The workmen's compensation commission may not award compensation on the basis of a mere possibility or guess that there is a disability due to employment.

4. SAME—EMPHYSEMA—PROXIMATE CAUSE—FINDING OF COMMISSION—EVIDENCE.
   The Supreme Court may not disturb finding of workmen's compensation commission that plaintiff's emphysema was not a disability due to employment as molder, as distinguished from one due to old age, where there was competent evidence to sustain the finding (CL 1948, § 413.12).

Appeal from Workmen's Compensation Commission. Submitted October 13, 1953. (Docket No. 44, Calendar No. 45,838.) Decided November 27, 1953.

George Fries presented his claim for compensation against Kalamazoo Stove & Furnace Company, employer, and Liberty Mutual Insurance Company

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation §§ 433, 436.
[2, 3] 58 Am Jur, Workmen's Compensation § 453.
[4] 58 Am Jur, Workmen's Compensation § 532.

and American Mutual Liability Insurance Company, insurers, for occupational disease. Award to defendants. Plaintiff appeals. Affirmed.

Edward J. Ryan, for plaintiff.

Warner & Hart, for defendants Kalamazoo Stove & Furnace Company and Liberty Mutual Liability Insurance Company.

Troff, McKessy & Lilly, for defendants Kalamazoo Stove & Furnace Company and American Mutual Liability Insurance Company.

DETHMERS, C. J. Plaintiff claims a disability from earning full wages at his molding trade as a result of emphysema caused by years of exposure to silica dust in his employment, entitling him to compensation. He says the basic question is "whether plaintiff's admitted disabling emphysema is due to years of exposure to foundry dust or merely to getting old."

In its opinion denying compensation the commission stated that there was no serious dispute that plaintiff has a mild to moderate emphysema and a generalized arteriosclerosis and that a diagnosis of silicosis could not be made from the X-rays. It found as a fact that plaintiff's claimed symptoms of tightness in the chest, coughing, shortness of breath, general weakness and fatigue could be due in part to emphysema but that it was questionable whether that condition was due to silica storage in the lungs or to the aging process; that it would be purely conjectural to ascribe it to the former, that plaintiff's disability was undoubtedly due in part to arteriosclerosis which was in no wise related to his employment, and that the evidence would not support a finding of disability due to employment.

There was medical testimony both ways. The finding of the commission is supported by the testimony of 2 doctors, one of whom examined plaintiff and X-ray pictures of his chest while the other examined the pictures only. Both testified that in their opinion plaintiff's emphysema was not due to silica deposits in the lungs but to the aging process and that such silica storage as existed in plaintiff's lungs was not disabling.

The burden of proving the right to compensation is on plaintiff. *Riley* v. *Kohlenberg,* 316 Mich 144. Where 2 inferences are equally possible and plausible from the evidence, 1 favorable and 1 adverse to the plaintiff, he has not sustained the burden of proof reposing on him and must fail. *Ginsberg* v. *Burroughs Adding Machine Co.,* 204 Mich 130. The commission may not award compensation on the basis of a mere possibility or guess that there is a disability due to employment. See *Cromie* v. *Florez, Inc.,* 317 Mich 516, and cases therein cited. There being competent medical testimony to support the commission finding that the evidence did not establish a disability due to employment, as distinguished from one due to old age, and that plaintiff was, therefore, not entitled to compensation benefits, we may not disturb it. CL 1948, § 413.12 (Stat Ann 1950 Rev § 17.186). *Krueger* v. *Hayes Manfg. Co.,* 213 Mich 218; *Rickard* v. *Bridgeman-Russell Co.,* 288 Mich 175; *Eplett* v. *Great Lakes Engineering Works,* 289 Mich 197.

Affirmed, with costs to defendants.

ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

ARROW SHEET METAL WORKS, INC., *v.* BRYANT & DETWILER COMPANY.

1. CONTRACTS—CONSTRUCTION OF BUILDINGS—SUBCONTRACTS—TIME.
   Defendant general contractor had the right to direct and control the time and manner of doing the work covered by plaintiff's subcontract for roofing, sheet metal work and installation of metal siding on stamping plant under clause of subcontract providing that time was of the essence and requiring that work was to be done at such time or times and in such manner and in such quantities as may be required by defendant to meet its time schedule, where defendant's general contract with owner might be interfered with to some extent by operations of 3 other general contractors.

2. SAME—CONSTRUCTION OF BUILDINGS—BREACH OF SUBCONTRACT—CONSTRUCTION OF CONTRACTS.
   All provisions of a subcontract must be construed together in such manner, if possible, as to avoid conflict but if such avoidance is not possible, the express terms of the agreement must control as against implications based on reference to the plan and specifications contained in the general contract for construction of stamping plant, where controversy involved claimed breach by general contractor of his subcontract with plaintiff.

3. SAME—SUBCONTRACT—REFERENCE TO PLANS AND SPECIFICATIONS IN GENERAL CONTRACT—PURPOSE.
   Reference in subcontract to plans and specifications contained in general contract for construction of a stamping plant *held*, to have been made for the purpose of identifying the work to be done and the extent, scope, and purpose thereof.

4. SAME—REFERENCE TO AN EXTRANEOUS WRITING.
   A reference by contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.

REFERENCES FOR POINTS IN HEADNOTES

[2–7] 12 Am Jur, Contracts §§ 245, 246.

5. SAME—SUBCONTRACTS—GENERAL CONTRACTOR'S BREACH OF GENERAL CONTRACT.

Plaintiff subcontractor was not entitled to recover damages for defendant general contractor's breach of provisions of its general contract with the owner for construction of a stamping plant and inserted therein for the benefit and protection of the latter, where subcontract granted the general contractor the right to direct and control the time and manner of doing the work covered by the subcontract.

6. SAME—SUBCONTRACTS—THIRD-PARTY BENEFICIARY CONTRACT ACT.

Subcontractor was not entitled to invoke so-called third-party beneficiary act and obtain benefit of provisions of the general contract to which reference had been made in subcontract for plans and specifications, where subcontract specifically provided that general contractor should have the right to direct and control the time and manner of doing the work covered by the subcontract and provisions which subcontractor claimed had been breached were inserted for the benefit and protection of the owner (CL 1948, § 691.541 *et seq.*).

7. SAME—CONSTRUCTION CONTRACT—SUBCONTRACT—BREACHES OF GENERAL CONTRACT—TIME.

Defendant general contractor was not liable to plaintiff subcontractor for breaches of general contract imposing duty upon defendant to organize the project, to provide proper supervision and co-ordination of work of the various subcontractors, to order and arrange delivery of materials so that plaintiff might perform its work within a reasonable time, to keep roadways to the project free from snow, ice and other obstructions so as to permit delivery of materials and personnel and to provide electric current for temporary power and light in view of specific provision of subcontract providing time was of the essence and granting to defendant the right to direct and control the time and manner of doing the work covered by the subcontract.

Appeal from Wayne; Webster (Arthur), J. Submitted October 9, 1953. (Docket No. 52, Calendar No. 45,949.) Decided November 27, 1953.

Action by Arrow Sheet Metal Works, Inc., a Michigan corporation, against Bryant & Detwiler Company, a Michigan corporation, for extras claimed

due under contract and for damages for alleged breach of contract. Judgment for defendant on count for damages. Plaintiff appeals. Affirmed.

Joel L. Bremer (*Carroll C. Grigsby,* of counsel), for plaintiff.

Wilber M. Brucker, John C. Donnelly and *Clark, Klein, Brucker & Waples,* for defendant.

CARR, J. The question at issue in this case concerns the right of the plaintiff to prosecute an action against defendant for damages for alleged breach of contract. The facts are not materially in dispute. In 1949 the Ford Motor Company entered into general contracts, 4 in number, for the construction of a stamping plant at or near Hamburg, New York. The first of said contracts covered the foundation work, the second the structural steel work, the third the furnishing and installation of boilers and materials and labor incident thereto, while the fourth contract was let to the defendant in this case and covered practically all of what was required to be done in the completion of the structure and not embraced within the terms of the first 3 contracts.

The contract between the Ford Motor Company, hereinafter referred to as the owner, and defendant, as one of the general contractors, was executed November 17, 1949. Thereafter defendant entered into negotiations with the plaintiff and on or about February 21, 1950, a written agreement in the form of an offer and acceptance thereof was finally executed, such subcontract covering roofing, sheetmetal work, and installation of metal siding on the stamping plant. It was provided in the agreement that the work was to be done in accordance with plans and specifications prepared by named architects and engineers. Copies of such plans and specifications

were incorporated in the general contract between the owner and the defendant. They indicated in detail the manner in which the construction work was to be performed.

Under the terms of the contract between the parties to this case plaintiff was to receive the sum of $380,000, payable in monthly installments, for the work that it undertook to do. It is not disputed that such sum was paid. Plaintiff claimed, however, that it had performed certain extras at the request and for the benefit of defendant, for which it was entitled to additional compensation. The parties were unable to agree with reference to the amount to which plaintiff was entitled because of such additional items. This case was thereupon instituted, the declaration seeking recovery for the doing of the extra work not covered by the written contract and also damages based on the theory of alleged breach of contract on defendant's part. Plaintiff's right to recover additional compensation for work done was submitted to the jury under 4 special questions, in answer to which the amount of recovery on each item in dispute was specified, and judgment in plaintiff's favor was entered accordingly. From that portion of the final judgment neither party has appealed.

Plaintiff's claim for damages on the theory of breach of contract was set forth in count 4 of its declaration, which alleged that by virtue of the contract between the owner and defendant and also the contract between plaintiff and defendant it was the duty of the latter "to organize the project, to provide proper supervision and coordinate the work of the various subcontractors, and to order and arrange delivery of materials" to the end that the plaintiff's agreement might be performed within a reasonable time. It was further averred that it was defendant's duty to keep roadways leading to the construction project free from snow, ice, and

other obstructions, in order to permit delivery of materials and the movements of personnel, and that defendant was also required to provide electric current for temporary power and light so that plaintiff's tools and equipment might be operated without interruption. It was alleged that defendant failed to perform the said duties, and that because of delays resulting from such failure plaintiff's costs were increased and it was deprived of a profit that otherwise it might have earned.

The contract between plaintiff and defendant did not set forth in specific terms the duties that plaintiff claims defendant owed to it and failed to perform. In support of its position plaintiff relies on the reference in said contract to the plans and specifications as contained in the general contract between defendant and the owner. It is urged in this regard that such reference incorporated into the subcontract, for the benefit of plaintiff, certain obligations that defendant had assumed in connection with the performance of its work under the general contract. The averments of count 4 of the declaration have reference principally to the following provisions set forth in the "general conditions" contained in the general contract:

"The work shall be carried to completion with utmost speed.

"Immediately upon award of the contract, the contractor shall prepare and submit a definite progress schedule and furnish same to the owner for approval. The contractor shall execute all portions of the work in accordance with the approved schedule.

"If necessary, in order to complete the work within the time stated in the contract, or if, in the opinion of the owner, it becomes necessary, in order to maintain the progress schedule, for the contractor to work after regular hours, the contractor shall, im-

mediately upon request, work such overtime, additional shifts, Sundays or holidays, as may be required, without additional cost to the owner. * * *

"Should the progress or completion of the several portions or the whole of the work be delayed as the result of fire, lightning or other casualty for which the contractor is not responsible, or should the contractor be delayed in the prosecution of the work through the fault of any other contractor employed by the owner, or because of the owner, the time of completion of such portion or portions of the work directly affected by such delay shall, unless the owner elects to terminate the contract as provided under the heading 'Termination by Owner', be extended for a period equivalent to the time lost, which period shall be determined by the owner. No such extension shall be granted unless the contractor, within 48 hours of the occurrence of the cause of such delay, notifies the owner, in writing, that such cause has occurred and makes written application for the specific extension of time claimed to be necessitated by reason of such cause.

"The contractor shall have no claim against the owner for damage, loss, expense or other compensation on account of any such delays, except as specifically otherwise provided under the heading 'Suspension of Operations.' * * *

"The total electric service that the power company can make available to the project for construction purposes is 1900 KVA at 4160 volts. This service has now been installed for the foundation contractor to meet his requirements and those of the structural steel contractor.

"Any portion of this present supply of current for power and light that may be required by the general contractor, over and above the needs of the foundation and structural steel contractors, shall be obtained by him through direct negotiations with the foundation contractor.

"It shall be understood that the general contractor shall furnish, install and maintain the electric serv-

ice for temporary power and light and the distribution system required for all of the construction needs of the various trades operating under his contract and those operating under the contracts assigned to him.

"The general contractor shall also arrange to provide the necessary service for temporary power and light and distribution system required for the trades operating under the combustion engineering company contract, and the general contractor shall be reimbursed by the owner for the current so consumed at the same rate electric current is paid for by the general contractor.

"It follows, therefore, that if the total combined requirements of the general contractor, boiler contractor, foundation and structural steel contractors should exceed the total electric service available of 1900 KVA; the general contractor shall provide the excess through such means as he may devise for the satisfactory performance of his work.

"Except as mentioned above, any temporary power and light required for the trades operating under those contracts not assigned to the general contractor, shall be provided by each of the individual contractors through such means as he may devise according to his individual needs.

"Under the terms of his contract with the owner, the foundation contractor has assumed the cost of installing the incoming electric service, and has or will provide, a distribution system suitable to his needs and those of the structural steel contractor. Therefore, it shall be understood that, when the foundation and structural steel contractors have no further need for temporary power and light for their operations, the general contractor will purchase for a consideration, mutually agreed upon, the foundation contractor's right, title and interest in the electric service that has been installed and in his distribution system in so far as the latter fits the general contractor's needs.

"The general contractor shall remove all temporary installations and equipment to which he has acquired title under this provision, on completion of his contract. * * *

"General contractor shall, during the entire time of the work under this contract, keep temporary construction roads and other pavements installed by the foundation contractor or under this contract, free from snow, ice or other obstructions for uninterrupted access to and from all buildings and Hamburg turnpike."

On the trial in circuit court objection was interposed to the introduction of testimony under count 4 of the declaration. After some discussion of the matter the jury was excused from the courtroom, and by permission of the trial judge a special record was made. Following the introduction of certain testimony which tended to indicate clearly the theory on which plaintiff was claiming damages, the trial judge came to the conclusion that the right to proceed under count 4 was wholly a question of law. Such question was determined adversely to plaintiff's contention. The conclusion reached was set forth in the final judgment, and plaintiff has appealed therefrom.

As before noted, plaintiff's right to recover damages under count 4 rests on the claim that because of defendant's alleged breaches of duty the completion of the contract was delayed and that, in consequence, plaintiff sustained certain losses. In view of this claim, the following provision in the contract between the parties to this case becomes significant:

"*Time is the Essence of this Order.* Work to be done at such time or times and in such manner and in such quantities as may be required by us, to meet our time schedule."

The trial judge, after listening to the proofs and arguments submitted to him, came to the conclusion that such clause was, as a matter of law, decisive of the question at issue. Appellee contends that such holding was correct. The clause quoted can scarcely be given any interpretation other than as granting to defendant the right to direct and control the time and manner of doing the work covered by the subcontract. In view of the possibility that performance by defendant of its undertaking with the owner might be interfered with to some extent at least by operations of the other general contractors, the reason for the reservation of such control is obvious. It may be assumed that the parties deemed such provision necessary for the proper protection of defendant.

The provision quoted is at variance with the claim of the plaintiff that the general conditions specified in the contract between defendant and the owner were incorporated in the subcontract to such an extent and in such manner as to impose on defendant a duty to perform them for plaintiff's benefit to the end that any delay in the performance of the subcontract, to plaintiff's damage, should not occur. All provisions of the agreement between the parties hereto must be construed together in such manner, if possible, as to avoid a conflict. If such avoidance is not possible, the express terms of the agreement must control as against implications based on the reference to the plan and specifications contained in the general contract. However, we think such reference must be regarded as having been made for the purpose of identifying the work to be done and the extent, scope, and purpose thereof.

In support of their contention counsel for defendant have cited *Guerini Stone Co.* v. *P. J. Carlin Construction Co.*, 240 US 264 (36 S Ct 300, 60 L ed 636). There the defendant had entered into a contract with

the government of the United States for the construction of a building at San Juan, Porto Rico. This was followed by the execution of a subcontract with Guerini, later assigned to plaintiff corporation, for the furnishing of certain materials and the installation thereof. The agreement made reference to the drawings and specifications of the architect. It was specifically provided, however, that defendant would furnish all labor and materials not included in the contract in such manner as not to cause delay in the progress of the work. In the event of failure to perform such obligation, the subcontractor was entitled to compensation. The general contract under which defendant was proceeding gave the government the right to suspend operations, but the subcontract contained no provision protecting defendant in the event that such action was taken. The government exercised its right, as a result of which plaintiff was prevented from continuing under its subcontract in the manner contemplated thereby. Suit for damages was brought. Defendant sought to rely on the provisions of its general contract, apparently on the theory that the plaintiff was bound thereby. In rejecting such contention, it was said in part:

"From what was said by the trial judge it would seem that he labored under the impression that the supervising architect of the treasury was a party to the subcontract. This is not the case; he did not sign the agreement, and his name was inserted solely in the capacity of architect or referee. And although the subcontract very plainly imports that it covers only a part of the work of constructing the building, and that the Carlin Company was the general contractor, it contains no clause incorporating into itself the provisions of the principal contract, or even in terms referring to that instrument. The subcontractor's work was agreed to be done

according to drawings and specifications, 'copies of which have been delivered to the subcontractor.' These copies were not produced, nor was their non-production accounted for. The parties seem to have assumed that the drawings and specifications of which copies were to have been delivered with the subcontract were identical with those that formed a part of the general contract; and we adopt that assumption.

"The reference in the subcontract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the subcontractor. Notwithstanding occasional expressions of a different view (see *Shaw* v. *First Baptist Church of Winona,* 44 Minn 22, 24 [46 NW 146]; *Avery* v. *Ionia County Supervisors,* 71 Mich 538, 546, 547; *Stein* v. *McCarthy,* 120 Wis 288, 295 [97 NW 912]), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. *Woodruff* v. *Hough,* 91 US 596, 602 (23 L ed 332); *Neuval* v. *Cowell,* 36 Cal 648, 650; *Mannix* v. *Tryon,* 152 Cal 31, 39 (91 P 983); *Moreing* v. *Weber,* 3 Cal App 14, 20 (84 P 220); *Short* v. *Van Dyke,* 50 Minn 286, 289 (52 NW 643); *Noyes* v. *Butler Bros.,* 98 Minn 448, 450 (108 NW 839); *Modern Steel Structural Company* v. *English Construction Company,* 129 Wis 31, 40, 41 (108 NW 70).

"In the present case, not only was the reference to the drawings and specifications for a limited purpose, but the subcontract, by the express terms of its eleventh paragraph, placed upon the general contractor (defendant) the obligation to 'provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work.' Applying this to the facts of the case,

defendant agreed to furnish the foundation in such manner that plaintiff might build upon it without delay. This is inconsistent with any implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless.

"We therefore hold that the general contract was not admissible in evidence against plaintiff, unless for the purpose of showing (if, indeed, it did show) what drawings and specifications were referred to in the subcontract; and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the government, were erroneous."

The decision in *Avery* v. *Ionia County Supervisors,* 71 Mich 538, cited in the *Guerini Stone Company Case, supra,* is not at variance with the proposition that the specific language of a subcontract controls, as between the parties thereto, notwithstanding the provisions of the agreement between the general contractor and the owner. It was there held that plaintiff, a subcontractor, was not entitled to recover damages because of failure on the part of the defendant board, and its committee, to require the general contractor to furnish a bond sufficiently broad in its provisions to protect plaintiff in his dealings with the general contractor. The controlling issue in the case was the construction of a statute of the State requiring that officials letting contracts for the erection of public buildings, or other public works, should require security for the payment of labor performed or materials furnished in carrying out the project. It was held that plaintiff subcontractor was not within the classes of persons sought to be protected by the statute (PA 1883, No 94).

In the case at bar the contract between the parties must be regarded as controlling. *Strom-Johnson Construction Co.* v. *Riverview Furniture Store,* 227

Mich 55, 67. In the face of the specific provision above quoted, plaintiff is in no position to claim the right to recover damages from defendant because of delays resulting from the alleged failure of defendant to perform certain duties that it had assumed in its general contract with the owner for the benefit and protection of the latter. Such provision likewise negatives the suggested claim that plaintiff is entitled to invoke the so-called third-party beneficiary act, PA 1937, No 296 (CL 1948, § 691.541 *et seq.* [Stat Ann 1953 Rev § 26.1231 *et seq.*]). Without reference to any other possible question in this respect, it is apparent that the provisions of the general contract on which plaintiff seeks to rely were not considered by the parties to the subcontract as having been made for plaintiff's benefit. Had they taken such view of the situation, it is scarcely conceivable that they would have incorporated in their agreement a specific provision giving to defendant the right to direct and control the time and manner of performance.

In support of its claim, plaintiff has cited *Perine* v. *Standfield,* 107 Mich 553; *Interstate Construction Co.* v. *United States Fidelity & Guaranty Co.,* 207 Mich 265; *Morgan* v. *Goddard,* 239 Mich 174, and other cases of like nature. In none of these cases, however, was there a factual situation presented analogous to that in the case at bar. In each it was definitely recognized that parties to a contract are bound thereby, and in each the contract involved was interpreted to carry out the intention of the parties as expressly stated or reasonably implied. The cases cited may not be regarded as supporting the right of plaintiff in the instant case to prosecute its claim for damages under count 4 of its declaration, in view of the express language in the contract relating to time and manner of performance.

In view of the conclusion above indicated, it is

unnecessary to discuss certain provisions of the general contract tending to support defendant's theory as to the intention of the parties thereto. We are in accord with the finding of the trial court, and the judgment entered is affirmed, with costs to defendant.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

MITCHELL *v.* GREWAL.

SAME *v.* HOFWEBER.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONSTITUTIONAL LAW.

   A question as to the constitutionality of an ordinance or statute, other than one which goes directly to the jurisdiction of the court, cannot be raised for the first time on appeal.

2. MUNICIPAL CORPORATIONS—ZONING—ORDINANCES—HARDSHIP—EXCEPTIONS.

   Undue hardship or practical difficulty in complying with zoning ordinance need not be shown in order to obtain review by municipal board of zoning appeals, where zoning ordinance specifically provides for special exceptions in addition to variations and modifications, such exceptions being distinct from variations and modifications and authorized by statute (CL 1948, § 125.583a; Detroit Zoning Ordinance No 171–D, § 20.7).

REFERENCES FOR POINTS IN HEADNOTES (See, also, next page)

[1] 3 Am Jur, Appeal and Error §§ 820, 830, 837, 838.

[2–5, 7–12] 58 Am Jur, Zoning § 194 *et seq.*

[2–5, 7–12] Creation by statute or ordinance of restricted residence districts within municipality from which business buildings or multiple residences are excluded. 19 ALR 1395; 33 ALR 287; 38 ALR 1496; 43 ALR 668; 54 ALR 1030; 86 ALR 659; 117 ALR 1117.

Right to resume nonconforming use after period of nonuse or of a different use from that in effect at or before the time of zoning. 114 ALR 991; 18 ALR2d 725.

3. SAME—ZONING—EXCEPTIONS—VARIANCES—STATUTES.

The legislative body of a city is authorized to provide by zoning ordinance for the resumption, restoration, reconstruction, extension or substitutions of nonconforming uses or structures upon terms and conditions contained in the ordinance, thereby providing for exceptions distinct from power of boards of zoning appeals to grant variances where there are unnecessary hardships or practical difficulties; the power to grant variances being contained elsewhere in the enabling act (CL 1948, §§ 125.583a. 125.585[d]).

4. SAME—ZONING—EXCEPTIONS—ORDINANCES—VARIANCES.

Conditions for an exception to a municipal zoning ordinance must be found within the ordinance itself and may not be varied but a variance in disregard of a literal enforcement of the ordinance may be permitted through an appeal from an administrative order.

5. SAME—BOARD OF ZONING APPEALS—EXCEPTIONS—HARDSHIP—STATUTES—ORDINANCES.

The municipal board of zoning appeals need not find that unnecessary hardship or practical difficulties exist as a prerequisite of granting a permit to the extension of a nonconforming building, structure or use, where neither the enabling statute nor zoning ordinance provide for such condition to the granting of a permit under the circumstances (CL 1948, §§ 125.583a, 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7).

6. SAME—CONSTRUCTION OF AN ORDINANCE.

All provisions of an ordinance must be construed so as to give meaning to each provision.

Validity and construction of zoning or building ordinance prohibiting or regulating subsequent alteration, addition, extension, or substitution of existing buildings. 64 ALR 920.

Attack upon validity of zoning statute or ordinance as affected by provisions for variations, permits, et cetera. 136 ALR 1378.

Constitutionality of variation provisions of zoning statutes or ordinances. 86 ALR 714.

Construction and application of provisions authorizing variations in application of, and special exceptions to, zoning regulations. 168 ALR 13.

Discretion of board as to changes, after adoption of zoning regulations, in respect of nonconforming existing use. 147 ALR 167.

Nature and extent of relief that may be granted where structure which does not violate zoning regulations is put to use that does. 140 ALR 1374.

[6] 37 Am Jur, Municipal Corporations § 187.

7. SAME—ZONING—CONSTRUCTION OF ORDINANCE—BOARD OF ZONING APPEALS—EXCEPTIONS—NONCONFORMNG USES.

Provision of municipal zoning ordinance authorizing board of zoning appeals to permit an increase in the number of dwelling units in a multiple dwelling existing in 2 designated restricted residential zones does not prevent the issuance of a building permit to increase number of dwelling units in a nonconforming building in a zone other than in the designated zones pursuant to section authorizing board to grant special exceptions subject to certain limitations in addition to its power to allow proper variations and modifications (Detroit Zoning Ordinance No 171–D, §§ 3.6, 20.7).

8. SAME—ZONING—WAIVER—STATUTES—ORDINANCES—HOUSING LAW.

A municipal board of zoning appeals is not empowered to waive provisions of any other statute, ordinance, rule, or regulation than as authorized by the zoning ordinance and its enabling act, hence, where expressly stated that it did not intend to waive provisions of any other statute, ordinance, rule, or regulation, an owner who violates the housing law acts at his peril (CL 1948, § 125.401 *et seq.;* Detroit Zoning Ordinance No 171–D, § 20.7).

9. SAME—COURTS—BOARD OF ZONING APPEALS—DISCRETION—FINDING OF FACTS.

Neither the circuit nor Supreme Court may substitute its discretion for that of a municipal board of zoning appeals established under an ordinance setting forth that the decision of the board in matters involving its discretion or finding of facts should be final (Detroit Zoning Ordinance No 171–D, § 20.7).

10. SAME—BOARD OF ZONING APPEALS—FINALITY OF ORDERS—FRAUD—BAD FAITH.

An order of a municipal board of zoning appeals which has been given immediate effect must be held to be final in the absence of fraud or bad faith (CL 1948, § 125.585[d]).

11. SAME—BOARD OF ZONING APPEALS—DISCRETION—COURTS.

Trial judge correctly refused to substitute his discretion for that of municipal board of zoning appeals in making an order involving an exercise of its discretion and then giving it immediate effect, where there was no evidence of fraud or bad faith in the making of the order (CL 1948, § 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7).

12. SAME—BOARD OF ZONING APPEALS—DISCRETION—FINDING OF FACTS—COURTS.

The fact that trial and appellate courts might, on the same facts, arrive at different results than a municipal board of zoning appeals would not necessarily make the board's action erroneous, a different result being imposed by a court only where it is clear the board has exceeded its jurisdictional limitations or abused the discretion lodged in it by statute or ordinance (CL 1948, §§ 125.583a, 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7).

Appeals from Wayne; Toms (Robert M.), J. Submitted June 9, 1953. (Docket Nos. 61, 62, Calendar Nos. 45,812, 45,813.) Decided November 27, 1953. Rehearing denied January 14, 1954.

Separate bills by William A. Mitchell and others against Sarwan S. Grewal and others and against Katherine Hofweber and others to restrain alteration of apartment buildings. Cases tried together. Decrees for defendants. Plaintiffs appeal. Affirmed.

G. Leslie Field (*Carl B. Grawn,* of counsel), for plaintiffs.

Miller, Canfield, Paddock & Stone, also of counsel for plaintiff on application for rehearing.

Clark, Klein, Brucker & Waples, Paul T. Dwyer, Corporation Counsel, and *Arthur L. Barkey,* Assistant Corporation Counsel, for defendants.

BUSHNELL, J. These cases, which were consolidated for trial and submitted here on 1 record, involve substantially identical adjacent apartment buildings under separate ownerships. They are located on the south side of Seward avenue in the city of Detroit between Twelfth and Woodrow Wilson streets. Each building is 3 stories in height, with basement, and one contains 31 and the other 33 apartments.

Being desirous of increasing the number of units in each to 77, applications were separately made by defendant owners to the department of buildings and safety engineering for permits for alterations thereof, in accordance with submitted plans. Permits were refused because of nonconformity to the zoning ordinance (No 171–D, as amended) of the city of Detroit. The department gave as the reason for its refusals a deficiency in side yards and lot area per room. The owners sought reversal of the orders of the department by applications to the board of zoning appeals, which, after a hearing, denied the petitions on April 22, 1952. Under its rules a member of the board may notify the secretary within 2 days after hearing that he proposes to move for reconsideration. Such notice was given by board member McBrearty. Following reconsideration on May 27th, an order was entered, 1 member dissenting, which embodied findings adverse to the determination of the department of buildings and safety engineering. These findings are summarized as follows:

"(1) The buildings are in an RM4 district (multiple dwellings) and are used in conformance with regulations governing such a classification.

"(2) The proposed conversion of the top 3 floors would not be detrimental to contiguous property or injurious to the neighborhood.

"(3) The conversion of the basement areas shall include no more than 6 apartments, instead of 17 as planned.

"(4) That the order of the board be given immediate effect.

"(5) That deficient yards are common in the district.

"(6) That many protesting property owners were heard at the hearing.

"(7) That field inspections of the premises were made and reports given to the board at the hearing."

The owners were given permission to convert their buildings into 66 apartments, each including not more than 6 in the basement, subject to the following conditions:

"(1) That the owners provide off-the-street parking at least 40 by 100 feet, and within 500 feet of the property for the use of occupants of both buildings;

"(2) That the owners be permitted to apply for building permits and to proceed with the proposed alterations subject to the specified limitations, within 6 months."

Building permits were then issued by the department and plaintiffs herein, who are the owners of other apartment buildings in the immediate vicinity, filed suits to restrain the defendants from proceeding with the proposed conversion of their buildings. After taking testimony, the trial judge held that the board of zoning appeals did not act capriciously, fraudulently, or beyond its lawful discretion. In concluding his written opinion the trial judge stated:

"The proposed alterations under the permit issued do not violate either the State housing law or the ordinances of the city of Detroit. If they do in the end, the owners act at their peril and the building and housing codes can be implemented by proper complaint and prosecution."

Plaintiffs have appealed from a decree dismissing their bill of complaint.

In their briefs the appellants raise, for the first time, the question of constitutionality of that part of the statute, PA 1921, No 207, as amended by PA 1941, No 306 (CL 1948, § 125.585[d] [Stat Ann 1949 Rev § 5.2935 (d)]) and the Detroit zoning ordinance (No 171–D, § 20.7), which delegates and purports to confer on boards of zoning appeals authority to vary or modify the strict terms of the zoning ordinance where there are practical difficulties or unnecessary

hardships. In replying to this argument, appellees say that the constitutional question is not presented by the pleadings, was not considered by the trial court, nor is it raised in the reasons and grounds for appeal, and therefore such issue should not be considered. A constitutional question, other than one which goes directly to the jurisdiction of the court, cannot be raised for the first time on appeal. *Jesiek* v. *Banfield,* 286 Mich 440, 443; and *Kruger* v. *Agnor,* 321 Mich 131, 138.

Appellants argue that a showing or claim of "undue hardship or practical difficulty" must first be made as a prerequisite to review by the board of zoning appeals. This position is not tenable, because the ordinance specifically provides for special exceptions in addition to variations and modifications. (See section 20.7.) Special exceptions are distinct from variations and modifications. The statute (CL 1948, § 125.583a [Stat Ann 1949 Rev § 5.2933(1)]), provides that:

"The legislative body may in its discretion provide by ordinance for the resumption, restoration, reconstruction, extension or substitutions of nonconforming uses or structures upon such terms and conditions as may be provided in the ordinance."

Under this provision it is permissive for local legislative bodies to set up ordinances containing provisions for special exceptions which may be distinct from the power of boards of zoning appeals to grant variances where there are unnecessary hardships or practical difficulties. Furthermore, the power to grant variances is contained in a separate section of the State enabling act (CL 1948, § 125.585 [d] [Stat Ann 1949 Rev § 5.2935 (d)]), which reads:

"Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall

have power in passing upon appeals to vary or modify any of its rules, regulations or provisions relating to the construction, structural changes in equipment, or alteration of buildings or structures, or the use of land, buildings or structures, so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done."

In this connection the following textual statement appears in 168 ALR 20:

"In practice sharp distinctions between exceptions and variances may not in all cases be readily made, but the approach to the former as a legislative process and to the latter through appeals from administrative orders as a judicial function will generally serve to avoid an overreaching of a variance into the field of exceptions. A literal enforcement of the ordinance may be disregarded to permit a variance, while the conditions for an exception must be found in the ordinance and may not be varied."

See *Stone* v. *Cray* (1938), 89 NH 483 (200 A 517), and other authorities annotated thereunder.

The buildings here involved, due to their deficient side yards and lot areas per room, are nonconforming structures situated in a district (RM4) which is zoned for multiple dwellings. Section 20.7 of the zoning ordinance provides:

"The board shall have power in addition to other proper variations and modifications, to grant the following special exceptions after public notice and hearing, provided that after investigation the board ascertains the conditions involved in the proposed exception conform to the limitations and restrictions specified for each such exception as listed in the following paragraphs: * * *

"(f) Permit an increase in height of a nonconforming building or structure existing at the effective date of this ordinance, or an enlargement or extension of such a nonconforming building, struc-

ture or use upon land partially occupied by such existing nonconforming building, structure or use at the effective date of this ordinance, subject to such conditions and protections as will safeguard the character of contiguous property and the surrounding neighborhood, provided that the spirit of this ordinance shall be observed, public safety secured and substantial justice done."

The buildings were in existence at the time of the effective date of the zoning ordinance of the city of Detroit, which was December 25, 1940.

The general rule in such circumstances is stated as follows:

"'Exceptions' permitted by some zoning ordinances differ from authority to vary the application of zoning provisions, in that an exception is allowable where facts and conditions detailed in the ordinance are found to exist; a literal enforcement of the ordinance may be disregarded to permit a variance, while the conditions for an exception must be found in the ordinance and may not be varied. Provisions of zoning regulations for the granting of variances or special exceptions to permit specific uses or structures, and provisions for the granting of variances generally, have in some instances been held to be separate and independent, so that the former provisions do not preclude the granting of relief under the latter provisions, but there are some cases in which a different result has been reached." 58 Am Jur, § 196, p 1047.

It therefore follows that where the facts come within the specific exceptions of section 20.7 of the ordinance, the board of zoning appeals need not find that unnecessary hardship or practical difficulties exist as a prerequisite to the granting of a permit, if those facts come within 1 of the specific exceptions stated in the ordinance, and if those exceptions are authorized by the zoning enabling statute, *supra*.

In the argument of this appeal, appellants urged that section 3.6 of the Detroit zoning ordinance nullifies the provisions of section 20.7(f), in that section 3.6 states that nothing in the ordinance shall prohibit—

"the alteration, improvement or rehabilitation of a nonconforming building or structure existing at the effective date of this ordinance provided such work does not involve any change in use or increase in height, area, bulk or number of dwelling units, except that the board may, after public hearing, permit an increase in the number of dwelling units in a multiple dwelling existing in an R1 or R2 district at the effective date of this ordinance, subject to the following conditions and limitations."

Appellees, on the other hand, argued that section 3.6 of the ordinance supports their position, because it must be assumed that the board has at least as much power in an RM4 multiple dwelling district as in an R1 or R2 district.

Section 3.6 was enacted to point out the effect of the zoning ordinance itself, independent of any consideration by the board of zoning appeals, and the board was given the power under section 20.7 to exercise the judgment required in matters mentioned in section 3.6. If section 20.7 is to be limited by section 3.6, then the latter is a useless statement. We therefore hold that section 3.6 does not prevent the issuance of a permit under the provisions of section 20.7.

It is insisted that on their face the plans show that the proposed alterations violate the housing law of Michigan (CL 1948, § 125.401 *et seq.* [Stat Ann 1949 Rev § 5.2771 *et seq.*]). Under CL 1948, § 125.409 (Stat Ann 1949 Rev § 5.2779), the State board of health is given power to "examine into the enforcement of this act." The board of zoning appeals, in its

order expressly stated that the granting of a permit would only authorize a variance or exception of the regulations of the zoning ordinance and is not intended to waive provisions of any other existing statute, ordinance, rule, or regulation. The opinion of the trial judge clearly pointed out that, in any event, the owners act at their peril, and if they violate the law, they may be called to account "by proper complaint and prosecution." The board of zoning appeals has no jurisdiction to enforce the housing law of Michigan and has not waived any variations therefrom; on the other hand, has expressly denied such waiver.

We are asked to consider whether the board of zoning appeals has abused its discretion in the premises, and it is argued that its determination will lead to the creation of a slum area, contrary to the intent and spirit of the ordinance. This may or may not be the result, but neither the trial court nor this Court is at liberty to substitute its discretion for that of the board. The ordinance at section 20.7 states:

"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 Detroit zoning ordinance was enacted prior to the 1941 amendment of the State enabling act. In that amendatory legislation (see PA 1941, No 306) similar language to that of the ordinance was deleted. The act, however, now provides:

"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." CL 1948, § 125.585(d) (Stat Ann 1949 Rev § 5.2935[d]).

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.

Appellants urge that decision in *Jones* v. *DeVries*, 326 Mich 126, is controlling. In that case we held that courts have the right to review decisions of boards of zoning appeals when appeal therefrom is taken timely. However, that case differs in many factual respects from the instant case. It was a situation where the board exceeded the limits of its discretion and authorized the erection of new multiple dwelling structures on lands in an area where that type of structure was not permitted. Neither the question of alteration of a nonconforming use structure nor the immediate effect of the board's order was involved in the *Jones Case*.

In the argument in support of the proposition that a determination of unnecessary hardship or practical difficulty is a jurisdictional prerequisite to action by the board, reliance is placed upon authorities from other jurisdictions where the statutes and ordinances differ from those applicable in this State. Here, exceptions are permitted, separate and apart from the existence of practical difficulties or unnecessary hardships.

It does not follow that, because trial and appellate courts might, on the same facts, arrive at different results, that the action of a board of zoning appeals is erroneous. A different result can only be imposed where it is clear that the board of zoning appeals exceeded its jurisdictional limitations or abused the discretion lodged in it by statute and ordinance. We find here no abuse of discretion, nor do we discern any capricious or arbitrary action. Appellants there-

fore must be denied relief, and the decree of the trial court affirmed. Costs to appellees.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, and REID, JJ., concurred.

BOYLES, J., did not sit.

McGREGOR *v.* CONSERVATION DEPARTMENT.

WORKMEN'S COMPENSATION—FIRE WARDEN—CORONARY THROMBOSIS —PROXIMATE CAUSE.

Disability due to coronary thrombosis of plaintiff fire warden for defendant conservation department found by workmen's compensation commission to have been due to strenuous efforts required in plaintiff's employment *held*, not a disability caused by a disease due to causes and conditions characteristic of and peculiar to the business of the defendant employer nor to have arisen out of and in the course of his employment; the exertion involved not having been shown to have been unusual to, or greater than, that experienced in the general field of common labor.

ADAMS and BUSHNELL, JJ., dissenting.

Appeal from Workmen's Compensation Commission. Submitted June 25, 1953. (Docket No. 79, Calendar No. 45,723.) Decided November 27, 1953.

Bruce L. McGregor presented his claim against Department of Conservation, employer, and State Accident Fund, insurer, for medical expenses in

---

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Workmen's Compensation §§ 210–212, 255.
Death from heart disease. 19 ALR 110; 28 ALR 209; 60 ALR 1314.

treating coronary thrombosis. Award to plaintiff. Defendants appeal. Reversed.

Harold B. Hughes, for plaintiff.

Harry F. Briggs (*Stanley Dodge,* of counsel), for defendants.

ADAMS, J. (*dissenting*). Bruce L. McGregor, plaintiff and appellee, seeks an award under the provisions of the workmen's compensation act for medical and hospital expenses incurred as a result of a coronary thrombosis suffered on May 11, 1950. At that time and for some years prior thereto, he was employed as a fire warden by the Michigan department of conservation in the Harrison area. Except for a temporary feeling of exhaustion on April 23d, he was in apparent good health and had required no recent medical attention.

His usual duties as a fire warden were varied and involved fire prevention, fire-fighting and supervision of men and equipment. The months of April and May are considered to be the fire season in Michigan and during that period the work of a fire warden is quite strenuous. Plaintiff had attended and assisted in controlling 4 fires on May 6th, working 19 hours on that day. On May 7th and 8th he attended 1 fire on each day and 2 on May 9th. On May 11th, after spending the morning at other work, he was called from his home before he could eat lunch to a fire east of Harrison. He drove a truck to the area, assisted in unloading fire-fighting apparatus and then worked for the greater portion of an hour in fighting the fire. During that time he was on and off his truck a number of times and while off the truck was observed to have moved at a "dog trot" while extinguishing flames. Later in the afternoon

he became ill and was hospitalized. A medical diagnosis indicated a coronary thrombosis.

All witnesses testified that no accident or fortuitous event occurred which of itself could have caused plaintiff's coronary thrombosis but that to the contrary everything plaintiff did both on May 11th and in the days prior thereto was a part of the normal but strenuous duties of a fire warden that might reasonably be anticipated during the fire season.

Only 1 doctor was called to testify. He was an experienced practitioner and had made special studies in diseases of the heart. The following statements from the record fairly summarize his testimony:

"It is my opinion that on May 11th this man had a coronary thrombosis. It is also my opinion that he had had, or perhaps I should say had, a preexisting arteriosclerosis of the coronary vessel for a time which I cannot determine. I believe that he may have had evidence of this arteriosclerosis, in the form of pain, at some time preceding the actual thrombosis, but I feel confident that his actual coronary thrombosis occurred on May 11th, and I have laboratory evidence to support my opinion. * * *

"*Q.* And the condition here of Mr. McGregor, the testimony this morning was that during the early part of May there was an unusual amount of work, fire fighting. Would that have any bearing on his condition?

"*A.* Yes, it could.

"*Q.* In what way, Doctor?

"*A.* Well, coronary thrombosis may occur at rest. It is more likely to occur following exertion, if there is a predisposition to coronary thrombosis, if no exertion occurred it might not occur for some years, whereas if exertion occurred or sufficient exertion occurred it could bring it on much sooner. * * *

"*Q.* Did you question him as to his immediate activity preceding that?

"*A.* Yes, I did.

"*Q.* From your information which you received were you able to determine the cause of the thrombosis?

"*A.* The history that the man gave me was that he had been exerting himself fighting fire and I felt that the over-exhaustion which he described was the direct cause leading to this attack. * * *

"*Q.* What was there that happened to him out there that caused this thrombosis?

"*A.* Perhaps the only thing I could say that happened to him was that he was working rather hard and exerting himself and that may have brought this on.

"*Q.* You didn't get such a history on his part?

"*A.* That is the history I got.

"*Q.* Would you say that the smoke he was exposed to which was a condition characteristic of and peculiar to the business of his employers, might have caused his coronary thrombosis?

"*A.* I do not feel that the smoke would have as much to do with the production of the coronary thrombosis as the exertion which he described to me.

"*Q.* What exertion did he describe to you?

"*A.* The exertion of having fought fires for several days preceding the attack and of having—

"*Q.* You say he gave you that history of what occurred several days before, not what happened to him on May 11th. Now, would that have anything to do with this attack?

"*A.* The exertion that he had had over that period of time could have tired this man and I think that could have been a factor. * * *

"*Q.* Did you determine in this case what that disease was?

"*A.* We are unable to determine the amount or the presence of the disease, except at postmortem, in an individual case. However, we know that a hardening of the coronary artery usually precedes an attack

of coronary thrombosis. That hardening would lead to a narrowing of the coronary artery, and would pre-dispose to the injury."

Plaintiff originally filed a claim for medical and hospital expense resulting from the coronary thrombosis under part 2 of the workmen's compensation act (CL 1948, § 412.1 *et seq.* [Stat Ann 1950 Rev § 17.151 *et seq.*]). At the hearing he was permitted to amend to bring his claim, in the alternative, under either part 2 or part 7 of the act (CL 1948, § 417.1 *et seq.* [Stat Ann 1950 Rev § 17.220 *et seq.*]).

A deputy commissioner found that plaintiff's "personal injury in this case was due to conditions which are characteristic of and peculiar to his employment, and arose out of his employment" and granted an award under the provisions of part 7 of the act. The award was affirmed upon review before the commission and the department has appealed.

The only question involved here is whether plaintiff's disability was such as is included under the provisions of subsection (c), section 1, part 7 of the workmen's compensation act, the pertinent portion of which reads as follows:

"Whenever used in this act: * * *

"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."

Testimony is undisputed that plaintiff, although unaware of it, had a pre-existing arteriosclerosis of a coronary vessel and that his employment required strenuous work and long hours when necessary. During the week preceding the disability, plaintiff had attended a number of forest fires in what was

considered the peak period of the year for such fires. In the uncontradicted opinion of the medical doctor, the exertion arising out of plaintiff's strenuous work "could have tired" plaintiff, and he "felt that the over-exhaustion * * * was the direct cause leading to this attack."

Defendants contend that a decision in this case is controlled by *Hagopian* v. *City of Highland Park,* 313 Mich 608, wherein we held that an employee who suffered disability as the result of a heart condition could not recover under part 7 of the act, laying special emphasis on the following phraseology found therein:

"Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable."

That decision, however, was founded upon a factual situation that differed from the present one. There the plaintiff in the usual course of his work was required to lift and empty cans of garbage, but there was no showing that the cans were of an excessive weight or that the work was more strenuous than that required in other normal occupations.

"There is absolutely no showing or claim here that the disability is one arising out of the particular type of work or resulting from the nature of the work performed. * * *

"There was nothing unusual about the weight of the cans and this work was done regularly by defendant's employees." *Hagopian* v. *City of Highland Park, supra.*

In the case of *Bederin* v. *Ex-Cell-O Corporation,* 311 Mich 334, compensation was denied to plaintiff who suffered from arthritis. There we affirmed the finding of the commission that arthritis is not a disease due to causes and conditions which are characteristic of and peculiar to the business of the

employer. The commission pointed out that they did not think that the "conditions of her employment caused a greater hazard than would be experienced in the normal run of employment; nor were the tasks which she performed more hazardous than any other tasks of such a nonstrenuous nature."

In the case at bar, plaintiff's work is not the normal run of employment and obviously cannot be defined as nonstrenuous.

Nor are we confronted with the situation found in *Poindexter* v. *Department of Conservation,* 316 Mich 235, where an award was sought for death resulting from coronary thrombosis but where the record showed nothing unusual or overstrenuous in decedent's work. At most, the record indicated mental strain while testifying as a witness in court proceedings. No physical strain being shown, an award was denied under the rule stated in the *Hagopian Case.*

The instant case is likewise to be distinguished from our decision in *O'Neil* v. *W. R. Spencer Grocer Co.,* 316 Mich 320, where a compensation award was denied for death caused by cardiac failure. There the record was void of any evidence showing a fortuitous event or strenuous or unusual effort. It was there claimed that driving a car in a heavy snowstorm could be termed a fortuitous event. In the opinion of this Court, however, the snowstorm was an experience common to all motorists in that area and deceased's death was due only to a disease of life to which the general public is exposed.

Recently, in the case of *May* v. *A. H. Powell Lumber Co.,* 335 Mich 420, this Court denied an award of compensation for death resulting from coronary disease aggravated by the inhalation of fumes from a tractor. The award there was denied for the reason that the claim was brought under part 2 of the act and no accident or fortuitous event was

shown in the record. Here we are concerned with a claim under part 7.

We think that the rule to be applied in this case is best enunciated in *Madden's Case,* 222 Mass 487 (111 NE 379, LRA 1916D, 1000) and quoted with approval in *Hagopian* v. *City of Highland Park, supra.*

"A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former cause, no award can be made; in the latter, it ought to be made."

The commission has the exclusive responsibility for the finding of facts and their findings are conclusive. (CL 1948, § 413.12 [Stat Ann 1950 Rev § 17.186]). Here undisputed testimony indicates and the commission so found, that the strenuous efforts required in plaintiff's employment were a proximate and contributing cause of his disability.

We are of the opinion that under the circumstances of this case, the plaintiff's disability was due to causes and conditions characteristic of and peculiar to the business of the employer and that it arose out of and in the course of such employment. The finding of the commission should not be disturbed. The award should be affirmed, costs to appellee.

BUSHNELL, J., concurred with ADAMS, J.

Dethmers, C. J. I do not concur in affirmance. As Mr. Justice Adams writes, (1) "plaintiff had a pre-existing arteriosclerosis of a coronary vessel", (2) "no accident or fortuitous event occurred", and (3) "everything plaintiff did * * * was a part of the normal but strenuous duties of a fire warden that might reasonably be anticipated during the fire season." A doctor testified that plaintiff had been working "rather hard" and that exertion over a period of time could have tired him and been a factor contributing to coronary thrombosis, because such attacks, in those predisposed thereto (as plaintiff was), are more likely to follow exertion, though they may occur at rest. If plaintiff is entitled to compensation on such showing, every arteriosclerotic employee would be so entitled after any disabling coronary thrombosis sustained during employment involving exertion or, at least, hard physical labor. In *Hagopian* v. *City of Highland Park,* 313 Mich 608, plaintiff was engaged, with the aid of another, in the strenuous physical exertion of lifting heavy—but not unusually heavy—refuse cans from the street to a man on a truck, as regularly done by the defendant's employees. After noting those facts and observing that there had been no accident or fortuitous event to aggravate the plaintiff's pre-existing heart condition, we held noncompensable the disability resulting from a heart attack sustained on the job. In the instant case, plaintiff, at most, was doing the hard labor customarily performed by him and fellow employees during at least 2 months of each year which required a degree of physical exertion not shown to have been unusual to or greater than that ordinarily experienced in the general field of common labor. Exertion to that extent did not constitute a fortuitous event. As in *Hagopian,* the disability is not caused by "a disease 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 employment." The holding in *Hagopian* is controlling and, accordingly, the award is set aside, with costs to defendants.

BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred with DETHMERS, C. J.

BEDFORD *v.* TETZLAFF.

1. VENDOR AND PURCHASER — LAND CONTRACTS — ACCELERATION CLAUSE.

An acceleration provision in a land contract which authorizes the vendor to declare the full balance of the principal sum and accrued interest due and payable upon buyer's failure to perform any of the covenants of the contract, although harsh, is not against public policy nor unenforceable.

2. SAME—NOTICE OF ELECTION TO ACCELERATE—FORECLOSURE.

The land contract vendor need not give notice of election to declare entire balance of principal and accrued interest due prior to filing bill to foreclose land contract upon default of purchaser's assignees in making payment of principal due in the absence of any unusual circumstances.

3. SAME—FORECLOSURE OF LAND CONTRACT IN CHANCERY—REDEMPTION.

Foreclosures of land contracts in chancery differ from foreclosures of mortgages in chancery in that no period of redemption is required by law.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 55 Am Jur, Vendor and Purchaser §§ 340, 621.
[3–5] Generally as to enforcement of vendor's lien, see 55 Am Jur, Vendor and Purchaser § 496.

4. SAME—FORECLOSURE IN CHANCERY—REDEMPTION—DISCRETION OF COURT.

The right to redeem from foreclosure of land contract in chancery exists independently of statute, rests entirely in the discretion of the court, and the vendee is not entitled to it as a matter of right.

5. SAME—FORECLOSURE—REDEMPTION—DISCRETION OF COURT.

Trial court did not abuse its discretion in not providing a period of redemption after sale under foreclosure of land contract in chancery, where purchaser's assignees had not kept up payment of insurance premiums and taxes, failed to make payment of principal and interest when due and during more than 10 months after bill to foreclose was filed they failed to pay the indebtedness to the vendor.

Appeal from Charlevoix; Brown (Charles L.), J. Submitted October 8, 1953. (Docket No. 36, Calendar No. 45,886.) Decided November 27, 1953. Rehearing denied December 29, 1953.

Bill by Arline Bedford against Paul J. Tetzlaff and others to foreclose a land contract. Decree for plaintiff. Defendants Tetzlaff appeal. Affirmed.

Clark C. Coulter (*Victor H. Hampton,* of counsel), for plaintiff.

Henry E. Rice, for defendants.

ADAMS, J. Arline Bedford, plaintiff and appellee, seeks to foreclose a land contract in chancery. In her bill of complaint she alleges a default by defendants and declares the full amount of principal and interest due in accord with an acceleration clause in the contract.

The decree of the lower court ordered the defendants to pay to plaintiff the entire principal due under the contract, together with accrued interest and unpaid taxes and insurance. In the event of nonpayment, the decree provided that the premises should

be sold and the proceeds of sale applied on the amount found due. No period of redemption after sale was provided.

Paul J. Tetzlaff and Nellie C. Tetzlaff, defendants and appellants, appeal from the decree claiming that the lower court was in error in not requiring plaintiff to give prior notice of her election to declare the full amount of principal due under the contract and in failing to provide a period of redemption after the sale of the property.

On May 15, 1946, the plaintiff and her husband, now deceased, sold certain real estate in Charlevoix, Michigan, on land contract to defendants Jack and Edith Glick and Charles and Zelda Levitt. The sale price was $22,000, with $5,000 paid in cash and the balance of $17,000 payable over a period of years with not less than $1,000 principal due on October 1st of each year. Payments of principal and interest were regularly and promptly made through the year 1948. The 1949 payment was delayed nearly 2 months and the 1950 payment was late by approximately 6 weeks. In 1950 taxes assessed against the property and premiums on insurance covering the buildings were not paid and remained unpaid through 1951 in violation of the purchasers' covenants in the land contract.

On July 18, 1951, defendants Tetzlaff became the owners by assignment of the land contract purchasers' interest with knowledge that the taxes and insurance premiums were in arrears. Shortly afterwards they suggested to plaintiff that they would be interested in paying the full amount due under the contract if they were granted a discount. Plaintiff, however, gave no indication that she would accept less than the full amount and on September 10, 1951, counsel for the defendants Tetzlaff wrote the following letter to the plaintiff.

"Paul J. Tetzlaff and Nellie C. Tetzlaff, his wife, who recently purchased the Pine River Hotel by assignment of purchasers' interest in the land contract, have requested I send to you copy of their assignment, together with a copy of the assignment from the original vendees, the Glicks and Levitts, to Murl Dwortson and Geraldine Dwortson, his wife, which copies are enclosed herewith.

"The Tetzlaffs desire me to inform you that the October 1, 1951, payment will be timely made, and that the past due taxes and insurance premiums will likewise be paid on or before October 1, 1951."

Defendants failed to make the October 1st payment and on October 12, 1951, plaintiff filed her bill of complaint to foreclose the land contract. In the bill of complaint she declared the entire balance of principal due. A decree of foreclosure was entered on August 1, 1952, decreeing the sum of $15,148.65 due the plaintiff from the defendants, ordering the defendants to pay said sum on or before August 30th and, in default of such payment, decreeing that the premises be sold at public sale under the direction of the circuit court commissioner at any time after August 30th.

Defendants contend on appeal that it is inequitable to permit the plaintiff to accelerate the payments due under the contract without giving notice of her intention to accelerate prior to the institution of the chancery action. They point out that the bill of complaint in which plaintiff made her election to declare the full amount due was filed only 12 days after the payment of principal and interest for the year 1951 became due under the terms of the contract and that during the preceding months defendants had attempted to pay off the contract through a compromise settlement of the amount owed. They contend that because they were, to a degree, lulled into a sense of security during such negotiations, it

would be inequitable to permit plaintiff to declare the full amount of principal due within the brief period of their default.

There are, however, other circumstances to be considered. A substantial amount of taxes and insurance premiums had become due and remained unpaid for the greater portion of a year preceding the commencement of suit. Defendants Tetzlaff acquired the purchasers' interest in the premises knowing of such default and subsequently advised plaintiff that the items would be promptly paid. Although the defendants suggested to plaintiff that the full amount due on contract would be paid if a discount were granted to them, there is nothing in the record which in any way indicates that the plaintiff was willing to grant a discount or that she gave defendants reason to believe otherwise than that she would expect prompt payment of all sums becoming due under the terms of the contract.

The contract states "that time is of the essence of this contract" and "in the event that the buyer shall fail to perform any of the covenants of this contract * * * at his option the seller may declare the full balance of the principal sum, together with accrued interest thereon, immediately due and payable."

In the case of *Brody* v. *Crozier,* 242 Mich 660, it was said in reference to a comparable contract clause there under consideration:

"The provision is harsh, but a part of the contract, and is not outlawed by public policy nor invalid or unenforceable. It was probably unwise for defendant to so place his interest in the property at the mercy of plaintiff, but we are powerless to extend to him anything more than commiseration.

"This suit was not to forfeit the contract, but to enforce payment in accordance with its terms. Accelerative clauses are common in mortgages, and have universally been held valid; they appear in

many cases of sales upon instalments and, under the negotiable instruments law (CL 1915, § 6043)*, bring about a sum certain in case of a provision: 'That upon default in payment of any instalment or of interest the whole shall become due.' "

Later, in reviewing another action to foreclose a land contract in chancery, this Court held:

"The acceleration clause is valid." *Barnard* v. *Huff*, 252 Mich 258 (77 ALR 259).

We find no unusual circumstances in the present case which would require an exception to the accepted rule and we are therefore of the opinion that plaintiff was rightfully entitled to declare the entire balance due under the contract upon defendants' default without giving notice of such election prior to the filing of the bill of complaint.

It is the defendants' further contention that they are entitled to a provision in the decree of foreclosure establishing a period after the sale of the premises within which to redeem from the foreclosure. On October 12, 1951, when the bill of complaint was filed, taxes assessed against the premises and insurance premiums on policies covering the buildings on the property in the total amount of $784.29 had been due and unpaid for a long period of time to the knowledge of the defendants Tetzlaff who admittedly acquired their interest in the property after being informed of such default. In acquiring the purchasers' interest they assumed the obligation created by the contract to pay those items. Later they neglected to promptly pay the principal and interest when due.

The action to foreclose was instituted on October 12, 1951, and the sale of the property decreed at any time after August 30, 1952. Defendants could have protected their interest in the property prior to

* CL 1948, § 439.4 (Stat Ann § 19.44).—REPORTER.

October 12, 1951, by the payment of delinquent taxes, insurance premiums and the annual payment of principal and interest as provided for in the contract. Thereafter for a period of more than 10 months they had the right to redeem from the foreclosure by the payment of the entire amount of principal, interest, taxes and insurance premiums due.

Foreclosures of land contracts in chancery differ from foreclosures of mortgages in chancery in that no period of redemption is required by law.

" 'There is no statute conferring the right to redeem in the foreclosure of land contracts. No such right exists independently of statute. It is customary for the trial court to fix a short time for redemption after sale, but the vendee is not entitled to it as a matter of right. It rests entirely in the discretion of the court.' (*Drysdale* v. *P. J. Christy Land Co.*, 248 Mich 184).

"This answers appellants' assertion of redemption as a matter of right." *Shady View Beach Land Co.* v. *Summers,* 255 Mich 6.

In this case defendants failed to pay taxes and insurance premiums long past due. Although aware of the due date for the annual payment of principal and interest, they neglected to make that payment when due. Thereafter during a period of more than 10 months while this action was pending and prior to the sale, they could, as a matter of right, have protected their interest in the property by paying their indebtedness to the plaintiff. Under such circumstances we find no abuse of discretion on the part of the trial court in failing to provide an additional period for redemption after sale.

The decree is affirmed, costs to the plaintiff.

DETHMERS, C. J., and BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

VANDERWALL *v.* GOODWIN.

1. HIGHWAYS AND STREETS—STATE HIGHWAY SYSTEM.
   The State highway commissioner is given supervision and control over the State highway system and has the responsibility to survey and plan for the construction and maintenance of those highways (CL 1948, § 250.31).

2. SAME—ROAD CONSTRUCTION CONTRACTOR—HAZARDS—WARNINGS.
   Defendant road construction contractor was not under a legal obligation to warn of a hazardous condition on a public highway that it had no part in creating and in an area over which it had no supervision and control.

3. SAME—HAZARDS—LIGHTING OF SIGNS—PROXIMATE CAUSE.
   Failure of road construction contractor to provide adequate lighting of stop sign at end of construction where road joined another State highway, as he was required to do by his contract, would not be a proximate cause of injuries to plaintiff, a passenger in a car operated over new construction, where such car had stopped and injuries occurred as car proceeded on across the previously constructed highway and into a ditch beyond the area of construction, since the stop sign had served its purpose irrespective of absence of lighting.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ROAD CONSTRUCTION CONTRACT—PROXIMATE CAUSE.
   It is unecessary to determine whether road construction contract created obligation on part of contractor for the benefit of those using the highway, where plaintiff's declaration did not show a breach of his contractual obligations having a causal relation to plaintiff's injuries.

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Highways § 55.
[3] 25 Am Jur, Highways § 377.

Appeal from Allegan; Smith (Raymond L.), J. Submitted October 9, 1953. (Docket No. 50, Calendar No. 45,861.) Decided November 27, 1953.

Case by Doris Vanderwall against Carl E. Goodwin and others, copartners doing business as Carl E. Goodwin & Sons, for damages suffered when the automobile in which she was riding ran into ditch. Case dismissed on motion. Plaintiff appeals. Affirmed.

Beers & Caughey, for plaintiff.

Farrell, Folz, Paulson & Palmer, for defendants.

ADAMS, J. Carl E. Goodwin & Sons, a copartnership, defendant and appellee, entered into a contract with the Michigan State highway department to construct a new highway known as US-31 from the village of West Olive, Ottawa county, south to the northerly edge of a State highway running east and west and known as M-21. No highway extends southerly from the intersection of the 2 highways. When the project was substantially completed, but before it was accepted by the highway department, it was opened to public traffic.

In the early morning of October 28, 1950, Doris Vanderwall, plaintiff and appellant, was riding in an automobile driven by her husband, now deceased, in a southerly direction on the new highway. Near the intersection of the 2 highways and northerly of the terminus of US-31 was an unlighted "stop" sign. Plaintiff's driver stopped before entering M-21 and then proceeded across that highway and into a deep ditch on the opposite side of the road. Plaintiff suffered severe physical injuries as a result of the abrupt stop.

Subsequently she commenced an action at law against the defendant to recover monetary damages

for her injuries. Her declaration contained 2 counts, the first alleging that the defendant owed plaintiff a duty, as a matter of law, to adequately warn her driver of the hazardous ditch across M-21 from the terminus of US-31 and that the failure to give such warning constituted actionable negligence. The second count alleged that the defendant had contracted with the State highway department to adequately warn the traveling public of hazardous conditions existing on the highway; that such obligation was for the benefit of the public; that the plaintiff was injured because her driver was not warned of the ditch, and that she was entitled to recover her damages from defendant because it negligently and wilfully breached its duty created by the contract.

Defendant promptly filed a motion to dismiss the cause of action on the ground that it owed no duty to the plaintiff either in law or by contract to warn plaintiff and her driver of hazardous conditions on highway M-21, a highway over which defendant had no control or supervision.

The circuit judge found that the declaration did not state a cause of action in either count and granted the motion to dismiss. Plaintiff appeals from that order.

By State law, the State highway commissioner is given supervision and control over the State highway system and it is his responsibility to survey and plan for the construction and maintenance of those highways.

"All trunk line highways now or hereafter established as provided by law, shall hereafter be constructed, maintained and improved in accordance with the provisions hereof under the direction, supervision and control of the State highway commissioner. Said commissioner is hereby authorized and directed to make surveys and proper plans and specifi-

cations and take charge of the construction and maintenance aforesaid." CL 1948, § 250.31 (Stat Ann § 9.881).

Pursuant to the authority granted by the above quoted statute, the highway commissioner entered into a contract with the defendant to construct a new highway to be known as US-31. It is not alleged in the declaration that the construction provided for in the contract encompassed any portion of highway M-21 or that defendant was responsible for the existence of the ditch on the far side of M-21 or that it took a part in fixing the location of the new highway which ended at M-21. It is plaintiff's contention, however, that since defendant was engaged to construct US-31, it was obligated to warn the traveling public of both the hazardous conditions which existed beyond the terminus of the project and of the necessity for making a right-angle turn when entering M-21.

Because the declaration makes no allegation in respect to such matters, we must assume for the purposes of this appeal that defendant did not dig, alter or repair the ditch or aid in establishing the location of the new highway. We think it follows that defendant was not burdened with a legal obligation to warn of a hazardous condition on a public highway that it had no part in creating and that existed in an area over which defendant had no supervision or control. The trial judge ably set forth the applicable law in his opinion granting the motion to dismiss the cause of action, wherein he said:

"'Count one of the declaration alleges that defendant, as contractor, had the duty of adequately warning the users of the highway under construction of hazardous conditions. This duty certainly exists where the hazardous condition was created by the contractor or grew out of the construction work. 104 ALR 955. The difficulty with the plaintiff's

position is that the alleged dangerous condition arose out of the location of the new highway and not out of its construction. * * *

"This court is unable to determine that defendant had a common-law duty as the contractor of the new highway to warn the public of any danger that may have existed off the right-of-way under construction and not created by the contractor. It follows that count one should be dismissed because it fails to allege a cause of action."

In relation to the second count of plaintiff's declaration alleging a violation of defendant's contractual duty to the plaintiff, there appears in the standard specifications for road and bridge construction of the Michigan State highway department, which was made a part of the contract between the defendant and the State highway department, the following:

"When any section of road is opened to through traffic before all work on that section is completed, or while construction operations are being conducted thereon, the department will furnish and the contractor shall erect and maintain adequate warning signs at each end of the section and all points of hazard within such section. * * *

"All barricades, warning signs and points of special hazard shall be adequately lighted and a red danger light shall be displayed on all road closure barricades. * * * There shall be placed and maintained not less than 3 lights at each warning sign and barricade at the ends of the temporary route and at intersecting trunk lines, and not less than 2 lights at each advance warning sign."

It is upon those provisions that plaintiff bases her contention that defendant owed an obligation to warn of the hazardous condition on M-21. She says that defendant failed in the requirements therein specified. The sections quoted impose 3 duties upon the defendant, the first being to erect and main-

tain adequate warning signs at the end of each section; the second, to erect and maintain warning signs at all points of hazard within such section; and the third, to adequately light such signs.

Plaintiff says the "stop" sign at the end of US-31 was not properly lighted. That statement standing alone could be construed as an allegation of a breach of defendant's contractual duty, but plaintiff also alleges that the vehicle in which she was riding stopped at the intersection. Having stopped, any inadequacies or deficiencies in the sign that prompted the stopping would not be a proximate cause of a subsequent accident occurring on the far side of the intersecting highway after plaintiff's car had resumed its forward movement. The "stop" sign at the terminus of US-31 had served its purpose. No warning sign, regardless of type or lighting, could have given plaintiff more protection for she admits she stopped before entering M-21. While stopped at the end of the new highway, she was secure from injury. It was the later forward movement of the car into an area beyond the control and supervision of the defendant that led to her injury.

In relation to defendant's further obligation to maintain adequate warning signs at other points of hazard, the contract defines such points of hazard as being "within" such section. A hazardous condition on M-21 was not within that section of US-31 involved in the construction contract, and the contract between the State highway department and the defendant did not impose upon defendant an obligation to maintain warning signs beyond the limits of that highway.

In our opinion, the circumstances alleged in plaintiff's declaration do not show a breach of defendant's contractual obligations that had a causal relation to plaintiff's injuries. It therefore becomes unnecessary to determine whether the contract was of such

nature that it created an obligation on the part of the defendant for the benefit of those using the highway.

The order of the circuit court dismissing the cause of action is affirmed, costs to the defendant.

DETHMERS, C. J., and BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

HOLT *v.* STOFFLET.

1. SPECIFIC PERFORMANCE—OPTION TO PURCHASE IN LEASE—ESTOPPEL.

   Lessees were estopped from specifically enforcing option to purchase, contained in their lease, where they not only stated orally and in writing they did not intend to exercise such option but took the initiative in suggesting and encouraging defendant landlords to sell to others, showed the property to defendants' prospective purchasers and defendants relied in good faith upon plaintiffs' actions and committed themselves to a sale.

2. ESTOPPEL—EQUITABLE ESTOPPEL.

   The vital principle of an equitable estoppel, or an estoppel *in pais*, is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

3. SAME—ACTS—REPRESENTATIONS—ADMISSIONS—SILENCE.

   An estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 19 Am Jur, Estoppel §§ 34, 85.

Appeal from Calhoun; Steinbacher (Harold E.), J. Submitted October 16, 1953. (Docket No. 87, Calendar No. 45,954.) Decided November 27, 1953. Rehearing denied December 29, 1953.

Bill by George M. Holt and wife against Lawrence M. Stofflet and wife for specific performance of option for sale of land. Decree for defendants. Plaintiffs appeal. Affirmed.

Alfred P. Stuart, for plaintiffs.

Cobb, Wilder & Nielsen, for defendants.

ADAMS, J. On June 30, 1948, the defendants and appellees, Lawrence M. and Patricia Stofflet, leased a restaurant and residence in Marshall, Michigan, for a period of 3 years to George M. and Dorothy E. Holt, plaintiffs and appellants. Included in the lease was an option to purchase, as follows:

"The parties of the first part hereby give unto the parties of the second part an option to purchase the said premises for the sum of $10,000 upon the written request of the second parties made at any time within 1 month of the expiration of the said lease term. If the said second parties should elect to exercise this option then the first parties covenant and agree to credit one-half of all instalments made by the second parties hereunder toward the said purchase price, provided however that there be no arrears of rent due at such time."

On the 28th of May, 1951, with slightly more than 1 month remaining of the 3-year term, plaintiffs served defendants with a notice, which read:

"This is your written notice that the said lessees are exercising their option of purchase as so provided, and request that you have the deed of purchase and the abstract of title in their hands in ample

time before the first day of June, 1951, in order that same may be examined."

Defendants did not convey and on June 22, 1951, plaintiffs filed their bill of complaint praying for specific performance of the option. Thereafter, on defendants' motion, the trial court dismissed the bill of complaint and plaintiffs appealed to this Court. (*Holt* v. *Stofflet,* 334 Mich 272.)

On appeal, this Court held that the notice by which plaintiffs attempted to exercise the option was timely given; that the language of the notice was proper in view of the provisions of the option, and that no tender of the purchase price was required at the time the option was exercised. Accordingly, the order of the trial court was reversed, and the case was remanded for the filing of such further pleadings as might be necessary and proper and a trial on the merits.

Following the decision on appeal, an answer and reply were filed, a trial had, and a decree entered dismissing the bill of complaint. Plaintiffs appeal from that decree.

From the testimony presented at the trial, it appears that on October 4, 1950, the plaintiffs wrote defendant Patricia Stofflet requesting that she come to their place of business "to talk to you about something of quite importance." Shortly afterwards Mrs. Stofflet called upon the plaintiffs and was told that they were not in a position to buy the property upon the termination of the lease and suggested that she try to find another buyer.

On November 16, 1950, Mrs. Stofflet wrote to the Holts telling them that a Mr. Kelly was interested in purchasing and inquiring whether they wished to reconsider their decision. Defendants promptly replied by letter on November 17th, saying, in part:

"No * * * I guess we still wouldn't care to buy the Grill. * * *

"I think you will find the Kellys very reliable people and hope you can do business with them."

The Kellys visited the restaurant and the property was shown to them by the plaintiffs.

Defendants failed to negotiate a sale with the Kellys and on January 13, 1951, entered into a real estate listing agreement with a realtor in Battle Creek. On May 12, 1951, the realtor obtained a written offer to purchase the property and some 2 days later defendants accepted and agreed to pay the realtor a commission of 5% on the sale price of the property. As in the previous instance the plaintiffs were aware of the purchaser's interest and had willingly showed him through the buildings when he called at their home prior to his offer to purchase.

After the defendants had accepted the offer to purchase, plaintiffs served them with the notice of May 28th in which they elected to exercise the option.

It is apparent from the record that the defendants in good faith relied upon plaintiffs' written and verbal statements that they did not intend to exercise their option to purchase the property. Plaintiffs went beyond the mere making of a statement of intention. They took the initiative in suggesting and encouraging defendants to sell to others. They showed the property to defendants' prospective purchasers and gave no indication of their rights as now claimed.

Defendants, with the knowledge and cooperation of the plaintiffs, obtained a purchaser and committed themselves to a sale. While some doubt may exist as to the enforceability of the sales agreement because of lapse of time, there can be no doubt that defendants have obligated themselves to pay a real-estate broker's commission.

Under such circumstances we are of the opinion that the plaintiffs are now estopped from enforcing the option agreement.

"The complainant may have estopped himself without any positive agreement, if he intentionally led defendants to do, or to abstain from doing, anything involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. * * * There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." *Faxton* v. *Faxon,* 28 Mich 159.

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson* v. *Colgrove,* 100 US 578 (25 L ed 618).

"It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. 16 Cyc, pp 722, 723. See, also, Bigelow on Estoppel (5th ed), p 570; *Dann* v. *Cudney,* 13 Mich 239 (87 Am Dec 755); 11 Am & Eng

Enc Law (2d ed), pp 427, 428; 16 Cyc, pp 759, 769." *Kole* v. *Lampen,* 191 Mich 156, as quoted in *Schudlich* v. *Yankee,* 272 Mich 482, and *Postal* v. *Home State Bank for Savings,* 284 Mich 220, 229.

" 'It has been held in many cases that if the owner of land knowingly stands by and permits his property to be mortgaged or sold by another, to one who is to the owner's knowledge relying on the apparent ownership of the person executing the conveyance, such conduct will estop the owner from asserting his title against the mortgagee or grantee.' *Craig* v. *Crossman,* 209 Mich 462, 480." *Colonial Theatrical Enterprises* v. *Sage,* 255 Mich 160, 169.

The decree is affirmed, costs to defendants.

DETHMERS, C. J., and BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LE VASSEUR *v.* ALLEN ELECTRIC COMPANY.

1. WORKMEN'S COMPENSATION—ELECTRICIAN—STREET HAZARDS.
   Electrician who received call from employer while at home to proceed to a school to hook up a cable for an electric range in the home economics department, who would normally be entitled to pay from time he left home until his return thereto and who was injured en route by limb which fell from a tree suffered a compensable injury, since the employment required the employee to go upon the public street upon a special mission for the employer (CL 1948, § 412.1 *et seq.*).

2. EVIDENCE—JUDICIAL NOTICE—FALLING LIMBS.
   The Supreme Court takes judicial notice of the fact that limbs of trees do not fall without some intervening force unless they have rotted.

3. COURTS—PRECEDENTS—EQUALLY DIVIDED COURT.
   A case decided by an equally divided court does not constitute a binding precedent.

4. WORKMEN'S COMPENSATION—STREET HAZARDS.
   The fact that the public is also exposed to perils of the public streets does not preclude recovery of workmen's compensation for injuries to an employee who suffers injury by reason of street hazard while on a special mission of the employer.

DETHMERS, C. J., and SHARPE and REID, JJ., dissenting.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Workmen's Compensation §§ 217, 219, 226.
[1, 4] Street risks incurred in course of employment. 51 ALR 509; 80 ALR 126.
Death or injury in course of traveling. 20 ALR 319; 49 ALR 454; 63 ALR 469; 100 ALR 1053.
Injury to employee in course of employment but away from employer's place of business, due to a cause or risk to which others are also subject, as arising out of the employment within workmen's compensation act. 139 ALR 1472.
Injury while on way to or from work sustained by employee who does not work regular hours or is subject to call. 142 ALR 885.
Right to compensation for injury while going to or from work as affected by fact that compensation covers time involved or cost of transportation, or both. 87 ALR 250.
[3] 14 Am Jur, Courts § 81.

Appeal from Workmen's Compensation Commission. Submitted June 3, 1953. (Docket No. 27, Calendar No. 45,637.) Decided November 27, 1953.

George Le Vasseur presented his claim for compensation against Allen Electric Company, employer, and State Accident Fund, insurer, for injuries sustained while in its employ. Award to plaintiff. Defendants appeal. Affirmed.

Roy De Gesero, for plaintiff.

Harry F. Briggs (*Stanley Dodge,* of counsel), for defendants.

BUTZEL, J. George Le Vasseur, plaintiff, was employed by Allen Electric Company of Bay City, Michigan, defendant, at its shop as a journeyman electrician. He also was sent out to do special jobs for customers. When acting in the latter capacity he was paid from the time he left the shop until his return and he received additional reimbursement at the rate of 8 cents per mile when he used his own car.

Because of a shortage of materials, defendant requested plaintiff to remain home until further notice. During the noon hour on September 12, 1950, defendant called plaintiff at his home and requested him to go to the Central High School in Bay City to hook up a cable for the electric ranges in the home economics department. Plaintiff's regular afternoon hours while at the shop were from 12:30 p.m. to 4:30 p.m. He claims that the telephone call reached him at 12:35 p.m., although defendant contends that it was 12:15 p.m., and that from 12:00 noon to 12:30 p.m. was the half-hour lunch period. In any event, plaintiff, after placing his tools in his car, set out for the school traveling along the most direct route. While driving along the road a limb fell

from a tree onto the car, penetrated the canvas top and struck plaintiff. It knocked him unconscious so that he lost control of the car, which crashed into a tree. Plaintiff suffered severe injuries and incurred large bills for hospital care and doctors' and nurses' services. He was able to return to work in about 3 months. The workmen's compensation commission affirmed an award of compensation made by the deputy commissioner against defendant and State Accident Fund, codefendant, who have appealed in the nature of certiorari. They contend that plaintiff's injuries did not arise out of and in the course of his employment as required by statute, CL 1948, § 412.1 (Stat Ann 1950 Rev § 17.151). They base their claim partly on the fact that plaintiff had not yet arrived at the high school, and that the injuries sustained going to and from work are not compensable. Testimony shows that plaintiff would normally be entitled to pay from the time he left home until his return when sent on a special job. Also, this is not the ordinary case of an employee going to and from his work but one where the employee was engaged in a special mission in the interest of and at the direction of his employer. See *Stockley* v. *School District No. 1 of Portage Township,* 231 Mich 523 (24 NCCA 170).

Defendants insist that plaintiff's injuries did not arise out of his employment. They cite *Nelson* v. *Country Club of Detroit,* 329 Mich 479; *Klawinski* v. *Lake Shore & Michigan Southern R. Co.,* 185 Mich 643 (LRA 1916A, 342); and *Thier* v. *Widdifield,* 210 Mich 355, all lightning cases where the injury occurred through an "act of God." In the instant case there was no storm or unusual weather conditions at all. Without objection, plaintiff was permitted to testify that he did not see the limb fall, but that he had been told that it was "a little decayed," and that it was 6 to 8 inches thick. We believe we can safely

assume that the information was correct, for limbs of trees do not fall without some intervening force unless they have rotted. Such a limb should have been removed for it constituted as much of a menace on the highway as any obstruction the car might have run into. Defendants further rely upon *Levchuk* v. *Krug Cement Products Company,* 246 Mich 589, wherein the employee was struck by flying glass when a pheasant flew into and shattered the windshield of a truck in which he was riding in the course of his employment. Our decision there that the injury did not arise out of the employment was by an equally divided court, so that case is not binding upon us as a precedent. In the later case of *Morse* v. *Port Huron & Detroit R. Co.,* 251 Mich 309, we said:

"Defendant contends that the accident did not arise out of Morse's employment because the street hazard was not peculiar to his work but was common to the neighborhood and a risk to which all persons in the street were subject. The nebulosity originally enveloping the rule invoked has been considerably dissipated by later cases. We need not spend the time to trace the change. It is sufficient to say that it is the rule in this State that if the employment requires an employee to go upon the public street, the ordinary hazards of the street are incurred in the course of the employment."

In *Widman* v. *Murray Corporation of America,* 245 Mich 332, an employee was required to travel by train in the course of his employment, and while so traveling was struck in the eye by a cinder. In affirming an award of compensation we quoted with approval from *Harry Cook's Case,* 243 Mass 572 (137 NE 733, 29 ALR 114), as follows:

"When these hazards thus become connected with, and incidental to the employment, and are the direct cause of the accident, such accidents arise out of, as well as in the course of the employment. And the

fact, that others engaged in their own affairs are more or less exposed to the same street risks, does not preclude recovery by an employee who is necessarily exposed to them in performing the duties of his employment contract."

We believe that the rule applicable to this class of cases is well stated in *Katz* v. *A. Kadans & Company,* 232 NY 420 (134 NE 330, 23 ALR 401), wherein the court of appeals said:

"If the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute."

The court further said that:

"Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets, * * * and do not commonly happen indoors."

See, also, our own decisions in *Kunze* v. *Detroit Shade Tree Company,* 192 Mich 435 (LRA 1917A, 252), where the employee was injured while boarding a streetcar while traveling from job to job in the course of his employment, and *Arnested* v. *McNicholas,* 223 Mich 488, where the employee was shot by an unknown deer hunter while searching for a route over which to construct a roadway through the woods. In both these cases we held that the employees' injuries arose out of their employment. A number of cases from other jurisdictions holding that street injuries are compensable as arising out of the employment when it is the employment itself that places the employee on the street may be found

in 80 ALR 126 and many supplemental decisions listed in the ALR blue books.

The award of compensation is affirmed, with costs to plaintiff.

ADAMS, CARR, and BUSHNELL, JJ., concurred with BUTZEL, J.

DETHMERS, C. J. (*dissenting*). I do not concur in affirmance. Mr. Justice BUTZEL and plaintiff stress the special mission doctrine. What is its significance? It is held generally that injuries sustained by employees while en route to or from work do not arise out of and in the course of their employment. *Daniel* v. *Murray Corporation of America,* 326 Mich 1, 6, and cases there cited. An apparent exception is noted in the case of the special mission, a brain child of judicial construction not mentioned in the statute. The theory is that while traveling en route to or from work on a special mission the employee is actually in the performance of duties for his employer and that, therefore, an injury then sustained arises "in the course of" his employment. Touching on whether it also arises "out of" his employment, this Court has held that it does, if caused by one of the ordinary hazards of the street or traffic or of the place where or of the means by which the mission is performed, such hazards being deemed connected with and incident to the employment. *Kunze* v. *Detroit Shade Tree Co.,* 192 Mich 435 (LRA1917A, 252); *Clifton* v. *Kroger Grocery & Baking Co.,* 217 Mich 462; *Arnested* v. *McNicholas,* 223 Mich 488; *Stockley* v. *School District No. 1 of Portage Township,* 231 Mich 523 (24 NCCA 170); *Favorite* v. *Kalamazoo State Hospital,* 238 Mich 566; *Widman* v. *Murray Corporation of America,* 245 Mich 332; *Morse* v. *Port Huron & Detroit R. Co.,* 251 Mich 309; *Konopka* v. *Jackson County Road Commission,* 270 Mich 174

(97 ALR 552); *Chrysler* v. *Blue Arrow Transport Lines,* 295 Mich 606. There is nothing in the workmen's compensation act to indicate a legislative intent, nor anything in the cited or related cases to suggest, however, that an injury sustained while en route to or from work on a special mission must be held to arise "out of" employment regardless of the source or cause, or that the granting of compensation may be justified on the single ground that it was because of his employment that the employee happened to be at the place when and where the accident happened, without a showing of any causal connection between the injury and the employment in the shape of unusual exposure to the hazard in question. On the contrary, the cited cases go no further than to hold that the effect of the doctrine of special mission is to take an employee injured en route to or from work on a special mission out of the position of the ordinary employee injured while going to or from his regular place of work in his employer's established place of business and to place him, instead, in a position comparable to that of a truck driver injured while driving truck in the performance of his duties for his employer. There has never been any question that under such circumstances injuries sustained by truck drivers resulting from the hazards of the road and traffic arise out of and in the course of their employment. See *Daniel* v. *Murray Corporation of America, supra,* p 14, and *Dennis* v. *Sinclair Lumber & Fuel Co.,* 242 Mich 89. As the compensation act extends its benefits to a person employed in a manufacturing establishment in relation to injuries resulting from the ordinary hazards of the factory, so it likewise extends them to a person whose duties of employment must be performed on the highways in relation to the ordinary hazards of the street and traffic. Each is protected against the ordinary hazards common to his place of employment. In neither

case does the act go beyond that. Applicable to both situations is our holding in *Luteran* v. *Ford Motor Company,* 313 Mich 487, that an injury arises out of employment when there is a causal conection between it and the conditions under which the employee's work is to be done or, as held in *Daniel,* when the injury follows as a natural incident to the employment and is not the result of a risk disassociated therefrom. Example of a case in which the injury was held to be the result of a risk disassociated from employment, and fully in point here, is *Steffes* v. *Ford Motor Co.,* 239 Mich 501. There an eye injury sustained by a foreman in a tool grinding room, resulting from a fellow employee's idle shooting of a paper clip with a rubber band (an act not connected with or necessary to the work), was held not to have arisen out of his employment. In that case the Court spoke of a bird flying into the room from the outside and striking the foreman in the eye as illustrative of a situation in which the injury could not be said to have arisen "out of" the employment. Similar is *Ryan* v. *City of Port Huron,* 234 Mich 648, in which an employee was engaged in street cleaning when a storm arose and he sought shelter in a nearby private garage, whereupon he was attacked and bitten by a dog. No point was made of the fact that the employee had left the street and gone to a private garage; on the contrary, this Court assumed that he was still "in the course of his employment" but held, nonetheless, that the injury "did not arise out of the employment." This Court said:

"Being bitten by a dog cannot be traceable to the nature of the employment in which Mr. Ryan was engaged. There was not the slightest causal connection between them. The risk of being bitten by a dog was no greater to him because of his employment than it was to any member of the public, who chanced

to be in the locality. The accident did not arise out of his employment."

So here, being struck by a falling limb cannot be traceable to the nature of the employment in which plaintiff was engaged and there was not the slightest causal connection between them. Mr. Justice BUTZEL cites *Arnested* v. *McNicholas, supra,* in which the employee was killed by gunfire while required by his employer to perform a special mission in a place of known danger where deer hunting was in progress during open season, the death being held to have resulted from injuries arising out of the employment. The distinction between *Arnested* and *Steffes, Ryan,* or the instant case is clear on the facts. To make the facts in the latter 3 cases comparable so as to call for application of the same rule and for the same result as in *Arnested* it would be necessary to conjure up a situation in each, under which, in *Steffes,* the foreman's eye would have been struck by a paper clip while he was performing a special mission in an area of known danger where a paper-clip-shooting contest was in progress; or, in *Ryan,* the employee would have been bitten while performing a special mission in an area of known danger where the presence of vicious dogs rendered the locality hazardous; or, in the instant case, plaintiff would have been struck by a falling limb while performing a special mission in an area of known danger where, customarily, trees were being felled and branches sawed out of trees. In each such situation the noted hazard would be, as in *Arnested,* an ordinary hazard of the place of employment, becoming connected with and incident to the employment. In the instant case, however, the falling branch was not an ordinary hazard of the street or traffic or of a place in which plaintiff was required to be. On the other hand, neither was the risk or danger in connection therewith peculiarly in-

cident to plaintiff's work or greater to him because of his employment than it was to any member of the public who chanced to be in the locality.

In point are *Klawinski* v. *Lake Shore & Michigan Southern R. Co.,* 185 Mich 643 (LRA1916A, 342); *Thier* v. *Widdifield,* 210 Mich 355; and *Nelson* v. *Country Club of Detroit,* 329 Mich 479, referred to by Mr. Justice BUTZEL as the "lightning cases where the injury occurred through an 'act of God.'" The applicability of those cases is in no wise diminished by the fact that "there was no storm or unusual weather conditions" or that the limb was "a little decayed." Bouvier's Law Dictionary (Rawle's 3d Rev) defines an act of God as:

"Any accident due to natural causes directly and exclusively without human intervention."

In *Tobin* v. *Lake Shore & Michigan Southern R. Co.,* 192 Mich 549, this Court said:

"An 'act of God' is defined as 'Inevitable accident without the intervention of man or the public enemy.' 29 Cyc p 441."

In *Jacobs* v. *Hagenbeck-Wallace Shows,* 198 Mich 73 (LRA1918A, 504, 16 NCCA 535), this Court approved an instruction that "an act of God may be defined as a natural cause." These definitions and the holdings in the cited "lightning cases" indicate no varying rule of law to be applied to injuries resulting from different, unexpected occurrences occasioned by the moving forces of nature, one if it be a descending bolt of lightning and another if a falling branch, dropped through natural causes and the forces of nature without human intervention or negligence. Whether it be by lightning, such falling branch, a dog bite, as in *Ryan,* or a flying pheasant, as in *Levchuk* v. *Krug Cement Products Co.,* 246 Mich 589, and as mentioned in *Steffes,* the injury does not

arise out of the employment. In this connection, it is to be noted that there is not one scintilla of evidence in the record to establish, or any from which the reasonable inference may be drawn, that the slightly decayed condition of the branch, its presence in the tree, or its falling into the street, was in anywise due to human negligence.

The language first employed by this Court in *Klawinski,* and quoted with approval in *Thier* and *Nelson,* with reference to injuries caused by lightning is equally applicable to the injury here caused by a falling limb, namely:

"It is clear * * * that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that plaintiff's decedent by reason of his employment was in no way exposed to injuries from lightning other than the community generally in that locality."

as is, also, the following from *Nelson:*

"There is no showing that plaintiff here was, by reason of his employment, in any way exposed to injuries from lightning other than the community generally in the locality in question or that there was anything about his employment which, through any agency of man, combined with the elements to produce the injury."

and the following from *Thier:*

"We conclude by saying that, in our opinion, there is in the instant case no evidence tending to prove that the death was brought about by the extra hazardous nature of the employment. As was said by the English court, it is not enough for the applicant to say, 'the accident could not have happened if I had not been engaged in the employment, or if I had not been in this particular place.' The applicant must go further and say, 'the accident arose because

of something I was doing in the course of my employment, and because I was exposed by the nature of my employment to some particular danger.' "

There is no magic in the term "special mission" which can operate to make an employer more liable to an employee on a special mission than he would be to an employee at work in the employer's established place of business for injuries resulting from lightning, biting dogs, falling limbs, or other causes disassociated from the employment, so long as the special mission in no way exposed the employee to such dangers other than the community generally in that locality.

Plaintiff seeks to distinguish the case at bar from the cited "lightning cases" on the factual basis that in *Thier, Klawinski* and *Nelson:*

"The injured party selected his own position at the time of accident, no duty was being performed that was a regular part of the work, nothing beneficial was being done for the employer, and the employee was serving himself in protecting himself from the weather and storm."

An examination of the opinions in those cases discloses that these distinguishing features on the facts were not treated as determinative factors in the decisions. On the contrary, the controlling tests applied were as set forth in the language above quoted from the opinions in those cases.

To sum up, this is neither a case of injury resulting from the ordinary hazards of the place of employment, nor, on the other hand, of employment occasioning an unusual exposure to an extraordinary hazard to a degree beyond that of others in the community generally. The award should be reversed and set aside, with costs to defendants.

REID, J., concurred with DETHMERS, C. J.

SHARPE, J. (*dissenting*). A fair statement of the facts in the instant case appears in Justice BUTZEL's opinion. Admitting that the employee was injured "in the course of" his employment does not admit that the injury "arose out of" that employment. In *Levchuk* v. *Krug Cement Products Company,* 246 Mich 589, a divided court sustained the commission and the contention of defendants that the injury of plaintiff did not "arise out of" his employment even though it occurred "during the course of" that employment. In that case plaintiff reported for work at defendant's manufacturing plant in Detroit where he was picked up to be taken to a gravel pit several miles outside of the city. His duties consisted of taking charge of the gravel pit and assisting in loading trucks. Before reaching the gravel pit, a fowl of some kind flew against the windshield and shattered the glass causing the loss of an eye. In that case the Court said:

"Unless the proof justifies us in concluding that this particular risk or danger which resulted in plaintiff's injury was one which was peculiarly incident to his work as the caretaker and watchman of a gravel pit, it cannot be said that the accident arose out of his employment. Surely, it cannot be said that the risk or probability of the plaintiff's being injured by a pheasant or other fowl flying into the windshield of a motor vehicle in which he was riding was any greater because of the fact of his particular employment as a watchman or caretaker than would have been the risk or probability of injury to any other traveler in an automobile in the same locality."

Further, in that case the Court held that lightning cases presented substantially the same situation:

"In each of the cited cases this Court held that the accident resulting from the building or the person being struck by lightning did not arise out of the employment; and likewise it must be held in the

instant case that the pheasant striking the windshield and thereby causing plaintiff's injury did not arise out of the employment."

In the instant case Justice BUTZEL argues that the lightning cases are not controlling because the injury occurred through an "act of God." See *Klawinski* v. *Lake Shore & Michigan Southern R. Co.*, 185 Mich 643 (LRA1916A, 342); *Thier* v. *Widdifield*, 210 Mich 355; and *Nelson* v. *Country Club of Detroit*, 329 Mich 479. It does not appear in the record that any human agency combined with the forces of nature to cause the limb to fall. There was a mild breeze blowing. There is hearsay evidence that the limb was a "little decayed." Nothing more appears to show why that limb fell, it would seem to be one of those natural happenings which in its suddenness is wholly unexpected. Ordinarily prudent persons do not inspect the limbs of each tree along a street they are about to travel. In many cases careful inspection would not discover the unsound limb about to fall. In its suddenness the falling of a limb is similar to lightning. In 2 Words and Phrases, p 169 a number of definitions of an "act of God" may be found, including the following:

"The distinguishing characteristic of an 'act of God' is that it proceeds from the forces of nature alone, to the entire exclusion of human agency. *Rice* v. *Oregon Short Line R. Co.*, 33 Idaho 565 (198 P 161)."

"Natural causes which directly and exclusively, without human intervention, produce damages not preventable by any reasonable foresight and care, constitute 'act of God' for which no liability exists; rule being otherwise if defendant's negligence cooperates. *Perkins* v. *Vermont Hydro-Electric Corporation*, 106 Vt 367 (177 A 631)."

However, it does not seem to me critical to the argument that the falling limb be held to be an "act of God." The point is that the factual distinction between the lightning cases and the instant case made by Justice BUTZEL is not substantial. He does not attempt any distinction between the *Levchuk Case, supra,* and the instant case. Instead, he relies on *Stockley* v. *School District No. 1 of Portage Township,* 231 Mich 523 (24 NCCA 170); *Morse* v. *Port Huron & Detroit R. Co.,* 251 Mich 309; *Widman* v. *Murray Corporation of America,* 245 Mich 332; *Katz* v. *A. Kadans & Company,* 232 NY 420 (134 NE 330, 23 ALR 401); *Kunze* v. *Detroit Shade Tree Company,* 192 Mich 435 (LRA1917A, 252); and *Arnested* v. *McNicholas,* 223 Mich 488. He also points to 80 ALR 126 for a collection of cases holding that street injuries are compensable as arising out of the employment "when it is the employment itself that places the employee on the street."

The *Stockley Case, supra,* involves a teacher who was injured while en route to attend an institute which she was required to attend. The car in which she was riding was struck by an interurban railway car and she was killed. In that case the general rule is recognized that when an employee is injured away from his place of employment while going to and from his work the injury does not arise out of his employment. However, the Court holds that that case fell within an exception to the general rule where an employee is doing some special service or discharging some duty incidental to the nature of his employment in the interest of or under direction of his employer. However, it must be recognized that critical to the decision is the fact that in that case the employee was required to make a journey of 12 miles away from her home and regular place of employment and thereby subjected to greater hazards

of travel than she would ordinarily experience in traveling to and from work.

"The criterion is not necessarily that others are exposed to the same dangers of travel, but whether with reference to the nature of his employment the performance of a special service within the scope of such employment, in the interest of or by direction of his employer, particularly subjects an employee to the *added danger* out of which the accident arises." (Emphasis supplied.)

It is questionable in the instant case whether the employee was subjected to any "added danger." It seems to me that in traveling to Central High School he was not subjected to any greater danger from the hazards of travel than if he was on his way to his regular place of employment.

In the *Morse Case, supra,* the defendant's employee after ordinary working hours had the duty of making bank deposits, and while on his way to make such a deposit he was struck by a car which resulted in his death. In that case the comment of Chief Justice WIEST concurring in affirmance is illuminating:

"I concur in the result. The employee was in the street, about the business of his employer, therefore the accident, incident to a hazard in using the street, arose out of and in the course of his employment.

"Beyond deciding the case before us, I do not care to be committed."

That case is different than the instant case in that in that case the carrying of the deposit to the bank was the service to be performed by the employee. Not so, in the instant case. In the instant case the employee was on the way to perform the service.

The *Widman Case, supra,* offers nothing new. In that case the employee was sent from Chicago to the west coast on business of the employer. While riding in the observation car of a train he was struck

in the eye by a cinder. The Court disposed of that case with the familiar language:

"We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature." Quoted with approval from *Kunze* v. *Detroit Shade Tree Co.,* 192 Mich 435, (LRA1917A, 252).

Applied to the instant case it cannot be said that the *very nature* of the duties of an electrician on his way to hook up several electric ranges involved any unusual risk of being struck by a falling limb.

The *Katz Case, supra,* involves a dairyman's chauffeur who was on the streets in performance of his duties when stabbed by a madman. Again a factual distinction appears when compared with the instant case in that in that case the service performed by the employee was performed on the streets. However, there is language in that case peculiarly applicable to the case at bar:

"Cases may arise where one is hurt in the street, but where the risk is of a general nature, not peculiar to the street. Lightning strikes fortuitously in the street; bombs dropped by enemy aircraft do not expose to special danger persons in a street as distinguished from those in houses. *Allcock* v. *Rogers,* [1918] House of Lords, 11 BWCC 149 (87 LJKB 693, 118 LT 386, 34 TLR 324, 62 SJ 421). The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer."

As applied to the instant case the risk of being struck by a falling limb is not a risk peculiar to the street any more than is the risk of being struck by lightning.

The *Kunze Case, supra,* involves an employee engaged in trimming and planting trees. He was injured while proceeding from one job to another. The Court said:

"We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature."

The decision of Justice BUTZEL may be justified on the ground that it is within a group of cases representing an established exception to the general rule that ordinarily injuries to an employee while going to and from work are not regarded as arising out of and in the scope of his employment when the employee is on his way to perform some special service or to discharge some duty incidental to the nature of his employment or in the interest of or under the direction of his employer or where the employee is on his way home from such a mission. Cases of this character are collected in 142 ALR 885. However, that exception recently has been repudiated in Michigan. In *Phillips* v. *Fitzhugh Motor Company,* 330 Mich 183, the injured employee was returning home after having rendered a service to his employer, while in the case at bar the employee was going to a place where he could render a service to his employer. The writer of this opinion wrote the dissenting opinion in the *Phillips Case.* I now feel bound by the majority opinion in that case. The majority opinion in the *Phillips Case* relies on *Daniel* v. *Murray Corporation of America,* 326 Mich 1:

"In order that compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough." Quoted with approval from the *McNicol's Case,* 215 Mass 497 (102 NE 697, LRA1916A, 306).

The opinion of Mr. Justice BUTZEL eliminates the element of injuries that arise out of employment. Some causal connection between the risk that resulted in the injury and the duties of employment should be required. In the case at bar the risk of being struck by a falling limb while traveling on a public highway had no connection with the employee's duties of hooking up electric ranges at the high school. For the reasons above stated I concur in reversal, with costs to defendants.

BOYLES, J., did not sit.

PEOPLE *v.* HERTZ DRIVEURSELF STATIONS, INC.

1. AUTOMOBILES—CONTRACT CARRIERS—LESSOR OF TRUCKS.
   Lessor of trucks was not subject to license as a contract motor carrier of property under motor carrier act, where it furnished fuel, oil, lubricants, repairs, insurance, license tags, garage and other service for the equipment to a lessee who paid rental based largely on mileage, took sole possession, furnished its own driver and transported its own property (CL 1948, § 477.1 *et seq.*).

2. SAME—MOTOR CARRIERS—LEASED EQUIPMENT—CONSTITUTIONAL LAW.
   The regulation of the business of leasing motor equipment to a lessee over whom the lessor exercised no control whatsoever

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 37 Am Jur, Motor Transportation §§ 72, 75.
[1–3] Statutes requiring license for use of highway by private motor carriers and contract motor carriers for hire. 109 ALR 550. When automobile or truck deemed to be operated "for compensation" or "for hire" within contemplation of license or tax statute or ordinance. 80 ALR 574.
[4] 14 Am Jur, Costs § 91.

is not a business covered by the title of the motor carrier act or within the purpose of the act as stated elsewhere than in amendment seeking to regulate the business of such leasing, hence, such amendment is unconstitutional (Const 1908, art 5, § 21; CL 1948, §§ 475.1, 475.2, 479.1).

3. SAME—LEASED EQUIPMENT—MOTOR CARRIER ACT.

The purpose of the motor carrier act is to promote safety and conserve the use of the highways of the State and to supervise, regulate and control the use of such highways by motor carriers of passengers and property for hire upon and over such highways, hence, does not cover the business of leasing motor equipment to a lessee by a lessor who did not itself transport passengers or property for hire (CL 1948, § 475.1 *et seq.*).

4. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTES.

No costs are allowed in criminal prosecution involving the construction of the motor carrier act, a public question being involved (CL 1948, § 475.1 *et seq.*).

Appeal from Saginaw; O'Neill (James E.), J. Submitted June 11, 1953. (Docket No. 71, Calendar No. 45,732.) Decided November 27, 1953.

Hertz Driveurself Stations, Inc., was charged with operating on the public highways without a contract carrier permit. Complaint and summons dismissed on motion. The people appeal. Affirmed.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara, Charles M. A. Martin* and *Robert A. Derengoski,* Assistants Attorney General, for the people.

Henry M. Hogan (*Walter R. Frizzell* and *Crane, Crane & Kessell,* of counsel), for defendant.

BUTZEL, J. Hertz Driveurself Stations, Inc., defendant, referred to herein as Hertz, was charged by the People of the State of Michigan, plaintiff, referred to herein as the State, with leasing, licensing or permitting the use of certain motor vehicles reg-

istered in its name by Associated Fruit & Produce Company, Inc., herein referred to as Associated, over the highways of the State of Michigan without a contract carrier permit first being obtained from the Michigan public service commission and contrary to the provisions of PA 1933, No 254, art 3, § 1 *et seq.*, as amended (being CL 1948, § 477.1 *et seq.* [Stat Ann § 22.548 *et seq.*]), and popularly known as the Michigan motor carrier act and so designated in the record and briefs.

Hertz, upon being found guilty by a justice of the peace, appealed to the circuit court for the county of Saginaw where the judge after directing a verdict of guilty set it aside and ordered a dismissal of the summons and complaint. The judge relied very strongly upon a very comprehensive and able opinion of Judge Chester P. O'Hara of the Wayne circuit court, in which under similar facts, he found that the act did not affect lessor-owners, and if it did, the act would be unconstitutional as to them. The State has aided us by printing Judge O'Hara's opinion as an appendix to its brief. The State appeals.

In an agreed statement of facts, the State admitted that if Associated "were the record title owner, hauling their own merchandise, then it (Michigan motor carrier act) has no application, but under these facts it isn't a question of fact but of statutory interpretation."

It was also stipulated under an agreed statement of facts that the evidence on behalf of the defendant developed the following facts:

"(a) A motor vehicle properly registered in the name of defendant was leased by said defendant to Associated Fruit & Produce Company of Flint on a long-term basis.

"(b) The operation of said motor vehicle over the highways of the State of Michigan was under the complete domination and control of lessee, except the

vehicle was maintained, insured and serviced by Hertz in its own garage.

"(c) The chauffeur engaged in driving said motor vehicle has been employed by said lessee for this purpose for a period of 4 years.

"(d) Said employee has no relationship with defendant.

"(e) Said employee is paid wages by said lessee for performing his duties as chauffeur.

"(f) Said employee receives all his instructions relative to his employment from said lessee.

"(g) The property (fruit jars) transported in said motor vehicle was owned by said lessee and was being transported by said lessee as a part of its commercial enterprise of dealing in fruits and vegetables."

The long-term lease between Hertz and Associated is not set forth in the agreed statement of facts, except as hereinbefore indicated. It is, however, printed as the appendix to the State's brief, and as the State bases the sole question involved partly on the terms of the lease, we briefly refer to some of its terms. It is dated October 26, 1944, and provides for the leasing of motor vehicles, evidently trucks, by Hertz as lessor to Associated as lessee. Hertz is to furnish fuel, oil, lubricants, repairs, insurance, license tags, garage and other service for the trucks. Associated agrees to pay a rental in the main based on mileage and takes sole possession of the motor vehicle for the term of the lease.

The particular section of the act on which the charge is based is as follows:

"No contract motor carrier of passengers or property shall operate any motor vehicle for the transportation of either persons or property for hire on any public highway in this State, except in accordance with the provisions of this act. It shall be unlawful for any contract motor carrier of passengers or property to operate within this State without first

having obtained from the commission a permit therefor." CL 1948, § 477.1 (Stat Ann § 22.548).

Under the facts as stipulated, defendant Hertz did not operate any motor vehicle for the transportation of either persons or property for hire on any public highway in the State—it merely leased the motor equipment to Associated. It retained no control, did not employ the driver, who was an old employee of Associated, and exercised no direction or control over him or Associated. It contends that it did not carry property for hire and did not operate a motor vehicle as a contract motor carrier.

The motor carrier act, prior to its amendment in 1945 defined the term "contract motor carrier of property" as follows:

"(i) The term 'contract motor carrier of property,' when used in this act, shall mean any person engaged in the transportation by motor vehicle of property for hire upon the public highways of this state other than as a common carrier of property." PA 1933, No 254, art 1, § 1(i) (CLS 1940, § 11352–1, Stat Ann § 22.531).

The declared purpose and policy of the act is stated to be "to confer upon the commission the power and authority and make it its duty to supervise and regulate the transportation of persons or property by motor vehicle for hire upon and over the public highways of the state." CL 1948, § 475.2 (Stat Ann § 22.532).

The policy was further set forth as follows:

"The business of all motor carriers of passengers and property operating over the highways of this State for hire is hereby declared to be affected with a public interest." CL 1948, § 479.1 (Stat Ann § 22.566).

When the act was amended in 1945, the definition of a contract motor carrier hereinbefore quoted was

amended by adding the following language to article 1, § 1(i), *supra,* in an attempt to include the owners of vehicles under certain circumstances:

"And including any person who leases, licenses, or otherwise permits the use of, any motor vehicle registered in his name to or by any person for the transportation of property upon the public highways of this State, of which property such latter person is the owner or lessee, when such transportation is for the purpose of sale, lease, rent or manufacture of such property or in furtherance of any commercial or industrial enterprise in connection with said property."

The title to the motor carrier act, as enacted in 1933, however, remained the same as before the amendment of 1945, and reads in part as follows:

"An act to promote safety upon and conserve the use of the public highways of the State; to provide for the supervision, regulation and control of the use of such highways by all motor vehicles operated by carriers of passengers and property for hire upon and over such highways."

Neither the title to the act nor the statutes setting forth the purpose and policy as hereinbefore quoted has been changed.

The amendment of 1945 thus attempted to reach the business not only of the carrier but also the owners of vehicles who were not carriers or transporters of property but who leased their vehicles to third parties over whom the lessors exercised no control whatsoever. This is an entirely different business and in no way is it covered by the title or purpose of the act. Article 5, § 21, of the Michigan Constitution of 1908 provides that no law shall embrace more than one object, which shall be expressed in its title. Only recently, in the case of *Rohan* v. *Detroit Racing Association,* 314 Mich 326 (166 ALR 1246), in view of this constitutional provision, it was held that its

object and purpose were to regulate and license horse racing meets; that it did not give notice of, or call attention to, or in any way express or indicate, the object or purpose of delegating authority to the department of agriculture to lease State-owned land for the purpose of conducting horse racing as provided in the act itself.

Both Hertz and the State place much stress on *Grand Rapids Motor Coach Company* v. *Public Service Commission,* 323 Mich 624, wherein we stated that the purpose of the motor carrier act is to promote safety and conserve the use of highways of the State and, therefore, to supervise, regulate and control the use of such highways by motor carriers of passengers or property *for hire* upon and over such highways. The case only referred to motor carriers of passengers and property *for hire.* Hertz neither transported passengers nor property for hire; it simply leased its trucks.

In view of our decision, it is unnecessary to discuss other questions raised by appellee.

The order dismissing the complaint and summons is affirmed, but without costs as a public question is involved.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE *v.* LOUZON.

1. CRIMINAL LAW—IDENTIFICATION OF ROBBERS—EVIDENCE.

   The credibility of testimony of theater janitor who was overpowered incident to robbing safe and who identified the accused as his assailants *held,* for the jury under evidence presented as to statements he had made as to inability to identify the robbers shortly after the robbery.

2. SAME — CONFESSIONS — VOLUNTARINESS — PRELIMINARY EXAMINATION.

   It was proper for trial judge in prosecution for robbery to conduct a preliminary examination in the absence of the jury to determine the voluntary character of confessions prior to their admission to the jury.

3. SAME—CONFESSIONS—VOLUNTARINESS—EVIDENCE.

   Reception in evidence of 2 confessions by 1 of 3 defendants in prosecution for robbery and submitting question of their voluntary character to jury *held,* proper, in view of conflicting testimony.

4. SAME—CONFESSIONS—PRELIMINARY EXAMINATION.

   Preliminary testimony which makes it clear that the confession of one charged with crime was voluntary imposed a duty upon the trial court to admit it; that it was involuntary, to reject it; that it was doubtful as to whether or not it was voluntary, to admit it and have question of voluntariness submitted to jury under proper instructions.

5. SAME—INTERROGATION OF SUSPECTED PERSONS.

   Interrogation by police officers of persons suspected of crime has social value in the solution of crime as the duty to disclose knowledge of crime rests upon all citizens, the limits of the

---

REFERENCES FOR POINTS IN HEADNOTES

[2, 4] 20 Am Jur, Evidence § 534.
[2, 4] Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession. 102 ALR 605.
[3–7, 9, 10] 20 Am Jur, Evidence § 480 *et seq.*
[8, 15] 58 Am Jur, Witnesses § 36 *et seq.*
[12] 31 Am Jur, Jury § 107.

inquiry being dependent upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.

6. SAME—CONFESSIONS—PHYSICAL COERCION—FALSE PROMISES.
Confessions are inadmissible when secured by inflicting physical force or its equivalent by means of harsh or cruel treatment or false promises.

7. SAME—CONFESSIONS—VOLUNTARINESS.
A confession, to be admissible, must be voluntary, but need not be voluntcered.

8. SAME—CONSTITUTIONAL LAW—PROTECTION AGAINST SELF-INCRIMINATION.
No one may be forced to be a witness against himself in a criminal case (Const 1908, art 2, § 16).

9. SAME—CONFESSIONS—SUPREME COURT.
The Supreme Court will examine the record on appeal to determine whether the trial judge and jury are both wrong in determining that a confession was voluntary if it finds the finding of the trial court in such matter was against the great weight of the evidence.

10. SAME—CONFESSIONS—PRELIMINARY EXAMINATION—VOLUNTARINESS—INSTRUCTIONS.
The confessions made by 1 of 3 persons charged with committing a robbery were properly admitted as against the confessor, where trial court conducted a preliminary examination out of the presence of the jury, admitted them in evidence, submitted matter of voluntariness to the jury and restricted their use to proof of guilt of the confessor alone inasmuch as the other 2 accused did not confess and statements implicating them were not made in their presence and Supreme Court does not find that finding of voluntariness was against the great weight of the evidence.

11. SAME—ROBBERY ARMED—CONVICTION OF LESSER OFFENSE—ROBBERY NOT ARMED.
Conviction of lesser crime of robbery not armed was not error on charge of robbery armed.

12. SAME—VOIR DIRE EXAMINATION.
Trial court's refusal to permit submission to jury on *voir dire* examination of questions as to whether jury would be prejudiced if it were to develop that any 1 or all of the 3 defendants, charged with robbery armed, had been convicted of former offenses and whether guilt or innocence could be determined solely on facts presented entirely uninfluenced by evidence of

former police records *held,* proper, where defense attorneys brought out records of former convictions and a fair charge was given by the trial judge, since the jury could consider the character of men with criminal records in judging their credibility as witnesses; the questions not being complete.

13. SAME—ROBBERY NOT ARMED—GREAT WEIGHT OF EVIDENCE.
Convictions of 3 defendants of robbery not armed *held,* not against the great weight of the evidence.

14. SAME—ROBBERY—CHARGE OF COURT.
Charge of the trial judge in prosecution of 3 defendants for robbery armed and in which they were convicted of robbery not armed *held,* to have been a very fair charge.

15. SAME—DEFENDANT AS WITNESS.
The defendant in a prosecution for crime is not obliged to take the witness stand.

16. SAME—ALIBI—EVIDENCE.
Alibi on part of 1 of 3 defendants in prosecution for robbery armed and in which they were convicted of robbery not armed *held,* not established by testimony adduced.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 15, 1953. (Docket No. 78, Calendar No. 45,650.) Decided November 27, 1953. Rehearing denied February 18, 1954.

Edward Louzon, Richard Sen and Archie Long were convicted of robbery not armed. Affirmed.

W. Newton Hawkins, for defendants Louzon and Sen.

Edward N. Barnard, for defendant Louzon on application for rehearing.

Lowery B. Hicks, for defendant Long.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,* Prosecuting Attorney, *Ralph Garber,* Chief Assistant Prosecuting Attorney, and *Samuel Brezner* and *Samuel J. Torina,* Assistant Prosecuting Attorneys, for the people.

BUTZEL, J. Edward Louzon, Richard Sen and Archie Long were tried together and found guilty of robbery not armed. They appealed from the jury's verdicts, judgments entered thereon, and denial of motions for a new trial.

While at work at the Lancaster theater in River Rouge, Michigan, around 2 a.m. on March 26, 1951, Otto Agnew, a janitor, was overpowered by 3 men, 1 of whom pressed a hard round object against his body and made him open the manager's office. Subsequently he was confined in the men's room and from there heard the hammering of the robbers in their attempt to open a safe. The robbers worked rapidly and broke open a small safe and removed therefrom $676 placed there by the theater cashier. Before leaving the theater they bound Agnew with a cord from a vacuum cleaner. They threatened him and stated they would kill him if he attempted to be a hero. After their departure, Agnew managed to crawl to the door and call for assistance from a passer-by who summoned the police.

Immediately following the robbery Agnew stated to several witnesses that he could not identify the robbers, and that 1 had a paper bag over his head. At the trial he positively identified the 3 defendants as the men who had committed the robbery. He testified that his earlier denial of ability to identify the 3 men was made because of the threats the men had made to him and his fear induced thereby. He stated that he had been scared by the threats and was still scared. He further testified that he had to go to the hospital a short time after the robbery because of a heart condition which he claimed was caused by his experience during the robbery. The credibility of his testimony was to be judged by the jury.

It was not until 5:30 p.m. on April 11, 1951, that defendant Sen was arrested for investigation in regard to several crimes that had been committed in

River Rouge. He claims that he was interrogated that same evening but denied participation in any crime. He was questioned about 7 times while in custody. He requested permission to see his mother and also an attorney but was refused. His mother finally located him and she was also told that she could not see him until the investigation was completed. She was, however, finally permitted to see him about 6:30 p.m. in the evening of April 13, 1951, and later that same evening about 8:30 Sen signed a confession written up by 1 of the police officers. In it he implicated the other 2 defendants, who had also been apprehended. The following day all 3 defendants were taken to the prosecutor's office in Detroit where Sen made a very complete and full confession, stating in detail what occurred. In this second confession Sen stated that no promises had been held out to him; that his answers were free and voluntary; and that he was aware of his constitutional privilege not to answer the questions. Both Louzon and Long became very angry when Sen made this confession at the prosecutor's office and they were permitted to leave the room.

The trial judge properly conducted a preliminary examination in the absence of the jury to determine the voluntary character of the confessions prior to their admission to the jury. *People* v. *Prestidge,* 182 Mich 80; *People* v. *Dudgeon,* 229 Mich 26. Defendant Sen claimed that he volunteered to accompany the officers to the police station the afternoon they stopped him but after being interrogated he was pushed into a cell which had only a bench and a steel sheet for a bed. Sen testified that he was cold and could not sleep because the steel sheet was not provided with a mattress, a pillow, or blankets. He stated that the next morning he was served chili but received no spoon. He could not, or did not, eat the chili. The following day he was served eggs

and potatoes that were cold. He claimed that all the meals were unpalatable. He was able to drink the coffee. He made no claim whatsoever that any physical violence was used or that he was subjected to constant interrogation. The trial judge very carefully went into the details when Sen stated that the entire confession was untrue and that he signed in order to be released. Upon questioning, Sen admitted that he was responsible for the statement in the confession that he drove his car toward the Lancaster theater and turned into an alley and let Louzon and Long out of the car; also, that they all had "handkerchiefs over their faces." The absurdity of his claim that the confession was all made up by the officers is shown by these admissions. He also claimed that he signed the confession because the officers told him that they were after Louzon and Long and not after him as he did not have the record that the other 2 had. Sen further testified that the officers told him that they would try to get him off with probation. The judge pertinently asked him why he would want probation if he had committed no crime. At the conclusion of the preliminary examination the trial judge stated that both confessions would be received into evidence and the question of their voluntary character would be submitted to the jury. This was proper in view of the conflicting testimony, *People* v. *Crow,* 304 Mich 529; *People* v. *Cavanaugh,* 246 Mich 680; *People* v. *Dudgeon, supra.*

Many decisions are cited to the effect that confessions obtained through physical violence or intimidation through threat of harm, promises, inducements or hope of reward, or a method known as "sweating" are inadmissible. *People* v. *Brockett,* 195 Mich 169; *People* v. *Cavanaugh, supra; People* v. *Prestidge, supra.* Defendants rely upon *People* v. *Cavanaugh, supra,* wherein we condemned confes-

sions obtained through improper methods. But in that case we also stated:

"The police had testified that the confession was voluntary. Defendant had an undoubted right to lay before the jury his full claim of what the police said to him, and it was for the jury to say whether, under all the circumstances, the confession was voluntary."

In *People* v. *Prestidge, supra,* we stated at page 82:

"If the preliminary testimony made it clear either that the statement claimed to have been made was voluntary or involuntary, it was the duty of the trial court to admit or reject it. If the testimony left the question in doubt, it was the duty of the court to admit it, and leave the question to the jury under proper instructions to determine whether it was voluntarily made."

In *People* v. *Moshier,* 306 Mich 714, 721, we stated:

"Nellie Brooks and the defendant were both sworn and testified before the jury. Their testimony was squarely contradictory. The jury is the sole judge as to the credibility of witnesses. The jury heard the testimony of these witnesses, of the State police officers who obtained the confession, and others who corroborated the people's claim of guilt. *It was not for this Court to say that the jury erred in accepting the defendant's confession as true.* The issue was adequately before the jury, whether to believe the defendant's detailed confession of the crime, or her subsequent testimony at the trial that it was merely a story she concocted at Nellie Brooks' suggestion. The court did not err in refusing to set aside the verdict, and in denying a new trial on this asserted ground." (Italics supplied.)

It is true that the United States supreme court in capital cases has for many years condemned the

use of confessions where force, mental intimidation, promises, or inducements were held out to obtain the confessions, but in the most recent case of *Stein* v. *New York*, 346 US 156, 184 (73 S Ct 1077, 97 L ed 1522), the court, in the majority opinion, stated as follows:

"Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving a crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. This Court never has held that the Fourteenth Amendment prohibits a State from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.

"Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

We believe that the judge properly submitted to the jury the question of voluntariness of the confessions and that there was no error.

We recognize the rule that confessions are inadmissible when secured by inflicting physical force or its equivalent by means of harsh or cruel treatment or false promises. The confession must be voluntary, but this does not mean that it must be volunteered. No one may be forced to be a wit-

ness against himself.* It is argued that in times of hysteria or during a crime wave and particularly after a heinous crime has been committed, improper methods may be used to force a confession. The law affords ample protection against such an abuse. If it is apparent that improper methods have been used to force a confession, the judge will refuse to admit it into evidence. Even if he is satisfied that the confession was not improperly obtained, but there is some question, he will leave it to the jury to determine whether it was voluntary or not. If the judge and the jury are both in error, this Court on appeal will examine the record. If we find that the finding of the trial court is against the great weight of the evidence, it becomes our duty to reverse and order a new trial. We find no reason to reverse in the present case.

The confessions of defendant Sen were admissible as evidence only against him. The court properly instructed the jury, stating:

"First of all, it is a confession only as to Sen and must not be regarded as any proof of guilt on the part of the other 2 defendants, because they didn't confess, and this statement was not made accusing them in their presence."

In *Stein* v. *New York, supra,* 1 of the 3 codefendants did not confess. The trial court denied a motion by this defendant that all references to him in the confessions be stricken from them. The New York court of appeals affirmed without opinion. The United States supreme court stated at page 196:

"Perhaps the methods adopted by the New York courts to protect Wissner against any disadvantage from the State's use of the Cooper and Stein confessions were not the most effective conceivable. But 'its procedure does not run afoul of the Four-

* See Const 1908, art 2, § 16.—REPORTER.

teenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder* v. *Massachusetts,* 291 US 97 (54 S Ct 330, 78 L ed 674).

The trial court in admitting the confessions under the instruction that they were to be considered as evidence solely against Sen followed the established procedure in this State. *People* v. *Roxborough,* 307 Mich 575, and citations therein.

Error is claimed because the charge against the defendants was robbery armed and they were convicted of a lesser crime of robbery not armed. There was no error in convicting defendants of this lesser offense. *People* v. *Rose,* 268 Mich 529; *People* v. *Bradovich,* 305 Mich 329.

Defendants further claim that there was error of the court in not permitting the following 2 questions to be submitted to the jury on the voir dire examination:

"If, in the course of this trial it were to develop that any 1 or all of these defendants had been convicted of former offenses, would that fact prejudice you against them in any degree?

"Do you feel that you can determine the guilt or innocence of these defendants on a basis solely of facts presented here pertaining to this case only, and be entirely uninfluenced by any evidence of former police records?"

These questions left out an important element. Undoubtedly the jury could consider the character of men with criminal records in judging their credibility as witnesses. If previous convictions of the defendants were brought out during the trial, the jury could consider this in evaluating the credibility of the defendants as witnesses. Had the questions been complete, the probability is that the jury might have answered that it would affect their opinion as

to the credibility of the defendants as witnesses. The prosecutors refrained from examining the witnesses in regard to their former convictions. The past records were brought out by defendants' own attorneys not by the prosecutor. The judge gave a very fair charge in regard to former convictions, et cetera, and defendants were not prejudiced through the refusal of the court to permit the asking of these questions on the voir dire.

Further error is claimed on the ground that the verdicts were against the great weight of the evidence and because of the charge of the judge. We believe that the convictions were not against the great weight of the evidence and the judge gave a very fair charge.

Defendant Long did not take the stand nor was he obliged to. He and the other defendants attempted to establish alibis as to their whereabouts during the late hours of night or early hours of the morning of March 25 and 26, 1951, almost 10 months prior to the trial of the case. These alibi witnesses did not impress the jury.

The register of a motel was introduced into evidence wherein it appeared that Long signed the names of "Mr. and Mrs. Archie Long" some time after midnight on March 26, 1951. A witness testified that she met defendant Long at about 2:40 a.m. in response to his phone call at 2:25 a.m. They arrived at the motel at 3:00 a.m. and left shortly thereafter. Inasmuch as the police released Agnew between 2:00 and 2:30 a.m., when the robbers had already fled, there was ample time for Long to meet this woman after the robbery occurred. The testimony did not establish an alibi on his part.

The convictions are affirmed.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

COZADD *v.* HEALY.

1. MONEY RECEIVED—JUDGMENT—ESCROW—INTEREST—EVIDENCE.
   Trial judge in nonjury action of trespass on the case for recovery of sums placed with defendant in escrow, who observed the witnesses and appraised the value of their testimony *held,* not in error in rendering judgment for plaintiff for amount of sum left in escrow and interest thereon from date of demand.

2. ACTION ON THE CASE—CONVERSION OF ESCROWED FUNDS—FORM OF ACTION.
   Action of trespass on the case was proper form of action to recover sum left with defendant for purpose of settling a tax case with the Federal government but which never came into his possession as his money, his retention thereof constituting an unlawful conversion.

Appeal from Wayne; Miller (Guy A.), J. Submitted October 9, 1953. (Docket No. 59, Calendar No. 45,954.) Decided November 27, 1953.

Case by Charles B. Cozadd, administrator *de bonis non* of the estate of Seweryn Kutnieski, deceased, against Robert K. Healy, for conversion of money in escrow. Judgment for plaintiff. Defendant appeals. Affirmed.

Cozadd, Shangle, Schmidt & Weideman, for plaintiff.

C. Leo Wing, for defendant.

SHARPE, J. This is an action to recover moneys placed in escrow. It is the claim of plaintiffs that

---

REFERENCES FOR POINTS IN HEADNOTES

[2] Generally, see 52 Am Jur, Trespass on the Case § 9 *et seq.*

on June 28, 1948, Seweryn Kutnieski and John Kutnieski turned over to defendant, Robert K. Healy, the sum of $3,000 and in return received a receipt which reads as follows:

"This money to be held in escrow until satisfactory settlement of tax case."

It appears that some time prior to May 21, 1948, Seweryn Kutnieski and John Kutnieski conferred with defendant, Robert K. Healy, in relation to certain income tax matters in which they were involved with the United States internal revenue department, and that on or about May 21, 1948, employed defendant to make an adjustment or settlement of the claim. Defendant was paid $1,300 for services rendered or to be rendered prior to and after the item involving the $3,000.

It is the claim of plaintiffs that the money was turned over to defendant for the purpose of making a partial payment to the United States internal revenue department as soon as a satisfactory agreement on the liability of plaintiffs could be arrived at with the internal revenue department. It is the claim of defendant that the money deposited with him in escrow was to be retained by him as his fee when and if a satisfactory settlement of the tax matter was effected; that a settlement was effected, and that he is the lawful owner of the money so deposited. In support of his right to retain the money for services rendered, defendant offered evidence to the effect that because plaintiffs' books and records were in such a poor condition, it was necessary to investigate plaintiffs' financial affairs as far back as 1925 to determine the correctness of the determination of the internal revenue department; that it was necessary to investigate the sales tax feature of the case, and that in doing so he spent much time and investigation in order to build up

plaintiffs' books and records to reflect the true condition of plaintiffs' financial affairs, and that for these services he received the sum of $1,300; that after partially completing this work, he determined that he should have his fees for the Federal phase of the case pertaining to the work that would be necessary in negotiating a settlement with the internal revenue department; that the case was finally settled in January, 1950, although defendant had previously brought about several offers of settlement which were not accepted by the plaintiffs.

Plaintiffs urge that defendant offered no evidence of the work performed such as expenditures, correspondence, memoranda of daily time sheets, or witnesses from the Michigan sales tax department or internal revenue department to corroborate any effort which he claims he performed on behalf of plaintiffs. The cause came on for trial, and at its conclusion the trial court entered judgment for plaintiffs in the amount of $3,497.08, which represented the $3,000 and interest from the date of demand for its return by plaintiffs.

The trial court did not file a written opinion; hence, we do not have the benefit of his reasoning in the matter, but we must conclude that he accepted plaintiffs' theory of the case, namely, that the $3,000 was placed in the possession of the defendant for the purpose of making a payment on the amount found to be owing to the internal revenue department.

Defendant appeals and urges that the judgment is against the clear preponderance of the evidence and should be reversed. The principal issue in this case is a factual one in which the credibility of witnesses is vital to the success or failure of plaintiffs' case. We have often said that the trial judge has greater opportunity to observe the witnesses and appraise the value of their testimony than does

an appellate court. In the case at bar the trial judge has had many years of experience in observing witnesses and evaluating their testimony. We cannot say that he was in error in his conclusions in the case at bar. The evidence does not clearly preponderate in the opposite direction, and we affirm the finding of facts by the trial judge.

Defendant also urges that the facts in this case do not support a judgment in trespass on the case. The theory on which plaintiffs founded their case was that the money was placed in defendant's possession for the purpose of paying whatever might be found due the internal revenue department, but was converted by defendant to his own use. In the case at bar the $3,000 never came into defendant's possession as his money. He never had any right to any part of it except for a certain purpose. His retention of the fund was an unlawful conversion.

See *Pierce* v. *Underwood,* 103 Mich 62; *Hogue* v. *Wells,* 180 Mich 19; *Moore* v. *Andrews,* 203 Mich 219.

The judgment is affirmed, with costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

PEOPLE v. HOLLINGSWORTH.

1. CRIMINAL LAW—CHANGE OF PLEA—SENTENCE.
   Generally, a defendant in a criminal prosecution has the privilege of changing a plea of guilty to one of not guilty at any time prior to sentence.

2. SAME—WITHDRAWAL OF PLEA OF GUILTY—DISCRETION OF COURT—SENTENCE.
   It was an abuse of discretion for trial judge to deny motion to withdraw plea of guilty to charge of uttering and publishing a worthless check, where motion for such purpose was made before trial judge pronounced sentence and reason for motion, that contents of probation report had not been treated as confidential information, was announced by defendants' counsel.

Appeal from Recorder's Court for the City of Detroit, Ide (O. Z.), J. Submitted October 16, 1953. (Docket No. 82, Calendar No. 45,845.) Decided November 27, 1953.

Motion by Beatrice Hollingsworth for leave to withdraw plea of guilty and for new trial denied. Defendant appeals. Sentence vacated and case remanded for new trial.

James N. McNally, for defendant.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,* Prosecuting Attorney, *Ralph Garber,* Chief Assistant Prosecuting Attorney, and *Samuel Brezner* and *Samuel J. Torina,* Assistant Prosecuting Attorneys, for the people.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 14 Am Jur, Criminal Law §§ 286–288.5.

[1, 2] Right to withdraw plea of guilty. 20 ALR 1445; 66 ALR 628. Withdrawal of plea of guilty and substitution of plea of not guilty after conviction. 146 ALR 1430.

SHARPE, J. Defendant, Beatrice Hollingsworth, pleaded guilty to an information charging her with uttering and publishing a worthless check in the amount of $989.53. The plea of guilty was accepted by the court, and the cause referred to the probation department and adjourned 2 weeks for sentence. The cause was again adjourned until February 20, 1953, when the following occurred:

"*The Court:* Beatrice Hollingsworth, have you anything to say before sentence is pronounced by the Court?

"*Mr. McNally:* Her counsel does. If your Honor please, I have just been informed by Mrs. Hollingsworth that certain parts of this probation report have been broadcast on the radio this morning and appear in this morning's paper. I thought those reports were more or less confidential information submitted to the court for the court's information only.

"*The Court:* I did, too.

"*Mr. McNally:* At this time, due to the existing situation before sentence and the fact that highly prejudicial information has appeared in the morning's paper and been broadcast over the radio, it is the desire of the defendant, Beatrice Hollingsworth, to withdraw her plea of guilty and enter a plea of not guilty, so that we may have an opportunity to check into how and who made these press releases and what it is all about.

"*The Court:* I am not going to grant that motion at this time. * * *

"Beatrice Hollingsworth, the sentence of the Court is that you be confined in the Detroit House of Correction for a period of 5 to 14 years.

"*Mr. McNally:* Now, if your Honor please, I again renew my motion which I made prior to sentence, that your Honor set aside the sentence based upon the fact that it was the defendant's wish and desire to withdraw her plea of guilty previously entered, made before sentence, in view of the highly

prejudicial information released by the press and broadcast over the radio before sentence was pronounced this morning. I further made the motion before Your Honor to set aside the plea of guilty in view of the fact that you have also read into the record something which—and I don't doubt the sincerity of Your Honor—which was gone into very thoroughly in my office, namely, an attorney called me from Birmingham—

"*The Court:* The defendant has been sentenced. If you have any motions to make you can make them in writing."

On March 3, 1953, counsel for defendant, Beatrice Hollingsworth, made a formal motion in writing for leave to withdraw her plea of guilty and for the granting of a new trial. Upon leave being granted, defendant appeals from the denial of her motion to withdraw her plea of guilty. It is the general rule in this State that a defendant has the privilege of changing a plea of guilty to one of not guilty at any time prior to sentence. See *People* v. *Piechowiak,* 278 Mich 550; *People* v. *Street,* 288 Mich 406; *People* v. *Stone,* 293 Mich 658; *People* v. *Anderson,* 321 Mich 533.

The people urge that permission to withdraw a plea of guilty is discretionary with the trial court and rely upon *People* v. *Banning,* 329 Mich 1. In the *Banning Case* defendant was charged with assault with intent to kill and murder a police officer. The cause came on for trial, and after the jury had been impaneled and testimony given, defendant asked that he be permitted to withdraw his plea of not guilty and plead guilty. His offer was accepted and the case referred to the psychopathic clinic and the probation department. At a later date, when the defendant came before the judge for sentence, his attorney asked the court to change his

plea of guilty to one of not guilty. The motion was denied, and upon appeal we said:

"We have never held that when the defendant changes his plea to guilty, after the commencement of the trial, he has the absolute right to change his plea to not guilty, nor do we now so hold."

The factual situation in the case at bar is not similar to the facts in the *Banning Case*. In the case at bar there was some reason for defendant's attorney to request that defendant's plea of guilty be withdrawn. In our opinion it was an abuse of discretion to deny defendant's request. The sentence is vacated and the cause remanded to the recorder's court, with directions to permit defendant to withdraw her plea of guilty and plead not guilty and have trial.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

WALLACE *v.* SKRZYCKI.

1. TRIAL—AUTOMOBILES—GUEST—SPECIAL QUESTIONS—QUESTION FOR JURY.

   It was not error to submit to jury issue as to whether or not plaintiff was a guest passenger within meaning of guest act

---

REFERENCES FOR POINTS IN HEADNOTES

[3] 5 Am Jur, Automobiles § 667.
[4] 5 Am Jur, Automobiles §§ 613, 614.
[5, 6] Generally as to refreshing memory of witness, see 58 Am Jur, Witnesses § 578 *et seq.*
[8] 3 Am Jur, Appeal and Error § 1185.
[8] Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants. 166 ALR 563.

together with special question as to whether plaintiff had been transported by the defendant as his guest without payment for such transportation, in view of conflicting claims and discrepancies and contradictions in the testimony (CL 1948, § 256.29).

2. AUTOMOBILES—PASSENGERS FOR HIRE—GUEST.
Whether the relationship between plaintiff passenger and defendant motorist is that of a passenger for hire or a guest passenger within meaning of the guest act depends on the facts of each case (CL 1948, § 256.29).

3. SAME—GUEST PASSENGER—DIRECTED VERDICT—EVIDENCE.
Motion for directed verdict on ground that plaintiff was a guest passenger in defendant's automobile *held,* properly denied, where testimony was conflicting as to whether or not plaintiff had paid for his transportation to and from work in defendant's car (CL 1948, § 256.29).

4. SAME—GUEST PASSENGERS—INSTRUCTION—BURDEN OF PROOF.
It was reversible error to follow an instruction that plaintiff passenger had the burden of proof of establishing his claim against defendant motorist by a preponderance of the evidence by a further instruction that such defendant had the burden of showing that plaintiff was a guest passenger without payment (CL 1948, § 256.29).

5. SAME—ACCIDENT—INVESTIGATING POLICE OFFICER—REFRESHING RECOLLECTION.
Testimony of police officer as to physical facts and admissions made by defendant oncoming motorist whose car collided with defendant host motorist and injured plaintiff *held,* properly received in evidence notwithstanding motion to strike by defendant oncoming motorist on ground that such witness had, before taking the witness stand, refreshed his recollection by reviewing the official police report and his own notes, both prepared by him at the time of the accident, where the witness had a personal, independent recollection of the accident and motion to strike failed to identify testimony to be stricken (PA 1949, No 300, § 624).

6. SAME — EVIDENCE — REPORTS — ADMISSIONS — PHYSICAL FACTS — STATUTES — REFRESHING RECOLLECTION.
The statutory bar to use in any court action of reports required in the motor vehicle code to be made with reference to cars

involved in accidents applies to reports made by drivers of vehicles involved and garage keepers under certain circumstances and has no application to notes or to reports made by investigating police officers of physical facts they have observed and admissions made to them by drivers of motor vehicles at the scene of the accident for use either as evidence or refreshing a witness's recollection (PA 1949, No 300, § 624).

7. EVIDENCE—PAST RECOLLECTION.

A record of a past recollection, authenticated by proof, is competent, if not barred by statute.

8. JUDGMENT—JOINT JUDGMENT—ERROR TO ONE DEFENDANT.

A joint judgment against defendant host and oncoming motorists, which is set aside for error as to the host motorist, must also be set aside as to the oncoming motorist and new trial granted both defendants, although on record presented by such defendants whose appeals were based on different grounds, no error appears to have been made as to the oncoming motorist.

BUSHNELL, SHARPE, AND BOYLES, JJ., dissenting in part.

Appeal from Wayne; Webster (Arthur), J. Submitted June 10, 1953. (Docket No. 74, Calendar No. 45,806.) Decided November 27, 1953.

Case by Aubrey Wallace against Edward Skrzycki and William Ritchie to recover damages for personal injuries sustained in an automobile accident. Verdict and judgment for plaintiff. Each of the defendants filed claim of appeal. Reversed and new trial granted.

Ward & Plunkett, for plaintiff.

Edward N. Barnard, for defendant Ritchie.

Vandeveer, Haggerty, Garzia & Haggerty, for defendant Skrzycki.

BOYLES, J. Defendants appeal from a judgment for plaintiff after verdict by jury allowing damages from an automobile collision. Defendants appeal separately on a consolidated record and file separate briefs, raising different grounds for reversal.

Plaintiff was a passenger in an automobile owned and operated by defendant Ritchie, going north on Telegraph road in Wayne county. Defendant Skrzycki was operating his automobile south on the same road, the 2 vehicles collided, and plaintiff was injured. Claiming joint and several negligence of the defendants, plaintiff sued both, alleging he was a passenger for hire in Ritchie's automobile. The defendants filed separate answers, each claiming that the other was the only one guilty of negligence. Ritchie also claimed that either he and the plaintiff were engaged in a joint enterprise, or that the plaintiff was his guest passenger. The question of which one of the defendants was guilty of negligence, or whether either one was guilty, is not raised on this appeal.*

1. Ritchie claims for reversal that the court erred in denying his motion for a directed verdict based on the claim that the plaintiff had failed to prove that he was a passenger for hire; and that the court erred in instructing the jury that the burden of proof was on him, defendant Ritchie, to show that the plaintiff was his guest passenger.

Plaintiff did not claim that Ritchie was guilty of wilful and wanton misconduct. In his amended declaration he claimed that he was a passenger for hire in Ritchie's automobile. Defendant Ritchie answered by denying that plaintiff was a passenger for hire, and specifically denied the facts alleged. Testimony on that issue was taken which supported each of the claims of both Ritchie and the plaintiff,

* This issue was litigated between Skrzycki and Ritchie and reached this Court for review in *Skrzycki* v. *Ritchie*, 333 Mich 480.

and the trial court held that the issue involved a question of fact to be determined by the jury. In that connection, at the request of defendant Ritchie a special question was submitted to the jury, whether the plaintiff was a guest passenger, and answered by the jury in the negative.

Plaintiff and defendant Ritchie were both employed at the same plant. Plaintiff, without an automobile, rode to and from work in Ritchie's car. There was testimony that this was done at the request of their employer, that he had made an "arrangement" with Ritchie and offered to furnish him gasoline. At one time plaintiff offered Ritchie $5 for gasoline, but Ritchie refused to accept it. Ritchie denied there was any "arrangement," or that plaintiff had ever furnished him any gasoline or paid for any. Plaintiff made no other claim of payment for the transportation except furnishing gasoline, which Ritchie denied. However, Ritchie in his answer had admitted that plaintiff and other passengers who rode with him to and from work made contributions to defray expenses of all, to and from work, and that "periodically" there was "an accounting with plaintiff and other passengers," on which they "made contributions" to defray the expenses to and from work.

At the close of the proofs, counsel for Ritchie moved for a directed verdict on the ground that the proofs showed plaintiff to be a guest passenger without payment for transportation, which motion the court denied. Ritchie's counsel also requested the court to submit to the jury a special question whether the plaintiff was "a gratuitous guest passenger" in Ritchie's automobile. In submitting the question, the court charged the jury as follows:

"A question is raised by the claim of the defendant Ritchie that plaintiff was a gratuitous guest

passenger in his automobile at the time of the accident. The statutes relating to motor vehicles, that is CL 1948, § 256.29 (Stat Ann § 9.1446), provides, among other things:

" 'That no person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against the owner * * * unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator.'

"There is no claim on the part of the plaintiff that defendant Ritchie was guilty of gross negligence or wilful and wanton misconduct and accordingly, if plaintiff was a guest passenger without payment for such transportation he cannot recover as against Ritchie. It becomes important then to determine whether or not plaintiff was a guest passenger of defendant Ritchie without payment for such transportation. This presents a question of fact for your determination as jurors. * * *

"In determining this question you should consider all of the facts surrounding the transaction, the period over which payments were made as well as all other testimony relating to this issue. The statute reads, 'without payment for such transportation.' In this connection it is not necessary that payment for the transportation should be made in money as when you take a bus and pay a quarter or anything of that kind; the payment may be either in money or some commodity as for example, gasoline or in services, and the question for you to determine is: Was the plaintiff being transported as a guest without payment?

"The defendant Ritchie has asked that a special question be submitted to be determined by you, as jurors, along with your general verdict. The question I am submitting reads as follows:

"At the time of this accident was plaintiff Wallace being transported by defendant Ritchie as his guest without payment for such transportation?

"And you answer that question, yes or no, as you find the facts to be.

"If you find by a preponderance of the evidence that the plaintiff was a guest passenger without payment for such transportation then your answer will be in the affirmative, yes, otherwise it must be answered no. This means that the burden of proof as explained in these instructions is upon the defendant Ritchie to show that plaintiff was his guest without payment."

The jury answered the question in the negative. Plaintiff had testified that he would hand Ritchie money at the gasoline station and Ritchie would use it to buy gasoline. Ritchie's testimony, however, was quite to the contrary, to support his claim that plaintiff was a guest passenger without payment, wherefore the plaintiff would have to show wilful and wanton misconduct in order to recover damages. Under the conflicting claims and the discrepancies and contradictions in their testimony, the court did not err in submitting the issue to the jury, together with the special question at defendant Ritchie's request, to determine whether the plaintiff had paid for his transportation, or was a guest passenger without payment. Whether the relationship between parties is that of a guest passenger or a passenger for hire depends on the facts in each case. The court did not err in denying Ritchie's motion for a directed verdict on the ground that plaintiff was a guest passenger.

After the court had concluded charging the jury at length as to burden of proof, and being on the plaintiff to establish his claims by a preponderance of the evidence, it was prejudicial error for the court to charge the jury that the burden of proof was on the defendant Ritchie to show that the plaintiff was his (Ritchie's) guest passenger without payment. This was the important issue raised by Ritchie, and

the error, which followed so closely the submission of the special question by the court, might well have influenced the jury in its answering the question in the negative. See *Baker* v. *Costello,* 300 Mich 686; *Bredeweg* v. *Boyce,* 322 Mich 298.

2. Defendant Skrzycki seeks reversal on the ground that the trial court erred in allowing a police officer to testify, over his objection, from the contents of an official police report, his official notes and memorandum; and in denying the motion to strike the testimony of said officer based on his use of the official police report and notes to refresh his recollection of facts and claimed statements relating to the accident. Defendant Skrzycki also claims that the court erred in allowing the police officer to testify as a claimed expert witness, reconstruct the accident, and express opinions and conclusions relating thereto.

During the course of the trial, an officer of the State police, who arrived on the scene shortly after the accident, was called as a witness for the plaintiff. He testified that prior to his taking the stand he had refreshed his recollection of what had happened as to the locus of the cars and the statements of the parties, from the official report and from notes taken from which the report was made, and from his own notes taken at the scene. This was objected to by counsel for defendant Skrzycki and was allowed over objection. The officer also was qualified as an expert witness and questioned as such, over defendant's objection, the court ruling that under the circumstances whether or not the officer was an expert was a question for the jury.

In the recent case of *Jakubiec* v. *Hasty,* 337 Mich 205, it was held that an officer who did not see the accident and did not write the report could not refresh his recollection from the report. In the instant case the officer who made the report refreshed

his recollection from the report he made. The report itself is not admissible in evidence. CL 1948, § 257.624 (Stat Ann 1952 Rev § 9.2324). Without regard to who made the report, as to refreshing recollection from it, the report is not admissible, nor available to refresh recollection. The court erred in allowing the officer to testify as to things in the report and the notes from which it was made, by refreshing his recollection from such use. In addition to the *Jakubiec Case,* see, also, *Trafamczak* v. *Anys,* 320 Mich 653; *Germiquet* v. *Hubbard,* 327 Mich 225.

For said errors relied upon for reversal, the judgment should be set aside and new trial granted as to both defendants. Costs to appellants.

BUSHNELL and SHARPE, JJ., concurred with BOYLES, J.

DETHMERS, C. J. (*concurring*). I concur in reversal but am not in accord with reasoning advanced by Mr. Justice BOYLES for reversal as to defendant Skrzycki. In my view it was not reversible error to deny his motion to strike testimony concerning physical facts and admissions made by him at the scene of the accident, on the sole ground that the witness who gave it, police officer Lutz, had, before taking the witness stand, refreshed his recollection thereof by reviewing the official police report and his own notes, both prepared by him at the time of the accident.

The following facts are to be noted: (1) Officer Lutz testified at the outset that he had a personal, independent recollection of this accident; (2) he testified that he had prepared the notes and police report at the time of the accident; (3) the notes and report were not received in evidence and Lutz did not read therefrom or use them on the witness stand

but merely refreshed his recollection by reviewing them before coming to the witness stand; (4) defense counsel made no objection to his testimony in this connection when it came in, and, on the contrary, facilitated it by questions and suggestions of his own at the time; (5) on cross-examination defense counsel asked officer Lutz whether he could forget the contents of his report and notes and still have some independent recollection of the subject and, after receiving an affirmative reply, directed him to testify on the basis of his present recollection, irrespective of the report and notes, and thereafter elicited from him testimony pretty well confirming his claim of independent recollection on crucial points; (6) after Lutz's testimony concerning the physical facts and defendant's admissions at the scene of the accident had all come in without defense objection, the motion was made to strike any testimony based on a recollection refreshed by the notes and report without further identifying the testimony thus to be stricken and without suggesting how the court or jury might single out and determine what portion of the mass of testimony theretofore adduced without objection had been based on independent recollection and what portion on refreshed recollection. Under such circumstances, defendant Skrzycki was scarcely in a position to complain of the ruling of the trial court even if it were to be conceded that all of the officer's testimony based on a refreshed recollection was barred by statute.

Had timely and proper objection been made, however, to such portions of Lutz's testimony as were based on refreshed recollection, it is my view that such objections should, nevertheless, have been overruled. PA 1949, No 300, § 624 (CL 1948, § 257.624 [Stat Ann 1952 Rev § 9.2324]), makes unavailable for use in any court action "the reports required by this chapter," being chapter 6, Michigan vehicle

code, PA 1949, No 300. The reports required in that chapter are those to be made by drivers of vehicles involved in accidents and by garage keepers under certain circumstances. The chapter contains no requirement that reports of accidents be made by police officers as such. The only duty imposed upon police officers in this connection is the requirement, contained in PA 1949, No 300, §§ 621, 622 (CL 1948, §§ 257.621, 257.622 [Stat Ann 1952 Rev §§ 9.2321, 9.2322]), that officers receiving the aforementioned reports shall "forward the same to the commissioner of State police on forms to be prescribed by him." Accordingly, the bar to use in any court action provided in PA 1949, No 300, § 624 (CL 1948, § 257.624 [Stat Ann 1952 Rev § 9.2324]), has no application to the notes or reports made, as in the instant case, by the investigating police officer.

If the mentioned statutory bar did apply to the police report and notes here used by the officer witness to refresh his recollection, such use would not be violative of the statute nor render the officer's testimony incompetent. This general subject has been considered heretofore by this Court in *Delfosse* v. *Bresnahan,* 305 Mich 621; *Baumgarten* v. *Tasco,* 312 Mich 161; *Heiman* v. *Kolle,* 317 Mich 548; *Trafamczak* v. *Anys,* 320 Mich 653; *Germiquet* v. *Hubbard,* 327 Mich 225; and *Jakubiec* v. *Hasty,* 337 Mich 205. In *Delfosse* the defendant made the statutory report to the chief of police, which was excluded by the trial court as privileged under the statute. This Court held, however, that it was proper to permit the chief of police to testify concerning physical facts at the scene of the accident, as observed by him. No question of use of the statutory report for refreshing the officer's recollection was involved, but, from the decision, it may be concluded that the making of the statutory report by the driver of a vehicle to a police officer does not seal the lips of the latter to

prevent his testifying concerning facts observed by him at the scene of the accident. In *Baumgarten* it was not a report required by the statute, but, as here, the police report which was involved. There, police officer Reiman, who admitted on the witness stand that he had no present, independent knowledge or recollection on the subject, testified that he had prepared the report and "that whatever he wrote down on the report was true or he would not have put it there." This Court held admissible "the testimony of witness Reiman when he testified from the use of the exhibit (police report) as to what defendant Heller told him about the collision." In *Heiman* the defendant had made the report required by the statute to officer Morin containing an admission damaging to the defendant. There was no attempt to introduce the report in evidence nor does it appear whether the officer used it to refresh his recollection as a witness. The case is significant here, however, in the respect that this Court there held (1) that it was competent for the police officer to testify, as witness for the plaintiff, concerning admissions of the defendant contained in the latter's statutory report to the officer; (2) that admission of such testimony does not contravene the purpose of the bar of the statute; and (3) that it was not the purpose of the latter to keep admissions made by defendant to police officers from the ears of the court or jury. *Trafamczak* involved the statutory report made by the defendant in that case to a deputy sheriff. There, the deputy, as witness for plaintiff, was permitted to examine said report for the purpose of refreshing his recollection. In answer to questions propounded to him on the witness stand he read from the report a statement indicating a damaging admission made to him by defendant. It was clear that the witness had no recollection to be refreshed. In that case, this Court recognized that the use to which the re-

port was being put was not that of refreshing the witness's recollection, but of incorporating it, in effect, into the evidence, contrary to statute; and, accordingly, it was pointed out that *Delfosse* and *Heiman* were distinguishable because there the witnesses whose testimony had been challenged had properly been permitted to testify, as here, to matters within their own knowledge or recollection. It was held that the granting of a motion to strike the testimony served to cure the error. In *Germiquet* the statutory report made by plaintiffs' driver to a deputy sheriff was involved. Testifying for defendant the deputy admitted that he had no independent recollection with reference to the statement made to him by plaintiffs' driver, that the report did not refresh his memory, and that his actual knowledge was limited to the fact that he had taken the report. When asked on the witness stand what plaintiffs' driver had told him about how the accident happened, the deputy referred to the statutory report and testified therefrom concerning a damaging admission made by plaintiffs' driver. This, like in *Trafamczak,* clearly circumvented the bar of the statute. In so holding we made point of the fact that no question of use of the report for the purpose of refreshing the witness's recollection was involved inasmuch as the deputy had no recollection to be refreshed. We there stated that *Baumgarten* is authority for the proposition that it is "settled law that under proper circumstances a record of a past recollection, authenticated by proof, is competent," if not barred by statute. We also pointed out that it may fairly be inferred that in the *Baumgarten Case* this Court did not consider the police report there involved to be a report required by the statute and thus subject to its bar. Under the announced "settled law" in *Germiquet* and *Baumgarten* the police report and notes here involved, not being barred to

court use by the statute, would, in the absence of an independent recollection by the witness, have been competent to be received in evidence, if authenticated by proof, as in *Baumgarten,* to be true records of a past recollection. In *Jakubiec* this Court held that it was not error for the trial court to prohibit a police officer witness from refreshing his recollection from an accident report prepared by another police officer. Inasmuch as the report was not authenticated by proof as being a true record of a past recollection, and particularly not of the witness in question, I have no quarrel with the statement of this Court in *Jakubiec* that "The report itself is not available as evidence." Citation therein of the statute as authority therefor seems to me, however, to have been in error for the reason that the bar of the statute has no application to reports made by police officers. By the same token the citation therein of *Trafamczak* was ill advised inasmuch as the report involved in the latter was the statutory report made by the defendant to a deputy sheriff and not, as in *Jakubiec,* a report made by a police officer. Had the police report in *Jakubiec* been authenticated, by proper proof, as a true record of a past recollection of the witness on the stand, as in *Baumgarten,* then, under our holding in *Baumgarten* and in *Germiquet,* it would have been necessary to hold it competent.

An examination of our previous holdings discloses, then, that except for language in *Jakubiec,* which I deem inadvertent and decline to follow although in accord with its decision, we have adhered to the position that the statute in question does not bar a police officer from testifying concerning physical facts observed by him or admissions made to him by drivers of vehicles at the scene of an accident and that police reports of accidents are not barred by the statute for use as evidence or refreshing a witness's recollection.

Inasmuch as the judgment, joint against both defendants, is set aside, for error, as against Ritchie, it seems to me, for reasons set forth and approved in *Grimshaw* v. *Aske,* 332 Mich 146, it should be set aside also as to Skrzycki. Accordingly, I concur in reversal and granting a new trial to both defendants, with costs.

ADAMS, BUTZEL, CARR, and REID, JJ., concurred with DETHMERS, C. J.

HOWARD *v.* BURTON.

SIMPSON *v.* SAME.

THOMAS *v.* SAME.

1. FALSE IMPRISONMENT—POISONING—EVIDENCE.
   That 3 plaintiffs, or any of them, were responsible for allegedly poisoned medicine on a previous occasion which was referred to in police report incident to the arrest of plaintiffs for murder of a 6-months-old baby *held,* not disclosed by any competent testimony in action for false arrest and imprisonment.

2. SAME—FALSE REPORT—PARTICIPATION IN ARREST—EVIDENCE.
   Jury's finding in plaintiffs' actions for false arrest and imprisonment that defendant had done more than merely report what he believed to be the commission of a crime without any knowledge whatsoever that a crime had been committed and acting

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 22 Am Jur, False Imprisonment §§ 32, 33.
[2] False imprisonment: Liability of private citizen for false arrest by officer. 21 ALR2d 643.
[3, 4] 41 Am Jur, Pleading §§ 293, 309.
[4] 3 Am Jur, Appeal and Error §§ 959, 964.
[5, 6] 53 Am Jur, Trial §§ 75, 76.
[7] 39 Am Jur, New Trial § 203.
[8] 22 Am Jur, False Imprisonment § 126 *et seq.*

solely upon his own suspicions and initiative, proceeded to give false information and actively participated in the subsequent arrests of plaintiffs *held,* supported by sufficient testimony.

3. PLEADING—AMENDMENT—DISCRETION OF COURT.

Permission to amend declaration during course of trial to conform to the proofs rather than opening statement to which defendant in action for false arrest and imprisonment had objected was within discretion of trial court and did not result in error, where trial court permitted amendment to avoid any question as to sufficiency of declaration.

4. APPEAL AND ERROR—AMENDMENT OF PLEADINGS—DISCRETION OF COURT.

The Supreme Court will not interfere with the exercise of a trial court's discretionary power to allow or refuse an amendment of a pleading unless the discretion is abused.

5. TRIAL—QUESTIONING OF WITNESSES BY COURT — POINTLESS REMARKS.

Trial judge's participation in questioning of witnesses and pointless remarks during course of trial, *held,* not to have constituted prejudicial and reversible error.

6. SAME—INTERFERENCE WITH TRIAL BY JUDGE.

A trial judge should permit counsel to try a case and not repeatedly interfere by questioning a witness.

7. NEW TRIAL—OPINIONS—COURT RULE.

An opinion by the trial judge in denying a motion for a new trial is desirable and the proper practice but the court rule calling for such an opinion is directory and not mandatory and reversal will not be ordered merely for a trial judge's failure to file such an opinion (Court Rule No 47, § 3 [1945]).

8. DAMAGES — FALSE IMPRISONMENT — REMITTITURS — EXCESSIVE JUDGMENT.

Judgments for $2,500, $2,500 and $3,000 for plaintiffs in 3 consolidated actions for false arrest and imprisonment, as reduced by remittiturs from verdicts of $5,000 for each plaintiff are not further reduced on defendant's claim judgments were still excessive, since the law provides no exact standard for measuring damages for being taken from work or home, fingerprinted, held in jail and subjected to the ignominy of having been arrested for murdering a baby.

Appeal from Wayne; Murphy (George B.), J. Submitted October 6, 1953. (Docket Nos. 6, 7, 8, Calendar Nos. 45,879, 45,880, 45,881.) Decided November 27, 1953.

Separate actions by Naomi Howard, Gola Mae Simpson and John C. Thomas against William Burton for false arrest. Cases consolidated. Verdict and judgment for plaintiffs, remittiturs filed. Defendant appeals. Affirmed.

Frank Schwartz (*Arthur M. Lang,* of counsel), for plaintiffs.

M. D. Smilay, for defendant.

BUTZEL, J. Gola Mae Simpson, Naomi Howard and John C. Thomas, plaintiffs, each brought a separate action against William Burton, defendant, for false arrest and imprisonment alleging that defendant directed and urged officers of the Detroit police department in the arrest of plaintiffs on the charge of poisoning a 6-months-old baby. The cases were consolidated for trial and at a former trial plaintiffs recovered judgments against defendant. We reversed on appeal and ordered a new trial. *Simpson* v. *Burton,* 328 Mich 557. The present appeal is from the judgments entered on the verdicts and the denial of motions for new trial after the second trial wherein the jury again awarded each of the plaintiffs damages, this time in the sum of $5,000 each. These amounts were subsequently reduced to $2,500 each as to plaintiffs Simpson and Howard and $3,000 as to plaintiff Thomas on order of the trial judge and remittiturs filed by plaintiffs.

Although the record in the present case differs somewhat from that in the prior appeal, the essential facts of this case are as set forth in 328 Mich 557, and we, therefore, shall not review them in detail.

We shall but briefly summarize the testimony in the instant case.

Lora Lee Thomas, who subsequently married the defendant, was the unwed mother of a baby boy 6 months old. Miss Thomas had lived in Detroit 10 months and was employed by defendant as a bookkeeper. She came to Detroit from Georgia where defendant met her. She and her baby lived in defendant's apartment building where he also resided. On November 18, 1946, shortly after 3 p.m., the baby became very ill. Plaintiff Thomas, who is a brother of Lora Lee, and plaintiff Simpson both had been in the apartment that day and had seen the baby but they had departed prior to 3 p.m. when the baby became very ill. Plaintiff Howard was present in the apartment at the time it was determined that the baby was sick. A doctor was called and he directed that the baby be taken to the hospital immediately.

A police report, which was excluded at the first trial but was admitted at the second trial, disclosed that Miss Thomas informed a police officer that at some previous time the baby had refused to take medicine; that the medicine had a peculiar odor and a doctor who analyzed the medicine told her it contained poison; that Miss Thomas at that time suspected her brother of trying to poison the baby; that her brother and Miss Howard were with the baby the afternoon of November 18, 1946, and her brother had given the baby some milk just before it became sick.

This report was admitted without objection for the purpose of showing the information which the officers received prior to the arrest of the plaintiffs. There is no competent testimony in this case tending to prove the existence of an earlier poisoned medicine or that the plaintiffs, or any of them, were responsible for the allegedly poisoned medicine on this

previous occasion. See *Simpson* v. *Burton,* 328 Mich 557, 563.

It is claimed that plaintiff Thomas resented the fact that his sister was an unwed mother and that he had urged her to get rid of the baby. Plaintiff Simpson had hoped to adopt the child, but after its birth the mother stated she was not going to give it away. Testimony indicates that plaintiffs Thomas and Howard were good friends. Lora Lee, then 18 years of age, and Burton 57, also were very good friends and married later.

The baby died of bronchial pneumonia the morning following its admission to the hospital. On analysis the baby's stomach content was found to be free of poison.

There is a sharp conflict in the testimony in the case in regard to the acts of defendant leading to the arrest of plaintiffs by the police officers. Defendant claims that his first contact with the police occurred at the police station while attempting to locate Miss Thomas; that the police had a report to pick up the plaintiffs. He testified that he merely informed the police of his suspicions that a crime had been committed and that the plaintiffs were involved; and that he accompanied the officers to assist in identifying the persons whom the officers were going to arrest.

It is the claim of plaintiffs that defendant, about 5 or 6 p.m. on November 18, 1946, hailed a police scout car on the street and told police officer Fred Truax that the plaintiffs had poisoned or participated in the poisoning of a baby; that defendant accompanied the officers to the police station and from there he went with the police officers to apprehend the plaintiffs; that defendant actively participated in the arrest of each plaintiff by insisting that the officers arrest them and that he directed their arrest. The police officer so testified.

Plaintiff Thomas testified that he was arrested at 8 that evening at his place of employment; that defendant Burton was with the officers and pointed him out; that defendant stated, "I want him arrested. He poisoned that baby;" that while he was in custody defendant asked him what he had given the baby and when he denied having given it anything, defendant told him he would have to disclose what he gave the baby before he would be released.

Plaintiff Simpson testified that she was arrested about 11:30 p.m. on November 18, 1946, in her home after she had retired for the night. She further claimed that defendant Burton accused her and plaintiff Thomas of poisoning the baby; that he told the officers to arrest her and that he would send them up if it cost $5,000.

Plaintiff Howard testified that she was arrested at a cleaning establishment where she had gone to inquire about plaintiff Thomas' arrest; that Burton said, "She is the one. * * * Arrest her;" that Burton insisted upon the police arresting her and that after questioning at the police station, Burton reiterated his demand that they all be arrested; that Burton stated at the time of the arrest that he wanted them all arrested for poisoning the baby.

Plaintiffs Simpson and Howard were held in the police station until 4:30 p.m. on November 19, 1946. They were confined for a period of 16 hours and 45 minutes each. Plaintiff Thomas was released about 5 p.m. on November 20, 1946. His confinement was for a period of 44 hours and 45 minutes. The parties were released from police custody because there was no evidence of the baby having been poisoned.

There was sufficient testimony to justify the jury in finding that the defendant did more than merely report what he believed to be the commission of a crime. Without any knowledge whatsoever that a crime had been committed and acting solely upon

his own suspicions and initiative, defendant proceeded not only to give information which proved to be absolutely false, but he also actively participated in the subsequent arrests.

In *Maliniemi* v. *Gronlund,* 92 Mich 222 (31 Am St Rep 576), a private citizen was held liable for false arrest even though his defense asserted that the police officer present had actually made the arrest. This Court stated at p 227:

"If it had not been for defendant, plaintiff would never have been arrested or imprisoned. The whole period of plaintiff's imprisonment was the natural result of defendant's acts. According to plaintiff's statement, defendant did more than simply to communicate facts and circumstances of suspicion to the officer, leaving such officer to act on his own judgment. The officer, who is not sworn in the case, evidently acted upon the judgment of Gronlund, and it may well be said that defendant directed the arrest."

In *McDermott* v. *W. T. Grant Co.,* 313 Mass 736 (49 NE2d 115), the request of defendant's manager to an officer whom he saw on the street that, "I want that man locked up. He's one of 3 men who have been in my store and stolen things," was held sufficient evidence of participation by the manager in the resulting arrest without a warrant to support a verdict against the manager's employer.

Numerous errors are claimed by defendant-appellant. It is claimed that counsel for plaintiffs in his opening statement went far beyond the allegations in the declaration. The declaration was the same as in the first case reported in 328 Mich 557. Substantially no objection was made in the first trial to the evidence which charged that defendant directed and urged the arrest of the plaintiffs. When in the opening statement in the present case counsel for plaintiffs placed special stress upon this point, defendant's attorney objected stating that it was not cov-

ered by the declaration. The parties had expressed themselves satisfied with the pleadings at the pretrial hearing and no amendment was asked for by plaintiffs' counsel. In order to avoid any question in the trial of the instant case, plaintiffs' counsel asked to amend the declaration so as to make it more full and complete and avoid any possible objection. Counsel inadvertently asked that the amendment be made so that the declaration would conform with the proofs rather than with his opening statement to which objection had been made. The court stated that he had some doubts whether the declaration was not sufficient to overcome the objection but in order to avoid any question he would permit the amendment. This was entirely in his discretion and there was no error.

"As a rule, the permission to amend rests wholly within the discretion of the trial court, and unless this discretion is abused, we will not interfere. This is true irrespective of whether the court refuses or permits the amendment." *Grant* v. *National Manufacturer & Plating Co.,* 258 Mich 453.

See, also, *Simonelli* v. *Cassidy,* 336 Mich 635; *Jackson City Bank & Trust Company* v. *Blair,* 333 Mich 399.

Error is here claimed, as in the prior appeal, that the trial judge took too active a part in examining the witnesses. While the judge did ask too many questions and did make some remarks which were pointless, we do not believe that his acts were sufficient to constitute prejudicial and reversible error. A trial judge should permit counsel to try the case and not repeatedly interfere by questioning the witness.

Appellant contends that the trial judge was in error in failing to file an opinion in denying the motions for a new trial as required by Court Rule No

47, § 3 (1945). The trial judge ordered a new trial unless remittiturs were filed by the plaintiffs. Such remittiturs were subsequently filed. An opinion in denying the motion for a new trial is desirable and the proper practice but the rule calling for such an opinion is directory and not mandatory. We do not reverse on that ground alone. *In re Kenealy's Estate,* 336 Mich 657.

It is further claimed that the judgment in each case is still excessive. We have no criterion for measuring damages in cases of this nature. Plaintiffs, besides being taken from their work or homes, were fingerprinted and held in jail. They claim they were and still are subjected to the ignominy of having been arrested for murdering a baby. The law does not provide any exact standard or yardstick for measuring damages of this type. There is no testimony in the record as to the evaluation of such damages in dollars. We decline to order a further remittitur.

Judgment is affirmed, with costs to plaintiffs.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred with BUTZEL, J.

SHARPE, J., concurred in the result.

BOTER *v.* BOTER.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.
   A decree of divorce to husband on the ground of extreme cruelty is affirmed, where there are no children of the marriage, a reconciliation had not been effected, parties are of different religious faiths, son of defendant wife by former marriage which had resulted in a divorce, had been a frequent cause of quarrels, and there was testimony of physical violence by her, although plaintiff was not entirely blameless.

2. SAME—COSTS.
   No costs are allowed either party upon affirmance of decree for plaintiff husband on wife's appeal.

Appeal from Ottawa; Verdier (Leonard D.), J., presiding. Submitted October 7, 1953. (Docket No. 23, Calendar No. 45,910.) Decided November 27, 1953.

Bill by Peter S. Boter against Mabel Boter for divorce on ground of extreme cruelty. Decree for plaintiff. Defendant appeals. Affirmed.

Amberg, Law & Buchen, for plaintiff.

Schmidt, Smith & Howlett, for defendant.

BUTZEL, J. Peter S. Boter, plaintiff, was granted a decree of divorce from Mabel Boter, defendant, on

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation §§ 53, 56, 57, 59.
[1] Religious differences as affecting right to divorce or separation. 28 ALR 1163, 44 ALR 726; 58 ALR 462; 25 ALR2d 928.

the ground of extreme cruelty. Although the judge believed that plaintiff was entitled to a divorce, he delayed the granting of the decree in the hope that after a cooling-off period the parties might become reconciled. A reconciliation was not effected because, as the judge stated "the differences that underlie their frequent clashes are too deep-seated."

The record indicates that most of the time both parties behaved as persons of intelligence and refinement. They both did some drinking and this, to a very minor extent, contributed to their difficulties. Defendant filed no cross bill nor did either party in any way show or claim at the hearing that the other was an habitual drinker. Liquor was not the basic cause of the difficulties.

The record indicates that defendant's conduct was so inexcusable and consisted of such acts of cruelty as to entitle plaintiff to a divorce. Defendant herself suggested to plaintiff several times that he obtain a divorce. The parties had a long courtship and engagement which was interrupted by plaintiff's absence in the military service during the war. They were of different religious faiths but plaintiff agreed to be married by a priest with the understanding that he would thereafter continue to maintain his membership in a church of another denomination. Defendant did not live up to her part of this understanding that there be no disputes due to the differences in religion. The testimony, however, shows that she referred to plaintiff's parents and their religion in most opprobrious terms. She did much nagging and was dissatisfied with the furnishings of the home although plaintiff was in this regard very liberal. He claims she made false charges in regard to his drinking, ridiculed him before his parents and constantly had long and violent arguments with him.

Very serious quarrels arose over defendant's 14-year old boy, a son by a former husband from whom she had been divorced. The child had behavioristic tendencies necessitating the intercession of the probate court or its juvenile agent. The facts are not set forth in the record which does, however, indicate that the boy was a serious problem. Plaintiff at one time agreed to adopt the boy and become his legal parent. He wrote to defendant's former husband, the father of the boy, and also prepared a petition for adoption. However, when he realized that the marriage relationship was uncertain and might come to an end, he refrained from adopting the boy. He did, however, spend considerable time and money consulting psychiatrists in an effort to solve the boy's problem.

The many quarrels that arose over the boy and other problems resulted in plaintiff leaving the home temporarily and staying at his parents or a hotel. This occurred at least a score of times. The physical attacks by defendant upon plaintiff might be looked upon as having been condoned by the frequent reconciliations but these attacks do evidence the severity and the extent of the arguments. One time defendant struck plaintiff over the eye with her engagement ring so that he was badly scratched. Plaintiff testified that on another occasion defendant tore off part of the protective garment he was wearing; another time she pressed a lighted cigarette against his ear.

Defendant was very frank and honest in her appraisal of the marital situation but still professed her love for plaintiff and sought a reconciliation. She stated that when she married the plaintiff she realized that there were "2 strikes against" the marriage because of the boy but thought that with plaintiff's cooperation this could be overcome. The final separation followed a dispute about the boy

who threatened to kill plaintiff if he did not stop abusing defendant. There was no abuse on plaintiff's part. Defendant sided with the boy. The boy has been sent away to school and defendant believes that his removal will end the difficulties theretofore existing.

The case differs from that of *Garb* v. *Garb,* 328 Mich 305, on which defendant largely relies. In that case we refused a divorce but the facts were significantly different. In the bill and cross-bill in the *Garb Case* each party charged the other with cruelty and proved it in a measure. One of the children involved was physically and mentally defective. His condition caused much quarreling between the parents. The boy was finally sent away to an institution where he was to remain for a considerable period of time. In the instant case defendant's boy will come home for vacations and may continue to be a source of unhappiness to both plaintiff and defendant. In the *Garb Case* we held that in view of the record, the home should not be broken up and thereby deprive the young children of the joint help and care of the parents. In the instant case, there were no children except defendant's son.

It is true, as defendant claims, that neither party was entirely blameless. But we have held that where the acts of cruelty on the part of one party are so far greater than those of the other, the latter is entitled to a divorce. We stated in *Gillett* v. *Gillett,* 269 Mich 364:

"We have frequently refused to grant a divorce where the parties are both at fault. * * * The instant case, however, is not free from doubt. There are no children of the marriage, and the relationship of the parties, as shown by the record, has become so unbearable that we are constrained to concur in the decision reached by the trial court to grant the divorce."

See *Trombley* v. *Trombley,* 313 Mich 80; *Gaw* v. *Gaw,* 327 Mich 120; *Stuart* v. *Stuart,* 311 Mich 30.

After a careful review of the record, we conclude that the trial judge properly granted a decree in favor of plaintiff. Decree affirmed, without costs.

ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

DETHMERS, C. J., did not sit.

SCHAIBLY v. VINTON.

1. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
   Trial judge's finding in nonjury case that plaintiff southbound motorist on through highway was guilty of contributory negligence *held,* justified under record submitted.

2. SAME—THROUGH HIGHWAYS—SPEED—CAUTION SIGNALS.
   The privileges of a motorist on a through highway do not carry the right to go beyond the legal speed limit nor to disregard the necessity for caution, where there is a caution signal as evidenced by a yellow flashing signal (PA 1949, No 300, § 614).

3. ATTORNEY AND CLIENT—PRIVILEGE OF SECRECY—WAIVER.
   The privilege of secrecy as to what passes between an attorney and client is the privilege of the client and he may waive it if he chooses; the privilege not being that of the court or any third party.

REFERENCES FOR POINTS IN HEADNOTES

[2] 5 Am Jur, Automobiles § 302.
[2] Rights and duties at intersection of arterial (or other favored) highway and nonfavored highway. 58 ALR 1197; 81 ALR 185.
[3–6] 58 Am Jur, Witnesses §§ 368, 371, 522.

4. APPEAL AND ERROR—ATTORNEY AND CLIENT—HARMLESS ERROR.
An improper ruling by a trial judge as to the existence of the attorney-client privilege in regard to testimony by a witness, not a party to the lawsuit, cannot be asserted by the plaintiff as reversible error.

5. SAME—HARMLESS ERROR—PRIVILEGE.
An improper ruling by a trial court upon a question of privilege of a witness who is not a party to the case, cannot be excepted to by a party as an error justifying an appeal and a new trial, if the ruling denies the privilege and compels the witness to testify.

6. SAME—HARMLESS ERROR—NONJURY CASE—ATTORNEY AND CLIENT.
Ruling of trial judge in nonjury case admitting into evidence the testimony of witness, not a party to the case, as to communication between himself and an attorney *held*, not reversible error, where trial judge stated that the issue arising from the reception of such testimony would have no consideration in deciding the case and it is evident it did not.

Appeal from Kent; Verdier (Leonard D.), J. Submitted October 9, 1953. (Docket No. 51, Calendar No. 45,948.) Decided November 27, 1953.

Case by Robert S. Schaibly and Auto Owners Insurance Company against J. Ross Vinton for damages to automobile involved in accident. Judgment for defendant. Plaintiffs appeal. Affirmed.

Fred Roland Allaben (*Craig E. Davids,* of counsel), for plaintiffs.

Markle, Markle & Eubank, for defendant.

BUTZEL, J. Robert S. Schaibly, referred to herein as plaintiff, together with the Auto Owners Insurance Company as subrogee of plaintiff, brought suit against J. Ross Vinton, defendant, to recover for the cost of repairs to and replacements in an automobile, owned by Schaibly, which was badly damaged in a collision which occurred at the intersection of Nine Mile road and Greenfield road in Oakland county,

Michigan, on August 18, 1950, at approximately 4:50 p.m. Plaintiff was driving his Oldsmobile in a generally southerly direction on Greenfield road, a 2-lane concrete through highway 20 feet in width. Defendant was driving his Ford automobile in an easterly direction along the Nine Mile road, a 2-lane blacktop road 20 feet in width. A stop sign is posted on Nine Mile road 100 feet or less west of the westerly line of Greenfield road. The legal speed limit on Greenfield road is 45 miles per hour. However, there is a flashing signal which was evidently in operation at this intersection and plainly visible to drivers traveling on Greenfield road. This flashing signal was yellow for traffic on Greenfield road and red for traffic on the Nine Mile road. The applicable statute provides:

"Whenever flashing red or yellow signals are used they shall require obedience by vehicular traffic as follows:

"1. Flashing red (stop signal). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked and the right to proceed shall be subject to the rules applicable after making a stop at a stop sign.

"2. Flashing yellow (caution signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution." PA 1949, No 300, § 614 (CL 1948, § 257.614 [Stat Ann 1952 Rev § 9.2314]).

The automobiles of plaintiff and defendant collided at this intersection. Plaintiff's automobile continued a short distance apparently somewhat out of control and collided with an automobile of one Brennan who was at that time traveling in a generally northerly direction on Greenfield road.

Plaintiff claims that defendant did not stop before entering Greenfield road. Defendant claims that the plaintiff did not enter the intersection with caution; that he was exceeding the speed limit; that he was relying upon the horn he was blowing rather than caution; and that he saw and was aware of the closely approaching traffic.

The case was tried before a judge without a jury. The trial judge discredited defendant's testimony and held him negligent in not stopping before entering upon the paved portion of Greenfield road. He also held the plaintiff guilty of contributory negligence under the facts as disclosed.

Plaintiff testified that he was a civil engineer and was driving between 2 construction projects; that he left the first project located at Fourteen Mile road and Greenfield road at approximately 4:15 p.m. and that the collision occurred at 4:50 p.m. According to plaintiff's testimony 35 minutes thus elapsed while he was traveling the short distance between the Fourteen Mile road and the Nine Mile road. Plaintiff testified that the second project to which he was driving was located 4 or 5 miles south of the intersection at which the collision occurred. Plaintiff stated that at the second project he usually worked until 5 or 5:30 p.m. but on that particular day he anticipated working later in order to supervise the placing of a furnace sitting outdoors under cover before night and the closing down of that project. Plaintiff testified that it had rained 10 minutes before the collision and that the pavement was wet. Plaintiff further testified that he saw 2 cars preceding that of defendant cross Greenfield road without stopping; that he also saw defendant's car approaching Greenfield road and expected defendant to stop but that when defendant proceeded to cross Greenfield road without stopping plaintiff was too near defendant's car to avoid a collision.

Under the facts as testified to by plaintiff there was sufficient reason for plaintiff to hurry. The judge may have noticed that plaintiff was not too accurate in his judgment of the speed at which he was traveling when he claimed it took him approximately 35 minutes to go from the Fourteen Mile road to the Nine Mile road. In any event, the judge did not believe plaintiff when he stated that he was going at less than the legal speed limit of 45 miles per hour. The testimony of witnesses places his speed at 50 miles per hour, and one witness who was disinterested testified that plaintiff was going "a good 50" miles per hour.

It would serve no useful purpose to review the testimony of the various witnesses except to say that the judge was fully justified in finding that plaintiff was guilty of contributory negligence. Had plaintiff gone slower and thus had his car under better control the accident would not have occurred.

Plaintiff cites many cases where we have pronounced the rule that a through lane gives a driver certain privileges which parties crossing at an intersection must respect. Such privileges do not carry with them the right to go beyond the legal speed limit nor to disregard the necessity for caution where there is a caution signal as evidenced by the yellow flashing signal. *Marciniak* v. *Sundeen,* 278 Mich 407; *Campbell* v. *Osterland,* 283 Mich 175; *Holley* v. *Farley,* 289 Mich 676; *Carrothers* v. *French,* 309 Mich 340.

Error is asserted in the ruling of the trial judge admitting, over objection of plaintiff's counsel, testimony of plaintiff's witness Leo Brennan on cross-examination. Witness Brennan was the owner and driver of the third automobile damaged as a result of the collision between plaintiff and defendant. On cross-examination witness Brennan was asked:

"*Q.* It is also your present intention to join Schaibly as a defendant in that case?

"*A.* No, sir. That is up to the lawyers.

"*Q.* Has the matter been discussed with you at all?"

At this point plaintiff's counsel objected to the question as an invasion into the privileged confidential communications between attorney and client. The trial judge denied the objection and ruled that the witness would be permitted to answer.

In the case of *Passmore* v. *Estate of Passmore,* 50 Mich 626, 627 (45 Am Rep 62), Justice COOLEY, in ruling upon the scope of the attorney-client privilege, stated:

"There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he may waive it if he chooses. * * * It is not the privilege of the court or any third party."

Witness Brennan was not a party to the lawsuit. The privilege of secrecy surrounding confidential communications between witness Brennan as a client and his attorney is a personal one. An improper ruling by the trial judge as to the existence of the attorney-client privilege in regard to testimony by a witness not a party to the lawsuit cannot be asserted by the plaintiff as reversible error.

"An improper ruling by the court, upon a question of privilege, cannot be excepted to by the party as an error justifying an appeal and a new trial, if the ruling denies the privilege and compels the witness to testify." 8 Wigmore on Evidence (3d ed), § 2196.

In the colloquy between the trial judge and plaintiff's counsel in regard to the citation of authorities pertaining to the extent and protection of confidential communication, the judge stated that the issue

that arose concerning confidential communications would have no consideration in his decision of the case. It is evident from the record that the court's decision was not influenced in any respect by the ruling on that issue and the testimony following that ruling.

We believe that there was sufficient testimony to fully justify the trial judge in holding that plaintiff was guilty of contributory negligence and the judgment in favor of defendant is affirmed, with costs.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LEWIS v. LEWIS.

1. DIVORCE—CUSTODY AND SUPPORT OF CHILDREN—AGREEMENT OF PARTIES.

   A court in a suit for divorce is not bound by any agreement of the parties in awarding the custody of children or making proper provision for their support.

2. SAME—CUSTODY AND SUPPORT OF CHILDREN—WELFARE OF CHILD.

   The welfare of a child of parties to suit for divorce is paramount in determining matters of its custody and support and not the claims and personal rights and desires of the parents and each case must be decided on its particular facts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation § 682.

[2-4] 17 Am Jur, Divorce and Separation § 683.

[4] Nonresidence as affecting one's right to custody of child. 15 ALR2d 432.

Order in divorce or separation proceeding concerning removal of child from jurisdiction, and award of custody to nonresident. 154 ALR 552.

[5, 6] 17 Am Jur, Divorce and Separation § 679.

3. SAME—CUSTODY OF CHILDREN—FITNESS OF MOTHER.
A girl of tender years should be with the mother upon decree of divorce, where there is not the slightest intimation that she is not a proper person.

4. SAME—CUSTODY AND SUPPORT OF CHILD—NONRESIDENT MOTHER.
A child of divorced parents is a ward of the court and if the court finds it conducive to the best interests of the child to do so, it may award custody to a mother residing without the State and charge the father with the child's maintenance and support.

5. SAME—CUSTODY OF CHILD—RIGHT OF VISITATION.
The privilege of visitation of a child by divorced parent denied custody is an important but not an absolute right and one which must yield to the good of the child.

6. SAME—RIGHT OF VISITATION.
Order of court that child of divorced parents, presently in custody of mother residing out of the State, be placed in custody of father in this State for 2 weeks in the summertime provided he was not in arrears on alimony payments and paid traveling expenses of the child from her mother's home and the return trip *held,* proper.

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 14, 1953. (Docket No. 85, Calendar No. 45,972.) Decided November 27, 1953.

Divorce proceedings between Hazen Jack Lewis and Lois Lewis. On petition of plaintiff for modification of decree relating to alimony. Modification denied. Plaintiff appeals. Affirmed.

Herman F. Lande, for plaintiff.

Joseph & Joseph, for defendant.

BUTZEL, J. On October 7, 1946, Lois Lewis, appellee, was awarded a decree of divorce on the ground of extreme cruelty on a cross bill filed by her against Hazen Jack Lewis, appellant. The cross bill also charged nonsupport. She was given the cus-

tody of Kathleen Lewis, a minor child who was less than 2 years of age. Appellant was given the right to visit the child at reasonable times and intervals and, if he so desired, the sole custody for 2 weeks during the summer. He was ordered to pay the sum of $10 a week as alimony to the friend of the court for the support and maintenance of the child until she attained the age of 18 or had completed her high school education, the sums so paid to be forwarded to the appellee.

The record, consisting of the settled case, as transmitted to this Court, embraces the report of the friend of the court filed just preceding the hearing of the divorce case and also the colloquy between judge and counsel at the time of the hearing of the present petition filed by appellant to modify the alimony provision in the decree so as to release him from payment for the child's support until it was returned to the jurisdiction of the court. Appellant also asked for such further relief as shall be agreeable to equity and good conscience. No objection is offered to the judge's basing his decision largely on the report of the friend of the court, which indicated that prior to the birth of the child appellant did not want the child nor did he care to see it when it was born. Appellant did not pay the alimony of $10 a week until considerable pressure was brought against him.

Some time after the original decree appellee, who is now remarried, moved to California, taking her young child with her. Appellant was far in arrears in payment of alimony when he filed this petition to modify the decree, stating that 2-1/2 years prior to the petition to amend, appellee had moved to California and that he thus was deprived of the right to visit the child. He further stressed the fact that the original decree was entered in accordance with a stipulation of parties, which provided for appellant's

rights of visitation with the child. He intimates that this is a contract. We dispose of that question at once. The court is not bound by any agreement of parties in awarding the custody of children or making proper provision for their support.

The record as submitted would indicate that appellant had never supported appellee. He was only 19 years of age and appellee a year older when they married. They lived together but a short time. As a property settlement in the divorce decree, appellee was awarded only $175 equity in a home and the household furniture and furnishings being purchased on contract. In his present petition appellant expresses no love for, nor desire to see the child, but only the right to see it. He bases his claim entirely on the case of *Meyers* v. *Meyers,* 161 Mich 487, which refers to the previous case of *Myers* v. *Myers,* 143 Mich 32. The *Meyers Case* does not state an absolute rule. It has been modified by *Kane* v. *Kane,* 241 Mich 96, where we stated that the welfare of the child and not the claims and personal rights and desires of the parents is paramount. Each case must be decided on its particular facts. In this case appellee has remarried and is living in California. The child is of tender years. It should be with the mother and there is not even the slightest intimation that she is not a proper person to have custody of the child. In *Kane* v. *Kane, supra,* we said:

"The rule is universal that a child of divorced parents is a ward of the court and that, in providing for its care, custody, maintenance, and education, the paramount consideration shall be its welfare. To that welfare, the claims and personal rights and desires of parents and even the wishes of the child must yield. *Corrie* v. *Corrie,* 42 Mich 509; *Weiss* v. *Weiss,* 174 Mich 431; 19 CJ, p 343, and cases in note.

"Where, in the fair and impartial exercise of its wise discretion, the court finds it conducive to the

best interests of the child to do so, it is authorized by the statute cited to award its custody to a parent who resides without the State, and in this or a foreign country, and, where the custody is awarded the mother, to charge the father with the child's maintenance and support.

"Access to the child by the parent denied custody is an important right. It is recognized that awarding custody to a nonresident parent may render the privilege of visitation impracticable in many cases. That privilege is not an absolute right but one which must yield to the good of the child. *Waldref* v. *Waldref,* 135 Minn 473 (159 NW 1068); *Bedolfe* v. *Bedolfe,* 71 Wash 60 (127 Pac 594); 19 CJ p 348. Its feasible exercise should be safeguarded by the decree, but only to the extent it may be done without opposing the best interest of the child. Where the proofs are convincing the welfare of the child demands that course be taken its custody may and should be awarded to the nonresident parent notwithstanding the effect may be the defeat of visitation by the resident parent."

See, also, *Hart* v. *Hart,* 266 Mich 564, and *Chadwick* v. *Chadwick,* 275 Mich 226.

The judge refused to modify the decree of alimony for the support of the child but did order that appellant might have the child for 2 weeks in the summertime, provided that he was not in arrears on alimony payments and paid the traveling expenses of the child from her mother's home and the return trip.

The order of the court is affirmed, with costs to appellee.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

WILLIAMS *v.* SECRETARY OF STATE.

1. STATUTES—CONSTRUCTION—AMENDMENT.

   The legislature, in amending one section of a statute, is presumed to have intended that in its amended form such section should be construed in connection with other provisions of the law and in harmony therewith.

2. SAME—CONSTRUCTION—RELATION OF A PORTION TO THE ENTIRE ACT.

   The language of a particular section or sections of a statute must be read in the light of the purpose of the legislature in its enactment as indicated by provisions of the law relating to the subject matter.

3. SAME—PURPOSE OF INTERPRETATION.

   The primary purpose of interpreting a statute is to ascertain and give effect to the intention of the legislature.

4. SAME—CONSTRUCTION—UNAMBIGUOUS LANGUAGE.

   A bare reading of a statute suffices and no interpretation is necessary if the language employed in a statute is plain, certain and unambiguous.

5. SAME—CONSTRUCTION OF ENTIRE ACT.

   An entire act must be read and the interpretation given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.

6. SAME—CONSTRUCTION OF PART OF ACT.

   One part of a statute must not be so construed as to render another part nugatory or of no effect.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 50 Am Jur, Statutes § 349.
[2, 3] 50 Am Jur, Statutes § 303 *et seq.*
[4] 50 Am Jur, Statutes § 225.
[5, 6] 50 Am Jur, Statutes § 357 *et seq.*
[7] 50 Am Jur, Statutes § 235 *et seq.*
[8, 9] Generally as to recount of elections, see 18 Am Jur, Elections §§ 256, 315, 316.
[10] 14 Am Jur, Costs §§ 23, 91.

7. SAME—CONSTRUCTION—ORDINARY MEANING.
A construction may be put upon a part of a statute other than would be accorded by its ordinary meaning and grammatical construction, where latter leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended.

8. ELECTIONS—RECOUNTS—COUNTERPETITION—RECOVERY OF DEPOSIT.
Fact that statutory provisions specifically authorized repayment to petitioner for recount of an election of statutory deposit made only when he established fraud or mistake and party seeking recount receives a certificate of election would not preclude party who filed counterpetition from recovering deposit he had made after he had received certificate of election upon withdrawal of both petition and counterpetition (CL 1948, § 189.1, as amended by PA 1951, No 213, § 189.3).

9. SAME—RECOUNTS—CONSTRUCTION OF STATUTES.
Statute relating to recounts of elections is construed as imposing equal obligations on, and giving like privileges to, candidates filing original recount petitions and those presenting counterpetitions (CL 1948, § 189.1, as amended by PA 1951, No 213, § 189.3).

10. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTES.
No costs are allowed in mandamus proceeding involving issues of statutory construction and a question of general public concern.

Mandamus by G. Mennen Williams and Democratic State Central Committee of Michigan to compel Owen J. Cleary, Secretary of State, to refund money deposited with counterpetition for recount of 1952 general election. Submitted September 9, 1953. (Calendar No. 45,831.) Writ granted November 27, 1953.

Alfred B. Fitt, for plaintiffs.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Russell A. Searl,* Assistant Attorney General, for defendant.

CARR, J. The facts in this proceeding are not in dispute. At the general election held November 4, 1952, Governor G. Mennen Williams was a candidate for re-election. The returns to the board of State canvassers, made pursuant to statute by local election officials, indicated that he had received the highest number of votes cast for the office of governor. Thereupon the candidate receiving the next highest number of votes filed a petition, in accordance with pertinent provisions of part 4, chap 19 of the Michigan election law,* demanding a recount of various precincts throughout the State. Governor Williams, hereinafter referred to as the plaintiff, then filed a counterpetition asking in terms for recounts in all precincts, other than those in which voting machines were used, not covered by the original recount petition, and deposited in connection therewith the sum of $12,500, estimated on the statutory basis of $5 for each precinct. It was subsequently determined that plaintiff's counterpetition covered 1908 precincts and that, in consequence, the amount deposited exceeded the required sum by $2,960. Said sum was returned to plaintiff and is not involved in this controversy.

Before the completion of the recounts demanded, the candidate filing the original petition requested leave to withdraw it. Thereupon plaintiff filed a like request as to his counterpetition, reserving at the time the right to demand a return of the amount of his deposit. The requests were granted and the recount proceedings terminated. A certificate of election was then issued to plaintiff. A demand for the return of the deposit made by plaintiff was denied as to the sum of $9,540 covering the 1908 precincts in which he had sought a recount. The present mandamus proceeding followed, plaintiff claiming

* PA 1925, No 351, as amended (CL 1948, § 145.1 *et seq.* as amended [Stat Ann and Stat Ann 1951 Cum Supp § 6.1 *et seq.*]).

that he is entitled to the full amount of his deposit under statutory provisions hereinafter quoted. On behalf of defendant the right to such return is denied, on the theory that the legislature in the enactment of the election law and the amendments thereto failed to make provision therefor.

The primary question at issue is, as above indicated, one of statutory construction. Part 4, chap 19, § 1, of the election law, being CL 1948, § 189.1 as amended by PA 1951, No 213 (Stat Ann 1951 Cum Supp § 6.540), reads as follows:

"Sec. 1. Any candidate voted for at any election for an office, the votes for which are canvassed by the board of State canvassers, who considers himself aggrieved on account of any fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by said inspectors, or of any county canvassing board, may, not later than 2 days after the final certification and determination of the State board of canvassers, present to and file with the secretary of State a written or printed petition which shall be sworn to by such candidate, setting forth as near as may be the nature and character of the fraud or mistakes complained of, and the townships, cities or counties, or the precincts thereof, in which they exist, which petition shall pray for a correction thereof by a recount of the votes cast therein, and any counterpetition shall be filed in like manner within 24 hours thereafter: Provided, That any candidate at any general or special election for a seat in the legislature, intending to file a contest in accordance with the rules of either house of the legislature, shall make the deposit of money required by this act with the clerk of the house or the secretary of the senate, as the case may be, and shall file 2 additional copies of any petition required by this act with the clerk of the house or the secretary of the senate, as the case may be, and the ballots in any precinct petitioned for recount in any legislative contest shall not be recounted for that office by any board of canvass-

ers but shall be preserved until the contest is disposed of under the rules of the legislative body concerned."

Section 3 of the chapter (CL 1948, § 189.3 [Stat Ann § 6.542]) governs the matter of deposits required from candidates demanding recounts, and the refunding thereof in certain cases. As last amended by PA 1931, No 200, it reads:

"Sec. 3. The candidate or elector presenting such petition to the secretary of State shall at the same time deposit with such officer the sum of 5 dollars for each precinct in which a recount of the votes is demanded. If by reason of such recount, the petitioner succeeds in establishing fraud or mistake as set forth in his petition and receives a certificate of election or establishes sufficient fraud or mistake to change the result upon any proposition, the votes for and against which were recounted, the money deposited by him shall be refunded. In event no refund is made as herein required, then the secretary of State shall pay to the treasurer of each county its proportionate share of such deposit based upon the number of precincts in such county in which the votes were recounted."

It may be noted that the recount provisions of the election law as originally enacted in 1925 contained, in section 1 of part 4, chap 19, no provision for the filing of a counterpetition. The clause now appearing therein with reference to such action was inserted by PA 1937, No 308. Counsel for defendant suggest that since the provisions of section 3 as to refunds were not then, or later, amended, it may be inferred that the legislature did not have in contemplation the making of a refund to a candidate filing a counterpetition, under circumstances of the character involved in the case at bar. We do not understand, however, that there is any claim on the part of defendant that section 3 should be construed as

not requiring the making of the prescribed deposit, by one filing a counterpetition, in the sum of $5 for each precinct to be recounted. As above stated, such deposit was made by plaintiff and was accepted. It is a fair conclusion, under established rules of statutory construction, that the legislature, in amending section 1, intended that in its amended form it should be construed in connection with other provisions of the law and in harmony therewith.

The statutory language in controversy here must be read in the light of the purpose of the legislature in its enactment as indicated by provisions of the law relating to the subject matter. In *City of Grand Rapids* v. *Crocker,* 219 Mich 178, 182, 183, it was said:

"There seems to be no lack of harmony in the rules governing the interpretation of statutes. All are agreed that the primary one is to ascertain and give effect to the intention of the legislature. All others serve but as guides to assist the courts in determining such intent with a greater degree of certainty. If the language employed in a statute is plain, certain and unambiguous, a bare reading suffices and no interpretation is necessary. The rule is no less elementary that effect must be given, if possible, to every word, sentence and section. To that end, the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.

" 'No rule is better settled than, in construing a statute, effect must be given to every part of it. One part must not be so construed as to render another part nugatory, or of no effect. The same rule applies to words in construing a sentence.' *People* v. *Burns,* 5 Mich 114."

The Court further quoted with approval the following from Endlich on the Interpretation of Statutes, § 295.

" 'Effect to be Given to True Intent of Act. Modification of Language.—Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence. This is done, sometimes, by giving an unusual meaning to particular words; sometimes by altering their collocation; or by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object, of all construction; and where the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter.' "

See, also, *Gardner-White Co.* v. *State Board of Tax Administration,* 296 Mich 225; *In re Petition of Bryant,* 323 Mich 424; *Ballinger* v. *Smith,* 328 Mich 23.

Counsel for defendant emphasize the specific language of section 3, above quoted, contending that no refund may be allowed unless fraud or mistake is shown and unless the party seeking the recount re-

ceives a certificate of election by reason thereof. As before noted, the recounts demanded by the petition and counterpetition in this case were not completed, the proceedings being discontinued at the requests of the candidates, and the certificate of election was issued to plaintiff on the basis of the original returns as canvassed by the board of State canvassers. Acceptance of the strictly literal interpretation urged in defendant's behalf would necessarily lead to the conclusion that the plaintiff is not entitled to a refund regardless of the fact that it was determined that he had been elected to the office in controversy. We do not think that such result is consistent with the general purpose of the legislature as indicated by the statutory provisions in question. The general intent is fairly disclosed that a candidate petitioning for a recount, who is successful in the final outcome of the matter, shall be entitled to a refund of his deposit. The language of the phrase "by reason of such recount," stressed by counsel for defendant, must be read in the light of such intent. It may not be given the interpretation urged. It may not be assumed that the legislature had in mind that candidates filing counterpetitions should be denied a right granted to those filing original petitions. Had it been the purpose to create any distinction or difference in this respect, we may assume that it would have been clearly expressed. In the absence of such expression the statute may not be interpreted as implying it, but rather as imposing equal obligations on, and giving like privileges to, candidates filing original recount petitions and those presenting counterpetitions.

Under settled rules of statutory construction, referred to in the cases above cited and consistently adhered to by this Court, plaintiff is entitled to the return of the sum of $9,540, but without interest. Inasmuch as the case involves issues of statutory con-

struction and is of general public concern, no costs are allowed. The writ sought will issue if necessary.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

EVER KRISP FOOD PRODUCTS COMPANY *v.* NEW AMSTERDAM CASUALTY COMPANY.

1. INSURANCE—BURGLARY—RECORD OF PROPERTY—EVIDENCE.
   Provision of burglary insurance policy that insured should keep records in such manner that the insurer can accurately determine therefrom the amount of the loss by necessary implication excluded mere notations on envelopes in which the money was contained as being sufficient alone to afford a basis for recovery under the policy for any loss sustained.

2. SAME—BURGLARY—EVIDENCE OF LOSS.
   Records of individual employees who had been permitted to leave money in employing company's safe for safekeeping, which records had been compared with notation on envelopes made by the bookkeeper the day before safe was burglarized *held,* competent to show amount of such money lost.

3. SAME—BURGLARY—EVIDENCE OF LOSS—FORFEITURE.
   Clause of burglary insurance policy requiring insured to keep records in such manner that the insurer could accurately determine therefrom the amount of the loss would be so construed as to permit the insured to present its best available proof in order to prevent a forfeiture.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 29 Am Jur, Insurance § 720 *et seq.*

[1–4] Sufficiency of bookkeeping to satisfy condition of insurance policy. 39 ALR 1443; 62 ALR 630; 125 ALR 350.

4. SAME—BURGLARY—AMOUNT OF LOSS—EVIDENCE.
Records which insured under policy of burglary insurance had required its employees to keep as to deposits they were permitted to make in insured's safe for safekeeping *held*, sufficient to establish amount of loss for which judgment had been entered by trial court.

Appeal from Wayne; Webster (Arthur), J. Submitted October 6, 1953. (Docket No. 10, Calendar No. 45,795.) Decided November 27, 1953.

Action by Ever Krisp Food Products Company, a Michigan corporation, against New Amsterdam Casualty Company, a New York corporation, on burglary insurance policy. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Gvazda & Shere (*Leroy G. Vandeveer,* of counsel), for plaintiff.

Walter A. Mansfield (*David S. DeWitt,* of counsel), for defendant.

CARR, J. During the summer of 1950 plaintiff was engaged in carrying on a food products business in the city of Detroit. On or about the 15th of June of that year unknown persons forcibly entered its plant and office, breaking open 2 safes and abstracting money therefrom. Of such money the greater part belonged to plaintiff. In addition thereto certain sums that employees of plaintiff had been permitted to leave there for safekeeping, under a definite arrangement to that effect, were lost, together with an estimated $250 in cash by way of uncollected payroll.

At the time of the burglary there was in force and effect an insurance policy issued by defendant to the plaintiff, providing for the indemnification of the assured for the loss of money and securities

caused by wrongful abstraction, burglary, or robbery within the premises. With provisions for extension of liability in certain cases we are not concerned in this case. The insurance policy covered not only property owned by the plaintiff, but also money belonging to others and held by plaintiff in any capacity. Subdivision B of the conditions of the policy read as follows:

"B. Ownership of property records. The insured property may be owned by the assured or held by him in any capacity whether or not the assured is liable for such loss or damage as is covered hereby, provided that the company shall not be liable for such damage to the premises unless the assured is the owner thereof or is liable for such damage thereto. In the event of claim hereunder involving property not owned by the assured, the company may adjust such claim either with the assured or with the owner or owners, and payment of such claim to such owner or owners shall constitute full satisfaction of such claim by the assured. If legal proceedings are taken against the assured to recover for such loss the assured shall immediately notify the company in writing and the company, at its own expense, may conduct and control the defense in the name and on behalf of the assured. The assured shall keep records in such manner that the company can accurately determine therefrom the amount of loss. In no event shall this policy cover any property owned by the United States government or held by the assured as postmaster."

Following the burglary plaintiff made demand on defendant for payment of the losses resulting therefrom. The parties were unable to reach an agreement, and in consequence suit was started. Thereafter defendant paid to plaintiff a sufficient sum to cover the money owned by the latter, which was stolen from the safe, together with damages to the premises resulting from the burglary, and the costs

of suit incurred up to the time of such payment. Defendant denied liability because of the uncollected payroll items and also for moneys belonging to employees of the plaintiff that were allegedly in the safe at the time of the burglary and were wrongfully abstracted therefrom, claiming that plaintiff had failed to keep proper records as required by the provision of the policy above quoted.

At the conclusion of plaintiff's proofs on the trial defendant moved for a directed verdict in its favor. Such motion was taken under advisement.* Pursuant to agreement of counsel a special question was then submitted to the jury under Court Rule 37, § 7 (1945), said question being in the following form:

"Did the plaintiff make and keep a memorandum or memoranda in such a manner as to constitute a record of the transactions which a person who is of ordinary intelligence can understand, and from which he can ascertain the amount of the loss?"

To such question the jury answered affirmatively. In passing on the legal questions presented by the motion for a directed verdict the trial judge concluded that plaintiff had made a sufficient showing to entitle it to judgment for the moneys belonging to its employees which were feloniously taken from the safes, but that the proof with reference to uncollected payroll was insufficient to justify recovery. Judgment was entered accordingly, and defendant has appealed.

The testimony introduced on behalf of the plaintiff was sufficient to establish that the system of permitting employees who desired to do so to leave money in the safes was approved by plaintiff. The latter's sales manager testified that the practice made "for better relationships" with the employees.

* See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—Reporter.

Plaintiff's bookkeeper was in immediate charge of such deposits. It was her custom when an employee brought in money for safekeeping to place it in an envelope bearing the name of the employee, on which she would note the amount deposited at the time and the balance. It is a matter of inference that a small number of employees only took advantage of the privilege allowed by the employer. Such transactions were not entered on the company books. However, at the request or direction of the bookkeeper, each employee making such deposits kept a record, and it appears that from time to time the records so kept were checked against the notations on the envelopes. It is in evidence that such a comparison was made on the day preceding the burglary.

At the time the money was stolen the envelopes bearing the notations of the bookkeeper were also abstracted. Subsequently one of them, with the end torn off and empty, was found on the floor. The claim presented by plaintiff to defendant was apparently based on the records kept by the employees as to their individual deposits, together with the recollection of the bookkeeper preparing the claim that such records were, when checked, in accord with the notations that she had placed on the respective envelopes.

It is the claim of defendant on appeal that the notations on the envelopes were not the character of record contemplated by the policy. Reliance is placed on the case of *Green's Hotel, Inc.,* v. *Commercial Casualty Insurance Company,* 4 NJ 517 (73 A2d 349). The policy of burglary insurance there involved contained a clause identical with the provision of the policy in the instant case on which defendant relies, namely:

"The insured shall keep records in such manner that the company can accurately determine therefrom the amount of the loss."

In that case it was the claim of the plaintiff that there was in its safe at the time of an alleged burglary not only money belonging to guests of the hotel but also other currency that was the property of plaintiff's officers. Such money was contained in an envelope bearing notations, presumably as to amount and ownership. As in the case at bar, the envelope was taken with the money. In consequence the plaintiff could present no record whatsoever with reference to it. On the theory that there was no reason why plaintiff might not have kept the same sort of a record that it maintained with reference to property of its guests, it was held that the notations on the envelope were not a sufficient compliance with the requirements of the policy. It was accordingly determined that the defendant was not liable for the money claimed to have been lost by plaintiff's officers. A similar conclusion was expressed in *Standard Accident Insurance Co.* v. *King Candy Co.* (Tex Civ App, May 20, 1949), 221 SW2d 349.

The trial court came to the conclusion in the instant case, as indicated by the opinion filed, that the notations on the envelopes were not in and of themselves sufficient to constitute a proper record within the meaning of the insurance policy. We think such conclusion was correct. Plaintiff should have anticipated that if the money was wrongfully abstracted from the safe the envelopes containing it would likewise be taken, so that no record would remain. The provision of the policy above quoted obviously contemplated not merely the keeping of a proper record but one from which the amount of loss might be determined. By necessary implication this excluded mere notations on envelopes in which the money was contained. In *Schlussel* v. *Commercial Casualty Insurance Co.,* 237 Mich 182, the records that plaintiff claimed he kept, and which were stolen from his safe at the time of the theft of the property

for which he sought indemnity, were wholly different in character than mere notations on envelopes as in the case at bar.

Appellant also urges that plaintiff could not rely on the records kept by its employees who made the deposits, and that the trial judge was in error in permitting it to do so. Such claim rests on the theory that each such employee kept a record solely for his own personal use and advantage. A fair interpretation of the testimony in the case discloses that such was not the situation. It must be borne in mind that these individual records were not kept by strangers, but rather by employees to whom the privilege of leaving money in these safes was granted. Doubtless the arrangement, as the sales manager testified, tended to promote a better relationship between the plaintiff and each such employee. It was thus for the benefit of both, and likewise the records kept at the request of the bookkeeper were for the benefit of both. Such system permitted checks, or comparisons, to be held from time to time for the purpose of obviating mistakes and consequent possible misunderstandings. It gave to each employee a record on which he was entitled to rely in the event that the records of the employer were lost. Likewise, in such event it afforded the employer the advantage of records which, because of the checks that were made, it could accept as accurate. It is a fair assumption from the evidence that such records were intended to supplement the notations on the envelopes in which the money was kept, to guard against mistakes, and the contingency resulting from a possible loss of the company's records.

Plaintiff relies on the general rule that an insurance policy will not be construed to permit a forfeiture if such result can be avoided. Attention is directed to the opinion in *Schlussel* v. *Commercial Casualty Insurance Co., supra,* where it was said:

"Although we fail to find, and counsel do not cite, any private home burglary insurance case which exactly quadrates with the situation presented here, under similar clauses in other lines of insurance largely relating to stocks of changeable merchandise in trade or business and therefore of greater significance, it is generally held that such clauses must be construed most favorably to the assured, in avoidance of forfeiture if possible, and if such books or accounts had been kept but were stolen or destroyed by fire, et cetera, through no participation or fault of the assured, it did not preclude him from recovery on producing the best available proof. That subject will be found instructively discussed, with citation of many authorities, in the annotations to *German Alliance Ins. Co.* v. *Newbern,* 28 LRA NS 337 (25 Okla 489 [109 P 826]). We think the question of whether or not plaintiff had kept such a book as he testified to, which without his fault was lost or stolen, became fairly an issue of fact to submit to the jury, as the court did."

See, also, as tending to support such rule of construction, *Exo* v. *Detroit Automobile Inter-Insurance Exchange,* 259 Mich 578; *Weller* v. *Cummins,* 330 Mich 286; *Mord* v. *New York Indemnity Co.,* 216 App Div 252 (214 NYS 693).

In *Green's Hotel, Inc.,* v. *Commercial Casualty Insurance Company, supra,* there was no record of any kind other than the notations on the envelopes in which the money was contained. The case is therefore not in point on the question whether, in the case at bar, plaintiff may rely on the records kept by its employees. In *Rives* v. *Fire Ass'n of Philadelphia* (Tex Civ App, Nov. 28, 1903), 77 SW 424, also cited by appellant, the policy contained the following clause, which serves to differentiate it from the case at bar:

" 'And the assured under this policy hereby covenants and agrees to keep a set of books showing a

complete daily record of the date at which each bale of cotton covered under this policy was purchased or received, from whom purchased or received, in what compress, warehouse or yard stored, together with the original tag number or mark thereon, with its weight and classification, and a complete daily record of all shipments or sales, showing to whom shipped or sold, with date of shipment, from the warehouse, compress or yard so shipped, and the original number of marks, weight and classification of each bale, and in case of loss the assured agrees and covenants to produce such books and records, and in event of failure to produce the same, this policy shall be null and void.' "

In the case at bar the policy did not prescribe the form in which the assured should keep its records. The requirement imposed was merely that the system followed should permit the defendant in the event of loss to accurately determine the amount thereof from the records. It is not disputed that as to the moneys deposited by employees in the plaintiff's safes the records that plaintiff had caused to be kept by the employees were sufficient to establish the amount of loss, for which judgment was entered in the trial court.

We find no reversible error in the case, and the judgment is affirmed, with costs to plaintiff.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

TREVOR *v.* FUHRMANN.

1. JOINT TENANCY—BANK ACCOUNT—EVIDENCE OF OWNERSHIP OF FUND.
   The husband of defendant was the actual owner of funds in a joint bank account, where evidence shows that the money in such account came from his earnings.

2. MONEY RECEIVED—ASSUMPSIT—EQUITY.
   The action of assumpsit for money had and received is essentially an equitable action and if it appear from the whole case that defendant has money which, according to the rules of equity and good conscience belongs to, or ought to be paid to, the plaintiff, he is entitled to recover.

3. SAME—RECEIPT OF MONEY BY DEFENDANT.
   Defendant in an action of assumpsit for money had and received must have received the money in order to be held liable to plaintiff.

4. SAME—PERSONAL ENRICHMENT OF DEFENDANT.
   An action of *indebitatus* assumpsit for money had and received will not lie against one who has not been personally enriched by the transaction.

5. SAME—INDORSEE OF CHECK—EVIDENCE AS TO ENRICHMENT.
   Defendant, indorsee of plaintiff's check, was entitled to show in action of assumpsit for money had and received that she did not actually receive plaintiff's money and was not "unjustly enriched" thereby.

REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 7 Am Jur, Banks § 426 *et seq.*
[1, 6] Gift or trust by deposit of funds belonging to the depositor in a bank account in the name of himself and another. 48 ALR 189; 66 ALR 881; 103 ALR 1123; 135 ALR 993; 149 ALR 879.
[2] 4 Am Jur, Assumpsit § 20.
[3–6] 4 Am Jur, Assumpsit §§ 22, 26.

6. SAME—RECEIPT OF MONEY—DEPOSIT IN JOINT ACCOUNT—UNJUST ENRICHMENT—FRAUD.

Testimony of defendant, indorsee of plaintiff's check, and other witnesses, received in nonjury action of assumpsit for money had and received subject to objection of plaintiff, *held*, competent and sufficient to establish that defendant had not actually received plaintiff's money and was not "unjustly enriched" thereby, where it appears that restrictive indorsement to defendant was to enable her to deposit it in joint bank account of herself and husband, that he actually owned the funds in the account and had previously paid therefrom such sum and more to drawee's stepdaughter who had directed its payment to defendant's husband and which stepdaughter had procured issuance of check to drawee by fraud.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted October 7, 1953. (Docket No. 24, Calendar No. 45,924.) Decided November 27, 1953.

Assumpsit by Russell F. Trevor against Louise C. Fuhrmann to recover amount of his check payable to third party and indorsed to defendant. Judgment for plaintiff. Defendant appeals. Reversed and remanded for entry of judgment for defendant.

Francis W. McCauley (*Wayne A. Anderson,* of counsel), for plaintiff.

Fildew, DeGree & Fleming and *Wallace Visscher,* for defendant.

CARR, J. Plaintiff brought suit to recover from defendant the sum of $13,000, claiming that he had been induced to part with the money through the fraud of a third person and that defendant had received it without payment of consideration therefor. The declaration alleged that on or about the 27th of October, 1951, one Eva Lott undertook to procure a loan from plaintiff, representing that she intended to use the money to finance a certain investment that

she claimed to have previously made and that plaintiff would be repaid within a few days thereafter. Plaintiff alleged that he relied on the representations by Mrs. Lott, that said statements were in fact false and made with intent to cheat and defraud him, and that Mrs. Lott intended to use the money to pay certain existing debts that she owed.

Plaintiff further alleged that he made an appointment with Mrs. Lott to meet her at a certain bank for the purpose of delivering the money to her, that at the appointed time Mrs. Lott did not come in person but sent another party to receive the funds, requesting plaintiff by telephone to give to such party a check in the sum of $13,000 for her account. Plaintiff complied with the request. He further claimed that subsequently the check was indorsed by Mrs. Lott's representative to the order of the defendant and was later paid by the bank on which it was drawn. The pleading did not aver any fraud on the part of defendant, or in fact any knowledge on her part of Mrs. Lott's fraudulent misrepresentations, if such there were, but asserted that as a result of the transaction defendant became "unjustly enriched" in the sum of $13,000 to which sum the plaintiff was legally entitled.

On the trial of the case plaintiff offered testimony tending to show that Mrs. Lott had negotiated the loan by representing that she intended to use the money to protect an investment or trust fund in the Oxford Paint & Varnish Company of Oxford, Ohio, and that within a few days she would be in position to make repayment. Plaintiff testified in substance that he believed Mrs. Lott's statements and that he issued the check to her representative, Mrs. Borck, who was Mrs. Lott's stepmother, in reliance on the truth thereof. At the time he took a note, signed by Mrs. Borck, in the amount of the check.

Mrs. Borck was called as a witness on behalf of plaintiff, testifying that she represented Mrs. Lott in actually obtaining the check from him. She then took it to Mrs. Lott who directed her to deliver it to Fred W. Fuhrmann, the husband of the defendant in this case. Thereupon Mrs. Borck went to the Fuhrmann home and, having indorsed the check, handed it to Mr. Fuhrmann. It was the claim of the latter that he had previously loaned money to Mrs. Lott and that the check handed to him by Mrs. Borck was in repayment of a portion of such loans.

Mr. and Mrs. Fuhrmann testified that some conversation was had with Mrs. Borck as to the form of the indorsement, and that Mr. Fuhrmann requested, or directed, that the instrument be indorsed to Mrs. Fuhrmann to the end that she might deposit it in the bank. Accordingly Mrs. Fuhrmann wrote on the back of the check the words "Pay to the order of Louise C. Fuhrmann," and Mrs. Borck signed her name beneath. A couple of days later Mrs. Fuhrmann deposited the check in the National Bank of Detroit, in which Mr. and Mrs. Fuhrmann maintained a joint account. Subsequently the check was paid by the Wabeek State Bank on which it was drawn.

It appears from the undisputed testimony of both Mr. and Mrs. Fuhrmann that the money in their account in the National Bank of Detroit came from the earnings of the former and that Mrs. Fuhrmann had no income of her own. It thus appears that the husband was the actual owner of the funds in the account. *Murphy* v. *Michigan Trust Co.*, 221 Mich 243; *Van't Hof* v. *Jemison*, 291 Mich 385. It may be noted further that the money loaned by Mr. Fuhrmann to Mrs. Lott was checked from this same account.

It was the claim of defendant on the trial that in the transaction in question she acted merely as the

agent of her husband, that the check was indorsed to her and deposited by her for the convenience of Mr. Fuhrmann, that the check was in payment of an obligation owing to him alone, and that she did not in fact receive the money that plaintiff was seeking to recover. Testimony offered in her behalf for the purpose of showing what actually occurred at the time Mrs. Borck brought the check to Mr. Fuhrmann was objected to by counsel for plaintiff, and was received at the time subject to such objection, but was later disregarded by the trial judge in reaching a decision in the case, apparently on the theory that the form of indorsement on the check was conclusive. Judgment was entered for the plaintiff and defendant has appealed, claiming that the negotiable instruments law* is not involved in the case.

The averments of the declaration clearly indicate that plaintiff did not seek recovery on the check, but was prosecuting his action on the theory of money had and received. It was, in substance, his claim, as set forth in his pleading, that defendant had in her possession a sum of money which belonged to him and which he was entitled to recover. The theory of such an action was considered by this Court in the early case of *Moore* v. *Mandlebaum,* 8 Mich 433, 448, where it was said:

"We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the

* CL 1948, § 439.1 *et seq.* (Stat Ann § 19.41 *et seq.*).—REPORTER.

plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action."

The foregoing statement was quoted with approval in *Weintraub* v. *H. B. Earhart, Incorporated,* 273 Mich 668, 674. It will be noted that such statement clearly imports that the defendant, in order to be held liable, must have received the money that the plaintiff seeks to recover. Of like import are *Wixson* v. *Haywood,* 33 Mich 68, and *Clark, Mason & Co.* v. *Parker, Webb & Co.,* 131 Mich 139. In recognition of the rule of law in this respect it was said in *Northwestern Upholstering Company* v. *First National Bank & Trust Company of Minneapolis,* 193 Minn 333 (258 NW 724):

"An action in *indebitatus* assumpsit for money had and received will not lie against one who has not been personally enriched by the transaction. *Erickson* v. *Borchardt,* 177 Minn 381 (225 NW 145); *Burleson* v. *Langdon,* 174 Minn 264 (219 NW 155)."

See, also, 58 CJS, p 929, § 23; 4 Am Jur, p 510.

In *Marine Company* v. *City of Milwaukee,* 151 Wis 239 (138 NW 640), the plaintiff brought action to recover the amount of a special assessment paid under protest, claiming that it was invalid. However, the money had been paid over to the contractor who held a special assessment certificate issued pursuant to the city charter. In holding that the plaintiff was not entitled to recover in an action for money had and received, it was said:

"Such action is founded upon the theory that the defendant has the money which is sought to be recovered, or that he has been enriched by the transaction, so that in equity and good conscience he should be compelled to turn over to plaintiff a portion or the whole of the amount in controversy. The basis of a common-law action for money had and re-

ceived is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same."

Counsel for plaintiff cites and discusses the case of *Walker* v. *Conant,* 65 Mich 194. This Court there reversed an order of the trial court sustaining a demurrer to the plaintiff's declaration in assumpsit and remanded the case for trial on the merits. On such trial defendant had judgment and plaintiff again appealed, with the result that the judgment was affirmed. *Walker* v. *Conant,* 69 Mich 321 (13 Am St Rep 391). The later opinion discusses the material facts, and the first opinion in the controversy should be read in conjunction therewith.

In view of the nature of the action defendant was entitled to show in the instant case that she did not actually receive plaintiff's money and was not "unjustly enriched" thereby. The testimony offered by her in this connection was competent. It was sufficient to overcome any possible inference or presumption arising from the form of the indorsement on the check and to establish beyond question, being uncontradicted in any respect, that defendant was not liable. The judgment entered against her must be reversed.

The case is remanded to the trial court with directions to set aside the judgment in plaintiff's favor and to enter judgment for defendant. Appellant may have costs.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

BRAMER *v.* AMES.

1. TRIAL—MOTION FOR DIRECTED VERDICT—EVIDENCE.

   A trial judge must construe plaintiff's testimony in a light most favorable to plaintiff in passing on a defendant's motion for a directed verdict.

2. AUTOMOBILES—DIRECTED VERDICT—ONCOMING CARS—SPEED.

   Trial court properly denied defendants' motions for directed verdict and for judgment *non obstante veredicto* in action under death act, where testimony was such that jury could find that driver of their eastbound tractor and trailer must have noticed oncoming car in eastbound lane, which had started to overtake and pass 2 westbound cars would not have room on 20-foot pavement to pass between defendants' equipment and the westbound cars in north lane unless eastbound driver drove off onto 13′ 10″ shoulder but that he failed to do so and did not start to decrease speed until 4′ from car in which plaintiff's decedent was a passenger (CL 1948, § 691.581 *et seq.*).

3. SAME—NEGLIGENCE—EVIDENCE.

   Verdict for plaintiff in action by administrator of estate of passenger in westbound car against driver of overtaking westbound car and owner and driver of eastbound tractor and trailer *held,* supported by evidence from which each of the 3 defendants could be inferred to be negligent.

4. SAME—SPEED—STATUTES—INSTRUCTIONS.

   Instruction relative to statute as to duty of operator of motor vehicle to drive so as to be able to stop within the assured clear distance ahead and have his vehicle under proper control *held,* not to have misled jury (PA 1949, No 300, § 627).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 349.
[1, 2] 5 Am Jur, Automobiles § 667.
[2, 4] 5 Am Jur, Automobiles § 166.
[2, 4] When automobile under control. 28 ALR 952.

5. DAMAGES—DEATH—FUNERAL EXPENSES—HIRING OF SUBSTITUTES —PREJUDICE.

Award of $20,000 for death of 42-year-old wife of 50-year-old man *held,* not excessive, where she left 5 children ranging in age from 5 to 20 years, $1,211.08 was paid for funeral expenses and testimony was introduced relative to cost of hiring others to perform duties deceased had performed but nothing appears to have occurred to improperly influence the jury in arriving at a verdict and jurors do not appear to have been actuated by prejudice or sympathy.

6. APPEAL AND ERROR—QUESTIONS REVIEWABLE—MATERIALITY OF TESTIMONY—NEW TRIAL.

Appellant is not in a position to urge as basis for new trial the claimed error of the trial court in refusing to permit him to introduce testimony of average income of husband of woman for whose death in highway accident administrator of her estate sought damages, where the trial judge commented that such subject matter was not of material significance in the case and question was withdrawn.

Appeal from Cass; Mosier (Carl D.), J. Submitted October 13, 1953. (Docket No. 71, Calendar No. 45,802.) Decided November 27, 1953.

Case by Harold Bramer, administrator of the estate of Wilma Mulhall, deceased, against George E. Ames, Frank Howe, Jr., and Clarence G. Ott, doing business as Ott Trucking Company for damages under death act. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Richard A. Wade (*Carroll B. Jones,* of counsel), for plaintiff.

White, Klute & White, for defendant Ames.

C. L. Stickler, for defendants Howe and Ott.

CARR, J. Plaintiff's decedent, Mrs. Wilma Mulhall, was fatally injured in an automobile accident occur-

ring on trunk line highway M–60 in Cass county, August 9, 1950, at approximately 3 o'clock in the afternoon. The administrator of her estate brought this action to recover damages under the so-called death act (CL 1948, § 691.581 *et seq.* [Stat Ann 1951 Cum Supp § 27.711 *et seq.*]), claiming that the death of decedent resulted proximately from concurrent acts of negligence on the part of defendants. At the time of the accident the weather was clear and the highway dry. The paved portion of the road was 20 feet in width, 10 feet on each side of the center line.

Mrs. Mulhall was a passenger in an automobile driven by Miss Katherine Weinberg, which was proceeding in a westerly direction in the north lane of traffic. The proofs indicate that such vehicle, referred to in the record as the Weinberg car, was preceded a short distance by another automobile. Defendant Ames, who was also driving in a westerly direction, undertook to pass the Weinberg car and for that purpose turned to the south half of the pavement. At the same time a tractor with trailer attached, owned by defendant Ott and driven by defendant Howe, appeared some distance in front of Ames and approaching him from the west. The testimony indicates that Ames first sought to return to his own side of the road, that he determined that he could not do so, and that the distance between the course of the approaching tractor and trailer and the cars in the north lane of traffic was insufficient to permit him to drive between them. He then turned his car rather sharply to the south, in front of the equipment operated by defendant Howe, and off the pavement, where his car ran into a tree. As defendant Ames crossed in front of him, Howe turned to his left toward the Weinberg car and then immediately to his right. Plaintiff claims that the front end of the trailer crossed the center line of the

road and struck the Weinberg car, causing the death of its occupants, including Mrs. Mulhall.

On the trial of the cause before a jury defendants Howe and Ott moved at the close of plaintiff's proofs for a directed verdict in their favor, claiming that actionable negligence on the part of Howe had not been shown. The motion was denied. At the conclusion of the testimony said defendants again moved for a directed verdict, which motion was taken under advisement by the trial judge. The jury returned a verdict in favor of the plaintiff in the sum of $20,000 against all defendants. Motion for judgment notwithstanding the verdict was submitted on behalf of Howe and Ott, and was denied. Motions for new trials on behalf of all 3 defendants were also denied. Defendants have appealed.

On behalf of appellants Howe and Ott it is claimed that the trial court was in error in denying their motion for a directed verdict at the conclusion of plaintiff's proofs. The determination of this issue involves consideration of the testimony of witnesses for the plaintiff. An officer of the Michigan State police arrived at the scene shortly after the accident occurred and took a number of measurements, to which he testified. He stated that in proximity to the point of the impact the south shoulder of the road was 13 feet 10 inches in width. It may be noted in this connection that a chart presumably showing the situation existing at the time was prepared and was introduced. It appears by stipulation of counsel that such exhibit, together with other exhibits introduced by plaintiff and submitted to the jury, has been lost. In consequence the incorporation of such exhibits in the record returned to this Court on appeal was not possible.

The record further discloses that some distance to the west of the point of the collision the highway curved somewhat gradually to the south. The

police officer placed the easterly end of such curve 336 feet from the approximate point of the accident. At what point on the curve defendant Howe might have seen the Ames car on the south half of the pavement, had he looked, does not appear from the record before us. However, a witness for plaintiff, a truck driver who had driven his equipment off the north side of the pavement shortly before the occurrence here involved, gave testimony indicating that defendant Howe did not apply any brake until he was approximately 4 feet from the Weinberg car, that separate brakes controlled the tractor and trailer, that the foot brake on the tractor was there applied, and that the result was the "jack-knifing" of the trailer in such manner as to cause it to cross the center line of the pavement and to come in contact with the automobile. The tractor did not strike the Weinberg car. The witness stated further that Howe was driving on the south edge of the pavement, but he was unable to say that the tractor and trailer actually left the pavement at any point although the observations of the police officer suggest that the right wheels of the tractor were, at one point, off the pavement. This witness estimated the speed of defendants' equipment at approximately 40 miles per hour, stating further that he did not notice any "characteristic motions" indicating that a brake had been applied at any prior point.

Further reference to the testimony of plaintiff's witnesses is unnecessary. In passing on the motion for a directed verdict, it was the duty of the trial judge to construe such testimony and permissible inferences therefrom in a light most favorable to plaintiff. *Anderson* v. *Kearly,* 312 Mich 566, 570; *Torma* v. *Montgomery Ward & Company,* 336 Mich 468, 475. Had defendant Howe made proper observations of the highway in front of him as he proceeded through the curve and upon the "straight-

away" he could scarcely have failed to notice the Ames car in the eastbound lane of traffic. The jury might well have concluded that the exercise of proper care on his part required that he decrease the speed of his equipment, and that his failure to do so was a proximate cause of the accident. It is a fair conclusion also that Howe might have driven entirely off the pavement, or approximately so. It appears that the trailer was empty. Defendants' equipment was approximately 8 feet in width. It must have been apparent to Howe that unless he either decreased his speed or got off the eastbound lane of traffic a sufficient distance to permit Ames to drive between the Ott equipment and the westbound cars an accident might result. Construing the proofs in accordance with the rule above indicated, the trial court was not in error in refusing to direct a verdict at the conclusion of plaintiff's case.

As a witness in his own behalf defendant Howe claimed that he did not see the Ames car until he had completely left the curve and was on the so-called "straightaway." He stated further that he had no recollection of decreasing the speed of his equipment either by removing his foot from the accelerator or by applying a brake. He stated, however, that he did turn somewhat to his right, and claimed that his truck was about one-half off the pavement. It was his opinion that the berm of the road was not wide enough to accommodate the truck and the Ames car at the same time. Why he did not turn 2 or 3 feet farther to the right is a matter of conjecture. Possibly it was his conclusion that he was allowing Ames sufficient room to pass the westbound cars without coming in contact with them or with the tractor or trailer. However, Ames concluded that he could not do so with safety, and therefore turned to his left in front of the tractor and went off the road. Noting this movement, Howe, as

he claimed, turned sharply to his left in close proximity to the center line of the pavement and then immediately to the right. He testified also that his brakes were in proper working order, that he could have stopped in approximately 150 feet while traveling 40 miles an hour, and that the shoulders of the highway were "comparatively wide" after he left the curve.

Under the testimony of the witnesses in the case issues of fact as to the negligence of defendant Howe were clearly presented for determination by the jury. The trial judge was not in error in failing to direct a verdict at the conclusion of the testimony, or in denying the motion for judgment *non obstante veredicto*. *Davis* v. *Belmont Creamery Co.*, 281 Mich 165; *Fitzcharles* v. *Mayer*, 284 Mich 122 (3 NCCA NS 565); *Vandenberg* v. *Prosek*, 335 Mich 382; *Lepley* v. *Bryant*, 336 Mich 224.

Error is also assigned by appellants Howe and Ott on the refusal of the trial court to grant them a new trial. It is urged that the verdict of the jury was against the great weight of the evidence. With this contention we are unable to agree. As before noted, the testimony presented issues of fact. It was for the jury to pass on the credibility of the witnesses, to determine matters that were in dispute, and to draw legitimate inferences from established facts. The conclusions indicated by the verdict find ample support in the record. *Vandenberg* v. *Prosek, supra*. The charge of the trial court fully and clearly submitted the issues of fact in the case. We find no error therein because of the reference to provisions of the statute relating to the duty of the operator of a motor vehicle to drive at a reasonable and proper rate of speed that would permit him to stop within the assured clear distance ahead, and to have

such vehicle under proper control.* Such charge as applied to defendant Howe undoubtedly had reference to his conduct as he came around the curve and saw or should have seen the Ames car before him on the highway. The jury could scarcely have been misled thereby.

The motion for a new trial submitted by defendant Ames raised certain questions as to the propriety of the verdict with respect to damages. Substantially the same questions are raised on this appeal. It is contended that the verdict was excessive, and that there was not sufficient testimony as to damages to enable the jury to arrive at a proper conclusion in that respect. Mrs. Mulhall left surviving her the husband, and 5 children ranging in age from 5 to 20 years. At the time of her death she was 42 years old and Mr. Mulhall was 50. The proofs in the case indicate that she had been in good health, and that she performed efficiently her duties in the home as a housewife and mother. Testimony was offered as to the payment of funeral expenses in the sum of $1,211.08. Other testimony relating to the cost of hiring others to perform, insofar as possible, the duties discharged by Mrs. Mulhall in her lifetime was introduced, apparently without objection. We appreciate the difficulty of establishing with mathematical precision the pecuniary injury resulting from the death of a wife and mother under circumstances of the character involved in the case at bar. It cannot be said, however, that there was not a sufficient showing of such injury, nor are we in accord with the claim that the amount of the award was excessive. In *Watrous* v. *Conor,* 266 Mich 397, 401, 402, it was said:

* See PA 1949, No 300, § 627 (Stat Ann 1952 Rev § 9.2327).—REPORTER.

"Assuming even that our verdict might be in a different amount, we are loath to disturb verdicts for personal injuries on the ground that the amount is excessive. *Cawood* v. *Earl Paige & Co.*, 239 Mich 485. 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 were the verdicts so great as to shock the judicial conscience. *Sebring* v. *Mawby,* 251 Mich 628."

In the case at bar it does not appear that anything occurred during the progress of the trial of such nature as to improperly influence the jury in arriving at a verdict. We find nothing to justify a conclusion that in their deliberations the jurors were actuated by prejudice or sympathy. See, also, *Graham* v. *United Trucking Service, Inc.*, 327 Mich 694.

Counsel for appellant Ames argues in his brief that the trial court erroneously refused to permit him to inquire into the earnings of the husband of decedent. Objection was interposed to a question directed to Mr. Mulhall's average income. The court did not pass on such objection but suggested by way of comment that the subject matter of the inquiry was not of material significance in the case. Thereupon counsel representing Ames withdrew the question. Under the record appellant is in no position to urge the matter here in support of his claim that he should be granted a new trial. The trial court was not in error in denying such motion. For the reasons above stated, the motion of the other defendants was also properly denied.

The record before us indicates that the case was carefully tried, that no error occurred of such prejudicial character as to justify or require the granting of a new trial, and that the verdict of the jury is sup-

ported by the proofs. The judgment is affirmed, with costs to plaintiff.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

WHITE *v.* BURKHARDT.

1. JURY—CHANCERY CASES.
   Juries in chancery cases act in an advisory capacity only.

2. APPEAL AND ERROR—CHANCERY CASES—TRIAL DE NOVO.
   The Supreme Court reviews chancery cases by a trial *de novo*.

3. MORTGAGES — FORECLOSURE — POSTING OF NOTICE — BURDEN OF PROOF.
   Plaintiff in suit to set aside sheriff's deed after mortgage foreclosure sale *held*, not to have sustained her burden of proof as to failure to post notice of foreclosure on the premises, hence, vacation of sheriff's deed was in error (CL 1948, § 692.3).

4. SAME—FORECLOSURE—CONSTRUCTION OF STATUTES.
   Statutory foreclosure of a mortgage is a matter of contract, authorized by the mortgagor, and should not be set aside without some good reason therefor and ought not to be hampered by an unreasonably strict construction of the law (CL 1948, § 692.3).

5. SAME—BILL TO SET ASIDE STATUTORY FORECLOSURE—EVIDENCE.
   Statutory foreclosure is sustained and decree setting it aside reversed, where record shows requirements of statute have been met, that plaintiff was in default some 26 months, and period of redemption had expired before she filed her bill to.

REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Equity § 404.
[2] 3 Am Jur, Appeal and Error § 815.
[3–5] Generally as to vacation of foreclosure sale, see 37 Am Jur, Mortgages § 640 *et seq.*

set the foreclosure aside and proofs failed to support claim that notice of foreclosure had not been posted on the premises as required by statute (CL 1948, § 692.3).

Appeal from Oakland; Holland (H. Russell), J. Submitted June 10, 1953. (Docket No. 4, Calendar No. 45,822.) Decided November 27, 1953.

Bill by Annie Mary White against Henry Burkhardt, his wife and others to set aside mortgage foreclosure by advertisement. Decree for plaintiff. Defendants appeal. Reversed.

Earl N. Nash, for plaintiff.

Tilden M. Gallagher, for defendants Blackno and Lukas.

BUSHNELL, J. Plaintiff Annie Mary White and her husband, Haywood White, acquired title by the entireties, in 1944, to property located in Royal Oak township, Oakland county, Michigan. On December 17, 1948, they borrowed $1,250 from defendants Henry Burkhardt and Eleanor Burkhardt, his wife, to whom they gave their promissory note with a mortgage on the Royal Oak property as security.

The required payments of $35 per month were made until June of 1949. Plaintiff and her husband separated on July 3d, when she went to Chicago to live with her sons. The husband remained in the property and collected rents from the tenant, Will Whitley, until June of 1951, at which time White disappeared and his whereabouts are unknown. The Burkhardt mortgage was thereafter foreclosed by advertisement, the sum of $1,011.64 being due and unpaid when the sale was held on May 2, 1950. The property was sold by the sheriff to the Burkhardts for the sum of $1,145.59. The sheriff's deed, with affidavits of publication and posting, was re-

corded with the register of deeds on May 17, 1950.

Prior to the expiration of the statutory period of redemption (CL 1948, § 692.11 [Stat Ann § 27.-1231]), the Burkhardts sold the premises to defendants Blackno. This deed, dated June 6, 1950, was recorded on June 26, 1950. Blackno and his wife conveyed by quitclaim deed to defendant Mary Lukas, a married woman, on June 22, 1950, that deed being recorded on June 28, 1950.

On May 21, 1951, Mary Lukas filed a complaint before the circuit court commissioner, against the Whites and their tenant. A writ of restitution issued on June 6th, was served and returned on August 3d, restoring the property and the premises to Mary Lukas. A brother-in-law, Vincent Lukas, who represented Mary Lukas in the circuit court commissioner's proceedings, testified that she afterwards conveyed the premises by warranty deed to Phillip Bricker and Zesse Katz. He also testified that about a month prior to May 2, 1951, the date of expiration of the period of redemption from the mortgage foreclosure, he sent a letter to the Whites advising them that, if the property was not redeemed, Mary Lukas expected it to be vacated by May 3, 1951. He said that about a week or 10 days later one Meyer called at his office and requested that the abstract be surrendered to him, he being a friend of Haywood White. Lukas demanded a deposit of $50 before he delivered the abstract. The abstract was returned to him on the 4th or 5th day of May and he refunded $50 to Meyer.

Annie White testified that when she received a letter from Whitley, postmarked in Detroit on July 19, 1951, telling her that the man who bought the house was going to sell it and that he, Whitley, would like to buy some of the contents, she immediately returned to Detroit. On July 31, 1951, plaintiff filed her bill of complaint, alleging lack of knowledge of

the foreclosure proceedings which she claims are not in accordance with law, in that the advertisement was not properly posted. She sought vacation of the sale and redemption of the property upon payment by her of the amount found to be due upon the mortgage, together with proper costs.

A jury trial was had of the issues framed by the pleadings. In submitting the matter to the jury the trial judge said: "The sole question for your determination is this: Was such a notice of foreclosure posted on the home in question on February 4, 1950?" The jury returned an answer of "No" to the question submitted to them. The trial judge, being of the same opinion as the jury, held that the foreclosure did not comply with the statute and, therefore, the mortgage sale was void and of no effect. A decree was entered on March 31, 1952, setting aside the mortgage foreclosure.

The appellants argue that a wife cannot maintain a suit in equity to vacate a sheriff's deed on property held by the entireties; that she cannot maintain such a suit after the expiration of the period of redemption without joining her husband as plaintiff and record titleholders as parties defendants. They further insist that a wife who moved to Chicago, leaving no forwarding address, and whose husband remained in possession only during the period of redemption, after which the property was sold to innocent purchasers, should not be afforded equitable relief. Appellants further argue, in effect, that the proofs in the instant case do not support the trial court's decree.

Juries in chancery cases act in an advisory capacity only, and we review here by a trial *de novo*. *Leser* v. *Smith,* 212 Mich 558, CL 1948, § 618.21 (Stat Ann § 27.1001). The first consideration is the nature and value of the testimony respecting the posting of the notice. An examination of that testimony re-

quires the conclusion that the plaintiff failed to sustain the burden of proof and that the trial judge was in error in vacating the sheriff's deed.

The record contains clear and unequivocal testimony by Louie H. Cheff that on February 4, 1950, he posted the mortgage foreclosure notice in a conspicuous place on the premises by attaching the same in a secure manner on the right-hand side of the front door jamb of the house. This witness seemed to have a better grasp of the factual situation as to posting; his testimony was unshaken and became stronger upon cross-examination. The testimony of plaintiff's witnesses was vague and indefinite and scarcely entitled to any weight. Foreclosure of mortgages by advertisement and sale has been in use in this State for about 100 years, and is well understood. Such statutory foreclosures should not be set aside without some good reason therefor. *Markoff* v. *Tournier,* 229 Mich 571, and *Detroit Trust Co.* v. *Agozzinio,* 280 Mich 402, 406. Statutory foreclosures are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law. *Lee* v. *Clary,* 38 Mich 223, and *Peterson* v. *Jacobs,* 303 Mich 329, 335.

Plaintiff had been in default for some 26 months, the period of redemption had expired before she filed her bill of complaint, she had been grossly careless in the preservation and protection of her property, and her proofs fail to support her contention of the lack of posting of notice. The record shows that the statutory requirements have been met in this foreclosure. See CL 1948, § 692.3 (Stat Ann § 27.-1223). In view of the foregoing, it is unnecessary to discuss the other questions raised by the appellants.

The decree of the trial court is vacated, the mortgage foreclosure is sustained, and a decree will be

entered here in accordance with this opinion. Costs to appellants.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

FABER *v.* GLASHAGEN'S ESTATE.

1. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES.
   Claims against the estates of deceased persons must be proved by the claimants and judicially found as they cannot be established by concession of the decedent's representatives.

2. SAME—SETTLEMENT AGREEMENT—ADMISSIONS—POSSESSION.
   Delivery of a settlement agreement, signed by decedent, was not essential to make it binding upon him as an admission in proceeding by other party to recover thereon as a claim against the estate of the decedent in the absence of any showing that the presence of the instrument in court was secured by illegal means.

3. SAME—CLAIM BASED ON SETTLEMENT AGREEMENT—PRIMA FACIE CASE.
   Claimant against the estate of decedent on a settlement agreement proved to have been signed by decedent established a prima facie case of delivery of the agreement by reason of his possession of that instrument which was filed by him in probate court.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONSIDERATION BY TRIAL COURT.
   Estate's claim that settlement agreement which had been executed by decedent was void as an attempt to change liquidated amount of an agreement relating to a security interest

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur, Executors and Administrators § 383.
[4] 3 Am Jur, Appeal and Error § 820.

in real estate was void is not discussed where, although it was claimed to have been raised at the trial, it was not considered by the trial judge (CL 1948, § 566.1).

5. ESTATES OF DECEDENTS—CONDITIONAL MATURITY OF DEBT—DEATH.
Debt of decedent which matured when he had disposed of his real estate holdings matured upon his death because at that time his real estate holdings were disposed of by operation of law.

6. SAME—REAL PARTY IN INTEREST ON CLAIM.
Claimant against estate of decedent *held*, real party in interest on claim under a settlement agreement which acknowledged indebtedness to claimant and which had been signed by decedent.

7. SAME—PARTIES—FINDING OF TRIAL COURT.
Finding of trial court that there was neither novation nor nonjoinder of proper parties is concurred in on appeal in proceeding on claim against the estate of a decedent.

8. INTEREST—WAIVER—CLAIMS AGAINST ESTATES OF DECEDENTS.
Claim of statutory interest on claim against estate of decedent is disallowed, where payment of interest had been specifically waived by claimant in settlement agreement following demand for payment (CL 1948, § 438.101).

9. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—NONJURY CASE—SETTLEMENT—PREPONDERANCE OF EVIDENCE.
Judgment in amount of 2 accounts against estate of decedent is ordered entered in favor of claimant on his appeal in nonjury action, where decedent had executed a settlement agreement in amount of such accounts, the testimony clearly preponderating in such direction.

Appeal from Mason; Neal (Max E.), J. Submitted June 2, 1953. (Docket No. 13, Calendar No. 45,833.) Decided November 27, 1953.

Harry M. Faber filed his claim against the estate of Paul C. Glashagen, deceased. On appeal to circuit court, judgment was for defendant. Plaintiff appeals. Reversed and remanded for entry of judgment for plaintiff.

Edward E. Barthell, Jr., for plaintiff.

Eugene Christman, for residuary legatee.

Keiser & Keiser, for estate.

BUSHNELL, J. This is an appeal from a judgment of the circuit court affirming an order of the probate court, denying allowance of a claim filed by the appellant, Harry M. Faber, in the estate of Paul C. Glashagen, deceased.

About 3 years prior to his death, Glashagen became a resident of Mason county. He had conducted a real estate and investment business at Chicago before coming to Michigan. His operations were financed by "depositors" whose moneys were usually secured by an interest in real property or in mortgages thereon. Separate accounts were kept with these depositors in "Pass Books" showing their respective payments and withdrawals. Faber, who had been dealing with Glashagen for some time, had 3 accounts with balances indicated therein as follows: "Partial Payment Plan No. 29—Balance due $1,732.40; Partial Payment Plan No. 654, Balance due $3,398.80; Stanley Student Loan No. 162, Balance due $1,813.98."

Faber made written demands for payment upon Glashagen on November 4, 1943, and December 27, 1943. On the latter date, Faber and Glashagen examined the accounts and a settlement agreement was entered into, which is shown in the record. In consideration of this settlement, Faber waived interest and Glashagen promised to pay the balances on accounts Nos 29 and 654, which he agreed to be due "in full to Harry M. Faber (or his estate) after disposing of my many real estate holdings."

The accounts indicate that Annie Faber, mother of plaintiff, and subsequently Caroline H. Faber,

his sister, had a survivorship interest in 1 or more of the accounts. There is no showing in the record as to when Mrs. Faber passed away, but it seems to be assumed that she is now deceased.

The opinion filed by the trial judge does not show the date of death of Glashagen. It contains findings of fact and law, and the determination that plaintiff had failed to sustain the burden of proof of possession of the settlement agreement from which an assumption of its delivery could arise. The trial judge found that Glashagen's signature on the agreement had been proved beyond controversy, but that there was no proof that the agreement had been delivered to claimant by the deceased or by someone having authority so to do, with the intent to make it effective. It was also held that the decedent's estate was not required "to deny under oath the execution by deceased of the instrument relied upon by claimant in order to cast upon the latter the burden of proving its due execution." *Hampton* v. *Van Nest's Estate,* 196 Mich 404, and *Caswell* v. *Stearns,* 257 Mich 461, 463, were cited as supporting authorities.

In the latter case it was said:

"Claims against the estates of deceased persons must be proved by the claimants, and judicially found. They cannot be established by concession of the decedent's representatives."

The trial judge felt that this statement in connection with the holding in *Wilbur* v. *Stoepel,* 82 Mich 344, 352 (21 Am St Rep 568), means that the claimant must affirmatively prove delivery as an essential part of the execution of the instrument relied upon, and that such proof is not present in the instant case. He declined to apply the following authorities because he did not consider them controlling: *Burson* v. *Huntington,* 21 Mich 415 (4 Am Rep 497);

Seligman v. *Estate of Ten Eyck,* 53 Mich 285; and *Equitable Trust Co.* v. *Fisher,* 301 Mich 66. As further authority for the proposition that decedent's representatives may not concede the execution of the instrument or its delivery, he cited *In re Griffin's Estate,* 309 Mich 376.

The trial judge concluded that there had been no conditional discharge of the debt, by reason of the failure of the decedent to dispose of his real estate holdings during his lifetime, and that such reference thereto in the agreement was only for the purpose of indicating the source of the repayment funds. He further held that there had been no novation nor nonjoinder of the proper parties; that the promise of repayment ran to Faber and no one else. Judgment was ordered in favor of the Glashagen estate.

We cannot agree with the conclusion reached by the trial judge in the light of our statement in *Equitable Trust Co.* v. *Fisher, supra,* 75, which reads as follows:

"The exhibit was produced in court by plaintiff. It was an admission of liability, signed by defendant. Delivery was not essential to make it binding upon him as an admission, and the only circumstances that could bar its reception in evidence would be a showing that its presence in court was secured by illegal means.

"Possession of the instrument was sufficient to establish a prima facie case of delivery. To hold otherwise would be to require the impossible from the representatives of estates of deceased persons when required to rely on the admission in evidence of written instruments in an effort to enforce obligations against living persons or the estates of other decedents."

In that case it was held that *Wilbur* v. *Stoepel, supra,* was inapplicable to the facts, which are also

distinguishable from those in the instant case. *In re Griffin's Estate, supra,* upon which the trial judge relied, does not contain any testimony or other proof as to the signature of the deceased. Plaintiff here, however, has proven execution within the rule of that case. See *Caswell* v. *Stearns, supra.*

Under the authority of *Equitable Trust Co.* v. *Fisher, supra,* Faber established a prima facie case of delivery of the Glashagen agreement by reason of his possession of that instrument which was filed by him in the probate court. The record is barren of any testimony showing that he obtained such possession by any illegal means.

Appellee urges that the agreement is void under the statute, CL 1948, § 566.1 (Stat Ann 1953 Rev § 26.978[1]), because of changes therein as to liquidated amounts. Although the estate claims that this question was raised at the trial, it certainly was not considered by the trial judge. For a discussion of the applicability of this statute, see *Thal* v. *Detroit Board of Education,* 316 Mich 351, 355.

As stated by the trial judge, the instrument acknowledged the existence of a debt which matured at the death of Glashagen, because at that time all of his real estate holdings were disposed of by operation of law.

The real party in interest is Harry M. Faber, and we agree with the trial judge that there is neither novation nor nonjoinder of proper parties in this case.

In urging reversal of the trial court's judgment and a remand with instructions, appellant asks for statutory interest on his claim as provided in CL 1948, § 438.101 (Stat Ann § 19.21). The difficulty with that argument is that payment of interest was specifically waived in the settlement agreement.

In this trial before the court without a jury, we are persuaded that the testimony clearly prepond-

erates in the opposite direction and that the trial judge erred in the application of the controlling authorities.

The judgment is vacated and the cause is remanded for entry of a judgment of $5,131.20 in favor of plaintiff. Costs to appellant in both courts.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, and REID, JJ., concurred.

BOYLES, J., did not sit.

In re CHAPPLE'S ESTATE.

TRULL *v.* KALAMAZOO COLLEGE.

1. WILLS—ADOPTED CHILDREN OF TESTATOR'S DAUGHTER.
Children adopted by testator's daughter and her husband after death of testator cannot take as "issue" or "children" under remaindermen provisions of will.

2. SAME—CHILDREN—ADOPTION.
When a will provides for a child of some person other than the testator, an adopted child is not included unless the will makes it clear that the adopted child was intended to be included.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 7] 57 Am Jur, Wills § 1383.
[1, 2, 7] Adopted child as within class in testamentary gift. 70 ALR 621; 144 ALR 670.
Term "issue", used as term of purchase, as including adopted children. 2 ALR 974; 117 ALR 714.
[3] 57 Am Jur, Wills §§ 1133, 1137, 1146.
[4] 57 Am Jur, Wills § 1129.
[5, 6] 57 Am Jur, Wills §§ 1158, 1159.

3. SAME—CONSTRUCTION—INTENT.
   The primary rule of construction of wills is to reach, if possible, the intent the testator had in mind and give effect to it, taking the whole will and giving effect to every part if possible.

4. SAME—CONSTRUCTION.
   All of the words used in a will must be taken into consideration in construing it.

5. SAME—RESIDUE—INTESTACY NOT PRESUMED.
   Intestacy will not be presumed, where there are bequests of residue in a will unless it is so provided in the will or the language or lack of language used necessitates such a result.

6. SAME—PRESUMPTION AGAINST INTESTACY.
   The presumption against intestacy is so strong that courts will adopt any reasonable construction of the will to avoid it.

7. SAME—CONSTRUCTION—RESIDUE—INTESTACY—ADOPTION.
   Provision of will leaving portion of residue in trust for testator's daughter with contingent remainder to her issue her surviving and in certain events in part to a college for certain purposes may not be construed as intending to provide that should daughter die intestate the property should go to her heirs, hence, daughter's surviving husband and their children, adopted after death of testator, do not participate in such portion of the residue as her heirs.

Appeal from Ionia; Davis (Morris K.), J. Submitted June 3, 1953. (Docket No. 30, Calendar No. 45,832.) Decided November 27, 1953.

In the matter of the estate of Edward E. Chapple, deceased. On filing the final account the will was construed. Harry R. Trull and others appealed to circuit court. Order of probate court affirmed. Harry R. Trull and others appeal. Affirmed.

Amberg, Law & Buchen, for appellants.

Jackson, Fitzgerald & Dalm, for Kalamazoo College.

BUSHNELL, J. This is an appeal from a judgment of the circuit court, which was entered after an appeal upon stipulated facts from an order of the probate court, construing the last will and testament of Edward E. Chapple, deceased. In that instrument the testator, after making a number of specific bequests, including the creation of trust for his wife out of an equal undivided 3/5 of the residue of his estate, provided in substance as follows: That the remaining equal undivided 2/5 of the residue of his estate was to go to the Michigan Trust Company, in trust for the benefit of his daughter, Rena B. Chapple, for and during the remainder of her natural lifetime. He then stated:

"At and upon the death of my daughter, and should she die leaving issue her surviving, then and in that event, I authorize and direct my said trustee to divide the said trust estate and property into as many equal shares or portions as there are children of my daughter, and issue of deceased children, surviving her (the issue of a deceased child to represent 1 share or portion), 1 of such shares or portions to be held, managed and invested for the use and benefit of each of her said children and the issue of any deceased children."

In this paragraph of his will the testator authorized his trustee, in certain events therein specified, to pay 1/2 of the share or portion to which "such child" mentioned in the heretofore quoted part of the will would be entitled, to Kalamazoo College of Kalamazoo, Michigan, for certain purposes. The remaining 1/2 of the residue of this trust was to be divided into 6 equal parts and paid to each of the previously designated legatees.

In the stipulated facts the following appears:

"Edward E. Chapple died on September 10, 1919. * * * The only heirs at law of said Edward E.

Chapple were Ola C. Tallman, his wife, and Rena C. Trull, his daughter.

"Rena C. Trull and Harry R. Trull were married on October 26, 1916.

"Robert Raymond Trull, of Midland, Michigan, and Elizabeth Trull Hartman, of Willow Run, Michigan, are the duly adopted children of Harry R. Trull and Rena C. Trull. Robert Raymond Trull was born November 5, 1917 and was adopted by Harry R. Trull and Rena C. Trull on March 7, 1921. Elizabeth Trull Hartman was born March 15, 1923 and was adopted by Harry R. Trull and Rena C. Trull on August 17, 1925.

"Rena C. Trull died November 10, 1950 and left surviving her as her only heirs-at-law said 2 adopted children and said Harry R. Trull, her husband. At no time did Rena C. Trull have any natural children. She died without leaving a will.

"Ola C. Tallman, the widow of said Edward E. Chapple, deceased, died August 8, 1946, leaving a last will and testament dated October 21, 1940, * * *

"The original inventory filed in the estate of Edward E. Chapple listed real estate in the amount of $10,799.44 and personal estate in the amount of $60,544.55."

The probate judge filed a written opinion which the circuit judge concluded had clearly decided the issues and which he adopted with the addition of the following statement:

"Since Elizabeth Trull Hartman and Robert Raymond Trull were adopted by the daughter of the testator after the death of the testator, under the doctrine announced by the Michigan Supreme Court in *Russell* v. *Musson,* 240 Mich 631, they cannot take as 'issue' or 'children'.

"To construe the will as urged by appellants, viz.: that the daughter must die leaving issue, and that such issue must die before attaining their majority, before Kalamazoo College could take, would pre-

sume that the testator intended intestacy under the situation as it has eventuated. The presumption is the other way. To interpret the will as urged by appellants would give a blind mechanistic interpretation to the will and in view of the fact that the testator did not give his daughter any power of appointment, such interpretation would thwart the plain intent of the testator."

The appellants, Harry R. Trull, the husband of Rena B. Trull, deceased, Robert Raymond Trull and Elizabeth Trull Hartman, their adopted children, insist that Kalamazoo College and the other named legatees are not entitled to the undivided 2/5 of the residuary estate, but that the appellants herein are entitled to such residue, either because of partial intestacy or that Robert and Elizabeth take under the will as the adopted children of testator's daughter.

Appellants have clarified the problem thus presented by a recognition of the barrier presented in *Russell* v. *Musson,* 240 Mich 631, and they concede that any contention that the 2 adopted children may take under the will is immediately met by the rule in that case. They argue, however, that the right of the adopted children of testator's daughter to take directly is only a secondary issue—

"for unless Kalamazoo College takes under the will or by virtue of the presumption, the 2/5 residue must inevitably go to all 3 appellants on intestacy, if not to the 2 adopted children-appellants under the will. There can be no doubt that the adopted children are the legal heirs of the adopting parent, the testator's daughter, CL 1948, § 710.9 (Stat Ann 1951 Cum Supp § 27.3178 [549]), *Fisher* v. *Gardnier,* 183 Mich 660 (1915); nor that the residue under such circumstances would go to them and their father as her sole surviving heirs-at-law and next of kin under the descent and distribution statute, *Conant* v. *Stone,*

176 Mich 654 (1913); *In re Martz's Estate,* 318 Mich 293, 301 (1947)."

We prefer to dispose of the adoption question first.

In the *Russell Case, supra,* the testator made a will in 1916. He was declared incompetent in 1921 and his son was appointed his guardian. He remained incompetent until he died in 1924, leaving his son, then 52 years old, as his sole heir at law. The son and his wife were childless, and in 1923 they legally adopted 2 children. The will gave a life use to the son and his wife, with the remainder over to his children; and in the event he (the son) should "die without children," the remainder of the estate was to go to persons named in the will. One of the questions in that case was whether the adopted children took under the will. It was held:

"That when a will provides for a child of some person other than the testator, an adopted child is not included, unless the will makes it clear that the adopted child was intended to be included. The rule does not appear to be applicable where the testator has himself adopted a child. In the instant case the children were not adopted until after the will was made and testator was declared incompetent. There is nothing in the will which indicates that testator intended they should be included. In view of this we must hold that the adopted children do not satisfy that provision of the will."

This rule, enunciated in 1927, has not been changed either by statute or decision. It is suggested that its reasoning ignores the purport of the Michigan statute, which makes an adopted child an heir-at-law of the adopting parents and entitled to inherit property from such parents in accordance with the law of descent and distribution. CL 1948, § 710.9 (Stat Ann 1951 Cum Supp § 27.3178[549]). See, also, *Burk* v. *Burk,* 222 Mich 149, 152, and *In re Rendell's Estate,* 244 Mich 197, 200.

Notwithstanding that suggestion we adhere to the rule expressed in the *Russell Case, supra,* and hold, as did the probate and circuit courts in the instant case, that the testator intended the property in question should only go to the surviving natural children and their children if any such children survived his only daughter. There being no natural children or their children surviving, the next question presented is whether the probate judge and trial judge were correct in holding that the residue of the trust created in paragraph 14 of the will passed to Kalamazoo College and the other legatees named therein.

This is the question which appellants say is the primary one in the case, namely: Was there a partial intestacy, in the light of the circumstances and under the conditions imposed by the testator?

Appellants present their analysis of the specific events in their order which they contend are conditions precedent and prerequisite to the contingent gifts to Kalamazoo College and other legatees. These are:

"(a) Rena, testator's daughter, must die, but must first survive both her parents.

"(b) There must be issue (children or grandchildren) of Rena who survive her death.

"(c) All of Rena's surviving issue must die, (1) before reaching 21 years of age, and (2) without leaving any surviving issue of their own."

It is argued that condition (a) has occurred and that if the adopted children, the appellants herein, are deemed "issue" of Rena, condition (b) has occurred. Condition (c), they say, has neither occurred nor can occur; that if the adopted children are excluded, neither condition (b) nor condition (c) has occurred, nor can occur, for the reason that the testator's daughter died without ever having had

children. Hence they contend it must follow that in either event the result is the same in that the requirements of the testator have not been met and the contingent gifts fail regardless of the fact that 2 of the appellants are adopted children.

The probate judge disposed of this argument by holding that the general plan and intent of the testator are easily discernible. The cardinal principle to be applied in the construction of wills is correctly stated by the probate judge as follows:

"It almost goes without saying that the primary rule of construction of wills is to reach, if possible, the intent the testator had in mind and give effect to it. The whole will is to be taken together and is to be construed as to give effect, if possible, to every part—*Thurber* v. *Battey,* 105 Mich 718; *Townsend* v. *Gordon,* 308 Mich 438 (151 ALR 1432). In construction of a will all the words therein must be taken into consideration—*Tonnelier* v. *Westin,* 302 Mich 213."

As stated in *Townsend* v. *Gordon, supra:*

"It is not necessary to cite authority that the established rules of law provide that the will must be read as a whole, that the intent of the testator must prevail, and that where there are bequests in the will as to the disposition of the residue, intestacy will not be presumed unless so provided by the will or the language or lack of language used necessitates such a result."

In *Hay* v. *Hay,* 317 Mich 370, 403, the Court adopted the headnote in the case of *Booth* v. *Krug,* 368 Ill 487 (14 NE2d 645, 117 ALR 1193), which reads:

" 'The presumption against intestacy is so strong that courts will adopt any reasonable construction of a will to avoid it, and it cannot be said there is a partial intestacy because the testator did not specifically devise his real estate to his trustees where the

concluding paragraph of the will names certain parties as trustees and executors 'to carry out and execute the provisions of this will.' "

In his will, Chapple provided for the payment of his just debts and funeral expenses, the erection of a monument at his place of burial, perpetual care of his family burial lot, legacies to an individual in England or his wife or son, to his church and other religious organizations connected with his denomination, a specific trust for his church so long as it should exist, and in the event that his estate should exceed the appraised value of $50,000, payment in full of such legacies and a reduction thereof in the event that his estate was appraised at less than this amount. He made an outright bequest of certain property to his daughter and her heirs and assigns forever, and established a trust of 3/5 of the residue of his estate for the benefit of his wife for her lifetime, with power of disposition of all or any part thereof by her last will and testament, and gave the remainder of the residue in trust under the language of the paragraph now in dispute. In that paragraph he made specific provision for the use of such portion as might go to Kalamazoo College, in that it was to be known as the Chapple Fund, with the "income therefrom to be used annually to aid needy and worthy students, male or female, such students to be selected by the board of trustees of said college." The remainder of the residue of this trust was to be divided into 6 equal parts to be added to certain legacies theretofore provided for in his will.

To say in the face of this careful disposition of his property, taking the will in its entirety, as we must, that Chapple did not intend these legatees to be benefited in certain events, would require us to completely disregard the specific language of the will. It may be that, under the analysis made by the

appellants, that there can be found a gap in the successive conditions precedent and prerequisite for the gift to Kalamazoo College and others, but it cannot be reasoned that this result was the clear intent of the testator. We therefore arrive at the same conclusion reached by the judge of probate in construing the will in its entirety. There were no grandchildren or great grandchildren surviving at the time of Chapple's daughter's death, and her mother was then deceased. Hence Kalamazoo College should receive, in accordance with the terms of paragraph 14 of the will, 1/2 of the residue of the trust thus created, and the other 1/2 should be distributed to the legatees named in the mentioned paragraph of the will.

The judgment of the trial court is affirmed. The cause is remanded for further proceedings in accordance with that judgment and the order and direction of the probate court. Costs to appellees.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, and REID, JJ., concurred.

BOYLES, J., did not sit.

GARVIT *v.* KREBS.

1. TRIAL—DIRECTED VERDICT—EVIDENCE.

The testimony must be considered in the light most favorable to a plaintiff in passing on a defendant's motion for a directed verdict.

2. AUTOMOBILES—INTERSECTIONS—RIGHT-OF-WAY—NEGLIGENCE.

A motorist having the right-of-way at an intersection is not relieved from the duty to use reasonable care under the circumstances.

3. SAME—INTERSECTIONS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Questions of negligence of eastbound defendant motorist and contributory negligence of northbound plaintiff motorist were properly left to jury, where it appears latter had stopped before entering intersection of the 2 country roads, neither of which was a preferred highway, started across while defendant was 300' away and approaching at estimated speed of 30 to 35 miles an hour, and although plaintiff shifted to second gear defendant collided with her machine without having seen it.

4. SAME—INTERSECTIONS—ERRONEOUS GRATUITOUS CHARGE AS TO EMERGENCY DOCTRINE.

Injection into case of a foreign issue by charge to jury about the emergency doctrine, correct in that it stated that one in sudden peril need not act with the very best judgment, but failing to state qualification that the situation must be one not brought about by the plaintiff's own negligence, constituted

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 349.
[2] 5 Am Jur, Automobiles § 298.
[2] Duty of one having right-of-way to use due care. 21 ALR 988; 37 ALR 509; 47 ALR 613.
[3] 5 Am Jur, Automobiles §§ 692, 715.
[4] 5 Am Jur, Automobiles § 171.
[4] "Emergency rule" as applied to automobile or motorcycle drivers. 6 ALR 680; 27 ALR 1197; 79 ALR 1277.

reversible error, where given without having been requested by either party to action arising out of collision at intersection of country roads, neither of which was a preferred highway.

Appeals from Livingston; Lyons (Willis L.), J. Submitted June 4, 1953. (Docket Nos. 43, 44, Calendar Nos. 45,854, 45,855.) Decided November 27, 1953.

Separate actions of case by Jean Garvit and Richard Garvit against Walter L. Krebs for damages arising out of automobile accident. Cases consolidated. Verdicts and judgments for plaintiffs. Remittitur filed. Defendant appeals. Reversed and new trials granted.

Van Winkle & Van Winkle, for plaintiffs.

Ballard, Jennings, Fraser & Parsons and *Francis E. Barron* (*Everett R. Trebilcock,* of counsel), for defendant.

BUSHNELL, J. These two cases, which were consolidated for trial, arise out of an intersection collision at the junction of Cemetery and Sergeant roads in Handy township, Livingston county. In the first case, plaintiff Jean Garvit, a 36-year-old farm housewife, who lives 300 or 400 north of the intersection, sought damages for the injuries she sustained and obtained a verdict at the hands of the jury in the sum of $10,000. A remittitur was ordered of $2,500, and the judgment entered was $7,500. In the second case, Richard Garvit, the husband of plaintiff in the first case, obtained a verdict in the sum of $2,515.50, a judgment being entered in this amount for his expenses and loss of services.

About 9 o'clock in the morning of September 25, 1951, Mrs. Garvit was driving her husband's automobile north on Cemetery road after having taken

her children to school. At the same time defendant Walter L. Krebs, who lives about 2 miles west and north of the intersection, was driving his car east on Sergeant road to his father's farm about 1/2 mile east of Cemetery road. These 2 gravel roads, 18 feet in width, are of equal rank, and there are no stop signs on any corner of the intersection. The southwest corner is covered by brush and trees to a point where visibility is obstructed for about 600 feet. There is a clover field on the southeast corner, a farmhouse on the northeast corner, and a corn field on the northwest corner. As Mrs. Garvit approached Sergeant road she was looking for mushrooms and traveling in low gear. She stopped about 600 feet south of the intersection and then proceeded at about 10 miles per hour, looked to the east, saw no approaching vehicle, proceeded to edge forward until she could look to the west, stopped her car about 5 feet south of the crossroad and saw Krebs approaching from the west at an estimated distance of 300 feet. She recognized the driver in the car, which was then straddling the center of the road. She estimated his speed at 30 to 35 miles an hour and, feeling she had ample time to cross, proceeded in low gear. When she saw that Krebs was not going to stop and was looking at the corn field at the northwest corner, she shifted into second gear but was unsuccessful in avoiding the collision. She testified that while she was lying in the ditch in the northeast corner under the wheel of her car, Krebs ran up and said: "Oh, my God, Jean, I didn't even see you."

Appellant Krebs claims that under the facts plaintiff failed to show freedom from contributory negligence and that the trial judge erred in denying a motion for directed verdicts and subsequent motions for new trials. He argues that the verdicts are contrary to the great weight of the evidence, claims

error in the trial judge's refusal to give certain requests to charge and prejudicial and reversible error in the court's charge on the emergency doctrine, which charge was not sought by either party. It is unnecessary to review some of the questions or to dwell upon authorities, that on a motion for a directed verdict the testimony must be considered in the light most favorable to plaintiffs; that one having the right-of-way is not relieved from the duty to use reasonable care under the circumstances; that intersection cases are to be considered on their own merits; and that, under the circumstances of this case, the questions of negligence and contributory negligence are ordinarily for the jury.

This is a case where the testimony shows that defendant was driving along a country road looking at the crops and fields nearby, and not paying too much attention to the approaching intersection. Plaintiff observed defendant's approach, made an estimate as to his speed and distance, and proceeded to cross as she thought she could safely do. The testimony shows that the defendant never looked but continued at the same high rate of speed, and collided with plaintiff's car. In a situation such as this, reasonable minds could differ and the questions of negligence were properly submitted to the jury. No questions are raised as to the amount of the damages or the extent of plaintiff's injuries.

It is unfortunate that a case containing circumstances such as these must be sent back for a new trial, but the prejudicial error involved in the court's gratuitous charge about the emergency doctrine, although but a brief paragraph, that could as well have aided defendant as plaintiff, is nevertheless too persuasive on the minds of the jury to go unchallenged. The trial judge charged as follows:

"I further charge you that when a person or 2 persons are suddenly confronted with risk of collision, each has the right in order to avoid a collision to act upon the facts as they appear to them at the time. They are not bound to act in the very best manner possible under the circumstances, or as it may appear to others afterwards, they should have acted, but they are to act upon their best judgment under all the circumstances. It is the duty of both to do what they reasonably can to prevent damage, but neither is bound to exercise the very best judgment, but they are bound to exercise such judgment as the circumstances appeared to them to require, and each is excused from failure to take the very best course."

This improper statement of the applicable law sets up a subjective standard of due care contrary to the established law in negligence cases. It is true that one in sudden peril need not act with the very best judgment, and to that extent the charge was correct. However, the qualification on that doctrine must be stated if such a charge is given. That qualification is that the situation must be one not brought about by the plaintiff's own negligence.

We said in *Socony Vacuum Oil Co.* v. *Marvin,* 313 Mich 528, 546:

"In view of the conflicting testimony as to how and why the accident happened, the jury should have been told that plaintiff was not entitled to the benefit of the emergency doctrine if his negligence contributed to or brought about the sudden peril by which it claims its driver was confronted. Under the holdings of this court in *Walker* v. *Rebeuhr,* 255 Mich 204; *Lagassee* v. *Quick,* 273 Mich 295, and other decisions of like import, we think that the failure to state the rule in such manner as to embody the necessary qualifications was erroneous."

This rule has been stated in 38 Am Jur, p 876, § 194, as follows:

"Of course, the presence of sudden peril will not excuse all errors of judgment and all omissions to act; such diligence must be exercised as the circumstances permit, the standard of care being that of a person of ordinary prudence when confronted with the same situation."

In addition to the charge not being properly limited in its application, the charge itself injected a foreign issue into the case. It thus furnished ground for reversible error. *Kerns* v. *Lewis,* 246 Mich 423, 427; *Herzberg* v. *Knight,* 289 Mich 29, 32.

In view of the possibility that the jury might have been misled on this point, the judgments are reversed and new trials are ordered. Costs to defendant.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, and REID, JJ., concurred.

BOYLES, J., did not sit.

MORRISH v. MORRISH.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.
   Extreme cruelty on part of husband *held,* established by wife by showing of unreasonable accusations of infidelity.

2. SAME—DIVISION OF PROPERTY—SECURITY OF LIVING FOR WIFE.
   There is no rigid rule for division of property in divorce actions, the security of a living for the wife being a major consideration.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation §§ 61, 63.
[2, 3] 17 Am Jur, Divorce and Separation § 445.

3. SAME—DIVISION OF PROPERTY—EQUITY.

Division of property at termination of marriage lasting 6 years because of extreme cruelty of husband *held,* equitable under the circumstances, where husband is ordered to pay wife $20,000 cash, $300 for her attorney fee and such personal property as she chose and he was awarded real estate valued at $25,000, some other land and vacant lots, 700 shares of stock, life insurance totalling $25,000, and 2 automobiles, and while wife is unable to earn her own living he is receiving a disability income.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 5, 1953. (Docket No. 63, Calendar No. 45,876.) Decided November 27, 1953.

Bill by Catherine P. Morrish against Ray S. Morrish for divorce on ground of cruelty. Decree for plaintiff. Defendant appeals. Affirmed.

Guy W. Selby (*Fred A. Sauer,* of counsel), for plaintiff.

Fred S. Flick, for defendant.

BUSHNELL, J. Plaintiff Catherine P. Morrish and defendant Ray S. Morrish were married on July 20, 1944. They lived happily together until some time in 1950, when they separated. The defendant and cross plaintiff, a surgeon, claims that on May 4, 1950, when he came home late that night, after being at the hospital, he found his wife with another man in a compromising situation. The party involved, who testified as a witness for the plaintiff, absolutely denied the allegations and said that the doctor was present at all times when he was in the home of the parties. The wife also denied this charge. The defendant further claims that his wife told him after this incident that she had something to say to him, and that she had "wronged him." This, the wife categorically denied. In any event, shortly after

the alleged incident occurred the wife, pursuant to previously made plans, left for California to visit her mother. She returned home on July 13, 1950, with her mother, and claims that when she arrived she was again accused by the defendant of infidelity. She returned to California on July 22d. During her absence her husband wrote her many endearing letters.

In August of 1950, Mrs. Morrish began a divorce action, which was later dismissed. She returned home about September 16, 1950, because her husband had been stricken with a cerebral thrombosis and was in a hospital. Mrs. Morrish visited him there a few times, but, according to the doctor, was not kind to him. On the contrary, she accused him of ill treatment. The relations between the parties failed to improve and they again separated on December 28, 1950, after which this suit was instituted for divorce and her husband filed a cross bill.

The defendant was 64 years old at the time of the trial, and since his illness has been unable to practice his profession. The bulk of his property was accumulated prior to his marriage. Plaintiff was 45 years old at the time of trial. She had $600 in bonds when she married. In 1949 she had a major operation and has since been unable to do any continuous work.

A decree was entered in favor of the wife, the husband being required to pay the sum of $20,000 in cash. He was given all the real estate and each is to choose such personal property as she or he might individually desire. The sum of $1 was awarded as permanent alimony, and $300 was allowed for the wife's attorney's fee.

Defendant appeals from this decree on the ground that it is not in accordance with the weight of the evidence, and that the division of property is unjust and inequitable.

The finding that the wife had established grounds for a divorce is in conformity with the rule expressed in *Brookhouse* v. *Brookhouse,* 286 Mich 151; and *Whitman* v. *Whitman,* 286 Mich 458.

There is no rigid rule for division of property in divorce actions. The security of a living for the wife is a major consideration. *Hallett* v. *Hallett,* 279 Mich 246. The facts are distinguishable from those in *Hall* v. *Hall,* 307 Mich 502, and *Maynard* v. *Maynard,* 329 Mich 247. Although plaintiff bore no children to defendant, she gave him happy companionship for about 6 years. In the *Maynard* and *Hall Cases* the wife was the wrongdoer and contributed very little to the marriage. While the property here in question was accumulated prior to the marriage, there is no showing that the wife married defendant for his money. In fact, there is every indication that the wife would have continued living with her husband if he had been more reasonable and had not elected to accuse her of infidelity.

It is obvious that the plaintiff is unable to support herself by any remunerative employment, and we agree with the trial judge's view that she cannot earn her own living. On the other hand, the husband is receiving disability income. He has the home and an adjacent lot appraised at $25,000, which the trial judge thought was too high; some land in Flint township; some vacant lots; land in Canada worth $2,500; 400 shares of General Motors stock; and 300 shares of Sears Roebuck stock; life insurance totaling $25,000; and 2 automobiles.

The decree is affirmed, with costs to appellee.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

ADKINS v. RIVES PLATING CORPORATION.

1. WORKMEN'S COMPENSATION—COMPENSATION COMMISSION—SUPREME COURT.

   The workmen's compensation commission is the sole trier of facts in a proceeding to recover workmen's compensation, the Supreme Court not being permitted to weigh the evidence (CL 1948, § 413.12).

2. SAME—PURPOSE OF ACT—CONSTRUCTION.

   The workmen's compensation act is to be construed liberally to provide indemnity for accidents peculiarly incidental to employment but it was not intended to be health, accident and old age insurance and spread general protection over risks common to all and not arising out of and in the course of employment.

3. SAME—COMPENSATION COMMISSION—INFERENCES.

   The workmen's compensation commission may draw legitimate and reasonable inferences from established facts and circumstances but may not draw inferences contrary to the established facts and the undisputed evidence.

4. SAME—SECOND FRACTURE—DISABILITY—PROXIMATE CAUSE.

   Disability due to second fracture of forearm was not compensable under the workmen's compensation act, where such fracture occurred as plaintiff fell off his bicycle while not at work for defendant employer, since it did not arise out of and in the course of his employment and there was no causal connection between second fracture and first one which had not completely healed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 532.
[2, 4, 5] 58 Am Jur, Workmen's Compensation §§ 209–212.
[3] 58 Am Jur, Workmen's Compensation § 450.
[4, 5] 58 Am Jur, Workmen's Compensation § 278.
[4, 5] Workmen's compensation as affected by external infection from original injury or subsequent accident. 7 ALR 1186; 102 ALR 790.

5. SAME—SECOND FRACTURE—DISABILITY—UNHEALED FRACTURE.
Award allowing workmen's compensation for a period of total disability, a period of partial disability and medical and hospital expenses after second fracture of forearm which fracture did not arise out of and in the course of employment was error insofar as there was allowance for disability and medical expenses directly resulting from such injury, although it appears that there had not been a complete healing of first fracture which had been sustained while in defendant's employ.

6. SAME—COSTS.
No costs are allowed in appeal in proceeding to recover further workmen's compensation, where neither party has prevailed.

Appeal from Workmen's Compensation Commission. Submitted September 18, 1953. (Docket No. 81, Calendar No. 45,632.) Decided November 27, 1953.

Joseph Adkins presented his application for further compensation against Rives Plating Corporation, employer, and State Accident Fund, insurer, for injuries alleged to have resulted from his employment. Award to plaintiff. Defendants appeal. Reversed and remanded.

Raymond H. Rapaport, for plaintiff.

Harry F. Briggs (*Peter Munroe,* of counsel), for defendants.

BUSHNELL, J. Plaintiff, Joseph Adkins, sustained an injury while in the employ of defendant Rives Plating Corporation on December 15, 1950, which resulted in a fracture of the radius bone of his left forearm. He was paid compensation at $28 per week for total disability from the date of the injury to and including May 30, 1951. He returned to work with lighter duties on May 31, 1951, at which time his compensation ceased because of his partial re-

covery. Thereafter payments were made to him of wages at the same rate that he formerly earned.

On Sunday, September 9, 1951, plaintiff was involved in an accident while riding a bicycle. That accident and its results are described by Adkins, in his testimony, as follows:

"Well, I was riding a bicycle up the street and went around a corner, the bike tipped over with me, I hit with my right hand and my left hand came over and hit too, and when my left hand hit it broke. Well, I knew it was broken; I picked the bike up, took it back to the house, my neighbor was there, I told him to take me to the doctor in my car, that I broke my arm, he did and Dr. Parker he sent me to the hospital."

Adkins filed an application for hearing and adjustment of claim on December 24, 1951, in which he stated:

"1. That this claim relates to a personal injury which occurred on or about December 15, 1950, or to a disablement from occupational disease, which occurred on or about * * *

"2. That the injury or disablement occurred at Rives Junction, Jackson, Michigan, and in the following manner: Injured was buffing, got away from him and struck him on the left forearm; Weekly earnings, $90.

"3. Nature of disability—Injured left arm."

Dr. Richard C. Demming and Dr. Earl E. Parker treated Adkins for the original fracture of his left arm, and also attended him after his second injury. Dr. Demming testified in part:

"*Q.* What did you find?

"*A.* We opened the radius and at the fracture site I found that actually there had been a little, or no bone union.

"*Q.* You say had been—you mean prior to the second injury?

"*A.* Yes, that the previous fracture had never healed by bony union.

"*Q.* And what else did you find?

"*A.* Oh, that the bone ends were extremely hard, very dense, with an indication that there was a non-union, nonbony union, or a very delayed union.

"*Q.* Then, from your observation, during the surgery, were you able to form an opinion as to whether or not the fracture, original fracture had healed?

"*A.* The original fracture had not healed. * * *

"*Q.* Let me ask you if what you found when you performed the bone reduction, was in your opinion a new fracture, as distinguished from an aggravation of an existing fracture?

"*A.* Well the old fracture was still present and unhealed, and that there was a fracture through the fibrous union at the site of the previous fracture; in other words, a new fracture through an unhealed old fracture. * * *

"*Mr. Rapaport:* * * * Give us your opinion Doctor, if you have one as to whether or not the original accident, namely the fracture when the man was buffing, might, or could be considered to be the cause of the condition which you reduced in September of 1951?

"*A.* Yes, I feel that the original injury was the cause of the second fracture superimposed on a trauma."

Dr. Parker's testimony was confined to the treatment following the first injury and his examination of Adkins' condition after the second injury. He stated in part:

"In September—on September 9, 1951, Joe was brought to my office with the story that he had fallen from the bicycle and had injured his left arm, and in looking at it it was obvious that it was injured, that it was fractured. I took him into Foote Hos-

pital, had him X-rayed immediately and determined that there was a fracture, that there was an angulation at the site of the old fracture, and I called in Dr. Demming as the orthopedic consultant again and it was Dr. Demming's opinion at that time that we should procrastinate no longer, but Joe should have bone reduction, with application of plate and bone graft. This was done on the 11th of September, and Joe had an uneventful recovery, except for his discomfort; and subsequent X-rays proved that there was good healing. The cast was eventually removed, I believe around the latter part of November or first of December, and Joe has had so far an uneventful recovery."

The deputy commissioner awarded compensation "at the rate of $28 per week for total disability from December 16, 1950 to May 30, 1951 and at the rate of $28 per week for total disability from September 9, 1951 to December 28, 1951."

He further found "that the employee is still partially disabled and entitled to receive compensation at the rate of $28 per week for the week ending January 4, 1952; $16.80 for the week ending January 11, 1952; $11.91 for the week ending January 18, 1952; $28 for the week ending January 25, 1952; payments to stop as of January 25, 1952, because plaintiff returned to work at equal or greater wages. Defendants may have credit for the compensation voluntarily paid."

An amended award was later filed which included medical and hospital expenses. In affirming these awards the commission, on review, said in part:

"There can be no doubt that plaintiff had not fully recovered from the first accident when the second accident occurred. He was not able to do buffing, the heavier work at which he was employed at the time of the original injury, because of the condition of his left arm. His inability to work as a buffer

was a direct result of that injury. It is evident from the medical testimony that the failure to heal of the original fracture was the proximate cause of the second fracture. There is a causal relation between the accident plaintiff sustained December 15, 1950 and the disability commencing September 10, 1951."

Appellant State Accident Fund denies that the plaintiff has suffered any compensable disability since May 30, 1951, or that he is entitled to reimbursement for hospital expenses when he himself did not make such expenditures.

Decision rests primarily upon the implication of the first question, which is stated by the appellee in this manner:

"Where the workmen's compensation commission's finding of fact that there is a causal connection between plaintiff's disability and a compensable accident is supported by competent evidence, should the finding be affirmed by the Supreme Court?"

It is fundamental that the commission is the sole trier of the facts, and that this Court cannot weigh the evidence. See CL 1948, § 413.12 (Stat Ann 1950 Rev § 17.186), which reads in part:

"The findings of fact made by the compensation commission acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said compensation commission."

We must, therefore, accept the finding of the commission that the failure of the original injury to heal was the proximate cause of the second fracture, unless that finding is the result of an erroneous application of the law.

The original injury may or may not have been a contributing factor in that it rendered plaintiff susceptible to the second injury, but it cannot be said

to be the proximate cause of the disability resulting from the second injury. The proximate cause of the second injury was the riding of a bicycle by Adkins which exposed him to the hazards entailed thereby. He certainly was not engaged in his master's employ on the Sunday in question; nor can we discern any accidental or fortuitous circumstance present upon which a causal relationship between the 2 injuries may be predicated. There was nothing in the nature of Adkins' employment which required him to expose himself to such a hazard, and common sense would have dictated that, in his condition, he refrain from such exposure.

Dr. Demming, on cross-examination, stated that the second fracture could have occurred even though the arm had never before been fractured. The record clearly shows that the first injury did not prevent Adkins from working and, in fact, from earning the same wages that he previously earned.

In *Simpson* v. *Lee & Cady,* 294 Mich 460, 463, the Court said:

"The compensation law is to be construed liberally to provide indemnity for accidents peculiarly incidental to employment, but it was not intended to be health, accident and old age insurance and spread general protection over risks common to all and not arising out of and in the course of employment."

This rule of law has been cited with approval in *Rucker* v. *Michigan Smelting & Refining Co.,* 300 Mich 668. See, also, *Riley* v. *Kohlenberg,* 316 Mich 144, 148; and *Wiltse* v. *Borden's Farm Products Company of Michigan,* 328 Mich 257, 265.

In *Harris* v. *Checker Cab Manufacturing Corporation,* 333 Mich 66, 71, we said:

"The commission may draw legitimate and reasonable inferences from established facts and circumstances. *Froman* v. *Banquet Barbecue, Inc.,* 284

Mich 44, 51; and *Goudie* v. *Lakey Foundry & Machine Co.*, 327 Mich 138, 141. Inferences, however, may not be drawn which are contrary to the established facts and the undisputed evidence. *Putnam* v. *Beechler*, 299 Mich 552, 561."

The commission's finding that the first fracture was the proximate cause of the second fracture is not even supported by the previously quoted testimony of plaintiff himself.

Appellants have cited no authority save *Fields* v. *G. M. Brass & Aluminum Foundry Company*, 332 Mich 113, a case where an award of compensation was affirmed, the original injury having rendered the employee in question susceptible to a subsequent injury which arose out of and in the course of his employment.

Appellee cites in support of the affirmation of the award a number of authorities, chief among which are: *Adams* v. *W. E. Wood Co.*, 203 Mich 673; *Reiss* v. *Northway Motor & Manfg. Co.*, 201 Mich 90; and *Mauch* v. *Bennett & Brown Lumber Co.*, 235 Mich 496.

In the *Adams Case* there was a fracture of the left arm. Later, when advised by the attending physician that he could resume work as a night watchman, Adams immediately started for his place of employment. While on his way he was jostled in a streetcar and suffered a refracture of his arm. He was then carrying out his employer's physician's instructions and was not engaged in any hazardous undertaking of his own.

The *Reiss Case* is somewhat similar in its facts, in that a broken leg was refractured while Reiss was returning from work which he resumed only under the instructions of his employer's doctor. He, also, was not engaged in any hazardous undertaking. The industrial accident board held that, when he re-

turned to work, Reiss was unable to do so and should not then have been ordered to resume work.

In the *Mauch Case* a logger bruised his great toe, which soon thereafter was frozen. The medical testimony was:

"He would not have frozen the toe, in all probability, if he had not received the injury and disturbed the normal circulation."

These 3 cases stand alone and their factual situations are entirely different from those in the instant case, where the second injury could have occurred notwithstanding the prior injury. There were in each of these cases causal connections between the first and the second injuries, and no independent intervening cause interfered to break the chain of causation. In the *Rucker Case, supra,* the employee suffered a leg injury and was sent by the employer for treatment to a doctor's office. While being taken home from the doctor's office he was injured in a collision between his taxicab and another vehicle which resulted in a loss of an eye. We said in that case:

"There is no causal connection between the leg injury received at the plant and the eye injury received in the taxicab collision. The chain of causation was broken and the eye injury came 'from a hazard to which the workman would have been equally exposed apart from the employment.'" Citing *Appleford* v. *Kimmel,* 297 Mich 8, 12. See, also, *Pearce* v. *Michigan Home & Training School,* 231 Mich 536.

The affirmation of the award in the instant case would establish a precedent allowing compensation for subsequent injuries which have not arisen out of and in the course of the employment, which bear no relationship to the scope thereof and are but remotely connected with the original injury.

The award of the commission, being contrary to law, is vacated and the cause is remanded with direction to further amend the order by disallowing compensation for the second injury and any medical expenses directly resulting from that injury. Neither party having prevailed, no costs will be taxed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

TOMLINSON *v.* TOMLINSON.

1. COURTS—SUPREME COURT—COURT RULES.
   The Supreme Court has inherent as well as constitutional rule-making power in the discharge of its general superintending control over all inferior courts (Const 1908, art 7, §§ 4, 5; CL 1948, § 601.14).
2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.
   The guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the State or nation, but rather one of equality of operation or applicability within the particular class affected, which classification must be reasonable (US Const, Am 14; Mich Const 1908, art 2, § 1).
3. COURTS—CONSTITUTIONAL LAW—COURT RULES—DISCOVERY.
   Court rule authorizing pretrial depositions and discovery is not unconstitutional, since it is within the rule-making power of the Supreme Court and does not violate equal protection clauses of the State and Federal Constitutions (US Const, Am 14; Mich Const 1908, art 2, § 1, art 7, §§ 4, 5; Court Rule No 35, § 6, as added in 1952).
4. DISCOVERY—PRETRIAL HEARING—DISCRETION OF COURT.
   Court rule permitting pretrial depositions and discovery as to matters relevant to the subject matter involved in the pending action reposes discretion in the court as to its applicability

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Courts § 151.
[2] 12 Am Jur, Constitutional Law §§ 469, 470.
[5] 14 Am Jur, Courts § 158.
[6] Generally as to discovery of assets, see 17 Am Jur, Discovery and Inspection § 20.
[8] 17 Am Jur, Divorce and Separation § 359 *et seq.*

and has the purpose of facilitating and expediting the trial of causes in circuits having a pretrial docket to alleviate their load and to obtain a better judicial administration (Court Rule No 35, § 6, as added in 1952).

5. COURTS—CONSTRUCTION OF COURT RULES.
Remedial procedural rules should be broadly construed.

6. DISCOVERY—DIVORCE—PRIVACY—SUPPRESSION OF PLEADINGS—DISCRETION OF COURT.
Order for pretrial discovery as to defendant husband's assets, liabilities and financial standing, entered in suit for divorce, was not an unconstitutional invasion of his privacy or an abuse of discretion, where the order also provided for the ruling of the court in the event of dispute over the admissibility of any testimony or any other disputed matter and local circuit court rule authorized the suppression of pleadings upon showing made to presiding judge of good cause therefor (Court Rule No 35, § 6, as added in 1952; Third Judicial Circuit Court Rule No 12).

7. DIVORCE—SUPPORT OF WIFE AND CHILDREN—FINANCIAL STATUS OF HUSBAND.
The financial status of the husband is material and relevant to the subject matter of divorce, since the proper support of the wife, in her accustomed station in life, commensurate with his ability, and especially the support of his children who may be dependents are the first concerns of the court.

8. SAME—ORDER OF PROOF—DISCRETION OF COURT.
The order of proof in a divorce case is entirely within the discretion of the court.

Appeal from Wayne; O'Hara (Chester P.), J. Submitted October 16, 1953. (Calendar No. 45,804.) Decided November 27, 1953.

Divorce proceedings between Mary Tomlinson and Willard Tomlinson. Order entered directing pretrial discovery. Defendant appeals. Affirmed.

Wilcox, Lacy, Lawson Kirkby & Hunt (*Eugene D. Kirkby,* of counsel), for plaintiff.

Freud, Markus, Gilbert & Lubbers, for defendant.

BUSHNELL, J. Defendant, Willard Tomlinson, was granted leave to appeal from a circuit court order, directing a pretrial discovery in a suit for divorce.

The circuit judge limited discovery to questions concerning the property and income of Tomlinson, his assets, liabilities and financial standing. Provision was made in the order for either party to apply to the trial court "for rulings in the event of dispute over the admissibility of any testimony or other disputed matters."

Although pretrial practice has been in existence in Wayne county for some years, the precise question now presented is one of first impression. It arose out of the addition of Court Rule No 35, § 6 (1945). This new pretrial discovery rule (section 6) was adopted and became effective June 27, 1952.

The crux of the question before us is whether the matters concerning which the trial judge permitted pretrial discovery are "relevant to the subject-matter involved in the pending action," *i.e.*, the suit for divorce.

Before determining that question we must first resolve another raised by the appellant. Is Rule No 35, § 6 unconstitutional under article 2, § 1, and article 7, § 5 of the Michigan Constitution of 1908, and section 1 of the Fourteenth Amendment to the Constitution of the United States?

It cannot be disputed that this Court has inherent as well as constitutional rule-making power in the discharge of its general superintending control over all inferior courts. (Const 1908, art 7, §§ 4 and 5.) This is further emphasized by the statute (CL 1948, § 601.14 [Stat Ann § 27.34]) which seeks the "attainment, so far as may be practicable," of certain "improvements in the practice" among which are the "expediting of the decisions of causes" and the "remedying of such abuses and imperfections as may be found to exist in the practice."

To that end the bench and bar of the State collaborated in the promulgation by this Court of the permissive rule for pretrial procedure, and later by the implementing of that practice by pretrial discovery. See in this connection Court Rule No 40 for the production of books and papers; Court Rule No 41 for discovery by deposition and examination as to injuries; Court Rule No 42 regarding admissions from adverse party; and *Hallett* v. *Michigan Consolidated Gas Co.*, 298 Mich 582.

For textual comments on comparable Federal rules and the existing pretrial practice in the third judicial circuit (Wayne) see:

Honigman, Michigan Court Rules Annotated.

Hon. Arthur T. Vanderbilt (Chief Justice of the supreme court of New Jersey) Cases and other Materials on Modern Procedure and Judicial Administration (1952), pp 563–674;

George Ragland, Jr., Discovery Before Trial (1932);

Harry D. Nims, Pretrial (1950);

Hon. Charles E. Clark, The Practical Operation of Federal Discovery, "A Symposium on the Use of Depositions and Discovery Under the Federal Rules," (12 FRD 131–170);

Hon. Irving R. Kaufman, Some Observations on Pretrial Examinations in Federal and State Courts (12 FRD 363–372);

Hon. Alfred P. Murrah, Pretrial Procedure, A Statement of its Essentials (14 FRD 417–446) contains a bibliography on pretrial material.

Appellant in the instant case narrows the constitutional question by his argument that the power under article 7, § 5 of the Michigan Constitution is limited to the promulgation of "general rules," and that pretrial discovery is without the pale because its use is limited by the rule in question to those judicial circuits "having a pretrial calendar."

We do not discuss the broader question other than to refer to our holdings in *Behr* v. *Baker,* 257 Mich 487; *Pear* v. *Graham,* 258 Mich 161; *Konstantine* v. *City of Dearborn,* 280 Mich 310; and *Jones* v. *Eastern Michigan Motorbuses,* 287 Mich 619. See authorities annotated in 110 ALR 22.

On the narrower phase of the question we merely observe that the guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the State or nation, but rather one of equality of operation or applicability within the particular class affected, which classification must, of course, be reasonable. *Tribbett* v. *Village of Marcellus,* 294 Mich 607. So tested, the rule in question does not transgress constitutional limitations.

The phrase "relevant to the subject matter involved" appears in paragraph (b) of section 6 of the rule, which we quote with the preceding one:

"(a) In any civil action the court or the judge or judges of any judicial circuit having a pretrial calendar may at any time permit any party by order of the court to compel the production, examination or inspection of any books, documents or other tangible things and to take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for the use as evidence in the action or for both purposes. The time, place and scope of the examination shall be fixed in the order authorizing the taking of the deposition. The attendance of witnesses may be compelled by the use of subpoena and the deposition of a person confined in prison may be taken only by leave of the court on such terms as the court prescribes.

"(b) The order of the court for pretrial depositions and discovery, unless for good cause otherwise shown, shall permit the examination of the deponent regarding any matter, not privileged and admissible under the rules of evidence governing trials, which

is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of relevant facts. The court may require parties to claim or waive physician-patient and hospital-patient privilege in fixing the scope of the examination and a claim of privilege at the pretrial hearing excludes such testimony if offered later in the trial."

This rule is not mandatory but permissive, with discretion reposed in the court as to its applicability. Its purpose is to facilitate and expedite the trial of causes in those circuits which have deemed it necessary to adopt pretrial dockets in order to alleviate their load and as an aid in obtaining a better judicial administration. Its application is limited to questions that are relevant to the subject matter involved.

Appellant contends that the proposed inquiry into his financial status and ability is both irrelevant and untimely. He insists that, until it has been determined that a decree of divorce should be granted, his privacy should not be invaded and he should not be required to disclose his financial affairs to public gaze. He cites in support of this position *Rea* v. *Rea,* 53 Mich 40; *Seibly* v. *Ingham Circuit Judge,* 105 Mich 584; and *Pingree* v. *Pingree,* 170 Mich 36. These are cases in which there was involved the determination of the procedural aspects of order of proof in divorce suits. They do not establish the rule that the proofs necessary to support the alimony and property settlement portions of a decree are not admissible until grounds for divorce are established and a decree of divorce has been ordered.

In *Mitchell* v. *Mitchell,* 333 Mich 441, which appellant also cites, we said:

"The matter of grounds for divorce is entirely distinct and separable from the question of property settlement, and this was a proper subject of inquiry at a partial rehearing."

This statement was made in connection with the determination that limited partial new trials are permissive, and that the trial judge did not abuse his discretion in refusing to grant a full rehearing. Also, at the original hearing in the *Mitchell Case,* as is the practice, both the question of divorce and that of property settlement were determined in the 1 trial.

In further support of his contention, appellant cites a series of New York authorities involving discovery proceedings under the statute law of that State and a number of authorities in this State, under our discovery rules (Nos 40, 41, 42). All of these authorities throw light on the subject and are persuasive, but in the instant case we are considering for the first time a new rule applicable only to pretrial procedure as such, and not to other steps that may precede a trial. To both is applicable the observation that remedial procedural rules should be broadly construed. See *Vincent* v. *Van Blooys,* 263 Mich 312, and *Zoski* v. *Gaines,* 271 Mich 1, 8.

The order for discovery adequately protected appellant by providing for the ruling of the court "in the event of dispute over the admissibility of any testimony or any other disputed matter." Rule No 12 of the third judicial circuit reads:

"Any party or his attorney may obtain the suppression of any pleading filed in any cause in the circuit court by filing a petition with the presiding judge showing a good cause for such suppression. No person except the parties to a cause or their attorneys shall examine or publish, in whole or in part, any papers so suppressed until such case or some phase thereof shall be heard in open court. The county clerk shall effectually suppress all papers

filed in such cause and shall prevent all persons from having access thereto."

This rule protects appellant's right of privacy, and it can be supplemented in the discretion of the trial judge by a subsequent order upon proper showing of the necessity therefor.

The proper support of the wife in her accustomed station in life, commensurate with the husband's ability, and especially that of his children who may be dependents, is the first concern of the court. To this end the financial status of the husband is material and relevant to the subject matter of divorce.

We adopt with approval the following statement of the trial judge:

"I further hold, if I have not covered it, that the question of property in a divorce case is something that under our present practice need not be held in reserve until a prima facie case is made. I think we have the right to go into these matters ahead of time; at least, that has been the practice with me for many years, and it has been the practice here since I have been on the bench, and for a great many years that I practiced law, I think any other system would be something which would cause a backlog in these courts which would virtually amount to a jam on the chancery side of the court.

"In that connection, I would like to repeat, if I said it before, that the order of proof is entirely within the discretion of the court, in a divorce case, just the same as in any other case. It is not grounds for error, in the absence of an abuse of discretion."

Under the facts presented in this record, the trial judge did not abuse his discretion, under Court Rule No 35, § 6 (1945).

The order is affirmed, with costs to appellee.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

WHITE *v.* PUBLIC SERVICE COMMISSION.

1. WORKMEN'S COMPENSATION—PUBLIC SERVICE COMMISSIONER—DEATH EN ROUTE HOME—TRANSPORTATION IN STATE CAR.

   Dependents of member of public service commission who was killed while en route from commission office to his home in another city, in a State-owned car, on a Friday afternoon for the week end *held,* not entitled to recover workmen's compensation, where although it appears that the employer paid for such transportation, the mere fact that he took work home with him did not establish that such transportation was incident to and a part of his employment, conclusion that the commission had another office in deceased's home city was not justified and there does not appear to have been an agreement that such transportation was a part of his compensation.

2. SAME—COSTS.

   No costs are allowed on reversal of award of workmen's compensation in favor of dependents of public service commissioner who was killed en route home with a file of work of the commission while in a State-owned car, the question presented involving the use of State property.

Appeal from Workmen's Compensation Commission. Submitted October 8, 1953. (Docket No. 40, Calendar No. 45,847.) Decided November 27, 1953.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 217 *et seq.*

[1] Performance of employer's work at home of employee as affecting recovery for injuries received while going to or from work. 83 ALR 216; 92 ALR 1036.

Injury while on way to or from work sustained by employee who does not work regular hours or is subject to call. 142 ALR 885.

Right to compensation for injury while going to or from work as affected by fact that compensation covers time involved or cost of transportation, or both. 87 ALR 250.

[2] 14 Am Jur, Costs § 91.

Marjorie A. White, widow of Stuart B. White, deceased, presented her claim for compensation against State of Michigan, Public Service Commission, employer, and State Accident Fund, insurer, for death of her husband. Award to plaintiff. Defendants appeal. Reversed.

Warner & Hart, for plaintiff.

Harry F. Briggs (*Stanley Dodge,* of counsel), for defendants.

BUSHNELL, J. The late Stuart B. White, of Niles, Michigan, was appointed chairman of the Michigan Public Service Commission on July 2, 1947. White acted in that capacity until July 3, 1949, and thereafter continued as a member of the commission until his untimely death on November 10, 1950. In accordance with a custom of many years' standing he was furnished, as were the other members of the commission, with an automobile owned by the State, and with credit cards to finance its maintenance and operation. Generally, such cars are used for State business, but it is the practice of those to whom they are assigned to also use them in driving from their homes to Lansing and return.

The commission, of which the deceased was a member, exercises regulatory control over all public utilities and other services affected with a public interest within this State, and to that end conducts hearings at the office of the commission in Lansing, although sometimes hearings are held elsewhere. The hours of employment of the office force are from 8 a.m. to 5 p.m., but members of the commission, like those of other departments, boards and commissions, do not and cannot adhere to specific office hours. Commissioner White used the car assigned to him in the performance of his duties and in order

to travel week ends to his home in Niles, Michigan. He, like other commissioners, usually took files home in order to study pending matters.

On Friday, November 10, 1950, Commissioners White and Schuyler L. Marshall conducted a hearing concerning the Mulvena Truck Lines, Inc., at the office of the commission in Lansing. The formal session was concluded about 3 o'clock that afternoon and, because Commissioner White had a dinner engagement that night and it had started to snow, he left the office about 3:45 p.m., taking with him some papers relative to the hearing just concluded. He departed from Lansing in the State-owned car for his home at Niles, and when he reached a point on M–60, about a half mile west of Burlington, Michigan, he had a fatal accident.

His widow, Marjorie A. White, filed an application for hearing and adjustment of claim as a dependent of the deceased, in which her daughter, Martha, and son, Joseph B., are also described as dependents. The claim was contested by defendants "State of Michigan, Public Service Commission, and State Accident Fund."

The deputy commissioner of the workmen's compensation commission in awarding compensation to the dependents found that "deceased carried out the duties as required by his employer both at the city of Niles and at Lansing, and was accustomed to travel between the 2 points with the cognizance and full approval of the employer."

Upon review, the compensation commission in its written opinion recited the details of Commissioner White's appointment and activities with considerable emphasis upon the testimony of ex-Governor Sigler. The Governor had testified that, due to reluctance to accept the appointment, Commissioner White was assured by him that he could take commission work home on Friday and would not have to

return to Lansing until Monday, in order that he might have more time with his family. In sustaining the award of the deputy the commission said:

"It is undisputed the deceased was furnished transportation from his home at Niles to Lansing and return by his employer at the cost of the employer. He was provided that transportation as a part of his contract of employment. The accident arose out of the transportation and because it was furnished by the employer the deceased was in the course of his employment when the accident happened. *Konopka* v. *Jackson County Road Commission,* 270 Mich 174 (97 ALR 552).

"There is another basis for concluding that the accident arose out of and in the course of the employment, namely, the deceased had with him a part of the commission's file in an important pending case to work on in his office in Niles where he was accustomed to work on commission matters over the week end. That alone is sufficient to establish a causal relation between the accident and his employment."

Appellants ask: "Did plaintiff's decedent's death arise out of and in the course of his employment?" The appellee asks: Is the fatal accident compensable under the rule of the *Konopka Case* and "did the contract of employment make Niles an additional post of employment?"

The application of the phrase "out of and in the course of employment" has produced much litigation. See numerous citations which appear in 58 Am Jur, § 209 *et seq.* of the article on Workmen's Compensation; Callaghan's Michigan Digest, Workmen's Compensation, § 68 *et seq.* See, also, Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), pp 93 to 173.

We have recently discussed facts comparable to those in the instant case and reviewed the authorities

applicable thereto in *Graham* v. *Somerville Construction Company,* 336 Mich 359, decided on April 13, 1953. In that case Graham, a superintendent of a pipeline construction project, had a room in Hastings, Michigan, several miles from the construction operations. He was furnished a pickup truck for his use in performing his duties and for transportation to and from his rooming place. A ditch-digging machine broke down and Graham picked up a fellow employee, Sutton, and drove to the pipeline excavation. They examined the damaged parts of the machine and made a note so that new parts could be ordered. On his return home Graham stopped at Sutton's home for dinner, and then left alone for Hastings, driving his employer's truck. While en route the truck left the road and Graham was instantly killed. There, like here, the dependent widow relied on the provisions of CL 1948, § 412.1 (Stat Ann 1950 Rev § 17.151), which reads in part:

"An employee, who receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined."

A dependency award was set aside because of the holdings in the cases therein cited, chief among which are: *Daniel* v. *Murray Corporation of America,* 326 Mich 1; *Hickman* v. *City of Detroit,* 326 Mich 547; *State Treasurer* v. *Kaiser-Frazer Corporation,* 326 Mich 715; *Pilgrim* v. *Menthen,* 327 Mich 714; *Phillips* v. *Fitzhugh Motor Company,* 330 Mich 183; and *Lyons* v. *Ford Motor Company,* 330 Mich 684. In *Konopka* v. *Jackson County Road Commission,* 270 Mich 174 (97 ALR 552), the case on which the compensation commission based its determination, Ko-

nopka was transported in a truck, together with other employees, by his employer, Jackson County Road Commission, from its office and warehouse to a point where work was being done by the commission some 14 miles west of Jackson. While making the return trip the truck skidded, struck a tree, and Konopka received injuries from which he died. The truck was owned by another employee who used it in connection with highway work, and while not expressly a part of his employment, it was the established custom that he should transport other employees to and from the place of work. The Court held the fatal accident arose out of transportation which clearly, in the contemplation of both the employer and employee, was incident to and a part of the employment.

The mere inference from the fact that Commissioner White took work home with him would not establish that his transportation to and from Lansing was incident to and a part of his employment. Nor would it justify the conclusion that the public service commission had another office in Niles, Michigan. See the rule applied in *Murphy* v. *Board of Education of the School District of the City of Flint,* 314 Mich 226, and *Kelly* v. *Dixie Fuel & Supply Company,* 329 Mich 466.

Notwithstanding the testimony of ex-Governor Sigler, there was no agreement between the State and Commissioner White that the furnishing of automobile transportation between Niles and Lansing, Michigan over week ends was a part of the commissioner's compensation. It has been more or less permissive over the years for certain State officers and employees to use State automobiles without restrictions thereon, and Commissioner White's use of the State vehicle in that respect was no different from that of others. The automobiles assigned to

Commissioners Marshall and McCarthy were used in the same manner.

The facts in the instant case fall squarely within those of Graham and other cases cited therein. Decision there is controlling here.

The award of the compensation commission is vacated. The question presented involves the use of State property, therefore no costs will be allowed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

KREN *v.* RUBIN.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—CONSTRUCTIVE TRUSTS.

   A suit to impose a constructive trust for an alleged breach of an agent's duty is a chancery case and facts are reviewed *de novo* by the Supreme Court.

2. SAME—CHANCERY CASES—FINDINGS OF FACT BY TRIAL JUDGE—CREDIBILITY OF WITNESSES.

   The Supreme Court gives deference to the findings of facts by a trial judge in a chancery case due to his opportunity to observe the witnesses and thereby judge their credibility.

3. TRUSTS—CONSTRUCTIVE TRUSTS—PRINCIPAL AND AGENT—PURCHASE OF REALTY—FRAUD—FINDINGS OF FACT BY TRIAL JUDGE.

   Trial judge's finding that defendant husband had acted as an

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 815.
[2] 3 Am Jur, Appeal and Error § 896 *et seq.*
[4–7] 49 Am Jur, Statute of Frauds §§ 151, 578 *et seq.*; 54 Am Jur, Trusts § 225 *et seq.*
[6, 7] 54 Am Jur, Trusts § 611.
[9] 54 Am Jur, Trusts § 581.
[10] 2 Am Jur, Agency § 299.

agent for the purchase of property and that by a violation of his trust he committed a fraud upon plaintiffs in that he purchased the entire property for less than he sold it to plaintiffs and then retained the rear 40 feet of it as he conveyed the front 100 feet to plaintiffs *held,* supported by record in suit to impose a constructive trust.

4. FRAUDS, STATUTE OF—PRINCIPAL AND AGENT—TRUSTS EX MALEFICIO.

An oral agreement relative to defendant's agency in the purchase of real estate on behalf of plaintiffs was not void and unenforceable because contrary to the statute of frauds as that statute does not apply to trusts *ex maleficio,* such trusts arising by operation of law and not by agreement or intention (CL 1948, § 566.106).

5. SAME—PURPOSE OF STATUTE—EQUITY.

The statute of frauds is meant to prevent frauds and not to encourage them and a court of equity will not permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud (CL 1948, § 566.106).

6. TRUSTS—CONSTRUCTIVE TRUSTS—PAROL EVIDENCE.

A constructive trust may be established by parol evidence.

7. SAME—PAROL EVIDENCE—STATUTE OF FRAUDS.

The statute of frauds does not bar proof of actual or constructive fraud in the sale of realty as parol evidence is admissible to establish a constructive trust even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive (CL 1948, § 566.106).

8. PRINCIPAL AND AGENT—PAROL EVIDENCE—VARYING DESCRIPTION IN LAND CONTRACT.

Parol evidence was properly admitted to vary an unambiguous description in a land contract, where such evidence was offered to show that plaintiffs understood the land contract was in fulfillment of a defendant's agency obligation (CL 1948, § 566.106).

9. EQUITY—LACHES—CONSTRUCTIVE TRUSTS—PRINCIPAL AND AGENT.

Plaintiffs were not guilty of laches in commencing suit to impose a constructive trust to gain title to land not included within description of land contract and deed, where they commenced suit less than a month after discovering defendant's claimed breach of agency agreement for purchasing the land.

10. PRINCIPAL AND AGENT—FRAUD—COMMISSIONS.
An agent who has been guilty of fraud in the transaction of his principal's business forfeits his rights to a commission as such.

11. SAME—TITLE—ACCOUNTING.
An agent's duty to his principal forbids him from disputing the principal's right or title to property when called upon to account for property received by him on the principal's account.

12. EVIDENCE—ENTRY MADE IN USUAL COURSE OF BUSINESS—CONSTRUCTIVE TRUSTS.
Admission of cancelled check to defendant for payment of attorney fees incident to purchase of property by defendant for plaintiffs and offered in evidence as an entry made in the usual course of business was not prejudicial error in suit to impose a constructive trust upon such agent, where trial court did not allow recovery for the amount so paid (CL 1948, § 617.53).

Appeal from Wayne; O'Hara (Chester P.), J. Submitted October 6, 1953. (Docket No. 16, Calendar No. 45,497.) Decided November 27, 1953.

Bill by Cyril Kren and wife against Nathan Rubin and wife to establish a constructive trust on real estate and for accounting. Decree for plaintiffs. Defendants appeal. Affirmed.

Thomas Giles Kavanagh, Jr., for plaintiffs.

Schmier & Schmier (*Sidney J. Karbel*, of counsel), for defendants.

SHARPE, J. This case involves the alleged breach of an agent's duty and the imposition of a constructive trust to prevent the agent from profiting by his fraud.

It is the claim of plaintiffs that in the year of 1940 they were leasing property from one Marcella Dudas, which consisted of a building and vacant land fronting on Scotten avenue in the city of

Detroit; that in said building they conducted a saloon and restaurant business; that defendant, Nathan Rubin, conducted a packing house in the immediate vicinity of plaintiffs' premises; that prior to March 1, 1943, the owner of the premises was desirous of repossessing herself of said premises; that said Marcella Dudas instituted eviction proceedings against plaintiffs; that defendant, Nathan Rubin, was aware of the strained relationship between plaintiffs and Marcella Dudas; that upon 1 occasion Nathan Rubin inquired of plaintiffs why they did not purchase the premises from Marcella Dudas, whereupon plaintiffs stated that because of the strained relations with Marcella Dudas they feared that she would not sell to them, whereupon defendant, Nathan Rubin, suggested that he would buy the premises for them; that Nathan Rubin discussed the matter with Marcella Dudas, and informed plaintiffs that he could purchase the premises for $8,500, whereupon plaintiffs gave him $500 in cash to make a down payment on said premises; that a few days later plaintiffs gave Nathan Rubin $1,500; that on March 11, 1943, Nathan Rubin took title to the premises in his own name; that on March 24, 1943, defendant, Nathan Rubin, offered to give plaintiffs a contract for the sale of the premises, which plaintiffs accepted, said contract purporting to convey the property which defendant, Nathan Rubin, had undertaken to purchase for them; that plaintiffs thereupon paid Nathan Rubin an additional $2,000 and received in return a contract setting forth a balance of $4,500 payable in monthly installments of not less than $375; that in 1947 defendant, Nathan Rubin, applied to the board of zoning appeals for a permit to erect a structure on a part of the property that plaintiffs believed they were purchasing from defendants; that upon an examination of the contract, plaintiffs first learned that defendants only conveyed to plain-

tiffs the front 100 feet of the lots and retained for themselves the rear 40 feet.

Defendants filed an answer to plaintiffs' amended bill of complaint, and defendant, Nathan Rubin, admits that he acquired the property in question from Marcella Dudas under date of March 11, 1943; that on March 24, 1943, the defendants sold a part of the property purchased to plaintiffs on a land contract, and on September 8, 1943, they executed a warranty deed in which plaintiffs are the grantees. Defendant, Nathan Rubin, denies that he ever acted as an agent for plaintiffs, and that the description of the property in the land contract and warranty deed is the identical description of the property that plaintiffs purchased, and he further denies that he is guilty of any fraud or deceit in his dealings with plaintiffs.

The cause came on for trial, and each of the parties produced testimony in support of their claims. At the conclusion of the trial, the trial court filed an opinion, in which he stated:

"I cannot escape the final conclusion that Mr. Rubin did act in this case for and on behalf of these plaintiffs in procuring this property for them from Mrs. Dudas. I think when the case is analyzed and the pleadings are analyzed, there is no other conclusion that the court could come to. * * *

"I was not impressed with his testimony, and I certainly was not impressed with the testimony of Marcella Dudas. I thought she was evasive, and I didn't think she was telling the truth. She couldn't tell anything. She couldn't testify to anything except the purchase of this property about Christmas time. She had no recollection of anything else. She remembered that too vividly, in my opinion. * * *

"A very strong factor in this case, in my judgment, is a question of taxes. These people have continued on the tax rolls for the entire piece of property, and have paid the taxes during all this period of time,

no effort being made by the defendant to have any changes made in the tax roll, or to assume the taxes for the portion which he retained.

"I realize that they should have read their land contract. I don't know that they would have understood, had they read it. She says she doesn't understand legal language, and she had faith in him. The other transactions, like the deed which followed, and later transactions, apparently were taken off the description in the land contract. Certainly some lawyer or somebody thoroughly familiar with the real estate descriptions drafted that contract, and there isn't any question in my mind but what it was drafted by somebody representing Mr. Rubin, and I think he knows who it was and could tell me if he wanted to. At least he collected the costs and what was termed 'attorney fees' at the time the sum of $109 was paid. There isn't any question but what he got this money. He hasn't explained what it was for to my satisfaction, and I am thoroughly convinced that he deliberately kept part of this property without advising these people. That being true, it follows that a fraud was committed at the time that he retained part of this property. He bought it on the 11th day of March. At least he concluded it on that day. He received the entire tract of 69 feet by 140, and then conveyed them 69 by 100 of these 3 lots. In so doing he violated his trust, and it comes within many rules that are laid down in *Stephenson* v. *Golden,* 279 Mich 710. It was his duty as the agent to turn over the entire property, and not only that, but he bought it for $8,000 and sold it at a profit of $500, getting $8,500 for it.

"I think they have established a constructive trust, and are entitled to the deed of the entire property and a return of the $500 that he profited in making this sale on the 24th of March."

On June 15, 1951, a decree was entered whereby defendants were required to convey to plaintiffs the

property in question and pay plaintiffs the sum of $500.

Defendants appeal and urge that plaintiffs failed to sustain the burden of proof that Nathan Rubin undertook to purchase the 40 feet of vacant property and then sell the same to plaintiffs. This is a chancery case and we review the facts *de novo*. We also give deference to the findings of facts by the trial judge due to his opportunity to observe the witnesses and thereby judge their credibility. The opinion filed in this case indicates that the trial judge did not give full credence to all of the testimony of some of the witnesses. We have carefully examined the record and conclude that the trial judge arrived at a correct appraisal of the evidence, and we affirm his findings of facts.

Defendants also urge that the statute of frauds* is a complete defense to plaintiffs' action to impose a constructive trust on the parcel of land retained by defendants. In discussing this issue we have in mind that Nathan Rubin acted as plaintiffs' agent in the purchase of the premises. The oral agreement made between plaintiffs and defendants, as set forth in the bill of complaint, and as found by the trial judge, was not void and unenforceable because contrary to the statute of frauds. In *Stephenson* v. *Golden*, 279 Mich 710, 746, we said:

" 'It is the settled doctrine of the Court that where a conveyance is obtained for ends which it regards as fraudulent or under circumstances it considers as fraudulent or oppressive by instant or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute of frauds by the party guilty of the fraud or misconduct in order to bar the court from effective interference with his

* See CL 1948, § 566.106 (Stat Ann 1953 Rev § 26.906).—REPORTER.

wrong doing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects. CL 1871, §§ 4692, 4693; 1 Story Equity Jurisprudence (12th ed), §§ 330, 333; 2 Story Equity Jurisprudence (12th ed), §§ 1254, 1265; 1 Spence's Equity Jurisprudence, p 511; 2 Spence's Equity Jurisprudence, pp 194, 294 *et seq.;* Hill on Trustees, p 144; *Mestaer* v. *Gillespie,* 11 Ves Jr 621 (32 Eng Rep 1230); *Pickett* v. *Loggon,* 14 Ves Jr 215, 234 (33 Eng Rep 503); *Barnesly* v. *Powel,* 1 Ves Sr 284, 289 (27 Eng Rep 1034); *Young* v. *Peachy,* 2 Atk 254, 257 (26 Eng Rep 557); *Brown* v. *Lynch,* 1 Paige (NY) 147; *Hutchins* v. *Lee,* 1 Atk 447 (26 Eng Rep 284); *Wolford* v. *Herrington,* 74 Pa 311 (15 Am Rep 548); *Gregory* v. *Williams,* 3 Mer 582 (36 Eng Rep 224).' *Huxley* v. *Rice,* 40 Mich 73.

" 'The statutory requirement that a trust must be created by a written instrument, does not apply to such a case, since trusts *ex maleficio* are either expressly or tacitly excepted from its provisions.' Pomeroy's Specific Performance (3d ed), p 375, § 144.

" 'Inasmuch as constructive trusts arise by construction or operation of law and not by agreement or intention, the statute of frauds, and statutes prohibiting parol trusts, have no application to such trusts, and do not prevent the establishment or enforcement thereof, since such statutes are meant to prevent frauds and not to encourage them, and a court of equity will not permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud. So it is frequently said that a constructive trust may be established by parol evidence.' 65 CJ, pp 459–461."

Defendants also urge that parol evidence for the purpose of varying the unambiguous provisions and legal description of the written land contract was inadmissible. In *Stephenson* v. *Golden, supra,* 750, we quoted with approval from 1 Perry on Trusts and Trustees (6th ed), § 226:

" 'The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property. Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive.' "

In the case at bar parol evidence was offered to show that plaintiffs understood the land contract was in fulfillment of defendant Nathan Rubin's agency obligation. Under such circumstances it was not error to offer and receive parol evidence.

It is also urged that plaintiffs are barred by laches from maintaining this suit. The record shows that the first notice that plaintiffs had that defendants claimed the property was when they received a notice from the board of zoning appeals under the date of August 13, 1947. The present suit was instituted less than a month later. Under such circumstances the doctrine of laches has no application.

It is also urged that plaintiffs are not entitled to recover the $500 difference between what defendant paid to Marcella Dudas and what he received for the property. In *Stephenson* v. *Golden, supra,* 759, 760, we cited with approval the following:

"It is settled law that an agent who has been guilty of fraud in the transaction of his principal's business forfeits his rights to a commission as such. 3 CJS, pp 77, 78, and cases cited. It is self-evident one should not be rewarded for violating the law. One who offends against the law may not have the help of the law. 2 Hale Pleas of the Crown (1st Am ed), p 386; Broom's Legal Maxims (9th ed), pp 197, 207; 2 Bouvier's Law Dictionary (Rawle's 3d Rev), p 2135. * * *

" 'An agent's duty to his principal forbids him, when called upon to account for property or funds received by him from his principal or on his account, from disputing his principal's right or title thereto.' 31 Cyc, pp 1481, 1482."

It is also urged that it was prejudicial to defendants' rights to admit in evidence a cancelled check dated March 24, 1943, in the amount of $109, payable to Nathan Rubin for attorney fees. The check was offered as an entry made in the usual course of business. The trial court did not allow plaintiffs any recovery for the amount paid. Under CL 1948, § 617.53 (Stat Ann § 27.902), it was admissible. See, also, *Valenti* v. *Mayer,* 301 Mich 551.

The decree of the trial court is affirmed, with costs to plaintiffs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

DENNIS *v.* WILFORD.

1. MASTER AND SERVANT—PORTABLE SAWMILL—FARM HAND—CONTRIBUTORY NEGLIGENCE.

   The matter of plaintiff farm hand's contributory negligence in the loss of his hand while acting as off-bearer at portable sawmill on defendant's farm incident to sawing logs to build a barn *held,* for jury, where it was the duty of defendant through his agent, the sawmill operator, to have informed plaintiff of the danger of removing pieces of wood from the saw while it was in operation inasmuch as plaintiff informed defendant he had not worked with such a saw before commencing with defendant 2 days before the accident.

2. SAME—FARMER—NEGLIGENCE—DEFECTIVE PORTABLE SAWMILL—DANGEROUS PLACE TO WORK.

   Record presented evidence from which jury could find defendant

---

REFERENCES FOR POINTS IN HEADNOTES

[3–8] 35 Am Jur, Master and Servant § 293 *et seq.*

[9–11] 35 Am Jur, Master and Servant §§ 334 *et seq.;* § 364 *et seq.*

farmer was guilty of negligence proximately causing loss of plaintiff's hand as he removed an edging from near 48-inch saw while it was in operation, where it appears that a part of the platform of the saw had become broken so as to permit edgings to fall around the saw and necessitating removal by an attendant, a dangerous place in which to work.

3. SAME—ASSUMPTION OF RISK.

An employee assumes the ordinary dangers of his employment and the risks of defective machinery and methods known to him, or so obvious that he should have known them, but the employee need not make a minute investigation of machines and methods to ascertain the dangers, though he does owe caution and care in such respects, in an activity not subject to the workmen's compensation act.

4. SAME—ASSUMPTION OF RISK—DEFECTIVE MACHINERY, TOOLS AND APPLIANCES.

A workman in an activity not subject to the workmen's compensation act assumes the risks incident to his employment when he enters upon it, but he has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and the employee assumes no risks growing out of their defective character unless fully advised thereof.

5. SAME—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES.

An employee in an activity not subject to the workmen's compensation act who did not appreciate the danger of the work he was doing, arising from the defective appliances, did not assume the risk which resulted in his injury if the employer was not justified in supposing he understood such danger.

6. SAME—ASSUMPTION OF RISK—UNUSUAL AND EXTRAORDINARY RISK.

A servant does not assume the unusual and extraordinary risk of which the master knows or which he should know or foresee, unless such risks are obvious, or the servant has actual, or presumptive, knowledge of the danger.

7. SAME—ASSUMPTION OF RISK—OBVIOUS DANGER.

A servant does not assume the risk of danger from the failure of the master to exercise reasonable care to provide safe machinery and appliances, or a safe place in which to do his work, unless the danger is obvious, or he can acquire knowledge thereof in the exercise of ordinary care.

8. SAME—ASSUMPTION OF RISK—PORTABLE SAWMILL—INEXPERIENCED FARM HAND.

The doctrine of assumption of risk *held,* not to apply, where defendant farmer who engaged portable sawmill for cutting logs into lumber for a barn had the duty of providing plaintiff farm hand with a safe place to work and give him proper instructions and warnings upon being advised of plaintiff's lack of experience in such activity.

9. SAME—FELLOW SERVANTS—DELEGATION OF POWER TO DIRECT.

Wherever the business conducted by the person selected by the master is such that the person selected is invested with full control over the action of the employees engaged in carrying on a particular branch of the master's business and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then the person selected stands in the place of the master and is not a fellow servant with those whom he controls.

10. SAME—FELLOW SERVANTS—DELEGATION OF DUTY TO KEEP APPLIANCES IN REPAIR.

A servant to whom the master delegates his duty to provide other servants with a place reasonably safe to work in and to keep machinery and appliances used in carrying on the work in reasonably good repair, cannot be held to be a fellow servant, no matter what his grade or rank, so as to relieve the master of liability.

11. SAME—PORTABLE SAWMILL—SAFE PLACE TO WORK—DELEGATION OF DUTY—NEGLIGENCE.

Portable sawmill operator who was designated by defendant farmer to operate sawmill to cut logs into lumber for a barn had duty to direct plaintiff farmhand who assisted in such operation and defendant was bound by orders given by c- negligence of the operator to plaintiff who lost his hand incident to such operation.

Appeal from Clare; Holbrook (Donald E.), J. Submitted October 7, 1953. (Docket No. 28, Calendar No. 45,928.) Decided November 27, 1953.

Case by Oliver A. Dennis against Gordon Wilford for damages for loss of hand cut off by saw. Verdict

and judgment for plaintiff. Defendant appeals. Affirmed.

Linsey, Shivel, Phelps & Vander Wal, for plaintiff.

Gerald J. Cotter and *Douglas A. Dehn,* for defendant.

SHARPE, J. This is an action to recover damages for the loss of a hand while helping to operate a portable sawing machine. Plaintiff was a farmer, 36 years old, and employed by defendant on or about February 26, 1951, to work on defendant's farm. On April 14, 1951, defendant employed William Harold Wray, the owner of a sawmill, to come to his farm to cut logs into lumber, which was to be used in building a barn on defendant's farm. The saw was 48 inches across and fastened to a shaft. There was a framework over the shaft called a husk. On this husk were the shafts and pulleys. The platform covered the whole husk and kept the sawdust off the pulleys and sticks from dropping down.

A part of the platform had been broken so there was a hole 3 inches by 11 inches next to the saw. This hole permitted pieces of wood to fall down through the hole. When pieces of wood dropped through the hole it was necessary to take them out. The distance from the bottom of the saw to the ground was approximately 18 inches. During the operation of the saw a stick about 2–1/2 feet long and 3/4 inches thick became imbedded in the hole alongside the saw. The stick was below the saw. Plaintiff took hold of the stick to remove it and in doing so the saw caught the stick and pulled plaintiff's hand into the saw and cut it off.

The cause came on for trial and at the conclusion of plaintiff's proof, defendant made a motion for a directed verdict on the theory that plaintiff's negli-

gence was the proximate cause of his injury, and plaintiff's failure to prove negligence on the part of defendant. The trial court denied the motion. The trial proceeded, and at the close of all evidence the following occurred:

"*Mr. Cotter:* May it please the court at this time I would like to renew the motion for a directed verdict. First that there is no negligence proven so far as the defendant is concerned; second, that the plaintiff here assumed the risk of his employment; and third, that the negligence of a fellow employee, if there was any negligence, was the negligence and the risk of that negligence is assumed by the plaintiff; fourth, that the plaintiff is guilty of contributory negligence in the manner in which he attempted to remove this slab. The danger was obvious and apparent and was such that an ordinary prudent man would not attempt what was attempted here under the same or similar circumstances and thus was contributorily negligent. If there was any negligence as far as the operation of the mill was concerned the operation was under the direction of a fellow employee and also that if the plaintiff, as he now claims, saw and he should have seen this claimed opening or hole in the platform, he assumed by continuing to operate and work there that risk, so we move at this time for a directed verdict.

"*By the Court:* I believe the court will reserve its decision under the Empson act.* Have the jury return, please."

The jury returned a verdict in favor of plaintiff in the amount of $3,750. A judgment was entered upon the verdict. Following the entry of judgment, defendant made a motion for a new trial for reasons stated above. The trial court denied defendant's motion for a new trial. Defendant appeals and urges that the court should have directed a verdict for

* CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—REPORTER.

defendant for the reason that plaintiff was guilty of contributory negligence. Plaintiff testified:

"I didn't know anything about a saw. I never worked in a sawmill. I told him that and he said Mr. Wray would tell me what to do. There was no sawmill set up there at the time, but there was afterwards. It was Harold Wray's mill. I started working on the job there for the cutting of the lumber. There was Mr. Wilford, Mr. Wray, and myself, the 3 of us. Mr. Wray run the saw. Mr. Wray told me I was to keep the boards away, the slabs and stuff away from the saw as it was sawed off. I have never worked on sawmills prior to that time. I started operation I presume on the 14th, it happened on the 16th. I had operated 2 days before the accident. Mr. Wray was the one operating the carriage and I was taking the slabs and the boards away as they was sawed. I did that at the direction of Mr. Wray. * * * Mr. Wray told me to take the stuff away from the saw there, take it out. I did it by, well, sometimes pieces would stick up above the saw shaft so I could take hold of them and lift it out from the top, and other times they were shorter and you couldn't reach them from the top. Then I went around to the other side of the saw so I could take it out from my underneath side. There was approximately 18 inches between the saw and the ground. I had gone in there and taken them out that way before. Mr. Wray was right there when I was doing it.

"I had an accident on the afternoon of the 16th. Just before this accident there was another piece that fell in this hole and you couldn't proceed with the sawing until it was removed, so I proceeded to take it out. I went around, it was a short piece so I had to go around to the other side of the saw and take it out underneath. The piece was standing up again the saw and I reached underneath to remove it and when I did the saw caught the stick and pulled my hand into the saw and cut it off. I had taken sticks out of there before like that. There was a

space of about 18 inches between the ground. At the time I got hurt I don't know whether the stick came out or not."

William Harold Wray, the owner of the sawmill, and a witness for defendant, testified:

"That hole was dangerous on that certain slab. It was dangerous to have a hole in there to let things go down through. If they went down through they had to be taken out. * * *

"Mr. Wilford never gave me any authority to give Mr. Dennis any orders. I didn't give any orders. I might have showed him how to take the boards and slabs away from the saw as off-bearer. I never showed him at any time about cleaning out the edgings under the saw."

The trial court gave the following instructions to the jury:

"In passing upon the question of contributory negligence it is your duty to take into consideration the experience of the plaintiff in connection with the sawmill, as shown by the evidence; the fact, if you find it to be a fact, that the plaintiff has been a farmhand and worked at that principally; his experience or inexperience in connection with the operation of a sawmill, and all the other facts in evidence bearing upon the question of contributory negligence. Now, I stated that the plaintiff in this case was bound to use ordinary care. In passing upon this question you will consider the distance between the saw and the ground, the fact that he had been between the saw and the ground, the fact that he had been removing such debris, slabs and pieces of board prior to the injury, if you so find the same to be true, and also the fact, if you find it to be a fact, that he had been instructed by his master, that is the defendant in this case, that he should take his orders from Mr. Wray, who would be in charge of the sawmill, if you find the same to be the fact; his experience or

lack of experience and the length of time he worked upon this job and all the facts surrounding the case."

In the case at bar there is evidence that plaintiff told defendant that he knew nothing about a sawmill and was told by defendant, "Mr. Wray would tell me what to do;" that if pieces of edgings fell into the hole the proper thing to do is to stop the saw and take them out, although an experienced man could reach under and take them out, but if you grabbed the edging solid it would jerk the hand into the saw.

In the case at bar it was the duty of defendant through his agent, William Harold Wray, to have informed plaintiff of the danger of removing pieces of wood from the saw while it was in operation. In our opinion plaintiff's contributing negligence, if any, was a factual question and properly submitted to the jury.

Defendant also urges that if he was guilty of negligence his negligence was not the proximate cause of plaintiff's injury. There was evidence from which a jury could find that defendant told plaintiff that Wray would tell him what to do, and that the hole in the platform created a dangerous place to work. Cecil Matthews testified:

"To have a hole there is very dangerous even for a sawyer or anyone working around the mill. Those edges by dropping down through could catch in the saw and they would be thrown back and could wedge up anywhere in the saw. The edgings could catch on the saw and be thrown at somebody. It could break the saw or break the teeth. If that platform was kept where it should have been, nothing could get through there. Nothing could get through there, nothing could happen as far as that is concerned. It wasn't proper practice to have that hole there. It was dangerous.

"If pieces of edgings fall down in there you either have to stop the mill to take them out, that would have to be removed, or take chances to get those out, somebody is liable to be hurt. An experienced man could probably reach in there while the saw was running and get it out, which has been done, if he didn't grab hold of it too solid and keep his hand far enough from the saw. If he didn't grab too solid, if it would grab the saw it would jerk out of his hand, wouldn't jerk the hand into the saw. If you grabbed it solid it would jerk the hand into the saw. It could be removed as it stood there some 18 inches the ground being some 18 inches below the saw, standing up, if you was careful. If you was careful you could hold back from the saw and take it out, which has been done. A man who has worked around saws for years would know what danger was there, he would keep his hand away from it and move the slab away instead of pulling it through in under the saw. If a man reached through under the saw it naturally is going to catch on the saw, or pull it against it. This platform is supposed to be solid up within a half or quarter of an inch from the saw to prevent stuff from falling in between the saw and the platform."

In our opinion there was evidence from which a jury could find that defendant was guilty of negligence, and that such negligence was the proximate cause of plaintiff's injury.

Defendant also urges that the trial court was in error in failing to direct a verdict for defendant on the ground that plaintiff assumed the risk of his employment. Defendant relies upon *Lamotte* v. *Boyce,* 105 Mich 545, 548, where we said:

"There is no obligation upon the part of employers to make their premises and machinery perfectly safe, or to have the most approved appliances. The duty of the employer to provide reasonably safe machinery is qualified by his right to contract for

the use of machinery which falls short of the best and most approved; and when the defect is obvious, and cannot escape ordinarily careful observation, which is always due from the employee, the risks attendant upon such use are assumed by the latter. In places like sawmills, appliances more or less crude may reasonably be expected, and those who use them are ordinarily as good judges of their safety as the master. If unsafe, and the employee still consents to use them, the risk is his; and the master has a right to expect that he assumes it, where the nature of the appliance, and its dangers, are obvious. *Batterson* v. *Chicago & Grand Trunk R. Co.*, 53 Mich 125, 129; *Ragon* v. *Toledo, Ann Arbor & N. M. R. Co.*, 97 Mich 265, 274."

In *Delbusso* v. *American Cement Plaster Co.*, 165 Mich 318, 323, we said:

"It is a well-settled rule, and nowhere better settled than in Michigan, that an employee assumes the ordinary dangers of his employment and the risks of defective machinery and methods known to him, or so obvious that he should have known them. It is not, however, the law that the employee must make a minute investigation of machines and methods to ascertain, though he does owe caution and care in these respects."

We also quoted with approval from 1 Labatt on Master and Servant, § 271, where it was said:

" 'The general rule that a workman assumes the risks incident to his employment when he enters upon it, is well settled, but its application is subject to certain qualifications. He certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has the right to suppose that his employer has provided such guards and means of protection from injury, in the

use of the machinery, tools, and appliances as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. *Rummel* v. *Dilworth, Porter & Co.*, 131 Pa 509 (19 A 345, 17 Am St Rep 827). * * * If the plaintiff did not appreciate the danger of the work he was doing, arising from the defective appliances, and if the defendants were not justified in supposing he understood it, it can not be held that, in the contractual relation of master and servant, he assumed the risk which resulted in his injury. *Demars* v. *Glen Manfg. Co.* (1892), 67 NH 404 (40 A 902). A servant does not assume the unusual and extraordinary risk of which the master knows or which he should know or foresee, unless such risks are obvious, or the servant has actual, or presumptive knowledge of the danger. *Reed* v. *Stockmeyer* (1896), 20 CCA 381 (74 Fed 186, 34 US App 727). A servant does not assume the danger from the failure of the master to exercise reasonable care to provide safe machinery and appliances, or a safe place in which to do his work, unless the danger is obvious, or he can acquire knowledge thereof in the exercise of ordinary care.' *Comben* v. *Belleville Stone Co.* (1896), 59 NJL 226 (36 A 473)."

See, also, *LaPointe* v. *Chevrette,* 264 Mich 482.

Under the circumstances of this case the doctrine of assumption of risk does not apply, as it was the duty of defendant to provide plaintiff with a reasonably safe place to work. It was also defendant's duty to give proper instructions and warnings to plaintiff.

It is also urged that the trial court should have directed a verdict against plaintiff on the theory that if there was any negligence it was the negligence of a fellow employee.

In *Hunn* v. *Michigan Central R. Co.*, 78 Mich 513, 519 (7 LRA 500), we said:

"Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employees engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls."

In *Maki* v. *Isle Royale Copper Co.*, 180 Mich 624, 632, we said:

"The rule that it is the duty of the master to provide his servant a place reasonably safe to work in, and that it is his duty to keep the machinery and appliances used in carrying on the work in reasonably good repair, is firmly established in this State.

"Likewise that when the master delegates this duty to a servant, no matter what his grade or rank, the servant cannot be held to be a fellow-servant to relieve the master of liability. Jack Glanville's duty to see that the chain was safe and properly adjusted was the duty of the master, and in doing so he acted for the master. In this he was the defendant's agent and vice principal and not the plaintiff's fellow-servant. *McDonald* v. *Michigan Central R. Co.*, 132 Mich 372 (102 Am St Rep 426); *Orso* v. *Great Lakes Engineering Works*, 164 Mich 568, 571, and cases cited."

The trial court was not in error in failing to direct a verdict in favor of defendant. The record shows that William Harold Wray was designated by defendant to operate the sawmill. It was Wray's duty to direct plaintiff in the services that plaintiff was to perform. Wray was the agent of defendant, and

defendant is bound by the orders given by Wray to plaintiff.

The judgment is affirmed, with costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

REITZ *v.* REITZ.

1. DIVORCE—DIVISION OF PROPERTY—TANGIBLE PERSONALTY.
   Trial court's division of tangible personal property of parties to suit for divorce *held*, fair and equitable, where wife was given household appliances and some of the furniture and husband other furniture, boat, motor and automobile.

2. SAME—DIVISION OF PROPERTY—REALTY.
   Provision of decree of divorce giving each party an undivided 1/2 interest in real estate theretofore held as tenants by the entireties *held*, proper at termination of marriage of over 20 years' duration.

3. SAME—DIVISION OF PROPERTY—SECURITY OF LIVING FOR THE WIFE.
   There is no rigid rule of division of property in divorce proceedings, the major consideration being the security of living for the wife.

4. SAME—DIVISION OF PROPERTY—PREVIOUSLY OWNED PROPERTY—INHERITED PROPERTY.
   A wife in suit for divorce may be entitled, under certain circumstances, to share in property owned by the husband prior to marriage or inherited after marriage.

5. SAME—DIVISIONS OF STOCKS AND SECURITIES.
   Wife is accorded $4,000 out of balance of bonds and securities worth $11,303, rather than $2,000 accorded by trial court,

---

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 17 Am Jur, Divorce and Separation § 445.

where joint holdings of $14,518 had been reduced by a disposal netting each party $1,607.50, husband had owned previously to marriage or inherited $6,000, marriage was of 20 years' duration, 1 child had been born, wife had worked outside of the home and had kept boarders and served meals to teachers and cessation of the family life was due to defendant husband's misconduct.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted October 13, 1953. (Docket No. 76, Calendar No. 45,859.) Decided November 27, 1953.

Bill by Hazel Reitz against Howard G. Reitz for divorce on ground of extreme and repeated cruelty. Decree for plaintiff. She appeals, claiming inadequate property settlement. Modified and affirmed.

R. G. Goembel, for plaintiff.

Ralph G. Birkhold, for defendant.

SHARPE, J. Plaintiff obtained a decree of divorce from defendant. The parties failing to agree upon a property settlement, the court made a division of the property. This appeal by plaintiff concerns only the property settlement.

Plaintiff and defendant were married in 1930, and as a result of this marriage one child was born, namely, Delores M. Reitz, born October 29, 1932. At the time of the divorce proceedings the daughter was attending a business college in Kalamazoo. The parties separated June 30, 1950. The record shows that defendant never had a fatherly interest in his daughter. He failed to buy her clothing or let her ride in his automobile. During the married life of the parties plaintiff worked about 6 months in Otsego and 3 years in Kalamazoo. She also kept boarders and served meals to teachers.

Defendant also worked steadily, but never earned large wages. It appears that in January, 1949, the parties had in their joint holdings, bank deposits, and bonds, the sum of about $14,518, and since the divorce proceedings were instituted, each of the parties, by order of the court, disposed of bonds which netted each party the sum of $1,607.50. At the time of the decree the parties jointly owned a home of the approximate value of $7,500, and a balance of $11,303 in bonds and securities, as well as certain personal property.

The trial court entered a decree by which he divided the personal property of the parties. Under such division plaintiff received:

"One General Electric Refrigerator.
"One range cookstove.
"The radio.
"The sewing machine.
"The 3-piece living room suite.
"The bedroom suite.
"The metal cabinets.
"The fruit jars.
"The Hoover sweeper.
"The living room rug.
"The dining room rug.
"The pink glassware.
"The wall-type can opener.
"The french-fryer.
"The waterless cooker.
"The metal door stop.
"The bird house.
"The set of 6 blue-rimmed cups and saucers.
"The cedar chest.
"The electric iron.
"The roaster.
"The white glassware set.
"The shower curtains.
"The hassock.
"The kitchen table.

"The coffee maker.
"The G.E. pad and hot water bottle.
"The clothes tubs.
"The lamp.
"One antique stand."

and defendant received:

"The piano.
"The bed.
"The dresser.
"The dining room suite.
"The boat and motor.
"The 1941 Pontiac automobile, engine #271534, serial #8JA5016."

In our opinion the division of the personal property was fair and equitable, and the decree making such division is affirmed.

The decree also provided:

"It is further ORDERED, ADJUDGED AND DECREED that the house and lot at Summer Home park, Long Lake, Portage township, Kalamazoo county, Michigan, and which house and lot is described as follows:

"All that certain piece or parcel of land situated in the township of Portage, county of Kalamazoo and State of Michigan and more particularly described as lot 12 of the plat of Summer Home park according to the recorded plat thereof.

and which the parties heretofore owned as tenants by the entireties shall hereafter be owned by the parties as tenants in common and that, accordingly, Hazel Reitz shall hereafter own an undivided ½ interest in the above described real estate and defendant, Howard G. Reitz, shall hereafter own an undivided interest in the above described real estate.

"In the event that either or both of the parties do not desire to continue to be a tenant in common in the above described real estate then their interest shall be determined as follows. Each party shall select an appraiser and which 2 appraisers shall select a third appraiser. The 3 appraisers shall ap-

praise the property and agree upon an appraised value. Either party may purchase the other party's ½ interest in the premises by paying to said other party ½ of the appraisal price. In the event that both parties desire to purchase the premises then the property may be sold to the party who will bid the highest price therefor.

"In the event that neither party desires to purchase the premises then the premises shall be listed upon the request of either party for a price to be mutually agreed upon with a reputable realtor and said premises shall be sold as soon as possible and the net proceeds therefrom equally divided between the parties."

We also affirm the trial court as to the disposition of the real estate.

The trial court also provided the following as to the division of the bonds and other securities as follows:

"It is further ORDERED, ADJUDGED AND DECREED that the defendant, HOWARD G. REITZ, shall forthwith pay to the plaintiff, HAZEL REITZ, the sum of $2,000.

"It is further ORDERED, ADJUDGED AND DECREED that upon the payment of the above mentioned $2,000, the defendant, HOWARD G. REITZ, shall be the sole and absolute owner of all of the cash and securities which amounted to $14,518 on January 3, 1949, which remains on hand and in the possession of the defendant, and that any and all interest of the plaintiff in the remainder of the $14,518 is terminated upon the payment of the above mentioned $2,000."

It should be noted that the sum of $14,518, mentioned in the decree, should be the sum of $11,303, as both plaintiff and defendant disposed of bonds of the value of $3,215, of which each received the sum of $1,607.50.

It also appears that prior to the marriage defendant had certain moneys on deposit in banks, and that

after marriage he inherited certain moneys, the total of which the trial court found to be approximately $6,000. The trial court, in making a division of the property, determined that plaintiff was not entitled to any part of the $6,000.

Plaintiff appeals and urges that the trial court was in error in failing to allow her to share in the property or money which defendant had at the time of the marriage or which he inherited.

It is the accepted rule in this State that there is no rigid rule of division of property in divorce proceedings, the major consideration being the security of living for the wife. See *Mayer* v. *Mayer,* 266 Mich 241. See, also, *Robinson* v. *Robinson,* 275 Mich 420, and *Hallett* v. *Hallett,* 279 Mich 246. In coming to our conclusion as to the rights of the parties, we do not overlook the fact that the cessation of the family life was caused by defendant's misconduct, and that it is his duty to furnish to the extent of his ability the needs that plaintiff may reasonably require. We have no hesitation in holding that under certain circumstances a wife may be entitled to share in property owned by the husband prior to marriage or inherited after marriage. While we hesitate to depart from provisions made by the trial court as to adjustment of property rights, in the instant case we think it would be inequitable to plaintiff to affirm the property settlement. In our opinion plaintiff should receive the sum of $4,000 out of the $11,303. A decree may be entered accordingly. Plaintiff may recover costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

ARNOLD HOME, INC., *v.* LABOR MEDIATION BOARD.

1. LABOR RELATIONS—ORDER FOR ELECTION—POWERS OF LABOR MEDIATION BOARD—STATUTES—STRIKE VOTE.

   The labor mediation board has not the statutory authority to order that an election among employees of a charitable institution for a "strike vote" be held to determine whether a certain union shall be the bargaining agent or representative of the employees, or a certain group of them, in labor matters, where there is no jurisdictional dispute between unions and no evidence of any desire or any request by any part of the employees that they be represented by the union seeking an election by a "strike vote", or that they be represented by any union at all, as their bargaining agent or representative in labor matters (PA 1939, No 176, § 23, as added by PA 1949, No 230).

2. COSTS—LABOR—ELECTION—STATUTES—LABOR MEDIATION BOARD.

   No costs are allowed on certiorari to determine power of labor mediation board to order an election at insistence of union, where employees do not seek the representation of such union and there is no jurisdictional dispute between unions, the aim of the union being to establish itself as bargaining agent by such election (PA 1939, No 176, § 23, as added by PA 1949, No 230).

Appeal from Labor Mediation Board. Submitted October 6, 1953. (Docket No. 2, Calendar No. 45,705.) Decided November 27, 1953.

REFERENCES FOR POINTS IN HEADNOTES

[1] Generally as to elections of bargaining agent, see 31 Am Jur, Labor §§ 132, 154, 173.

[1] Selection of bargaining agent under National Labor Relations Act. 123 ALR 624.

The Labor Management Relations (Taft-Hartley) Act, 1947, and its effect upon the National Labor Relations (Wagner) Act. 173 ALR 1401.

Effect of National Labor Relations Act to exclude state action. 174 ALR 1051.

The Labor Mediation Board of the State of Michigan ordered a strike vote at Arnold Home, Inc., a nonprofit Michigan corporation. It reviews by appeal in the nature of certiorari. Reversed.

Clark, Klein, Brucker & Waples, for plaintiff.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for defendant board.

BOYLES, J. This is a statutory proceeding in this Court in the nature of certiorari* to set aside an order of the labor mediation board calling a strike vote among certain employees of the plaintiff Arnold Home, Inc. The facts and circumstances are as follows:

The Arnold Home, Inc., hereinafter called the Home, is a charitable institution in Detroit, financed by gifts, contributions and bequests, for the care of persons who are aged and infirm. It houses upwards of 285 aged persons, mostly women, of an average age of 82 years. In employee relationships it deals directly with its employees, and no bargaining agent for any of its employees in labor matters has ever been authorized or certified. In August, 1952, the secretary of Local Union No. 1064, United Catering, Restaurant, Bar & Hotel Workers, C.I.O., a labor organization, hereinafter called the union, wrote counsel for the Home asking whether they would consent to a representation election among the food workers in the Home. Consent was refused. On September 8, 1952, the State labor mediation board received a written request from the secretary of the union that the board "mediate" between the Home and the union "for representation among the food

* PA 1939, No 176, § 23, as added by PA 1949, No 230. See CLS 1952, § 423.23 (Stat Ann 1950 Rev § 17.454[25]).

workers and nurses aids, employees of the Arnold Home, Inc." The board assigned a mediator to the case. On October 14th the secretary of the union wrote the board that the union had "failed to settle the existing dispute," and asked the board "to conduct a strike vote among the food workers and nurses aids, employees of the Arnold Home, Inc." Counsel for the Home advised the board that the Home did not recognize any union as a duly authorized bargaining agent for employees of the Home and that the Home would not agree to the board holding a "strike vote" among its employees to determine whether Local Union No. 1064, C.I.O., should be certified as the bargaining agent representing its employees.

On November 3, 1952, the labor mediation board ordered a "statutory strike vote" to be held on the premises of the Home on November 14th. In the interim, by request of the board, counsel for the Home appeared before the mediator for the board together with the secretary of the union and a record was made of the objections of the Home to the holding of any "strike vote." They were, that the Home was a charitable organization which did not come within the jurisdiction of the labor mediation board, that the Home did not recognize Local Union No. 1064, C.I.O., as duly authorized bargaining agent for its employees or any of them, that the board had no authority to hold an election for a "strike vote" to determine a bargaining agent, and, finally, that the statutory steps necessary as a condition precedent to conducting a strike vote had not been taken.

The election was postponed to November 28th. Before that date arrived, the Home filed in this Court the instant petition for a writ of certiorari requiring the labor mediation board to certify the record and proceedings in the matter to this Court, asking for a stay of proceedings, and that the board be re-

strained from holding any election by the employees of the Home, or from recognizing the said union as the representative of its employees, until further order of the Court. No objection was interposed by the attorney general on behalf of the board to granting the petition and it was granted accordingly. The writ was issued, and a stay of all proceedings under the order of the board until the further order of this Court was granted. Issue has been joined, briefs filed, and the case submitted.

This case does not involve a jurisdictional dispute between labor unions or an employer over the question which union shall be certified as the bargaining agent or representative of the employees in labor matters. The question here is whether the board, at the request of a certain union, can order a "strike vote," by calling an election among certain employees of an employer to decide whether they will be represented by said union, under the labor mediation act.

No such election has been requested by the employees, or any of them, either for a "strike vote," or for any vote to determine whether a strike will be called, or whether the union here involved, or any other union, shall be selected by them, or a majority of them, or in fact any of them, as their bargaining agent or representative, in dealings between the Home and any of its employees.

The union, in an effort to become the legal representative of certain of the employees of the Home, in labor matters, attempts to accomplish that objective, through the cooperation of the board, by having an election called by the board for a "strike vote."

We find no statutory authority, in the provisions of the act, either those which apply to the taking of a strike vote, or elsewhere, for the ordering by the board of an election among employees for a "strike vote" to determine whether a certain union shall

be the bargaining agent or representative of the employees, or a certain group of the employees as in the case at bar, in labor matters. The act gives the board authority to determine which union shall act as the representative of employees in case of a jurisdictional dispute between unions, but significantly omits similar authority under the present circumstances. No machinery is set up for such an election, under the guise of a "strike vote." The union here involved cannot successfully claim, as yet, that it represents any of the employees of the Home. It seeks to acquire that right by the so-called "strike vote."

The issue here does not involve a dispute between employer and employees. It does not disclose any desire or any request, by any part of the employees of the Home, that they be represented by the labor union here seeking an election by a strike vote, or that they be represented by any union at all, as their bargaining agent or to represent them in labor matters.

The order of the board calling the election is without authority and will be set aside. The temporary stay will be continued in effect. No costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

EBERT *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA.

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

   The Supreme Court does not reverse a nonjury case on issues of fact unless the evidence clearly preponderates in the opposite direction.

2. COURTS—CONSTRUCTION OF INSURANCE POLICY—TOTAL AND PERMANENT DISABILITY.

   Provisions of insurance policies referring to total and permanent disability are construed in the light of previous decisions of the Supreme Court, where appeal called for opinion on issue of fact.

3. INSURANCE—CONSTRUCTION OF POLICY—AMBIGUITY.

   Ambiguous or obscure provisions in an insurance policy are liberally construed in favor of the insured.

4. SAME—TECHNICAL CONSTRUCTION OF POLICIES NOT FAVORED.

   Technical construction of insurance policies is not favored.

5. SAME—TOTAL AND PERMANENT DISABILITY—QUESTION OF FACT.

   Whether an insured is totally and permanently disabled entitling him to waiver of premiums and to disability benefits under a life insurance policy is a question of fact.

6. SAME—TOTAL AND PERMANENT DISABILITY—NONJURY CASE—PREPONDERANCE OF EVIDENCE.

   Trial court's finding in nonjury case that plaintiff, an undertaker, insured under life insurance policies entitling him to certain

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 3 Am Jur, Appeal and Error § 896 *et seq.*

[3] 29 Am Jur, Insurance § 166.

[4] 29 Am Jur, Insurance § 158.

[5, 6] 29 Am Jur, Insurance §§ 434, 1160 *et seq.*

[5, 6] Construction and effect of provision of life insurance policy for waiver of future premiums in case of disability. 68 ALR 1389.

Construction and application of provision of accident policy or accident feature of life policy extending benefits to one disabled to engage in any occupation or employment for wage or profit. 149 ALR 7; 153 ALR 430.

When insured deemed to be totally and continuously disabled or unable to transact all business duties. 24 ALR 203; 37 ALR 151; 41 ALR 1376; 51 ALR 1048; 79 ALR 857; 98 ALR 788.

Presumption of total disability raised by provision of statute or policy upon continuation of disability for specified period. 110 ALR 631.

Provision limiting indemnity to permanent disability as affected by clause providing for payment for life and during disability. 54 ALR 294.

benefits in the event he became totally and permanently disabled, had established that his disability was total and permanent in that he not only could not perform any substantial part of the undertaker business, but that his condition was such that he could not perform any other work for remuneration is not disturbed, where, although there were proofs from which a contrary conclusion could be drawn, the evidence does not clearly preponderate in the opposite direction.

Appeal from Clinton; Cash (Paul R.), J. Submitted October 16, 1953. (Docket No. 49, Calendar No. 45,774.) Decided November 27, 1953.

Action by Clarence D. Ebert against Prudential Insurance Company of America on insurance policies. Judgment for plaintiff. Defendant appeals. Affirmed.

Leo W. Corkin, Dykema, Jones & Wheat and *Thomas L. Munson,* for plaintiff.

Cook, Michelson & Hoffman (*Gilbert Y. Rubenstein,* of counsel), for defendant.

BOYLES, J. This appeal calls for opinion on an issue of fact and involves the construction of certain provisions in 4 life insurance policies, which provide for payment of benefits for total and permanent disability. The crucial question is whether the insured was totally and permanently disabled within the terms of the policies.

Plaintiff was engaged in the business of an undertaker. In 1916 the defendant insurance company issued a $1,000 policy on the life of the plaintiff, which included "provisions as to permanent disability," as follows:

"If the insured, after the first premium on this policy has been paid, shall furnish due proof to the company, * * * that he, at any time after payment of such first premium, from any cause whatso-

ever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company upon receipt of such proof will waive the payment of each premium that may become payable thereafter under this policy during such disability.

"If such disability shall occur before the insured is 60 years of age the company will, in addition to such waiver, during such disability, pay to the insured the amount insured, less any indebtedness, in 120 monthly instalments during 10 years, each instalment of the amount of $9.74 per $1,000 of insurance payable; the first instalment to become payable 6 months after the company shall have received such proof and subsequent instalments monthly thereafter."

In 1919 the company issued 2 additional $1,000 policies on the life of the plaintiff, both containing identical provisions for "total and permanent disability benefits," and waiver of premiums in such event. The provisions for disability benefits were as follows:

"TOTAL AND PERMANENT DISABILITY BENEFITS: MONTHLY INCOME 10 DOLLARS PER MONTH FOR EACH $1,000 of the face amount of insurance, payable to the insured in event of total and permanent disability before age 60, subject to the provisions as to total and permanent disability contained in the policy. WAIVER OF PREMIUMS in event of total and permanent disability as hereinafter provided, * * *

"PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY—WAIVER OF PREMIUMS—MONTHLY PAYMENTS TO THE INSURED.

"Disability before age 60—Waiver of premiums.—

"If the insured, after the first premium on this policy has been paid, shall furnish due proof to the company, while this policy is in full force and effect and while there is no default in the payment of prem-

ium, that he, at any time after payment of such first premium, while less than 60 years of age, from any cause whatsoever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company upon receipt of such proof will waive the payment of each premium * * * during such disability. * * *

"Disability before age 60—Monthly income to the insured.—If such disability shall occur before the insured is 60 years of age the company will, in addition to such waiver, pay to the insured monthly as specified on the first page hereof, the sum of $10 for each $1,000 of the face amount of insurance under the policy."

In 1930 the company issued a 4th life insurance policy to plaintiff as the insured, for $10,000, with the following provisions as to total and permanent disability benefits and waiver of premiums:

"TOTAL AND PERMANENT DISABILITY BENEFITS: MONTHLY INCOME 10 DOLLARS PER MONTH FOR EACH $1,000 of the amount of insurance payable to the insured in event of total and permanent disability before the anniversary date of this policy nearest the 60th birthday of the insured, subject to the provisions as to total and permanent disability contained in the policy.

"WAIVER OF PREMIUMS in event of total and permanent disability.

"ANNUAL PREMIUM DURING FIRST THREE YEARS: $298.30. Thereafter an annual premium of $340.60. The premium specified above includes a constant extra annual premium of $58.80 for the total and permanent disability benefits, which extra premium in no event shall be payable on and after the anniversary date of the policy nearest the 60th birthday of the insured.

"PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY BEFORE AGE 60: WAIVER OF PREMIUMS, MONTHLY INCOME TO THE INSURED

"The disability benefits hereinafter specified will be granted by the company if the insured shall become totally and permanently disabled, from bodily injury or disease, to such an extent as to be incapacitated from engaging in any occupation for remuneration or profit.

"DISABILITY BENEFITS: (1) WAIVER OF PREMIUMS.—The company will waive the payment of any premium or premiums the due date of which, as specified in the policy, shall occur after the commencement of such total continuous disability but in no event before a date more than 1 year prior to the date of receipt by the company of said notice of disability.

"(2) Monthly income to the insured.—The company will, in addition to waiving premiums, pay to the insured the monthly income specified on the 1st page hereof under the heading 'total and permanent disability benefits' during the continuance of such total disability, beginning at the end of 4 months from the commencement of such total disability."

Plaintiff became 60 years of age October 25, 1949. On September 28, 1949, he filed a claim with the company for total and permanent disability benefits under the policies, alleging total and permanent disability in August, 1948. The company denied liability whereupon plaintiff started the instant suit. It was tried before the court without a jury, and much testimony taken, resulting in entry of judgment for the plaintiff. The defendant appeals.

The substance of the controversy is whether, under the proofs adduced, the plaintiff became totally and permanently disabled before 60 years of age, within the provisions of the policies. On this appeal, having in mind that the trial court heard the case without a jury, we do not reverse on issues of fact unless the evidence clearly preponderates in the opposite

direction. In considering the facts, it is necessary to have in mind the meaning of the provisions in the policies which refer to total and permanent disability in the light of the previous decisions of this Court. The Court has consistently adhered to certain fundamental rules in construing an insurance policy. If the provisions as a whole are ambiguous or obscure, they are liberally construed in favor of the insured. Technical construction of insurance policies is not favored. *DeLand* v. *Fidelity Health & Accident Mutual Insurance Company,* 325 Mich 9; *Van Zanten* v. *National Casualty Company,* 333 Mich 28.

The policies here under examination repeatedly use the terms "total and permanent disability." Generally, there is room for a variance between a liberal interpretation of that term, as heretofore indicated in the opinions of this Court, and limitations in these policies apparently intended to restrict the benefits by defining said terms. In the case at bar, 3 of the policies read "permanently disabled or * * * incapacitated to such an extent that he * * * is rendered wholly and permanently unable to * * * perform any work for any kind of compensation of financial value." The 4th reads "to such an extent as to be incapacitated from engaging in any occupation for remuneration or profit." To what extent should the previous rules of construction announced by this Court be applied to these policies?

It is evident that the variations in result in the many cases where the Court has considered whether an insured was totally and permanently disabled within the meaning of his policy are due to differences in facts and circumstances as well as in the wording of the policies. But the rule has been well established that whether the insured was totally and permanently disabled is a question of fact. *Mellinger* v. *Prudential Insurance Company of America,* 322

Mich 596. However, no 2 circumstances are exactly alike, as presented to the Court for review.

In *Starling* v. *Supreme Council Royal Templars of Temperance,* 108 Mich 440 (62 Am St Rep 709), a life insurance policy included benefits if the insured became totally disabled for life, so as to prevent his following his own or any other avocation. The policy included among the conditions for total disability "paralysis so extensive as to produce absolute disability to follow any avocation, and which is conclusively permanent." The insured was stricken with paralysis. The trial court considered the issue of total disability to be a question of fact, and charged the jury:

"The fact that a man may carry a bucket of coal, or may carry a stick of wood, or perhaps may run a lawn mower over a lawn, will not, in itself, necessarily show that he is competent to follow some avocation. The fact that a man may work for a few moments, even though, perhaps, he may work for a few months, will not, necessarily,—it is not conclusive evidence that he can follow some avocation. But, if you find that he can perform some kind of employment,—if you find, as suggested by the counsel in this case, that he could keep a newspaper stand, or a peanut stand, or could do any work, or follow any line of employment,—why, then, gentlemen of the jury, under those circumstances, he would not be entitled to recover."

On appeal by the defendant, the judgment for the plaintiff was affirmed.

In *Turner* v. *Fidelity & Casualty Company of New York,* 112 Mich 425 (38 LRA 529, 67 Am St Rep 428), the insured, a real estate dealer and moneylender, slipped and fell, dislocating his shoulder. His accident policy was for total (but not permanent) disability, as follows:

"Loss of time, not exceeding 26 consecutive weeks, resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated."

The insured admitted that he went to his office everyday during his disability, but did not do any work—he had a man do his work for him. On the appeal, in affirming a judgment for the plaintiff, the Court said:

"We find nothing in the record which shows, or tends to show, from the testimony of the plaintiff or his attending physician, that the plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation. At least, it was a question for the jury to determine."

In *Hohn* v. *Inter-State Casualty Company,* 115 Mich 79, a barber slipped and wrenched his back. The next day he went late to his place of business and did some work, but not as much as usual. The ensuing week he visited his shop each day, suffering pain, occasionally worked a little. His accident policy provided:

"If such injuries, independently of all other causes, shall immediately, continuously, and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay."

The trial court submitted to the jury the question of fact, was he disabled and entitled to recover benefits under the policy? On appeal, the Court affirmed the judgment for the plaintiff, relying on *Turner* v. *Fidelity & Casualty Company of New York, supra.*

In *Hoffman* v. *Michigan Home & Hospital Association,* 128 Mich 323 (54 LRA 746), a disability policy had been issued to the insured which provided for sick benefits if the insured became

"totally disabled, and such disability shall, independent of all other causes, wholly and continuously disable and prevent said member from prosecuting any and all kinds of business, upon satisfactory proofs to the association of such total and continuous disability said member shall be entitled to receive at the rate of $10 per week, after the first week, during the time he is continuously confined to his bed, or continuously confined to the house, and subject to the personal calls of a registered physician."

At the trial, the plaintiff admitted that during the period of his claimed disability (*la grippe*) he had gone to Chicago and was not continuously confined to his home. The trial court charged the jury, in part:

"First, then, what is meant by the provision in this policy, 'continuously confined to the house, and subject to the personal calls of a registered physician in good standing?' * * *

"I charge you, gentlemen, that, to constitute a compliance with this provision, it is not necessary that the plaintiff should remain in the house continuously during the entire time of disability; that to step out of doors now and then, or to occasionally go to the office of his physician, would not be a violation of this clause, or defeat plaintiff's right of recovery. * * *

"So, gentlemen, I charge you that if you find from the testimony in this case that the plaintiff was continuously confined to his home on account of a sickness or disease covered by the terms of his policy, to the extent that he was necessarily, in good faith, there the larger portion of the time, and only went forth either from necessity for consultation with, or by direction of, his physician, Dr. Barth, in whose charge and care he was, if you so find, then and in

that case the plaintiff is entitled to recover for the term so continuously confined, at the rate fixed in the policy,—$10 per week."

On appeal, a majority (3) of the Court held that the question was properly tried and submitted, and affirmed the judgment for the plaintiff. It may be of some significance that in the 3–2 division of the Court the minority wrote for a less liberal interpretation of the wording of the policy on the basis of the plaintiff's own testimony. The minority wrote that after he had been confined in his house for 6 weeks he went to his physician and said:

" 'I am confined up there in that place of business, where I sleep right in the store there, and I don't think it is very healthy for me.' I said: 'I have a friend living in Chicago; he wants me to come there.' He said: 'That is all right; that won't hurt you any to go there.' He said: 'You go over there; take care of yourself over there in good shape, and you will come out all right.' I was confined there all the time, only I used to take a morning walk."

In dissenting, the minority said:

"The policy contains the contract which the parties saw fit to make, and we should not enlarge it by construction. It is obvious that during this period plaintiff was not continuously confined to the house, subject to the personal calls of a physician. It is a radically different contract from those in the cases cited."

For a decision on comparable facts which declines to follow the conclusion in the above case, see *Shirts* v. *Phoenix Accident & Sick Benefit Association*, 135 Mich 439. However, the above *Hoffman* and *Shirts Cases* fairly represent the difference in viewpoints which the trial court in the instant case discussed in its opinion. The court said:

"What is the meaning of 'totally and permanently disabled,' and 'incapacitated from engaging in any occupation for profit?'

"There are 3 different theories as to what 'permanently and totally' and 'from following any occupation whatsoever' means. See 149 ALR 14.

"The first group construes these terms in a strict or literal way. This construction would mean that one must be absolutely helpless to recover.

"A state of absolutely helplessness rarely exists, except in those cases in which the physical disability is accompanied by mental incapacity. It is hard to believe that an interpretation which makes this clause practically valueless was contemplated by the parties when they entered into the insurance contract.

"The second theory gives the policy a liberal interpretation and makes the definition of 'permanently and totally disabled' to apply to the insured's occupation.

"The third group is the qualified or intermediate construction. The intermediate group of authorities holds that such insuring phrase means a disability that prevents the insured from following any substantial or remunerative occupation, or from doing any labor for which he is qualified mentally and physically and by which he is able to earn a livelihood."

The court said that the question of total disability, and whether the insured can follow any occupation or employment, is a fact question for the court. The court used the language approved by this Court in *Hohn* v. *Inter-State Casualty Company, supra,* later followed and cited or quoted with approval in *Hallock* v. *Income Guaranty Company,* 270 Mich 448; *Wheeler* v. *Equitable Life Assurance Society of the United States,* 294 Mich 520; and *Besh* v. *Mutual Benefit Health & Accident Association,* 304 Mich 343.

In *Letherer* v. *United States Health & Accident Insurance Company,* 145 Mich 310, the insured had a policy indemnifying for loss of time caused by acci-

dental injury "which shall independently of all other causes and immediately following the receipt thereof wholly and continuously disable and prevent the assured from performing any and all duties pertaining to any business or occupation." The insured was injured on October 2d by falling and striking against a scantling. Although in pain, he continued to do his work as the engineer in a cider mill until October 9th when he left, after a disagreement with his employer, without telling his employer of any injury. He then worked 2 or 3 days building a summer kitchen, then dug potatoes 2 or 3 days. The jury found for the plaintiff, and on appeal this Court reversed without a new trial, saying that the trial court should have directed a verdict for the defendant. Obviously, the decision indicates that liberality in construing disability benefits in favor of the insured reaches a limit when it would require ignoring completely the plain facts in the case.

In *Brod* v. *Detroit Life Insurance Company,* 253 Mich 545, the company had issued a life insurance policy, with added benefits if the insured became totally and permanently disabled so as to be "permanently, continuously and wholly prevented thereby for life from performing any work for compensation, gain or profit, or from following any gainful occupation." Holding that the testimony raised an issue of fact, on appeal the Court affirmed judgment for the company on the ground that the proofs failed to show the disability was permanent.

In *Forman* v. *New York Life Insurance Company,* 267 Mich 426, a life insurance policy included disability benefits if the insured became "wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit." On appeal, a judgment for the plaintiff was affirmed, where the proofs

showed that the insured had a disease and the medical testimony showed "that plaintiff could not pursue any suggested vocation with a reasonable degree of regularity or length of time and without hazard of relapse. The doctors opined that plaintiff is not able to engage in any occupation for gain except under circumstances so favorable and fortuitous as to be without the range of probabilities."

In *Hallock* v. *Income Guaranty Company, supra,* the insured, an attorney, had a policy which provided for monthly benefits "for the period of continuous total disability, resulting from bodily disease, during which the insured should be necessarily and continuously confined within the house." He had visited his office during the period of claimed disability, went to the doctor's office, and also remained in a hospital for some time. On the appeal, the Court said:

"We believe the testimony fully supports the finding of the trial judge that on the 28th day of February, 1933, plaintiff was suffering from a disease and illness which totally incapacitated him from carrying on his business. He was unable to perform the essential acts necessary to the exercise of his profession. This constitutes total disability."

In *Wheeler* v. *Equitable Life Assurance Society of the United States, supra,* the insured brought suit to recover the amount claimed under a provision in an insurance policy. In the trial court it was shown that he had tuberculosis, and the court found that he was totally and permanently disabled prior to August 1, 1935, although he continued to do work as a salesman for his employer until November, 1935. In affirming a judgment for the plaintiff, the Court said:

"But the mere fact that an insured carried on his work to some extent after a certain date does not, under the usual legal definition of total and perma-

nent disability, conclusively indicate that he was not permanently and totally disabled as of that date."

In the case at bar the trial court, hearing the case without a jury, used as a yardstick in applying the law to the facts and circumstances, this Court's decisions in the *Hohn, Hallock, Wheeler* and *Besh Cases, supra.** The trial court, in an exhaustive opinion, after first discussing the law, wrote that the above decisions state the law in Michigan relative to permanent and total disability. We agree with the conclusion.

It remains only to consider whether the facts bring the instant case within the conclusion of the trial court. We do not reverse unless the evidence clearly preponderates in the direction opposite to the finding of the trial court. The insured was an undertaker in St. Johns, Clinton county, population about 5,000. He began the business there in 1923. He had to do most of his own work. In 1936 or soon thereafter his son became a licensed embalmer and became active in the business with his father. In 1939 the insured was hospitalized due to an injury to his back, in an automobile accident. He suffered a fracture of left 2d to 8th ribs and resulting arthritis involving the 5th to 8th dorsal vertebrae. He had bony arthritis, called hypertrophic, a "spurring" of the spine, which grew progressively worse and became permanent and painful. His condition was diagnosed as hypertrophic arthritis. He could not continue his daily work, embalming and lifting, in order to run the business. He still could do some light work, but there was no work elsewhere of any financial value. He had given up the funeral business to his son. The insured could not operate the undertaker business.

* *Hohn* v. *Inter-State Casualty Company*, 115 Mich 79; *Hallock* v. *Income Guaranty Company*, 270 Mich 448; *Wheeler* v. *Equitable Life Assurance Society of the United States*, 294 Mich 520; *Besh* v. *Mutual Benefit Health & Accident Association*, 304 Mich 343.

About 1939 plaintiff bought some farms and looked after them until 1947 when he sold them. From 1945 to 1950, while his son operated the undertaker business, plaintiff was "going behind" and consuming his capital. His son left the business and the insured sold it. Since 1947 he engaged in no gainful occupation, and has done practically no work, except to act as a bank director and look after his investments. He constantly suffered pain. The medical testimony established that his disability was total and permanent, that he not only could not perform any substantial part of the undertaker business, but also that his condition was such that he could not perform any other work for remuneration. The trial court concluded:

"My best judgment is that the plaintiff is, by a preponderance of the evidence, permanently and totally disabled, and is entitled to recover under the disability benefits of the policies, plaintiff's exhibits 1, 2, 3 and 4."

The defendant produced proofs from which a contrary conclusion could have been drawn. The insured had been going to California every winter and drove his own automobile part of the time. He still drives some. In 1947 he sold his farms at a profit. He acted as a bank director, continued to attend Rotary, lodge and church. He could do light manual work. He was "a retired businessman." He made his own investments, for income or profit. Defendant's examining physician disagreed with the medical testimony of the insured.

No benefit could result from a detailed reconstruction of the 230 printed pages of testimony and exhibits considered by the trial court. The case was well tried and has been efficiently briefed by counsel for both parties. The question involves troublesome issues of law and fact, but the evidence does not

clearly preponderate in a direction opposite to the findings of the trial court and the court correctly applied the law.

Affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

RUTLEDGE v. GILLESPIE.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Testimony is reviewed by the Supreme Court in the light most favorable to the plaintiff on defendant's appeal from denial of motions to direct verdict in their favor and for new trial on the ground that injured plaintiff had been guilty of contributory negligence as a matter of law.

2. AUTOMOBILES—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of whether or not 18-year-old pedestrian crossing easterly on a 50-foot boulevard on a dark, rainy night in December was guilty of contributory negligence in failing to observe the approach of defendants' southbound taxicab was properly submitted to jury, where there was conflicting testimony as to how the accident happened, credibility of the witnesses being for the jury.

Appeal from Wayne; Maher (Thomas F.), J. Submitted October 14, 1953. (Docket Nos. 74, 75, Calendar Nos. 45,968, 45,969.) Decided November 27, 1953. Rehearing denied January 14, 1954.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 947.
[2] 5 Am Jur, Automobiles §§ 450, 451, 671, 705, 706.

Separate actions by Patricia Rutledge, by William Rutledge, her next friend, and William Rutledge against Thomas A. Gillespie and another for damages suffered when Patricia was hit by defendants' automobile. Cases consolidated. Verdicts and judgments for plaintiffs. Defendants appeal. Affirmed.

Rothe, Marston, Bohn & Mazey (*Theodore Sachs*, of counsel), for plaintiffs.

Edward N. Barnard, for defendants.

BOYLES, J. This is an appeal from judgments for the plaintiffs for damages resulting from an automobile-pedestrian accident. Plaintiff Patricia Rutledge, then about 18 years of age, sued defendant Gillespie, the driver, and defendant Bleil, the owner of a taxicab which struck her when she was crossing East Grand boulevard in Detroit. Her father, William Rutledge, also sued to recover medical expenditures and for loss of services of his daughter. The 2 cases were consolidated for trial by jury, and again here on the appeal. The plaintiffs had verdicts, and from the judgments entered thereon the defendants appeal.

The negligence of the taxicab driver is not denied. The only claim of the defendants for reversal is that the plaintiff Patricia was guilty of contributory negligence as a matter of law. At the trial, at the close of plaintiffs' proofs and again at the close of all the proofs, the defendants moved for a directed verdict on that ground. Later, the defendants also moved for a new trial on the same ground. The motions were denied.

Did the trial court err in submitting to the jury the question whether the plaintiff Patricia Rutledge was guilty of contributory negligence? Under the circumstances, we review the testimony in the light most favorable to the plaintiffs.

The accident occurred in the center of East Grand boulevard in Detroit, opposite Preston street which ends at the boulevard, on a dark, rainy night in December, 1949. At that point the boulevard is about 50 feet wide and runs approximately north and south. It has parking at both the east and west curbs, plus room for 2 lanes of traffic each way. There is no center-line marking. Plaintiff Patricia and a friend, Stanley Herold, were on their way to attend a class play at a high school building on the east side of the boulevard. He was taking her in his car from her home to the school building and had parked at the west curb on the boulevard, opposite the school building. As they got out of the car to go east across the boulevard they both looked both ways, north and south, on the boulevard. There was no traffic toward them from the north between them and the next cross street, Mack avenue. At Mack avenue the traffic light was red against traffic on the boulevard, and cars were standing north of the intersection, facing south, waiting for the light to change. Plaintiff and her companion walked east, across the west half of the boulevard (the southbound lane) side by side, close enough so their clothing might touch, and stopped at the center of the boulevard to wait for cars approaching from the south in the east half of the boulevard. They had been there less than a minute when Patricia was struck by defendants' taxicab coming from the north. She had not moved, her forward progress delayed by several cars on the east part of the boulevard going north. Patricia testified that she did not remember whether she looked north again after they were in the center of the boulevard. She did not see the taxicab that struck her.

A disinterested witness, the driver of one of the cars going north on the east side of the boulevard, for which the plaintiff was waiting at the center,

testified that he was driving nearest the center of the boulevard in a group of cars. He saw plaintiff and her male companion standing in the center of the street and saw cars coming from the north on the boulevard. He saw the man step forward into his lights and had to veer to his right to avoid hitting him. He saw the taxicab hit the woman, who was the plaintiff Patricia. He testified:

"I saw the car that struck the people. That car was coming. Going towards Jefferson.

"*Q.* Was it coming directly south or due south in accordance with the manner in which the street runs?

"*A.* It was coming out from behind another car, clearing another car.

"*Q.* Was it heading parallel to the curb of the street or heading towards the center?

"*A.* He turned out from the back of another car and struck the woman. He turned towards the center of the street."

On cross-examination, he testified:

"In other words, as I am approaching Preston, I am driving to the right of the center. And the wheels on the left side of my car were about 12 inches from the imaginary center line of the boulevard. * * *

"*Q.* And that is the position that you maintained when you went beyond the center and passed the people that were on the street?

"*A.* No, I told you 6 feet away. * * * As I was driving north, I was driving to the right of the center and observed these 2 people in the street and changed to further away."

Patricia's companion, Stanley Herold, testified:

"After I parked my car, we got out of the car. Both of us. We walked east. I am sure my car was parked south of Preston on the west side of the street. We walked east. In other words to go to the high school. We were together. That is we were close to each other. Side by side. We stopped in

the middle, sir. When we stopped, we were still in the same position as we were before, I mean side by side. When we stopped there, I turned my head north. I mean south, rather. I turned my head south. I saw this car coming. I turned my head back again also and I heard Patricia scream and she was down. I remained standing there myself. I am sure about that."

On cross-examination, he testified:

"I saw Patricia just before she was hit. I saw her before I turned my head. Just before I turned my head she was standing next to me. Then I turned left, I looked back, and she was hit. I didn't see her get hit. I said I was standing still.

"*Q.* Are you sure whether or not you moved at all? Are you absolutely positive?

"*A.* Yes, it happened so long ago, I can't exactly recall. I am sure I was standing still."

Defendant Gillespie, testifying in his own behalf, said:

"*Q.* Mr. Gillespie, how far were you from the scene of the accident, that is the place where the accident occurred, when you first saw these pedestrians?

"*A.* About 40 or 45 feet.

"*Q.* All right. Now do you know where the pedestrians were when you saw them? Where were they in reference to the street? What part of the street were they in?

"A. They were directly in the center of the boulevard crossing and they would be in the direct line of my car. When I first saw them."

Later, on cross-examination, he testified:

"*Q.* How far were you from the 2 people in the street when you first saw them?

"*A.* I would say about 45 feet. * * *

"*Q.* Where were they at that time?

"*A.* They were just directly in my line of travel when I first saw them. They were continuing right across the boulevard, which they got to the center.

"*Q.* Where were they when you were 30 feet from them?

"*A.* Where were they then? Well, they were moving, still moving towards the center of the boulevard. * * *

"*Q.* Where were they when you were 20 feet from them? That is a simple question.

"*A.* Walking towards the center of the highway.

"*Q.* Still walking towards the center? Where were they when you were 10 feet from them?

"*A.* Probably in the middle of the highway then.

"*Q.* Then in the time in which you traveled the next 10 feet, the girl stepped back 6 feet?

"*A.* Well, it is so long ago that all I can say, they were almost in the center of the boulevard.

"*Q.* You stated earlier, did you not, that the plaintiff was approximately 5 or 6 feet west of the center line at the time your left fender hit her, did you not?

"*A.* That is right.

"*Q.* Are you saying then that in the time you proceeded from 10 feet north of her that she jumped back 6 feet?

"*A.* By the time I got down to the fellow there, she must have jumped back that far, because I was still watching traffic coming south."

The defendants argue that because Patricia did not testify that she maintained her look to the left (north) after she reached the center, she was guilty of contributory negligence as a matter of law. She testified that she was there only about half a minute when she was hit. It is doubtful if a look by the plaintiff toward the north could have saved her from being hit. The driver of the taxicab testified that she jumped back 6 feet into the path of his vehicle, or against it. The court did not err in submitting the question of her negligence to the jury. Credibility

of the witnesses was for the jury, and the issue as to which was the true version, under the conflicting testimony, as to how the accident happened was properly a question of fact.

Affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

ANN ARBOR BANK v. WEBER.

1. APPEAL AND ERROR—MOTION TO DISMISS APPEAL—ESTOPPEL.

Appeal from entry of default, not taken simply as of course but after trial court had stricken defendant-appellant's answer, is considered and not dismissed, where plaintiff did not move to dismiss the appeal upon being served with notice thereof but delayed making such motion on ground now claimed for dismissal until after appellant had procured a copy of transcript of proceedings in the trial court, prepared and settled the record on appeal, printed the record, and prepared and printed brief on appeal, since plaintiff was estopped by its delay.

2. APPEARANCE—PROCESS—COURT RULES—CONTINUANCES—JURISDICTION.

Court rule authorizing a trial court to call upon parties or witnesses to testify orally in open court, grant continuances of causes for such purpose and issue process to compel the appearance of such party or witness before the court does not expressly or impliedly authorize issuance of process enforceable outside of the State (Court Rule No 32 [1945]).

3. SAME—ATTORNEYS—PARTIES—COURT RULES.

It is proper for court rules to provide that courts in their discretion may require attorneys for parties to appear before

---

REFERENCES FOR POINTS IN HEADNOTES

[2, 4–6] 58 Am Jur, Witnesses § 16.

the court yet not require that parties be directed to appear as parties, as attorneys are officers of the court and the court has a right to require their attendance (Court Rules Nos 32, 35, § 4 [1945]).

4. SAME—JURISDICTION—PRESENCE WITHIN STATE—DISCOVERY.
A court of this State has no judicial authority to subpoena a defendant, not in this State, to attend the session of a court of this State or to make an order for personal appearance for the purpose of discovery (Washtenaw Circuit Court Rule No 21).

5. DISCOVERY—NOTARY PUBLIC—PRESENCE WITHIN STATE.
An order to make a personal appearance before a notary public in this State to make discovery cannot be made upon a person not within this State.

6. SAME—DEFAULT—ATTORNEY AND CLIENT.
Trial court's entry of default on plaintiff's motion based on defendant's nonappearance in person before notary in this State when subpoenaed for purpose of making discovery was error, where it appears defendant was then not in this State and had submitted certain documents by an attorney, since defendant's constitutional right to defend his suit by an attorney of his own choice was violated (Const 1908, art 2, § 12; Court Rules Nos 32, 35, § 4 [1945]; Washtenaw Circuit Court Rule No 21).

Appeal from Washtenaw; Breakey (James R., Jr.), J. Submitted June 24, 1953. (Docket No. 78, Calendar No. 45,347.) Decided November 27, 1953. Rehearing denied January 14, 1954.

Bill by Ann Arbor Bank, a Michigan banking corporation, against Fred E. Weber, individually and doing business as Ypsilanti Frozen Food Lockers and Cold Storage Vaults, John Teasdale and others to set aside agreements for fraud and for foreclosure of chattel mortgage. Decree for plaintiff. Defendants appeal. Reversed and remanded.

Burke, Burke & Smith, for plaintiff.

William G. Fitzpatrick and *Joseph W. Louisell* (*Howard H. Campbell,* of counsel), for defendants.

REID, J. Plaintiff filed its bill in chancery in the Washtenaw circuit court, to obtain a decree setting aside for fraud certain agreements and a lease affecting the rights of plaintiff as to certain personal property, decreeing a foreclosure of plaintiff's chattel mortgage and sale to satisfy the mortgage and for a decree for the deficiency, if any, after the sale.

In its brief, plaintiff requests that we dismiss the appeal of defendant Teasdale as having been taken without right, because on a contested hearing the trial court struck the answer of defendant Teasdale and the appeal was taken without motion by defendant Teasdale to set aside the order striking out the answer and directing entry of default of defendant. Plaintiff did not, upon being served with notice of the appeal, make motion to dismiss the appeal on this ground, and waited while defendants procured a copy of transcript of proceedings in trial court, prepared and had settled the record on appeal, printed the record, prepared and printed their brief in this Court. Plaintiff now for the first time in its brief filed in reply to defendants' brief, raises the question that the appeal was not permissible without motion in trial court to set aside the default.

Plaintiff is estopped by its delay and has lost its right to insist on the motion to dismiss the appeal in view of the expense and efforts put forth by defendants after plaintiff was served with notice of the appeal. It is further to be noted that the trial court made its finding on the matters involved in the proceedings looking toward entry of default order, and directed that the default order be entered. Hence, the default in this case was not a default taken simply as of course. In view of the whole situation, we conclude not to dismiss but to consider the appeal.

The court struck from the files the answer of defendant Teasdale and ordered the default of defendant Teasdale to be entered on 2 grounds: First, because the court found that the disclosure was not a proper disclosure, and in consequence that defendant John Teasdale had failed to comply with and was guilty of violation of an order for discovery as to certain documents; secondly, because defendant John Teasdale failed and neglected to appear personally in Michigan, at the time and place appointed for his personal appearance. There is a showing in the record that defendant John Teasdale is absent from Michigan as a fugitive from justice.

The local court rules adopted by the Washtenaw circuit court provide for pretrial conference and Rule No 21 of the Washtenaw circuit provides,

"The judge presiding over the docket shall have jurisdiction under the rules to enter a judgment, decree, dismissal, default, or nonsuit, as the case may be, on the failure of a party to appear as required herein."

Plaintiff counts upon its interpretation of Michigan Supreme Court Rule No 32 (1945) to sustain the order appealed from in this case, which rule is as follows:

"In any suit, whether contested or not, the court may, at any time before verdict or decision, for the furtherance of justice, call upon any or all of the parties to such suit, or any witness therein, to testify orally in open court, and may continue or keep open the cause for that purpose, and may issue process to compel the appearance of such party or witness before the court."

Plaintiff considers that this Court Rule No 32 is broad enough in its terms to permit the adoption of the Washtenaw Rule No 21 above quoted, to include the order for a person not within the State of Mich-

igan to appear before the circuit court personally for examination as a witness.

There is nothing in Court Rule No 32 that suggests that the court is to be considered as expressly or impliedly authorized to issue process enforceable outside Michigan.

Even in criminal cases, a fugitive is not to be brought back from some other State, except upon the order of the executive thereof, according to the Federal Constitution.*

It is significant that Court Rule No 35, § 4 of Michigan Supreme Court Rules (1945) provides, "The court may in its discretion direct the attorneys for the parties to appear before the court," but does not provide that the parties may be directed to appear in person before the court as parties. The attorneys are officers of the court and the court has the right to require their attendance.

The order for personal appearance at a designated office in Ann Arbor, Michigan, must have had some useful judicial purpose in view, otherwise it would amount to mere oppression. Apparently it was that be be cross-examined as a witness. The Michigan court would have no judicial authority to subpoena defendant, who was not in Michigan, to attend the session of a Michigan court. An order for personal appearance in Michigan for the purposes of discovery, intended to take the place of a subpoena, would be equally without the authority of the court. The party ordered to appear before a notary public in Michigan to make discovery must be within the State. We say in *Starkstein* v. *Starkstein,* 318 Mich 258, at page 260, "If he is within the jurisdiction of the court and able to attend, and give his testimony."

Defendant John Teasdale, within the required time, November 8, 1950, made return to the order for discovery as to papers and documents pertaining

* See US Const, art 4, § 2(2).—REPORTER.

to the controversy between the parties, by and through his attorney, and filed with the clerk of the court 11 such papers, together with a statement that he had made diligent inquiry and search for other papers required by the order and was advised that such other documents and papers may be in existence and says that such other documents and papers are without the control or possession of defendant, and the attorney made affidavit to the correctness of the statements in the return. Defendant John Teasdale verified the statements of his attorney in the return in an affidavit made in Lucas county, Ohio, November 24, 1950 and filed with the clerk of the trial court, November 27, 1950. Motion by plaintiff had in the meantime and on November 18, 1950, been made for leave to enter default, which motion was granted, January 22, 1951.

The order for discovery ordered, "That the defendant, John Teasdale, his agents, employees and servants, be and are hereby required to make discovery of all the documents, et cetera." Plaintiff does not claim in its motion for leave to enter default that the return by defendant's attorney was not sufficient as to depositing papers in court, but places the motion solely on the ground that defendant did not appear in person before the notary in Michigan when subpoenaed so to do.

Defendant had the right under Michigan State Constitution (1908), art 2, § 12, "to prosecute or defend his suit, either in his own proper person or by an attorney or agent of his choice."

The court was without the authority to strike defendant's answer for nonappearance before the notary in Michigan. A contrary rule would violate the constitutional provision for appearance by attorney and could result in unjust enrichment and could transform the court into a tool for gross oppressors.

The decree for plaintiff is reversed with costs to defendant Teasdale, and the case is remanded to the trial court for further proceedings.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, and SHARPE, JJ., concurred with REID, J.

BOYLES, J., concurred in the result.

In re RENZ' ESTATE.

DEPARTMENT OF REVENUE *v.* BEATTIE.

1. TAXATION—INHERITANCES—JOINT BANK ACCOUNTS.
   Decedent donor who placed bank accounts in joint name of himself and his niece, or survivor, created a right of property in her not subject to taxation under the State inheritance tax law, where he did not before his death over 3 years later restrict her right thereto by any words or acts qualifying the gift and allowed her to have possession of the passbooks during some of the time which elapsed before his death. (CL 1948, § 487.703).

2. JOINT TENANCY—BANK ACCOUNTS—REVOCATION BY DONOR.
   The donor of a joint bank account can revoke it in his lifetime (CL 1948, § 487.703).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 28 Am Jur, Inheritance, Estate, and Gift Taxes § 124.
[1, 4] Joint bank accounts as subject to transfer or succession tax: 3 ALR 1640.
[2, 3] 7 Am Jur, Banks § 434.
[5] 28 Am Jur, Inheritance, Estate, and Gift Taxes § 35.
[6] 50 Am Jur, Statutes §§ 323, 458 *et seq.*
[7] 3 Am Jur, Appeal and Error § 820.
[8] 14 Am Jur, Costs §§ 23, 91.

3. SAME—BANK ACCOUNTS—PRINCIPAL AND AGENT.
It is always competent for a donor, or his fiduciary after death, to show that the joint account was only made for agency purposes (CL 1948, § 487.703).

4. TAXATION—INHERITANCES—CONSTRUCTION OF STATUTES—ESTATES IN POSSESSION.
The rule that an estate in possession is an estate in present enjoyment is generally recognized in construing inheritance tax laws (CL 1948, §§ 205.201, 205.221).

5. SAME—INHERITANCE—CONSTRUCTION OF STATUTES.
Provisions of the inheritance tax law are not to be extended by implication beyond the clear import of the words used since it is the duty of the taxing power to express the intent to impose such special burden in clear and unambiguous language (CL 1948, § 205.201 *et seq.*).

6. COURTS—CONSTRUCTION OF STATUTES—PRIOR CONSTRUCTION BY OTHER STATE.
The mere fact that a statute of this State was adopted from the statute law of another State does not necessarily require that decision in the Supreme Court of this State be controlled by the prior construction placed upon the statute law of the other State by its courts but such decisions must be given weight in construing the statute in this State.

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CLAIMS NOT PRESENTED TO TRIAL COURT.
Claims made for the first time on appeal in the Supreme Court will not be considered by it, since it had not been presented to the trial court.

8. COSTS—PUBLIC QUESTION—JOINT DEPOSITS—INHERITANCE TAX.
No costs are allowed in proceeding to recover an inheritance tax upon bank deposits transferred by decedent to the joint names of himself and niece, or survivor, upwards of 3 years prior to his death, a public question being involved (CL 1948, § 487.703).

Appeal from Wayne; Webster (Arthur), J. Submitted October 15, 1953. (Docket No. 56, Calendar No. 45,937.) Decided November 27, 1953.

In matter of estate of Henry L. Renz, deceased. The Attorney General petitioned for determination

of additional inheritance tax. Petition dismissed. Plaintiff appealed to circuit court where order of probate court was affirmed. Plaintiff appeals. Affirmed.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for plaintiff.

Stanley E. Beattie, administrator, *in propria persona.*

REID, J. The department of revenue of the State (herein referred to as plaintiff) appeals from an order of the circuit court, which determined that the order of the probate court appealed from by plaintiff, is correct, and denied plaintiff's petition for the imposition of an inheritance tax on bank accounts which decedent had made joint between himself and his niece, who survived decedent.

Henry L. Renz died, January 30, 1951, aged about 83 years. When he died there were savings accounts in 4 banks held in the name of Henry L. Renz or Esther Haag, payable to either or the survivor of them. Decedent deposited all the moneys in the 4 savings accounts from his own separate property, and in December, 1947, he caused that all 4 accounts be made to stand in the name of Henry L. Renz or Esther Haag or the survivor. Miss Haag went with decedent (her uncle) to the banks to sign the signature cards. She testified that he said the money was "to belong to him and to me." Later when her mother was ill, decedent withdrew $1,000 and brought the money to Miss Haag. At another time, she withdrew $500 because she was paying the bills when he was ill.

Plaintiff cites portions of statutes as to inheritance tax as involved in and applicable to the instant case as follows:

"Sec. 1. That after the passage of this act a tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $100.-00 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, not exempt by law in this State from taxation on real or personal property or not heretofore or hereafter existing within this State as incorporated foundations or not heretofore existing within this State as established nonprofit unincorporated foundations operated exclusively for benevolent, charitable or educational purposes, in the following cases: * * *

"Third, When the transfer is of property made by a resident or by nonresident, when such nonresident's property is within this State, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect, in possession or enjoyment at or after such death. Any transfer of a material part of this property in the nature of a final disposition or distribution thereof made by the decedent within 2 years prior to his death, except in case of a bona fide sale for a fair consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section. Such tax shall also be imposed when any such grantee, vendee or donee becomes beneficially entitled in possession or expectancy to any property or the income thereof by any such transfer, whether made before or after the passage of this act." CL 1948, § 205.201, as amended by PA 1949, No 177 (Stat Ann 1950 Rev § 7.561).

"Sec. 21. The word 'estate' and 'property' as used in this act shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those

not herein specifically exempted from the provisions of this act, and not as the property or interest therein passing or transferred to the individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein whether situated within or without this State and including all property represented or evidenced by note, certificate, stock, land, contract, mortgage or other kind or character of evidence thereof, and regardless of whether any such evidence of property is owned, kept or possessed within or without this State. The word 'transfer' as used in this act shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, device [devise], bequest, grant, deed, bargain, sale or gift in the manner herein prescribed." CL 1948, § 205.221 (Stat Ann 1950 Rev § 7.582).

It is within the facts shown in the record that a right of property was created by decedent donor; that he did not at the time of making the deposits joint with Miss Haag nor at any subsequent time restrict her right by any words or acts qualifying the gift contrary to the inferences to be drawn from the manner of the deposit as made by him at the time the deposits were made joint; and that he allowed Miss Haag to have possession of the passbooks during some of the subsequent time which elapsed before his death.

It is important that we decide whether there was a gift *inter vivos* made by decedent to his niece Miss Haag.

Plaintiff claims that decedent by placing moneys in bank accounts standing in his name or Miss Haag's, payable to either or the survivor, did not make a gift effective in possession and enjoyment by Miss Haag until an actual withdrawal was made by her or until she was entitled to the moneys by surviving decedent; that his act of so depositing was

equivocal; that her interest was inchoate till his death; that he could have prevented her making any withdrawals by so notifying the banks.

Defendant administrator of the estate of Henry L. Renz (hereinafter referred to as administrator) claims among other things: 1, That placing the accounts in the names of Henry L. Renz or Esther Haag payable to either or the survivor constitutes a true joint tenancy and gift *inter vivos* of the balances of the accounts; 2, That New York State, prior to a statutory change expressly including in the inheritance tax law transfers creating joint property, did not, according to its courts' decisions, subject such transfers to an inheritance tax and that in consequence a rule of construction of statutes requires Michigan courts to construe the Michigan statute similar to New York's construction of its earlier form of statute; 3, That opinions by 2 attorneys general of Michigan are of long standing that transfers such as that in question are not taxable; 4, That the State legislature though making other changes in the inheritance tax law and though requested to change the law to impose the tax plaintiff claims, has not seen fit so to do.

Defendant concedes that the donor of a joint bank account can revoke it in his lifetime; and that it is always competent for a donor, or his fiduciary after death, to show that the joint account was only made for agency purposes.

Plaintiff cites and relies upon 4 cases: *Rasey* v. *Currey's Estate,* 265 Mich 597; *Esling* v. *City National Bank & Trust Company of Battle Creek,* 278 Mich 571; *Manufacturers National Bank* v. *Schirmer,* 303 Mich 598; and *Sussex* v. *Snyder,* 307 Mich 30, and says that in each of these cases, the court has upheld the property right of the depositor (*i.e.,* the donor depositor).

In the *Rasey Case,* a bank deposit stood in the names of John Rasey or Elizabeth Currey (who was the donor); at the request of Mrs. Currey the name of Rasey and the word "or" were stricken out, and the account then stood in the sole name of Mrs. Currey. Later Mrs. Currey caused the account to stand in the name of "Elizabeth Currey or Mrs. Dora Corey or survivor of either." Rasey died May 22, 1932. In June, 1932, Mrs. Currey sent a draft for withdrawal of the whole deposit. The bank in depression days withheld full payment. Plaintiff in that case (as survivor of herself and husband) claimed that the deposit was impressed with a trust use to pay for Mrs. Currey's care (she having died in the meantime) and board and if not so found, that then there was a gift *inter vivos.* Evidently plaintiff Alice Rasey claimed that the deposit had brought about a perfected gift, irrevocable by Mrs. Currey, to Mr. Rasey (Alice Rasey's deceased husband). This Court's decision, p 602, recites:

"The designation of the bank account as one subject to the order of Mrs. Currey or Mr. Rasey did not constitute a gift *inter vivos,* for it did not strip Mrs. Currey of all ownership of and dominion over the deposit."

The plaintiff in that case was evidently endeavoring to stretch the intendment of the deposit to amount to irrevocability by Mrs. Currey. We found no such irrevocability, and upheld Mrs. Currey's right to revoke. We shall see, as brought out in other decisions, there can be revocability during donor's lifetime by donor as to "or" deposits. See *Negaunee National Bank* v. *LeBeau,* 195 Mich 502 (LRA1917D, 852), at p 508 (*infra*). If we consider that the intendment in the *Rasey Case* is, that the action of the claimed donor there did not constitute an *irrevocable*

gift *inter vivos,* the *Rasey* decision is in harmony with other opinions of this Court.

In the case of *Esling* v. *City National Bank & Trust Company of Battle Creek, supra,* we say at p 576, "The testimony discloses facts which tend to negative an intent on the part of Mrs. Lewis that by opening an account in the joint names of herself and her granddaughter she was to release her right to, and control of, the money deposited," which facts differentiate the *Esling Case* from the instant case.

In *Manufacturers National Bank* v. *Schirmer, supra,* we held that the creation of a joint bank account does not conclusively establish title thereto in the survivor but merely creates a presumption of ownership in the survivor which is rebuttable by competent evidence to the contrary (see syllabus 2) and further, we held there was such modification of the status of the parties as to ownership of account, by notice given the bank which destroyed "the presumption of ownership in the survivor." (See p 603.) No such notice was given in the instant case.

In *Sussex* v. *Snyder, supra,* we held the conditional acceptance of the donor depositor's check and holding it for collection did not obligate the bank to make payment (see p 37). The decision of that case seems to have turned on provisions of the negotiable instruments statute (see p 36) rather than upon the statute as to rights of survivor in a joint bank account denominated an "or" account.

Each of the 4 cases *supra,* the *Rasey Case,* the *Esling Case,* the *Manufacturers National Bank Case,* and the *Sussex Case,* is to be distinguished from the instant case as above noted.

By PA 1909, No 248, CL 1915, § 8040, the legislature enacted a statute which, with some changes unimportant to the issues in the instant case, now

stands as CL 1948, § 487.703 (first paragraph) (Stat Ann 1943 Rev § 23.303), which is as follows:

"When a deposit shall be made, in any bank by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof."

In *Negaunee National Bank* v. *LeBeau, supra,* we say (per syllabus 1):

"Where a father deposited money in a bank and a certificate was indorsed upon the ledger sheet of the bank stating that the sum deposited to the account belonged to the father and daughter jointly, and that it was understood that each might withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either should go to the survivor, and signed by both, a gift *inter vivos* of the property of the father, and not a testamentary disposition thereof, was created, and it is immaterial that the father retained the passbook in his possession."

A decree in favor of the daughter was affirmed apparently on other grounds than the statute of 1909, above cited, but it is to be noted that the gift was recognized as *inter vivos* even though the father,

the donor, could have withdrawn during his lifetime, and was expressly held to be not *testamentary* in character. This characterization of the gift as *inter vivos* is quoted with apparent approval in *Betker* v. *Ide,* 335 Mich 291, at pages 296 and 297.

In the case of *In re Rehfeld's Estate,* 198 Mich 249, we say (per syllabus):

"Under PA 1909, No 248, § 3 (CL 1915, § 8040), providing that when a deposit shall be made in a bank by any person in the name of the depositor or any other person, and in form to be paid to either or the survivor of them, such deposit shall be the property of such persons as joint tenants, and may be paid to either during the lifetime of both, or to the survivor, the ownership of the fund is actually fixed, and the fund, in the absence of competent evidence to the contrary, when deposited, becomes the property of such persons as joint tenants, with the attendant right of survivorship."

In *People, ex rel. Attorney General,* v. *Welch's Estate,* 235 Mich 555, we say (per syllabus 5):

"The rule that an estate in possession is an estate in present enjoyment is generally recognized in construing inheritance tax laws."

In the case of *In re Rackham's Estate,* 329 Mich 493, we say (per syllabus 4):

"Provisions of the inheritance tax law are not to be extended by implication beyond the clear import of the words used since it is the duty of the taxing power to express the intent to impose such special burden in clear and unambiguous language."

An opinion by the attorney general of the State dated May 29, 1940, is cited, as follows:

"As estates by the entirety and joint estates with full right to the survivor are based on the theory that upon the death of one of the joint tenants the joint

property becomes the property of the survivor not by descent, distribution or transfer but by right of survivorship therefore there would be no tax on the joint estate because there is no transfer."

A similar opinion by attorney general in 1920 was rendered.* In keeping with these 2 opinions of the attorney general's office, inheritance tax on joint estates have practically uniformly been not collected by the state.

In the case of *In re Dalsimer's Estate,* 167 App Div 365 (153 NYS 58), affirmed without opinion by New York court of appeals, 217 NY 608 (111 NE 1085), the New York courts held that the New York inheritance tax law, in language similar to the Michigan statute, did not impose an inheritance tax upon a joint bank account with right of survivorship.

In *Re Rackham's Estate, supra,* at p 504, we say:

"The mere fact that the Michigan inheritance tax law was adopted from the statute law of New York does not necessarily require that decision in this Court be controlled by the prior construction placed upon the statute law of New York by its courts. However, such decisions are of importance and must be given weight in construing the statute law in this State."

Plaintiff claims as a second issue, that 1, at least, of the bank accounts was increased by some comparatively insignificant payments on an outstanding land contract, received by decedent and placed in the bank within 2 years before his death, and that such payments are subject to the inheritance tax.

Plaintiff made no such claim in probate court, nor in the circuit court on appeal to that court. Ordinarily such claims made for the first time in this Court are not considered by us.

* Report of Attorney General 1921, 1922, p 72.—REPORTER.

The part of the statute, so far as material to this second issue, is as follows:

"Third * * * Any transfer of a material part of this property in the nature of a final disposition or distribution thereof made by the decedent within 2 years prior to his death * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section." CL 1948, § 205.201, as amended by PA 1949, No 177 (Stat Ann 1950 Rev § 7.561).

The payments within 2 years before his death are shown by the stipulation on record, to have been monthly payments made on a land contract. The bank account seems to indicate that these payments were a continuation of payments made on the same contract which payments began more than 2 years before decedent's death.

The showing by plaintiff on the second issue (tax on payments made within 2 years of decedent's death) is unconvincing and evidently incomplete. We are content to dismiss the second issue under the rule stated above that it cannot be considered by us if not presented in the court below.

The first paragraph of said CL 1948, § 478.703 hereinbefore recited contains the words, "Such deposits * * * shall become the property of such persons as joint tenants." The second and third paragraphs of said section are not of too great importance to a decision in this case, because no fact is shown in evidence nor act of the donor nor of the survivor which qualified or changed the inference arising from the form of the deposits.

If we were to adopt the reasoning of plaintiff in this case, we would overturn our own former decisions respecting joint bank deposits, disregard the opinions of 2 attorneys general and the ruling of the courts of a sister State from which we adopted our inheritance tax law.

We consider the bank accounts in the instant case, not subject to the State inheritance tax law. The decree appealed from is affirmed. No costs, a question of public importance being involved.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

NOTH *v.* EVENING NEWS ASSOCIATION.

LIBEL AND SLANDER—NEWSPAPER STATEMENT AS TO CRIME—CONFESSION—EVIDENCE.

Dismissal of action of libel against newspaper owner was justified, where the publication stated that defendant's conviction of manslaughter on charge of murder when, he had in fact committed rape of wife of victim of homicide, was a shocking miscarriage of justice was amply justified by plaintiff's signed confession which indicated that he had not been so drunk but that he must have known what he was doing.

Appeal from Wayne; Culehan (Miles N.), J. Submitted October 13, 1953. (Docket No. 61, Calendar No. 45,617.) Decided November 27, 1953.

Action of libel by Walter M. Noth against Evening News Association, a Michigan corporation. Motion to dismiss granted. Plaintiff appeals. Affirmed.

Andrew J. Hollis, for plaintiff.

Butzel, Eamon, Long, Gust & Kennedy (*Rockwell T. Gust,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

As to truth as justification for libel, see 33 Am Jur, Libel and Slander § 117 *et seq.*

REID, J. This is an action of libel which was dismissed by the circuit court on motion of defendant. Plaintiff appeals.

Plaintiff was tried in circuit court on a charge of murder but was convicted of manslaughter. Plaintiff claims as his cause of action, that defendant maliciously and falsely published a statement in its Detroit newspaper for the purpose of increasing the circulation of the newspaper and prejudicing its readers against plaintiff, and that as a result of the publication, plaintiff was brought to trial and wrongfully convicted of the crime of rape for which he was sentenced to a term of life.

The published statement was as follows:

"WRONG! WRONG!

"The verdict given by a Mt. Clemens jury in the case of Walter M. Noth is about as shocking a miscarriage of justice as anything which has happened in Michigan courts during recent years.

"This young fiend went forth one evening intending to criminally assault the first woman he met. He took a pistol along intending to shoot down anyone who attempted to prevent his crime. * * *

"By any reasonable interpretation of law, when he pocketed his weapon as he went forth with a criminal object in mind, he premeditated murder. This is how the law is made to apply when the courts are dealing with burglars, bank robbers and others planning crimes less vicious than the one on which Noth was bent.

"There was no question of the man's guilt; he admitted that he killed a citizen so that he could proceed to rape his wife.

"But the jury convinced itself that he had not premeditated murder because his main interest was rape. Therefore he was convicted only of manslaughter.

"This jury need not ask itself why crime flourishes in Michigan; it has served only to increase the burden on other law-abiding citizens. * * *

"Nothing but a capital punishment law could have handled the Noth case properly. Noth was a cold-blooded murderer, deliberately so. He should die! Michigan should have a law under which such wretches would pay the proper price for their crimes!"

Defendant moved to dismiss the declaration which set forth the foregoing published statement as libelous. Defendant in the motion to dismiss refers to a confession marked exhibit A, made by plaintiff before his trial for murder. Plaintiff in his answer to the motion to dismiss, admits that he signed exhibit A, which is as follows:

"EXHIBIT 'A'

"On June eleventh (11) I Walter Noth went to a picnic with friends and returned about 7 o'clock. Then I went to a tavern where my mother works in the kitchen to get something to eat. I continued to drink beer until I was drunk. Then I went home and got undressed for bed. I had not been with a woman in about 4 months, so I decided to go get one. I never had any money and knew of no one to go to, so I figured I would take my pistol and find a couple of lovers and force the woman to come with me, thinking that the gun would keep the man at bay, but he got out of the car and came at me around the rear of the car. I was excited and shot twice, not remember hearing the shots. Still excited I jumped in the truck and tried to start it, but there was a dead short, so I got out of the truck going to take the car and I seen the woman and remembered what was my purpose. Then I grabbed her and forced her to the ground. She protested but I hit her on the head with the handle of the gun. Then I told her to get in the car and drove her part way to Nine Mile road. Then I told her to get out and go back to her husband. (She called him that when I shot him.) Then I left

for I don't know where but I picked up 2 fellows just west of Toledo, Ohio. I came into Cincinnati. We ate 1 and everybody paid for their own. Then again Tony bought some fruit, and they both bought some gas for I was broke, for I had spent the $5 that I took from the victim.

"WALTER M. NOTH (Signature)"

The foregoing statement, admitted by plaintiff, amply justified defendant in stating that plaintiff was in fact guilty of murder though convicted only of manslaughter. His claim of extenuating circumstances that he was too drunk to form a criminal intent could well be considered as negatived by his several statements showing consciousness of purpose and recollection of his own actions. In other words, he must have known what he did, for he can tell all about it.

The court was abundantly justified in granting the dismissal. The order appealed from is affirmed. Costs to defendant.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

RUDE *v.* MUSKEGON COUNTY BUILDING AUTHORITY.

1. COUNTIES—COUNTY BUILDING AUTHORITY—SEPARATE ENTITY—BOARD OF SUPERVISORS.

   County building authority as provided for by statute is not the alter ego of the county, since, although it is in a sense a county-wide municipal corporation, it is limited in its scope of activities and is intended to be a separate body from the board of supervisors (CL 1948, § 123.951 *et seq.*).

2. SAME—BUILDINGS—RECORD.

   Finding of trial court in suit, involving validity of county building authority's bond issue, that there was a compelling need for a building to house the welfare administration of the county *held,* supported by record presented (CL 1948, § 123.951 *et seq.*).

3. SAME—PLEDGE OF FULL FAITH AND CREDIT—COUNTY BUILDING AUTHORITY—REVENUE BONDS—CONSTRUCTION OF STATUTES.

   Proviso of statute, permitting the establishment of a county building authority, that bonds issued by the authority were payable solely from the revenues of the property is construed as the reasonable annual rental for an absolute necessity but not a pledge of the full faith and credit of the county (CL 1948, § 123.961).

4. SAME—COUNTY BUILDING AUTHORITY—INCREASE OF CONSIDERATION.

   Statutory power conferred upon county building authority to increase consideration specified in contract for use of buildings if necessary in order to provide funds to meet its obligations is construed as permitting such increase only up to a reasonable amount, if below what is reasonable, and if necessary to meet its debts (CL 1948, § 123.958).

REFERENCES FOR POINTS IN HEADNOTES

[3] As to obligations payable from a special fund, see 14 Am Jur, Counties § 64; 38 Am Jur, Municipal Corporations § 468 *et seq.*

[5] 3 Am Jur, Appeal and Error § 985.

[9] 14 Am Jur, Costs § 91.

5. COURTS—LAW OF THE CASE.

The determination of the Supreme Court on the facts of a case and pertinent statutes under the Constitution stands as the law of such case.

6. COUNTIES—BUILDING CONSTRUCTION AND REPAIR—COUNTY BUILDING AUTHORITY—CONSTITUTIONAL LAW.

The assumption by a county building authority of a debt, repayable so far as the county is concerned only from reasonable rents necessary for the county to pay, is not a raising of the entire sum in the county within 1 year so as to exceed 1/10 of 1 mill as limited by the Constitution for county building construction or repair (Const 1908, art 8, § 10; CL 1948, § 123.951 *et seq.*).

7. SAME—COUNTY BUILDING AUTHORITY—BONDS—RENT CHARGEABLE COUNTY—PARTY TO BONDS.

County building authority's power to charge rent for use of its buildings is limited to charging not more than a maximum rental that is reasonable and the authority is required to be the sole obligor on its revenue bonds, lest the lease which it enters into with county exceed limit of county's permissible indebtedness without a vote of the electors (Const 1908, art 8, § 10; CL 1948, § 123.951 *et seq.*).

8. STATUTES—EXTRA SESSION—GOVERNOR'S MESSAGE.

Holding of decree that subject matter of legislation construed was properly contained within scope of governor's message to the legislature convened in extra session and that procedure enacting such statute was proper is affirmed (Const 1908, art 5, § 22; CL 1948, § 123.951 *et seq.*).

9. COSTS—PUBLIC QUESTION—COUNTY BUILDING AUTHORITY—BONDS.

No costs are allowed in suit to enjoin issuance of bonds by county building authority, a question of public importance being involved (CL 1948, § 123.951 *et seq.*).

Appeal from Muskegon; Fox (Noel P.), J. Submitted October 16, 1953. (Docket No. 67, Calendar No. 45,965.) Decided November 27, 1953.

Bill by Arthur M. Rude against Muskegon County Building Authority and County of Muskegon to restrain issuance of bonds. Decree for plaintiff. Defendants appeal. Reversed.

Arthur M. Rude, in propria persona.

Berry, Stevens & Moorman (*Claude H. Stevens* and *Milton M. Thompson,* of counsel), for defendants.

REID, J. Plaintiff filed the bill of complaint herein, to enjoin the Muskegon County Building Authority (herein referred to as the authority) from exercising certain powers, more particularly, issuance of $200,000 of bonds for acquiring building and site for welfare functions; also for a declaration of rights. From a decree for plaintiff, the defendants appeal.

Defendant authority is a body corporate created under PA 1948 (1st Ex Sess), No 31 (CL 1948, § 123.951 *et seq.* [Stat Ann 1951 Cum Supp § 5.301 (1) *et seq.*]). Section 1 of the act provides that any county or city may incorporate an authority for the purpose of acquiring, et cetera, buildings and sites for the use of the county or city.

Section 8 (CL 1948, § 123.958) provides:

"The authority and any incorporating unit or units shall have power to enter into a contract or contracts whereby the authority will acquire property contemplated by the terms of this act and lease the same to the incorporating unit or units for a period not to exceed 40 years. *The consideration specified in such contract for such use shall be subject to increase by the authority if necessary in order to provide funds to meet its obligations.*" (Italics supplied.)

Plaintiff claims that in effect the authority is the alter ego of the county and bound by all the limitations in the State Constitution as to the county in the raising of moneys, expenditure of moneys and pledging the faith and credit of the county. Plaintiff's claim in that regard is based on the following reasons: First, because the articles of incorporation of the authority may be amended at any time by

the board of supervisors; second, because of the delegation to the authority of the right to proceed with condemnation proceedings and issue self-liquidating bonds similar to the right of the board of supervisors so to do; third, because the authority may build buildings for certain county purposes; fourth, because the corporate limits of the authority are the same as the county's; fifth, because the board may provide the initial incorporating and operation costs of the authority and may eventually take over under certain conditions, the buildings built by the authority. In practical effect, the trial court held with these contentions of plaintiff.

Defendants cite *Gledhill* v. *Fisher & Company,* 272 Mich 353 (102 ALR 1042); *Finley* v. *Union Joint Stock Land Bank of Detroit,* 281 Mich 214; *John A. Parks Company* v. *General Discount Corporation,* 294 Mich 316; and *Bourne* v. *Muskegon Circuit Judge,* 327 Mich 175, in opposition to the finding of alter ego. Without considering it necessary to set forth an analysis of those cases, we are satisfied to overrule the finding as to alter ego. While the authority is in a sense a county-wide municipal corporation, it is limited in its scope of activities even inside of county affairs. The legislature in enacting the statute providing for the creation of an authority evidently intended it to be a separate body from the board of supervisors. The board of supervisors in this case evidently intended the authority to carry on specific activities with which from then on, the board need not necessarily directly concern itself.

PA 1948 (1st Ex Sess), No 31, authorized the board of supervisors to incorporate the authority. The trial court found, "There is a present, compelling need for a building to house the welfare administration of Muskegon county." We find nothing in the record to indicate the contrary of this statement

of the trial judge, and sufficient on which to base the statement.

The authority, at a meeting held August 1, 1952, resolved to retain an architect to draft plans and an attorney to prepare a lease and to take other steps to acquire a building to be leased to the county for use in its welfare functions and to issue and sell revenue bonds of about $200,000 for such purposes.

Both plaintiff and defendants cite *Walinske* v. *Detroit-Wayne Joint Building Authority* (city-county authority incorporation under section 2 of the act in question in this case), 325 Mich 562. The lease in the *Walinske Case* had not yet been prepared when that case was heard, so that its terms were not before the court. In the instant case also, the lease has not as yet been signed so far as the record discloses.

Defendants in the instant case argue respecting the *Walinske Case,* "These documents [*i.e.,* an interim contract and the articles of incorporation] made it plain that the lease would have to extend beyond the last bond maturity, that the rental would have to be *sufficient to pay off the bonds,* and that the conveyance of the property to the incorporators on retirement of the bonds was mandatory." Defendants also argue, "The foregoing argument [referring to their own argument] should demonstrate that the proposed bond-lease arrangement would create no county indebtedness *in the constitutional sense.*" (Italics in both quotations supplied.)

We infer that the authority argues that it has the lawful right and that it intends by its acts to create a situation by which the county is to be bound to pay the indebtedness about to be incurred of $200,000 regardless of the value to the county of the rental use to be provided in the building or buildings proposed to be acquired or built.

Our State Constitution (1908), art 8, § 10, provides:

"The board of supervisors of any county may in any 1 year levy a tax of 1/10 of 1 mill on the assessed valuation of said county for the construction or repair of public buildings or bridges, or may borrow an equal sum for such purposes; and, in any county where the assessed valuation is less than 10,000,000 dollars, the board may levy a tax or borrow for such purposes to the amount of 1,000 dollars; but no greater sum shall be raised for such purposes in any county in any 1 year, unless submitted to the electors of the county and approved by a majority of those voting thereon."

In the *Walinske Case,* we say, page 581:

"The authority, not the city and county, is to pay for and erect the proposed building, and is to be the sole obligor on the proposed revenue bonds. The city and county will not pledge their full faith and credit, but they merely agree to pay over a term of years a reasonable annual rental for an absolute necessity the same as they would for any other services."

These words are not an exact recital of express statements in the contract in the *Walinske Case* nor exact quotations from the governing statute, but are a ruling by this Court construing the statute and declaring the lawful situation of the parties. It is to be noted that the statute in section 11 (CL 1948, § 123.961 [Stat Ann 1951 Cum Supp § 5.301 (11)]), contains the proviso:

"That such bonds shall be payable solely from the revenues of such property, which revenues shall be deemed to include payments made under any lease or other contract for the use of such property."

When we say in the *Walinske Case,* page 581, "The city and county will not pledge their full faith and credit, but they merely agree to pay over a term of years a *reasonable* annual rental for an absolute ne-

cessity the same as they would for any other services" (italics supplied), we are by judicial construction setting forth the words, "reasonable annual rental for an absolute necessity" as a construction of what is meant in the statutory proviso last above mentioned by the words, "revenues of such property."

It is further to be understood, so far as concerns the instant case, that the words in section 8 of the statute, "The consideration specified in such contract for such use shall be subject to increase by the authority if necessary in order to provide funds to meet its obligations," do not mean that the authority can under any circumstances increase the rent beyond what would be reasonable, but can raise its rent charges up to a reasonable amount if below what is reasonable and if necessary to meet its obligations and may continue the lease if necessary to meet its debts.

What we said in the *Walinske Case* stands as the law governing that case. We decide the instant case on the facts of this case and pertinent statutes under the Constitution and our decision herein is to stand as the law of this case.

In the instant case, the trial court held:

"Under the admitted facts in this case, in 1952, Muskegon county had an assessed valuation of $223,257,936. One-tenth of 1 mill, in the case of Muskegon county, is $22,235.79 [corrected from the record to $22,325.79]. A proposed building in the approximate amount of $200,000 would violate the provisions of Michigan State Constitution (1908, art 8, § 10). Therefore, the creation of a corporation under the provisions of PA 1948 (1st Ex Sess), No 31, § 4, to accomplish this purpose, is invalid."

The last portion of Constitution 1908, art 8, § 10, above quoted is, "But no greater sum shall be raised for such purposes in any county in any 1 year, unless

submitted to the electors of the county and approved by a majority of those voting thereon." If Muskegon county should bind itself to pay in a contract or lease more than a reasonable rental, in a total amount of $200,000, this would amount to a plain evasion of the last cited clause in article 8, § 10 of the Constitution, because the county in the year in which the county signed such a lease would make itself liable for that total amount on the county's faith and credit, and by that means *raise* $200,000 in that year.

We do not consider that the assumption by the authority of a debt of $200,000 repayable so far as the county is concerned only from reasonable rents necessary for the county to pay, is a *raising* of $200,000 *in the county* within the meaning of article 8, § 10.

In order not to contravene the provisions of article 8, § 10, the lease contemplated between the parties shall provide for a reasonable rental only, without right on the part of the authority to require more rent than what is or shall be reasonable rental, and that the authority is to be the sole obligor on the bonds to be issued for the $200,000.

We affirm only so much of the decree of the trial court as holds that the subject matter of PA 1948 (1st Ex Sess), No 31, § 1 was properly contained within the scope of the governor's message of April 16, 1948, and that the procedure followed in enacting such legislation was proper and not in violation of article 5, § 22 of the State Constitution. In all other particulars, the decree appealed from is reversed. A decree may be entered in accordance with this opinion. No costs, a question of public importance being involved.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with REID, J.

BUTZEL, J., concurred in the result.

HAYES *v.* COLEMAN.

1. TRIAL—INSTRUCTIONS—EXCESSIVE REPETITION.
   Excessive repetition of a point of law in a charge to a jury is unnecessary, argumentative and prejudicial.

2. SAME—CHARGE CONSIDERED IN ITS ENTIRETY.
   The charge of a court to a jury must be considered in its entirety, and error will not lie upon detached sentences which, when construed with the rest of the charge, are not objectionable.

3. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—REPETITIOUS INSTRUCTIONS.
   Fact that trial court made 9 separate and individual references to rule that negligence of the plaintiff to bar recovery must be a proximate cause of the accident *held,* not reversible error, under the circumstances, where it appears the trial court accepted 3 sets of requests to charge and instructions given, covering some 20 pages of printed record, although more extended than necessary, did not indicate the court's opinion on factual issues.

4. SAME—IDENTIFICATION OF INSTRUCTIONS.
   Identification of source of instructions given jury in pedestrian's action against southbound motorist and driver and owner of eastbound taxicab *held,* not to have detracted from weight to be accorded instructions, where it appears trial court tried to give equal consideration to each of 3 sets of requests to charge in addition to charge prepared by himself and neither counsel objected to instructions given or proffered others.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 53 Am Jur, Trial §§ 552, 559.
[2] 53 Am Jur, Trial § 564.
[6, 7] Generally, see 11 Am Jur, Compromise and Settlement § 25; 20 Am Jur, Evidence § 565.
[8] 58 Am Jur, Witnesses §§ 611, 621, 624, 664.
[9] 58 Am Jur, Witnesses §§ 610, 715 *et seq.*
[10] 58 Am Jur, Witnesses § 623.
[11] 58 Am Jur, Witnesses § 725 *et seq.*
[12, 13] 53 Am Jur, Trial §§ 480, 485.

5. SAME—INSTRUCTIONS—REQUESTS TO CHARGE.

It is presumed that jurors are of at least ordinary intelligence and understood, from opening statement of instructions, that requests read to them were submitted as statements of rules of law governing the case.

6. WITNESSES—CROSS-EXAMINATION—CREDIBILITY—DISCREPANCY IN POSITION.

Court's admission on cross-examination of defendants' witness of testimony relative to compromise she had made with such defendants as to her claim for injuries arising out of same accident *held,* not error, where the credibility of such witness was thereby affected by reason of discrepancy between her position at trial and that presented by her declaration in her action against the defendants relative to speed of defendants' taxicab and as to traffic light.

7. COMPROMISE AND SETTLEMENT—ADMISSION OF LIABILITY—EVIDENCE.

A compromise with one person is in no sense an admission of liability to someone else.

8. WITNESSES—CROSS-EXAMINATION.

The right of cross-examination is an absolute right accorded to any litigant who finds himself confronted by an adverse witness, and it may not be denied nor unduly restrained nor interfered with by the court.

9. SAME—CROSS-EXAMINATION—ADVERSE WITNESSES—PREJUDICE.

It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other.

10. SAME—CROSS-EXAMINATION—COMPETENCY OF TESTIMONY.

The party producing a witness may not shield him from proper cross-examination for the reason that facts thus elicited may not be competent upon the merits of the cause.

11. SAME—SCANDAL—ATTACKS ON CHARACTER.

A trial judge has a duty to repress needless scandal and gratuitous attacks on character of a witness.

12. TRIAL—ARGUMENT TO JURY—INFERENCES.

Counsel are limited, in arguing to a jury, in subject matter to those matters before the court as disclosed by the testimony

and reasonable inferences therefrom and may not express opinions or conclusions upon matters not found in the record.

13. SAME—ARGUMENT TO JURY—COMPROMISE—INFERENCES.
Remarks of plaintiff's counsel in argument to jury to effect that one of defendants' witnesses had changed her position because of settlement she had effected with defendants for her injuries which had been sustained in same accident *held,* not reversible error, where such inference was not wholly unreasonable.

Appeal from Wayne; Maher (Thomas F.), J. Submitted October 15, 1953. (Docket No. 55, Calendar No. 45,821.) Decided December 29, 1953. Rehearing denied February 18, 1954.

Case by Paul Hayes against Louis Anthony Coleman, Fay Russell and William Albrecht for injuries received when he was struck after collision between defendants' automobiles. Verdict and judgment for plaintiff. Defendants Russell and Albrecht appeal. Affirmed.

Maile & Leach (*Saul M. Leach* and *Marvin W. Reider,* of counsel), for plaintiff.

Edward N. Barnard, for appellants.

ADAMS, J. In this appeal we are asked to review several claimed errors in a jury trial in the Wayne county circuit court.

Plaintiff and appellee, Paul Hayes, brought the action to recover damages from defendant Louis Anthony Coleman and defendants and appellants Fay Russell and William Albrecht for injuries arising out of an accident that occurred about 11:45 p.m. on July 4, 1949, at the intersection of Holbrook avenue and Oakland avenue in the city of Detroit. Holbrook runs in an east-west direction and Oakland is a north-and-south street.

Defendant Coleman was driving south on Oakland and defendant Russell, operating a taxicab owned by defendant Albrecht, was proceeding in an easterly direction on Holbrook avenue. The 2 cars collided near the center of the intersection and the impact of the collision pushed Coleman's car in a southeasterly direction over the curb and against a utility pole. As the cars collided, plaintiff, a pedestrian, was standing in Oakland avenue not more than 5 feet from the easterly curb. He sought to regain the safety of the sidewalk, ran into the utility pole and his leg was pinned against the pole by the Coleman automobile. The leg was crushed and eventually it became necessary to amputate.

On September 30, 1949, plaintiff started this action at law seeking money damages for pain, suffering, medical and hospital expenses and loss of earnings. Upon trial before a jury and at the close of plaintiff's proofs, the defendants moved for a directed verdict on the theory that plaintiff was guilty of contributory negligence. Decision was reserved* and at the conclusion of the trial the motion was renewed and denied, the court ruling that it was for the jury to determine whether plaintiff's negligence was a proximate cause of the accident. The jury rendered a verdict against the 3 defendants. Later, a motion for a new trial was denied and an appeal taken to this Court in behalf of defendants Russell and Albrecht.

On appeal, defendants urge the following errors in the trial of the case: first, that the court's instructions to the jury were prejudicial to the defendants in that there was undue emphasis and repetition of the rule that in order for plaintiff's negligence to bar his recovery, it must be a proximate cause of the accident; second, that the court minimized the effect

* See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—REPORTER.

of portions of his charge to the jury by identifying certain instructions as having been requested by counsel for the litigants; third, that 1 of defendants' witnesses was permitted to testify on cross-examination in reference to the details of the settlement of her separate cause of action arising out of the same accident; and, fourth, that counsel for plaintiff made irresponsible and prejudicial comments concerning 1 of defendants' witnesses in his argument to the jury.

Giving attention to the claimed errors in the order named, appellants say, and the record confirms their statement, that the trial court while instructing the jury at the close of the trial made 9 separate and individual references to the well-recognized rule that negligence of the plaintiff which would bar recovery must be a proximate cause of the accident that caused plaintiff's injury. Appellants do not contend that the court misstated the law but they say that the several repetitions of the same point were prejudicial to defendants' rights in that by such emphasis the court indicated to the jury his own belief that the plaintiff's admitted negligence (that of standing in the traveled portion of the street while vehicular traffic was passing through a green traffic light) was not a proximate cause of the accident that caused his injury.

This Court has held that unnecessary repetition of a point of law in a charge to a jury is argumentative and prejudicial (*Buchel* v. *Williams,* 273 Mich 132) and that excessive repetition is "wholly unnecessary." *Bowmaster* v. *William H. DePree Company,* 252 Mich 505.

We have also said:

"The charge of a court to a jury must be considered in its entirety, and error will not lie upon detached sentences which, when construed with the rest of

the charge, are not objectionable." *Bathke* v. *City of Traverse City* (syllabus), 308 Mich 1.

Here we have a trial involving 3 defendants and requiring 7 days for the presentation of proofs. Three separate sets of requests to charge were presented to the court by counsel for plaintiff and defendants. Many of the requests were accepted and the instructions cover 20 printed pages of the record. Because of the many requests and the extent of the charge as given, it would have been literally impossible not to repeat some of the law applicable to the cause of action. It may be that the trial judge, in an effort to treat all of the parties equally, submitted a more extended charge than was necessary under the circumstances, but viewing the charge as a whole, we find nothing that would in any way indicate the court's opinion on factual issues. While more than 1 reference was made to several rules of law, including that of proximate cause, a reading of the whole text does not give the impression of undue emphasis on any particular point. We are of the opinion that the situation is comparable to that in *Cook* v. *Vineyard,* 291 Mich 375, 382, where we said:

"The brief of plaintiff lists 7 references by the trial court to the fact that plaintiff must prove his case by a preponderance of the evidence, and, it is urged, such undue repetition is reversible error, relying on *Bowmaster* v. *William H. DePree Company,* 252 Mich 505, and *Buchel* v. *Williams,* 273 Mich 132. Four of the statements complained of were given as the court defined and explained the term. The 3 remaining repetitions of the rule were inserted incidentally as the court sought to explain other features of the case. The charge to the jury is a long one, occupying 21 pages of the printed record. As was said in *Hanna* v. *McClave,* 273 Mich 571, where the instructions were 20 pages in length, 'It is difficult so to extend instructions without needless repetition

and danger of faulty reiteration. Flaws, however, unless of serious moment, may be passed as innocuous effusions.' "

It is the further contention of the appellants that the trial court erred in identifying to the jury the source of those requests to charge submitted by the several parties. The court began its charge to the jury in the following manner:

"Members of the jury: In this case my instructions to you are not going to be of any great length. I have additional requests to charge, which I think together with the instructions that the court will give you, will cover the matter fully and extensively."

The judge then submitted instructions prepared by himself followed by several charges that he identified as the requests to charge of counsel for both plaintiff and defendants. Appellants argue that by so doing the court in effect, said that the requested charges were not the charges of the court but merely those of counsel and thus minimized their significance to the jury, quoting *LaBarre* v. *Grand Trunk Western Railway Company,* 133 Mich 192, 201:

"This was apparently a request to charge of the plaintiff's counsel, and, while requests to charge are frequently efficient aids to the trial judge, they are apt to be, as in this case, misleading, when they are given to the jury as such. It is preferable and safer to give a connected and logical charge, in which so much of the various requests as can be properly and profitably used is included without reference to the fact that they are requests of either party."

More than the usual number of requests to charge were submitted to the trial judge. Two separate sets were offered by defendants and 1 set by plaintiff. Some were similar in text. It is apparent that the court tried to give equal consideration to each set and in so doing some repetition was inevitable.

Undoubtedly the court sought, in part, to explain that repetition by stating the source of the charges. More concise instructions with less duplication would have been preferable, but we cannot glean from a reading of the whole charge that the court attached less significance to one portion than to another, nor do we believe that the members of the jury could have gathered that impression as they listened. Those portions of the charge given at the request of the litigants were, in most instances, prefaced by the words "I charge you" or "I instruct you." When he had completed his charge, the court inquired of counsel if they had further requests that should be given. None were urged or objection made to those submitted. While the jury was told that the court had adopted portions of his instructions from counsel's requests, they could not, with reason, have concluded that less significance should attach to those portions because they had been suggested to the court by the attorneys. Identification of source did not detract from their weight.

The situation is similar to and controlled by a previous holding of this Court where we said:

"If defendant's counsel thought that the jury were likely to be misled by the difference in verbiage in the submission of the requests of the respective parties, they should have called the court's attention to the matter before the jury retired. Moreover, we must presume that the jury was composed of men of at least ordinary intelligence, and must therefore have understood from the opening statement of the circuit judge that all of the requests read to them were submitted to them as statements of the rules of law governing the case." *Davis* v. *Michigan Central Railroad Company,* 147 Mich 479, 482.

The third error claimed by the appellants has to do with the admission of testimony from a witness for the defendants relating to the settlement of her

separate cause of action against the same defendants and arising out of the same accident. At the time of the accident, Mary Pope was a passenger in the taxicab operated by defendant Russell and owned by defendant Albrecht. As a result of the accident she was bruised and her collarbone broken. On the day that the plaintiff instituted this suit, she brought a similar action against the same defendants through other counsel. In her declaration it was alleged that immediately prior to the collision the taxicab was traveling at a speed of approximately 35 miles per hour and was driven into a red light at the intersection of Holbrook and Oakland. Later, when she appeared as a witness for the defendants, she testified that at the time of the accident the taxicab was traveling at an estimated speed of 25 miles per hour and that as the cab approached Oakland from the west, the traffic light at the intersection was green for Holbrook traffic.

Upon cross-examination, counsel for the plaintiff questioned her concerning the discrepancies between the allegations in her declaration and her testimony at the trial, and with the court's permission but over defendant's objection, inquired into the details of the settlement of her cause of action. She then admitted that 4 days before the trial of this cause she went to the office of the attorney representing defendants Russell and Albrecht, signed a statement, the nature of which was not disclosed, and settled her claim against the defendants for the sum of $1,500. The court permitted the testimony to be taken on the theory that such questioning was proper on cross-examination as bearing upon the credibility of the witness.

Appellants insist that the testimony of the settlement was irrelevant and prejudicial and that the court erred in admitting it. A compromise with 1 person is in no sense an admission of liability to

someone else (*Fulton Iron & Engine Works* v. *Township of Kimball,* 52 Mich 146), and the jury was so instructed. It is conceded that it would have been improper for the plaintiff to have presented such proofs, but the testimony we are here concerned with was elicited on cross-examination.

Before commencing her suit against the defendants, Miss Pope discussed the details of the accident with her counsel. If the suit later commenced was brought in good faith, it was predicated on the conviction that defendants had committed acts of negligence resulting in injury to her. She so alleged in the declaration drafted by her attorney. In the trial of this cause she testified that the driver of the taxicab was free of negligence. Inconsistencies between the position she took when her suit was commenced and her testimony in this trial were matters to be considered by the jury in determining her credibility as a witness. Testimony on cross-examination disclosing the settlement of her claim and the payment of money to her by defendants shortly before the trial was properly admitted as bearing upon a possible motive for changing her version of the accident.

"The right of cross-examination is a right the law freely accords to any litigant who finds himself confronted by an adverse witness, and it may not be unduly restrained or interfered with by the court. The right of a litigant to cross-examine an adverse witness within proper bounds is an absolute right, and it is not within the discretion of the court to say whether or not the right will be accorded. The right of cross-examination is regarded of such consequence that it is made one of the chief grounds for the exclusion of hearsay evidence. If the right to cross-examine an adverse witness be denied or unduly limited or restrained, the testimony given by the wit-

ness would, in a very marked degree, partake of the character of hearsay testimony. It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other. The party producing a witness may not shield him from such proper cross-examination for the reason that the facts thus elicited may not be competent upon the merits of the cause." *Gurley* v. *St. Louis Transit Co.* (Mo App), 259 SW 895, 898.

Finally, appellants say that the court erred in permitting plaintiff's counsel to make unjustified and intemperate accusations against defendants' witness, Miss Pope. In his argument to the jury, counsel for the plaintiff, in referring to the witness, said:

"Mary Ellen Pope, her testimony is she received $1,500 for testifying that the Checker Cab went through a green light—"

Defendants' counsel immediately objected to the statement as being prejudicial and the court then said:

"Probably that is improper. However, it is a matter for the jury. They heard the testimony."

Appellants contend that the statement had no foundation in fact, was irresponsible and inflammatory and was highly prejudicial to defendants because Miss Pope was 1 of their important witnesses.

"In *Rickabus* v. *Gott,* 51 Mich 227, this Court held that 'the duty of the trial judge to repress needless scandal and gratuitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully.' See, also, as bearing upon this question, *Bond* v. *Pontiac, O. & P. A. Railroad*

Co., 62 Mich 643 (4 Am St Rep 885); *Cronkhite* v. *Dickerson,* 51 Mich 177; *Wheeler* v. *Wallace,* 53 Mich 355, 364; *People* v. *Hare,* 57 Mich 505." *Sullivan* v. *Deiter,* 86 Mich 404, 411.

In arguing to a jury, counsel is limited in subject matter to those matters before the court as disclosed by the testimony of witnesses. He is entitled to draw reasonable inferences from that testimony, but he cannot express his opinions or conclusions upon matters not found in the record. In this record we have the testimony of a witness in contradiction of allegations found in her declaration filed in the same court and concerning the same accident. Just prior to the trial she received $1,500 from the defendants in settlement of her claim. From these circumstances it would not be wholly unreasonable to infer that her change in position had been motivated by the settlement. Counsel's statement is extreme but it cannot be said that there is no foundation for it in the record. There was no error which would justify a reversal of judgment.

"Various exceptions were taken to the remarks of Mr. Boudeman, one of the attorneys for the plaintiffs, in summing up the case to the jury. While some of his deductions from the testimony, and claims made by him, might not coincide with our ideas, we find no such error in any of his remarks as would warrant a reversal of the judgment. An attorney is entitled to some license in his argument, and the testimony to him may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge. But if we were to reverse cases because the attorneys of the parties claimed more from the testimony for their clients than we could discern in the evidence, or argued that facts were established when we thought they were not, we should not only invade the province of the jury, but vacate most, if

not all, of the judgments that come for review before us." *Dikeman* v. *Arnold,* 83 Mich 218, 221.

The judgment is affirmed, costs to appellee.

DETHMERS, C. J., and BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LENZ *v.* MAYOR OF DETROIT.

1. MUNICIPAL CORPORATIONS—CIVIL SERVICE COMMISSION—SETTING ASIDE DISCHARGE.

   The civil service commission of Detroit may set aside a discharge of an employee, where it was made for religious or political reasons or for reasons other than the good of the service (Detroit Charter, title 4, chap 2, §§ 18, 18a).

2. SAME—CVIL SERVICE COMMISSION—JUDICIAL REVIEW.

   The judicial review of the action of the civil service commission of Detroit is solely by an appeal in the nature of certiorari in which leave must first be obtained.

3. CONSTITUTIONAL LAW—COURTS—CIVIL SERVICE COMMISSION—JUDICIAL REVIEW.

   The supervisory control of the circuit court over inferior tribunals is not a trial *de novo,* since such a trial would be unconstitutional as being the exercise of administrative and executive functions by the court.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 8–11] 10 Am Jur, Civil Service §§ 11, 14.

[1, 2, 8–11] Constitutionality and construction, as to nature of review, of statute providing for appeal to or review by court, as regards order of civil service commission. 125 ALR 263.

Power of civil service body on own motion and without notice or hearing to reconsider, modify, vacate, or set aside order relating to dismissal of employee. 16 ALR2d 1126.

[2, 10, 11] 10 Am Jur, Certiorari § 10 *et seq.*

[5, 6] 10 Am Jur, Certiorari § 3.

[8, 9] Generally as to powers of mayors, see 37 Am Jur, Municipal Corporations § 261.

[11] 34 Am Jur, Mandamus §§ 4, 11.

4. CERTIORARI—NATURE OF REVIEW OF ACTION OF ADMINISTRATIVE TRIBUNAL.

A court does not determine administrative policies nor purely administrative questions when reviewing the action of an administrative tribunal on an appeal in the nature of certiorari.

5. SAME—OFFICE OF THE WRIT.

The office of the common-law writ of certiorari is to bring before the court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior tribunal has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law.

6. SAME—JURISDICTION.

The principal office of the writ of certiorari is to control the action of an inferior tribunal and to keep it within its jurisdiction.

7. MANDAMUS—PURPOSE OF REMEDY.

The writ of mandamus ought to be used upon all occasions where the law has established no specific remedy and where, in justice and good government, there ought to be one.

8. MUNICIPAL CORPORATIONS—MAYORS—HEARING—DISCHARGE OF AN EMPLOYEE—VETERANS' PREFERENCE ACT.

The mayor of a city is authorized to conduct a hearing and determine whether a discharged employee is guilty of 1 or more grounds set up in the veterans' preference act for removal and if he finds the employee should not have been discharged, he may order his reinstatement (CL 1948, § 35.402 *et seq.*).

9. SAME—MAYORS—EMPLOYEES IN OFFICE OF CITY CLERK.

The mayor of a city has no power to compel reinstatement of an employee in the office of city clerk, such action being by mandamus.

10. SAME—MAYOR—VETERANS' PREFERENCE ACT—CERTIORARI.

A mayor's power to determine the validity of a discharge of a city employee under the veterans' preference act is reviewable solely by an appeal in the nature of certiorari (CL 1948, § 35.402 *et seq.*).

11. SAME—MAYOR—CITY CLERK—CIVIL SERVICE COMMISSION—CERTIORARI—MANDAMUS.

The action of a mayor in failing to order the reinstatement of an employee in the office of the city clerk and in finding that his

discharge by the city clerk and city civil service commission was proper may be reviewed solely by an appeal in the nature of certiorari, mandamus not being the proper remedy to determine the validity of the proceedings had (CL 1948, § 35.402 *et seq.;* Detroit Charter, title 4, chap 2, §§ 18, 18a).

12. COSTS—MANDAMUS—REINSTATEMENT OF MUNICIPAL EMPLOYEE. No costs are allowed in mandamus proceedings to compel reinstatement of a city employee, where such writ, issued by the circuit court, is quashed.

Appeal from Wayne; Weideman (Carl M.), J. Submitted November 10, 1953. (Calendar No. 45,818.) Decided December 29, 1953. Rehearing denied February 18, 1954.

Mandamus by John N. Lenz against Albert E. Cobo, Mayor of the City of Detroit, to compel his reinstatement as a city employee. Judgment for plaintiff. Defendant appeals. Reversed.

Craig Thompson, for plaintiff.

Paul T. Dwyer, Corporation Counsel, *Helen W. Miller, G. Edwin Slater* and *Lawrence E. Eaton,* Assistants Corporation Counsel, for defendant.

SHARPE, J. The action in this case involves a review by mandamus of the legality of the discharge of plaintiff, John N. Lenz, by defendant, Albert E. Cobo, mayor of the city of Detroit. Prior to November 11, 1949, plaintiff was an employee of the city of Detroit connected with the office of city clerk. Among plaintiff's duties was assistance to members of the common council in handling minor matters for them as well as relieving superiors of ordinary office details.

On November 14, 1949, plaintiff received the following notice:

"CITY OF DETROIT
Department of City Clerk

"November 14, 1949

"NOTICE OF DISCHARGE

"To John Lenz:

"You are hereby notified that you are discharged from your position of legislative clerk which you now hold in this department, effective November 11, 1949, for the following reasons: Insubordination, conduct unbecoming a city employee, threatened intimidation of employer, misuse of council office, and fraudulent use of council stationery.

"Department of City Clerk
By /s/ ERNEST JONES
Deputy City Clerk"

On December 14, 1949, plaintiff sent a letter to the then mayor of the city of Detroit requesting a hearing under the veterans' preference act, CL 1948, § 35.402 *et seq.* (Stat Ann § 4.1222 *et seq.*). The letter reads as follows:

"12661 Tuller Ave.,
Detroit 4, Michigan
"December 14, 1949

"Honorable Eugene I. Van Antwerp,
Mayor, City of Detroit,
Detroit 26, Michigan.

"Dear Mayor:

"I would greatly appreciate an early hearing before the holidays, under the veterans' preference act, which would require Mr. Jones or Mr. Leadbetter to prove that I as legislative clerk have been guilty of:

"Official misconduct.
Habitual, serious or wilful neglect in the performance of duty.
Extortion.
Conviction of intoxication.
Conviction of felony.

Incompetency.

"Which they cannot do.

"As you know by a recent Supreme Court decision the civil service commission cannot go into the facts, nor weigh them, nor pass upon their flimsiness (See [*Martin* v. *Civil Service Commission of the City of Detroit*], 313 Mich 639), as you will be able to do.

"Sincerely yours,
/s/ JOHN N. LENZ
John N. Lenz"

The above letter was replied to as follows:

"January 5, 1950

"Mr. John W. Lenz,
12661 Tuller Ave.,
Detroit 4, Mich.

"Re: Formal notice of hearing, before the mayor, Under the veterans preference act.

"*Dear Sir:*

"You are hereby notified that in accordance with the provisions of the veterans' preference act, you will be granted a hearing on the matter of your discharge from the office of the city clerk, in my office, 102 City Hall on Friday, January 27 at 10:15 a.m.

"At this time you will be expected to be present and may present such facts in your defense and may be represented by such counsel in your behalf as you may desire.

"The reasons charged for your dismissal are: Serious and wilful neglect in the performance of duty and incompetency.

"You are hereby further notified that as a condition precedent to this hearing, the city of Detroit will insist upon proof that you are an honorably discharged veteran within the meaning of the veterans' preference act. Therefore, please bring with you for this purpose your honorable discharge.

"Very truly yours,
"ALBERT E. COBO,
Mayor."

On January 17, 1950, a detailed list of charges was mailed to plaintiff's counsel:

"CITY OF DETROIT
OFFICE OF THE CORPORATION COUNSEL

"January 17, 1950

"Mr. E. C. Ide,
Attorney at Law,
1703–1705 National Bank Building,
Detroit 26, Michigan.

"Re: Formal hearing of John N. Lenz
Under veterans' preference act.

"Dear Sir:

"In your letter of January 9, 1950, addressed to the mayor, you request more detailed particulars of the charges of 'serious and wilful neglect in the performance of duty and incompetency' in advance of the hearing.

"Please be advised that in support of the above mentioned charges, the city clerk will insist that Mr. Lenz was duly notified of his discharge on November 11, 1949, for reasons of 'Insubordination, conduct unbecoming a city employee, threatened intimidation of employer, misuse of council office and fraudulent use of council stationery,' which charges were upheld by the civil service commission on December 12, 1949.

"The city clerk will further insist that the said John N. Lenz is guilty of serious and wilful neglect in the performance of duty and incompetency as follows: In that

"1. The said John Lenz is an unsuitable unfit person to be retained in the service of the city, because of his inability to cooperate with his employer or his fellow employees.

"2. The said John Lenz is not amenable to discipline and has constantly resented the position which he has filled by waging a steady and unreasonable campaign to have his salary increased and to compel the city clerk so to do by a requested survey by the

civil service commission, which was denied on or about July 18, 1949.

"3. The said John Lenz did approach several members of the common council to set up its own separate payroll where he would not be under the supervision of the city clerk.

"4. The said John Lenz did accumulate a private file while in the employment of the city clerk since the year 1941 for the avowed purpose of reflecting upon the honesty and integrity of his superior, which would bring the city into public suspicion, contempt and ridicule, and did threaten to publish the same with the intent of intimidating his superior.

"5. The services of the said John Lenz as legislative clerk were negligently performed and in some instances his conduct was positively unsatisfactory to members of the common council.

"6. The said John Lenz has fraudulently used council stationery to transact his private business and has fraudulently represented himself as 'secretary of the Detroit common council' and 'secretary to the city councilmen of Detroit.'

"7. That on or about August 16, 1949, the said John Lenz wrongfully took a letter out of the private file of Mr. Edgecomb and made a copy of the same and sent it to Mr. Willis Hall of the Detroit board of commerce.

"8. The said John Lenz has openly resented a resolution of the common council of November 15, 1949, J.C.C. pages 3438–3439, substituting 2 positions of senior stenographer for the positions of legislative clerk, and did take this matter to the police department as a basis for charges of misconduct against the city clerk.

"9. That the said John Lenz has sought publicly to criticize and humiliate the city clerk, his superior officer, by unwarranted statements for publication by radio and newspapers, and by causing to be submitted to the common council a list of unwarranted statements for the purpose of casting distrust, suspicion, contempt and ridicule upon the city

clerk and contrary to the best interests of the city of Detroit.

"In regard to your request for reinstatement in advance of the hearing as already set, please be advised that no such proceeding is authorized by the veterans' preference act. Any objections you have to the form of the charges may be raised at the hearing.

"Very truly yours,
JULIAN P. RODGERS,
Assistant Corporation
Counsel."

On January 27, 1950, the hearing was held before the mayor. Plaintiff was present at the hearing, was represented by counsel, and participated in the proceedings. On February 6, 1950, plaintiff received the following from the mayor:

"February 6, 1950

"Mr. John Lenz,
c/o Mr. E. C. Ide, Attorney,
1703–1705 National Bank Bldg.,
Detroit 26, Michigan.

"*Dear Sir:*

"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.

"May I assure you that I reluctantly reached this decision but on the basis of the testimony offered, I could not do otherwise.

"It is always regrettable that a man has to leave the city service after such a long period and I sincerely hope that you may find a vocation in which you will be happy.

"Very truly yours,
ALBERT E. COBO,
Mayor."

On February 5, 1951, plaintiff filed a petition in the circuit court of Wayne county, citing Albert E. Cobo as mayor of the city of Detroit as defendant, and asking for a writ of mandamus to reinstate plaintiff. The petition alleges that the hearing was illegal for the following reasons:

"A. Your petitioner had been discharged before the hearing took place, and that was petitioner's status at the time of the said hearing.

"B. Said hearing was not held within 30 days of receipt of your petitioner's protest in writing to the said defendant, as required by said statute.

"C. On the record, petitioner was not permitted to defend himself against the charges set forth to him in writing under date of January 5, 1950; was not permitted to challenge or cross-examine hostile witnesses; was not permitted to set forth testimony of witnesses to refute said charges.

"D. Albert E. Cobo, said defendant, did not permit petitioner to enter a full and complete defense as to any charges, and permitted no defense at all to the charges, excepting only as to alleged collecting of facts embarrassing to the city clerk; and as to that charge, he permitted no adequate defense.

"E. Said hearing was concluded by the said defendant without conclusive proof, or a preponderance of testimony, on any of the charges."

Defendant filed an answer to plaintiff's petition in which there is a denial of the claims made in plaintiff's petition. The cause came on for trial, and at its conclusion the trial court held that mandamus was a proper remedy; that laches had not barred the action, and that the hearing conducted by the mayor was not the full hearing required by the veterans' preference act. On January 28, 1953, a judgment for writ of mandamus was entered directing defendant to reinstate plaintiff to his former employment. Upon application, we granted defendant leave to appeal.

Defendant urges that the trial court was without jurisdiction to review the discharge of a city employee by means of mandamus rather than certiorari. Defendant relies on *Goodfellow* v. *Detroit Civil Service Commission*, 312 Mich 226; *Bischoff* v. *County of Wayne*, 320 Mich 376; and *Dyson* v. *City of Detroit*, 333 Mich 116. In the *Goodfellow Case, supra*, a bill of complaint was filed in the circuit court in chancery against the civil service commission of the city of Detroit and the department of street railways to set aside the action of the civil service commission and for the purpose of directing the civil service commission and the department of street railways to reinstate or reemploy the plaintiffs. A motion was made and granted to dismiss the bill for want of equity. In an opinion we said:

"We quote from the opinion of the trial court as follows:

" 'Under the city charter an employee who is discharged by a department head has a right of appeal, upon written request within 10 days, to the civil service commission (Charter, title 4, chap 2, §§ 18, 18a). The civil service commission can set aside the

discharge for 3 reasons only: If it was for religious or political reasons or reasons other than the good of the service. If the civil service commission denies his protest or appeal, his next step is to the circuit court by appeal in the nature of certiorari. The Constitution (1908), art 7, § 10, gives the circuit courts supervisory control over inferior tribunals. But the Supreme Court has pointed out that this control does not mean a trial *de novo,* since such a trial would be unconstitutional as thrusting upon the courts administrative and executive functions. So the court has held that the review is by appeal in the nature of certiorari for which leave must first be obtained. *In re Fredericks,* 285 Mich 262, 267 (125 ALR 259).'
* * *

"The trial court in the instant case was correct in holding that the review of the action of the civil service commission of the city of Detroit is by appeal in the nature of certiorari, in which appeal we do not determine administrative policies, nor purely administrative questions. The bill of complaint in the instant case petitioned the court to determine administrative matters, which bill of complaint was properly dismissed."

In the *Bischoff Case, supra,* plaintiff sought by mandamus to compel the county of Wayne and the civil service commission of Wayne county to reclassify him to a higher position. We there said, p 393:

"In the instant case the circuit judge sought by hearing *de novo* to substitute his judgment for that of the civil service commission in the discharge of one of its administrative functions. In attempting to do so he acted without jurisdiction. The courts cannot supplant or function as civil service commissions.

"From our review in the above matter it is not to be inferred that under the circumstances of the instant case mandamus was a proper remedy. The method of our review has been prompted by reason of the fact that defendants did not in the circuit

court challenge plaintiff's right to seek relief by mandamus. That issue was not presented to the trial judge. But it is strenuously urged by defendants in this Court; and it may be urged here for the first time because it presents a matter of jurisdiction. *Warner* v. *Noble,* 286 Mich 654; *Township of Warren* v. *Raymond,* 291 Mich 426. Whether under other circumstances, presenting a different type of issue, mandamus would be a proper remedy, need not be and is not decided herein. However, so that an erroneous inference may not arise from our present opinion, we note, and we trust with finality, that under the record in the instant case wherein the commission acted in the exercise of its vested powers, the sole remedy available to plaintiff was certiorari. A summary disposition of this appeal might have been made on that ground. See *In re Fredericks,* 285 Mich 262 (125 ALR 259); *Goodfellow* v. *Civil Service Commission,* 312 Mich 226."

In the *Dyson Case, supra,* plaintiff filed a bill of complaint against the city of Detroit and its civil service commission for the purpose of having a decree to the effect that defendant was without authority to order plaintiff to discontinue working for the city of Detroit. The trial court dismissed the bill on the ground that plaintiff's only remedy was by way of certiorari. Upon appeal we said:

" 'The office of the common-law writ of certiorari is to bring before the court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law.' 10 Am Jur, p 524, § 3.

" 'The principal office of the writ [of certiorari] is to control the action of an inferior tribunal and to keep it within its jurisdiction.' 14 CJS, p 122, § 2a.

" 'The writ is also used, in many jurisdictions, to review not only proceedings of inferior courts but also proceedings of inferior officers, boards, and tribunals exercising judicial or quasi-judicial functions.' 14 CJS, p 122, § 1.

"See, also, *In re Fredericks,* 285 Mich 262 (125 ALR 259); *Public Welfare Commission of Detroit* v. *Civil Service Commission of Detroit,* 289 Mich 101, 107; *Goodfellow* v. *Civil Service Commission,* 312 Mich 226; *Bischoff* v. *County of Wayne,* 320 Mich 376.

"Plaintiff's complaint against defendant is over administrative actions. Plaintiff's remedy, if any, is by certiorari. It is not for the chancery court to review *de novo* defendant's administrative determinations. See *In re Fredericks, supra.*"

Plaintiff urges that his action for mandamus is based upon the statute known as the veterans' preference act, CL 1948, § 35.402 *et seq.* (Stat Ann § 4.1222 *et seq.*) and relies upon *Fawcett* v. *Department of Labor and Industry,* 282 Mich 489, 494, where we said:

"It is also fundamental that the writ of mandamus 'ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one.' * * * *People, ex rel. Township of LaGrange,* v. *State Treasurer,* 24 Mich 468."

Plaintiff urges that a hearing in certiorari would have resulted at most in quashing the 2 orders of dismissal, leaving plaintiff still lacking the needed affirmative relief of reinstatement. Under the act the mayor is authorized to conduct a hearing and determine whether the discharged employee is guilty of 1 or more grounds set up in the statute for removal. If the mayor finds that the discharged employee should not have been discharged he may order his reinstatement, as was done by the governor

in *O'Donnell* v. *Liquor Control Commission,* 288 Mich 377. The mayor has no power to compel reinstatement of an employee in the office of city clerk. Such action would be by mandamus, as was done in the *O'Donnell Case, supra.* It necessarily follows that the purpose of an appeal from the action of the mayor is to review the action taken and determine its legality. This may be accomplished by certiorari. Under the record in this case where the mayor acted by virtue of the power granted under the veterans' preference act, the sole remedy available to plaintiff was certiorari.

Other issues raised need not be determined on this appeal. The writ of mandamus issued by the circuit court is quashed and the case dismissed, without costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

PRATT v. VALLIQUETTE.

1. CORPORATIONS—MORTGAGES—STATUTES—CREDITORS.
   A mortgage given by a corporation without express statutory authority, to secure payment of individual debts of its officers or stockholders, is not enforceable against the rights of creditors.

2. SAME—CHATTEL MORTGAGES—ULTRA VIRES.
   A corporate chattel mortgage, given to secure the obligation of its individual stockholder, is *ultra vires* and void.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CORPORATE CHATTEL MORTGAGES.
   It is unnecessary to discuss whether or not chattel mortgage was void, either in whole or in part, under the bulk mortgage act, where the mortgage was *ultra vires* and void *ab initio* in its entirety (CL 1948, § 442.51 *et seq.*).

4. PARTIES — CHATTEL MORTGAGES — CORPORATIONS — TRUSTEE IN BANKRUPTCY.
   The trustee in bankruptcy of a corporation was the proper party to bring suit for restoration of possession of property of which defendants had taken possession pursuant to void chattel mortgage which had been executed by the corporation.

Appeal from Wayne; Smith (Raymond L.), J., presiding. Submitted October 9, 1953. (Docket No. 46, Calendar No. 45,887.) Decided December 29, 1953.

Bill by Harry C. Pratt, trustee in bankruptcy of Robert Simmons Company, a Michigan corporation,

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 13 Am Jur, Corporations § 833.
[1–3] Validity of obligation given by corporation for a personal debt of officer or stockholder. 47 ALR 78.
[4] 6 Am Jur (Rev Ed), Bankruptcy §§ 638, 869.

against Octave M. Valliquette and wife to have chattel mortgage declared null and void. Decree for plaintiff. Defendants appeal. Affirmed.

Arthur H. Rice (*Arthur M. Schueler,* of counsel), for plaintiff.

Dunbar Davis, for defendants.

BOYLES, J. Plaintiff is the trustee in bankruptcy of the assets of the Robert Simmons Company, a bankrupt corporation. Prior to January 3, 1950, the defendants owned half of the capital stock of the corporation and Robert Simmons owned the other half. At that time and prior to the adjudication in bankruptcy Robert Simmons bought the defendants' stock for $10,000, by paying $5,000 cash and giving the defendants a chattel mortgage on the merchandise and fixtures of the corporation, which was carrying on a general retail business. The chattel mortgage was signed by Robert Simmons as president and by his wife as secretary of the corporation.

The chattel mortgage remains unpaid. A few days prior to the adjudication in bankruptcy in 1952 the defendants, relying on a provision in the mortgage, took possession of certain merchandise and fixtures belonging to the corporation. The plaintiff, as trustee of the bankrupt estate, filed the instant bill of complaint in chancery to compel a return of the property and for a decree determining the chattel mortgage to be *ultra vires* and void. The trial judge held that the mortgage was void *ab initio* and decreed a return of the property. The defendants appeal.

The chattel mortgage was given to secure the personal debt of Robert Simmons. He purchased the stock for himself. The corporation was not involved in the transaction, and it is not claimed that the corporation received a benefit.

A mortgage given by a corporation without express statutory authority, to secure payment of individual debts of its officers or stockholders, is not enforceable against the rights of creditors. 13 Am Jur, Corporations, § 833. The instant situation is analogous to the giving of a corporate note for the obligation of an individual stockholder. Such acts are *ultra vires* and void. *McLellan* v. *Detroit File Works,* 56 Mich 579; *Merchants' National Bank of Chicago* v. *Detroit Knitting & Corset Works,* 68 Mich 620, 624.

Appellants' brief argues that the chattel mortgage should be held void only to a limited extent, relying on their interpretation of certain provisions in the bulk mortgage act.* At the same time, appellants concede that the mortgage "was not subject to the bulk mortgage act and hence compliance therewith was unnecessary." In view of our conclusion that the mortgage was *ultra vires* and void *ab initio* in its entirety, it is not necessary to discuss whether or not it was also void, either in whole or in part, under the bulk mortgage act.

The trustee is the proper party to bring the instant suit. The decree of the trial court is affirmed solely on the ground on which it was based, namely, that the mortgage ostensibly given by the corporation to secure the personal obligation of its president was *ultra vires* and void. Costs to appellee.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

* PA 1929, No 200, as amended by PA 1931, No 198 (CL 1948, § 442.51 *et seq.* [Stat Ann § 19.371 *et seq.*]).

WEERSING *v.* AIRSEAL INSULATING & ROOFING COMPANY.

WORKMEN'S COMPENSATION—ROOFING SALESMAN—DEVIATION FROM DIRECT LINE OF TRAVEL—ACCIDENT—IN COURSE OF EMPLOYMENT.

Roofing salesman who worked on a commission basis did not suffer injury in the course of his employment, where highway accident occurred en route to an eating place and while he was away from direct line of travel between last place he had called and next place he was to stop on business of the employer.

ADAMS and BUSHNELL, JJ., dissenting.

Appeal from Workmen's Compensation Commission. Submitted June 9, 1953. (Docket No. 37, Calendar No. 45,843.) Decided December 29, 1953.

James Weersing presented his claim for workmen's compensation against Airseal Insulating & Roofing Company, employer, and Auto-Owners Insurance Company, insurer. Award to plaintiff. Defendants appeal. Reversed.

Waalkes, Wierenga & Sevensma, for plaintiff.

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

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Workmen's Compensation §§ 222–228.

Injury to solicitor, collector, or outside salesman as arising out of and in the course of the employment. 29 ALR 120; 36 ALR 474.

Death or injury in course of traveling. 20 ALR 319; 49 ALR 454; 63 ALR 469; 100 ALR 1053.

Injury to employee while going to or from work during lunch hour. 141 ALR 862.

REID, J. Defendants appeal from an award by the workmen's compensation commission for personal injuries received by plaintiff in an automobile accident, at the time of which accident plaintiff claims he was in the employ of the defendant company (hereinafter referred to as defendant) and engaged in the business of the defendant.

Plaintiff had sold to his son the business of the defendant company and thereafter worked for defendant as the only salesman for the business. Plaintiff owned his own car and received no allowance for expenses in using his car. Plaintiff worked on a strict commission basis of 15 and 20%. He ordinarily worked 5 days a week.

On Friday evening, September 29, 1950, plaintiff's son came to plaintiff's house and said that he, the son, was going the next day to Ann Arbor and asked plaintiff to go on certain jobs on Saturday, September 30th. He gave plaintiff 2 cards, that is, the designation of 2 prospects to call on in Grandville, after which he was to go to a prospect at Jenison, and then to go to Black Lake at Holland where the defendant had started a job; plaintiff took along in the trunk of his car some more shingles for that job. The son told plaintiff after delivering the shingles to go to Mrs. Vanden Beldt's cottage at Cardou Beach to pick up some roofing felt if any had been left in the garage there, which was the termination of the directions given by the son to plaintiff for the day's activities, September 30th.

On Saturday, September 30th, after having had lunch at home, plaintiff accompanied by his wife left Grand Rapids and made 2 stops at Grandville. Neither of the 2 prospects were at home. Proceeding from Grandville on M–21, they stopped at Jenison where he made a call, then drove on M–21 to Holland, and made the call at the Black Lake job. Then plaintiff and his wife drove over to the cottage at Cardou

Beach, where plaintiff looked in and around the garage for a roll of felt roofing which he did not find.

After completing the stop at Cardou Beach, if the plaintiff and his wife by their conversation had not changed plaintiff's plans, plaintiff would then have returned by M–21 to Grandville to call again on the 2 prospects whom he had not found there earlier in the afternoon, but instead, plaintiff and his wife discussed having dinner; it was late in the afternoon and plaintiff's wife wanted to have a chicken dinner at the Holiday Inn at Pottawatamie, which is just east of Grand Haven and a distance of 18 miles north and east of the cottage at Cardou Beach. They left on the road for Pottawatamie and having traveled north 3 miles, plaintiff and his wife changed their minds about going to Pottawatamie. Plaintiff said: "You don't want chicken dinner; let's go and get a steak dinner at the Hub at Zeeland." He reminded his wife that he had obtained a chicken and they could have that the next day, Sunday, for their Sunday dinner. Accordingly, they again changed their plan and took a road which they had not before contemplated, and the accident happened on that road before they had reached M–21 on which, but for the accident, plaintiff would have resumed the course of his employment and gone to Grandville.

The workmen's compensation commission in making its award, among other things stated:

"His [plaintiff's] travel sometimes kept him on the road at meal times, and getting something to eat on those occasions was a necessary incident thereto. His work did not confine him to any particular route nor to any particular eating place."

The commission also considered in making its award that the employment was the dominant purpose of the plaintiff in making his trip upon the day in question. The commission found that the injuries

complained of arose out of and in the course of plaintiff's employment and made an award accordingly.

We think the commission was in error in considering that the injury occurred in the course of plaintiff's employment. If plaintiff on his return from the vicinity of Holland had intended merely to carry out the course of his employment, he would have returned by M–21 to Grandville. Instead, at the suggestion of his wife he made diversion from such direct route from one place where he was carrying out the terms of employment to the next place that he would go to in the course of such employment and went actually 3 or 4 miles distant in another direction at his wife's suggestion and for her enjoyment and had not returned to the direct line of travel in his employment when the accident in question in this case occurred.

Among many Michigan cases, see *Conklin* v. *Industrial Transport, Inc.,* 312 Mich 250; *Haggar* v. *Tanis,* 320 Mich 295; and the majority opinion in *Carner* v. *Sears, Roebuck & Company,* 337 Mich 219.

The award appealed from is vacated. Costs to appellants.

DETHMERS, C. J., and BUTZEL, CARR, and SHARPE, JJ., concurred with REID, J.

ADAMS, J. (*dissenting*). It is an accepted rule in relation to the workmen's compensation act, that a laborer, performing services off the employer's premises, who has left his regular route for personal reasons is not within the ambit of his employment until he has returned to that regular route at a point not more distant from his destination than the point of his departure. That rule should not be applied to the circumstances of this case. All rules are subject to exception and the facts here presented do not fit into the usual pattern.

Plaintiff was employed to sell his employer's products in an undefined area centered about Grand Rapids. No route was laid out for him nor schedule fixed. He had no prescribed hours of employment. He furnished his own transportation, paid his own expenses and received a commission only on those sales actually made. The conditions of his employment are not comparable to the customary situation where an employee with fixed income and definite hours of employment is directed to an established point of destination. Deviation from the regular route in such cases is obviously outside the intended scope of the employment.

In this case the only directive given to plaintiff by his employer on the day of the accident was to call on certain people. Two of the persons to be called upon were not at home in the afternoon and if they were to be seen that day, they had to be contacted in the evening. Plaintiff kept all of his other assignments of the day and then started for dinner in a direction away from Grandville, the area of his evening calls. After driving some 3 miles, he changed his mind and turned towards the Grandville area in order that he might be in that vicinity after the dinner hour. Regardless of whether he had temporarily interrupted his services to his employer or not, it seems clear that when he turned towards Grandville for the purpose of carrying out his intent to call on customers in that area, he was within the ambit of his employment as understood by both employee and employer. His reason for going in that direction was to serve his employer. His presence in the area where the accident happened, the fact of his being in an automobile at the time of the accident and the path that he was traveling were all brought about by the purposes of his employment. There was a clear and certain causal relation between the circumstances of the accident and his employment.

"An accident, to be compensable, must be one arising 'out of' as well as 'in the course of' the employment. *Appleford* v. *Kimmel,* 297 Mich 8. To arise 'out of' the employment the injury sustained must have a causal connection with the work to be performed; it must be one which follows as a natural incident to the employment, be connected with it, and not the result of a risk disassociated therefrom. See *Appleford* v. *Kimmel, supra; Dent* v. *Ford Motor Company,* 275 Mich 39; *Rucker* v. *Michigan Smelting & Refining Company,* 300 Mich 668." *Meehan* v. *Marion Manor Apartments,* 305 Mich 262.

To say that at the time of the accident he was not in the service of his employer because of a fixed and all-encompassing rule would bring about a result not intended by the act. Application of the general rule to employment of the type here presented cannot be justified in logic or right. If applied, the employee would at all times be required to travel the customary or generally used route from customer to customer. Otherwise, in the course of a normal working day he would experience a constant change of status from employment to unemployment and back again. A stop for a cup of coffee would suspend the relationship. Taking a chance acquaintance a short distance off route or purchasing a package of cigarettes would have the same effect. Such is not the intent of the law and surely the parties to the employment contract did not anticipate such a result.

The conditions of employment in this case distinguish it from those cases where the general rule has been applied.

" 'The principal issue in this case is whether plaintiff's injury arose out of and in the course of his employment. We have repeatedly held that the question of whether an injury can be said to have arisen out of and in the course of the employment depends upon the particular facts and circumstances of each

case. Under the statute (CL 1948, § 413.12 [Stat Ann 1949 Cum Supp § 17.186]), findings of fact by the workmen's compensation commission are, in the absence of fraud, conclusive, if supported by competent evidence.' *Tegels* v. *Kaiser-Frazer Corporation,* 329 Mich 84." *Carner* v. *Sears, Roebuck & Company,* 337 Mich 219, 225.

The plaintiff was within the ambit of his employment when the accident occurred.

" 'An injury is received "in the course of" employment, as that term is used in the workmen's compensation act, when it comes while the workman is doing the duty which he is employed to perform (CL 1929, § 8417, as amended by PA 1943, No 245)*.' " *Carner* v. *Sears, Roebuck & Company, supra,* 226.

The accident arose out of and in the course of his employment and plaintiff should be compensated. The award should be affirmed.

BUSHNELL, J., concurred with ADAMS, J.
BOYLES, J., did not sit.

* CL 1948, § 412.1 (Stat Ann 1950 Rev § 17.151).—REPORTER.

ALLEN v. STATE HIGHWAY COMMISSIONER.

1. MUNICIPAL CORPORATIONS—ORDINANCES—BURDEN OF PROOF.
   A party claiming an ordinance is arbitrary, unreasonable or discriminatory has the burden of so showing.

2. SAME—HIGHWAYS AND STREETS—STATE TRUNK LINE HIGHWAYS.
   The reasonable control of streets reserved to cities under the Constitution does not give them exclusive control, preventing the State from assuming any control over State trunk line highways running through cities (Const 1908, art 8, § 28).

3. SAME—REASONABLE CONTROL OF STREETS—CONSTRUCTION OF CONSTITUTION.
   The "reasonableness" of a city's control of its streets is not within the final determination of the city in all cases, but may be determined in accordance with the legislature's interpretation in some instances, provided such interpretation can be approved by the court (Const 1908, art 8, § 28).

4. CONSTITUTIONAL LAW—CONSTRUCTION.
   The legislative interpretation of a provision of the Constitution can give rise to a justiciable question.

5. SAME—COURTS—MUNICIPAL CORPORATIONS—CONTROL OF STREETS.
   The court would not ordinarily substitute its judgment for that of a city as to the control of its streets (Const 1908, art 8, § 28).

6. HIGHWAYS AND STREETS—STATE TRUNK LINE HIGHWAYS.
   A State assumes an obligation to the people of the State in general to see to it that a trunk line highway, which it

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations §§ 173, 177, 178.
[2, 3, 5, 8, 9] 37 Am Jur, Municipal Corporations § 314.
[6, 8, 9] 25 Am Jur, Highways § 254.
[7] 11 Am Jur, Constitutional Law §§ 96, 128.
[8, 9] 5 Am Jur, Automobiles § 58; 25 Am Jur, Highways § 211.
[10] 14 Am Jur, Costs § 91.

establishes and which includes a part located within the limits of a city, is so maintained and controlled as to be reasonably available for the flow of traffic (CL 1948, § 750.498; PA 1949, No 300, § 675 [d]).

7. STATUTES—PRESUMPTION OF CONSTITUTIONALITY.
Statutes are presumed to be constitutional.

8. HIGHWAYS AND STREETS—TRUNK LINE HIGHWAYS—STATE HIGHWAY COMMISSIONER—MUNICIPAL CORPORATIONS.
Statutes authorizing State highway commissioner and State police commissioner to place signs prohibiting parking of vehicles upon State trunk line highways even within city limits, when such action is found to be in the interest of public safety and convenience *held,* not in violation of provision of the Constitution giving cities the "reasonable" control of the streets within their limits (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675 [d]).

9. SAME—STATE OFFICERS—RESTRICTION OF PARKING ON STATE TRUNK LINE HIGHWAYS.
Order issued jointly by State highway commissioner and State police commissioner, which prohibited parking on a portion of a State trunk line highway within the limits of a city, issued pursuant to State statutes *held,* not invalid as in contravention of provision of the Constitution giving cities the reasonable control of their streets (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675 [d]).

10. COSTS—PUBLIC QUESTION—STATE TRUNK LINE HIGHWAYS WITHIN CITIES.
No costs are allowed in suit testing the validity of statutes empowering the State highway commissioner and the State police commissioner to restrict parking on portion of State trunk line highways located within the limits of cities, a public question being involved (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675 [d]).

Appeal from Ingham; Coash (Louis E.), J. Submitted October 8, 1953. (Docket No. 31, Calendar No. 45,731.) Decided December 29, 1953.

Bill by Robert Allen and others against Charles M. Ziegler, State Highway Commissioner, and Donald S. Leonard, Commissioner of the Michigan State

Police, to enjoin defendants from prohibiting parking of vehicles on a State trunk line highway within city limits of City of East Lansing. City of East Lansing intervenes as party plaintiff. Decree for plaintiffs. Defendants appeal. Reversed.

Joseph W. Planck, for plaintiffs.

Barnard Pierce, for intervening plaintiff.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara* and *Eugene F. Townsend,* Assistants Attorney General, for defendants.

Amici Curiae:

Frederick McGraw.

John C. Jacoby, General Counsel, Wayne Board of County Road Commissioners and County Road Association of Michigan.

REID, J. The individual plaintiffs filed the bill of complaint in this case to enjoin defendants from prohibiting parking of vehicles at the curb on the north half of US 16 between Charles street and Haslett street in East Lansing and from continuing to maintain "no parking" signs at such location along such street, and praying that CL 1948, § 750.498 (Stat Ann 1951 Cum Supp § 28.766) and PA 1949, No 300, § 675(d), as amended by PA 1951, No 47 (Stat Ann 1951 Cum Supp § 9.2375[d]) be declared unconstitutional and that a certain traffic order hereinafter set forth, dated May 3, 1951, be declared null and void. The city of East Lansing intervened as plaintiff. From a decree for plaintiffs, the defendants appeal.

This suit involves a difference between the State authorities and the city government of East Lansing co-operating with owners of lands abutting on US 16, over the control of the trunk line road through East Lansing, so far as concerns parking of vehicles along the north half of US 16 in East Lansing.

It is a matter of historical knowledge that from a period early in the history of Michigan there existed a wagon road known as Grand River road, from Detroit to the banks of the Grand river at what is now the city of Lansing. This highway known now as US 16 was a trunk line in fact from an early history of the State. East Lansing gave up control of Grand River avenue to the county road commission in 1924 as part of the county road system. Later the State highway department succeeded to the county road commission in control of the trunk line.

PA 1913, No 334, § 2, div 9 (CL 1948, § 250.2 [Stat Ann § 9.862]), provided for the establishment of the street or highway in question as a State reward trunk line highway.

Later enactments provided further as to this trunk line.

Subd (d) of PA 1949, No 300, § 675, as amended by PA 1951, No 47 (Stat Ann 1951 Cum Supp § 9.2375), is as follows:

"The State highway commissioner with respect to State trunk line highways and the county road commission with respect to county roads, acting jointly with the commissioner of the Michigan State police, may place signs prohibiting or restricting the stopping, standing, or parking of vehicles on any highway where in the opinion of said officials as determined by an engineering survey, such stopping, standing, or parking is dangerous to those using the highway or where the stopping, standing, or parking of vehicles would unduly interfere with the free

movement of traffic thereon. Such signs shall be official signs and no person shall stop, stand, or park any vehicle in violation of the restrictions stated on such signs. Such signs shall be installed only after a proper traffic order is filed with the county clerk."

CL 1948, § 750.498 is as follows:

"Upon request of any township board, county road commission, or the officials of any incorporated city or village, or upon their own initiative, the State highway commissioner and the commissioner of public safety, acting jointly may investigate or cause to be investigated the traffic conditions on any State trunk line highway within this State, and, if upon such investigation they shall find it in the interest of public safety and convenience, they may direct the said State highway commissioner, township board, county road commission, city or village officials, to erect and maintain, take down, regulate or control such parking, speed and traffic control signs, signals or devices as the said State highway commissioner and commissioner of public safety shall designate, and in default thereof, said State highway commissioner and commissioner of public safety shall be authorized to cause such designated signs, signals and devices to be erected and maintained, taken down, regulated or controlled, in the manner previously directed, and pay for same out of the highway fund designated. A public record of any and all such traffic signs, signals or devices so authorized shall be kept in the office of the State highway commissioner. Any person who shall, on any State trunk line highway in any township, city or village, fail to observe any parking, speed or traffic signs, signals or devices authorized as aforesaid, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than 100 dollars or by imprisonment in the county jail for not more than 10 days or

by both such fine and imprisonment in the discretion of the court."

Exhibit A of the record in this case is as follows:

"Michigan State Highway Department
Charles M. Ziegler
State Highway Commissioner

Michigan State Police
Donald S. Leonard
Commissioner

"State of Michigan

"State Seal

"6. County Clerk

"Traffic Control Order

"Order No. P33–183–51 Effective Date June 1, 1951.

"In accordance with law we have jointly caused to be investigated traffic conditions on State trunk line highway US 16 in the city of East Lansing in Ingham county, and in the interest of public safety and convenience hereby direct the officials of said MICHIGAN STATE HIGHWAY DEPARTMENT, MICHIGAN STATE POLICE, city of East Lansing and Ingham county to erect, maintain and enforce sufficient and suitable signs upon and along said highway prohibiting traffic from parking at any time within the right of way of the south half of State trunk line highway US 16 between the westerly limit (Coolidge road) of the city of East Lansing and the easterly limit (Milford street) at said city; parking at any time within the right of way of the north half of State trunk line highway US 16 between the said westerly limit and a point 264 feet west of Evergreen avenue; and parking at any time within the right of way of the north half of State trunk line highway US 16 between M.A.C. avenue and the said easterly limit of said city.

"It is directed that this order be filed in the office of the State highway commissioner of the State of

Michigan and a copy thereof in the office of the commissioner of the Michigan State police.

"DONALD S. LEONARD
Commissioner of the Michigan
State Police

"Dated May 3, 1951

"CHARLES M. ZIEGLER
State Highway Commissioner
of the State of Michigan
"Dated May 3, 1951"

In *Bowers* v. *City of Muskegon,* 305 Mich 676, we say at page 685:

"The failure of plaintiffs to show that the ordinance is arbitrary, unreasonable, discriminatory or one for the purpose of raising revenue compels us to affirm the trial court in dismissing plaintiffs' bill of complaint."

This was a case where the right of the city to erect parking meters on streets not spoken of as trunk line streets, was questioned. This case was decided before the passage of the statutes so far as affects installation of parking meters and placing of signs controlling traffic on State trunk lines is concerned, and before the making of the order complained of in the instant case.

Plaintiff city relies upon Const 1908, art 8, §§ 27 and 28, which are as follows:

"Sec. 27. The legislature shall not vacate nor alter any road laid out by commissioners of highways, or any street, alley or public ground in any city or village or in any recorded town plat.

"Sec. 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without

the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

Traffic ordinance No 26 was adopted by the plaintiff city, October 6, 1947. By its terms, 1-hour parking is permitted in front of (in addition to certain other properties on US 16) the places of business of the individual plaintiffs. The individual plaintiffs gave testimony that their business suffered by reason of the termination of the 1-hour parking privilege.

J. Carl McMonagle, director of planning and traffic for the State highway department, testified:

"The reason we made our study is that we had a problem of trying to move some—well, it ranges from 20,000 vehicles down around Bogue street to 30,000 vehicles up around the junction of M–43 and US–16, through 28 feet of pavement on one side, and 28 to 34 on the other. Now, in 1946 the Michigan State highway department and the city of East Lansing removed the parking from the south side to give us more capacity. What we are trying to do is only to get more capacity on US–16 through the city of East Lansing. We are trying to move on the north side, say, an average of around 12,000 vehicles a day, 12 to 14 thousand vehicles a day. * * *

"I sent a crew of men into the field with automatic traffic recorders and these traffic recorders are placed down and left for a period of time that we might designate necessary. In this particular survey it was for one full week. We take traffic counts and we make manual turning movements. We send men into the field to actually manually check the turning movements. That is done under the direction of a

field engineer who takes his orders from the Lansing office. The way we operate he might get some orders from me or my assistant but the order of the survey was directed definitely under my own personal direction. After these counts are made they are brought back into the office, tabulated and analyzed and then made up into charts and every one is entirely checked and finally submitted to me as a final report. The charts were made by draftsmen after the data was brought in by the field men, and an analysis is made by a section in the office under Mr. Eisenach's direction, and he brings this final report to me."

Mr. McMonagle further testified:

"*Q.* Speaking of this particular situation right here on the portion of the street in question in East Lansing, what is your opinion with reference to the problem and its connection with public safety and convenience there, I mean the use of the highway?
* * *

"*A.* Well, my opinion on that is that if we were to build that highway today carrying 14,000 vehicles, we would have to require 4 lanes of traffic. Now, we are trying to put 14,000 vehicles every day through a very meager 2 lanes, and my opinion is that when you do that you are creating a hazardous condition that is bound to result in maybe not serious accidents but in minor accidents, property damage, and a congestion that can only be harmful not only to the moving traffic but to business itself."

"The reasonable control of streets reserved to cities under the Constitution (article 8, § 28) does not give them exclusive control, preventing the State from assuming any control over State trunk line highways running through cities." *Allen* v. *Rogers* (syllabus 5), 246 Mich 501.

The right to reasonable control of their streets is not a gift of an arbitrary prerogative to the cities, villages and townships. The reasonableness of the

city's control of its streets is not to be within the final determination by the city in all cases, for that in practical effect could erase the word "reasonable" from the constitutional provision. The reasonableness may be determined in accordance with the State legislature's interpretation in some instances provided that such interpretation can be approved by the court. Interpretation can give rise to a justiciable question. The court would not ordinarily substitute its judgment for that of the city as to the control of the streets. However, in this case, we have a conflict between the city and abutting property owners on the one hand, and the State legislature, the State highway commissioner and State commissioner of police on the other hand. The State by the establishment of a trunk line highway which includes the street in question in East Lansing, thereby assumed an obligation to the people of the State in general to see to it that the street in question, together with the trunk line in general, is so maintained and controlled as to be reasonably available for the flow of traffic.

The State legislature, by the statutes complained of, has interpreted the word "reasonable" to indicate such a reservation of the control of streets that an order such as that of May 3, 1951, could not well be reasonably opposed by the city. We should presume the statutes constitutional and as applied to the undisputed facts in this case, both statutes seem not unconstitutional, and we so determine. The statutes being constitutional, the order of May 3, 1951, is, under the facts shown in the record, a proper order and we decline to determine that it is void. We uphold that order.

The decree appealed from is reversed. A decree will be entered in accordance with this opinion. No costs, a question of public importance being involved.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, and BOYLES, JJ., concurred with REID, J.

SHARPE, J. (*concurring*). I concur in the result of Mr. Justice REID's opinion. Article 8, § 28, of the Michigan Constitution (1908) provides in part as follows:

"The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

Under the above section of the Michigan Constitution we have held that a municipality has the power to exercise reasonable control of the streets, alleys and public places within its own limits. See *North Star Line, Inc.,* v. *City of Grand Rapids,* 259 Mich 654. However, that part of US 16 in controversy here became a part of Ingham county road system on September 10, 1924, and on the same date it was established as a State trunk line highway. By such action US 16 not only was a city street but also a part of the State highway systems. I note that the city of East Lansing on September 10, 1924, adopted a resolution, a copy of which reads as follows:

"Resolution by Alderman Hallman. Resolved, that the common council of the city of East Lansing, Ingham county, Michigan hereby consents, for and on behalf of said municipality, that the board of county road commissioners of said county may take over as a part of the county road system the following described streets and parts of streets: Grand River avenue, beginning at its junction with Michigan avenue east to the east city limits, known as Project FA–88–C–2. Resolution adopted: Yeas, 3; Nays, none." (The project referred to was a Federal aid project.)

Under the above resolution the city of East Lansing released and surrendered its rights to control

parking in that part of US 16 involved in this case. It follows that in such case CL 1948, § 750.498 (Stat Ann 1951 Cum Supp § 28.766) and PA 1949, No 300, § 675 (d), as amended by PA 1951, No 47 (Stat Ann 1951 Cum Supp § 9.2375 [d]) of the Michigan vehicle code is not unconstitutional.

BOYLES, J., concurred with SHARPE, J.

HAVENS *v.* DETROIT MOTION PICTURE PROJECTIONISTS, INTERNATIONAL ALLIANCE, THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA.

LABOR RELATIONS—MOTION PICTURE PROJECTIONISTS—AFFILIATE UNION MEMBER—PRIORITIES—EQUALLY DIVIDED COURT.

Plaintiff, a member of an affiliate union, who was replaced as a projectionist in a theater by a member of the local in whose jurisdiction the theater was located *held,* not entitled to complain of such action by the local union by an equally divided court.

Appeal from Wayne; Maher (Thomas F.), J. Submitted June 10, 1953. (Docket No. 20, Calendar No. 45,595.) Decided December 29, 1953.

Bill by Louis G. Havens against Local 199 Detroit Motion Pictures Projectionists, International Alliance, Theatrical Stage Employees and Motion

---

REFERENCES FOR POINTS IN HEADNOTES

31 Am Jur, Labor §§ 55, 66, 67.

Controversy within labor union regarding seniority rights as subject of litigation in civil courts. 142 ALR 1055.

Picture Machine Operators of the United States and Canada, and others to restrain interference with plaintiff's employment. Decree for defendants. Plaintiff appeals. Affirmed by an equally divided court.

Travis & Warren, for plaintiff.

Leonard Simons (*Chris M. Youngjohn,* of counsel), for defendants.

ADAMS, J. (*for affirmance*). Louis G. Havens, plaintiff and appellant, is a moving picture projectionist and a member of Local No. 738 (Allegan) of the International Alliance, Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada. For several years he was employed in Detroit which is within the jurisdiction of Local 199 of the International Alliance, 1 of the defendants and appellees (hereinafter referred to as the local). Defendants Kinsora, Kennedy, Sullivan and Ruben are officers of the local.

The local has a contract with substantially all of the theaters in the Detroit area to supply them exclusively with moving picture projectionists. The contract also establishes hours of employment and pay rates. By assignment of the local, the plaintiff was employed by Wade E. Allen, defendant, owner and operator of the Fine Arts Theatre, until December, 1948, when he was removed from his job by the local. This action in chancery was brought to restrain the defendants from interfering with plaintiff's employment and for damages for loss of earnings. After hearing, the trial court concluded that the plaintiff had failed to prove a cause of action and dismissed the bill of complaint. Plaintiff appeals.

Plaintiff was formerly a resident of Allegan, Michigan, and worked in a theater in that city. While so

employed, he helped to organize Local 738 of the International Alliance, Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, and became a member of that local. Later he was temporarily employed in Battle Creek and from there went to the city of Detroit in the year 1942 where he sought employment through Local 199.

By requirement of the International Alliance, the local gave priority in available employment to its members. If all members had employment, members of other locals of the International Alliance were assigned to openings and, finally, if neither members nor members of other locals were available, then jobs could be assigned to nonmembers. Under this provision of the International Alliance constitution, plaintiff was assigned jobs from time to time in a number of theaters in the Detroit area. He estimates that he worked at more than 180 theaters during the 6 years following his arrival in Detroit. During that period he paid dues to his local union in Allegan and work assessments to Local 199 at the same rate required of members.

In 1945 he obtained a job at the Fine Arts Theatre in Detroit and continued to work there without interruption until the early part of December, 1948. His earnings were good and it is conceded that his services were in every respect satisfactory to his employer.

In the meantime and during the year 1945, the plaintiff made application for membership in the Detroit local and deposited the required membership fee. The local took no action on his application and, becoming impatient, plaintiff wrote to the president of the International Alliance complaining of the local's failure to act. He requested, however, that the letter be kept confidential and for that reason nothing came of the letter. Later he contacted reporters

of 2 Detroit newspapers, suggested to them that the local was not being properly administered, and urged them to investigate. Apparently the matter was of little interest to the newspapers and it was given no publicity.

On October 25, 1948, he again wrote to the president of the International Alliance complaining of the local's delay in acting on his application for membership. In the letter he said that he was one of a sizable group who had been denied membership in the organization, and concluded with this statement:

"We do not want to turn to other sources to gain our rights but will in case you cannot see fit to correct this situation."

A copy of his letter was transmitted to the local and shortly thereafter the plaintiff was called to appear before an investigating committee that had been directed to act on his application for membership. The plaintiff met with the committee and was questioned briefly with reference to the letter written to the president of the International Alliance. After the meeting the committee recommended that his application be rejected, having in mind, as they later testified, the letter written by the plaintiff to the International Alliance president, his efforts to have the union investigated by the local newspapers, and a letter written by the plaintiff in 1942 to an officer of the International Alliance accusing another official of improper conduct. The recommendation of the investigating committee was promptly presented to a meeting of the local attended by 93 members and upon motion, plaintiff's application was unanimously rejected.

Following the rejection of the application, a motion was adopted to request Local 738 to recall the plaintiff from the jurisdiction of Local 199. Approximately a week later by direction of the local, plain-

tiff was removed from his employment at the Fine Arts Theatre and a member of Local 199 replaced him as projectionist. Two days after that, plaintiff was officially advised by letter of the rejection of his application and his membership fee deposit and working card were returned to him. A working card is issued to a member of a local and must be deposited with the local that has jurisdiction in the area where the member is then working. Without the card in the files of the local union, plaintiff was not eligible for employment. The request to Local 738 that the plaintiff be withdrawn from the jurisdiction of the Detroit local was forwarded to Allegan but that local took no action.

Plaintiff was offered employment within the jurisdiction of his own local in Allegan. He did not accept it. Neither did he ask for further employment as a projectionist in the Detroit area but almost immediately instituted this suit to test the right of the local to remove him from employment at the Fine Arts Theatre. In his bill of complaint he asked that the local and its officers be restrained from denying to him the rights and privileges of members of the local and from interfering with his employment at the Fine Arts Theatre. He further asked that the owner of the Fine Arts Theatre be restrained from denying him employment and that the agreement between the theater and the local be declared null and void. In addition, he asked for money damages for the loss sustained through his removal from employment.

It is the plaintiff's principal contention that the local is a closed membership union in that it arbitrarily refuses to admit new members and that when it entered into an agreement with the theaters in the Detroit area that they would employ as projectionists only those persons assigned by the local, it took from plaintiff and others in a like position the right

to follow their chosen occupation. In other words, plaintiff says that the defendant local has taken from him the privilege of employment in Detroit by combining a closed shop with a closed union.

It is conceded by the parties that a closed shop for moving picture projectionists does exist in the Detroit area. With some 202 theaters in operation as of the time of trial, only 3 theaters were not under contract with the local, and the record indicates that those 3 were probably owner-operated. We think it undisputed, therefore, that no one can obtain employment in the Detroit area as a moving picture projectionist unless he is assigned to that work by the local.

A person's employment or occupation is a property right which is entitled to protection (*Baldwin* v. *Escanaba Liquor Dealers' Association,* 165 Mich 98) and "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure." *Truax* v. *Raich,* 239 US 33 (36 S Ct 7, 60 L ed 131, LRA1916D, 545, Ann Cas 1917B, 283).

If the local has arbitrarily taken from the plaintiff his right to employment through the implement of a closed union, then it has taken from the plaintiff one of his assured and fundamental rights as a citizen.

"If the union can force a closed shop upon all, or almost all, of the employers of an industry or area, the right to employment will depend upon union membership; and if union membership be refused the workman, he is more totally excluded from the opportunity to labor than he was before union recognition. This problem has been perceived many times by our courts." *Carroll* v. *Local 269, International Brotherhood of Electrical Workers,* 133 NJ Eq 144 (31 A2d 223).

It becomes necessary, therefore, to determine whether or not the defendant local is a closed union; a closed union being one which has no reasonable standards or qualifications for membership and which, without cause, arbitrarily denies admission to anyone distasteful to the membership.

The constitution and bylaws of the defendant local set forth the qualifications of a member. He must be a male person at least 21 years of age who has been employed as a moving picture projectionist for not less than 2 years. The constitution of the International Alliance, in addition, requires that each member be a citizen of the United States or Canada and not affiliated with any organization having for its aim or purpose the overthrow of government by force. Upon application for admission to the union, the applicant must answer correctly at least 75% of the questions put to him touching upon his practical and technical qualifications as a moving picture projectionist. The examining board must also inquire into his character. Having completed their inquiry, the board then reports with recommendations to the membership and the application must be approved by at least two-thirds of the members voting at a regularly called union meeting.

Among the rules of conduct set forth in the special laws of the International Alliance are the following:

"(3) No member or local union shall disobey or fail to comply with, or engage in any action or conduct detrimental to, the principles, doctrines, purposes, aims, programs, interests, laws, determinations, decisions, rulings, directives, orders or mandates of this Alliance or any of its duly constituted officers.

"(4) No member or local union shall slander, libel, defame or circulate scurrilous statements concerning this Alliance or any of its officers or any of its local unions or officers thereof."

While it is conceded that the plaintiff is qualified for his employment as a projectionist, it is equally clear that he violated the tenets of the International Alliance and of the local to which he seeks membership when he contacted 2 local newspapers suggesting improprieties in the administration of the union, urging an investigation and the publicizing of its conduct. He was then engaging in action detrimental to the interests of the organization. When he wrote to an officer of another local accusing a union officer of misconduct, which from the record appears to have been unjustified, he was guilty of circulating scurrilous statements concerning an officer of the union. When he wrote to the president of the International Alliance stating that he would have to turn to sources outside of the union to gain his rights, he indicated an intention to act contrary to article 17, § 7, International Alliance constitution, which provides:

"Section 7. Exhausting internal remedies.

"The members of this Alliance further consent to be disciplined in the manner provided by this constitution and bylaws, and under no circumstances to resort to the civil courts until all the remedies therein provided shall have been exhausted."

All of these circumstances were known and considered by the investigating committee before they acted upon plaintiff's application for membership. Any one of them would have justified expulsion had plaintiff already been a member of the organization. We think it follows that the defendant local, having given consideration to the plaintiff's previous conduct in relation to the International Alliance, was justified in finding him unfit for membership in the local and in recommending that his application be denied.

A union has the right to set up reasonable rules and regulations for the conduct of its members and to expect compliance. Without such rules, a union would not have the unity essential to the purposes for which it exists. It would be unable to attain lawful labor objectives. A local owes the duty to its membership to insist that each member adhere to appropriate rules of conduct established by bylaw and constitution. This right to a reasonable control of its membership and the privilege of excluding those who refuse to abide by such rules have been recognized in the courts of other States where the right to a closed union has been in issue.

"Defendants argue that a union should not be compelled to admit all persons to membership, because some of such persons may have interests inimical to the union and may destroy it from within. The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union (*Brown* v. *Lehman* [1940], 141 Pa Super 467 [15 A2d 513]; see 4 Restatement, Torts, comment b to § 810) affords it an effective remedy against such persons." *James* v. *Marinship Corporation,* 25 Cal2d 721, 736 (155 P2d 329, 160 ALR 900).

"Whether or not a labor organization is arbitrarily closed to a particular worker depends, of course, upon the facts of each case, and it is plaintiffs' burden to prove that they are entitled to membership, that membership is closed to them, and that it is arbitrarily closed, since these matters are essential parts of their cause of action under the *Marinship Case.* * * * As recognized in the *Marinship Case,* a union is not compelled to admit all persons as a condition to maintaining closed shop agreements, and it has the 'right * * * to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union.' * * * Clearly a union cannot be said to have acted arbitrarily in withholding

membership from an applicant who does not meet all reasonable requirements or qualifications prescribed by the union as conditions of membership." *Dotson* v. *International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators,* 34 Cal 2d 362, 369 (210 P2d 5).

Under the circumstances of this case, we are of the opinion that defendant local did not act arbitrarily in denying plaintiff's application for membership and that the local has not been shown to be a closed union.

The further question is presented as to whether plaintiff was improperly removed by the defendant local from his position as a projectionist in the Fine Arts Theatre. Article 19, § 16, of the International Alliance constitution provides:

"Section 16. Employment of members.

"Affiliated locals are required to insist that all positions within their jurisdiction be filled by their own members. In the event of the local membership being unable to care for all vacancies, preference must be given to members of sister locals affiliated with this Alliance. Not until the available members of the resident and out-of-town locals have been employed shall the engagement of nonmembers be permitted. Any local failing to comply with the requirements of this section shall be fined not less than $50 for each offense."

This section gives priority of right to employment, comparable to seniority, to members of the local having jurisdiction in the area. Plaintiff was replaced in his employment by a member of Local 199.

"By his membership, the plaintiff consented to the manner in which his claim of seniority rights should be disposed of, and he is bound thereby." *Ryan* v. *New York Central Railroad Co.,* 267 Mich 202, 209.

Plaintiff, having agreed to abide by the constitution of the International Alliance, cannot now com-

plain that the job to which he had been assigned was given to a member of Local 199. His removal from that particular job, however, did not preclude him from the right as a member of an out-of-town local of the International Alliance to demand another position in the Detroit area. At the time there were some 33 nonmembers of the union employed as projectionists and plaintiff, under the provisions of the above-quoted section of the International Alliance constitution, had the right to take the job then held by any of the nonunion members. Plaintiff, however, failed to request such employment. He testified that he made no effort to obtain further employment as a projectionist in either the Detroit or Allegan areas but immediately brought this action.

Had he requested employment from the local and been refused, he would then have had a grievance against the local and would have been entitled, under union rules, to present that grievance to a union tribunal for consideration and decision. If aggrieved by the decision of that tribunal, he was entitled to an appeal under procedure set up in the union constitution. As already stated, in becoming a member of the International Alliance, plaintiff consented to be disciplined in the manner provided in the constitution and bylaws of the union "and under no circumstances to resort to the civil courts until all the remedies therein provided shall have been exhausted."

"Plaintiffs as members of a voluntary association, under the circumstances of this case, were bound by the provisions of the union's constitution and general laws." *Mayo* v. *Great Lakes Greyhound Lines,* 333 Mich 205, 214.

We are of the opinion, therefore, that defendant local was justified under its constitution and bylaws in removing plaintiff from his employment at the

Fine Arts Theatre and replacing him with a local member. Further, that if plaintiff then desired employment as a projectionist in the Detroit area, it was incumbent upon him to demand such employment from the local. Failing to make such demand, he cannot now say that he has been denied employment in violation of his rights as a member of the International Alliance. It follows that because he made no demand for such employment, he is not entitled to damages for loss of earnings.

The decree of the lower court is affirmed, costs to appellees.

DETHMERS, C. J., CARR and SHARPE, JJ., concurred with ADAMS, J.

BUTZEL, J. (*for reversal*). Almost all of the essential facts of this case are set forth in the opinion of Mr. Justice ADAMS. In showing my reasons for reaching a different conclusion than he did, I find it necessary to repeat and also to add some of the more pertinent facts that lead me to believe that the defendant local was effectuating an arbitrarily closed union policy.

Defendant Wade E. Allen, who also does business as the Fine Arts Theatre, apparently had nothing to do with plaintiff's denial of membership in the Detroit local and was not responsible for plaintiff losing his job at the Fine Arts Theatre. Under his contract with the union, defendant Allen had to obey the orders of the defendant local and replace plaintiff with another man selected by the union. Other defendants, and particularly Local 199, insist that they acted within their rights in whatever they did in refusing membership to plaintiff and returning his card. They claim plaintiff had previous difficulties within an affiliated union many years prior to his employment in the Detroit area. Plaintiff claims that his past actions were not improper in view of

the circumstances. The trial judge paid scant attention to these complaints of what happened at least 6 years prior to the time when plaintiff was denied the right to make a living at his regular trade in the Detroit area.

Defendants complain that plaintiff, after a long period of time elapsed in which he failed to gain membership, contacted 2 newspapermen in Detroit probably with the expectation that they would write of how unfairly he was being treated in his attempt to become a member of the local union. Aside from 1 article that is not included in the record there was no publicity as a result of plaintiff's acts. In his desperation plaintiff also wrote to Congressman Hartley to ascertain whether he could obtain any relief under the Taft-Hartley Act. Plaintiff also wrote 2 letters to the International Alliance president's office complaining of defendant local's inaction in regard to his application.

There can be no question of the right of the defendant Local 199 to enter into a closed shop agreement with employers. The defendant local cannot, however, in the manner herein indicated, prevent plaintiff as a loyal citizen from earning a living at a trade in which he is thoroughly skilled and experienced. *James* v. *Marinship Corporation,* 25 Cal2d 721 (155 P2d 329, 160 ALR 900); *Seligman* v. *Toledo Moving Pictures Operators Union, Local 228,* 88 Ohio App 137 (98 NE2d 54); *Dotson* v. *International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators, Local 162,* 34 Cal2d 362 (210 P2d 5).

Plaintiff joined the International Alliance in 1940 as a charter member of Local 738 of Allegan, Michigan. In 1942, he sought employment in the Detroit area under the jurisdiction of Local 199, defendant. From 1942 to 1945, he worked at irregular jobs relieving members of the local who were ill, on vaca-

tion, or otherwise unavailable for their regular work. This type of work constitutes the "extra board" which consists of a reservoir of men who are more or less substitutes for regular projectionists. Plaintiff worked these irregular jobs for 3 years without complaint. In 1945 he obtained a steady operator's position at the Fine Arts Theatre in Detroit, Michigan, and continued as a regular projectionist at that theater until removed by the defendant local in December, 1948. During the period 1945 to 1948 he also worked extra jobs, when called by the union, without complaint even though the jobs on the "extra board" paid less, involved poorer working conditions, and necessitated an understanding of various types of projection equipment. During the period of employment, 1942 to 1948, plaintiff performed his work skillfully and satisfactorily and was in all respects a good worker and union man. From time to time he assisted in training apprentices and regular members in the operation of projection equipment. During all this period he paid 1–1/2 per cent of his wages to Local 199, as provided by their rules.

It seems clear that plaintiff learned during this period that the established policy of the defendant local prevented members of affiliated locals from transferring membership into the defendant local. The record shows that such was the policy. Therefore, in 1945, plaintiff submitted an application in proper form for a full regular membership in defendant local. This application was submitted with the required fee of $200. Plaintiff had complied with article 21, § 1, of the International Alliance constitution which requires that an applicant be a resident for 18 months within the jurisdiction of the local to which the application is tendered. There seems to be no doubt that plaintiff at this time had complied with the other essential qualifications for membership. At the time of submitting his application, plaintiff had

worked for a period of over 3 years continuously within the jurisdiction of defendant local. This is significant in view of the policy of the International Alliance as expressed in article 19, § 26, of the International Alliance constitution, which reads:

"No local shall be permitted to maintain a 'Junior' or 'Apprentice' upon its rolls in such status for a period of more than 3 years. At the expiration of such time such 'Apprentice' or 'Junior' member shall be balloted upon by the membership of the local union in the manner herein provided, and shall become a full regular member of this Alliance, or shall cease to have any connection therewith, dependent upon the action of the membership of the local union."

In view of this section of the constitution requiring locals of the Alliance to act upon the membership status of a "junior" or "apprentice" immediately at the end of a 3-year period, obviously in order to prevent a continuing and indefinite period of inferior class membership, the plaintiff was justified in expecting an early and, in view of his record within the defendant local, favorable response to his application.

Plaintiff's status in defendant local was that of an inferior associate. His membership in an affiliated local benefited him in only 1 respect, he was assigned work in preference to nonmembers working under the jurisdiction of defendant local. There was little hope of transferring his membership into defendant local because, as defendant Ruben testified, only 1 transfer had been effected in many years and that occurred in 1929. Plaintiff was clearly in an inferior class within defendant local with only an expectation that full membership would some day be accorded him.

Defendant local had not acted upon plaintiff's membership application in 1946, and in fact no action was taken until December, 1948. In 1946, therefore,

plaintiff already was in the position of having met basically all qualifications and prerequisites for membership but no action was taken in response to his application. His position was, indeed, a delicate one. He had the difficult choice of remaining silent and continuing indefinitely in his subservient status, or speaking out and thus supplying the defendant local with a pretext for rejecting his application on the basis of "conduct unbecoming a member" or "trouble making." During this period plaintiff's resentment at not being made a full member began to grow. This resentment was no doubt intensified by seeing others, some of whom plaintiff had trained, gain full membership and acquire seniority rights. In November, 1946, he wrote the first of 2 letters to the International Alliance president complaining of defendant local's failure to grant him membership. It was during this period that plaintiff contacted the 2 Detroit newspapermen concerning the defendant local's membership policies. In October, 1948, plaintiff wrote a second letter to the International Alliance president protesting the inaction of defendant local in regard to his membership application. Both replies from the president's office stressed the autonomy of each local over admitting or accepting transfer of new members. These replies were in conformity with article 2, § 4, of the International Alliance constitution, which provides:

"Each affiliated local union, subject to the laws of this Alliance shall exercise full and complete control over its own membership and affairs. This provision shall not be construed to confer upon local unions the power to enact laws inconsistent with any portion of this constitution and bylaws."

In view of the constitutional provisions of the International Alliance, the letters received by plaintiff from the president's office, and the admissions by

defendants in their answers to plaintiff's bill of complaint, it is clear that defendant local claimed the authority to exclude any one from membership, whether justifiably or arbitrarily, and to designate an applicant as acceptable or undesirable, and that such designation was completely within the power and control of defendant local. In long delaying action upon plaintiff's application and in finally rejecting his application for membership, defendant local was effectuating an arbitrarily closed union policy. Plaintiff was qualified in all respects for membership in the local and had worked more than a reasonable period within its jurisdiction. The requirement that applicant be deemed a person desirable for membership within the local was beyond the objective attainment of plaintiff. This bar was the means by which defendant local claimed the power to arbitrarily reject a fully qualified applicant. The local was not a social or golf club, or a secret fraternal organization.

Plaintiff as a member of an affiliated local had worked more than a reasonable period within the jurisdiction of defendant local. He had performed all reasonable requirements for membership. He had been a resident for 18 months within the local's territory; he had demonstrated his skill as a projectionist and his work was satisfactory to his employers; he had paid all proper assessments; he had trained other members and apprentices; he had worked the less desirable jobs for 3 years and periodically thereafter, at the union's request, while holding a steady job; his honesty and loyalty were unquestioned; his application was in proper form and submitted with the full required fee of $200, which the local deposited but subsequently returned. Plaintiff's resentment at not being made a full member is directly attributable to defendant local's membership policy. If apprentices were entitled to action on membership applications at the end of 3 years, plaintiff, working

in a somewhat comparable status within the defendant local, should have been entitled to equivalent treatment. Defendant local, by pursuing this dilatory policy in regard to plaintiff's application, evidenced an intent to exercise its control over membership in an arbitrary manner. Defendant local admits this arbitrary power to accept or reject an applicant in paragraph 6 of its answer which asserts:

"A favorable vote of at least two-thirds of its members being requisite to admission of any person, however qualified, to membership in such local."

In the case of *James* v. *Marinship Corporation, supra,* 731, the supreme court of California, in declaring the illegality of the combination of a closed shop and a closed union, said:

"In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed-shop agreements and other forms of collective-labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."

In *Seligman* v. *Toledo Moving Pictures Operators Union, Local 228, supra,* a case similar to the present one, the Ohio court stated:

"The right to labor, to follow a chosen trade or occupation, and to earn a livelihood for oneself and those dependent on him, is a property right within the benign protection of the bill of rights of the Ohio Constitution, and of the Constitution of the United

States, and the invasion of that right is a legal wrong for which the law provides a remedy.

"In the instant case, the action taken by the local union, depriving plaintiff of his right to work and have employment in the field where he is trained and learned through years of labor, is arbitrary, unreasonable, violative of plaintiff's constitutional rights and contrary to public policy."

In *Gompers* v. *Bucks Stove & Range Company*, 221 US 418, 439 (31 S Ct 492, 55 L ed 797, 34 LRA NS 874), Mr. Justice Lamar stated:

"Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such an appeal is made it is the duty of government to protect the one against the many as well as the many against the one."

It is admitted that unions must have, as a means of self-protection, the right to impose reasonable requirements and qualifications for admission to membership. As stated in *James* v. *Marinship Corporation, supra:*

"Defendants argue that a union should not be compelled to admit all persons to membership, be-

cause some of such persons may have interests inimical to the union and may destroy it from within. The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union * * * affords it an effective remedy against such persons."

But reasonable regulations and qualifications, of necessity embrace admission into the union within reasonable time. Plaintiff is not an apprentice or beginner at his trade; it is conceded that he is a skilled projectionist.

Following the submission of his membership application, plaintiff waited an additional 15 months and then wrote the first letter to the International Alliance president. This was the first manifestation of plaintiff's resentment at the delaying policy carried on by the defendant local. Two years later defendant local decided to give plaintiff "action." At this time plaintiff's resentment at the dilatory policy of defendant local was apparent, and the result of the "action" was evidently predetermined by plaintiff's failure to acquiesce in the local's admission policy. A membership investigating committee briefly interviewed plaintiff. Although few questions were asked, most of the questions pertained to the letters plaintiff had written to the International Alliance president's office. Following this interview, the committee recommended that plaintiff's application be rejected. This recommendation was read during a union meeting that same evening. By voice vote of the 93 members present out of a total membership of 310, plaintiff's application was rejected. This vote, *viva voce,* rather than by ballot as required by the union laws is indicative of the abrupt manner in which plaintiff's application was finally rejected.

The facts set forth above indicate that a discriminatory admission policy prevailed within the de-

fendant local. The action of defendant local in denying membership to plaintiff even though he had complied with the reasonable regulations and qualifications imposed by the union justified the plaintiff in resorting to the courts to protect his right to work.

"A person's occupation or calling, by means of which he earns a livelihood and endeavors to better his condition, and to provide for and support himself and those dependent upon him is property within the meaning of the law, and entitled to protection as such." *Baldwin* v. *Escanaba Liquor Dealers' Association,* 165 Mich 98, 113.

"As a part of the right of acquiring property, there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. It makes little difference whether the right which underlies such contracts of the latter sort is called a personal right or a property right." *Brennan* v. *United Hatters of North America, Local 17,* 73 NJL 729, 742 (65 A 165).

In *Truax* v. *Raich,* 239 US 33, 41 (36 S Ct 7, 60 L ed 131), Mr. Justice Hughes stated:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure."

The New Jersey courts have stated:

"It is not inappropriate, however, to remark that the right to earn a livelihood is a property right which is guaranteed in our country by the Fifth and Fourteenth Amendments of the Federal Constitution, and by the State Constitution." *Carroll* v. *Local 269, International Brotherhood of Electrical Workers,* 133 NJ Eq 144 (31 A2d 223) following *Cameron* v. *International Alliance of Theatrical*

Stage Employes and Moving Picture Operators, 118 NJ Eq 11 (176 A 692, 97 ALR 594).

"The right to labor, to work, or to be employed is property, and as such it merits legal protection. One cannot be deprived of the right to labor by mandate of the legislature, for it is protected by the Fourteenth Amendment to the Constitution of the United States and numerous guaranties of State Constitutions. It is likewise embraced by the Fifth Amendment to the Federal Constitution." 31 Am Jur, p 843.

"The right to pursue any lawful occupation or calling is generally, if not universally, recognized as property within the due process clause of the Federal Constitution. Every man has a natural right to the fruits of his own labor. The right to earn wages is just as much property and within the protection of the due process clause of the Fourteenth Amendment to the Federal Constitution as earned wages." 12 Am Jur, p 353.

See *Howland* v. *Local Union 306, UAW-CIO,* 331 Mich 644, wherein this Court affirmed the verdict and judgment of the lower court awarding plaintiff damages for the acts of defendant union in wrongfully interfering with plaintiff's employment and causing his discharge.

"As a general rule, an action for damages will lie against anyone, including a labor union, its officers, or members, or a former employer who unlawfully prevents one from procuring employment, or who intentionally and without legal justification or excuse procures an employer to discharge his employee, to the damage of the latter. So, if officers of a labor union wrongfully prevent one from obtaining employment, an action will lie against them, and against the union as well if their acts were done in the course of their service and for the benefit of that body." 31 Am Jur, p 844.

4 Restatement, Torts, § 810, states:

"Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers are * * * liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms."

Plaintiff is accused of misconduct which it is asserted justified rejection of his application. A letter written by plaintiff in 1942 to an official of another local accused a union officer of misconduct. It is evident from the testimony of the recipient of the letter that the contents of the letter were unknown to defendant local at the time of rejecting plaintiff's application. Acts of plaintiff in speaking on the floor of 2 other locals, some time in 1942, in order to request assignment to an open job are characterized by defendants as misconduct. It is evident from the testimony that what at the time was open discussion in a union meeting, in defendants' opinion, is now deemed serious misconduct. Defendant Kennedy testified that the plaintiff had a right to speak on the floor of defendant local. It was the past exercise of this right that defendants now characterize as misconduct justifying rejection of plaintiff's application. It appears from the record that the principal grounds asserted by defendant local for rejecting plaintiff's application were the letters to the International Alliance president complaining of the defendant local's membership policy and the intent of the plaintiff, as expressed in the last letter, to resort to the court to secure his rights. These letters seem to have aroused the indignation of the officers of defendant local.

Defendants claim that plaintiff thereby expressed an intent to violate article 17, § 7, of the International Alliance constitution which reads:

"The members of this Alliance further consent to be disciplined in the manner provided by this constitution and bylaws, and under no circumstances to resort to the civil courts until all the remedies therein provided shall have been exhausted."

Plaintiff as a member of the International Alliance is bound by the constitution and by-laws of that association. If plaintiff has remedies by way of appeal within the union he must first exhaust those remedies before resorting to the courts. *Harris* v. *Detroit Typographical Union,* 144 Mich 422; *Mayo* v. *Great Lakes Greyhound Lines,* 333 Mich 205. If plaintiff has no remedy by way of appeal under the constitutional provisions of the International Alliance, or if any possible remedy within those provisions is illusory or would in fact be futile, plaintiff is justified in resorting to the court for protection of his rights. *Howland* v. *Local Union 306, UAW-CIO, supra;* annotation, 168 ALR 1462.

Plaintiff's principal ground of complaint is that defendant local acting *within its power* under the International Alliance constitution has illegally deprived him of his right to work on a basis equivalent to that of a full member. At the time of writing the letters to the International Alliance president's office, plaintiff could assert no constitutional provisions violated by defendant local under article 20, § 2 and § 3, of the International Alliance constitution which read:

"Sec. 2—Charges.

"Charges against an affiliated local union for violation of the constitution and bylaws of this Alliance may be preferred by any member, officer, International officer or affiliated local union. Such charges must be in writing setting forth the offense charged and the section of the constitution or bylaws alleged to be violated thereby. Charges must be made in the form of a sworn affidavit and in duplicate.

"Sec. 3—To whom preferred.

"All charges against an affiliated local union shall be preferred to the International president of this Alliance who shall, if the charges are cognizable, appoint a time and place for trial."

Plaintiff could assert no charges invoking the judicial power of the International Alliance president under article 7, § 5:

"Sec. 5—Judicial powers. * * *

"The president shall have original jurisdiction to try all charges against an affiliated local union whether these charges are preferred by an individual member or by another affiliated local union."

Cognizant of local autonomy in regard to membership under article 2, § 4, *supra,* and acting upon advice of the International Alliance president's office, plaintiff could not invoke procedure under article 7, § 6, of the International Alliance constitution, which reads:

"Sec. 6—Interpret constitution and bylaws. * * *

"The International president shall render decisions upon questions of law where the constitution and bylaws contain no express provisions for the determination thereof—his ruling upon such questions shall be made in conformity with the spirit and substance of the constitution and bylaws and with regard to the equities of the circumstances."

Since the International Alliance contained an express provision in regard to local control over membership, this procedure was unavailable to plaintiff. The judicial power of the general executive board could not be invoked under article 11, § 5, since, as stated above, the International Alliance constitution expressly provided for local autonomy in membership matters. Article 11, § 5, of the International Alliance constitution reads in part:

"Section 5—Judicial powers.

"The general executive board shall act as an appellate tribunal of the Alliance to hear all appeals from decisions of the president of the Alliance in cases of discipline of officers or members. The general executive board shall also entertain appeals from decisions of the president interpreting the laws of the Alliance decisive of matters not provided for by the laws of this Alliance."

No charges had been filed against plaintiff pursuant to article 16 of the constitution, therefore, the appeal procedures set forth in article 17 do not apply. Nor were charges filed against plaintiff pursuant to article 8 of the defendant local's constitution.

Plaintiff although a member of the International Alliance submitted an application for new membership in defendant local. There are no provisions in the International Alliance constitution or in the defendant local's constitution providing for an appeal procedure upon rejection of an application by the local. Plaintiff had no remedy or appeal procedure within the union in regard to the conduct of defendant local in delaying action upon and then arbitrarily rejecting his membership application. The issue of whether plaintiff had an appeal within the union from the subsequent act of defendant local in withdrawing his working card and permitting nonunion members to work while plaintiff was denied the right need not be confused with plaintiff's principal complaint in this case, that defendant local arbitrarily excluded him from the union and thereby deprived him of working privileges equal to those of a full member.

Seligman v. *Toledo Moving Pictures Operators Union, Local 228, supra,* differs from the present case in one fundamental respect. Seligman was removed from his job by the local union and denied the right

to work. This removal of Seligman, while permitting nonmembers to work, was in violation of article 19, § 16, of the International Alliance constitution. Seligman asserted this violation in a letter to the International Alliance president's office and then, not having been permitted to work notwithstanding a recommendation to that effect by the president's office, resorted to the courts. In that case Seligman was asserting primarily a violation of the union constitution, and secondarily, the arbitrary exclusion from the union. The Ohio court refused to allow the defense of failure to exhaust remedies within the union because the defendant local in that case had refused to follow the recommendation of the International Alliance president's office on the informal appeal.

In the present case plaintiff is asserting as a primary complaint the long delay and arbitrary rejection of his application for membership. His basic complaint is that defendant local acting within its power under the union constitution can arbitrarily exclude him from full membership and retain him indefinitely in an inferior status similar to that condemned by the New Jersey court in *Cameron* v. *International Alliance of Theatrical Stage Employes and Moving Picture Operators, supra,* and *Collins* v. *International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators,* 119 NJ Eq 230 (182 A 37).

The act of defendant local in returning plaintiff's working card and thereby effectively removing him from his job while at the same time permitting nonunion members to work is a second complaint of plaintiff, and an asserted union constitutional violation as in the *Seligman Case, supra.* To hold that plaintiff, upon demand for employment after being removed from his job, would have had a remedy by way of appeal under the union constitution merely decides that plaintiff must exhaust his union appeal

procedures in order to possibly resume the inferior working status of which he complains.

In *Dotson* v. *International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators, supra,* factually similar to the present case, the California court stated:

"Further, it is clear that defendants cannot satisfy their duties under the *Marinship Case* by offering to resume dispatching plaintiffs to work as outside men because the record shows that giving plaintiffs work in this manner would not be equivalent to granting them full membership in Local 162. As visiting members plaintiffs would have few of the privileges accorded to regular members, for instance, they would not be allowed to vote for officers or upon matters of union policy, and their seniority rights, if existing at all, would not be equal to those of members. Although they would be under the control of the local and would be required to pay the same percentage of their wages as is paid by regular members of the local, they would be kept in an inferior status analogous to that of the auxiliary membership considered in *James* v. *Marinship Corporation,* * * * and the junior membership condemned in *Cameron* v. *International Alliance of Theatrical Stage Employes and Moving Picture Operators,* 118 NJ Eq 11 (176 A 692)."

The significant difference between the present case and the *Dotson Case* is that in the present case plaintiff has claimed substantial compliance with all reasonable qualifications or requirements for admission and has submitted an application for membership to the defendant local. In the *Dotson Case,* plaintiffs had never submitted an application or transfer card and had made no effort to comply with the admitted reasonable requirements for membership; therefore, the court felt justified in reversing the case and requiring that plaintiffs prove compliance with reasonable qualifications for membership. There is no

intimation in the *Dotson Case* that writing to the International Alliance president's office was unreasonable conduct precluding plaintiffs from admission into the union.

Defendant local after rejecting plaintiff's application returned his working card. This was in furtherance of a motion made at the union meeting that the Allegan local be requested to withdraw plaintiff from the jurisdiction of the Detroit local. No charges had been made against plaintiff. He had no hearing. Despite these acts, defendants now insist that plaintiff should have redeposited his working card with the Detroit local and thereby become eligible for work. This would have been an idle gesture on plaintiff's part. Defendants' answer admits that plaintiff was informed that he could no longer be employed within the jurisdiction of defendant local.

Defendants further claim that plaintiff was still a member of the Allegan local and, therefore, could go back there and obtain employment. Plaintiff had been employed in Detroit for 6 years and established a residence there. It is no justification to defendants' actions that plaintiff may have been able to obtain employment within the jurisdiction of the Allegan local where, as the testimony indicates, the wages were much less than in Detroit.

In ruling that the defendant local, as a voluntary association, had the right to withhold membership from plaintiff at its pleasure, the trial court cited *Mayer* v. *Journeymen Stone-Cutters Association*, 47 NJ Eq 519 (20 A 492), and *Greenwood* v. *Building Trades Council of Sacramento, California*, 71 Cal App 159 (233 P 823). These 2 cases decided by the courts of California and New Jersey treating trade unions as pure voluntary associations are today impliedly reversed by the courts of those States. See *Cameron* v. *International Alliance of Theatrical Stage Employes and Moving Picture Operators*,

supra; Collins v. *International Alliance of Theatrical Stage Employes & Moving Picture Machine Operators, supra; James* v. *Marinship Corporation, supra; Dotson* v. *International Alliance of Theatrical Stage Employes & Motion Picture Machine Operators, supra.*

As cited above, the California court, in *James* v. *Marinship Corporation, supra,* stated:

"Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations."

The New Jersey court in *Carroll* v. *Local 269, International Brotherhood of Electrical Workers, supra,* in citing other New Jersey decisions, stated:

"It has been held in this State that although a monopoly of labor opportunity is a permissible labor objective and realization of a union, unions obtaining such monopolies must be democratic and admit to their membership all those reasonably qualified for their trade. * * * Otherwise such persons by the act of the union would be deprived of their constitutional right to earn a livelihood."

The cases cited by the trial judge as authority are, therefore, no longer fully accepted in the States wherein they were decided. As indicated by the later cases in those States, trade unions are today considered as being affected with a public interest. Arbitrary action by such unions when interfering with the fundamental right to earn a living may be remedied by the courts.

Plaintiff asks for damages and in his brief requests that they also include any sustained since the

filing of the bill up to the time final decision is rendered. In *Howland* v. *Local Union 306, UAW-CIO, supra,* in which damages were claimed the case was transferred to the law side of the court when the injunctive relief originally sought was no longer necessary.

A decree should be entered ordering defendant Wade E. Allen, individually and doing business as the Fine Arts Theatre, to restore plaintiff to his position as projectionist at the Fine Arts Theatre, plaintiff upon such restoration to deposit his card from the Allegan local with defendant Local 199, and to pay to it such assessments as were payable heretofore; further, that defendants be enjoined from interfering with plaintiff's employment as a projectionist with any theater in the Detroit area; that defendants be also enjoined from enforcing the closed-shop agreement against theaters in the Detroit area as far as the latter's employment is concerned. This shall be conditioned upon plaintiff's continuous offer to join defendant local and be subject to all reasonable rules and regulations thereof and all disciplinary action, including suspension or expulsion, if such becomes necessary in the event that plaintiff violates such rules and regulations.

The record before us shows no determination of damages, although it is apparent that plaintiff would in no event be entitled to damages from all the defendants. The decree should provide that the prayer of the bill of complaint may be amended so as to include damages, if any, up to the time of the trial by the law side of the court to which the case should be transferred for further proceedings as to damages, and render an appropriate judgment. See *Howland* v. *Local Union 306, UAW-CIO, supra.* Plaintiff should recover costs of both the trial court and this

Court against defendants with the exception of defendant Allen.

BUSHNELL, BOYLES, and REID, JJ., concurred with BUTZEL, J.

ROUTHIER v. CITY OF DETROIT.

1. TRIAL—IMPEACHMENT OF VERDICT—ESTOPPEL.
   Jurors are estopped from impeaching their verdict once it has been reached.

2. SAME—DISAGREEMENT OF JURY—AFFIDAVITS.
   Affidavits of jurors are competent to show a want of assent to the verdict, where it appears some had been persuaded that it was only necessary for a majority to agree to the verdict.

3. SAME—DISAGREEMENT OF JURY—POLLING JURORS.
   Order of court setting aside verdict of jury on day following rendition of verdict when jury was polled and discovery then that 1 of the jurors had not agreed to it was not improper, since it established the fact that no verdict had been reached by the jury by a proceeding in open court.

4. SAME—CORRECTION OF FORM.
   It is proper to correct the form in which a verdict was returned, with the approval of the jury.

5. SAME—POLLING JURY—JUDGMENT NOTWITHSTANDING DISAGREEMENT OF JURY.
   Counsel for defendants had the right to move for judgment notwithstanding the disagreement of the jury, where a polling of the jury in open court disclosed that 1 of the jurors had not agreed to the verdict (CL 1948, § 691.701).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 1105.
[2–5] 53 Am Jur, Trial §§ 1106, 1110.
[6–8] 30 Am Jur, Judgments § 57; 53 Am Jur, Trial §§ 349, 365, 366.

6. APPEAL AND ERROR—DISAGREEMENT OF JURY—EVIDENCE.
The testimony must be construed most strongly in favor of the plaintiff in determining whether or not judgment was properly entered upon granting defendant's motion for judgment notwithstanding the disagreement of the jury (CL 1948, § 691.-701).

7. CARRIERS—NEGLIGENCE—SUDDEN STOPPING—SPEED—OBSERVATION AT INTERSECTION—QUESTION FOR JURY.
Issues of fact were presented for decision by jury against bus owner and operator for injuries sustained due to sudden stopping to avoid a collision with another motor vehicle, following driving at excessive speed and without having made proper observations for traffic passing through an intersection, where plaintiff's pleading and proof supported such theory of the case and was at variance with testimony on such matters presented by defendants, hence, it was error to grant defendant's motion for judgment notwithstanding disagreement of the jury.

8. TRIAL—QUESTION FOR JURY—DIRECTED VERDICT.
A verdict cannot properly be directed for one party nor judgment entered for defendant after disagreement of jury when an issue of fact is presented for the jury's determination.

Appeal from Wayne; Miller (Guy A.), J. Submitted October 14, 1953. (Docket No. 53, Calendar No. 45,917.) Decided December 29, 1953.

Case by Olive D. Routhier against City of Detroit and Archie Torando for personal injuries sustained while a passenger on defendant's bus. Erroneous verdict of jury set aside. Judgment for defendant. Plaintiff appeals. Reversed and new trial granted.

W. J. McBrearty and *Stephen Riffel,* for plaintiff.

James S. Shields and *Leo A. Sullivan* (*A. Albert Bonczak,* of counsel), for defendants.

CARR, J. On the 10th of March, 1951, plaintiff was riding as a passenger on a bus owned and operated by the city of Detroit. Defendant Torando was the

driver of said bus which was proceeding in a southerly direction on Cass avenue. According to her claim, plaintiff was standing in the rear of the vehicle and was grasping a vertical steel pole or rod in order to save herself from being suddenly jostled or thrown. She further claimed that in the intersection of Cass and Hancock the driver applied the brakes, bringing the vehicle to such a sudden stop that she was thrown backward, striking a steel bar across the rear door and being thence thrown to the floor. As a result she sustained serious injuries, and brought action to recover damages therefor.

After the introduction of plaintiff's proofs as to how the accident occurred, counsel for defendants moved for a directed verdict on the ground that plaintiff had failed to establish that the injuries sustained by her were the proximate result of negligence on the part of the defendants. Decision on the motion was reserved. Thereupon defendants introduced the testimony of 1 witness and the cause was submitted to the jury which returned a verdict in the sum of $5,000 for the plaintiff. The following day, as counsel agree, the trial judge recalled the jurors, stating in substance that he had received certain information with reference to the proceedings in the case that made it necessary for him to poll the jury. Such action was taken, and, in answer to the usual question to each juror whether the verdict was his or her verdict, 11 answered affirmatively and 1 answered "no". Thereupon the judge stated that the verdict not being a unanimous one it would be necessary to set it aside. The members of the jury were thereupon excused with an admonition from the court not to discuss anything that may have occurred in the jury room. Subsequently counsel for defendants submitted a motion for judgment in their favor, alleging therein the grounds set forth as the basis for the motion for a directed verdict made in

the course of the trial. Plaintiff moved to set aside the mistrial declared by the court and for the entry of judgment on the verdict. Plaintiff's motion was denied and defendants' motion was granted. Judgment was entered accordingly, and plaintiff has appealed.

The first question presented is whether the trial court was in error in setting aside the verdict returned by the jury and declaring a mistrial. On behalf of plaintiff it is contended that the court had no authority to take such action, while appellees insist that under the circumstances presented the course followed was a proper one. It will be noted that the situation presented here does not involve an attempt to impeach the verdict of a jury after it has been returned by proof of fraud, mistake, or improper conduct of any kind in arriving at such verdict, but rather a showing that in fact no agreement was reached by the jurors, resulting in the absence of any verdict whatsoever. Where the latter situation obtains the rule has been recognized that affidavits by jurors are competent for the purpose of showing want of assent to the verdict. In 53 Am Jur, p 776, it is said:

"Only when jurors have agreed to the verdict are they estopped from impeaching it. Consequently, affidavits that they never assented to it are admissible. Thus, where some of the jurors had not in fact agreed to the verdict, but, being persuaded by the majority of their fellows that it was only necessary for a majority to agree, failed to object to it when it was returned, their affidavits are admissible to show that they had never consented to the verdict."

Similar language appears in an annotation in 12 Am Dec, pp 142, 143, in support of which the case of *Cochran* v. *Street,* 1 Wash (Va) 79, is cited. In *Smith* v. *Eames,* 3 Scammon (4 Ill) 76, the supreme court of Illinois discussed the matter of the use of

the affidavits of jurors in order to impeach the verdict, pointing out the dangers that might result if such affidavits were permitted for the purpose of showing the reasons on the basis of which the conclusion of the jurors was reached. In the course of the discussion it was said:

"There is one class of cases, where the affidavits of jurors may be received to impeach their verdict, and that is, where a part of them swear that they never consented to any verdict: [*Cochran* v. *Street,* 1 Wash (Va) 79]; [*Cogan* v. *Ebden,* 1 Burr 383 (97 Eng Rep 361)]."

The conclusion would seem to follow that if what occurred in the instant case might have been shown by affidavits of jurors, the proceeding actually followed was not open to objection. It served the purpose of establishing, by a proceeding in open court, that as a matter of fact no verdict had been reached by the jury. Counsel for appellees direct attention to the case of *Hopkinson* v. *Stocker,* 116 Vt 98 (70 A2d 587). There the jury returned a verdict in favor of the plaintiffs in the sum of $5,000 and was dismissed by the court. Some days later the presiding judge, having learned that the jury had intended a verdict of $500 instead of $5,000, recalled the jurors and caused them to be polled. In response to the question propounded each juror answered that the verdict was not correct. Thereupon the trial court sent the jurors to their room for further deliberations in the cause. A verdict for $500 was then returned and judgment was entered thereon. The supreme court of Vermont recognized that under the general rule observed in that State affidavits of jurors may not be received to show impropriety in the conduct of the jury, or an improper method of arriving at a verdict, in support of a motion to set the verdict aside. In the case before it, however,

it was held that the statements of the jurors were not an impeachment of their verdict but were received for the purpose of correcting it. It was further held that, while the proceeding taken was not open to objection, a new trial should have been granted on the setting aside of the erroneous verdict, rather than resubmitting the cause to the jury returning such verdict.

Counsel for appellant cites the case of *In re Sorter's Estate,* 314 Mich 488 (164 ALR 985), in support of the general argument that a verdict once returned is final. Reliance is placed particularly on a quotation therein from 8 Wigmore on Evidence (3d ed), p 704, quoted in *People* v. *Pizzino,* 313 Mich 97, with reference to the finality of assent by jurors on being polled in open court. However, the propriety of correcting the form in which the verdict of the jury was returned, with the approval of the jury, was recognized. In view of the factual situation involved the *Sorter Case* may not be regarded as authority for the proposition that it may not be shown, either by affidavits of jurors or by such method of procedure as was observed in the instant case, that the verdict announced in open court by the foreman was not in fact the verdict of all the jurors. While the precise question at issue appears to be a novel one in this State, we conclude that the action of the trial judge was not improper.

This brings us to the second question in the case, that is, whether the trial judge was in error in ordering judgment entered for defendants on the basis of the motion for a directed verdict submitted on the trial. The polling of the jury established that there had been no agreement of the jurors. In other words the verdict announced by the foreman did not represent unanimous action. As a practical proposition there was a disagreement. Such being the situation counsel for defendants had the right under CL 1948,

§ 691.701 (Stat Ann § 27.1471), to move for judgment notwithstanding such disagreement, the motion for directed verdict made on the trial having been taken under advisement.

In determining whether the judgment was properly entered the testimony must be construed as strongly as possible in favor of the plaintiff. *Longfellow* v. *City of Detroit,* 302 Mich 542; *Dasovich* v. *Longacre,* 324 Mich 62; *White* v. *Herpolsheimer Company,* 327 Mich 462 (26 ALR2d 667). It was the theory and claim of the plaintiff as set forth in her declaration that the sudden application of the brakes by defendant Torando followed the negligence of said defendant in driving at an excessive rate of speed and without making proper observations for traffic passing through the intersection on Hancock avenue. In support of her claim she introduced the testimony of 2 witnesses, McCurry and Chowning. The record indicates that a police officer of the city of Detroit had discovered that McCurry did not have a Michigan license for the operation of an automobile, and that he had directed McCurry to follow him to the police station. Chowning was riding in the car that McCurry was driving. Both men testified that the officer was proceeding immediately ahead of them in an easterly direction, that the parties stopped before crossing Cass avenue, and that, having observed traffic conditions, they then proceeded on Hancock into and across the intersection. McCurry testified in substance that when approximately in the middle of the street he heard the brakes of the bus being applied, said vehicle being at the time a distance of between 60 and 75 feet away. The witness Chowning, riding with McCurry, claimed that he made rather careful observations of the bus and concluded that it was being driven in excess of 30 miles per hour "or nearly 35." The testimony of these witnesses was at variance with that of defendant Tor-

ando, who claimed that McCurry failed to stop at the intersection. He also denied that he was driving at an excessive rate of speed. The trial judge, in determining that defendants were entitled to judgment, indicated that little, if any, weight should be given to the testimony of either McCurry or Chowning. From the verdict returned, it is apparent that the jury reached a different conclusion.

We are impressed that under the testimony in the case issues of fact were presented that the parties were entitled to have decided by the jury. In *Davis* v. *Belmont Creamery Company,* 281 Mich 165, 169, it was said:

"The determination of factual questions is purely within the province of the jury. The judgment *non obstante veredicto* was based upon the court's decision on a reserved motion for a directed verdict, and in determining said motion the same considerations are applicable as are pertinent to the determination of a motion for a directed verdict. A verdict cannot properly be directed for one party when an issue of fact, as in the instant case, is presented for the jury's determination. See *Yacobian* v. *Vartanian,* 221 Mich 25; *Burt* v. *Detroit, Grand Haven & Milwaukee Railway Company,* 262 Mich 204."

See, also, *Vukich* v. *City of Detroit,* 325 Mich 644. The situation in the case at bar differs materially from that presented in *Russ* v. *City of Detroit,* 333 Mich 505. There the plaintiff passenger on defendant's bus was denied recovery, the action being based wholly on the claim that defendant's employee was negligent in suddenly stopping his vehicle. No proof of negligence in any other respect was made. In the instant case plaintiff has alleged, and offered proof before the jury tending to show, that defendant Torando, preceding his bringing the bus to a sudden stop, was negligent in driving at an excessive rate of speed and in failing to make proper observations of traf-

fic passing through the intersection on Hancock. It is plaintiff's theory here that such negligence rendered necessary the sudden application of the brakes on the bus in order to avoid a collision with another motor vehicle.

The judgment entered in the trial court is reversed, and the case is remanded for a new trial. Plaintiff may have costs.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred with CARR, J.

BOYLES, J., concurred in the result on the first question.

In re DeWATERS' ESTATE.

1. TAXATION—INHERITANCE TAX—UNITED STATES BONDS—CO-OWNERSHIP.

United States government savings bonds payable to either of 2 persons as co-owners or survivor should not be included among the assets of the estate of the person who dies first for the purpose of determining the State inheritance tax (CL 1948, § 205.201, as amended).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 28 Am Jur, Inheritance, Estate, and Gift Taxes §§ 81, 101, 122–124.

[1, 2] When transfer deemed to be in contemplation of death within the meaning of the inheritance tax law. 7 ALR 1028; 21 ALR 1335; 41 ALR 989; 75 ALR 544; 120 ALR 170; 148 ALR 1051.

When transfer deemed to take effect in possession or enjoyment at or after death within the inheritance tax law. 49 ALR 864; 67 ALR 1247; 100 ALR 1244; 121 ALR 359; 155 ALR 850; 167 ALR 438.

Succession or estate tax as affecting or as affected by estate by entirety or other joint estate with right of survivorship. 1 ALR2d 1101.

[3] 14 Am Jur, Costs § 91.

2. SAME—INHERITANCE TAX—UNITED STATES BONDS—BENEFICIARIES—EQUALLY DIVIDED COURT.

Order of circuit court holding that no inheritance tax was payable upon United States government savings bonds "payable on death" of owner to another person, designated as a beneficiary, is affirmed by an equally divided court (CL 1948, § 205.201, as amended).

3. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTES—INHERITANCE TAX—UNITED STATES BONDS.

No costs are allowed on appeal in proceeding to recover inheritance tax on United States government savings bonds involving the construction of a statute, a public question (CL 1948, § 205.201, as amended).

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 9, 1953. (Docket No. 57, Calendar No. 45,929.) Decided December 29, 1953.

In the matter of the estate of Sarah A. DeWaters, deceased. The Department of Revenue of the State of Michigan petitioned for determination of inheritance tax. Order determined that "payable on death" bonds should be taxed. The administrator with will annexed and Michigan National Bank appealed to circuit court. Judgment that order be reversed and remanded with direction that government bonds not be included in taxable property. Plaintiff appeals. Affirmed, in part by an equally divided court.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for plaintiff.

Gault, Davison & Bowers, for defendants.

BUSHNELL, J. *(for affirmance).* The department of revenue of the State of Michigan has appealed from a judgment of the circuit court of Genesee county, entered on an appeal thereto by the administrators,

with will annexed, of the estate of Sarah A. DeWaters, deceased, from an order entered by the probate court in which it was determined that certain series G United States government bonds should be included in the assets of the estate for determination of the State of Michigan inheritance tax.

The circuit court held that no inheritance tax was due the State of Michigan and the department of revenue in connection with these bonds. The order of the probate court was reversed and set aside.

In the circuit court the facts were stipulated by the parties as follows:

"Sarah A. DeWaters, deceased (hereinafter referred to as the decedent), died a resident of Genesee county, State of Michigan. At the time of her death, $20,000 face value series 'G' United States government bonds, registered in the names of Mrs. Sarah A. DeWaters or Enos A. DeWaters and $45,000, face value series 'G' United States government bonds, registered in the name of Mrs. Sarah A. DeWaters, payable on death to Enos A. DeWaters, were found in the decedent's compartment of a double compartment safety deposit box held jointly by the decedent and Enos A. DeWaters in the Michigan National Bank of Flint, Michigan. The 'decedent's compartment' designates the portion of the safety deposit box set aside for the use of the decedent. It was in this portion of the box that the decedent kept property belonging to her separate and segregated from property belonging to Enos A. DeWaters.

"The decedent used her own separate funds to purchase the bonds in question. Further she used and received the income from the aforesaid series 'G' bonds during her lifetime and reported such income for Federal income tax purposes. The decedent did not make delivery of such bonds to Enos A. DeWaters during her lifetime but at all times retained possession and control of the same and in all respects treated the bonds as her separate property."

The parties further stipulated and agreed that the United States treasury department regulations covering savings bonds should be considered and certain extracts therefrom should constitute a part of the printed record in this cause. Among these extracts are the following:

"(2) *Two persons; co-ownership form.* In the names of 2 (but not more than 2) persons in the alternative as co-owners, for example:

"John A. Jones or Mrs. Ella S. Jones.

"No other form of registration establishing co-ownership is authorized.

"(3) *Two persons; beneficiary form.* In the name of 1 (but not more than 1) person, payable on death to 1 (but not more than 1) other person, for example:

"John A. Jones, payable on death to Miss Mary E. Jones. 'Payable on death to' may be abbreviated as 'p.o.d.' The first person named is hereinafter referred to as the owner or registered owner, and the second person named as the beneficiary or designated beneficiary."

Interest on series G registered bonds is "paid on each interest payment date by check drawn to the order of the person or persons in whose name the bond is inscribed, in the same form as their names appear in the inscription on the bond." Such bonds "may be redeemed in whole or in part at the option of the owner, prior to maturity, under the terms and conditions set forth in the offering circular of each series and in accordance with the provisions of the regulations."

The provisions regarding reissue are as follows:

"During the lives of both co-owners the bond will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner; and upon payment to either co-owner the other person shall cease to have any interest in the bond."

A savings bond registered in the name of 1 person, payable on death to another, will be reissued—

"upon the duly certified request of the registered owner together with the duly certified consent of the designated beneficiary, to eliminate such beneficiary, or to substitute another person as beneficiary, or to name another person as co-owner."

Transfers of property subject to tax by the Michigan inheritance tax law (CL 1948, § 205.201 *et seq.*, as amended [Stat Ann 1950 Rev § 7.561 *et seq.*]), can be summarized as follows: (a) transfer by will; (b) transfers by intestate succession; (c) transfers in contemplation of death; (d) transfers intended to take effect in possession or enjoyment at or after death.

The department takes the position that the transfers of both the co-owner and payable on death bonds are subject to the inheritance tax as transfers "intended to take effect in possession or enjoyment at or after the decedent's death." It argues that, although the questions here presented are matters of first impression before this Court, we have on 4 different occasions had inheritance tax matters directly involving the scope of the term "possession or enjoyment at or after death," and, therefore, our decision in those cases should be of material help, citing *People, ex rel. Attorney General,* v. *Welch's Estate,* 235 Mich 555; *Auditor General* v. *Bassett's Estate,* 246 Mich 440; *In re Kutsche's Estate,* 268 Mich 659; and *In re Rackham's Estate,* 329 Mich 493.

It is pointed out in the State's brief that the Michigan inheritance tax statute was adopted in its present form in PA 1899, No 188, from a comparable statute in New York, and that, therefore, the decisions of the court of appeals of New York should be examined. Citations are also given to cases in other jurisdictions which are claimed to be directly in

point regarding the taxability of transfers of both the "or" and "p.o.d." bonds.

We do not attempt to anaylze these authorities or determine their applicability to the instant problem, because we have recently considered a comparable question in *Re Renz' Estate,* decided November 27, 1953, *ante* 347. In the *Renz Case* the department of revenue appealed from an order of the circuit court which upheld the order of the probate court denying the department's petition for the imposition of an inheritance tax on bank accounts which decedent had made jointly between himself and his niece, who survived him.

In that case the department claimed that the decedent, by placing moneys in the bank accounts standing in his name or that of his niece, and payable to either or the survivor, did not make a gift effective in possession and enjoyment by the niece until an actual withdrawal was made by her or until she was entitled to the moneys by surviving the decedent. It argued that the interest of the niece was inchoate during the decedent's lifetime and that Renz could have prevented her from making any withdrawals by so notifying the bank. We held, however, that the joint bank accounts were not subject to the State inheritance tax law.

The situation here is the same as that in the *Renz Case.* The gift to Enos A. DeWaters could have been revoked by his wife in her lifetime by cashing either type bond. The "or" bonds are no different, so far as their nature and taxability are concerned, from the joint bank accounts. As to the "p.o.d." bonds; the treasury department regulations hereinbefore referred to and quoted in part are no different than the "or" bonds insofar as payments during the lives of both owners are concerned, because a "p.o.d." bond "will be paid to the registered owner during his lifetime upon his properly executed request as

though no beneficiary had been named in the registration."

However, "p.o.d." bonds can only be reissued "upon the duly certified request of the registered owner together with the duly certified consent of the designated beneficiary," unless such reissue is for the purpose of naming the beneficiary designated in the bond a co-owner.

We conclude, therefore, in the light of the decision in the *Renz Case* and the regulations of the treasury department, that, so far as the Michigan inheritance tax statute is concerned, neither the "or" nor "p.o.d." bonds are subject to an inheritance tax upon the death of the owner.

The judgment of the circuit court is affirmed. This being a public question, involving the construction of a statute, no costs may be taxed.

DETHMERS, C. J., and CARR and REID, JJ., concurred with BUSHNELL, J.

ADAMS, J. *(for reversal in part).* I concur with Justice BUSHNELL in his opinion that United States government savings bonds registered in the name of the deceased and another as co-owners should not be included in the assets of the deceased's estate for the purpose of determining the Michigan inheritance tax, but I cannot agree that bonds registered in the name of the deceased and payable on death to another should be treated in the same manner.

The applicable portion of the Michigan statute reads:

"Sec. 1. * * * A tax * * * is hereby imposed upon the transfer of any property * * * in the following cases: * * *

"Third, When the transfer is of property made * * * by * * * grant * * * intended to take

effect, in possession or enjoyment at or after such death"

of the grantor. CL 1948, § 205.201, as amended (Stat Ann 1950 Rev § 7.561).

United States treasury department regulations covering savings bonds define the rights of bondholders and provide, in part:

"Sec. 315.4 * * *

"(2) *Two persons; co-ownership form.* In the names of 2 (but not more than 2) persons in the alternative as co-owners, for example:

"John A. Jones or Mrs. Ella S. Jones.

"No other form of registration establishing co-ownership is authorized.

"(3) *Two persons; beneficiary form.* In the name of 1 (but not more than 1) person, payable on death to 1 (but not more than 1) other person, for example:

"John A. Jones, payable on death to Miss Mary E. Jones. 'Payable on death to' may be abbreviated as 'p.o.d.' The first person named is hereinafter referred to as the owner or registered owner, and the second person named as the beneficiary or designated beneficiary."

"Sec. 315.21(a) *Method of interest payments.* Interest due on a current income bond will be paid on each interest payment date by check drawn to the order of the person or persons in whose name the bond is inscribed, in the same form as their names appear in the inscription on the bond, except that in the case of a bond registered in the form 'A, payable on death to B,' the check will be drawn to the order of A alone until the Bureau of the Public Debt, Division of Loans and Currency, 536 South Clark street, Chicago 5, Illinois, receives notice of A's death, from which date the payment of interest will be suspended until such time as the bond is presented for payment or reissue. Interest so withheld will be paid to the person found to be entitled to the bond."

"Sec. 315.45 * * *

"(a) *Payment during the lives of both co-owners.* During the lives of both co-owners the bond will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner."

"Sec. 315.46 * * *

"(a) *Payment to the registered owner* [p.o.d. bond]. The bond will be paid to the registered owner during his lifetime upon his properly executed request as though no beneficiary had been named in the registration."

A savings bond registered in the name of one person, payable on death to another, will be reissued

"upon the duly certified request of the registered owner together with the duly certified consent of the designated beneficiary, to eliminate such beneficiary, or to substitute another person as beneficiary, or to name another person as co-owner." Sec. 315.46(b)(2).

It is significant that these regulations distinguish as between "owner" and "beneficiary." In the case of co-owners, each has equal rights in relation to payment of interest and principal. In contrast, the income from "p.o.d." bonds is payable only to the owner during his lifetime. When due, the proceeds of the bond are likewise paid exclusively to the owner, if alive.

Under such circumstances, the interest of the beneficiary in the bond is, in the first instance, inchoate. He has neither enjoyment nor possession until the death of the owner. There is no gift *inter vivos* because he takes nothing during the lifetime of the owner. While the consent of the beneficiary must be obtained to effectuate reissue prior to the date of payment, that requirement ceases to exist when the bond becomes due and the proceeds are paid to

the owner. Such limited control by the beneficiary is not an adequate criterion in a determination of ownership.

The assignment or grant of the bond to the beneficiary does not become effective in any real sense until the death of the owner. Such a transfer falls within the statutory definition and is taxable under our inheritance tax statute.

" 'The test is always whether the property comes into possession and enjoyment of the transferee upon the death of the transferor. If the death of the transferor makes no difference in the rights of the parties there is no tax.' Gleason & Otis on Inheritance Taxation (4th ed), p 876." *People, ex rel. Attorney General,* v. *Welch's Estate,* 235 Mich 555, 566.

The judgment of the circuit court is affirmed as to the determination of tax on the bonds held in co-ownership and should be reversed as to the determination of tax on the "payable on death" bonds. No costs.

BUTZEL, SHARPE, and BOYLES, JJ., concurred with ADAMS, J.

GARAVAGLIA *v.* DEPARTMENT OF REVENUE.

1. VENUE—DECLARATION OF RIGHTS—AGREEMENT OF PARTIES—SALES AND USE TAXES.

   Institution of suit for declaration of rights as to liability for sales and use taxes on material, used in concrete construction work but which never became a structural part of the real estate, in Ingham county by a party not a resident thereof *held*, not subject to question, where prior to institution of suit, the parties, in conference, had agreed, that for the convenience of both the department of revenue and the taxpayer the suit should be instituted in such county (CL 1948, § 205.51 *et seq.*; § 205.91 *et seq.*).

2. DECLARATORY JUDGMENT—SALES AND USE TAXES.

   A suit for declaration of rights to ascertain liability for sales and use taxes on material used in concrete construction work but which never became a structural part of the real estate was a proper procedure (CL 1948, § 205.51 *et seq.*).

3. TAXATION—STATUTES.

   Tax exactions, property or excise, must rest upon legislative enactment and collecting officers can act only within express authority conferred by law.

4. SAME—CONSTRUCTION OF STATUTES.

   The scope of tax laws may not be extended by implication or forced construction.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 16 Am Jur, Declaratory Judgments §§ 9, 10.
[1, 2] Declaration of rights or declaratory judgments. 12 ALR 52; 19 ALR 1124; 50 ALR 42; 68 ALR 110; 87 ALR 1205.
[2] 16 Am Jur, Declaratory Judgments § 49.
[3] 51 Am Jur, Taxation §§ 42–44.
[4] 51 Am Jur, Taxation § 310.
[5] 51 Am Jur, Taxation § 316.
[7] 47 Am Jur, Sales and Use Taxes §§ 28, 55.
[7] Sale of building materials, supplies, or fixtures to contractor, or his use thereof in construction or repairs, as sale at retail within tax statute or ordinance. 163 ALR 276; 171 ALR 697.
Constitutionality, construction, and application of general use tax or other compensating tax designed to complement State sales tax. 153 ALR 609.
[8] 14 Am Jur, Costs § 91.

5. SAME—AMBIGUITY—CONSTRUCTION OF STATUTES.
The language of a tax statute, if dubious, is not resolved against the taxpayer.

6. SAME—SALES TAXES—STATUTES—RULES AND REGULATIONS.
Liability for payment of the State sales tax is controlled by statute and cannot be imposed by administrative rulings and regulations (CL 1948, § 205.51 *et seq.*).

7. SAME—SALES TAX—USE TAX—MATERIALS USED IN PERFORMANCE OF CONTRACT WITH STATE.
Materials such as form lumber, nails, masonite, coke, grease, plywood, sinkers, burlap, hay, asbestos and rubber belts, aggregate bin and scale, interlock and elevator extension, used in the performance of contracts for construction jobs for State highway department are not subject to sales and use taxes, even though the materials sought to be taxed do not become a part of the highway (CL 1948, § 205.51 *et seq.*; § 205.91 *et seq.*).

8. COSTS—PUBLIC QUESTION—DECLARATION OF RIGHTS—SALES AND USE TAXES—CONTRACTS WITH STATE.
No costs are allowed in suit for declaration of rights as to liability of taxpayer for sales and use taxes on materials used in performance of contracts for construction of highway jobs for the State highway department but which never became a structural part of the real estate, a public question being involved (CL 1948, § 205.51 *et seq.*; § 205.91 *et seq.*).

Appeal from Ingham; Hayden (Charles H.), J. Submitted October 14, 1953. (Docket No. 12, Calendar No. 45,727.) Decided December 29, 1953.

Bill by Louis A. Garavaglia, Jr., and others, doing business as Louis Garavaglia, against Michigan Department of Revenue for declaration of rights relative to sales and use tax on certain items used in their business. Decree for plaintiffs. Defendant appeals. Affirmed.

Ballard, Jennings, Fraser & Parsons, for plaintiffs.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *T. Carl Holbrook*

and *William D. Dexter,* Assistants Attorney General, for defendant.

BUSHNELL, J. Plaintiffs, doing business as Louis Garavaglia, are contractors engaged in improving, repairing and altering real estate for others. They specialize in the building of roads, bridges and grade separations.

In fulfillment of their contracts with the State highway department, plaintiffs used plywood and other lumber to build forms in which concrete was poured. After these forms had been stripped, wet burlap was used to drape over the concrete so that the structure would remain moist for a longer period of time and thereby produce a more stabile and uniform setting. Marsh hay was used to cover portions of the concrete construction in order to protect it from freezing and avoid crumbling and deterioration. After their use these materials had little or no salvage value, and none became a structural part of the real estate.

Believing that the purchases of these materials were subject to sales* and use† tax, defendant Michigan department of revenue, after an audit of Garavaglia's records, made an assessment as follows:

Sales taxes, including interest and penalties in the amount of $835.72 covering the period from July 1, 1946 to December 31, 1949, and use tax, including interest and penalties, in the amount of $186.18 for the period beginning July 1, 1947 and ending December 31, 1949.

The amount of such taxes was based upon the price plaintiffs paid for form lumber, nails, masonite, coke, grease, plywood, sinkers, burlap, hay, asbestos and rubber belts, a 2-compartment aggregate bin, an ag-

* See CL 1948, § 205.51 *et seq.* (Stat Ann 1950 Rev and Stat Ann 1951 Cum Supp § 7.521 *et seq.*).—REPORTER.

† See CL 1948, § 205.91 *et seq.* (Stat Ann 1950 Rev and Stat Ann 1951 Cum Supp § 7.555(1) *et seq.*).—REPORTER.

gregate scale, Michigan Interlock and No 7 elevator extension.

Garavaglia filed a bill for a declaratory judgment in the circuit court for the county of Ingham, seeking determination of liability. The trial court concluded that the transactions were exempt from both sales and use taxes because the property was used in industrial processing.

In the decree from which defendant appeals the assessments were declared void and of no effect.

The questions of jurisdiction and venue that are raised by defendant must first be resolved. It is argued that the Ingham circuit court was without jurisdiction because plaintiffs do not reside in that county. It is sufficient to say that, prior to the institution of the suit, the parties, in conference, agreed that, for the convenience of both the department and the taxpayer, the suit should be instituted in Ingham county and that neither party would raise any question as to the jurisdiction of the court. Defendant further argues that declaratory proceedings are improper. A short answer to that question is that this procedure was used and approved in the following cases: *Acorn Iron Works, Inc.*, v. *State Board of Tax Administration*, 295 Mich 143 (139 ALR 368); *Metzen* v. *State Board of Tax Administration*, 301 Mich 532; *Michigan Allied Dairy Ass'n* v. *State Board of Tax Administration*, 302 Mich 643; *R. C. Mahon Company* v. *Department of Revenue*, 306 Mich 660, and others. The more important question is whether the taxpayer is liable.

In *Michigan Allied Dairy Case* we quoted from *In re Dodge Brothers*, 241 Mich 665, 669, as follows:

"'Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned

in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer.' "

In the *Acorn Case* we said that "liability for payment of the sales tax is controlled by statute. It cannot be imposed by rulings or regulations of the board," and we quoted the syllabus in *J. B. Simpson, Inc.*, v. *O'Hara,* 277 Mich 55.

We might arrive at our determination by tracing our way through the authorities discussed in the respective briefs, but that seems unnecessary because the crux of the controlling question was decided in the *Mahon Case,* where we said:

"But this appeal presents the further question as to plaintiff's liability for payment of the sales tax on materials used 'in the performance of contracts with the Federal government, State government, or its subdivisions, agencies or instrumentalities thereof, hospitals, houses for the care or maintenance of children or aged persons not operated for profit, and regularly organized churches or houses of religious worship.' The answer to this question is clearly covered by PA 1933, No 167, § 4, subd (b), § 4a, as amended by PA 1939, No 313 (CLS 1940, § 3663–4, subd (b), § 3663–4a, Stat Ann 1942 Cum Supp § 7.524, subd (b), § 7.525)."

For the wording of this statute, see CLS 1952, §§ 205.51, 205.54 (Stat Ann 1950 Rev §§ 7.521, 7.524). For the language of the exemptions under the use tax act, see CLS 1952, § 205.94 (Stat Ann 1951 Cum Supp § 7.555 [4]).

The answer here must be the same that was given there.

The department, however, argues that because the materials were used and consumed by the taxpayer without being incorporated into the several highway

projects, they are not exempt under the Michigan sales and use tax statutes.

It clearly appears from the language of section 4 of the general sales tax act that the legislature intended that the department of revenue could not impose a direct or indirect sales or use tax upon another entity of the State of Michigan. Section 4 reads in part:

"No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American Red Cross and its chapters and branches, and the State of Michigan or its departments and institutions or any of its political subdivisions. (As amended by PA 1949, No 272, Imd Eff June 7)." (CLS 1952, § 205.54, Stat Ann 1950 Rev § 7.524.)

To hold that because of the industrial processing amendments of 1939 and 1941, as amended (See CLS 1952, § 205.54a, subd [g], Stat Ann 1951 Cum Supp § 7.525, subd [g]), materials used in construction jobs for the State highway department should be taxed, would merely be imposing an indirect tax upon the State itself, in that such a tax would necessarily become a part of the cost of the job.

Notwithstanding the reason advanced by the trial judge for his conclusion of no tax liability, we hold that materials used and consumed in construction work for the State, such as those described in the instant case, are not subject to either a sales or use tax.

The decree is affirmed. A public question being involved, no costs will be allowed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, and REID, JJ., concurred with BUSHNELL, J.

BOYLES, J., concurred in the result.

DARMODY *v.* BISHOP OF LANSING.

1. DEEDS—ALTERATION OF INSTRUMENTS.
   Alteration of deed whereby the wording designating the grantee was changed at the grantee's request but which left the grantee bishop, his office and designation as trustee the same, *held,* not an alteration of which daughters of grantors might complain in daughters' suit to cancel the deed.

2. SAME—ALTERATION AFTER EXECUTION—INFERENCES.
   The fact that an immaterial alteration of a deed was made after its execution does not raise an inference that other alterations were also made at that time, especially where the changes corrected obvious errors.

3. SAME—ALTERATIONS—DESCRIPTION—OVERREACHING.
   Alterations in deed to defendant bishop are presumed to have been made prior to its execution, except such as were admittedly made afterwards and which were immaterial, where the deed does not purport to grant more than was needed for the use intended and there is no evidence of overreaching.

4. SAME—PRESUMPTION OF GENUINENESS—EVIDENCE.
   The presumption of genuineness of a deed prevails in the absence of any testimony on the subject.

5. SAME—MENTAL COMPETENCY—UNDUE INFLUENCE—FRAUD—EVIDENCE.
   Grantors in deed of land to be used as a site for purposes of church of which they were members *held,* to have been mentally competent to make the deed and not to have been subjected to undue influence or fraud upon the part of representatives of the church, under evidence presented.

REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur, Alteration of Instruments §§ 6, 7, 59, 60.
[2, 3] 2 Am Jur, Alteration of Instruments §§ 106–109.

Appeal from Cass; Smith (Raymond L.), J., presiding. Submitted October 13, 1953. (Docket No. 58, Calendar No. 45,939.) Decided December 29, 1953.

Bill by Margaret Darmody and another against Joseph H. Albers, Bishop of Lansing, as trustee of St. Ann's Church of Cassopolis, to cancel and set aside a deed. Decree for defendant. Plaintiffs appeal. Affirmed.

Jones & Theiss, for plaintiffs.

Robinson, Robinson & Robinson, for defendant.

BUSHNELL, J. Plaintiffs Margaret Darmody and Katherine Morris, who are 2 of the 6 daughters of Dr. Ersom M. Cunningham and his wife, Katherine J. Cunningham, brought a suit for cancellation of their parents' deed on certain real estate in the village of Cassopolis to defendant Joseph H. Albers, Bishop of Lansing, in trust for St. Ann's Church of Cassopolis. They have appealed from a decree dismissing their bill of complaint.

We have reviewed the testimony *de novo* and arrive at the same conclusion that was reached by the trial judge. His opinion clearly and concisely states the facts and the applicable law. We therefore adopt and accept it as the opinion of this Court.

"Plaintiffs claim to be the owners of an undivided 1/2 interest in the real estate herein involved. Defendant claims the entire interest in the property under a deed from plaintiffs' parents. The record establishes the following facts:

"Dr. Ersom Cunningham and Katherine Cunningham were the parents of 6 daughters, 2 of them being plaintiffs. They were members of the Cassopolis Catholic church, Mrs. Cunningham having been a

member all her life while Dr. Cunningham joined the Church in 1944.

"In 1942 Dr. Cunningham suffered a cerebral hemorrhage. As a result he discontinued his duties as county physician but continued to practice medicine to a limited extent until some time in 1945 when a second attack left him unable to talk and partially paralyzed. He suffered failing eyesight since 1942. Although Dr. Beardsley testified that Mrs. Cunningham had a cerebral hemorrhage in 1941 the evidence also indicates that until the time of her death she lived a normal, active life except for some eccentricities.

"Evidently there had been expressions from the doctor during his lifetime that the family home in Cassopolis should be given to some charity after he and Mrs. Cunningham were gone. In 1946 the defendant Bishop and other priests, visiting at the Cunningham home, mentioned the need for a new church building and site for the Cassopolis church. The need for a new church cannot be seriously contested.

"On March 27, 1947, Father Ceru and one Leo Donohue, a friend of the Cunningham family, of Dowagiac, called at the Cunningham home and secured the signatures of the doctor and Mrs. Cunningham to a warranty deed to certain real estate adjacent to the family home. Leo Donohue was the father of the priest who then served as defendant's secretary. Dr. Cunningham made his X on the deed in lieu of his signature.

"The deed was sent to defendant by Father Ceru. Defendant returned it to Father Ceru with a request to change the wording designating the grantee. This change was made by Leo Donohue at the behest of Father Ceru. It is the plaintiffs' claim that at the time the change was made in the description of the grantee that the second part of the description of the realty was altered to read 99 feet instead of 33 feet and that the third paragraph of the description was added. It is the plaintiffs' further claim that the

grantors were mentally incompetent and that the deed was obtained by false representations.

"The deed was recorded April 4, 1947. Within a few weeks thereafter the gift of the property was announced during the church services on several Sundays. A campaign to raise the necessary funds to start the building followed in which Mrs. Cunningham took an active part. Dr. Cunningham died in 1948 at the age of 80 years and Mrs. Cunningham died a few months later at 72 years of age.

"Prior to their deaths and in 1948 plaintiff Mary Darmody filed proceedings of guardianship in probate court to have her parents declared incompetent. In neither of these proceedings did she list the property in question as an asset of their estates. The property in question having been held by the entireties by Dr. and Mrs. Cunningham there were no probate proceedings following the doctor's death and in Mrs. Cunningham's estate the property was not inventoried as an asset although it is mentioned in the assignment of the residue. The court attaches some significance to this omission.

"On the claim of alteration the court is of the opinion that the admitted alteration in describing the grantee changed nothing. The grantee and his office and designation as trustee remained the same. Plaintiffs cannot complain of this change. As to the balance of the alterations there is proof that they were made on the same typewriter as the admitted alteration but no proof that they were made after execution of the deed. The fact that an immaterial alteration was made after execution does not raise the inference that other alterations were made at that time, especially where the changes corrected such obvious errors. It is just as reasonable to find that the corrections in the descriptions of the property were made prior to execution of the deed even though 2 typewriters were used. The lips of the Cunninghams and Leo Donohue are sealed by death and Father Ceru claims to have no knowledge of the de-

scription or their alterations and additions. The deed does not purport to grant more than is needed for the use intended. Although there is no denying the alterations there is no evidence of overreaching. In the absence of any testimony on the subject the presumption of genuineness prevails. *Donohue* v. *Vosper,* 189 Mich 78.

"The court is of the opinion that both Dr. and Mrs. Cunningham were mentally competent to make the deed. There was nothing secret about the gift, it was a subject of family conversation, it was a very small part of the family estate, it was made public immediately, the family evidently accepted the fact without dissent for some time, and finally the prior death of the doctor foreclosed any possible argument as to his condition as Mrs. Cunningham took any interest he may have had and her deed passed full title to defendant. The court, not overlooking the testimony of Dr. Beardsley, but his willingness to characterize the Cunninghams as incompetent as early as 1941 and 1942, casts serious doubt on the weight to be given his opinion. Without hesitation the court finds that Mrs. Cunningham remained mentally competent until her death in 1948.

"There is nothing to substantiate the claim of fraud and misrepresentation on the part of the defendant or of any of the representatives of the church. The need for the new church was apparent and the need for a site before building could be commenced was only practical. There was no representation of an existing fact, merely talk of future hopes and possibilities. There is no evidence that the sketch of the proposed church was shown to the Cunninghams prior to their gift or that it was relied upon by them in making their gift. In coming to this conclusion the court has not lost sight of the confidential relationship that existed between the Cunninghams and the representatives of the church or of the burden placed upon defendant to prove freedom from undue influence. The court specifically finds no

undue influence and further finds that the gift was open and above suspicion in all respects."

The decree is affirmed, with costs to appellee.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

HOFFMAN *v.* STICKNEY.

1. AUTOMOBILES—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—SPEED.
   The matter of contributory negligence of plaintiff's decedent, an eastbound pedestrian who had reached center or perhaps the easterly portion of street approximately 35 feet wide when struck by defendant's southbound car traveling at an excessive rate of speed before daylight on a dark, cloudy December morning, was properly left to jury, where there is evidence from which it may be inferred that decedent had made proper observation as to approaching traffic, formed a judgment as to its distance away and speed, again observed traffic while crossing the street and had exercised that degree of care and caution which an ordinarily careful and prudent person would exercise, to reach a place of safety.

2. EVIDENCE—CONJECTURE—INFERENCES.
   A finding as to particular fact may be based upon inferences fairly drawn from other facts established by proof, although a verdict may not rest upon bare conjecture.

3. SAME—INFERENCES—PRESUMPTIONS.
   Reasonable inferences which may be drawn from affirmative facts proven are evidence, and not presumptions.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur, Automobiles §§ 705, 706.
[2, 3] 20 Am Jur, Evidence § 157 *et seq.*, § 270 *et seq.*

4. DAMAGES—DEATH—HOSPITAL, MEDICAL AND FUNERAL EXPENSES—SUPPORT OF WIDOW.

Verdict of $5,000 in widow's action for death of 71-year-old husband whose hospital, medical and funeral expenses were $955.45, and who was her sole means of support *held,* within the reasonable range of proofs, the final verdict allowing her but $236.17 annually for food and clothing for duration of 8.07 years as his expectancy (CL 1948, §§ 691.581, 691.582).

Appeal from Ingham; Salmon (Marvin J.), J. Submitted October 7, 1953. (Docket No. 18, Calendar No. 45,890.) Decided December 29, 1953.

Case by Mina E. Hoffman, administratrix of the estate of Fred C. Hoffman, deceased, against Charles C. Stickney, Sr., and Marie Stickney for damages arising from accident causing death of plaintiff's decedent. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Donald A. Jones (*Frederick C. Newman,* of counsel), for plaintiff.

Ballard, Jennings, Fraser & Parsons, for defendants.

BOYLES, J. Plaintiff's decedent, Fred C. Hoffman, was struck and killed by an automobile owned by the defendants and driven by defendant Charles, while crossing North Larch street in Lansing. His surviving widow brought the instant suit* to recover medical, hospital and funeral expenses and for loss of future support. On trial by jury plaintiff had verdict for $5,000, and from the judgment entered thereon the defendants appeal.

Three grounds are urged for reversal. Two of them may be considered together: Was the decedent

* See CL 1948, §§ 691.581, 691.582 (Stat Ann 1951 Cum Supp §§ 27.711, 27.712).

guilty of contributory negligence as a matter of law, namely, did the court err in denying defendants' 2 motions for a directed verdict on that ground during trial, and in submitting that issue to the jury; also, did the court err in denying defendants' motions for a new trial and for judgment *non obstante veredicto,* based on the same ground?

The accident occurred before daylight on the morning of December 6, 1951, at a place where railroad tracks cross North Larch street in Lansing, near the plant of the Motor Wheel Corporation. It was a dark morning, cloudy, and it had been raining. The defendant Charles C. Stickney, with his headlights turned on, was driving south on Larch street. Plaintiff's decedent was struck by defendants' automobile while walking east on the railroad track, to get across Larch street.

The only disinterested eyewitness to the accident, Frank Judge, testified that he was driving his automobile south on Larch street and that when he was more than 200 feet away he saw the decedent enter into the traveled portion of the highway. At that time the defendant Charles C. Stickney was passing Judge's automobile on its left, and was straddling the center line of Larch street. Mr. Judge noticed that the decedent increased his speed in crossing the street, indicating having seen defendants' car passing the Judge car. Mr. Judge also testified that he was traveling at 35 miles per hour at the time the Stickney car passed him. The maximum legal speed at that place was 25 miles per hour. Judge testified:

"*A.* * * * As I proceeded south on North Larch street, I approached one of the Motor Wheel plants on my left side, on the east. * * * I saw a pedestrian as I went along on North Larch, directly across from the Motor Wheel plant. On North Larch on the side I was driving, there are 2 lanes but there were parked cars in the 1 lane. * * *

"*Q.* Now where were you, approximately, when you first observed the pedestrian in front of you, * * *

"*A.* * * * He was just past the parked cars. * * * The parked cars were occupying, as I have indicated, the other lane or the other side. When I first saw this pedestrian, he was just out in the street from the parked cars and down on the tracks, beyond the parked cars in the other lane. While I was traveling I saw another motor vehicle traveling south, there was one that passed me. * * *

"*Q.* How far north were you of the pedestrian at the time this automobile (the Stickney car) passed you?

"*A.* I will say about 200 feet.

"*Q.* What part of the highway did your vehicle occupy as you traveled south while this other automobile passed you? In other words, where were you in the street when the other automobile passed you?

"*A.* I was in the only other lane that was left to drive in. There is just the 2 lanes. In the outside lane—next to the centerline. I saw this car pass me. There is more than room for just 1 car in that lane, it is about a lane and a half I would imagine, and it was partially in the other lane and partially in the lane that I was driving in, the other lane being on the opposite side of the street across the centerline. After that car passed me I did not see the pedestrian again; I was looking for the pedestrian after he passed me.

"*Q.* After the first time you saw the pedestrian did you see him again before this automobile passed you?

"*A.* Yes, he was hurrying across the street before the car—just as the car was passing me. I was driving 35 miles per hour; this other automobile passed me while I was going 35 and continued on to the south. I thought that the pedestrian was going to get hit and I kept looking to where he was standing when the car blocked my view and I didn't see him standing there after the car went past where he was

standing, and I seen his dinner pail flying through the air. * * *

"*Q.* Where was the pedestrian when you last saw him before this other vehicle hit him?

"*A.* He was right in the center lane—right at the centerline. The vehicle was going down the centerline. After I saw the dinner pail flying in the air, I saw the car that passed me right up at Beaver street; that was south of the point where I saw the dinner pail fly in the air, I would say between 60 and 70 feet. This car that passed me stopped and I went down there. I saw this pedestrian in front of the car. He was right in front of the car, laying right down in front of it.

"*Q.* Did you observe the car that the pedestrian was lying in front of?

"*A.* Yes, sir.

"*Q.* Did you see any evidence of damage to the car?

"*A.* Yes, it was the left front fender and headlight. * * *

"*Q.* Are you able to state what part of the street this automobile was located in, Mr. Stickney was driving?

"*A.* It was in a cocked position. The rear of the car was by the centerline and the front of the car was pulled back into the lane that I was driving in. * * *

"*Q.* Are you able to point out on the drawing up there on the blackboard approximately where Mr. Hoffman was standing when you last saw him?

"*A.* Yes, sir, I believe so, he was standing right out in here.

"*Q.* Right at the centerline or possibly a little to the east?

"*A.* He may have been a foot or so on either side of it, but he was right about on the centerline.

"*Q.* I believe you testified that the Stickney car was astraddle of the centerline?

"*A.* Yes, sir. * * * At the time he passed, I was in the second lane. His vehicle was partially

in the lane that I was driving in and partially over the yellow line. There wasn't enough room there for us to pass. I don't know how fast he was traveling; I would say that he was traveling approximately 10 miles an hour faster than I because he passed me quite rapidly, he didn't pass me slowly. I was going 35."

The defendant driver testified that he had been driving 35 miles per hour, had reduced it to the legal limit of 25, that he had to move out toward the center line to pass cars parked at the west curb, that he did not cross the center line, that he did not see decedent before he (Stickney) reached the railroad tracks, that Mr. Hoffman

"appeared in front of my car about the time I was crossing the last pair of tracks on the south side of the crossing.

"*Q.* How far did he travel after you first saw him?

"*A.* Very short distance; probably not over 10 feet. It seemed as though I could reach out and touch him when my car struck him. Impact showed that the left front fender and headlight had received the brunt of the damage."

One of the Lansing police officers who answered the accident call and went to the scene of the accident testified that he saw the 1939 Chevrolet coupe (defendants' car) "sitting in the middle of the street with a person underneath the front end of it."

The other city police officer who also answered the call testified:

"When I got to the scene in the vicinity of Beaver and North Larch streets I saw a 1939 Chevrolet in the middle of the street, on Larch street. * * * The Chevrolet automobile was approximately in the center of the intersection on Beaver street, slightly to the south, and would be on the centerline of Larch street. * * * From what I observed, there were no tracks on the wet pavement to indicate the route

of the car at the time that I arrived. There was nothing to indicate to me that the car was on the west half of the street before the collision."

Considering the testimony in the light most favorable to the plaintiff, when the decedent passed the automobiles parked at the west curb of Larch street to go across the street to the east, the Judge car was about 200 feet distant. Decedent had about 17 or 18 feet to go, to reach the center. He started to walk faster when the defendants' car had passed the Judge car. He had reached a place of apparent safety, either at the center of Larch street or east of the center, when he was struck by the left headlight and fender of defendants' automobile traveling south on the center line at an excessive rate of speed. It was reasonable for the jury to conclude that deceased had made a proper observation as to the approaching traffic and formed a judgment as to its distance away and speed, again observed traffic while crossing the street, and had exercised that degree of care and caution which an ordinarily careful and prudent person would exercise, to reach a place of safety. *Malone* v. *Vining,* 313 Mich 315. See, also, *Lang* v. *Ginste,* 333 Mich 108, where under similar circumstances it was held that where a pedestrian who was crossing a street had reached the streetcar tracks at the center of the street, in a place of apparent safety, and was hit by a taxicab that had turned out onto the tracks from behind another vehicle, he would not be held guilty of contributory negligence as a matter of law, but that his contributory negligence was a jury question.

Appellants claim that the trial court erred in denying their motion for judgment *non obstante veredicto.* In a short opinion denying the motion the trial court briefly reviewed the testimony and concluded that the decedent had made proper observation, may

have been struck after he had reached a point east of the center line of Larch street. Appellants argue that the court improperly based an inference upon an inference of no probative value. We do not agree.

"While a verdict may not rest upon bare conjecture, a finding as to a particular fact may be based upon inferences fairly drawn from other facts established by proof. * * *

"Reasonable inferences which may be drawn from affirmative facts proven are evidence, and not presumptions." *Butrick* v. *Snyder* (*syllabi*), 236 Mich 300.

Finally, appellants claim that the verdict was excessive, not supported by the proofs, and that the court erred in denying their motion for a new trial on that ground.

It was admitted that plaintiff's life expectancy was more than that of the decedent and that according to the tables she would survive him. It was stipulated that decedent's life expectancy was 10.67 years.* Appellants claim that there was no testimony as to the amount contributed by the decedent to plaintiff's support. It is not borne out by the record. The testimony showed that the hospital, medical and funeral expenses were $955.45; that the aggregate annual amount paid by decedent for the expenses of their home, for taxes, coal, electricity, automobile maintenance, insurance, doctor bills, telephone, was $550. The court correctly charged the jury as to the proper method for determining the present worth of such expenditures. The aggregate total including the amount paid for medical, hospital and funeral expenses is $4,763.83, after allowing from their verdict $2,790.26, the amount which the court charged the jury to deduct for the amount paid to

* The record does not show why the court charged that his expectancy was 8.07 years, unless it was computed on a showing that his age was 71 years in 1951.

plaintiff by an insurance company at her husband's death, decedent having deferred his retirement from his employment beyond his normal retirement age. This was not a payment by decedent or from decedent's estate. The testimony was not disputed that the decedent was plaintiff's sole means of support, that he paid all expenses and provided her with food and clothing. The final verdict allowed plaintiff $236.17 annually for food and clothing for 8.07 years as decedent's expectancy. The undisputed evidence that the decedent was plaintiff's sole means of support was sufficient to establish the fact that he provided her with food and clothing. The amount allowed by the verdict was within the reasonable range of the proofs. Appellants rely on *McGrain* v. *Bell,* 248 Mich 523, to support their claim that there was no basis in the proofs to support the verdict in that regard. The facts in that case distinguish it from the facts in the instant case, as an authority.

Affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

McKENZIE *v.* STERNICKI.

1. AUTOMOBILES—PEDESTRIANS—OBSERVATION—CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

   A pedestrian owes a duty to maintain a reasonable and proper lookout for his own safety when crossing a street used by motor vehicles and his failure to do so constitutes contributory negligence as a matter of law.

2. SAME—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

   Southbound pedestrian who crossed in front of 3 lanes of westbound traffic, stopped some 100 feet east of traffic light as required by walk to 47-1/2-foot barricaded safety zone for streetcar passengers, and who twice observed westbound defendant motorist while 40 and 20 feet east of end of safety zone was guilty of contributory negligence as a matter of law in failing to continue to observe defendant whom he knew would have to alter his course to avoid the safety zone and who could legally continue westward south of the zone on the streetcar tracks and was struck by defendant's car while on such tracks.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted October 13, 1953. (Docket No. 62, Calendar No. 45,392.) Decided December 29, 1953. Rehearing denied February 18, 1954.

Case by Henry McKenzie against Frank Sternicki for injuries sustained when he was hit by defendant's automobile. Verdict for plaintiff. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5 Am Jur, Automobiles §§ 451, 452, 705, 706.

[1, 2] Duty and liability to person struck by automobile while crossing street at unusual place or diagonally, 14 ALR 1176; 67 ALR 313.

Charfoos, Gussin, Weinstein & Kroll, for plaintiff.

Brown, Jamieson, Erickson, Dyll & Marentay (*Henry C. Odbert,* of counsel), for defendant.

DETHMERS, C. J. Suit was for damages caused by being struck by defendant's automobile when plaintiff undertook to walk across a street. He appeals from judgment *non obstante veredicto* for defendant.

Plaintiff stood on the north curb about 80 feet east from an intersection. Immediately south of him were 3 lanes for westbound vehicular traffic; beyond those 3 lanes, and slightly to his left, was a safety zone for streetcar passengers; beyond it were car tracks over which 1 lane, immediately south of the safety zone, was available for westbound traffic, and then lanes for eastbound traffic. The safety zone was a raised platform, 3 feet wide and protected by posts, with an open end toward the west, from which it extended east for 47–1/2 feet to a closed end, which came to a point at a standard. The most northerly rail of the car tracks was about 2 feet south of the south side of the safety zone. Lines were marked on the pavement, extending from the north curb where plaintiff stood to the most northerly rail, to designate a walk from the curb to the open end of the safety zone. Traffic signs directed westbound motorists in the 3 lanes north of the safety zone to stop just east of the mentioned walk, leading from the curb to the safety zone, when the light at the intersection was against them; but it appears that westbound motorists in the lane south of the safety zone were not required to stop for such traffic light until reaching the crosswalk at the intersection, approximately 100 feet farther west.

When the traffic light turned against westbound traffic plaintiff stepped off the curb and proceeded south, over what was designated as the walk, to the

west end of the safety zone. In so doing he passed in front of 3 lanes of standing automobiles to his left and reached a point just north of the north line of the safety zone extended, at which time he saw defendant's automobile approaching from his left, at a rate of speed of 20 to 25 miles per hour at best, at a point 35 to 40 feet beyond the east end of the safety zone (about 90 feet to plaintiff's left) and about 3 feet north of the most northerly rail, headed directly toward the closed end of the safety zone. Plaintiff advanced until he was about in line with the south side of the safety zone and 5 feet west from its open end when he made a second observation of defendant's automobile, which was then from 15 to 20 feet east of the safety zone (about 70 feet to plaintiff's left), traveling at approximately the same rate of speed and a little farther north from the rail than before. Plaintiff thought or assumed that it was going to turn to its right and proceed along the north side of the safety zone, behind the standing automobiles. He made no further timely observation to the left. Although there were no lines on the pavement to designate a crosswalk south of the most northerly rail, plaintiff nonetheless walked on, with the intention of crossing the street. From the point of his second observation of defendant's automobile he advanced 3 or 4 steps, crossed the most northerly rail, heard screeching automobile brakes, and saw defendant's automobile, which had turned to its left and proceeded along the south side of the safety zone, too close for plaintiff to avoid it. He started to step back and was struck by defendant's right front fender. The point of impact was just south of the most northerly rail.

The trial court found plaintiff guilty of contributory negligence as a matter of law for failure to maintain a reasonable and proper lookout to his left to observe defendant's approaching automobile from

the time it was 70 feet distant until too late for plaintiff to avoid the accident. In *Levine* v. *Schonborn*, 336 Mich 312, plaintiff was crossing a street at an intersection. We held her guilty of contributory negligence as a matter of law for failure to have observed the defendant's automobile at any time after it had completed a turn and while it was approaching from her right for a distance of from 48 to 50 feet. The rule followed in that case, applicable here and generally, is that plaintiff owes a duty to maintain a reasonable and proper lookout for his own safety and that failure to do so constitutes contributory negligence as a matter of law.

Plaintiff seeks to avoid the implication of that rule here by reliance on the so-called "swerve" cases, in which defendants' vehicles suddenly changed their courses in a manner that plaintiffs could not reasonably have been expected, and we held them not bound, to anticipate. Examples are *Gray* v. *Elliott*, 254 Mich 275; *Gayden* v. *Arabais*, 292 Mich 651; *Staunton* v. *City of Detroit*, 329 Mich 516; *Phillips* v. *Marten*, 331 Mich 330; *Lang* v. *Ginste*, 333 Mich 108. In *Staunton*, *Phillips* and *Lang* the facts were such that we held the plaintiffs had no reason, and were not bound, to anticipate that defendants would suddenly swerve out of the line of traffic in which they had been traveling; in *Phillips* and *Gayden* we mentioned that plaintiffs had formed reasonable judgments that they could proceed in safety; and in *Gray* the defendant's automobile suddenly shot out from behind the car it had been following and passed on the wrong side. Distinguishable is the instant case in which plaintiff testified that he knew, when he saw defendant's automobile the second time, that it would necessarily have to alter its course to avoid striking the closed end of the safety zone. The mere fact that defendant's automobile was then somewhat farther to the north of the car tracks than when plaintiff had

first observed it, and that it was centered slightly to the right rather than to the left of the center of the safety zone, did not warrant plaintiff's assuming, as he says he did, that it would turn to the right, north of the safety zone, rather than to the left, as it actually did; and in relying entirely on that assumption and paying no further attention to it he did not act as an ordinary, reasonable and prudent person would have done under like circumstances. Plaintiff not only knew that defendant must necessarily turn one way or the other, but also that he had a legal right to go either way, and that there would be nothing unusual about his going the way he did. It cannot be said of plaintiff, as in the cited cases, that he had no reason, and was not bound, to anticipate that defendant's car would swerve; it did not, as in *Gray,* pass when and where it should not have. Plaintiff's judgment, if he formed one after his second observation, that he could from that time on ignore defendant's automobile and safely proceed from his place of safety at the open end of the safety zone to a place of danger on the car tracks beyond it was not, as in *Phillips* and *Gayden,* a reasonable opinion or judgment. Plaintiff was, in consequence, guilty of contributory negligence as a matter of law.

Affirmed, with costs to defendant.

Adams, Butzel, Carr, Bushnell, Sharpe, Boyles, and Reid, JJ., concurred.

BROWN *v.* BROWN.

1. PARENT AND CHILD—CUSTODY OF YOUNG CHILDREN.

   The mother is entitled to the care and custody of her children who are under the age of 12 years in the event she and her husband are separated and a court has the right to make such disposition of the children as will be in their best interest (CL 1948, § 722.541).

2. SAME—ABDUCTION.

   One who, without a privilege to do so, abducts a minor child is liable to the parent, who is legally entitled to the child's custody.

3. SAME—ABDUCTION—CUSTODY OF CHILD—DAMAGES FOR DEPRIVATION.

   A parent who is wrongfully deprived of the custody of his child may recover for the loss of society of his child, for the emotional distress resulting from the abduction and for loss of services.

4. CONSPIRACY—ALIENATION OF AFFECTIONS—ABDUCTION OF CHILDREN—EVIDENCE.

   Evidence presented in wife's action for damages against husband's relatives for conspiracy to break up their marriage and for conspiracy to abduct and deprive plaintiff of the custody of her 2 young children *held,* to have established such conspiracies and participation therein by each of the defendants against whom judgment was rendered therefor.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation § 683; 39 Am Jur, Parent and Child §§ 11, 23.
[2, 3] 39 Am Jur, Parent and Child § 72.
[4, 11] 11 Am Jur, Conspiracy § 56.
[5] 53 Am Jur, Trial § 79 *et seq.*
[6] 20 Am Jur, Evidence § 994 *et seq.*
[7] 3 Am Jur, Appeal and Error § 263.
[9–11] 11 Am Jur, Conspiracy §§ 45, 47, 48.
[10] 11 Am Jur, Conspiracy § 54.

5. APPEAL AND ERROR—QUESTIONS TO WITNESSES—RULINGS ON FRIVOLOUS OBJECTIONS.

Trial judge's questions put to witnesses and rulings he made upon repeated and frequent objections, motions to strike and the making of other comments which were mainly captious or frivolous *held,* not to show bias upon part of trial judge.

6. EVIDENCE—RECORD IN ANOTHER SUIT.

The introduction of record in suit for divorce between plaintiff and her husband in action against his relatives for their conspiracy to break up the marriage and for their conspiracy to abduct her children whose custody had been awarded to her was not reversible error, where it had been introduced for purpose of showing the various orders, petitions and papers as had a bearing on instant case but without referring to testimony therein and defendant's counsel interposed only general objections and even assented to such limited use of the record.

7. APPEAL AND ERROR—TRIAL—OBJECTIONS TO RULINGS.

An objection made to the ruling of a trial court, which fails to clearly advise the trial judge of the specific ground on which it was made, does not justify reversal.

8. CONSPIRACY—TESTIMONY OF LAWYER—DAMAGES—EVIDENCE.

Testimony of Illinois lawyer in regard to professional services he had rendered in legal proceedings had in Illinois to regain custody of plaintiff's children for her was competent for purpose of proving an item of damages asserted in her declaration against former husband's relatives for conspiracy to abduct her children.

9. SAME—LIABILITY OF ALL FOR ACTS OF ONE.

Once a conspiracy is established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact that they did not actively participate therein or the extent to which they benefited thereby.

10. SAME—PARTIES.

A joint action may be maintained against the conspirators for the damages caused by their wrongful acts, but all the conspirators need not be joined, as an action may be maintained against but one.

11. SAME—JOINT AND SEVERAL LIABILITY OF CONSPIRATORS.

The liability of conspirators to civil damages is joint and several, and, a conspiracy being shown prima facie, the plaintiff may give in evidence the acts and sayings of any conspirator done

or said in furtherance of the common purpose, whether that conspirator be a party defendant or not.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted October 8, 1953. (Docket No. 37, Calendar No. 45,938.) Decided December 29, 1953. Rehearing denied February 18, 1954. Application for certiorari filed in Supreme Court of the United States May 7, 1954.

Action by Adele Brown against Tamara Brown and others for damages resulting from conspiracy to alienate the affections of her husband and from conspiracy to abduct her children and deprive her of their custody. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Dann & Rosenbaum, for plaintiff.

William H. Brown (*Joseph Sanders,* of counsel), for defendants.

BUTZEL, J. Adele Brown brought suit against Tamara Brown, Eleanor Brown, Bertha Allen, her sisters-in-law, Edward Allen, her brother-in-law, and Louis Brown and Fanny Brown, her parents-in-law. She also included Joseph Brown, another brother-in-law, as a party defendant but he was not served with process and the case evidently was dropped as to him. In the amended declaration there remained 2 counts, 5 of the original 7 counts having been abandoned or dismissed. Count 1 against all of the defendants, with the exception of Edward Allen who was excluded as a defendant in that count by instruction of the trial judge, alleged a conspiracy which resulted in alienating the affections of William H. Brown, plaintiff's former husband. See CL 1948, § 551.302 (Stat Ann § 25.192). The second count alleged a conspiracy to abduct and deprive plaintiff of the custody of her 2 young children. The 2 children

were surreptitiously taken from plaintiff by William H. Brown, her husband, allegedly with the collusion of the defendants, removed to South Africa without plaintiff's knowing what became of them for a considerable time thereafter, and not returned to plaintiff until she was put to great expense both in discovering the whereabouts of the children and in seeking to regain their custody. In the meantime she had become very sick due to worry. The jury awarded her damages of $50,000 on the first count from defendants Louis, Fanny, Tamara and Eleanor Brown, and $150,000 on the second count against all the defendants. On appeal defendants make no claim that these amounts are excessive.

The case presents a very unusual state of facts. Plaintiff produced considerable testimony to substantiate her claims and defendants produced no witnesses to refute plaintiff's claims or even try to explain their conduct. Defendants did call an attorney for plaintiff as a witness. His testimony in no way contradicted the testimony of plaintiff or the others who testified in her behalf.

Plaintiff married William H. Brown in December of 1940 and lived about 9 months in Lansing where her husband was employed. In order to supplement the family income she worked and continued to do so until about a month prior to September, 1941, when their son was born. Very shortly thereafter they moved to Detroit and lived in a 6-room lower flat where all of defendants resided. The Allens were not there all the time. While thus living with defendants plaintiff was constantly threatened by them; fault was found with her, and her marital life was made miserable by the interferences of the defendants. Evidently her husband was much influenced against plaintiff by the family's conduct toward her. In 1943 plaintiff and her husband and child moved to the upper flat of that home. Their

second child, a daughter, was born in 1945. Defendants' conduct continued and in 1945 plaintiff started a divorce suit but discontinued it shortly thereafter. In September of 1949 plaintiff testified that she could not stand it any longer and left the home on account of the defendants' alleged cruelty toward her. In October, 1949, her bill of complaint for divorce was filed.

In her declaration in this action plaintiff alleges in count 1 that defendants conspired together to break up the marriage; that they constantly found fault with her; that they threatened her, and all of them contributed to completely alienate her husband's affections; that plaintiff's husband William H. Brown seemed to be torn between 2 loyalties, that to plaintiff and that to his family, but the latter prevailed in alienating his affections for plaintiff. Plaintiff appears to be a woman of ability and refinement and was musically inclined. She had studied piano and singing and a piano was purchased so that she might continue her music and also teach her 4-1/2-year-old son. The family objected to the piano playing. We attach little importance to this incident and only mention it to possibly show the animus against plaintiff.

Plaintiff's husband, as a copartner with Tamara and Eleanor, owned 2 retail stores, which were called "The Brownie Stores," and he and his sisters worked there. Plaintiff also worked at the store at odd times but not continuously and her absence from the stores caused further difficulties. Various efforts were made toward a reconciliation and it looked as if at last it might have been successful had it not been for the family's interference. Brown seemed to be more attached to defendants than to his wife.

In February, 1950, Brown and his sister Tamara took the 2 children over the weekend to Chicago and secretly obtained passports to go abroad. On March

30, 1950, he was permitted by plaintiff to take the younger child for the purpose of buying some clothes for her. He also obtained possession of the older child who was at school, and then Brown and the children disappeared. Plaintiff was told by defendants Bertha and Edward Allen that she would never see her children again. She became distraught and very sick and had to be hospitalized for 3 weeks. By strenuous efforts of her attorneys and the assistance of the department of State in Washington and the use of court process it was discovered that Brown had taken the children to South Africa, but his exact whereabouts there was not known until later. Through appeal to Washington, Brown's passports were cancelled and he returned with the children to the United States. They arrived at New Orleans. Arrangements were made to place the children in a boarding home in Texas, but subsequently the children were taken to Chicago. Through local and Illinois courts and at great expense for attorneys, the children were eventually returned to plaintiff. Plaintiff as a result suffered much mental strain and physical illness.

Defendants claim on appeal that no order was ever entered giving plaintiff the exclusive custody of the children. Her attorneys possibly did not think it necessary to secure such an express order but relied on the statute, CL 1948, § 722.541 (Stat Ann § 25.-311), which provides that in the event of separation of husband and wife the mother shall be entitled to the care and custody of all such children under the age of 12 years. The court always has the right to make such disposition of the children as will be in their best interest. After Brown had taken the children away, an order *nunc pro tunc* was entered giving plaintiff exclusive right to the children. However, it must have been understood prior to the time that Brown abducted the children that plaintiff was

entitled to their custody because plaintiff had been awarded temporary alimony for their support. Just prior to the time that Brown removed the children from this country, he filed in the divorce proceedings a petition for visitation privileges, but no order was entered as Brown, in the meantime, had abducted the children and taken them to South Africa. The petition for visitation privileges in Brown's behalf was signed by his attorney at that time, a man of high standing at the bar. He withdrew from the case shortly thereafter.

Appellants claim in their appeal that the cause of action asserted by plaintiff in count 2 of her declaration, conspiracy to deprive a parent of custody of her children, is not recognized in Michigan. In *Oversmith* v. *Lake,* 295 Mich 627, defendants were held liable for the abduction and false arrest of plaintiff's minor children. It is there stated:

" 'One who, without a privilege to do so, abducts a minor child * * * is liable to the parent, who is legally entitled to the child's custody.' 3 Restatement, Torts, p 502, § 700."

The damages recoverable in such an action are not limited to the loss of services. The parent wrongfully deprived of the custody of his child may recover for the loss of society of his child and for the emotional distress resulting from the abduction. *Pickle* v. *Page,* 252 NY 474 (169 NE 650, 72 ALR 842); *Steward* v. *Gold Medal Shows,* 244 Ala 583 (14 So2d 549); 3 Restatement, Torts, § 700, comment g.

Before Brown left for South Africa he transferred his interest in the stores to some of the defendants. The defendants seem to have worked in concert. Plaintiff testified that her husband's parents, Louis and Fanny Brown, warned her not to try to move away from the house. The mother misled plaintiff

by telling her at first that the children might be in Chicago. The father denied having any knowledge of the whereabouts of the children when the habeas corpus proceedings first were brought. The father would not permit plaintiff to remove her personal belongings from the house during the pendency of the divorce proceedings and at that time the mother struck plaintiff and the father called her what she termed "awful names."

Defendant Tamara Brown seemed to have been more vicious than the others. Plans of plaintiff and her husband had to be discussed with Tamara and receive her approval. She told plaintiff to make arrangements to leave the children and go to work; that she and her husband had to listen to and do whatever she wanted of them. Tamara made some of the arrangements for the children's passports and made part of the financial arrangements for the trip. She accompanied Brown and the children to England but returned home when he and the children left for South Africa. Brown transferred his assets to her in order to enable him to travel more freely in South Africa. About a year later Tamara together with defendants Bertha and Edward Allen drove 2 automobiles to New Orleans when the children arrived on their return from South Africa. She participated in the arrangements to place the children in a Texas boarding home. Tamara at the hearing of the petition for writ of habeas corpus denied having any knowledge whatsoever as to the whereabouts of the children. She physically attacked plaintiff. Tamara told plaintiff that she was working for her; that plaintiff had to do what she told her.

Defendant Eleanor Brown was also one of the transferees of Brown's interest in the stores before he left for South Africa. At the habeas corpus proceedings she claimed she did not know where the children were. Plaintiff had a serious operation in

Ann Arbor some time prior to her marriage to Brown. Eleanor raised suspicions in Brown's mind about the nature of the operation so that plaintiff found it necessary to take Brown to Ann Arbor to prove that the operation had in no way affected her mind or character.

Defendants Bertha and Edward Allen left their home in Texas and came to Detroit in March, 1950, to take over the operation of the stores thereby enabling Tamara and William Brown to leave with the children for South Africa. With Tamara they drove an extra automobile to New Orleans to meet Brown and the children and made arrangements to place the children in a home. They denied having any knowledge of the children's whereabouts.

Review of the entire testimony shows that there was a concerted effort on the part of the defendants to break up the marriage and later to abduct the children. We believe a conspiracy was shown in which each of the defendants played a part.

The case was defended in a very unique manner, counsel for defendants constantly interposing repeated and frequent objections, motions to strike, and making other comments. We might characterize them in the main as captious, frivolous, and they were properly overruled by the trial judge. On the first 25 pages of the record before us there are 50 such improper objections, et cetera. It has beclouded the record and we can readily see how the jury might possibly have been unfavorably impressed by such conduct. On appeal complaint is made that the trial judge's conduct was prejudicial. In the brief for appellants, counsel referred to a colloquy which arose after plaintiff testified that she was happy to assist in the business conducted by her husband and members of his family but that she could not do so when her child was ill; that defendants would come home from the store at night and shout and call plaintiff names

and threaten her unless she did what they told her to do. Thereupon, the following took place:

"*Mr. Sanders:* I move to strike it as all conclusions, what they said. It is characterization. She is characterizing that they shouted.

"*The Court:* Can't you tell when people shout at you? Isn't that a fact?

"*Mr. Sanders:* There is no necessity in becoming so facetious about it. I am raising these objections because they are proper.

"*The Court:* It appears to me you are objecting to every word that she says.

"*Mr. Sanders:* That is my duty, and I think it is incumbent upon me to do so.

"*The Court:* When the woman says somebody shouts and you say that is a conclusion?

"*Mr. Sanders:* Get her entire answer.

"*The Court:* Then it appears to me that the objection is facetious. Go ahead.

"*A.* So they threatened me if any little thing didn't go according to their wishes.

"*Mr. Sanders:* Same objection.

"*The Court:* Same ruling. What did they threaten you with?

"*A.* That it will lead to a divorce, and everything. I can't even repeat those words, what they said to me.

"*The Court:* What do you mean, you can't repeat those words?

"*A.* I don't use those words. I am not too familiar with them. They are very bad words.

"*Q.* Well, if you can use those words in keeping with your dignity, try and say them. It is not because we are—

"*A.* It was a constant threat.

"*The Court:* You mean they constantly threatened what would happen if you didn't do these things?

"*A.* That it will lead to a divorce or it will lead me to a mental institute.

"Yes, during those conversations and threats all the defendants were present at one time or another.

After these discussions I would wait a few days and then go to the person and talk to them calmly."

In spite of the many interruptions and objections without any merit by defendants' counsel, we find that the trial judge exercised commendable restraint. The questions he asked were proper and his rulings show no bias.

This is a companion case to that of *Brown* v. *Brown,* 335 Mich 511, wherein we affirmed a divorce decree obtained by Adele Brown from William H. Brown. The record in that case is very similar to that in the instant case and was referred to from time to time during the trial of the present case but only to show various orders, petitions, et cetera, as had a bearing on the present case. The testimony contained therein was not referred to. Although defendants' counsel often interposed general objections to the use of this record, he at other times assented to the use of the record for the limited purpose set forth. The following colloquies took place during the trial:

"*The Court:* Well, the record is in evidence, as I understand it, only for the purpose of these orders that were entered in the lawsuit, and the petitions, and not for any testimony taken in the other case.

"*Mr. Sanders:* That is right, your Honor."

And later in the trial:

"*The Court:* Do you wish to introduce it?

"*Mr. Sanders:* Yes, the book, which is known as the record in the Supreme Court of the State of Michigan, appeal from the Honorable Miles N. Culehan, Circuit Judge, calendar No. 45,618, wherein Adele Brown is plaintiff and William Brown is defendant."

The orders, injunctions, decrees, et cetera, contained in the record of *Brown* v. *Brown, supra,* were relevant to the issues in the instant case. If the record as admitted was subject to any objection, the

trial court was not apprised of the specific ground of objection. In *Humphries* v. *Complete Auto Transit, Inc.,* 305 Mich 188, the Court stated:

"If anything is settled by our decisions, it is that, unless an objection clearly advises the trial court of the specific ground upon which it is made, it will not justify a reversal."

See, also, *Detzur* v. *B. Stroh Brewing Co.,* 119 Mich 282 (44 LRA 500, 5 Am Neg Rep 371), and citations therein.

Error is asserted in permitting plaintiff's witness, a member of the Illinois bar, to testify in regard to legal proceedings instituted in Illinois to regain custody of the children. This witness testified as to the professional services he had performed in those proceedings. The testimony was competent for the purpose of proving an item of damages asserted by plaintiff in her declaration.

The conflict in evidence in regard to whether defendants herein were named as defendants in the Illinois proceedings is immaterial. William Brown was named as a defendant in those proceedings. The allegations of plaintiff's declaration set forth a conspiracy between William H. Brown and the present defendants to deprive her of the custody of her children; testimony during the trial substantiated that allegation. The acts of William H. Brown in furtherance of that conspiracy would be attributable to the defendants as co-conspirators. In *Warsop* v. *Cole,* 292 Mich 628, we stated:

"There is no question but that the conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact they did not actively participate therein or the extent to which they benefited thereby."

In *Hanover Fire Insurance Company of New York* v. *Furkas*, 267 Mich 14, this Court said:

"'A joint action may be maintained against the conspirators for the damages caused by their wrongful acts, but all the conspirators need not be joined; an action may be maintained against but one.' 5 RCL, p 1103.

"'But the liability of conspirators to civil damages is joint and several, and, a conspiracy being shown prima facie, the plaintiff may give in evidence the acts and sayings of any conspirator done or said in furtherance of the common purpose, whether that conspirator be a party defendant or not.' *Schultz* v. *Frankfort Marine, Accident & Plate Glass Ins. Co.*, 151 Wis 537 (139 NW 386, 43 LRA NS 520)."

Numerous other errors are claimed by defendants. We have examined them. Even if there were any merit to them, they would be nonprejudicial.

Two judgments were returned. They are both affirmed, with costs to the plaintiff.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

ASTA *v.* DEPARTMENT OF REVENUE.

1. CERTIORARI—ALLEGATIONS IN PETITION—MOTION TO DISMISS.
   Well-stated allegations of fact in an application for a writ of certiorari must be taken as true for the purpose of determining whether or not the denial of a motion to dismiss the writ was proper.

2. SAME—CLAIMED UNCONSTITUTIONAL APPEAL PROCEDURE OF STATUTE.
   A party is not bound to follow appeal procedure set up in the statute which he assails as unconstitutional, hence, he may resort to an independent attack on the statutory proceedings by the use of the writ of certiorari.

3. SAME—FUNCTION OF WRIT.
   The function of the writ of certiorari is to review the jurisdictional validity and errors of law of inferior tribunals and judicial bodies not according to the course of the common law.

4. SAME—CONFISCATION OF ALLEGED CONTRABAND—CONSTITUTIONALITY OF STATUTES.
   The issue as to whether the defendant department of revenue, in exercising a judicial function based upon statutory authority to confiscate alleged contraband cigarettes, was proceeding illegally because the statute creating the judicial authority was unconstitutional was properly determinable by certiorari (CL 1948, § 205.501 *et seq.*, as amended by PA 1951, No. 78).

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 332.
[2–4] 10 Am Jur, Certiorari §§ 5, 11, 13.
[5] 10 Am Jur, Certiorari § 6.

5. SAME—DISCRETION OF COURT.

The writ of certiorari is a discretionary one and its issuance by a court having authority will be upheld in the absence of an abuse of discretion.

6. SAME—ISSUANCE OF WRIT—MOTION TO DISMISS.

The propriety of the issuance of the writ of certiorari is not properly raised on a motion to dismiss.

7. COSTS—CERTIORARI—MOTION TO DISMISS—CONSTITUTIONAL LAW—STATUTES.

No costs are allowed on appeal from the denial of department of revenue's motion to dismiss petition for certiorari filed by party from whom department had taken possession of alleged contraband cigarettes by a proceeding authorized by a statute which petitioner claimed was unconstitutional (CL 1948, § 205.-501 *et seq.*, as amended by PA 1951, No 78).

Appeal from Wayne; Marschner (Adolph F.), J. Submitted October 13, 1953. (Docket No. 66, Calendar No. 45,532.) Decided December 29, 1953.

Certiorari by Dominic Asta against Michigan Department of Revenue to vacate departmental order of confiscation. Motion to dismiss writ denied. Defendant appeals. Affirmed, and remanded for consideration of issues.

Philip Weiss, Frank H. Finney, Sidney K. Meyer, for plaintiff.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara, T. Carl Holbrook* and *William B. Elmer,* Assistants Attorney General, for defendant.

BUTZEL, J. Dominic Asta, plaintiff herein, shipped 218 cases of assorted cigarettes from St. Louis, Missouri, to Detroit, Michigan. Although they were consigned to one Joe Spezia, Asta states in a sworn petition that he and Spezia are one and the same person. The Hancock Trucking Company of Detroit, the carrier, was notified to deliver the cigarettes at a speci-

fied time at the corner of Schaefer road and Raupp road, located near the outskirts of the city of Detroit. The truck was driven to the rear of a building at or near the designated place where Asta and one Frank Navarro were waiting for it. They produced evidence of being the representatives of the consignee named in the freight bill and the driver removed the truck seal. Asta and Navarro took possession of the cigarettes. After they had transferred 26 cases of the shipment to a Studebaker Vanette truck, the police arrived, seized the cigarettes and the truck and turned them over to the department of revenue, defendant herein, in accordance with the provisions of the Michigan cigarette tax act, PA 1947, No 265 (CL 1948, § 205.501 *et seq.*), as amended by PA 1951, No 78 (Stat Ann 1950 Rev and Stat Ann 1951 Cum Supp § 7.411[1] *et seq.*).

Subsection 9(b) of the cigarette tax act, as amended, *supra,* makes it a felony in certain instances, and a misdemeanor in others, for an unlicensed person to be in control or possession of cigarettes contrary to the provisions of the cigarette tax act. Asta was not a licensed person nor were the taxes on the cigarettes paid. It is claimed by defendant, and the record so indicates, that Asta was engaged in what is frequently termed the "bootlegging" of cigarettes. Subsection (d) of section 9 of the act, as amended, *supra,* provides that such cigarettes and the vehicle containing them are contraband and subject to seizure and forfeiture in accordance with section 9, subs (e) of the cigarette tax act, as amended. Subsection (e) provides:

"Within 5 days after the date of service of the inventory the person from whom the property was seized or any person claiming an interest in the property may file with the commissioner a demand for a hearing before the commissioner or any person designated by him for a determination of the question

as to whether the property was lawfully subject to seizure and forfeiture. Such inventory shall also contain a notice to the effect that unless demand for hearing as provided in this section is made within 5 days the property designated therein shall be forfeited to the State. Such person or persons shall be entitled to appear before the department and be represented by counsel and present testimony and argument. After the hearing the department shall render its decision in writing and by order either declare the property seized subject to confiscation and sale by the department or declare the property returnable to the person entitled to possession of the same.

"If any person is aggrieved by the decision of the department, he may appeal only to the circuit court of the county where the seizure was made to obtain judicial determination of the issue of forfeiture. Such action shall be commenced within 20 days after notice of the department's determination is sent to the person or persons claiming an interest in the property seized. The court shall hear the action and determine the issues of fact and law involved in accordance with rules of practice and procedure as in other *in rem* proceedings.

"In the event an appeal is taken from a decision or order of the department to the circuit court of the county where the seizure was made and a judicial determination of the issue of forfeiture cannot be made before deterioration of any of the property seized, the court shall order the sale of such property with public notice as determined by the court, and require the proceeds to be impounded with it until the issue of forfeiture is finally adjudicated."

In accordance with the act, notice of seizure and inventory was served on Asta, together with a notice that he might demand a hearing within 5 days after time of service to determine whether the property was subject to seizure and forfeiture. Asta and Navarro appeared by an attorney who demanded a

hearing in respect to the power and authority of the State of Michigan to make the seizure, asserting that the State had no power under the First and Fourteenth Amendments to the Constitution of the United States and also "under the civil rights act thereof" to make such seizure. A hearing was held before the deputy commissioner and Asta's attorney reasserted the claims on the above constitutional grounds and stressed the fact that the entire procedure had taken place within 30 days or thereabouts after the 1951 amendment, PA 1951, No 78, had been passed by the legislature and signed by the governor, and not 90 days after the final adjournment of the session of the legislature that passed the act, it being claimed that the immediate effect provision of the act was null and void on the ground that the act did not make an appropriation, nor that it was immediately necessary for the preservation of the public peace, health or safety, as provided for in article 5, §§ 1 and 21 of the 1908 Constitution of the State of Michigan. Although Asta's attorney cross-examined the State's witness at the hearing he did not produce any testimony on behalf of Asta. At the conclusion of the hearing, an order was entered determining that the cigarettes and the Studebaker Vanette truck were contraband within section 9(e) of the act and subject to sale in accordance with section 9(f) of the act. By a subsequent stipulation the cigarettes were sold and the proceeds were deposited to await the outcome of the litigation that followed. The Studebaker Vanette truck has also been impounded.

Counsel for Asta applied for a writ of certiorari to the circuit court for the county of Wayne asserting in the application for the writ that the confiscation and forfeiture proceedings taken by the department of revenue were void; that authority for the confiscation and forfeiture purported to arise under PA 1951, No 78, which was unconstitutionally given

immediate effect. He further alleged that the confiscation was in violation of article 1, §§ 9 and 10, of the Constitution of the United States and in derogation of the Fourteenth Amendment to the Constitution. A writ of certiorari was issued pursuant to an amended application for the writ, the amended application having omitted the objectionable portion of the original writ requesting mandatory relief against the department of revenue. Defendant, department of revenue, thereupon filed a motion to dismiss the writ on many general grounds and included the specific claim that plaintiff had an adequate remedy by appeal as provided within the statute, CL 1948, § 205.509(e), as amended by PA 1951, No 78, § 9(e) (Stat Ann 1951 Cum Supp § 7.411[9] [e]), and that the circuit court was therefore without jurisdiction to review the proceedings of the Michigan department of revenue by writ of certiorari. Section 9(e), as set forth above, provides for an appeal by the aggrieved party in which the court may determine the issues of fact and law. The trial court denied defendant's motion to dismiss and from this denial, leave having been granted, the defendant appeals.

For the purpose of this appeal, well-stated allegations of fact in the application for the writ of certiorari must be taken as true. *Diggs* v. *State Board of Embalmers and Funeral Directors,* 321 Mich 508; *Reed* v. *Civil Service Commission,* 301 Mich 137. Plaintiff alleges the unconstitutionality of the statute under which the defendant proceeded on various grounds but principally that it contravenes article 5, § 21, of the 1908 Constitution of the State of Michigan. Plaintiff claims, as stated above, that the immediate effect clause of the act is null and void and, therefore, he could not appeal under the provisions of the act without recognizing the validity of the act. *Diggs* v. *State Board of Embalmers and*

Funeral Directors, supra, is analogous. In that case we stated:

"In the case at bar plaintiff, as before noted, assails the constitutionality of the statute under which the defendant board has proceeded. The trial court did not pass on the merits of the claim, and for obvious reasons this Court may not, on the record now before us, undertake to do so. If plaintiff's position is correct, in other words, if the entire statute is unconstitutional, then the provisions with reference to an appeal from an order of defendant board would necessarily fall with the rest of the act. It is scarcely logical to say that plaintiff is bound to press a remedy ostensibly granted by the statute the validity of which he assails."

Since under the authority of the *Diggs Case, supra,* plaintiff was not compelled to follow the appeal procedure set up in the statute which he assailed, he proceeded to make an independent attack on the statutory proceedings by the use of certiorari. The function of the writ of certiorari is to review the jurisdictional validity and errors of law of inferior tribunals and judicial bodies not according to the course of the common law. *Jackson* v. *People,* 9 Mich 111 (77 Am Dec 491). The defendant was exercising a judicial function based upon statutory authority. Plaintiff alleges that the defendant was proceeding illegally because the statute creating the judicial authority was unconstitutional. This issue could properly be determined by certiorari.

Defendant sets forth several reasons why the writ should not have been granted. The writ of certiorari is a discretionary one and its issuance by a court having authority will be upheld in the absence of an abuse of discretion. The propriety of the issuance of the writ is not properly raised on a motion to dismiss.

In *Rowe* v. *Rowe,* 28 Mich 353, this Court stated:

"A motion is made to dismiss the writ of certiorari on 2 grounds: first, because the case is not a proper one for that writ; and second, because it was improvidently granted.

"The first point relates to the merits, and should be considered when the case is argued, and not on this motion. * * *

"Where a writ has been granted by a competent officer, upon a sufficient application, we could not review his discretion in granting it."

The order denying the motion to dismiss is affirmed without prejudice and the cause remanded to the circuit court for the county of Wayne for further consideration of the issues raised by the petition and return, but without costs.

DETHMERS, C. J., and ADAMS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

MUTH *v.* W. P. LAHEY'S, INC.

1. NEGLIGENCE—STORES—INVITEES—EVIDENCE.
   Customer in shoe department of a store *held,* an invitee at place and time of accident alleged to be due to defendants' negligence, where it appears she had bought shoes there previously, inquired if her size was among shoes advertised as being on sale, clerks were then busy and 1 of them directed her to look at the shelves on which the shoes were located, since she was engaged in a mission for the benefit of both herself and the store operators.

2. SAME—TRAP DOOR IN STORE AISLE—BARRICADE—WARNING.
   Lessee of shoe department of a store was bound by the active negligence of its clerks in leaving a trap door through the floor of an aisle along which shelves containing shoe boxes were located without having any barricades or warning to prevent persons falling through it and then directing plaintiff customer to examine shelves without warning her of the danger.

3. SAME—GENERAL OPERATOR OF DEPARTMENT STORE—LIABILITY FOR DANGEROUS CONDITION OF PREMISES—CONTROL OF LESSEE—QUESTION FOR JURY.
   Whether or not defendant general operator of department store was liable for installation and maintenance of a dangerous condition on premises leased to codefendant for conducting shoe department was properly left to jury, where lease provided that lessor agreed to furnish heat, light, janitor and local telephone services, air conditioning and cooling facilities,

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5, 10–12] 38 Am Jur, Negligence §§ 98, 99, 131 *et seq.*
[1–3, 5, 10–12] Duty and liability respecting condition of store or shop. 33 ALR 181; 43 ALR 866; 46 ALR 1111; 58 ALR 136; 100 ALR 710; 162 ALR 949.
[2] 35 Am Jur, Master and Servant §§ 532 *et seq.*, 565, 566.
[3] 32 Am Jur, Landlord and Tenant §§ 665, 688, 689, 818.
[5–9] 38 Am Jur, Negligence § 174 *et seq.*

sales books and wrapping materials, required advertising to be carried in general operator's name and receipts to be paid to it and reserved control over all credit sales and purchases and the right to decide controversies between the lessee and its employees and customers and fitness of lessee's employees, and trap door through which plaintiff fell had been installed with the general operator's approval.

4. APPEAL AND ERROR—DIRECTED VERDICT—JUDGMENT NOTWITHSTANDING VERDICT—EVIDENCE.

Testimony must be construed as strongly as possible in favor of plaintiff on defendant's appeal from denial of motions for directed verdict and for judgment notwithstanding verdict.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—UNGUARDED TRAP DOOR—WARNING.

Whether or not plaintiff customer in shoe department was guilty of contributory negligence was properly left to jury, where it appears that 1 of the clerks had left a trap door through the floor of an aisle unguarded and without warning plaintiff of the danger another clerk had directed plaintiff to search for her own size of shoes among the stock located on shelves along the aisle and she fell through the trap door opening while making such search.

6. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Contributory negligence is ordinarily a question of fact for the jury, if there is one, unless the evidence so plainly and clearly establishes such contributory negligence that no reasonable man could come to any other conclusion.

7. SAME—CONTRIBUTORY NEGLIGENCE.

One in the exercise of ordinary care under all of the circumstances is not guilty of contributory negligence.

8. SAME—ORDINARY CARE—QUESTION OF FACT.

What is ordinary care under the circumstances of a case is usually a question of fact.

9. SAME—DEFINITION OF ORDINARY CARE.

Ordinary care is the care which an ordinarily prudent person would exercise under the same or similar circumstances.

10. SAME—CONTRIBUTORY NEGLIGENCE—UNGUARDED TRAP DOOR—ANTICIPATED DANGER.

Evidence adduced in shoe department customer's action for injuries sustained in fall through unguarded trap door opening in aisle where shoes were stored *held*, to have failed to suggest any possible reason why she should have anticipated

an opening in the floor, hence, negligence will not be imputed to her as a matter of law for her failure to look out for such danger.

11. EVIDENCE—EXPERT ON LIGHTING ARRANGEMENTS—UNGUARDED TRAP DOOR—WARNING.

Testimony of expert on lighting arrangements and visual perception was competent to assist jury in determining issues of negligence and contributory negligence in actions based on injuries received by customer as she fell through unguarded trap door opening in floor of aisle where, without warning of danger, lessee's shoe clerks had directed her to search for shoes on sale which were advertised by defendant lessor and sold by codefendant lessee.

12. NEGLIGENCE — TRIAL — PROPER ISSUES — REIMBURSEMENT OF LESSOR.

Whether or not defendant general operator of store has a right to reimbursement from lessee of shoe department for payment of judgments arising out of injuries to lessee's customer from active negligence of lessee's clerks was not a proper issue in customer's action against such lessor and lessee, hence, trial court was not in error in so holding.

Appeal from Muskegon; Fenlon (Edward H.), J., presiding. Submitted October 8, 1953. (Docket Nos. 38, 39. Calendar Nos. 45,925, 45,926.) Decided December 29, 1953.

Separate actions by Ben Muth and his wife, Mina Muth, against W. P. Lahey's, Inc., a Michigan corporation, and Brummel Shoes, Inc., an Indiana corporation, for damages sustained by wife's fall on premises. Cases consolidated for trial and appeal. Verdicts and judgments for plaintiffs. Defendants appeal. Affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Thomas W. Finucan,* of counsel), for plaintiffs.

Mitts, Smith & Haughey, for defendant W. P. Lahey's, Inc.

Sessions & Barlow, for defendant Brummel Shoes, Inc.

CARR, J. On the 7th of November, 1950, plaintiff Mina Muth entered the store of W. P. Lahey's, Inc., in the city of Muskegon. After paying a bill she proceeded to the shoe department, which was at the time operated by the other defendant, Brummel Shoes, Inc., pursuant to the provisions of a lease between defendants that set forth at some length their respective contractual rights and obligations. It was Mrs. Muth's intention to purchase a pair of shoes if she could find what she wanted. She discovered that the clerks were busy at the time, but was told by one of them that she might look along the shelves where the shoes were kept to see if she could find her size among those that were marked as being on sale. She proceeded in accordance with the suggestion, it being her purpose, if she found a box marked with her size, to call the attention of a clerk to it and not to herself remove it from the shelf.

While proceeding along a passageway between shelves containing shoes and the west wall of the building, she stepped through an opening in the floor and fell to the basement, sustaining serious injuries. Below such opening was a stairway which was used by employees of the defendants in going to the basement where both had merchandise stored. It was covered ordinarily by a trap door, carpeted, as was the passageway, and of the same width as the space between the shelves, on which the shoes were placed, and the wall. The stairway in question had been used by an employee of defendant Brummel who had not taken the trouble to lower the door or to put up a chain that was evidently intended to be used to protect the opening.

Mrs. Muth brought suit to recover damages for the injuries sustained by her, and the other plaintiff, her husband, also instituted suit for hospital and medical expenses resulting from such injuries and for other damages that he had sustained. The cases

were tried together before a jury. At the conclusion of the plaintiffs' proofs defendants moved for directed verdicts which were taken under advisement. Said motions were renewed at the conclusion of the testimony, and the same action taken. The jury returned a verdict of $12,500 for Mrs. Muth, and $5,786 in favor of her husband. Motions for judgments notwithstanding the verdicts were made, and denied. Both defendants have appealed, asserting that the trial judge was in error in refusing to direct verdicts in their favor, and also that there was prejudicial error in the admission of certain testimony. The appeals in both cases have been submitted on 1 record.

The first question raised by appellants has reference to the status of Mrs. Muth, hereinafter referred to as the plaintiff, at the time she received her injuries. That she was an invitee at the time she entered the store is not open to question, but it is apparently the position of appellants that when she was examining the boxes on the shelves she was merely a licensee. As a witness in her own behalf, plaintiff testified as follows with reference to what occurred when she entered the shoe department of the store:

"*A.* These clerks were busy and I had bought so many shoes there and I asked them—I said, 'You are very busy and I am in a hurry; would you know if you have any shoes to fit me?' They said they thought they had, then I said, 'Then I will wait.' He said, 'Why don't you go back there and look for yourself?' I said, 'Am I allowed back there?', and he said 'Oh, sure that is fine.' I wouldn't say that is the exact words, but to that effect. I said, 'How would I know the shoes that were on sale?' He said they had tags on them, and I proceeded to look. * * *

"*Q.* Do you mean to tell us here you talked to some clerk there and he told you to go and pick your own shoes out?

"*A.* He said, 'Go and look.' "

The clerk with whom plaintiff talked was called by her on the trial for cross-examination,* and in substance corroborated her claim as to what was said and done. Under the circumstances disclosed by the proofs, we think that the plaintiff at the time she engaged in the search for shoes of the kind that she wished to purchase was an invitee. She was entitled to follow the direction of the clerk. *McCrum* v. *Weil & Co.*, 125 Mich 297 (9 Am Neg Rep 59). In doing so she was engaged in a mission not merely for her own benefit, but for that of defendants as well. See, also, *Otto* v. *Hansen Wholesale Lumber Corporation*, 331 Mich 37.

Was there sufficient evidence of negligence on the part of the defendants to support the verdicts of the jury? It is undisputed that the trap door was left open by 1 of Brummel's employees, without the opening being protected either by the chain provided for that purpose or in any other manner. Plaintiff was directed by another employee to look for shoes that she might wish to purchase, no warning being given to her with reference to the trap door, of which, as she testified, she had no knowledge. The unsafe condition resulted not from the act of a third party but directly from the conduct of defendant Brummel's employee. Said defendant is bound by the active negligence. *Carpenter* v. *Herpolsheimer's Co.*, 278 Mich 697; *Hulett* v. *Great Atlantic & Pacific Tea Co.*, 299 Mich 59. For the safety of plaintiff defendant Brummel was charged with the observance of the duties discussed at some length in *Nezworski* v.

* See CL 1948, § 617.66 (Stat Ann § 27.420).—REPORTER.

Mazanec, 301 Mich 43. See, also, *Torma* v. *Montgomery Ward & Company,* 336 Mich 468, 476, 477.

Defendant Lahey's argues that the relation between it and the other defendant was such that it cannot be charged with liability for the negligence shown. Reliance is placed on the lease into which it had entered with the assignor of Brummel's, by the terms of which the lessee was authorized to carry on, for the period of time therein named, the shoe business in Lahey's store. The arrangement thus created was in effect at the time of the injuries to plaintiff. The lessee thereunder agreed to install certain equipment and fixtures for the conduct of the business, while the lessor was to furnish heat, light, janitor service, local telephone service, and air conditioning and air cooling facilities as furnished to the rest of its store, together with sales books, wrapping paper, bags and twine. All advertising was carried in the name of Lahey's. All receipts from the lessee's business were required to be paid directly to the lessor to be held in a trust fund and accounted for to lessee after certain deductions therein provided, designated as rents. Lahey's also reserved control over all credit sales and purchases. It is particularly significant that the written undertaking gave to Lahey's the right to decide any controversies arising between lessee, or its employees, and its customers, relating to claims in connection with goods sold, and further reserved the right to determine the fitness and qualifications of any employee of lessee, with the right to insist upon dismissal of any such employee who might prove unsatisfactory to the lessor.

The shoe sale of which plaintiff desired to take advantage was advertised in the name of Lahey's. Plaintiff testified that she had not at the time heard of Brummel's. It is also in evidence that the installation of the stairway and trap door was approved

by Lahey's, and that its employees occasionally used the stairway as a means of ingress and egress to and from the basement. Defendant Lahey's was not prejudiced by the action of the trial court in leaving to the jury the question whether plaintiff was entitled to assert negligence on its part.

It is urged by both appellants that plaintiff failed to establish her freedom from contributory negligence, and that for such reason the motions for directed verdicts should have been granted. In determining the matter the testimony, as has been repeatedly recognized by this Court, must be construed as strongly as possible in plaintiff's favor. As bearing on her conduct the following excerpts from her testimony are significant:

"*Q.* What did you say?

"*A.* I said to him, 'I see you are busy and I am in a hurry; do you think you have any shoes to fit me?' He said, 'Why don't you go back and look for yourself?' I said, 'How would I know which ones are on sale?' and he said, 'The ones with the tags on.'

"Then I started looking. I did not look along the line of this first shelving here right opposite the chairs. I went over here (indicating) toward the mezzanine. I went from where the clerk told me, toward the back of the store toward the mezzanine, where the shoes are. That would be along this line of shelving shown in back of plaintiffs' exhibit 1. The end of those open shelves was near the mezzanine, I don't know just how close, but it was up towards the mezzanine floor. I don't remember that I went to the first section, but I remember looking over here and starting along here (indicating). When I started looking at this section of the shelving I started behind the chairs. I started looking in this section of shelving near the mezzanine floor. As I went along I noticed certain of the boxes had tags on. When I started to look at the boxes the mezzanine floor was on my right and I was facing

the row of shelving along the wall of the store, and looking there I could see the tags. I could see the size written on the tags. I had no trouble making out what was on the tags, it was very plain.

"I proceeded from my right towards the left, facing the row of shelving along that wall, looking up and down at the rows of boxes for these tags. My attention was closely taken up to see if I could find a pair of shoes that had my size. That is what I went back there for. As I proceeded in search of a box marked with my size, I was stepping sideways to my left.

"*Q.* And you continued along there from your right stepping sideways to the left, looking at those boxes on the shelves until you fell into the trap door, isn't that right?

"*A.* Yes. I heard somebody call loud, 'She is going to fall.'

"*Q.* Just then your left foot went into the hole and you fell?

"*A.* That is right. * * *

"*Q.* When you got back there where you started to look at the boxes on the shelf, you glanced around?

"*A.* You glance around; yes, I did.

"*Q.* At that time, where did you glance?

"*A.* Down to the floor.

"*Q.* At the floor. Then after you had glanced around, when you glanced around, did you see this trap door open there?

"*A.* I did not.

"*Q.* After you had glanced around, you started looking at the boxes, is that right?

"*A.* That is right.

"*Q.* From that time you, you didn't glance around, did you?

"*A.* Not to my recollection.

"*Q.* From the time you made that 1 glance around, you proceeded to walk sideways to your left examining the boxes, is that right?

"*A.* Yes, sir.

"*Q.* As you approached the trap door, you didn't glance around again to see what was on the floor there, did you?

"*A.* No.

"*Q.* If you had, you could have seen that opening there, couldn't you?

"*A.* If I had looked down, but I never saw it open before. I didn't know it was there.

"*Q.* I will repeat the question and please answer my question. As you stepped sideways along there, facing this rack of shoe boxes to your left, looking in the shoe boxes, as you proceeded there from the time you started up near the mezzanine to just before the time you fell in, if you had looked to your left at any time, you could have seen that open trap door, couldn't you?

"*A.* I doubt it.

"*Q.* Why not?

"*A.* When you look at it, the carpeting and floor and everything looked alike.

"*Q.* This is the way it looked, wasn't it (indicating).

"*A.* Yes.

"*Q.* Now, you claim that as you walked along there, if you had glanced to your left on that floor, you claim you could not have seen that trap door?

"*A.* I don't claim I couldn't have.

"*Q.* You could have seen it just as plain then as you can see it in that plaintiffs' exhibit 3, couldn't you?

"*A.* If I had been looking for it, that is right.

"*Q.* If, as you stood here (indicating) you had glanced to your left, you could have seen that open trap door just as well at that time as you can see it now in plaintiffs' exhibit 3, couldn't you?

"*A.* If I had been looking for it.

"*Q.* If you had glanced to your left as you proceeded along there, you could have seen the open trap door that time just as well as you can see it here now in plaintiffs' exhibit 3, couldn't you?

"*A.* If I had looked right at it.

"*Q.* It would have been just as visible to you then as it is in this picture now, wouldn't it?

"*A.* If I had been looking for it probably. I don't know how else to put it."

In *Reedy* v. *Goodin,* 285 Mich 614, 620, it was said:

"Contributory negligence is ordinarily a question of fact for the jury, if there is one, unless the evidence so plainly and clearly establishes such contributory negligence that no reasonable man could come to any other conclusion. *Frary* v. *Grand Rapids Taxicab Co.,* 227 Mich 445. If plaintiff was in the exercise of ordinary care under all of the circumstances, he was not guilty of contributory negligence; and what is ordinary care is usually a question of fact. It is the care which an ordinarily prudent person would exercise under the same or similar circumstances."

The proofs in the case do not suggest any possible reason why plaintiff should have anticipated an opening in the floor. The following statement from the opinion in *Hulett* v. *Great Atlantic & Pacific Tea Co., supra,* 68, may well be repeated here:

"Plaintiff could not be said, as a matter of law, to be under obligation to look for an unsafe condition of the floor. Negligence will not be imputed to plaintiff for failing to look out for danger if, under the surrounding circumstances, she had no reason to suspect that such danger was to be apprehended. *Lawrence* v. *Bartling & Dull Co.,* 255 Mich 580; *Corey* v. *Hartel,* 216 Mich 675; *Brown* v. *Stevens,* 136 Mich 311 (16 Am Neg Rep 101); *Wine* v. *Newcomb, Endicott & Co.,* 203 Mich 445; Baldwin, Personal Injuries (2d ed), p 138, § 146. Plaintiff was not guilty of contributory negligence as a matter of law."

See, also, *Brown* v. *Stevens,* 136 Mich 311, 314 (16 Am Neg Rep 101); *Corfeld* v. *Douglas Houghton Hotel Company,* 324 Mich 459; *Kuhn* v. *King,* 330 Mich 49; *Cochran* v. *Pinto,* 333 Mich 91; *Torma* v. *Montgomery Ward & Company, supra; Thompson* v.

F. W. Woolworth Company, 100 Ind App 386 (192 NE 893); *Ralph* v. *MacMarr Stores,* 103 Mont 421 (62 P2d 1285). It may not be said in the instant case that plaintiff was guilty of contributory negligence as a matter of law in failing to make a closer inspection of the floor than her testimony indicates was made by her, in view of the fact that she had no reason to anticipate the presence of any unguarded opening in it. Whether she established that she exercised proper care for her own safety was for the determination of the jury. The trial court was not in error in submitting it as a factual issue.

Apparently in support of the claim that plaintiff did not fail to exercise due care in making observations for her own safety, counsel in her behalf offered the testimony of an expert on lighting arrangements and visual perception who testified, on the basis of experience in investigations and researches made in connection with industrial lighting problems, with reference to the situation in defendants' store. Defendants assert that such testimony was improperly received over their objections. However, we are not prepared to say that expert testimony of the character in question may not be of assistance to a jury under circumstances such as are involved in the case at bar, the weight to be given thereto resting in the sound judgment of the jury. Defendants were not erroneously prejudiced thereby.

By its requests to charge and by subsequent motion, defendant Lahey's raised in the trial court the claim that in the event of judgment against both defendants it should be held entitled to recover from Brummel's the amount of the damages found in favor of the plaintiffs. The trial judge refused to submit the matter to the jury, and denied the motion. Such refusal and denial are assigned as errors on appeal. Our consideration of the matter brings us to the conclusion that said assignments are not well found-

ed. Whether defendant Lahey's, in the event that it is required to pay the judgments recovered by plaintiffs, or any portion thereof, has a right to reimbursement from the other defendant was not a proper issue in the present cases, and the trial court was not in error in so holding.

The judgments are affirmed, with costs to plaintiffs.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE *v.* WOLFE.

1. STATUTES—CONSTRUCTION.

   Pertinent provisions of a statute must be read together to determine the intent of the legislature.

2. SAME—CONSTRUCTION—AMENDMENT—REFERENCE—INTENT—OVERWEIGHT MOTOR VEHICLES—JUSTICES OF THE PEACE—JURISDICTION.

   Claim that proviso, added to section of the code of criminal procedure relating to jurisdiction of justices of the peace by an amendatory act which became effective on the same day as an act amending section of the vehicle code referred to in the proviso, did not confer on justices of the peace the power to hear and determine misdemeanors requiring the imposition of

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 50 Am Jur, Statutes § 348.

[2, 3, 6, 7] 14 Am Jur, Criminal Law § 215; 31 Am Jur, Justices of the Peace § 54.

[4, 5] 50 Am Jur, Statutes § 435 *et seq.*

[10, 11] Generally as to publication of administrative orders, see 42 Am Jur, Public Administrative Law § 97.

[14] 15 Am Jur, Criminal Law § 551.

[20] 25 Am Jur, Highways § 269.

[20] Power to limit weight of vehicle or load thereon with respect to use of highways. 26 ALR 747; 72 ALR 1004.

penalties in excess of $100 arising under other sections of the vehicle code not specifically referred to nor amended, *held*, without substantial merit, where it is apparent the legislature intended to enlarge the jurisdiction of such justices as to certain offenses and make expeditious disposition of proceedings for imposition of penalties for operating overweight vehicles on the public highways (CL 1948, § 774.1, as amended by PA 1952, No 14; PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13).

3. CONSTITUTIONAL LAW—LEGISLATURE—JUSTICES OF THE PEACE—JURISDICTION.

The legislature is authorized to provide for the criminal jurisdiction of justices of the peace (Const 1908, art 7, § 16).

4. STATUTES—PROVISOES—IRRECONCILABLE INCONSISTENCY.

An irreconcilable inconsistency in the proviso of a statute takes precedence and controls the enactment, as expressing the latest legislative intent to the extent of the inconsistency.

5. SAME—PROVISOES—REPUGNANCY.

Proviso of statute, as included by an amendatory act, was not repugnant to purview of statute amended, where it did not render prior provisions of such statute inoperative and was limited in its scope to a certain class of cases (CL 1948, § 774.1, as amended by PA 1952, No 14).

6. JUSTICES OF THE PEACE—JURISDICTION—STATUTES.

The matter of the jurisdiction of justices of the peace is entirely subject to the control of the legislature and its right to enact specific provisions covering particular situations may not be denied (Const 1908, art 7, § 16).

7. SAME—JURISDICTION—STATUTES—PROVISOES—OVERWEIGHT VEHICLES.

The enactment of a proviso permitting justices of the peace to impose a fine of more than $100 for violation of weight restrictions imposed by the vehicle code was a proper method of modifying the general provisions as to the jurisdiction of such justices (Const 1908, art 7, § 16; CL 1948, § 774.1, as amended by PA 1952, No 14).

8. CRIMINAL LAW—COMPLAINT—AVERMENTS OF FACT—CONCLUSIONS—STATUTES.

The averments of fact in complaint, charging a misdemeanor, are controlling rather than the conclusion of the individual drawing it as to the particular section of the law on which the charge should be predicated.

9. SAME—SUFFICIENCY OF COMPLAINT—AVERMENT AS TO OVERWEIGHT VEHICLE—REFERENCES TO STATUTE.

Fact that complaint filed against defendant referred to section of vehicle code relative to weight restrictions instead of sections making it illegal to move overloaded vehicles on the highways and imposing wheel and axle load limits *held*, immaterial, where it was averred that defendant operated a vehicle that was carrying a load in excess of the weight restrictions imposed by law and section referred to declared such offense a misdemeanor (PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13).

10. HIGHWAYS AND STREETS—ADMINISTRATIVE ORDERS IMPOSING WEIGHT RESTRICTIONS—NOTICE TO PUBLIC.

Reasonable notice of an administrative order of the State highway commissioner or county road commission imposing weight restrictions upon vehicles using highways, except in March, April, and May, must be given to the public in such manner and form as the legislature may prescribe in order to be effective (PA 1949, No 300, § 722[f]).

11. SAME—WEIGHT RESTRICTIONS—NOTICE TO PUBLIC.

An administrative order, made by the State highway commissioner, which imposed weight restrictions upon vehicles using a certain highway during February was inoperative, where the statute authorizing it failed to provide for a method of giving notice thereof to the public and no notice appears to have been given by the posting of signs or pursuant to the administrative code act (CL 1948, § 24.71 *et seq.*, as amended by PA 1949, No 90 and PA 1951, No 9; PA 1949, No 300, § 722[f]).

12. SAME—COMPLAINT FOR OVERWEIGHT VEHICLE—SUFFICIENCY—ADMINISTRATIVE ORDER—STATUTES.

The fact that an administrative order imposing weight restrictions upon a certain highway during the month of February, inoperative for lack of notice thereof to the public, was not referred to in the complaint and warrant in prosecution for driving an overweight vehicle in violation of statute is immaterial but the sufficiency of the allegations in the complaint must be determined without reference to such order (CL 1948, § 24.71 *et seq.*, as amended by PA 1949, No 90 and PA 1951, No 9; PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13).

13. SAME—OVERWEIGHT VEHICLES—EVIDENCE.

The extent of the claimed overweight of a vehicle is a matter of

proof in a prosecution for driving an overweight vehicle on the public highway in violation of statute (PA 1949, §§ 716, 722; § 724, as amended by PA 1952, No 13).

14. CONSTITUTIONAL LAW—EXCESSIVE FINES.

Whether or not a fine which is authorized by the legislature is excessive involves a consideration of the purpose sought to be accomplished by the legislature and of the seriousness of the problem with which it undertook to deal (Const 1908, art 2, § 15).

15. EVIDENCE—JUDICIAL NOTICE—HEAVILY LOADED VEHICLES—DAMAGE TO HIGHWAYS—DANGER TO TRAVELLERS.

The court will take judicial notice that heavily loaded trucks and trailers may, and do, cause serious damage to public highways and endanger all who travel thereon.

16. CONSTITUTIONAL LAW—EXCESSIVE FINES—OVERWEIGHT VEHICLES.

A statute providing for graduated fines based on the amount of overweight of vehicles beyond permissible statutory maximum so as to deter owners and operators of commercial vehicles from using the public highways for transporting overweight loads that destroy the highways and endanger traffic, did not provide excessive fines by way of punishment (PA 1949, No 300, § 724, as amended by PA 1952, No 13).

17. SAME—FINES—INDIVIDUAL HARDSHIP.

A law may not be held invalid on the ground that in individual cases it may be difficult for one against whom the fine is assessed to make payment.

18. SAME—FINES—INDIVIDUAL HARDSHIP—OVERWEIGHT VEHICLES.

Fact that fine imposable for operating an overweight vehicle on the public highway may effect a hardship upon the owner or operator would not render the statute unconstitutional as permitting an excessive fine in view of the purpose of the statute to deter such persons from such use of the highways and also in view of the fact that they may avoid any violation of the statute by the exercise of proper care (PA 1949, No 300, § 724, as amended by PA 1952, No 13).

19. SAME—CRIMINAL LAW—IMPOSITION OF SENTENCE—DISCRETION OF COURT.

It is not essential to the validity of a penal statute that the court imposing sentence be permitted to exercise discretion to some extent, or within prescribed limitations.

20. SAME—MANDATORY IMPOSITION OF PRESCRIBED SENTENCE—OVERWEIGHT VEHICLES.

Statute *requiring* imposition of *prescribed* penalty upon finding as to amount of excessive weight transported by the equipment of one charged with operating overweight vehicles on the public highways is not unconstitutional because of such mandate (PA 1949, No 300, § 724, as amended by PA 1952, No 13).

21. AUTOMOBILES — STATUTES — OVERWEIGHT VEHICLES — LIENS — BONDS—FORFEITURES.

Statute which authorizes retention of vehicle carrying an overweight load and for imposition of a lien for securing payment of fine and costs, which lien may be avoided by furnishing a bond as security for such payment does not contemplate a forfeiture of the vehicle involved, although the legislature has power to provide for the forfeiture of property devoted to an illegal use (PA 1949, No 300, § 724[b], as amended by PA 1952, No 13).

22. CONSTITUTIONAL LAW—LEGISLATURE—ILLEGAL USE OF PROPERTY —FINES.

The State legislature may provide for a lien upon property to secure the payment of a fine and costs for conviction of the user of such property for an illegal use made of it.

23. SAME—ENFORCEMENT OF PENALTIES—VIOLATION OF VEHICLE CODE.

The method to be followed in the enforcement of the penalty imposed for a violation of the vehicle code is for legislative determination as an incident of the authority it possessed over the general subject matter (PA 1949, No 300, as amended).

24. CRIMINAL LAW—REMAND—OVERWEIGHT VEHICLES.

Case involving prosecution for operation of overweight vehicles on the public highways is remanded to the circuit court which had quashed the proceeding, where the complaint and warrant were valid and sufficiently specific to advise the defendant as to the offense with which he was charged and none of the provisions of the statute involved was unconstitutional, the proceedings to be had to be in accordance with the statute and opinion rendered herein (PA 1949, No 300, as amended).

Appeal from Jackson; Simpson (John), J. Submitted October 15, 1953. (Docket No. 79, Calendar No. 45,901.) Decided December 29, 1953.

James Randall Wolfe was charged with operating a vehicle on a highway in violation of weight restrictions. On appeal to circuit court, motion to quash was granted. The people appeal. Reversed and remanded.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Russell A. Searl,* Assistant Attorney General, and *Kenneth B. Johnson,* Prosecuting Attorney, for the people.

McKone, Badgley, Kendall & Domke, for defendant.

Ivan D. Wright, amicus curiae.

CARR, J. Defendant was prosecuted in a justice court in Jackson county on the charge of operating a motor truck and trailer on US–127 in violation of weight restrictions imposed by provisions of the Michigan vehicle code.* The complaint on which the warrant was issued alleged that on the 27th of February, 1953, defendant operated a truck and trailer on the highway referred to "with 20,500 lbs. overweight on said vehicle in violation of PA 1949, No 300, § 724, as amended (CLS 1952, § 257.724 [Stat Ann 1952 Rev § 9.2424]) contrary to the form of the statute in such cases made and provided." Following his arrest defendant pleaded guilty to the charge against him, and, pursuant to the provisions of section 724 of the motor vehicle code, as last amended by PA 1952, No 13, was fined $2,050, with costs of $5. From such sentence the defendant took a general appeal to the circuit court of Jackson county. Motion to quash the charges against him and to release him from custody was submitted, and

* PA 1949, No 300, as amended (CLS 1952, § 257.1 *et seq.* [Stat. Ann 1952 Rev § 9.1801 *et seq.*, as amended]).

granted. From the order entered, the plaintiff, leave having been obtained, has appealed to this Court, asserting that as a matter of law said order was erroneously made.

Pertinent provisions of the motor vehicle code are found in section 722 (CLS 1952, § 257.722 [Stat Ann 1952 Rev § 9.2422]) and in section 724 thereof (CLS 1952, § 257.724 [Stat Ann 1952 Rev § 9.2424, as amended by PA 1952, No 13]), which read as follows:

"Sec. 722. (a) In no case shall the maximum axle load exceed the number of pounds designated in the following provisions which prescribe the distance between axles:

"1. When the axle spacing is 9 feet or over between axles, the maximum axle load shall not exceed 18,000 pounds for vehicles equipped with high pressure pneumatic or balloon tires.

"2. When the axle spacing is less than 9 feet between 2 axles but more than 3–1/2 feet, the maximum axle load shall not exceed 13,000 pounds for high pressure pneumatic or balloon tires.

"3. When 2 axles are spaced less than 3–1/2 feet apart the combined weight thereof shall not exceed the maximum weights as specified for a single axle when spaced 9 feet or more apart.

"4. The foregoing shall be known as the normal loading maximum.

"(b) When such normal loading is in effect the State highway commissioner, and local authorities with respect to highways under their jurisdiction, shall have the authority to designate certain highways, or sections thereof where bridges and road surfaces are adequate for heavier loading, which designation may be revised as needed, on which the maximum tandem axle assembly loading shall not exceed 16,000 pounds for any axle of such assembly.

"(c) On any legal combination of vehicles, only 1 tandem axle assembly shall be permitted on such designated highways at the gross permissible weight of 16,000 pounds for any such axle and no other

tandem axle assembly in such combination of vehicles shall exceed a gross weight of 13,000 pounds for any such axle.

"(d) The normal size of tires shall be the rated size as published by the manufacturers and in no case shall the maximum wheel load permissible for any wheel exceed 700 pounds per inch of width of tire.

"(e) During the months of March, April and May in each year, the maximum axle load allowable on concrete pavements, or pavements with a concrete base, shall be reduced by 25% from the maximum axle loads as specified heretofore in this chapter and the maximum axle loads allowable on all other types of roads during these months shall be reduced by 35% from the maximum axle loads as herein specified. The maximum wheel load shall not exceed 525 pounds per inch of tire width on concrete and concrete base or 450 pounds per inch of tire width on all other roads during the period the seasonal road restrictions are in effect.

"(f) The State highway commissioner or county road commission, with respect to highways under their jurisdiction, may suspend the restrictions imposed by this section when and where in their discretion conditions of the highways so warrant and may impose the restricted loading requirements of this section on designated highways at any other time that the conditions of the highway may require."

"Sec. 724. (a) Any police officer or any duly authorized agent of the Michigan highway department having reason to believe that the weight of a vehicle and load is unlawful is authorized to require the driver to stop and submit to a weighing of the same by means of either portable or stationary scales and may require that such vehicle be driven to the nearest weighing station of the State highway department for the purpose of allowing said officer or agent of the State highway department to determine whether such conveyance is loaded in conformity with the provisions of this chapter.

"(b) Whenever the said officer or agent upon weighing a vehicle and load, as above provided, determines that the weight is unlawful, such officer or agent may require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this chapter. All material so unloaded shall be cared for by owner or operator of such vehicle at the risk of such owner or operator: Provided, That any judge or magistrate imposing a fine and costs under this section which are not paid in full immediately or for which a bond is not immediately posted in double the amount of such fine and costs, shall order said driver and/or owner to move said vehicle at his own risk to a place of safekeeping within the jurisdiction of said judge or magistrate, inform said judge or magistrate in writing of such place of safekeeping, and there to keep said vehicle until said fine and costs are paid or sufficient bond furnished or until said judge or magistrate shall be satisfied that said fine and costs will be paid: Provided further, That for the purposes of this section the removal, forwarding, care or preservation of the load shall be under the control of and at the risk of the owner and/or driver: And provided further, That vehicles impounded as provided in this section shall be subject to a lien, subject to any prior valid, bona fide lien, of prior record in the amount of such fine and costs and in the event the same are not paid within 90 days after such seizure, said judge or magistrate shall certify such unpaid judgment to the prosecuting attorney of the county in which the violation occurred, who shall proceed to enforce said lien by foreclosure sale in accordance with procedure authorized in the case of chattel mortgage foreclosures.

"When such duly authorized agent of the State highway department is performing his duties under this chapter he shall have all the powers conferred upon peace officers by the general laws of this State.

"(c) Any driver or owner of any vehicle as defined in this act who violates the provisions of section 722 of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be assessed a fine in an amount equal to 2 cents per pound for each pound of excess load over 1,000 pounds when the excess is 2,000 pounds or less; 4 cents per pound for each pound of excess load when the excess is over 2,000 pounds but not over 3,000 pounds; 6 cents per pound for each pound of excess load when the excess is over 3,000 pounds but not over 4,000 ponds; 8 cents per pound for each pound of excess load when the excess is over 4,000 pounds but not over 5,000 pounds; 10 cents per pound for each pound of excess load when the excess is over 5,000 pounds.

"(d) Any driver or owner of any vehicle as defined in this act who shall knowingly fail to stop at or who shall knowingly by-pass any scales or weighing stations shall be deemed guilty of a misdemeanor and upon conviction thereof shall be assessed a fine not to exceed $100.00, or shall be imprisoned in the county jail not to exceed 90 days, or both.

"This act is ordered to take immediate effect."

Attention is also called to section 716 of the code (CLS 1952, § 257.716 [Stat Ann 1952 Rev § 9.2416]) which declares it to be a misdemeanor for any person to drive, on any highway in this State, a vehicle exceeding the limitations as to maximum size and weight as prescribed by the code. For the obvious purpose of granting to justices of the peace the power to impose the fines authorized and required by section 724, above quoted, the legislature enacted PA 1952, No 14, which was given immediate effect and became operative on the same day as did Act No 13, *supra,* amending section 1 of chapter 14 of the code of criminal procedure (CL 1948, § 774.1 [Stat Ann § 28.1192]). Said section in terms grants general jurisdiction to justices of the peace to hear and determine offenses punishable by fine not exceeding

$100, or by imprisonment in jail not exceeding 3 months, or by both such fine and imprisonment. The amendment above referred to added the following proviso:

"Provided further, That for all offenses arising under the provisions of section 724 of Act No 300 of the Public Acts of 1949, as amended, being section 257.724 of the Compiled Laws of 1948, any justice of the peace shall have power to impose the several fines therein provided."

It is the claim of the defendant that the amendment to the statute defining the jurisdiction of justices of the peace was ineffective to accomplish the result sought. It is suggested that the added proviso did not in specific terms confer on justices the power to "hear and determine" offenses requiring the imposition of penalties in excess of $100, and that the offense involved in the instant case arises under either section 716 or 722 of the code, rather than under section 724 referred to in the amendment. We think the claim is without substantial merit. The provisions of the motor vehicle code in question here must be read together. If this is done there can be no question as to the intention of the legislature. Counsel for defendant does not raise an issue as to such intent. The legislature undertook to enlarge the jurisdiction of justices of the peace as to certain offenses. Presumably it was deemed desirable that a proceeding of the nature here involved should be disposed of as expeditiously as possible. In view of the authority expressly granted by article 7, § 16, of the State Constitution (1908), the right of the legislature to make such provision is not open to question. It is there provided that justices of the peace shall have "such criminal jurisdiction and perform such duties as shall be prescribed by law."

It is further urged that the proviso added by Act No 14, *supra,* is repugnant to the purview of the statute amended. Attention is called to 50 Am Jur, p 460, § 440, indicating that courts have disagreed as to the effect to be given, if any, to a proviso repugnant to the body of the act. The situation in this respect is also recognized in 82 CJS, p 889, where it is said:

"Some authorities have held that a proviso which is repugnant to the body or purview of the statute, and cannot be reconciled therewith, is inoperative and void. Other authorities have held that in case of irreconcilable inconsistency, the proviso is not void, but takes precedence and controls the enactment, as expressing the latest legislative intent, but this has been held a rule of necessity and of last resort, and is never to be applied where the true intent can be gathered from the whole act. It is generally agreed that, where the inconsistency is only partial, the proviso is valid and prevails to the extent of the inconsistency."

In the instant case it may not be said that the proviso is repugnant to the body of the amended statute in the sense that it, if deemed operative, would render prior provisions of such statute inoperative. It is limited in its scope to a certain class of cases. It presents merely a special exception to the restrictions imposed generally on the exercise of jurisdiction by justices of the peace. The matter of such jurisdiction being entirely subject to the control of the legislature, the right to enact specific provisions covering particular situations may not be denied. The method employed to accomplish the desired result in the instant case is not open to objection. The making of exceptions to the general provisions of a statute, and modifications of the general plan thereof, is a commonly recognized function of a proviso.

The fact that the complaint filed against defendant

referred to section 724 of the Michigan vehicle code, instead of 716 or 722, is not material. Defendant was charged with operating a vehicle that was carrying a load in excess of the weight restrictions imposed by law. It is the averments of fact in the complaint that are controlling rather than the conclusion of the individual drawing it as to the particular section of the law on which the charge should be predicated. See *People* v. *Murn,* 220 Mich 555, and *People* v. *Hopper,* 274 Mich 418. It may be noted further that section 724 of the code, above quoted, expressly declares such an offense a misdemeanor.

In connection with the question as to the sufficiency of the complaint and warrant, consideration must be given to subsection (f) of section 722, above quoted. It is urged on behalf of defendant that this provision of the statute is invalid in that it does not provide for the giving of notice by the State highway commissioner or the county road commission, as the case may be, that the weight restrictions contemplated by the subsection have been imposed on traffic on designated highways at a period other than during the months of March, April and May in each year. The omission to require the posting of notices along the highway or highways affected by an administrative order of the character in question is not in harmony with other provisions of the code authorizing the creating by highway authorities of so-called speed control zones, the designation of through highways by the erection of proper stop signs, and other matters with reference to which like authority is granted. In those instances the legislature has specifically provided for giving notice to the public by appropriate signs or notices. It is also significant in this connection that authority granted to county road commissioners and other local highway officials to impose limitations as to weight of

trucks and commercial vehicles and the operation thereof on public highways under the jurisdiction of such local authorities, granted by section 726 of the code (CLS 1952, § 257.726 [Stat Ann 1952 Rev § 9.2426]) requires the giving of notice of the prohibitions and limitations so imposed by appropriate signs placed on the highways affected. Other statutes, of which the laws pertaining to the public health are illustrative, likewise recognize the necessity of notice of regulations imposed by administrative authorities. Of significance in this connection is PA 1943, No 88 (CL 1948, § 24.71 *et seq.*, as amended by PA 1949, No 90 and PA 1951, No 9 [Stat Ann 1952 Rev § 3.560(7) *et seq.*]) relating to rules, regulations and orders, promulgated by State officers, boards and commissions. Such act requires the filing thereof in the office of the secretary of State and publication in the manner prescribed before they may become effective. Included in exceptions to such rules, regulations and orders, are those which relate "to the use of public works, including streets and highways, under the jurisdiction of any State agency, when the effect of such order is indicated to the public by means of signs or signals."

The record in the instant case does not affirmatively disclose that the State highway commissioner had issued any order, ostensibly effective at the time of the commission of defendant's offense, imposing on traffic over US–127 the special weight limitations and restrictions set forth in section 722(e). However, on the oral argument of the case before this Court it was stated by counsel for the plaintiff that such an order had been made, and that the alleged excessive weight had been computed with reference thereto. It was further stated that without reference to such order defendant's equipment was overweight under the provisions of the statute. Counsel for defendant assail the complaint and warrant

because of failure to refer to the administrative order, contending, however, that section 722(f) is unconstitutional for the reason above stated.

The practical situation presented here is that the legislature in the enactment of section 722(f) did not include therein any specific provision for publication or notice, and it is not claimed in the instant case that notices were posted. Neither is it claimed that the order of the highway commissioner was published under the act of 1943, above cited. Whether such method of publication would be practicable does not require discussion. Assuming that the act of 1943 may apply to orders of the character here in question, when specific notice is not required to be given by the posting of signs on or along the highways affected thereby, it is evident that the requirements of said act were not observed. A regulation or order of the character here involved may not be given effect without reasonable notice to the public, in manner and form as the legislature may prescribe. *State* v. *Butts,* 3 SD 577 (54 NW 603, 19 LRA 725). Under the facts presented here the order of the State highway commissioner in question must be regarded as inoperative, and hence as having no bearing on the case. The fact that it was not referred to in the complaint and warrant becomes, in consequence, immaterial, and the sufficiency of the allegations thereof must be determined without reference to it. The actual situation is that defendant was charged with driving an overweight vehicle in violation of the statute, the extent of such overweight being a matter for proof. We need not consider the situation that would be presented had the complaint and warrant been based on the order of the State highway commissioner by express reference thereto. Neither is it necessary to discuss the procedure to be observed in such a situation,

considered in *State* v. *Hall,* 96 Vt 379 (119 A 884) and in other cases of similar import.

It is further claimed that the statute as amended by the legislature at the 1952 session permits excessive fines in violation of article 2, § 15, of the State Constitution (1908). This question necessarily involves a consideration of the purpose sought to be accomplished by the legislature and of the seriousness of the problem with which it undertook to deal. It is commonly recognized that heavily loaded trucks and trailers may, and do, cause serious damage to public highways. The language of the Illinois supreme court in *People* v. *Linde,* 341 Ill 269 (173 NE 361, 72 ALR 997), covers the situation in apt terms. It was there said:

"This court will take judicial notice that the use of the public roads and bridges by vehicles of excessive weight is calculated to result not only in injury to public property but also in danger to all who travel such thoroughfares. (*Murphy* v. *California,* 225 US 623 [32 S Ct 697, 56 L ed 1229, 41 LRA NS 153]; *Jacobson* v. *Massachusetts,* 197 US 11 [25 S Ct 358, 49 L ed 643, 3 Ann Cas 765]; *Mugler* v. *Kansas,* 123 US 623 [8 S Ct 273, 31 L ed 205]; *Pierce Oil Corp.* v. *City of Hope,* 248 US 498 [39 S Ct 172, 63 L ed 381]; *Polglaise* v. *Commonwealth,* 114 Va 850 [76 SE 897].) We must presume that the legislature recognized this fact and enacted the statutory provision here attacked for the purpose of promoting the safety of State property and the safety of the traveling public. (*Powell* v. *Pennsylvania,* 127 US 678 [8 S Ct 992, 1257, 32 L ed 253]; *Durand* v. *Dyson,* 271 Ill 382 [111 NE 143, Ann Cas 1917D, 84].) The end thus sought is appropriate and legitimate."

It may be assumed that the legislature in the enactment of the provision in question had in mind the practical necessity of providing penalties that would deter owners and operators of commercial

vehicles from using the public highways of the State for the purpose of transporting quantities of merchandise of such weight as to be destructive to such highways, to the danger of traffic thereon and to the detriment of the public generally. In view of the seriousness of the problem it may not be said that the legislature has prescribed excessive fines by way of punishment, especially in view of the obvious fact that an owner or operator of such equipment may by the exercise of proper care avoid any violation of the statute.

Counsel for defendant cite and rely on *Robison* v. *Miner,* 68 Mich 549. It was there held that a provision of the general liquor law preventing one convicted of a violation thereof, under certain circumstances, from continuing business for 1 year following conviction was invalid. It was pointed out that the imposition of such penalty necessarily resulted in breaking up the business in which the offender was engaged, irrespective of its value. Certain other provisions of the statute were likewise held open to objection on constitutional grounds. In the case at bar, however, one convicted of a violation of the pertinent provisions of the Michigan vehicle code is not penalized by taking away his right to continue in the business in which he is engaged. The law may not be held invalid on the ground that in individual cases it may be difficult for one against whom the fine is assessed to make payment. Such a situation may arise in instances involving other penal statutes. The fact that a result of such nature may follow a violation of the law in a particular case, due to the financial situation of the offender or to other conditions, cannot be given the effect of rendering the statute under which the prosecution is brought open to objection on constitutional grounds. In the case at bar the objection raised is not tenable.

The validity of section 724, as amended by PA 1952, No 13, is further challenged on the ground that no discretion in the imposition of the statutory fine is permitted. In other words the statute itself fixes the amount of the fine, based on the determination by the court or jury, as the case may be, as to the amount of excessive weight transported by the equipment of the defendant. It is not essential to the validity of a penal statute that the court imposing sentence be permitted to exercise discretion to some extent, or within prescribed limitations. In the event of conviction of first degree murder the offender is subject to a mandatory life sentence. The validity of such provision of the statute is commonly recognized. In *People* v. *Palm,* 245 Mich 396, 403, 404, certain mandatory provisions of the code of criminal procedure of the State were sustained, the opinion in the case declaring in substance that courts have no discretionary power except as conferred by law. See, also, *State* v. *Stang Tank Line,* 264 Wis 570 (59 NW2d 800), in which it was held that, under a similar statute, the trial court had no discretion as to the amount of the fine. The fact that the legislature in the instant case saw fit to prescribe the penalty and to make the imposition mandatory does not render the statute under which defendant was prosecuted unconstitutional.

The provisions of section 724(b), above quoted, with reference to the holding of the equipment used in the violation of the law for which a defendant has been convicted, unless a bond is posted for the payment of the fine and costs imposed, and for a lien thereon to insure the payment of such fine and costs, are also assailed. It will be noted from the language of the statute that such lien is subordinate to prior valid bona fide liens of record. The statute does not direct the forfeiture of the vehicle used in

the unlawful transportation, but, rather, seeks to provide a method to insure the collection of the statutory fine and costs, the payment of which would prevent the establishing of the lien. Likewise, the creating of a lien may be avoided by furnishing a bond as security for such payment. The power of the legislature to provide in certain instances for the forfeiture of property devoted to an illegal use is not open to question. *Osborn* v. *Charlevoix Circuit Judge,* 114 Mich 655. As noted, however, the statute under consideration here does not contemplate forfeiture.

The right of a State legislature in the enactment of a penal statute to provide for a lien of the nature here involved to secure the payment of a fine and costs is generally recognized. 36 CJS, pp 797, 798, § 15. In *Jasper County* v. *Sparham,* 125 Iowa 464 (101 NW 134), the statute provided for a lien on property, following the conviction of the owner thereof on a charge of maintaining a liquor nuisance on the premises, to secure the payment of the fine imposed. The validity of the lien was not questioned, and was recognized by the court notwithstanding the fact that the indictment in the prosecution for maintaining the nuisance did not specifically describe the property. So far as the instant case is concerned, it must be said that the legislature in providing for the lien violated no provisions of the State or Federal Constitutions. The method to be followed in the enforcement of the penalty imposed for a violation of the statute was for legislative determination as an incident of the authority possessed by the lawmaking body over the general subject matter.

For the reasons stated, it is our conclusion that the complaint and warrant in this case were valid and sufficiently specific to advise the defendant as to the offense with which he was charged, and that none of the provisions of the statute here involved

is open to objection on constitutional grounds. As stated at the outset, defendant took a general appeal to the circuit court. The order quashing the proceeding and discharging the defendant was erroneous, and must be reversed. The case is remanded to the circuit court with directions to set aside said order, and for further proceedings in the case in accordance with the statute and with this opinion.

DETHMERS, C. J., and ADAMS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LLOYD A. FRY ROOFING COMPANY *v.* PUBLIC SERVICE COMMISSION.

1. CARRIERS—LEASED EQUIPMENT—MOTOR CARRIER ACT.

   Neither the lessor nor the lessee of motor vehicles nor the latter's driver who owned the truck and had leased it to lessor are carriers of passengers or property for hire over the highways subject to the valid provisions of the motor carrier act, where the property carried in the leased equipment was the lessee's own merchandise (CL 1948, § 475.1 *et seq.*).

2. COSTS—PUBLIC QUESTION—MOTOR CARRIER ACT—LEASED EQUIPMENT.

   No costs are allowed in suits to restrain the public service commission from subjecting the drivers and lessee of leased motor vehicle equipment which carried lessee's own merchandise to provisions of the motor carrier act, a public question being involved (CL 1948, § 475.1 *et seq.*).

Appeal from Wayne; Brennan (John V.), J. Submitted June 11, 1953. (Docket No. 6, Calendar No. 45,466.) Decided December 29, 1953.

REFERENCES FOR POINTS IN HEADNOTES

[1] 9 Am Jur, Carriers §§ 17, 31.
[2] 14 Am Jur, Costs § 91.

Bill by Lloyd A. Fry Roofing Company, a Delaware corporation, against Michigan Public Service Commission and its members, to restrain enforcement of contract carrier provisions of motor carrier act against leased motor vehicle equipment. Bill dismissed. Plaintiff appeals.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted June 11, 1953. (Docket No. 7, Calendar No. 45,646.) Decided December 29, 1953.

Bill by Lloyd A. Fry Roofing Company, a Delaware corporation, and Windsor Davidson against Michigan Public Service Commission and its members, to restrain enforcement of contract carrier provisions of motor carrier act against leased motor vehicle equipment. U. S. Truck Company, Inc., and Consolidated Freight Company intervened. Bill dismissed as to plaintiff company during hearing. Commission's order impounding truck vacated, but other relief denied plaintiff Davidson. Plaintiffs appeal.

Cases consolidated. Reversed and decrees ordered entered in Supreme Court.

David I. Hubar (*Milton M. Maddin,* of counsel), for plaintiffs.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara, Charles M. A. Martin,* and *Robert Derengoski,* Assistants Attorney General, for defendants.

BUSHNELL, J. In 1 of these 2 cases, namely that from Ingham county, plaintiffs Lloyd A. Fry Roofing Company, a Delaware corporation, and Windsor Davidson have appealed from a decree granting defendant Michigan Public Service Commission's mo-

tion to dismiss their bill of complaint. In that suit plaintiffs sought to restrain the commission from proceeding against or interfering with their right to haul Fry's merchandise in leased motor vehicle equipment. Plaintiffs sought a decree declaring certain portions of the motor carrier act (CL 1948, § 475.1 *et seq.* [Stat Ann 1951 Cum Supp § 22.531 *et seq.*]) unconstitutional, and that an impounding order issued by the commission be set aside and held for naught and that certain property seized thereunder be returned to Fry.

In the other case plaintiff Fry filed a bill of complaint against the commission in Wayne county, in which a similar restraining order was sought, and a determination that the policies adopted by the defendants in finding that plaintiff is subject to the rules and regulations of the commission and must obtain a license and permit to haul its own merchandise to its customers within the State, is contrary to statute law and in violation of the constitutional rights of the plaintiff.

In the Wayne case, on an order to show cause why a restraining order should not issue, the commission entered a special appearance and moved to dismiss. That court held plaintiff was not a contract carrier of property within the statutory definition set forth in the motor carrier act, and that the proceedings should be dismissed. In the Ingham case the court held that Davidson was a contract carrier, and that since Fry was not a party to the cause before the commission, it had no authority to appeal from the commission's order. Fry's motion to vacate the order was denied. The commission's impounding order of May 15, 1950, was vacated and set aside. The constitutional question respecting the 1945 amendment to the act was discussed but not decided because of the holding that Davidson was a contract carrier for hire.

Fry has 19 roofing material manufacturing plants throughout the country and operates in 48 states. It sells and distributes its products within this State and makes its deliveries exclusively in leased motor truck equipment. Windsor Davidson, a plaintiff in the Ingham case but not in the Wayne case, is the owner of a tractor involved in this litigation. He leased his tractor to John (Jack) M. Stivason, not a party hereto, and Fry in turn leased from Stivason a number of tractors, motor equipment and trailers, including the one in question. Davidson, employed by Fry as a driver, devotes his entire time to that work and is paid at the same rate paid other employees similarly engaged.

Prior to the commencement of this litigation the defendant commission, through its enforcement officers, apprehended a number of the driver-employees of Fry at various points throughout the State to whom they issued violation tickets because of Fry's refusal and that of his drivers to make application to and obtain a permit from the commission. Thus by issuance of violation tickets and the seizure of property and equipment they sought to prevent Fry from using leased equipment upon the highways of the State. In justification of this course of action, the commission classified Davidson and other employee-drivers as "contract motor carriers of property."

We need not labor all of the questions which arose out of the determination of the Wayne and Ingham circuit courts, or discuss the authorities cited by the parties, because our recent decision in the case of *People* v. *Hertz Driveurself Stations, Inc., ante,* 139, controls the instant case.

In the *Hertz Case* a motor vehicle registered in its name was leased to Associated Fruit & Produce Company of Flint. This vehicle was operated over the highways of the State under the complete domi-

nation and control of the lessee, except that it was maintained, insured and serviced by Hertz in its own garage. The driver was employed and paid by the lessee and had no relationship with Hertz. He received all of his instructions from the lessee and the property transported was a part of the lessee's commercial enterprise in dealing in fruits and vegetables. We held that Hertz did not operate a motor vehicle for the transportation of persons or property for hire on a public highway, but merely leased its equipment to another. We there pointed out that the title to the motor carrier act, as enacted in 1933, has not thereafter been changed. That title reads in part:

"An act to promote safety upon and conserve the use of the public highways of the State; to provide for the supervision, regulation and control of the use of such highways by all motor vehicles operated by carriers of passengers and property for hire upon or over such highways."

In the instant cases neither the lessor nor lessee or its drivers are carriers of passengers or property for hire over the highway. Their operation not coming within the contemplation of the act, the requirement of the commission that applications be made to it and permits for such operations issued by it, is a nullity. No authority exists under the act for the seizure of motor vehicles so used.

The decrees of the Wayne and Ingham circuit courts are vacated and ones may be entered here in conformity with this opinion. A public question being involved, no costs will be allowed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

ZDERO *v.* BRIGGS MANUFACTURING COMPANY.

1. EQUITY—REMEDY—DISMISSAL OF BILL.
   Plaintiff's claim that he was denied an existent equitable remedy *held,* untenable, where his bill of complaint was entertained and not dismissed until after he had concluded his proofs.

2. SPECIFIC PERFORMANCE—DISCRETION OF COURT.
   Specific performance is an equitable remedy, not one of right, but of grace and rests in the sound discretion of the trial court, which is to be exercised in the light of the facts of the case.

3. SAME—BURDEN OF PROOF—EVIDENCE.
   The plaintiff in a suit for specific performance has the burden of showing by clear and convincing proof that his contract had been breached by the defendants and that he had fully performed his part or was excused on some legal ground from such performance.

4. LABOR RELATIONS—SENIORITY RIGHTS—CONTRACTS—UNIONS.
   Seniority rights are not inherent in employment, but exist solely by virtue of a contract, either between the employer and his employees or a union acting in their behalf and are subject to such contracts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Equity § 122.
[2] 49 Am Jur, Specific Performance § 8.
[3] 49 Am Jur, Specific Performance § 167.
[4] 31 Am Jur, Labor § 17.
[5] 41 Am Jur, Pleading § 198.
[6] 19 Am Jur, Equity § 278.
[7] 3 Am Jur, Appeal and Error § 567.
[8] 31 Am Jur, Labor § 117.
[9] 31 Am Jur, Labor § 66.
[9] Controversy within labor union regarding seniority rights as subject of litigation in civil courts. 142 ALR 1055.

5. PLEADING—FAILURE TO DENY ALLEGATION CONSTITUTES AN ADMISSION.

The failure to deny an allegation in defendant's answer constitutes an admission thereof by plaintiff (Court Rule No 24, § 1 [1945]).

6. EQUITY—WELL-PLEADED FACTS—BILL—ANSWER—MOTION TO DISMISS—ADMISSIONS.

All properly alleged facts in a bill of complaint and uncontroverted facts well pleaded in defendant's answer are to be taken as admitted and considered in deciding a motion to dismiss the bill.

7. APPEAL AND ERROR—RECORD.

The Supreme Court bases its conclusions on appeal upon the record before it.

8. SPECIFIC PERFORMANCE—LABOR RELATIONS—SENIORITY RIGHTS—EVIDENCE.

Plaintiff in suit for specific performance of his contract of employment and for reinstatement to his former or similar employment, with full seniority rights *held,* not entitled to such relief, where there is evidence that following termination of his disability from injury for which he had beeen paid workmen's compensation he had not made his request for re-employment within the requisite time, no evidence of breach of contract by either the employer or unions was involved nor proof of exhaustion of remedies with the union made before filing of bill of complaint.

9. LABOR RELATIONS—COURTS—UNION OFFICERS—BAD FAITH—NEGLIGENCE.

Courts do not interfere with the acts of officers of labor unions without proof that such officers acted in bad faith or in an arbitrary or negligent manner.

Appeal from Wayne; Webster (Clyde I.), J. Submitted October 6, 1953. (Docket No. 15, Calendar No. 45,692.) Decided December 29, 1953.

Bill by Frank Zdero against Briggs Manufacturing Company, a corporation, and Local Unions Nos. 212 and 742, United Automobile, Aircraft and Agricultural Implement Workers of America, both unincorporated associations, to enforce reinstatement in

employment with full seniority rights, for specific performance of employment contract and assessment of damages for violation. Bill dismissed. Plaintiff appeals. Affirmed.

Heal, Deeley, LoCicero & Wilke, for plaintiff.

Monaghan, Hart & Crawmer, for defendant Briggs Manufacturing Company.

Rothe, Marston, Bohn & Mazey, for defendant Local Union No. 212.

Ralph R. Goldsmith, for defendant Local Union No. 742.

BUSHNELL, J. Plaintiff Frank Zdero was in the employ of defendant Briggs Manufacturing Company from January, 1923, to September 1, 1942. In 1936 he joined defendant Local Union No. 212 (UAW–CIO) and in 1942 he was transferred to another Briggs plant where defendant Local Union No. 742 (UAW–CIO) was the exclusive bargaining agent.

On September 1, 1942, Zdero was injured and was paid compensation at the rate of $18 per week, until January 12, 1943. The agreement covering this compensation was approved by the department of labor and industry.

All of the necessary facts pertaining to the compensation proceedings appear in the record by stipulation between the parties. The opinion of the commission, which is appended thereto, refers to the fact that the medical testimony conclusively shows that plaintiff was able to return to work, despite his claim to the contrary, and was unwilling to do so.

Zdero was removed from the Briggs pay roll on May 14, 1943, because of his refusal to accept offered employment. At the time of his discharge a collec-

tive bargaining agreement, dated November, 1942, was in effect between both of the local unions and the defendant company. This agreement established seniority rights, grounds for forfeiture thereof, and a grievance procedure for adjustment of differences between the company and employee members of these unions

After futile attempts to subsequently obtain re-employment at Briggs, Zdero enlisted the aid of the local unions to help him get back on the job, but those efforts were unsuccessful. On October 9, 1947, plaintiff, accompanied by the president of Local No. 212 and another union official, met with the representatives of Briggs regarding Zdero's reinstatement. A letter from the president of Local No. 212 to the president of Local No. 742, dated October 10, 1947, states that Briggs would not reinstate Zdero and Local No. 742 was requested to initiate grievance proceedings in his behalf. On August 18, 1948, more than 5 years after his discharge, Zdero brought suit in equity for specific performance of his contract of employment and for reinstatement to his former or similar employment, with full seniority rights. At the close of plaintiff's proofs the motions of the several defendants to dismiss were granted.

Appellant's argument that he was denied an existent equitable remedy is untenable. The trial court entertained his bill of complaint, denied defendants' earlier motions to dismiss on the pleadings, and only acted after plaintiff had concluded his proofs.

The decisive question is whether Zdero established a *prima facie* case for equitable protection of his seniority rights and proved his damages for the claimed breach of his employment contract, both against defendant company and defendant unions.

Specific performance is an equitable remedy, is not one of right, but of grace. It rests in the sound discretion of the trial court, which is to be exercised in

the light of the facts of the case. *Ressler* v. *O'Malley,* 328 Mich 331; *Fisk* v. *Fisk,* 328 Mich 570; and *Rex Oil & Gas Co.* v. *Busk,* 335 Mich 368. The burden rested upon the appellant to show by clear and convincing proof that his contract had been breached by the defendants and that he had fully performed his part thereof or was excused on some legal ground from such performance. *Saari* v. *George C. Dates & Associates,* 311 Mich 624.

Seniority rights are not inherent, but exist solely by virtue of a contract, either between the employer and his employees or a union acting in their behalf. These rights are subject to the terms and conditions of the contract, and in this instance their benefits inure through the union to its members. See *Ryan* v. *New York Central Railroad Co.,* 267 Mich 202.

Article 4, § 8 of the agreement, which was in effect at the time of Zdero's discharge, reads in part:

"Seniority rights shall be forfeited if an employee is absent over 18 months, quits of his own accord, or is discharged, or refuses to return to work when called."

Defendant Briggs in its answer to plaintiff's bill of complaint avers that:

"On and after January 12, 1943, plaintiff was offered employment similar in nature to that formerly held by him and which plaintiff was able to perform; that he continuously refused to accept such employment. Thereafter, on May 14, 1943, because of plaintiff's refusal to accept such employment, his name was removed from the payroll of defendant."

Plaintiff's failure to deny this allegation is an admission thereof. *Neada* v. *State Farm Life Insurance Co.,* 324 Mich 233; Court Rule No 24, § 1 (1945).

On a motion to dismiss a bill of complaint all properly alleged facts are to be accepted as true; and uncontroverted facts well pleaded in defendants' an-

swer must be taken as admitted and considered in deciding the motion. *Grevnin* v. *Collateral Liquidation, Inc.*, 302 Mich 274, and *Terranova* v. *Cottrell Block Construction Co.*, 302 Mich 417.

We base our conclusions on appeal upon the record before us. *Howe* v. *Webert*, 332 Mich 84; *Henning* v. *McEuen*, 332 Mich 104; *Floyd* v. *Roberts*, 335 Mich 696.

The record is barren of any evidence showing that Zdero made his request for reemployment within the requisite time, nor does it show to whom any requests were made. We find no breach of contract by defendant Briggs Manufacturing Company nor any failure on the part of the respective local unions to do all in their power to aid and assist Zdero in securing reinstatement. There is a complete absence of any testimony indicating that the defendants, Local Unions Nos. 212 and 272, acted in bad faith or in an arbitrary or negligent manner. Courts of equity, without such proofs, do not interfere with the acts of the officers of labor unions. *Hartley* v. *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees*, 283 Mich 201; *Mayo* v. *Great Lakes Greyhound Lines*, 333 Mich 205. See, also, *Ryan* v. *New York Central Railroad Co., supra*, and citations therein. Furthermore, although we may assume that plaintiff exhausted his remedies within the union before he filed his bill of complaint, there is no proof of this prerequisite to equitable action.

There is nothing in this record which requires reversal of the decree of the trial judge. It is affirmed, with costs to appellees.

DETHMERS, C. J., and ADAMS, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

BUTZEL, J., did not sit.

JAMES v. MILKS.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—FINDINGS OF TRIAL JUDGE.

   The Supreme Court, in reviewing a chancery case *de novo*, is not bound by the findings of the trial judge but does give consideration and weight to his conclusions.

2. PLEADING—ADMISSIONS—EXISTENCE OF NOTE AND MORTGAGE.

   The existence of note and mortgage involved in suit for an accounting did not need to be proved, where it was admitted by answer and cross bill (Court Rule No 17, § 10 [1945]).

3. ACCOUNTING—MORTGAGES—NOTES—EVIDENCE—ADMISSIONS.

   Plaintiff's failure to produce note referred to in mortgage did not preclude finding of trial judge in suit for accounting that note and mortgage did exist, where execution of note and mortgage was admitted in defendant's answer and cross bill (Court Rule No 17, § 10 [1945]).

4. MORTGAGES—ACCOUNTING—EVIDENCE.

   Finding of trial judge as to amount of mortgage indebtedness involved in suit for accounting is not overruled in view of testimony presented, there being no justification for so doing.

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 7, 1953. (Docket No. 27, Calendar No. 45,706.) Decided December 29, 1953.

Bill Saleem C. James against Jessie Milks for accounting to determine amount due on mortgage, originally instituted by action in assumpsit. Cross

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 815.
[2, 3] 41 Am Jur, Pleading § 369.

bill to have instrument declared void. Decree for plaintiff. Defendant appeals. Affirmed.

Joseph & Joseph, for plaintiff.

B. Morris Pelavin, for defendant.

BUSHNELL, J. Plaintiff Saleem C. James' suit in equity, in the nature of an accounting, was originally begun as an action at law. James was at one time the husband of defendant Jessie Milks. Approximately 2 months after the parties were divorced in September of 1946, the defendant married one Milks. She divorced this husband 9 months after the marriage, and in 1950 married another man.

Subsequent to their divorce in 1946, the parties hereto entered upon a confusing series of business transactions which, according to the trial judge and our examination of the record, are almost impossible to ascertain and unravel. Although we are not bound on a review *de novo* by the findings of the trial judge, *Henning* v. *McEuen,* 332 Mich 104, consideration and weight should be given to his conclusions, *Burton* v. *Burton,* 332 Mich 326, 342, and *Stevenson* v. *Aalto,* 333 Mich 582, 589.

The trial judge found that defendant, in her own handwriting, acknowledged on June 6, 1948, an indebtedness of $500 to plaintiff, and on the next day another indebtedness of $860. On July 1, 1949, the parties purchased property on land contract for $3,550, paying $50 down. Payments have since been made reducing the indebtedness, as of April 1, 1951, to $3,169.65. Defendant also borrowed $1,600 from plaintiff and gave him a mortgage of $5,500 on an apartment building she owned.

The principal controversy pertains to the amount of the mortgage indebtedness. The trial judge said:

"There is no testimony here at all as to whether all previous indebtedness was merged in this amount justifying a mortgage or not, or whether the mortgage is indicating a previous indebtedness."

The court found:

"It was a written document offered in evidence, and the testimony of the banker is, and I think that is undisputed, or partially at least, verified by the parties to this litigation, that at the time they stated that the $1,600 was to bring the indebtedness of the defendant to the plaintiff up to the $5,500, so the court believes it is safe to assume by that, the prior indebtedness was merged in this mortgage of $5,500. There was a balance on the mortgage of $5,554.88, nothing paid on it since the interest date, and the mortgage draws interest at the rate of 6%, so up to date the interest on the mortgage is $703.05, that is up to last Friday, so that there is due on the mortgage an amount of $6,181.93. The mortgage is a written instrument, an existing written instrument, a contract between the parties, and there is nothing here to warrant the court to not say it is an existing obligation of the defendant to the plaintiff, so on that phase the mortgage, as of the date, is an existing obligation in the amount of $6,118.93, principal and interest."

Appellant contends that because the plaintiff failed to produce the note referred to in the mortgage the court erred in decreeing the mortgage to be a good and sufficient evidence of defendant's indebtedness.

Section 10 of Court Rule No 17 (1945) provides:

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

Defendant in her answer and cross bill admitted the execution of the note and mortgage. The vice-president of the bank which handled the collection of

the mortgage, on re-cross examination, testified that the defendant picked up the note at the same time she picked up the mortgage. In view of this admission of the defendant and this testimony, proof of the existence of the note was not required. *Watson-Higgins Milling Co.* v. *Graczyk,* 253 Mich 175; *Cooklin* v. *Cooklin,* 260 Mich 69; *Grand Trunk Western Railroad Co.* v. *Lovejoy,* 304 Mich 35. See Court Rule No 23, § 2 (1945) and authorities annotated thereunder in Honigman's Michigan Court Rules.

The trial judge found that the mortgage indebtedness, together with interest thereon, amounted to $6,118.93.

After reviewing the testimony given by 8 witnesses in behalf of the plaintiff, and the testimony of the defendant herself, who was her only witness, we find no justification for overruling the finding of the trial judge. *Kelley* v. *Dodge,* 334 Mich 499, and *Vanden Bogert* v. *May,* 334 Mich 606.

The decree is affirmed, with costs to appellee.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE v. MOSLEY.

1. CRIMINAL LAW—COMPLAINT—STATUTES—IMPEACHMENT.
   A complaint in a criminal prosecution which, upon its face, purports to be made upon the knowledge of the affiant, is a sufficient compliance with the pertinent statute and it is incompetent for the defendant, upon arraignment, to impeach the complaint by showing a lack of knowledge by the complaining witness (CL 1948, §§ 766.2, 766.3).

2. SAME—COMPLAINT—WARRANT—EXAMINATION OF WITNESSES.
   The positive statements of a complaining witness setting forth a crime charged in a sworn complaint give the examining magistrate jurisdiction to issue the warrant and the fact that it does not appear there was no examination of witnesses under oath, or that the complainant did not adhere to the truth, cannot avoid a warrant (CL 1948, §§ 766.2, 766.3).

3. SAME—WARRANT—JURISDICTION—IMPEACHMENT.
   A warrant in a criminal case cannot later be impeached, once jurisdiction has attached for the issuance of such warrant (CL 1948, §§ 766.2, 766.3).

4. SAME—JURISDICTION—DENIAL OF MOTION TO QUASH—LEAVE TO APPEAL—STAY OF PROCEEDINGS.
   The circuit court had jurisdiction to try case for inciting to commit perjury on May 21, 1952, where motion to quash information had been denied December 3, 1951, and a stay of 20 days granted, but record fails to show any extension thereof, notwithstanding defendant's application for leave to appeal from order denied was not denied by the Supreme Court until June 11, 1952.

5. PERJURY—INCITEMENT TO COMMIT—MATERIAL WITNESSES IN OTHER PROSECUTION.
   The reading of the names of witnesses indorsed on the information in a rape case was proper in prosecution for inciting a witness therein to commit perjury, since it was necessary

---

REFERENCES FOR POINTS IN HEADNOTES

[1] Generally as to knowledge of affiant to a complaint in a criminal prosecution, see 14 Am Jur, Criminal Law § 245.
[2] 4 Am Jur, Arrest §§ 7, 12, 13.
[5, 9, 10] Generally as to crime of inciting to commit perjury, see 41 Am Jur, Perjury § 74 *et seq.*
[8] 53 Am Jur, Trial § 116.
[11] 3 Am Jur, Appeal and Error § 1005; 14 Am Jur, Criminal Law §§ 129–132.

for the prosecution to show that the rape case was pending and that the witness therein whom defendant was claimed to have attempted to incite to commit perjury was a material witness in the prosecution for rape (CL 1948, § 750.425).

6. WITNESSES—HUSBAND AND WIFE—COMMON-LAW MARRIAGE.
It was not error to permit woman to testify in prosecution for inciting to commit perjury, where defendant claimed but failed to sustain his burden of proof that she was the common-law wife of defendant (CL 1948, § 750.425).

7. CRIMINAL LAW—EVIDENCE—IMMATERIAL ISSUE.
Exclusion of testimony of a woman whom it was sought to show was the legal wife of man who had been married to woman whom defendant in prosecution for inciting to commit perjury claimed as his common-law wife *held,* proper, since the marital status of such proposed witness was not a material issue in prosecution for inciting to commit perjury (CL 1948, § 750.425).

8. SAME — FURTHER CROSS-EXAMINATION — WITNESSES — ORDER OF PROOF — DISCRETION OF COURT.
Court's ruling and statement to jury that defendant in criminal prosecution who recalled for further cross-examination, after the people had rested, 2 witnesses who had testified for the people, made such witnesses his witnesses and that he was bound by their answers, *held,* not an abuse of discretion, the control of the presentation of proof being a matter within his discretionary power.

9. PERJURY—INSTRUCTIONS.
Charge to jury in prosecution for inciting to commit perjury *held,* fair and comprehensive (CL 1948, § 750.425).

10. SAME—ARGUMENT TO JURY.
Prosecutor's argument to jury in prosecution for inciting to commit perjury *held,* not such as to require reversal (CL 1948, § 750.425).

11. CRIMINAL LAW—IRREGULARITIES—FAIR TRIAL.
The test to be applied in determining whether irregularities in a criminal trial are grounds for reversal is not whether there were some irregularities but whether defendant had a fair and impartial trial (CL 1948, § 769.25).

12. PERJURY—INCITEMENT TO COMMIT—EVIDENCE.
It is not necessary to show that witness whose testimony was sought to be procured knew that it was false, in prosecution for inciting and procuring one to commit perjury (CL 1948, § 750.425).

13. PERJURY—VERDICT—EVIDENCE.

Jury's verdict of guilty in prosecution for inciting to commit perjury *held,* supported by sufficient testimony (CL 1948, § 750.425).

Appeal from Genesee; Galoda (Paul V.), J. Submitted October 16, 1953. (Docket No. 81, Calendar No. 45,846.) Decided December 29, 1953. Rehearing denied February 18, 1954.

John Mosley was convicted for endeavoring to incite and procure one to commit perjury. Affirmed.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Chester R. Schwesinger,* Prosecuting Attorney, *Albert H. Callahan,* Assistant Prosecuting Attorney, for the people.

E. B. Reese, for defendant.

BUSHNELL, J. Defendant John Mosley was convicted and sentenced for the crime of endeavoring to incite and procure one to commit perjury. See CL 1948, § 750.425 (Stat Ann § 28.667).

At the September, 1949, term of the circuit court for Genesee county, an information was filed charging Richard Schaffer, Raymond Schaffer and John Tierney with the crime of rape on one Iris Romer. Approximately a week before October 23, 1951, that being the date fixed for their trial, Ramona Romer, a sister of Iris, was subpoenaed as a witness for the people in that case. It is claimed that Mosley, on October 22, 1951, endeavored to incite and procure Ramona to commit the crime of perjury by falsely testifying at the Schaffer trial that the crime of rape perpetrated upon her sister, Iris, occurred in Shiawassee county and not in Genesee county. It is alleged that Mosley promised to pay Ramona $500 and give her a trip to Florida for such testimony.

On October 31, 1951, Frank C. Zeiter, a deputy sheriff of Genesee county, swore to a complaint before Hon. Raymond C. French, a municipal judge of the city of Flint, in which the foregoing facts were recited. The complaint being regular in form, the municipal judge issued a warrant. Mosley was brought before Judge French on November 5, 1951, and upon demand for an examination, one was had resulting in the determination that there was probable cause that the charged offense had been committed and that Mosley was guilty thereof.

Upon arraignment in the circuit court on November 13, 1951, defendant stood mute and a plea of not guilty was entered. Zeiter was called as a witness by the defendant and he testified that he signed the complaint in the case and that no one gave any testimony before the court on the complaint other than himself. Zeiter further testified:

"*Q.* You weren't present at any of this conversation that was alleged to have occurred in which the defendant was involved in this subornation of perjury?

"*A.* No, sir.

"*Q.* You got this information from someone else?

"*A.* That is correct.

"*Q.* And you have no knowledge from any other source?

"*A.* That is correct."

A motion to dismiss on behalf of Mosley was then made and denied. A subsequent motion to quash the information was also denied. A 20-day stay of proceedings was granted by the trial court and an application for leave to appeal from the denial of the motion was made to this Court, and while that application was pending here the cause came on for trial in the circuit court on May 21, 1952. Mosley's application for leave to appeal was denied here on June 11, 1952. After conviction and sentence a motion

was made in the circuit court to set aside the verdict and judgment and grant a new trial on various grounds, which were denied. Upon leave granted, Mosley has appealed.

The 17 questions raised on appeal have been examined. The first of these is: "Did the municipal judge have jurisdiction to issue the warrant for the arrest of the defendant?"

The statutory provisions regarding the making of a complaint read in part as follows:

"Sec. 2. Whenever complaint shall be made to any magistrate named in section 1, chapter 4, of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him.

"Sec. 3. If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." (CL 1948, §§ 766.2, 766.3 [Stat Ann §§ 28.920, 28.921].)

The complaint upon its face purports to have been made upon the knowledge of Deputy Sheriff Zeiter. The following is stated therein:

"The complaint, on oath and in writing, of Frank Zeiter, taken and made before me * * * who being duly sworn, says that heretofore, to-wit, on or about the 22d day of October, A.D. 1951, at the city of Flint, and in the county aforesaid, James Mosley did feloniously and unlawfully endeavor to incite and procure," et cetera.

This Court, in *People* v. *Lynch,* 29 Mich 274; *Potter* v. *Barry Circuit Judge,* 156 Mich 183; and *People* v. *Czckay,* 218 Mich 660, settled the question that a complaint which, upon its face, purports to be made upon the knowledge of the affiant, is a sufficient compliance with the statute, and that it is incompetent for a defendant, upon arraignment, to impeach the complaint by showing a lack of knowledge by the complaining witness. The positive statements made upon the oath of the complainant gives the magistrate jurisdiction to issue the warrant. The fact that "it does not appear there was no examination of witnesses under oath," or that the complainant did not adhere to the truth, cannot avoid a warrant. *People* v. *Hare,* 57 Mich 505, and *People* v. *Schottey,* 66 Mich 708. Jurisdiction having attached for the issuance of the warrant, it could not be later impeached. *Potter* v. *Barry Circuit Judge, supra.*

Mosley insists that the circuit court was without jurisdiction to try his case while an application for leave to appeal was pending in the Supreme Court from the order denying his motion to quash the information. After denial, in the trial court, of this motion on December 3, 1951, a stay of 20 days was granted. The calendar entries do not show any extension of this stay. On May 21, 1952, when the jury was impaneled and the trial begun, this stay had expired. Although defendant's application for leave to appeal was not denied here until June 11, 1952, the circuit court had not lost jurisdiction to proceed with the trial on May 21st.

At the trial the people, over the objection of the defendant, were permitted to read to the jury the names of the witnesses indorsed on the information in the case of the People *v.* Raymond Schaffer, Richard Schaffer and John Tierney. This is assigned as error. It was necessary that the prosecution show that the Schaffer-Tierney rape case was pending and

that Ramona Romer was a material witness in that case.

Iris Romer, the complainant in the rape case, was called as a witness in the instant case. Counsel objected to her testimony on the ground that she had entered into a common-law marriage with Mosley in 1947. From the testimony taken in the absence of the jury, it appears that Iris had lived with Mosley for about 6 weeks in 1947, but she denied that they had ever agreed to take each other as husband and wife in the manner required to constitute a common-law marriage. She stated that she did not use the name of Mosley; that he had never contributed to her support except for such 6-week period, and that she later married Donald Howard in a formal ceremony in 1948, and had lived with him since that time. It further developed that the Howard marriage was not challenged until December, 1951, when, following the arrest of Mosley, he filed a suit for divorce. That suit was dismissed in Genesee county on the ground of insufficient allegations of the marriage after Mosley failed to amend his bill within the time required.

The trial in the instant case began on Wednesday, May 21, 1952. Iris was served with a summons and bill of complaint in a second divorce suit begun by Mosley on Saturday, May 17, 1952. Mosley's present counsel represented him in both divorce suits.

The burden of proving that a marriage between Mosley and Iris had existed was not met by the defendant. See *People* v. *Zabijak,* 285 Mich 164. The court did not err in permitting Iris Howard, formerly Iris Romer, to testify in the instant case.

It is urged that the court erred in denying the defendant the right to examine the witness, Kathleen DeKeyser Howard, concerning the status of her marriage and in denying him the right to show what he proposed to prove by such witness. According to

Mosley's counsel, Kathleen had entered into a ceremonial marriage with Donald Howard, the present husband of Iris, at Boyce, Louisiana, in December of 1941, and it was proposed to question her as to whether she had any information regarding a divorce case begun by her husband, Donald Howard, in Genesee county in 1946. The court excluded all this testimony, and properly so, on the ground that the marital status of Kathleen was not a material issue in the case at bar.

It is argued that the court erred in holding and stating before the jury that the defendant, in recalling the witness, Ramona Romer, and her sister, Iris, for further cross-examination, made both of these parties his witnesses, and that he was bound by their answers.

The people had rested their case. The ruling of the trial judge was within his discretionary power to control the presentation of proof. No abuse of that discretion is shown.

Other questions propounded by defendant have to do with the court's denial of a motion to direct a verdict of not guilty at the close of the testimony, the prosecutor's claimed prejudicial argument to the jury and the court's refusal to give certain requested charges.

The charge has been examined and the claimed prejudicial statements considered. The charge, taken in its entirety, is fair and comprehensive, and the prosecutor's arguments are not such as would require reversal.

In determining whether irregularities in a criminal trial are grounds for reversal, the test to be applied is not whether there were some irregularities but whether defendant had a fair and impartial trial. *People* v. *O'Hara,* 278 Mich 281; *People* v. *Logie,* 321 Mich 303. See CL 1948, § 769.26 (Stat Ann § 28.1096).

Mosley insists that the verdict of guilty is against the "great weight * * * of the evidence" and that the court erred in denying his motion for a new trial.

There is little case law in this State on the offense of inciting and procuring one to commit perjury. The statute heretofore quoted sets out the elements of the crime. In proving the offense it is not necessary to show that the witness knew the testimony sought to be procured was false. *People* v. *Clement*, 127 Mich 130. There is sufficient testimony in this record to support the jury's verdict of guilty. An examination of the entire record discloses that the defendant received a fair and impartial trial.

The judgment and sentence entered in the trial court and the order denying a new trial are affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

In re DOLGY'S ESTATE.

APPEAL OF POLATE.

1. CONTRACTS—CONSIDERATION—PAST CONSIDERATION.
   An agreement to render services is a good consideration for a promise to pay for past services as well as those about to be rendered.

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Contracts §§ 113, 114, 118.
[2] 21 Am Jur, Executors and Administrators § 924.
[5] 21 Am Jur, Executors and Administrators § 327.
[8] Generally as to witnesses in regard to transactions with a deceased person, see 58 Am Jur, Witnesses § 214 *et seq.*

2. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—LIMITATION OF ACTIONS.

   Claim against estate of deceased person for performance of services and expenditure of money is limited to 6 years prior to such person's death, where there is no evidence that plaintiff had obligated himself to perform services or expend money in the future when making his claim for services rendered antedating as well as within such 6-year period (CL 1948, § 609.13).

3. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—BURDEN OF PROOF.

   The burden of showing that the evidence sought to be barred was equally within the knowledge of the deceased party against whose estate a claim is presented is upon the party invoking the statute (CL 1948, § 617.65).

4. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—BURDEN OF PROOF.

   The burden of establishing a right to recover as to each item of a claim against an estate is upon the claimant.

5. SAME—CLAIMS AGAINST ESTATES—BURDEN OF PROOF—EXPECTATION OF PAYMENT.

   Son-in-law claimant against an estate of decedent must prove that services were rendered and money expended with the expectation and intent on the part of both decedent and claimant that latter would be compensated therefor.

6. SAME—CLAIMS AGAINST ESTATES—VALUE—EVIDENCE.

   A claimant against the estate of a decedent must establish by competent evidence the fair amount of each item for which he claims payment of compensation.

7. SAME—CLAIMS AGAINST ESTATES—WIDOW'S AGREEMENT TO REPAY CLAIMANT FOR OBLIGATIONS OF HUSBAND'S ESTATE—EVIDENCE.

   Items claimant, a former son-in-law, presented against the estate of decedent widow which would have been proper items against her late husband's estate, such as his hospital and funeral expenses, but as to which there was no showing of an agreement on her part to repay claimant, supported by a valuable consideration, were properly disallowed.

8. SAME—CLAIMS AGAINST ESTATES—EVIDENCE—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   Items of claim against decedent's estate for services rendered and materials furnished which were such as must have been known to deceased but which were proved only by the testimony of claimant, deceased's former son-in-law, were properly disallowed, since such testimony was incompetent (CL 1948, § 617.65).

9. SAME—CLAIMS AGAINST ESTATES—EVIDENCE.
Items of claim against the estate of a decedent as to which there was testimony supporting claim by witnesses other than claimant himself, formerly decedent's son-in-law, became matters for consideration of jury, hence, directed verdict for the estate as to such items was reversible error (CL 1948, § 617.65).

Appeal from St. Clair; Stewart (Shirley), J. Submitted October 6, 1953. (Docket No. 1, Calendar No. 45,661.) Decided December 29, 1953.

In the matter of the estate of Anna Dolgy, deceased. Steven Polate presented his claim for materials, labor and money advanced. Directed verdict for disallowance of all but $40. Plaintiff appeals. Reversed and remanded.

Duncan J. McColl, Jr., and *Robert J. Wojcinski*, for plaintiff.

Black & Bush, for defendant.

SHARPE, J. This is an appeal by Steven Polate from the disallowance of a claim which he filed against the estate of Anna Dolgy, deceased.

The claimant, Steven Polate, was married to Alice Polate in August of 1936. The record shows that Wookal Dolgy, better known as Nick Dolgy, and wife Anna owned an 80-acre farm in St. Clair county, about 60 miles from Detroit. Nick Dolgy died January 10, 1943, and his widow Anna Dolgy survived him and continued to live on the farm until August, 1948. Claimant was separated from Alice Polate in 1945. They were later divorced. See *Polate* v. *Polate*, 331 Mich 652.

Anna Dolgy died in August, 1948, and Alice Polate was appointed administratrix of her mother's estate. Claimant filed a claim in the probate court of St. Clair county in the estate of Anna Dolgy.

It is plaintiff's claim that shortly after his marriage, he started to work on the Dolgy farm; that he had performed various services in connection with the operation and management of the farm; that he had helped to repair, construct, and maintain some of the buildings on the farm; that he had helped to maintain the equipment and machinery; that he had likewise purchased, furnished and paid for various materials, equipment and machinery for the farm; that he had purchased a team of horses that were delivered to the farm; that he had made substantial payments on account of the principal and interest on the mortgage covering the farm; it is his further claim, that he had performed such work and labor, rendered such services, purchased and paid for such machinery and equipment and made such payments on the mortgage at various intervals of time, particularly on weekends, during his vacation periods, and during the time that he was employed by the United States Rubber Company. This covered a period from 1936 until sometime in 1944.

Objections were filed to plaintiff's claim, and the claim was disallowed in the probate court. Plaintiff appealed to the circuit court where the cause was tried before a jury. At the conclusion of plaintiff's testimony, defendant made a motion for a directed verdict for the reason that the testimony offered by plaintiff was not admissible for the reason that it was equally within the knowledge of the deceased. The trial court took the motion under advisement, by virtue of the authority of the Empson act,* and at the conclusion of all testimony defendant renewed the motion. The trial court granted the motion with the exception of an item of $40, which he directed the jury to find in favor of plaintiff. Prior to the

* CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—REPORTER.

directing of a verdict, plaintiff requested the trial court to give the following instructions to the jury:

"It is the claim of the claimant that he was the son-in-law of Nick and Anna Dolgy, who lived on a farm in Emmett township, St. Clair county, and that, in 1936, he married the daughter of Nick and Anna Dolgy, who owned the farm as tenants by the entireties.

"It is further his claim that in 1936, shortly after the marriage, he started working on the Dolgy farm and furnishing materials and performing services for them. It is further his claim that he performed the following services, and furnished the following materials:

"1.	1936—Oct., To cost of material for roof on house	$	92.00
	To cost of labor		80.00
"2.	1937—To cost of material for roof in barn		50.00
	To cost of labor		20.00
"3.	1938—1,000 feet of barb wire		55.00
"4.	1938—To cost of building silo—Romeo, Michigan		195.00
"5.	1938—To cost of material for remodeling house—7740 Greenfield		125.00
"6.	1938—To cost of material for horse stables		150.00
"7.	1938—To cost of corn binder		245.00
"8.	1938—To payment on farm mortgage		49.72
"9.	1938—Nov., To cost of material to build tool shed—Mr. Kudzia–M–21, Emmett, Michigan		500.00
	To cost of labor		310.00
"10.	1940—To cost of material to build porch Carl Orlesky		125.00
	To cost of labor		95.00

"11.	1940—To cost of material for metal sheet roof on granary—Mr. Apley	$	65.00
	To cost of labor		20.00
"12.	1940—May, To cost of disc—Yale, Michigan		104.75
"13.	1940—May, To cost of tractor—Yale, Michigan		350.00
"14.	1940—Sept., To cost of plow—Jack Apley, Emmett, Michigan		115.00
"15.	1940—To cost of harness—Marr Morosoff at Detroit, Michigan		50.00
"16.	1941—May, To cost of side rake and manure spreader—Allis-Chalmers, Yale, Michigan		385.00
"17.	1941—To cost of cow shed—Carl Orlesky for material		160.00
	To cost of labor		65.00
"18.	1941—To cost of material of 1500 feet of wire fence—J. Ebinoff—18417 Keystone Avenue		90.00
"19.	1942—June, To cost of cultivator, Emmett, Michigan		65.00
"20.	1942—Oct. 24 to Jan. 10, To cost of hospitalization of Nick Dolgy at Mack and John R.		185.00
"21.	1943—To painting of porch and barn		70.00
"22.	1943—Jan., Payment on farm mortgage		500.00
"23.	1943—May, To purchase of 2 horses — C. McKinney, Brockway, Michigan		210.00
"24.	1943—June, To payment of balance on farm mortgage		180.47
"25.	1943—To purchase of hay wagon and gate, Carl Orlesky		110.00
"26.	1943—Funeral bill—John Jurkiewicz		497.06

"27.	1943—Russian Church—Henry & Jos. Campau	$	32.80
"28.	1943—Stone for grave—6 Mile		70.00
"29.	1943—Wake after funeral		100.00
"30.	1944—Sept., To cost of material for building pig pen		50.00
	To cost of labor		10.00
"31.	1944—To cost of fence posts		51.31
"32.	1937—to 1944 incl.—To moneys due for work and labor performed in connection with haying for a period of 2 weeks during the month of July for the years of 1937 to 1944, inclusive, being a total of 16 weeks, at $25 per week for each week		400.00
"33.	1938—To work and labor performed in connection with building, repairing, constructing, improving, painting, building structures and dwellings in and about the farm belonging to Anna Dolgy, Deceased, and her deceased husband, Nick Dolgy, for a period of 9 months commencing on or about February 5, 1938, and continuing until and including October 8, 1938, at the rate of $75 per month		600.00
	Total		$6,628.11"

Over objections, plaintiff offered testimony in support of his claim. The statute invoked by defendant is CL 1948, § 617.65 (Stat Ann § 27.914). We note that plaintiff's claim is for continuing services dating from 1936 until 1944. In *Riggs* v. *Riggs' Estate,* 232 Mich 579, 590, we quoted with approval

from *Graham* v. *Stanton* (syllabus), 177 Mass 321 (58 NE 1023):

"'An agreement to render services is a good consideration for a promise to pay for past services as well as those about to be rendered.'"

In the case at bar we do not find any evidence that plaintiff obligated himself to perform services or expend money in the future. It follows that plaintiff's claim for services must be limited to August 26, 1942, which is 6 years prior to the death of Anna Dolgy.*

The statute relative to testimony equally within the knowledge of the deceased has been before the Supreme Court in numerous cases. The burden of showing that the evidence is equally within the knowledge of the deceased is upon the party invoking the statute, see *Lapachin* v. *Standard Oil Company,* 268 Mich 477, but it is also true that the burden of establishing a right to recover as to each item of a claim against an estate is upon the claimant. See *In re Jorgenson's Estate,* 321 Mich 594. It is also essential that claimant prove that the services rendered and money expended were done with the expectation and intent on the part of each of them that claimant would be compensated therefor. It is also essential that claimant establish by competent evidence the fair amount of each item for which he claims compensation pay.

In *Re Jorgenson's Estate, supra,* plaintiff went to live in the home of decedent as a roomer and boarder. He claimed that after he went to live there he began paying household bills and performed labor incident to repairing and improving her home, as well as paying for the materials used. We said (p 603):

"Touching such items as groceries, coal, clothing, et cetera, it must be concluded from the record that

* See CL 1948, § 609.13 (Stat Ann § 27.605).—REPORTER.

the amount or fair value thereof was equally within the knowledge of Mrs. Jorgenson, and, hence, plaintiff's testimony, which was the only testimony as to the amount or value of these and similar items, was incompetent."

The first item of plaintiff's claim subsequent to August 26, 1942, is for $185, which represents a hospital bill incurred by decedent's husband. This claim would be a proper item to consider as a claim against decedent's husband's estate. The record does not show that decedent promised, for a valuable consideration, to repay claimant. It follows that the trial court was not in error in disallowing this claim.

The next claim of claimant is that he purchased the paint and furnished the labor to paint the barn and porch of the home in 1943, at a combined value of $70. There is no evidence in the record, outside of claimant's testimony, that he purchased the paint or performed the labor. If such services were performed it must have been known to deceased, and under the authority of the *Jorgenson Case, supra,* claimant cannot recover.

The next claim of claimant is that 2 or 3 days after the death of Nick Dolgy, which occurred January 10, 1943, he paid $500 on the mortgage. The only evidence to support such claim is claimant's testimony. There is no evidence that decedent promised to repay claimant for the money claimed to have been paid.

Another claim of claimant is that he purchased 2 horses for use on the farm. It would appear self evident that if 2 horses were brought to the farm that decedent could not fail to know about them. Moreover, there is no evidence other than that of plaintiff that he paid for the horses. This item must be excluded.

Another item is the payment of the funeral expense of decedent's husband in the amount of $497.-

06. This item of expense, if paid by plaintiff, is a proper charge against the estate of Nick Dolgy. The record fails to show that decedent, for a consideration, promised to reimburse plaintiff for such payment.

Other items claimed are $32.80 for funeral services; $70 for a monument; and $100 for a funeral wake for decedent's husband, Nick Dolgy. These items fall in the same category as the cost of the funeral.

Other items in plaintiff's claim are $40 paid to Carl Orlesky; $27.30 and $24.01 paid for fence posts; $60 for labor and materials in building a pig pen, as well as labor performed in connection with haying since August 26, 1942. Although there is a dispute as to who paid for the material in the above items, there is some evidence other than that of plaintiff that the labor was performed and materials paid for by plaintiff. In our opinion these items should have been submitted to the jury for their consideration. The judgment is reversed and remanded to the circuit court of St. Clair county for trial on the items that should have been submitted to the jury on the previous trial. Plaintiff may recover costs.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

In re RUDNIK.

1. CRIMINAL LAW—REMAND—JURISDICTION—VIOLATION OF PAROLE—SENTENCE.

   The remand by the Supreme Court of a criminal case to the recorder's court upon setting aside an invalid sentence for failure to give parolee information of charge he was required to meet at summary hearing for violation of parole and revoking order of probation gave the recorder's court jurisdiction to hold a valid hearing and impose a valid sentence.

2. SAME—WITNESSES—OPPORTUNITY FOR CROSS-EXAMINATION.

   Transcription of testimony of witness whose testimony was taken at an earlier hearing and as to whom an opportunity to cross-examine had been afforded was properly introduced where such witness admittedly was not available at the trial (CL 1948, § 768.26).

Habeas corpus, with accompanying certiorari by Frank Rudnik to obtain his release from Detroit House of Correction. Submitted November 10, 1953. (Calendar No. 45,908.) Writ dismissed December 29, 1953.

Roman V. Ceglowski (*Harold Helper,* of counsel), for petitioner.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 1216.
[2] 20 Am Jur, Evidence § 695.
[2] Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial. 15 ALR 495; 21 ALR 662; 79 ALR 1392; 122 ALR 425; 159 ALR 1240.

Prosecuting Attorney, and *Samuel Brezner,* Assistant Prosecuting Attorney, for people.

BOYLES, J. We allowed petitioner habeas corpus directed to the superintendent of the Detroit house of correction with ancillary certiorari to the recorder's court of Detroit, to inquire into the legality of his detention in said prison. The matter has been submitted on typewritten returns and printed briefs.

On February 10, 1944, petitioner Frank Rudnik pleaded guilty in recorder's court to a charge of breaking and entering a building in the nighttime, with intent to commit larceny therein. Sentence was deferred because Rudnik had been inducted into the United States army. On September 5, 1944, he was placed on 3 years' probation, which was suspended during his army service. He was discharged from the army December 8, 1944, and on March 2, 1945, he was brought into court for violation of probation. After a hearing, his probation was continued. On June 5, 1945, he was arrested for threatening a gasoline station attendant with a knife, and a warrant for rearrest for violation of probation was issued. On June 8, 1945, his probation was revoked, and he was sentenced to prison for not less than 3 nor more than 15 years. He was paroled on May 24, 1948, before his minimum sentence had expired. While at liberty on this parole he was found guilty of an attempt to break and enter a store in the nighttime, and sentenced to 2 to 5 years in State prison, to run concurrently with his previous sentence.

Rudnik was before this Court in 1952 on original proceedings in habeas corpus, with ancillary certiorari to the recorder's court of Detroit, to obtain his release from State prison, on the ground, *inter alia,* that the order entered in 1945 revoking probation, and the ensuing sentence, were void because he was not then informed of the charge he was then required

to meet. On April 7, 1952, this Court set aside said order and sentence, for the following reason:

"There is nothing in the file before us to show that Rudnik was informed of the charge that he was required to meet at the hearing. The 1945 proceedings were not a 'summary hearing' as required by the statute. CL 1929, § 17374 (Stat Ann § 28.1134). For present statute see CL 1948, § 771.4 (Stat Ann 1951 Cum Supp § 28.1134). The situation in the instant case is comparable to that in *Re Bobowski,* 313 Mich 521.

"The order revoking the probation is set aside, the sentence vacated, and petitioner is remanded to the custody of the recorder's court for the city of Detroit, where a proper hearing is ordered after information is given Rudnik of the charge that he may be required to meet." *In re Rudnik,* 333 Mich 216.

On May 19, 1952, pursuant to said finding and order, the recorder's court ordered Rudnik returned from State prison for further disposition. An information charging violation of probation was filed, an amended warrant for arrest for violation issued, Rudnik was arraigned and thereby informed of the charge he was to meet, a plea of not guilty entered, a hearing held, and testimony taken, June 18, 1952. Rudnik was found guilty of violating probation, sentenced to 3 to 15 years in State prison, with recommendation that he be given credit for previous time served. No appeal has been taken from that finding and sentence.

In the instant case, Rudnik now seeks release on habeas corpus claiming that the recorder's court did not have jurisdiction over him in 1952, because his original 3 years' probation, September 5, 1944, had expired in 1947.

When this Court on April 7, 1952, set aside the 1945 order of recorder's court, we ordered Rudnik remanded to recorder's court for a proper hearing.

after information given him of the charge he was required to meet. As hereinbefore stated, this has been done, our order complied with, and on June 18, 1952, Rudnik was resentenced to 3 to 15 years in State prison. The charge was that in June, 1945, during the time he was on probation under the order of September 5, 1944, he was arrested for the commission of another crime while at large. He was charged with violation of probation by committing a felonious assault, being armed, on one Ulysses Richardson, with intent to rob, on June 8, 1945, during the 3-year period of his original probation. He was convicted thereof, and sentenced to 3 to 15 years in State prison. Our remand to the recorder's court laid the foundation for the rehearing there, in 1952, on a proper information as to said charge. The court had jurisdiction, and Rudnik is not entitled to his release at this time, on habeas corpus.

A second ground claimed for release is that the recorder's court relied on a transcript of the testimony of one Ulysses Richardson, a witness whose testimony was taken to prove violation of probation in 1945. At the hearing in June, 1952, the court received testimony by the court reporter transcribed from the testimony given by Richardson in 1945, a witness who admittedly could not be produced in 1952. Rudnik claims the court erred in receiving the reporter's transcript, because he was not given an opportunity to cross-examine. There is no merit in the claim. Rudnik was represented by counsel at the hearing in 1945 when the testimony was taken and an opportunity to cross-examine was afforded. The people—defendant—claim the record of that hearing shows that Richardson was cross-examined. However, such proof is not necessary. Opportunity to cross-examine is all that is required.

"Testimony taken at an examination, preliminary hearing, or at a former trial of the case, * * *

may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial." CL 1948, § 768.26 (Stat Ann § 28.1049).

"In *People* v. *Myers,* 239 Mich 105, we held that the testimony before an examining magistrate might be read at the subsequent trial even though there had been no previous cross-examination of the witness, it being only necessary that an opportunity for cross-examination had been present." *People* v. *Hunley,* 313 Mich 688.

The petition is denied and the writ dismissed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

JUDD *v.* VOLLMER.

AUTOMOBILES—INSURANCE—RESTRICTED COVERAGE—FINANCIAL RESPONSIBILITY ACT.

Automobile insurance policy which provided that it afforded insurance for bodily injury liability complying with the financial responsibility law of any State during the period of the policy to the extent of the coverage and limits of liability required thereby, and which was issued to principal defendant while he was restricted in his driving his car to and from work, imposed liability upon the insurer for injuries negligently inflicted by insured upon plaintiff at a time other than while he was driving to or from work, where such limited coverage was not recognized by the financial responsibility law and restriction upon insured's right to drive had been removed prior to occurrence of accident (PA 1949, No 300, §§ 518, 520).

Appeal from Ottawa; Smith (Raymond L.), J. Submitted October 7, 1953. (Docket No. 30, Calendar No. 45,893.) Decided December 29, 1953.

Garnishment proceedings by Robert Judd against Russell Vollmer, principal defendant, and Cadillac Mutual Insurance Company, garnishee defendant. Judgment for plaintiff. Garnishee defendant appeals. Affirmed.

R. Burr Cochran, for plaintiff.

Vandeveer, Haggerty, Garzia & Haggerty (*Leroy G. Vandeveer,* of counsel), for garnishee defendant.

BOYLES, J. Plaintiff Judd obtained judgment against defendant Vollmer for $3,460 damages arising out of an automobile accident in which Vollmer's automobile was involved. The judgment was not appealed. Vollmer's car was insured in a policy issued by the Cadillac Mutual Insurance Company, which company denied liability and refused to pay the judgment. Thereupon Judd caused a writ of garnishment to be issued against the insurer to collect. The garnishment suit was heard by the trial court on an agreed statement of facts and from the ensuing judgment for the plaintiff the garnishee defendant appeals.

The only question involved here is whether, under the circumstances of the case, the insurance coverage was in effect on the date of the accident, in view of the provisions of the policy and the applicable financial responsibility requirements in the vehicle code.*

The policy in question was issued February 10, 1950, for 1 year. Vollmer's license to operate a motor vehicle on the highways had been suspended

*PA 1949, No 300 (CLS 1952, § 257.1 *et seq.;* Stat Ann 1952 Rev § 9.1801 *et seq.*).

for a 3-year period because of his having been convicted 3 times for driving while drunk. However, on January 30, 1948, the circuit judge had entered an order altering and amending the order of suspension by the secretary of State, to provide as follows:

"That the order of the secretary of State of the State of Michigan, suspending the motor vehicle operator's license of Russell Vollmer be and the same is hereby altered and amended so as to permit the said Russell Vollmer to operate a motor vehicle in transporting himself to and from his place of employment and in the course of his employment, and that a limited motor vehicle operator's license for the purpose hereinbefore set forth be issued to the said Russell Vollmer."

Thereupon the secretary of State granted Vollmer a license to operate, limited to the above restriction. The 3-year period during which Vollmer's license to operate a motor vehicle was suspended expired October 6, 1950. On October 9th the secretary of State issued a license to Vollmer to operate without the restriction, and notified him as follows:

"Our records disclose that the statutory period for which you were placed under the provisions of the financial responsibility law has expired, therefore, the suspension order entered against you is hereby lifted.

"I am herewith enclosing your original operator's license No. AA 116137. Please destroy the financial responsibility limitation license now in your possession."

It should be noted that the policy issued to Vollmer by the garnishee defendant on February 10, 1950, was by its terms still in effect, to February 10, 1951. It still has never been cancelled.

On November 22, 1950, while Vollmer was driving his car at a time other than to and from work in the course of his employment, he was involved in an

automobile accident resulting in personal injuries and property damage to the plaintiff, and as a result the plaintiff obtained the judgment on which the instant garnishment suit is based.

The appellant insurer disclaimed liability because the accident occurred while Vollmer was driving his car at a time other than to and from work in the course of his employment, relying on a provision in the policy as follows:

"In consideration of the premium charged for this policy, it is understood and agreed that there shall be no coverage under this policy while the above named insured, Russell Vollmer, may be driving the automobile described in this policy at any time other than to and from work in the course of his employment."

However, the policy also provided that its coverage for such liability shall comply with the provisions of the State's motor vehicle financial responsibility law, and expressly states that

"Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

The narrow question here involved would seem to be whether the attempt to limit the liability of the insurer to damages for accidents occurring solely while the insured was driving to and from work in the course of his employment conflicts with the financial responsibility provisions of the vehicle code. If so, it would also seem to follow that the purported limit of liability would be no defense in the instant case, as between the plaintiff and the insurer. However, while the appellant in its brief concedes that would be a proper conclusion, the appellant claims that it does not control. Appellant says the controlling question is otherwise:

"It is the plaintiff and appellee's contention, however, that * * * the violation by Russell Vollmer of the restricted use and therefore the restricted coverage afforded to him by virtue of the language of the special indorsement could not avail garnishee defendant in an action by the plaintiff as judgment creditor of the principal defendant. For the purpose of this case we will assume and concede that if the garnishee defendant at the time of the accident involving plaintiff, Robert Judd, was bound by this provision of the financial responsibility act (PA 1949, No 300, § 520) that it could not avail itself of the violation of the condition imposed upon the plaintiff and the restrictions set forth in the special indorsement. It is the position of the garnishee defendant and appellant that this statutory provision is not applicable because principal defendant, Russell Vollmer, was not under financial responsibility or the provisions of the financial responsibility act at the time of the accident that occurred on November 22, 1950, and appellant and garnishee defendant insurance company was likewise not subject to the provisions of the financial responsibility act whatsoever."

Under section 520(a) of said statute,[1] a motor vehicle liability policy covering a resident owner means a policy certified as provided in section 518 of the act.[2] Under said section 518, proof of financial responsibility may be furnished by filing with the secretary of State the written certificate of the insurance carrier, "certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility."

Under the above provisions, the garnishee defendant filed with the secretary of State the applicable certificate, for the purpose of showing its liability, as

[1] CLS 1952, § 257.520(a), Stat Ann 1952 Rev § 9.2220(a).
[2] CLS 1952, § 257.518, Stat Ann 1952 Rev § 9.2218.

a matter of record. At the time of the accident the certificate was still a matter of record in the office of the secretary of State. The policy to which it referred was apparently still in effect. In fact, it has never yet been cancelled.

The provision in the policy limiting its liability to accidents while the insured was driving to and from work finds no recognition in the financial responsibility provisions of the vehicle code. On the contrary, the limitation conflicts with the provisions of section 520(b) of the act,* which expressly sets out what the policy of liability of the owner shall insure:

"Such owner's policy of liability insurance: * * *

"2. Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows."

The provisions of the vehicle code, as well as appellant's policy, were still in effect. We are in accord with the conclusion stated by the trial court, as follows:

"It might be argued that the restoration of defendant insured's operator's license on October 9, 1950, would render the act inapplicable to defendant thereafter. The answer to this contention is found within the policy itself,—Condition 8, which provides: 'Such insurance as is afforded by this policy for bodily injury liability * * * shall comply with the provisions of the motor vehicle financial responsibility

* CLS 1952, § 257.520(b), Stat Ann 1952 Rev § 9.2220(b).

law of any State, * * * during the policy period, to the extent of the coverage and limits of liability required by such law,' * * * This provision definitely binds the policy to the financial responsibility act for the duration of the policy period, in this case until the expiration date of February 10, 1951, or until cancelled within the provisions of the act. Although it would seem that the policy could have provided that the terms of the act would cease to affect the liability under the policy as soon as the insured ceased to come within its provisions, it provided otherwise."

Affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

HAMMITT v. STRALEY.

1. ARREST—PROBABLE CAUSE.
   Whether an officer has reasonable cause to believe person arrested committed a felony must depend upon the situation in the particular case.

2. FALSE IMPRISONMENT—DAMAGES—PEACE OFFICERS.
   Doubts should be resolved in favor of an honest discharge of duty by peace officers, if possible, and courts should not place such officers in fear of responding in damages for the lawful and proper discharge of that duty.

3. ARREST—WITHOUT WARRANT—PROBABLE CAUSE.
   Probable cause for an arrest for a felony without a warrant is a reasonable ground of suspicion supported by circumstances

---

REFERENCES FOR POINTS IN HEADNOTES

[1–6] 4 Am Jur, Arrest §§ 48, 50.
[5] 4 Am Jur, Arrest § 25.

sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

4. SAME—WITHOUT WARRANT—PROBABLE CAUSE.

Probable cause for an arrest for a felony without a warrant does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth of the accusation.

5. SAME—WITHOUT WARRANT—PROBABLE CAUSE.

A peace officer may arrest without warrant any person whom he suspects, on reasonable grounds, of having committed a felony.

6. SAME—WITHOUT WARRANT—PROBABLE CAUSE.

The facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest.

7. SAME—WITHOUT WARRANT —PROBABLE CAUSE—QUESTION OF FACT.

It is for the jury to determine which way the evidence preponderates or what inferences should be drawn therefrom where the evidence, as to whether or not a peace officer had probable cause to believe that person arrested for a felony without a warrant, was conflicting and such that reasonable minds might differ as to the inference to be drawn; but where the facts are conceded or the evidence uncontradicted and susceptible of but 1 reasonable inference, issues as to probable cause are for the court.

8. FALSE IMPRISONMENT—PROBABLE CAUSE—DIRECTED VERDICT.

The trial court properly granted motion for directed verdict by defendant chief of police in action against him for illegal arrest and detention, where evidence was undisputed that complaint had been made by woman who claimed plaintiff had tried to run her down with an automobile in a threatening manner in such a way as to constitute a felonious assault or assault with intent to do great bodily harm, defendant's investigation showed plaintiff had a previous record of criminal conduct and arrest was made without a warrant, since defendant reasonably had probable cause to believe a felony had been committed.

9. JUDGMENT—RES JUDICATA—HABEAS CORPUS—FALSE IMPRISONMENT—DETERMINATION OF ISSUE OF PROBABLE CAUSE.

Release of plaintiff from custody by habeas corpus proceeding less than 14 hours after his arrest by defendant chief of police did not bar defense that he had reasonable cause to believe

that a felony had been committed and that plaintiff had committed it, in action for illegal arrest and detention, where it appears defendant was not permitted to have the matter of probable cause passed upon in the habeas corpus proceeding although it was a question which could have been raised and passed upon.

10. SAME—RES JUDICATA.

A judgment, to constitute a bar to a claim in a subsequent action, must be rendered upon the merits, upon the same matter in issue, and between the same parties or their privies.

Appeal from Oakland; Simpson (John), J., presiding. Submitted October 13, 1953. (Docket No. 77, Calendar No. 45,971.) Decided December 29, 1953.

Case by Gunery R. Hammitt against Herbert W. Straley, Pontiac chief of police, for false imprisonment on arrest without warrant. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

William John Beer and *John B. Osgood,* for plaintiff.

Glenn C. Gillespie and *William A. Ewart,* for defendant.

BOYLES, J. In this case the plaintiff sued to recover damages for illegal arrest and imprisonment. At the close of the proofs, on trial by jury, the court granted a motion of the defendant for a directed verdict of no cause for action. From the judgment entered thereon, the plaintiff appeals. The principal question here is whether the arrest without a warrant was legal.

About 10:30 p.m., August 27, 1952, the defendant, chief of police of the city of Pontiac, arrested the plaintiff, without a warrant, on the oral complaint of one Mrs. Sidwell, and took him to the Oakland county

jail. There the plaintiff was booked on the charge of "investigation to assault with intent to do great bodily harm," and held overnight. The issue here is whether the officer in making the arrest without a warrant had reasonable cause to believe that a felony had been committed and that the plaintiff had committed it.

About 9:45 in said evening of August 27, 1952, the defendant chief of police received a telephone call from one Mrs. Sidwell, at his office in Pontiac, as to which he testified as follows:

"*Q.* * * * Tell the jury what Mrs. Sidwell said to you on the telephone that night.

"*A.* As I said when I finally succeeded in getting her collected in her mind, the first thing I can remember her telling me over the phone was that there was a man coming to the house to kill her and I said 'What man?' and she said 'A man I ride to work with.' I said, 'Who is this talking?' and she said, 'This is your neighbor.' As I said up to that day I was not acquainted with any of my neighbors. I said, 'What is your name?' and she said 'Mrs. Sidwell, you know, I live just a couple of houses from you' and I had to get her, I had to have her identify the house before I could place her, and I asked her, 'Well, now, you just tell me what the trouble is.' She said 'A man I ride to and from work with is threatening to come and drag me out of the house by the hair of the head and beat me within an inch of my life.' I said, 'Who is this man?' She said, 'Mr. Hammitt.' I said 'How long have you known him?' 'About a year and a half or so' and I said, 'Is he there now?' She said, 'No, he is not here now, but he just got through calling me up' and she said 'I am just scared to death.' I said 'You'd better lock the doors.' She said, 'I've got my doors locked.' I said, 'I will try to send an officer to your house.' I said, 'Just a minute, describe him to me.' She said, 'I don't know anything about him, I just ride back and forth to

work with him.' I said 'What caused him to make such a threat.' She said 'It all started about a week ago when he tried to run me down with his car.' I said, 'Why did he try to do that?' She said, 'Because I refused to ride with him any more.' I said, 'Why?' and she said 'Because he started making advances towards me and abusing me with his conversation and I just couldn't stand it any more. I wouldn't let my husband talk to me that way and I certainly won't let him.' I said, 'How long has this gone on?' She said, 'Just since I stopped riding with him. I just don't want to have anything to do with him. I've tried to avoid him. I meet him on the street and he hollers or orders me to get in the car, or he is going to get me.' 'What specific instance, what specific times has he done this?' and she said 'Just last week when he tried to run me down with a car.' I had her describe that to me as best she could and her voice sort of faded away. I said, 'Hello, are you still there?' Then she was just whispering. I said, 'What is the matter, can't you talk?' She gave me to understand she couldn't very well. I said, 'Are you so frightened you can't talk?' She said, 'Yes.' I couldn't understand her conversation, her voice at that time was just so distant that I told her, I said, 'All right, I'll try to have an officer out to the house as soon as possible. You keep your doors locked and if there is anything we can do we certainly will,' having obtained a description of the man from her.

"*Q.* Just a second, please, sir. Is that the conversation which you had on the telephone?

"*A.* Partially.

"*Q.* Well, is that all of it?

"*A.* Not quite all.

"*Q.* Then will you tell us the rest of it?

"*A.* I obtained a description of the man from her, what kind of a car he was driving and I tried to learn the license number of the car from her, and she didn't remember the number. She said it was a green '50 Buick sedan. * * * I learned his address, she said

it was Fairgrove, she didn't know the number, so that is about the substance of the initial conversation.

"*Q.* You made a memorandum of it, I think you say that is annexed there?

"*A.* Yes, that plus the personal conversation I had with her some 15 or 20 minutes later. * * *

"*A.* * * * After the telephone conversation was concluded, I contacted the sergeant on duty, asked what detectives were working that evening, he told me Detective DePau, I found Detective DePau in the detective office and asked where his partner was, he said he was working alone. I told him about the complaint I received from Mrs. Sidwell, a hysterical woman in fear of her life. I said 'She has made a complaint now, but,' I said, 'I couldn't get it as clear as we should get it over the phone.' So, I said, 'You are going to have to go out to the house and talk to her,' and I said, 'Do you know anything about this man?' He said, 'No, I don't.' I said, 'All right, let's check the identification bureau to see if there is a record against him there.' We did check the identification bureau, found the record.* After finding the record I said, 'If you are working alone like this, I can't let you go alone. We don't know what kind of a character he is. I can't let you go alone.' Then we went out to Mrs. Sidwell's house."

The defendant then testified further as to what Mrs. Sidwell told him at her home. In substance, he said it was the same as she had told him over the telephone, amplified as to what she had told him had occurred when Hammitt tried to run over her with his car. She said that she had waited 15 or 20 minutes past her quitting time from work and had left by a rear entrance,

* At the trial plaintiff admitted to 13 arrests in Pontiac, for larceny, disorderly conduct, drunk and disorderly, assault and battery, driving an automobile under the influence of liquor, felonious assault, nonpayment of alimony, et cetera.

"so that he would not be around, but as she was walking on the sidewalk she was nearly run over by Hammitt. She stated Hammitt must have waited for her to come out of the building, he drove his car along the roadway as she was walking along the sidewalk, he called her, to her, and when she didn't look up or answer him, he cursed her and called her vile names and then threatened to get her. She became very frightened and hurried her walk and suddenly heard the motor of the Hammitt car speed up and race, and the sound coming close to her. She glanced up and saw Hammitt's car come over the roadway directly where she was walking, he jumped out of his car and was walking up towards her, calling her vile names and threatening to kill her if she didn't get in the car with him. Mrs. Sidwell states(d) she ran across the curbway and roadway, stumbling over piles of dirt in the roadway, fearing he would catch up with her, she continued running across the fields. She fell down and injured her knee, but thinking Hammitt might still chase her, she continued running on, narrowly escaping being struck. She ran between the houses and to her house on Liberty street. * * * That is the sum and substance of the conversation that took place in the home and on the telephone."

The defendant's testimony was undisputed, and was corroborated by the testimony of Mrs. Sidwell. Under the circumstances, did the officer have reasonable cause to believe that a felony had been committed and that Hammitt had committed it? If so, the arrest without a warrant was legal. CL 1948, § 764.15(d) (Stat Ann § 28.874[d]).

"Whether an officer has reasonable cause to believe the person arrested committed a felony must depend upon the situation in the particular case." *People* v. *Orlando,* 305 Mich 686, 689.

"If possible, any doubt should be resolved in favor of an honest discharge of duty by peace officers, and

the courts should not place them in fear of responding in damages for the lawful and proper discharge of that duty." *Odinetz* v. *Budds,* 315 Mich 512, 518.

" 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth of the accusation.'

"While stated by courts and textbook writers in different language, the test, as was said in *People* v. *Wilson,* 55 Mich 506, seems to be: Were there 'any facts which would induce any fair-minded man of average intelligence and judgment to believe' that defendant had committed a felony? Tiffany on Criminal Law (How 4th ed), p 92, thus puts it:

" 'Any constable or sheriff may arrest any person whom he suspects, on reasonable grounds, of having committed a felony.' * * *

"While the rights of individuals to be protected from unwarranted arrests must be carefully guarded, the rights of the public must also be considered. Robberies and holdups are now so frequent, and the opportunity to get away quickly so covenient, that unless officers may act promptly on information apparently reliable and circumstances reasonably convincing, there is but little hope of apprehending the guilty parties. If the officer must delay to ascertain that the information received comes from a responsible person, in many cases the opportunity to arrest will have passed. That officers do make arrests on such information, and that they are complimented on their promptness in doing so, is a matter of common knowledge." *People* v. *Ward,* 226 Mich 45.

In *United States* v. *Horton,* 86 F Supp 92, in a case from the United States district court for the

western district of Michigan, southern division, Judge Starr, in an exhaustive opinion, discussed at length the facts in a case where the defendants were charged with unlawfully transporting narcotics into Michigan, reviewed the laws of this State applicable to an arrest for a felony without a warrant, and said (96, 97):

"The court will consider first the legality of the arrest without warrant of defendant Horton. In the absence of an applicable Federal statute, the validity of an arrest without warrant is determined by the law of the State where the arrest takes place. * * *

"In *People* v. *Licavoli,* 245 Mich 202, the Court said: 'The rule is pretty well settled that if an officer believes, and has good reason to believe, that one has committed a felony, or is committing a felony in his presence, he has probable cause, as the term is used, and may arrest without a warrant.' See, also, *People* v. *Orlando,* 305 Mich 686. * * *

"'"Probable cause" has been defined by this court as "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."' *Stacey* v. *Emery,* 97 US 642, 645 (24 L ed 1035).

"'"In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched, and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."' * * *

" 'The facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest.' * * *

"Therefore, the legality of the arrest of defendant Horton depends upon whether or not the facts in the possession of the arresting officers at the time of his arrest were sufficient to warrant a man of reasonable prudence and caution in the belief that defendant Horton had committed a felony."

In *Leisure* v. *Hicks,* 336 Mich 148, decided March 10, 1953, this Court said (152–155):

"It is the position of the defendant and appellant that, there being no real dispute as to the facts, it was error to submit to the jury the question of whether defendant had probable cause to believe that plaintiff had committed a felony. He contends that the issue should have been determined by the court as a matter of law.

"This problem has been before this Court frequently as evidenced by the long list of precedents referred to in both the appellant's and appellee's briefs, and in some instances we have said that where the facts are undisputed, the question of probable cause is one of law, for the court. *Schneider* v. *Shepherd,* 192 Mich 82 (LRA 1916F, 399). * * *

"While fundamental rules of constitutional immunity cannot be relaxed and private liberty must at all times be protected (*Malcolmson* v. *Scott,* 56 Mich 459), nevertheless the orderly and efficient enforcement of the law in the protection of our society requires the prompt arrest and detention of those persons honestly and reasonably believed to be guilty of crime. Delay in arrest may endanger the public by permitting a felon to remain at large. It may also permit his escape. No exact and safe yardstick can be established. Facts which might constitute probable cause justifying an arrest in one situation might not justify an arrest in the opinion of a reasonably prudent person under other circumstances, and we therefore feel that the better interpretation of

the rule applicable in these cases, and one which we believe to be consistent with precedents of this Court, appears in 10 Callaghan's Michigan Pleading and Practice, § 73.15, wherein it is said:

" 'As to all points respecting which the evidence is conflicting or reasonable minds might differ as to the inference to be drawn, it is for the jury to determine which way the evidence preponderates or what inferences should be drawn therefrom. * * * The facts being conceded or the evidence being uncontradicted and susceptible of only 1 reasonable inference, issues as to probable cause are for the court.' * * *

"These undisputed facts are susceptible to only 1 reasonable inference; namely, that the defendant acted as a reasonably prudent person in believing that the plaintiff was guilty of the commission of a felony and that under the circumstances the arrest was justified. It was therefore the responsibility of the trial judge to instruct the jury that the arrest was legal."

See, also, *Oxford* v. *Berry,* 204 Mich 197; *People* v. *Guertins,* 224 Mich 8; *State, ex rel. Wayne Prosecuting Attorney,* v. *Martin,* 314 Mich 317; *People* v. *Bommarito,* 309 Mich 139; *People* v. *Licavoli,* 245 Mich 202; *People* v. *Ormsby,* 310 Mich 291.

In the instant case, the facts and circumstances as to the information received by Straley preceding the arrest are undisputed. The trial court, in directing the jury to return a verdict of no cause for action, said:

"Jurors, in your absence, a motion has been made on behalf of the defendant for a directed verdict of no cause of action. They claim that in this case the defendant, Mr. Straley, was justified in making the arrest, that he had reasonable grounds to believe that a felony had been committed, that is, a felonious assault, or assault with intent to do great bodily harm, which under the laws of the State of Michigan,

is a felony, and they claim that under all of the testimony in this case, taken in the light most favorable to the plaintiff, that there is no testimony which the court should allow the case to go to the jury on.

"They claim that on this night in question Mr. Straley had this telephone conversation with this lady, that he investigated the plaintiff's record, and he then went to the home of Mrs. Sidwell, there he talked with her, found out what had occurred, and that this plaintiff had tried to run her down a few days ago with an automobile, in a threatening manner, and had she not run to get away from him, she might have been seriously injured or probably killed, so they claim that that constitutes a felonious assault, or assault with intent to do great bodily harm, a felony under the statutes of the State of Michigan. That, therefore, the chief of police was, had probable cause to arrest the plaintiff in this cause.

"In view of the testimony the court will sustain their holding and beliefs that Mr. Straley had probable cause to arrest Mr. Hammitt at that time. * * * Therefore, under all the circumstances the court will grant the motion of no cause of action."

The trial court properly applied the law to the undisputed facts in the instant case, and did not err in directing a verdict for the defendant.

Plaintiff also claims for reversal that an order made by the circuit court in a habeas corpus proceeding on August 28th, the day following his arrest, releasing him from custody, is *res judicata,* holding that the arrest was illegal.

Plaintiff was arrested by the defendant about 10:30 p.m. on the night of August 27th and taken to the county jail. At about 5 minutes before 12 o'clock, noon, on the next day, August 28th, defendant Straley was served with a writ of habeas corpus issued out of the circuit court for Oakland county, directing him to have Gunery Hammitt in that court at 12 o'clock. Defendant went at once to the court where

he saw Hammitt, who had been brought to court by someone from the county jail. The judge at once began to hear counsel for Hammitt, and to take the testimony of Hammitt, sworn as a witness. His testimony was brief, mostly to the point that he had been arrested without a warrant. Chief Straley was not afforded any time or any opportunity to file an answer or return to the writ, and none was filed.[1] The statute provides that the officer shall file a return, state the cause of the restraint, and that a hearing be held as to the legality of the arrest and detention.[2] Straley was not given an opportunity to testify as to the circumstances, to show that the arrest without a warrant was legal. No hearing was held on the crucial question whether the officer had reasonable cause to believe that a felony had been committed and that Hammitt had committed it, whereby the arrest without a warrant would be legal.[3] Although the time during which Hammitt might be legally detained had not expired (CL 1948, § 637.28 [Stat Ann § 27.2271] [See, also, CL 1948, § 764.13 (Stat Ann § 28.872); *Mooradian* v. *Davis,* 302 Mich 484]), the judge, after 10 or 15 minutes, announced that the prisoner was discharged and left the courtroom. Thereupon Hammitt also left, with his counsel. Straley's request to the prosecuting attorney, who appeared in behalf of the people, that he would "like to have an opportunity to tell the court my side of this, why I arrested the man" was met with the answer "No, never mind," and that the court had decided the matter.

While the question here could have been raised and passed upon in the habeas corpus proceeding, Straley was not afforded an opportunity to raise it. There was no hearing intended by the statute, to as-

1 See CL 1948, § 637.18 *et seq.* (Stat Ann § 27.2261 *et seq.*).
2 CL 1948, § 637.26 (Stat Ann § 27.2269).
3 CL 1948 § 764.15(d) (Stat Ann § 28.874[d]).

certain whether the arrest without a warrant was justified by the information which had been received by the officer before the arrest. Under the circumstances, the release of Hammitt was not a bar to Straley's defense in the instant case, that in making the arrest he had reasonable cause to believe that a felony had been committed, and that Hammitt had committed it.

"We are not in accord with the claim of defendants that since the judgment of the circuit court at law was legal and valid, a court of chancery was without jurisdiction to dispose of the issues involved.

"In *Tucker* v. *Rohrback,* 13 Mich 73, we said:

" 'That a judgment, to constitute a bar to a claim in a subsequent action, must be rendered upon the merits, upon the same matter in issue, and between the same parties or their privies, is unquestionable.'

"See, also, *Reid* v. *Gooden,* 282 Mich 495; *Le Roy* v. *Collins,* 165 Mich 380; *MacKenzie* v. *Union Guardian Trust Co.,* 262 Mich 563." *Zak* v. *Gray,* 324 Mich 522, 525.

Affirmed.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

SCHELBE *v.* BUCKENHIZER.

1. APPEAL AND ERROR—DENIAL OF REHEARING—DISMISSAL OF APPEAL.
   The Supreme Court hears appeal as from the original decree, where defendants appealed from denial of a defendant's motion for rehearing and plaintiff sought dismissal of the appeal because not taken from the decree itself.

2. DEEDS—MENTAL COMPETENCY—EVIDENCE.
   Decedent *held*, not to have been mentally incompetent to execute deed of property shortly after she married one of the defendants under evidence showing she was married to a first husband for about 34 years, was a widow for 6 years and then married to such defendant for 6 years without anyone having filed a complaint or petition to have a guardian appointed for her to free her from marriage ties or to conserve her property.

3. SAME—FRAUD—HUSBAND AND WIFE—EVIDENCE.
   Deeds whereby title which plaintiff's decedent transferred to property which had theretofore stood in her own name so as to become vested in herself and one of the defendants, her second husband, as tenants by the entireties, for which he paid nothing and then transferred by him after her death without payment of anything to other defendants, his son, daughter-in-law and granddaughter are ordered set aside on the ground of fraud, where it appears that shortly before marriage to decedent, defendant had stripped himself of title to all of his realty, exercised a domination over decedent in property matters and abused trust reposed in him by her.

REFERENCES FOR POINTS IN HEADNOTES

[3] 16 Am Jur, Deeds § 30 *et seq.*
[4] 35 Am Jur, Marriage § 86 *et seq.*; § 107 *et seq.*
[4] Competent party's right to annulment of marriage because of incompetency of other party. 51 ALR 852.
Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage. 14 ALR 121; 75 ALR 663.
[5] 3 Am Jur, Appeal and Error § 896 *et seq.*

4. MARRIAGE—ANNULMENT—FRAUD—EVIDENCE.

A marriage may be annulled on the ground of insanity or idiocy of a party thereto by bill authorized by statute but the statutes do not authorize annulment of a marriage for fraud, merely because it is shown that husband appears to have represented himself as being wealthier than he was and conveyed his realty to his children by a former marriage before subsequent marriage to plaintiff's decedent (CL 1948, §§ 552.35, 552.37).

5. SAME—ANNULMENT—DEATH—EVIDENCE.

Annulment of marriage between a defendant and his deceased wife, as decreed by trial court after her death is set aside, where no ground for annulment has been established by the evidence.

6. ACCOUNTING—SCOPE—FRAUD.

An accounting, limited to receipts from property transferred by plaintiff's decedent to herself and defendant husband as tenants by the entireties by reason of his fraud, since her death and covering no other phase is ordered, where during the 6 years of her marriage the avails of such property appear to have been used largely in the reduction of an outstanding mortgage and use of other income of decedent seems to have been acquiesced in by her.

7. COSTS—FAILURE OF EITHER PARTY TO PREVAIL IN FULL.

No costs are awarded either party where neither has prevailed in full on appeal.

Appeal from Wayne; Murphy (George B.), J. Submitted October 7, 1953. (Docket No. 19, Calendar No. 45,853.) Decided December 29, 1953. Rehearing denied February 18, 1954.

Bill by Viola Schelbe, administratrix of the estate of Margaret Draper Buckenhizer, against Frederick William Buckenhizer, Herbert B. Buckenhizer, Florence Buckenhizer, and Beverly Burton, to annul marriage, cancel certain deeds, and for an accounting. Decree for plaintiff. Defendant appeals. Reversed in part, and decree ordered entered in Supreme Court.

Edward N. Barnard, for plaintiff.

Norman H. Magel, for defendants.

REID, J. Plaintiff, as special administratrix of the estate of Margaret Draper Buckenhizer, deceased, (later substituted as general administratrix), filed (with leave of probate court) a bill of complaint against Frederick William Buckenhizer, the husband of deceased, praying that the marriage between defendant and said deceased be set aside and annulled because of fraud committed upon the deceased by defendant in procuring the marriage; also praying that certain deeds transforming the title of deceased to certain real estate owned by her into a tenancy by the entireties between defendant and deceased, with full rights to survivor, be set aside for fraud committed on deceased by defendant; and also praying for an accounting and for an injunction.

After the death of decedent, March 4, 1951, and the next day after her burial, defendant husband without consideration deeded as survivor a one-half interest in the lands in question to Herbert Buckenhizer (defendant's only living son) and Florence Buckenhizer, his wife, and the other half interest to Beverly Burton (defendant's granddaughter) as tenants in common. The latter 3 persons, Herbert and Florence Buckenhizer and Beverly Burton, were later added as defendants. The trial court found for plaintiff and entered a decree accordingly.

Defendants appealed from an order denying defendants' motion for a rehearing but did not directly appeal from the decree theretofore rendered. Plaintiff requests dismissal of the appeal for that reason. We do not dismiss the appeal on such ground and hear the appeal the same as though appeal had been taken from the original decree, a rehearing of which was denied by the trial court.

One phase of the dispute hinges upon the mental capacity of the deceased. Plaintiff claims that the decedent Margaret was during all her lifetime so far below par mentally that she was incapable of un-

derstandingly entering upon a marriage and was incapable of making a valid contract. Some witnesses testified to having observed her and having observed a want of mental concentration and apparent lack of understanding of conversation. Several witnesses on the other hand testified to her having a normal mind, including witnesses who had dealt with her and had met her frequently over a period of many years.

Deceased Margaret married John W. Draper when she was 21 years of age in 1904, and lived with him as his wife until his death on January 2, 1938. They lived at 1921 Campbell on the northwest corner of West Vernor highway and Campbell. The property consisted of a 4-family flat, a hardware store with a flat above and a home with flat above. Mr. Draper was in the hardware business and the property above described, hereinafter spoken of as the Draper property, seems to have been acquired and paid for by him largely or entirely out of the profits of the business conducted by him. A mortgage against the Draper property obtained in 1935 from the H O L C for $8,809.56 had been reduced to approximately $8,000 at the time of his death. By August 17, 1950, the mortgage had been reduced to $3,146.07. No earnings of defendant Frederick William Buckenhizer went into the reduction of the mortgage. The marriage between decedent and Mr. Draper appears to have been a happy marriage and it continued over a period of 34 years with no suggestion on the part of any of her relatives or anybody that might be concerned, that decedent was incompetent to enter into that marriage. During Mr. Draper's lifetime she often waited on the trade in the hardware store. During Mr. Draper's lifetime and afterwards for the 6 years that she remained his widow and as well, during her marriage with defendant Frederick, she seems to have kept boarders and received a consid-

erable revenue from the boarders. She collected rent from tenants, supervised the redecoration of her home, and managed the Draper property after Draper's death.

During the 47 years since her first marriage and until her death, the record fails to show that any complaint was made or petition to any court that decedent needed a guardian to free her from improper marriage ties or conserve her interest in the Draper property.

During Mr. Draper's lifetime, the title to the Draper property was placed in the name of Mr. Draper and decedent Margaret, his wife, by the entireties. There is nothing in this record to show that Mr. Draper considered that in case his wife survived him, it would be necessary that her title to the property be safeguarded by a guardian or trusteeship. The Draper property which became Margaret's upon the death of Mr. Draper, was in the later years of the value of $50,000, and during the period of over 6 years of her widowhood, it would seem that her brothers and sisters, if they felt any uncertainty about her ability to conserve her own property, would have petitioned during that period for a guardian. It seems incredible that they really considered that she ever needed a guardian. There were cash payments made on account of rent and outlays of money required for taxes and improvements to the Draper property. None of her brothers and sisters had any very close contact with these matters, helping her out only upon comparatively rare occasions. The actions and the nonaction of her brothers and sisters during all of her lifetime speak louder than, and contradict, the testimony of their friends who testified she was wanting in mental capacity.

Upon the death of his first wife, defendant Frederick William Buckenhizer gave a deed of the premises in which he and his first wife had lived as their

homestead, to his son Herbert, January 25, 1936, reserving to himself a life estate, and at the same time entered into an agreement by which Herbert was to furnish defendant Frederick William with a home, the use of a certain room in the house that had been conveyed and to take care of his funeral expenses when he died. He also gave 70 feet of a vacant lot to Herbert and the other 70 feet to his only granddaughter, Beverly Buckenhizer, now Burton, with similar reservation of life estate.

In the summer of 1944, defendant Frederick William then being retired from his railroad service, met deceased Margaret, and on September 14, 1944, they were engaged to be married. The next day defendant Frederick obtained a license to marry her, he being then 77 years of age and deceased Margaret 62 years of age. Deceased Margaret had been subject to diabetes for some time preceding this, but it seems not to have been in an acute stage. Deceased Margaret at the time of their engagement was the owner of the Draper property, the flat occupied by 4 tenants paying a total of $120 per month and the store and flat above rented for about $70 per month, and the property was worth somewhere between $30,000 and $50,000. Defendant Frederick William had a retirement allowance of $91 a month, which later became $96 a month, and he had some cash in the bank of $1,500 or less, besides life use of the house he then lived in and his son's agreement for life support.

On September 19, 1944, four days after taking out the license to marry deceased Margaret, the defendant Frederick William cancelled the agreement for his life support, and conveyed to his son Herbert and Herbert's wife, Florence, his life estate in the property on Military avenue in which he had lived with his former wife and in which he was then living, and he likewise cancelled his life estate in the 2 va-

cant lots heretofore spoken of by deeds, 1 to his son and his wife and 1 to the granddaughter. Decedent Margaret at the time of her second marriage was laboring under a false impression evidently received by her from defendant Frederick William Buckenhizer that he was a wealthy man worth about $50,000, that he had a house to live in and that he had a retirement pension fund with sufficient railroad passes to enable him to travel practically at will, taking her along.

Defendant Frederick William and deceased Margaret were married, October 14, 1944. On November 10, 1944, defendant Frederick William took his wife, deceased Margaret, to the law office of an attorney, nephew of defendant Frederick William, and in that office was drawn up a conveyance of the Draper property heretofore spoken of to a third party called a "dummy," who in turn reconveyed the property to defendant Frederick William and deceased Margaret as husband and wife, resulting that the title thereto stood in the name of the 2 by the entireties. Nothing was paid by defendant Frederick William to Margaret but he did on or about November 10, 1944, make his bank account of approximately a thousand dollars payable to himself and defendant Margaret or the survivor, with full rights to the survivor.

Apparently Frederick William abused the trust reposed in him by deceased Margaret and wrongfully exercised a domination over her as to property matters. We conclude that under all the circumstances it is fairly established that defendant Frederick William committed a fraud upon decedent Margaret in procuring the transfer of the title to the Draper property so that it became a title by the entireties of the 2, defendant Frederick William and deceased Margaret. The next day after deceased Margaret's funeral, defendant Frederick William conveyed the Draper property by deeds, so that he

no longer was an owner of it but that the title stood one half in the name of his son and wife and the other half in the name of his granddaughter Beverly, none of whom paid him anything for it.

The deeds transferring the title to the Draper property from decedent Margaret to cause that it stand in the name of decedent Margaret and Frederick William Buckenhizer, defendant, by the entireties, should be set aside, and as well, the deeds from Frederick William of the same property, to his son, his daughter-in-law and to his granddaughter, should also be set aside.

The statutes of the State of Michigan provide that a bill to annul a marriage on the ground of insanity or idiocy, may be exhibited by any person admitted by the court to prosecute as the next friend of such idiot or lunatic. CL 1948, § 552.35 (Stat Ann § 25.111).

Further, CL 1948, § 552.37 (Stat Ann § 25.113) reads:

"No marriage shall be annulled on the ground of force or fraud, if it shall appear that, at any time before the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife."

See, also, CL 1948, §§ 552.3, 552.4 and 552.5 (Stat Ann §§ 25.83, 25.84 and 25.85).

No statute of Michigan has been cited in this case which would authorize an annulment of a marriage for fraud under the circumstances of this case.

It is true that in *Mogk* v. *Stroecker,* 243 Mich 668, we considered the case on the merits and did not merely dismiss the case for want of jurisdiction, but in that case it was claimed that one spouse was married to and undivorced from another party. If that claim had been proven, the marriage attacked would

have been totally void *ab initio* even if both parties had wished it upheld.

The testimony in this case does not establish any grounds for the annulment of the marriage between deceased Margaret and defendant Frederick William Buckenhizer. That portion of the final decree which undertook to annul the marriage is reversed.

Defendant Frederick William evidently used his "pension" or retirement allowance during the marriage between himself and decedent Margaret toward the upkeep of the family. The income of the Draper property during that period seems to have gone into the reduction of the mortgage against the Draper property, at least very largely, if not entirely. Decedent Margaret seems to have acquiesced in the disposition of the avails and net income of the Draper property and of her income derived from keeping boarders during her lifetime.

An accounting should be had between the defendants and plaintiff as to the receipts from the Draper property since the death of decedent Margaret and covering no other phase. A decree will be entered in this cause in accordance with this opinion. The decree appealed from is reversed. No costs shall be awarded, neither party having prevailed in full.

DETHMERS, C. J., and ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* STATE BANKING COMMISSIONER, *v.* NATIONAL BANK OF DETROIT.

1. CONSTITUTIONAL LAW—STATE STATUTES—NONACTION BY CONGRESS.
   A federally-created agency is subject to State law and enforcement thereof in State courts when there is no Federal law governing the subject and the State act, undertaking to do so, in nowise conflicts with paramount Federal law or with the purposes for which the federally-created agency was established.

2. SAME—STATE STATUTES—PERMISSION BY CONGRESS.
   A federally-created agency is subject to State law when congress has expressly delegated to the States power to legislate in the field and the States have done so, since then the States are not enforcing Federal, but State, laws and there is impliedly conferred upon State courts the power to enforce it.

3. BANKS AND BANKING—BRANCH BANKS—FEDERAL STATUTES.
   The national bank act, in providing for and governing the establishment of branches by national banks and fixing the standard, by which it must be determined as whether State law permits it to be done by State banks, sets up a standard for the violation of which would be a Federal offense (12 USCA, § 36; CL 1948, § 487.34).

4. SAME—NATIONAL BRANCH BANKS—JURISDICTION OF STATE COURTS.
   The State Supreme Court is without jurisdiction to enforce a Federal law against a federally-created corporation even though the Federal law employs State law as a measuring stick for its application; hence, such court may not prevent a national bank from establishing a branch in a city in which a State bank is already in operation although such action by a State bank is barred by State statute (12 USCA, § 36; CL 1948, § 487.34).

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 11 Am Jur, Constitutional Law § 174 *et seq.*
[3, 4] 7 Am Jur, Banks § 24.
[3, 4] Branch banks. 30 ALR 927; 50 ALR 1340; 136 ALR 471.

Frank G. Millard, Attorney General, on the relation of Maurice C. Eveland, Commissioner of the Banking Department, and on the relation of the Bank of Livonia, a Michigan banking corporation, filed an information in the nature of quo warranto to determine under what authority the National Bank of Detroit operates a branch in the City of Livonia. Submitted October 16, 1953. (Docket No. 64, Calendar No. 45,913.) Information and relations dismissed December 29, 1953.

Frank G. Millard, Attorney General, and *Edmund E. Shepherd,* Solicitor General, for relator Commissioner.

Bratton, Bratton & Brooke and *Marx, Levi, Thill & Wiseman,* for relator Bank of Livonia.

Dickinson, Wright, Davis, McKean & Cudlip (*Robert E. McKean* and *Max L. Veech,* of counsel), for defendant.

DETHMERS, C. J. This is quo warranto brought here to challenge the right of defendant National Bank of Detroit to establish and operate a branch at 27637 Grand River avenue in the city of Livonia. The case is submitted on pleadings and stipulation of facts going to the merits and defendant's motion to dismiss for lack of jurisdiction.

Plaintiffs allege that relator Bank of Livonia, a State bank, was in operation in Livonia when defendant established the branch in question there. They contend that, accordingly, defendant was precluded therefrom by the following statutory provisions:

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following: * * *

"(c) A national banking association may, with the approval of the comptroller of the currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks.*" 12 USCA, § 36.

"Any bank having a capital of at least $50,000.00 may, with the written approval of the commission, establish and operate a branch or branches within a village or city other than that in which it was originally chartered: Provided, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: *Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation.*" CL 1948, § 487.34 (Stat Ann 1951 Cum Supp § 23.762.)

Touching this Court's jurisdiction, defendant cites *First National Bank in St. Louis* v. *Missouri,* 263 US 640 (44 S Ct 213, 68 L ed 486); *Territory* v. *Lockwood,* 3 Wall (70 US) 236 (18 L ed 47); *Ex Parte Shockley,* 17 F2d 133; and *People, ex rel. Trombley,* v. *Auditor General,* 23 Mich 471 (9 Am Rep 94), for the proposition that State courts have no authority or jurisdiction, by quo warranto or otherwise, to call a Federal corporation or officer to account for acts

alleged to be in excess of powers granted by, or for alleged violations of, Federal law. Conceding the validity of that proposition, plaintiffs urge its inapplicability on the ground that presented here is a question of violation of State rather than Federal law, citing as authority for that contention and for the right of enforcement and vindication of State law by State courts against agencies constitutionally created by Federal law. *Attorney General* v. *First National Bank of Bay City,* 192 Mich 640, reviewed in *First National Bank of Bay City* v. *Attorney General,* 244 US 416 (37 S Ct 734, 61 L ed 1233); *First National Bank in St. Louis* v. *Missouri, supra; Ex parte Worcester County National Bank,* 279 US 347 (49 S Ct 368, 73 L ed 733, 61 ALR 987); and *Anderson National Bank* v. *Luckett,* 321 US 233 (64 S Ct 599, 88 L ed 692, 151 ALR 824).

First National Bank of Bay City involved, as stated in the report of that case, "the validity of provisions in the Federal reserve bank act authorizing national banks to act as trustees, et cetera, when allowed by the reserve board and *not in contravention of State law;* also the jurisdiction of the State court to determine the authority of such banks in proceedings akin to quo warranto." *Worcester County National Bank* involved a like situation and statutory provision. It was held in *Worcester* that the act of congress limiting national banks in certain respects to acts "not in contravention of State law" enjoins upon the federally created corporation "complete conformity with the State law" (syllabus) and in *Bay City* that in so doing "Congress impliedly, if not expressly, authorized the institution and conduct in the State Supreme Court of proceedings in the nature of quo warranto to test whether the exercise of such function by a national bank is consistent with State law." (Syllabus.) *First National Bank in St. Louis* was decided at a time (1923) when Federal law

made no provision for establishment of branches by national banks. The supreme court of the United States held that enforcement of the State act, theretofore construed by the State supreme court to prohibit national as well as State banks from establishing branches, constituted a valid exercise of State power and that national banks were subject thereto because it did not (656) "interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies or conflict with the paramount law of the United States"; and, further, that (660) "since the sanction behind it (the State act) is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." *Anderson National Bank,* in which jurisdiction of the State court was not questioned, was of the same import as *St. Louis* to the effect that a State could make applicable to national banks a law providing for the administration of abandoned bank deposits so long as that was not in conflict with any Federal law.

To summarize the holdings of the above cases, it appears that when, as in *St. Louis* and in *Anderson,* there is no Federal law governing the subject and the State act undertaking to do so in no wise conflicts with paramount Federal law or with the purposes for which the federally created agency was established, the latter is subject to the State law and enforcement thereof in the State courts; and that when, as in *Bay City* and in *Worcester,* congress has expressly delegated to the States the power to legislate in the field and the States have done so, then, as said in *St. Louis,* the State courts may enforce the applicable law because in so doing they are not enforcing Federal but State law and, as said in *Bay City,* in leaving the matter to be governed by State law congress has impliedly conferred upon State courts the power to enforce it.

Unlike *St. Louis* and *Anderson,* in the instant case there is Federal law governing the subject matter. The national bank act provides for and governs the establishing of branches by national banks. It has left no area to be occupied by a State statute covering that subject. The case at bar is distinguishable from *Bay City* and *Worcester* in which congress delegated to the States the power to legislate on the subject there in question by providing that the federally created corporations might act in certain respects only when "not in contravention of State law." Here congress has not delegated to the States power to enact legislation forbidding or governing the establishment of branches by national banks. Rather the act of congress has fixed and set the standard by which it must be determined whether a national bank may establish a branch, namely, whether State law permits it to be done by State banks. Violation of the standard offends against Federal, not State, law, for how can a national bank be guilty of violating a restriction imposed by State law on State banks. Clearly distinguishable is the situation, as in *Bay City* and *Worcester,* in which the act of congress provides for a course of action by a Federal agency when and if it is not prohibited by State law, for in such case it is the State law, while in the instant case it is the act of congress, which either permits or prohibits the action in question.

Not only does the prohibitory State statute here involved (part of an act providing for the incorporation, operation and regulation of State banks) make no express mention of national banks but, if it were deemed to have been the legislative intent to make its restrictions on branches applicable to national banks, it would in that respect fail for the reason that the act of congress has preempted the field.

May defendant establish and operate the branch? The answer is to be found in Federal law which gov-

erns and employs State law as a measuring stick for its application. The suit being for enforcement of Federal law against a federally-created corporation, this Court is without jurisdiction in the premises.

The information and relations are dismissed, with costs to defendant.

ADAMS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred, with DETHMERS, C. J.

BOYLES, J., concurred in the result.

JANUARY TERM, 1954.

NICHOLS *v.* STATE ADMINISTRATIVE BOARD.

1. BONDS—REVENUE—BRIDGES—HIGHWAY IMPROVEMENTS.

Revenue bonds for construction of bridge do not constitute an indebtedness of the State within meaning of provision of the Constitution limiting State indebtedness for improvement of the highways, where statute providing for their issuance declared they were payable solely from revenues of the State agency constructing and operating the bridge and source of payment was stated on the face of the bonds as well as that they are not general obligations of the State (Const 1908, art 10, § 10; PA 1952, No 214, as amended by PA 1953, No 141).

2. SAME—REVENUE—GENERAL OBLIGATION OF STATE.

Revenue bonds of State agency do not become general obligation bonds of the State on the theory that the principal is liable for the acts of its agent, where the authorizing statute and the bonds both state they were payable solely from revenues and were not general obligations of the State (PA 1952, No 214, as amended by PA 1953, No 141).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 43 Am Jur, Public Securities and Obligations § 285.

[3] Obligation to meet which money is appropriated at the time of its creation as an indebtedness within limitation of indebtedness. 92 ALR 1299, 134 ALR 1399.

[4, 5] 49 Am Jur, States, etc. § 63.

[6] 43 Am Jur, Public Securities and Obligations § 16 *et seq.*

[7] 42 Am Jur, Prohibition § 40.

Taxpayer's right to maintain action to enjoin wrongful expenditure of public funds, as affected by the fact that the funds in question were not raised by taxation. 131 ALR 1230.

[8] 14 Am Jur, Costs § 23.

3. STATES—CONTRACTS—EARMARKED FUNDS—IRREVOCABLE PLEDGE.

The payment of not to exceed $417,000 during any fiscal year from taxes earmarked for highway use and imposed on gasoline and motor fuels and motor vehicles registered in the State for operation, repair and maintenance of bridge which was to become a part of the highway system of the State, the same as ferries operating across the straits have been considered and which have been operated at an average annual loss of over $500,000 during past 5 years, constituted an irrevocable pledge of such earmarked funds but not a general indebtedness of the State subject to the limitation placed upon highway improvement by the Constitution (Const 1908, art 10, §§ 10, 11; PA 1952, No 214, as amended by PA 1953, No 141).

4. SAME—CONTRACTS—DURATION OF CURRENT SESSION OF LEGISLATURE.

A legislature may adopt a policy of contracting in respect to public business for a term longer than the life of the current session of the legislature.

5. SAME—CONTRACTS—STATUTES.

Statutes existing at the time of the issuance of bonds by a State agency and relevant thereto enter into and form a part of the contract as if they were expressly referred to and incorporated in its terms.

6. SAME—CONTRACTS—BRIDGE REVENUE BONDS—PLEDGE OF EARMARKED HIGHWAY FUNDS—STATUTES.

The contract existing between the holders of bridge revenue bonds issued by a State agency, a bridge authority, pursuant to a statute wherein State agreed to pay to the authority from funds earmarked for highway use not to exceed the sum of $417,000 per year for maintenance, operation and repair of the bridge included the statutes authorizing the collection of taxes for such special fund for highway use (PA 1952, No 214, as amended by PA 1953, No 141).

7. PROHIBITION—STATE AGENCY—PLAINTIFF—DAMAGE.

Plaintiff has no standing in court to obtain writ of prohibition and stay of all proceedings to prevent the consummation of the sale and delivery of bridge revenue bonds by a State agency, where he sues as a taxpayer and user of highways but fails to show he will sustain a substantial injury or suffer loss or damage as a taxpayer through increased taxation and the consequences thereof (PA 1952, No 214, as amended by PA 1953, No 141).

8. COSTS—PUBLIC QUESTION—VALIDITY OF REVENUE BOND ISSUE.
No costs are allowed in proceeding to obtain a writ of prohibition involving the validity of revenue bond issue of a State agency, a public question being involved (PA 1952, No 214, as amended by PA 1953, No 141).

Original application by Haskell L. Nichols, as a taxpayer, against members of the State Administrative Board and members of the Mackinac Bridge Authority for writ of prohibition staying all proceedings in connection with bond issue to finance construction of bridge. Submitted December 29, 1953. (Calendar No. 46,051.) Writ denied and case dismissed January 22, 1954.

Haskell L. Nichols, in propria persona, for petitioner.

Frank G. Millard, Attorney General, and *Edmund E. Shepherd,* Solicitor General, for defendant members of State Administrative Board and for defendant members of Mackinac Bridge Authority.

BUTZEL, C. J. Haskell L. Nichols, as petitioner, seeks a writ of prohibition and a stay of all proceedings to prevent the consummation of the sale and delivery of bonds issued by the Mackinac Bridge Authority to pay for the cost of a bridge to span the Straits of Mackinac and connect the highway system of the southern and the northern peninsulas of the State of Michigan. Such cost is to include the bridge approaches, paving, toll house, and all other incidentals. Petitioner attacks the validity of the issuance and sale of revenue bonds amounting to $99,800,000 and consisting of 2 series: series A in the principal sum of $79,800,000, with a priority of lien of payment over series B in the principal amount of $20,000,000. Petitioner claims that under article 10,

§ 10, of the 1908 Constitution of the State of Michigan, the State could not, without a vote by the people, contract a debt in excess of $50,000,000 for improvement of highways and pledge its credit and issue bonds therefor. However, the issuance and sale of the revenue bonds by the Mackinac Bridge Authority and the building of the bridge are provided for by PA 1952, No 214, as amended by PA 1953, No 141 (CL 1948, § 254.311 *et seq.* [Stat Ann 1953 Cum Supp § 9.1361(1) *et seq.*]), which clearly and unequivocally states that the bonds are revenue bonds which, with interest, are to be paid solely from the revenues of the bridge authority, or from refunding bonds, if any are thereafter issued, and that such revenue bonds do not constitute an indebtedness of the State of Michigan. It is again so stated, as required by the act, on the face of the bonds that have been issued and are about to be delivered. The bonds have been sold prior to December 31, 1953. The delivery of the bonds would have been completed and the purchase price would have been paid had this suit not been instituted. It has been definitely settled that revenue bonds issued by a State agency for a public improvement do not constitute an indebtedness of the State within the meaning of the constitutional provision. *Attorney General, ex rel. Eaves,* v. *State Bridge Commission,* 277 Mich 373, and cases therein cited.

Petitioner further claims that inasmuch as the Mackinac Bridge Authority is an entity and State agency the bonds become general obligation bonds, possibly on the theory that the principal is liable for the acts of its agent. Petitioner overlooks the fact that the statute and the bonds issued thereunder distinctly state that these are revenue bonds and not general obligation bonds of the State.

Petitioner further calls attention to the provision in PA 1953, No 141, *supra,* amending PA 1952, No

214, *supra,* providing that if the bonds are sold prior to December 31, 1953, there shall be appropriated out of the funds of the State highway department, derived from taxes imposed on gasoline and motor fuels and motor vehicles registered in the State, a sum in each fiscal year sufficient to pay for the operation, repair and maintenance of the bridge but not in excess of $417,000 during any fiscal year. It is admitted that the bridge will be part of the highway system of the State of Michigan, the same as the ferries now operating across the Straits of Mackinac have been considered. The annual loss from the operation of the ferries across the Straits of Mackinac has averaged over $500,000 a year during the past 5 years, according to the printed reports on file in the office of the auditor general. Act No 141, *supra,* further provides that when the bonds have been paid off, the tolls for the use of the bridge shall continue until the highway department has been repaid all sums that it has expended for the maintenance, operation and repairs of the bridge.

Petitioner claims that the obligation to appropriate an amount not in excess of $417,000 a year is a legislative act and that future legislatures cannot be bound thereby, but he overlooks the fact that in accordance with PA 1953, No 141, the payment of a maximum of $417,000 for a fiscal year is made part of a contract with the bondholders.

In *State Highway Commissioner* v. *Detroit City Controller;* 331 Mich 337, we held valid an irrevocable pledge of earmarked funds of the State highway department to be used to pay the principal and interest on bonds. That case applied the "special fund" doctrine and held that the pledge of such special funds did not constitute indebtedness within the meaning of article 10, §§ 10 and 11, of the 1908 Michigan Constitution. In regard to petitioner's present attack on the validity of the proposed appro-

priation as a contract with the bondholders and subject to the impairment of obligation of contracts, article 1, § 10, of the United States Constitution and article 2, § 9, of the 1908 Constitution of the State of Michigan, our decision in *State Highway Commissioner* v. *Detroit City Controller, supra,* is controlling. We need not repeat at great length what we have so recently stated.

In that case we cited with approval *Gruen* v. *State Tax Commission,* 35 Wash2d 1 (211 P2d 651), wherein it was claimed that an excise tax was not binding on future legislatures because one legislature could not abridge the right of future legislatures to repeal or amend laws. The court, however, noted an exception in the following language (54):

"The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the State and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of article 1, § 10. If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature."

We also stated in *State Highway Commissioner* v. *Detroit City Controller, supra,* at page 352:

"It is not disputed that when the bonds are issued a contract will be made between the bondholders and the issuing authorities, and that the contract will include the provisions of all relevant existing laws.

" 'It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and

incorporated in its terms.' *Von Hoffman* v. *City of Quincy,* 71 US (4 Wall) 535 (18 L ed 403).

"See *Hammond* v. *Place,* 116 Mich 628 (72 Am St Rep 543); *City of Pontiac* v. *Simonton,* 271 Mich 647. Thus the contract will include those acts which authorize the collection of taxes for the State highway fund."

We could further elaborate on the various questions that petitioner has raised. We cannot overlook the fact, however, that he brings this suit solely as a taxpayer and as a user of the State highways and in no other capacity. As such he has no standing in court in his attempt to enjoin the proceedings by the defendants. This Court in a very recent case, *Menendez* v. *City of Detroit,* 337 Mich 476, stated as follows:

"In each of these cases it is clearly recognized that prerequisite to a taxpayer's right to maintain a suit of this character against a unit of government is the threat that he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof. This is uniformly true of all the Michigan cases considering this subject."

This governs the instant case.

The petition for writ of prohibition is denied and the case is dismissed. No costs, a public question being involved.

CARR, BUSHNELL, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

HARTWICK *v.* SANILAC DRAIN COMMISSIONER.

1. STATUTES—CONSTRUCTION—INTENT.

   The provisions of a statute must be construed together and, if possible, harmonized; the basic inquiry being as to the legislative purpose and intent.

2. DRAINS—NEW DRAINS—WIDENED DRAINS—BRIDGES—PASSAGEWAYS—CONSTRUCTION OF STATUTE.

   Statutory requirement that "1 bridge or passageway across" a newly-constructed drain traversing a farm to connect the disconnected portions and provision that when drain is widened, deepened, straightened or relocated there "shall be constructed the necessary bridges or culverts as part of such improvements" are so construed as not having intended to provide a distinction between accommodations afforded, it being reasonably clear that the legislature intended to insure that the property owner be afforded a reasonable and adequate means of proceeding from one portion of his farm across the drain to and upon the other portion (CL 1948, § 272.2).

3. SAME—CROSSINGS—QUESTION OF FACT—DISCRETION OF DRAIN COMMISSIONER.

   The type of construction provided for crossing a public drain, newly-constructed or enlarged, does not rest wholly in the discretion of the drain commissioner under statute imposing upon him the duty to provide the necessary means of crossing such drain, the type of construction called for being an issue of fact (CL 1948, § 272.2).

4. SAME—DISCONNECTED PARTS OF FARM—SUFFICIENCY OF CROSSINGS.

   Passageway consisting of a slab of cement on bottom of drain 70′ in width at top, 40′ in width at bottom and 9′ deep *held*, not to constitute a compliance with provision of drain law that when drain traverses a farm the disconnected portions be connected with the necessary bridges or culverts, where testimony shows that large quantities of sand and silt are washed down the drain and proposed passageway would not be passable at certain seasons of the year (CL 1948, § 272.2).

REFERENCES FOR POINTS IN HEADNOTES

[2–5] Generally as to drains and sewers, see 17 Am Jur, Drains and Sewers.

[6] 34 Am Jur, Mandamus § 40.

[7, 8] 34 Am Jur, Mandamus § 197.

5. SAME—DISCONNECTED PARTS OF FARM—BRIDGES.
Owners of farm traversed by public drain 70′ wide at top, 40′ wide at bottom and at least 9′ deep in places *held,* entitled to such a bridge across the drain as will provide reasonable access from one part of the property to the other (CL 1948, § 272.2).

6. MANDAMUS—WRIT OF GRACE.
Mandamus is a writ of grace and not of right.

7. DRAINS—DISCONNECTED PARTS OF FARM—BRIDGES—MANDAMUS.
The remedy of mandamus to compel drain commissioner to construct a bridge across large drain which traversed plaintiff's farm is available to plaintiff under pertinent statute, the right to such remedy being clear and specific (CL 1948, § 272.2).

8. MANDAMUS—REMAND—FURTHER PROOFS—BRIDGE ACROSS DRAIN.
Mandamus proceeding to compel drain commissioner to construct a bridge across large drain which traversed plaintiff's farm is ordered remanded for purposes of taking testimony in order to determine the precise character of the bridge to be constructed, where trial court had denied relief sought on erroneous ground that drain commissioner had complete discretion in providing the means of crossing the drain (CL 1948, § 272.2).

Appeal from Sanilac; Noe (Alton H.), J., presiding. Submitted January 5, 1954. (Calendar No. 45,678.) Decided February 18, 1954.

Mandamus by Verna Mae Hartwick, trustee, against J. Neil Muir, Drain Commissioner of Sanilac county, to compel construction of bridge over drain traversing farm property, under provisions of drain law. Writ dismissed. Plaintiff appeals. Reversed and remanded.

Leonard J. Paterson, for plaintiff.

Charles W. Rigney, for defendant.

CARR, J. Plaintiff trustee, having been duly authorized by the probate court of Sanilac county,

brought this action in circuit court on behalf of her minor children who are the owners of a certain farm crossed from east to west by a public drain known as the Elk Creek drain. The defendant is the drain commissioner of Sanilac county. Prior to the institution of the proceeding that has resulted in this case the occupants of the property, which is divided by said drain, crossed from one side to the other by fording. The testimony indicates that said drain was in part a natural watercourse and that at the place where the ford was maintained the bottom of the stream was covered with sand or gravel, or a combination of the two, and that it was feasible to cross in the manner indicated with heavy loads including threshing machines and other farm machinery.

In 1948 a petition was presented to defendant under the general drain law* for the cleaning out, widening and deepening of the drain. No question has been raised as to the validity of the procedure taken. It resulted in the drain being substantially enlarged. The record indicates that through the farm referred to it is 70 feet in width at the top, 40 feet at the bottom, and that the depth at the place where the drain was formerly forded is 9.1 feet. Apparently the depth varies from place to place, and doubtless the same situation obtains as to other dimensions. In connection with the improvement defendant adopted the plan of installing bridges across the reconstructed drain only at points where such structures had previously been maintained. To connect the portions of the farm here involved, divided by said drain, he proposed a concrete passageway consisting of a slab of cement on the bottom of the drain and for a portion of the distance up the banks on the sides. Apparently 9 of such passageways had been in-

* PA 1923, No 316, as amended (CL 1948, § 261.1 *et seq.* [Stat Ann 1952 Rev § 11.1 *et seq.*]).

stalled, at the time of the trial of this matter in circuit court, by defendant at places other than on said farm. On behalf of their children plaintiff and her husband objected to the proposed method of crossing the drain, insisting that it would be inadequate for the conducting of proper and necessary farming operations, and asking for a bridge in lieu thereof. The defendant declined to comply with the request, claiming that the concrete passageway would be adequate, that it would be more economical than a bridge, and giving as a further reason that the cost of the improvement had exceeded the estimates on which the drain assessment was based. Thereupon plaintiff sought a writ of mandamus in circuit court to compel the construction of a bridge across the drain on the farm of her children.

After listening to the testimony of the parties and the arguments of counsel, the circuit judge who heard the matter came to the conclusion that plaintiff was not entitled to the relief sought, primarily on the ground that under pertinent provisions of the drain law the defendant commissioner is granted discretionary authority to construct such means of crossing a drain, either newly constructed or widened, as he may determine to be proper. No finding was made as to the actual adequacy of the passageway proposed in the instant case, it being the conclusion of the circuit judge, as indicated, that the judgment of the defendant was final. An order was entered dismissing plaintiff's petition and, on leave granted, she has appealed to this Court.

The statutory provisions in question are found in chapter 12, § 2, of the general drain law (CL 1948, § 272.2 [Stat Ann 1952 Rev § 11.111]). Insofar as material, said section reads as follows:

"As part of such drain, there shall be constructed at least 1 bridge or passageway across such drain connecting the highway (except limited access high-

ways established under Act No 205 of the Public Acts of 1941), with each farm entrance, and when a drain crosses a farm or any portion thereof, there shall be constructed 1 bridge or passageway across said drain connecting the portions of said farm disconnected by said drain, which bridge or passageway shall also be charged in the first instance as a part of the construction of such drain, after which such bridge or passageway shall be maintained by the owner of the land: Provided further, That in the event the drain commissioner shall make future improvements such as widening, deepening, straightening or relocating such drain (but not cleanout alone), there shall be constructed the necessary bridges or culverts as part of such improvements."

On behalf of plaintiff it is contended that the specific language of the statute, particularly the final proviso above quoted, entitles the owners of land crossed by an improved and enlarged drain to either a bridge or a culvert, that a passageway is excluded because not specifically named in the proviso. It will be noted, however, that in the case of the initial construction of a public drain crossing a farm a "bridge or passageway" is required. The trial judge concluded that it was not the intention of the legislature to make a distinction between a newly-constructed drain and an enlarged and improved drain. We think that such interpretation is correct. The provisions of a statute must be construed together and, if possible, harmonized. The basic inquiry is as to the legislative purpose and intent. We think that it is reasonably clear that in the enactment of the statute and of the amendments thereto it was intended to insure that an owner of property crossed by a public drain, whether newly-constructed or improved, should be afforded a reasonable and adequate means of proceeding from one portion of his farm across the drain to and upon the other portion. If a passageway of the character contemplated by defendant in

the instant case, or perhaps of some different type of construction, is feasible and adequate for crossing an enlarged and improved drain such construction would constitute a compliance with the statute.

Does the type of construction provided for crossing a public drain, newly-constructed or enlarged, rest wholly in the judgment of the drain commissioner? We cannot agree with the position of the trial court on this phase of the case. The statute does not in terms grant any such discretionary authority. Rather, it prescribes in specific language the duty of the drain commissioner to construct *necessary* means of crossing such drain. The type of construction required in any given instance obviously presents an issue of fact. Whether in the instant case the method of crossing proposed by the defendant will be reasonably adequate and feasible for the purpose for which it is to be used must be determined from the proofs. Our examination of the testimony brings us to the conclusion that a concrete passageway of the type of construction proposed will not constitute a compliance with the statute. The dimensions of the drain are such as to suggest the difficulty of crossing on such passageway with heavy loads of farm produce and with heavy machinery. The slope of the banks is approximately 30%. The testimony indicates that large quantities of sand and silt are washed down the drain, and it seems to be conceded by defendant that at certain seasons of the year the passageway that he has proposed, if constructed, would not be passable. The testimony of witnesses produced by plaintiff as to the situation at other points where concrete passageways of the proposed type have been placed indicates that they are, in a drain of the character here involved, not reasonably adequate for the required use. Without discussing the testimony in detail, the conclusion cannot be avoided that the owners of this farm, whom plaintiff

represents, are entitled to a bridge of such type of construction as will provide reasonable access from one part of the property to the other.

We are not unmindful of the general rule that mandamus is a writ of grace and not of right. The general principles involved in determining whether the writ shall issue in a given case were discussed at some length in *Kosiba* v. *Wayne County Board of Auditors,* 320 Mich 322. There is, however, no serious question as to the duty of a court in an instance where the right to such remedy is clear and specific. *National Bank of Detroit* v. *State Land Office Board,* 300 Mich 240; *Bitonti* v. *Wayne County Auditors,* 311 Mich 322. Under the provisions of the statute above quoted, by which defendant is bound, the right of the property owners is of the nature suggested.

The case is remanded to the trial court with directions to set aside the order dismissing plaintiff's petition, and to enter in lieu thereof an order granting to her the relief sought. If found necessary or expedient, further proofs may be taken for the purpose of determining the precise character of the bridge to be constructed. An order will enter accordingly, with costs to plaintiff.

BUTZEL, C. J., and BUSHNELL, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

CASE *v.* BEECH LANES, INCORPORATED.

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

   The Supreme Court does not reverse a nonjury case on a question of fact unless the evidence clearly preponderates against the finding on which the judgment was based.

2. BROKERS—COMMISSIONS—CONTRACTS—EVIDENCE.

   The burden of proof rests upon a broker who sues for commission for sale of corporate stock to establish a contract under which he was authorized to find a purchaser for the stock in question for the amount fixed by the owners or for such lesser amount as they might thereafter agree to accept and also to establish that he found a purchaser ready, willing and able to buy the stock on such terms.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—SALE OF STOCK—LICENSES.

   The Supreme Court may not consider whether or not plaintiff real-estate broker's lack of license to sell corporate stock affected his right to recover commission for sale of entire stock of corporation, where no question in that regard was raised by the trial court.

4. WITNESSES—INTEGRITY VOUCHED FOR BY PARTY CALLING WITNESS.

   A party who calls a person not a party to the action as a witness, vouches for his integrity.

5. BROKERS—COMMISSIONS—CONTRACTS—EVIDENCE.

   Plaintiff broker *held*, to have failed to sustain burden of proof as to contract for commission for sale of corporate stock or that he had found a purchaser ready, willing and able to buy the stock on terms fixed by defendants or acceptable to them.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 896 *et seq.*
[2, 5] 8 Am Jur, Brokers §§ 158, 222.
[3] 3 Am Jur, Appeal and Error § 820.
[4] 58 Am Jur, Witnesses § 792.

Appeal from Wayne; FitzGerald (Frank), J. Submitted January 7, 1954. (Docket No. 27, Calendar No. 45,961.) Decided February 18, 1954.

Assumpsit by Virgil G. Case against Beech Lanes, Incorporated, a Michigan corporation, Walter Walters and Edmund F. Kalko, for commission claimed on sale of business. Judgment for plaintiff. Defendants appeal. Reversed and remanded for entry of judgment for defendants.

Lewis Daniels and *James M. Wienner,* for plaintiff.

William G. Comb, for defendants.

CARR, J. In August, 1951, the plaintiff was carrying on business as a real-estate broker in the city of Detroit, and had a license covering such operation. He specialized in the sale of bowling alleys. Defendants Walters and Kalko were at the time the owners of 80% of the stock in Beech Lanes, Inc., a corporation owning such alleys and engaged in the operation thereof. Relying on a claimed agreement with the said stockholders, plaintiff undertook to find a purchaser for the business and showed the corporate property to possible purchasers, including one Peter White. Subsequently the corporate real estate and the personal property used in the carrying on of the business were purchased by White from the corporation for the sum of $160,000.

Claiming that under his agreement he was entitled to a commission in the sum of $5,000, plaintiff brought suit in the circuit court to recover that amount. In his declaration he alleged that he was employed by defendants to find a buyer "for their stock and for the business," that he had carried out his contract, that the sale to White had come about

because of his efforts, and that he was entitled to receive the amount that defendants had agreed to pay him. The answer of the defendants denied the material allegations of the declaration, alleging further that if there was any agreement between the individual defendants and plaintiff it related to the sale of an interest in real property, that there was no promise in writing to pay plaintiff a commission, and that, in consequence, the promise to pay a commission, if made, was void. Such defense was based on CL 1948, § 566.132 (Stat Ann 1953 Rev § 26.922) which declares, among other provisions, that "Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate" shall be void unless in writing signed by the party to be charged or by some person lawfully authorized by him.

It is conceded that there was no written promise by defendants, or either of them, to pay plaintiff a commission. On the trial of the case plaintiff testified that he prepared a contract, or listing agreement, which he mailed to defendant Walters. The instrument was not returned to him, nor was it signed. Without waiting for its return, plaintiff, as he claims, undertook to find a purchaser, contacting, among others, Mr. White who subsequently purchased the property of the corporation.

On the trial of the case it was plaintiff's claim that his verbal agreement with defendants Walters and Kalko contemplated the sale of stock of the corporation, including the shares owned by them and others owned by a third party which they were to acquire. It appears that Walters and Kalko actually obtained said stock, thus becoming the owners of all shares issued by the corporation, but there is no showing as to when such transaction took place. Plaintiff testified further that Mr. White made an offer of $160,000 for all the corporate stock, which offer was submitted

to defendants but not accepted. Defendants denied that they authorized plaintiff to find a purchaser for their stock, and denied that any offer was made by White therefor. Following trial of the case before the court without a jury, judgment was entered for plaintiff for the amount claimed by him. A motion for a new trial was made and denied. Defendants have appealed, asserting that the finding of the trial court was against the great weight of the evidence, and that plaintiff failed to sustain the burden of proof resting on him.

The question in the case is one of fact and must, in consequence, be determined on the basis of the proofs. In considering the claims of the parties we are not unmindful of the general rule that in cases tried before the court without a jury, we do not reverse unless the evidence clearly preponderates against the finding on which the judgment entered is based. *Vannett* v. *Michigan Public Service Co.*, 289 Mich 212; *Hall* v. *Horak*, 329 Mich 16. However, if it appears that the evidence clearly preponderates against the conclusion of the trial judge, it becomes the duty of this Court to reverse. *Fruit Growers Package Co.* v. *Anderson*, 323 Mich 169; *C. O. Porter Machinery Co.* v. *Coleman*, 329 Mich 8.

The burden of proof rested on the plaintiff to establish a contract under which he was authorized to find a purchaser for the corporate stock in question, for the amount fixed by defendants or for such lesser amount as they might thereafter agree to accept, and also to establish that he found a purchaser ready, willing and able to buy the stock on such terms. It is conceded that if the agreement contemplated the sale of an interest in land, plaintiff is not entitled to recover. It is equally apparent that if the agreement was as he claimed, but that he did not find a purchaser for the corporate stock, the judgment in his favor should be set aside.

The testimony of the plaintiff does not indicate that, as a part of his regular business, he was engaged generally in the sale of corporate securities. He makes no claim that he was licensed as a stock salesman. However, no question in this respect was raised in the trial court, and we may not consider it here. Plaintiff stated that he had been licensed as a real-estate broker for approximately 6 years, and that he had specialized in the sale of bowling alleys, having brought about the transfer of 60 or 65 such properties during the 5-year period preceding the trial. He claimed that he first contacted defendant Walters and was told that defendants had a "place for sale." Plaintiff claimed also that, about a year previously, he had talked with the manager of defendant corporation with reference to the sale of the place, but that nothing had materialized at that time.

Throughout his testimony plaintiff repeatedly referred to the sale of the place and to the sale of the business. The conclusion is naturally suggested that such result was the main purpose sought to be accomplished by the parties. Doubtless a transfer of ownership might have been effected as a practical proposition by the sale of the corporate stock, or perhaps by sale of a controlling interest. It is of some significance, however, that plaintiff, so far as this record discloses, did not inquire with reference to the market value of the stock except as the value of the property and business might indicate, the indebtedness of the corporation, nor whether the sale of such stock to the public was authorized by law. The details of claimed conversations, relating to the stock, between plaintiff and Mr. White were not shown by testimony, although plaintiff claimed that an offer therefor in the sum of $160,000 was made.

Plaintiff's right to recover rests on the interpretation of his testimony and the force to be given to it.

Mr. White, who was called as a witness by plaintiff, testified in substance that he was interested in the purchase of the property and business but specifically denied that he made any offer for the stock. He further stated that his attorney had advised against the purchase of the stock. Counsel for appellee suggest in their brief that such statement must be construed as indicating that there was some conversation with plaintiff in contemplation of a stock purchase. We do not think that such an inference is tenable, but if it is we may not base thereon the further inference that Mr. White made a definite offer for the stock. As noted, he specifically denied that he did so. He was called by plaintiff as a witness, and hence plaintiff is in the position of having vouched for his integrity. There is nothing on this record that tends in any way to impeach his testimony other than plaintiff's contradicting statements. Defendants Walters and Kalko, testifying in their own behalf, denied the making of any agreement with plaintiff under which he was authorized to sell their stock in the corporation and to receive a commission therefor. In substance it was, and is, their claim that what they desired to do was to sell the real estate, the business, and the personal property used in connection with it, and that the sale to White after plaintiff, as they claimed, had ceased his efforts to dispose of the property, was made in accordance with their plans and intentions with reference to the transaction that they desired to effect.

Further detailed discussion of the testimony would serve no useful purpose. Under the record before us it must be said that plaintiff failed to establish a contract whereby he was to receive a commission for the sale of the stock that had been issued by the corporation. Furthermore, if we assume the making of the verbal contract claimed by him, the further conclusion follows that he did not find a purchaser ready,

willing and able to buy said stock on terms fixed by defendants, or acceptable to them. The proofs clearly preponderate against plaintiff's right to recover.

It is unnecessary to discuss other matters referred to by counsel in their briefs. An order will enter remanding the case to the trial court with directions to set aside the judgment in plaintiff's favor and to enter a judgment for defendants.

BUTZEL, C. J., and BUSHNELL, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

KERN *v.* SCHAAR.

1. TAXATION—SCAVENGER SALE—TITLE—EASEMENTS.
   A quitclaim deed by the State to a purchaser of lands at a so-called scavenger sale conveys the title in fee free from any encumbrances such as easements which had existed for more than the period necessary for ripening into prescriptive rights (CL 1948, § 211.359).

2. BROKERS—UNDEDICATED ALLEYS—PURCHASE OF ABUTTING LOTS.
   Real-estate broker who owned 10′ x 200′ strip of land at back of lots which was not dedicated for use as alley for lots for which he negotiated sales to defendants, who owned 2 other lots also adjacent to lots defendants purchased and the 10′ strip and who obtained a deferral of action by defendant purchasers upon their discussion of the strip of land usable for alley purposes *held,* not to have become legally obligated to permit defendants' use of such strip.

3. EQUITY—CLEAN HANDS—INJUNCTION—RECORD.
   Claim that real-estate broker came into court of equity without clean hands when he sought to enjoin defendants from using

---

REFERENCES FOR POINTS IN HEADNOTE

[1] 51 Am Jur, Taxation § 1078.

10′ x 200′ strip of land which abutted rear of 2 lots for which he had previously negotiated sale to defendants *held,* without foundation under record presented.

Appeal from Oakland; Hartrick (George B.), J. Submitted January 5, 1954. (Docket No. 4, Calendar No. 45,828.) Decided February 18, 1954.

Bill by Paul A. Kern against Albert C. Schaar, as Al's Auto Parts, and Lewis Schaar, to enjoin use of property under claimed easement. Decree for plaintiff. Defendants appeal. Affirmed.

Dudley & Patterson, for plaintiff.

Odin H. Johnson, for defendants.

BUSHNELL, J. Defendants Albert C. Schaar and Lewis Schaar are the owners of property located in the city of Pontiac, consisting of lots 4 and 5 and the west portion of lot 23 of Assessor's Plat No 35. Plaintiff Paul A. Kern is the owner of lots 2 and 3. On or about June 6, 1940, Kern purchased, through the State land office board, at a scavenger sale (CL 1948, § 211.351 *et seq.* [Stat Ann 1950 Rev § 7.951 *et seq.*]) property known as lot 24 of Assessor's Plat No 35. This lot is 10 feet wide and about 200 feet deep. It lies southerly of lots 2, 3, 4 and 5, and northerly of lot 23.

The record before us is barren as to who was the former owner of lot 24, title thereto having been acquired in 1938 by the State for nonpayment of taxes for 1935 and prior years. For many years prior to the tax sale this lot had been used as a private alleyway by abutting property owners and had never been dedicated to the use of the public. Kern, a real-estate broker and a commissioner of the city of Pontiac, was the broker in the sale of lots 4 and 5, the first sale being lot 5 in 1941. When negotiations

were being conducted in 1950 for the transfer of title to lot 4 there were discussions as to lot 24. Defendants claim that Kern made this statement:

"We will do one thing at a time and you don't need to worry about that 10-foot strip."

Kern admitted making the first part of the statement but denied the remainder.

There is an intimation that a $50 consideration was discussed regarding a contemplated transfer of a portion of lot 24. However, nothing materialized and finally Kern served notice on defendants that they must cease using his property as a means of ingress and egress. A barricade was erected on lot 24, which was torn down, and Kern brought suit in equity to restrain defendants from using this lot. Defendants have appealed from a decree permanently enjoining them and others from using plaintiff's property.

Appellants contend that the acquisition of a tax deed from the State does not relieve the purchaser of prior easements that had been in existence for more than 50 years. Appellants' position cannot be sustained in the light of CL 1948, § 211.359 (Stat Ann 1950 Rev § 7.959), which reads in part:

"Any quitclaim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the State obtained title, except as herein otherwise provided."

We see no need to repeat our observations on this question, which may be found in *Young* v. *Thendara, Inc.*, 328 Mich 42.

Defendants argue that Kern's view should not be sustained because of our decision in *Stansell* v. *American Radiator Co.*, 163 Mich 528. In that case

one who purchased property at a tax sale was held to have merely discharged his preexisting duty to pay the tax and, therefore, he acquired no new rights in the easement then in question.

The only showing in the record before us as to any duty on the part of Kern is that which is claimed to have arisen out of his representations at the time he acted as a broker in the sale of lot 4. Such a nebulous foundation as that indicated above does not rise to the dignity of a legal duty. We have found nothing in this record which created a duty or agreement requiring Kern to pay the taxes on lot 24. Defendants' claim of equitable estoppel and the resulting effect of Kern's responsibility as a city commissioner and a real-estate broker is wholly without merit. Although he is charged in appellants' argument with having come into equity without clean hands, there is no foundation whatever for this contention.

The decree is affirmed, with costs to appellee.

BUTZEL, C. J., and CARR, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

In re RYERSON'S ESTATE.

STATE *v.* PELL.

1. ESTATES OF DECEDENTS—DEBTS DUE THE STATE—OLD AGE ASSISTANCE.

   A claim by the State against the estate of a decedent for old age assistance grants to him during his lifetime must be allowed and paid as a claim of the fourth class as a debt due the State was clearly intended to have been created therefor under pertinent statutes (CL 1948, §§ 400.34a, 708.10).

2. COSTS—PUBLIC QUESTION—ESTATES OF DECEDENTS—RECOVERY OF OLD AGE ASSISTANCE.

   No costs are allowed in proceeding to recover from estate of decedent for old age assistance which had been granted to decedent during his lifetime, a public question being involved (CL 1948, §§ 400.34a, 708.10).

Appeal from Allegan; Smith (Raymond L.), J. Submitted January 8, 1954. (Docket No. 42, Calendar No. 45,834.) Decided February 18, 1954.

Claim of State of Michigan for reimbursement from estate of Gabriel Ryerson, deceased, for funds furnished under old age assistance provision of social welfare act. Allowed as fourth class claim. Executor appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Poor and Poor Laws § 44; 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 41.

[1] Right of public to reimbursement from recipient, his estate or relatives, of old age assistance payments. 125 ALR 712; 29 ALR2d 731.

[2] 14 Am Jur, Costs § 91.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara* and *John E. McEvoy,* Assistants Attorney General, for plaintiff.

Harry Pell, executor, *in propria persona.*

BUSHNELL, J. Gabriel Ryerson, prior to his death on September 21, 1951, had drawn old age assistance, totaling $2,575, from the State. This assistance began in November, 1947. After his death, certain common stocks found in his cash box were sold, the proceeds of which, together with other liquid assets, amounted to $3,996.39. After bills for funeral expenses and other preferred claims in the amount of $904.46 had been paid there remained a balance of $3,091.93 for the payment of all other claims and the expenses of administration.

The State of Michigan, through its department of social welfare, was allowed a fourth class claim in the sum of $2,575. Several fifth class claims were also allowed. Because payment of the State's claim would exhaust the estate and leave nothing to apply on the fifth class claims, an appeal was taken to the circuit court. There, the case was heard solely upon an issue of law. The order of the probate court allowing the State a fourth class claim was affirmed and a judgment was entered accordingly.

The executor has appealed from this judgment and here presents the sole question of whether a claim for reimbursement for old age assistance filed by the bureau of social welfare under CL 1948, § 400.34a (Stat Ann 1950 Rev § 16.434[1]), is a "debt" due the State of Michigan and entitled to a preference as a fourth class claim.

The statute under which the claim is filed reads:

"The State bureau may file a claim for reimbursement from the estate of the deceased for old age

assistance grants paid during the life time of the deceased, and such claim shall be allowed and paid in the same manner as claims filed against the estate of deceased persons, and shall be paid into the general fund of the State: Provided, That any such claim shall not have preference over claims filed under section 77 of this act by any county department of social welfare for reimbursement for expenditures made on behalf of the decedent."

It is provided in CL 1948, § 708.10 (Stat Ann 1943 Rev § 27.3178[420]), that claims allowed against an estate shall have the following classification and preference: (1) the necessary funeral expenses as determined by the judge of probate; (2) debts due the United States; (3) expenses of last sickness; (4) debts due the State of Michigan; and (5) all other debts.

Appellant argues that, in order to constitute a debt, there must be a personal liability incurred during the lifetime of the decedent and that liability must have arisen out of the contractual relationship; hence a claim by the State cannot ripen into a debt; that a statutory liability imposed on one during his lifetime is a duty, but not a debt; nor can judicial determination change the character of the State's claim from a statutory right of reimbursement into a debt due the State of Michigan.

We see no justification whatever to follow such fine-spun reasoning. The language of the classification provisions of the probate code and the social welfare act, as heretofore quoted (CL 1948, § 400.1 *et seq.* [Stat Ann 1950 Rev § 16.401 *et seq.*]), contain no ambiguities nor inconsistencies. The language is clear and plain. It provides that the "debt" may be established by the filing of a claim which must be allowed. There is no doubt that the legislature clearly intended, through such process, to finally create a debt within the classification of the probate code.

We therefore refrain from any further discussion of the question.

The order of the circuit court remanding the cause back to the probate court for further proceedings is affirmed, but without costs, a public question being involved.

BUTZEL, C. J., and CARR, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

WEBSTER *v.* WEBSTER.

DIVORCE—CUSTODY OF CHILDREN—RECORD.

Decree of divorce wherein custody of 3 children, 3 to 5 years of age, was awarded mother is not disturbed under record presented on father's appeal wherein he claimed it was detrimental to the paramount interests of the children to take them from the home of the paternal grandparents (CL 1948, § 553.17).

Appeal from Charlevoix; Brown (Charles L.), J. Submitted January 12, 1954. (Docket No. 66, Calendar No. 46,053.) Decided February 18, 1954.

Bill by Virginia Webster against Carroll Webster for divorce. Decree for plaintiff. Defendant appeals only as to custody of children. Affirmed.

John W. Bellamy, for plaintiff.

Schmidt, Smith & Howlett, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

17 Am Jur, Divorce and Separation § 683.

BUSHNELL, J. Defendant Carroll Webster has appealed from that portion of a divorce decree in which plaintiff Virginia Webster was granted custody of the minor children.

It is of little benefit to discuss at length the marital difficulties recited in the record. It is sufficient to say that the parties were married on September 21, 1945, and lived and cohabited together as husband and wife until February 16, 1951. During this time 3 children were born who, at the date of the filing of plaintiff's bill of complaint, were then 2, 3 and 4 years of age, respectively.

When the matter came on for trial in August of 1951, the court and counsel made every effort to effect a reconciliation and provide proper care for the children. After careful consideration, the parties, under the direction of the trial judge but without waiver of their respective rights, attempted to readjust their affairs. The matter was held in abeyance for more than a year. When the parties reappeared in court, testimony was taken and the reports of the friend of court of both Charlevoix and Kent counties were considered. After patient and careful reconsideration, it was ordered that a divorce decree be entered and that the custody and control of the minor children be awarded to the wife.

Strong representations are made here on appeal that it is detrimental to the paramount interest of the children to take them from the home of the paternal grandparents. Upon review of the record, we find no justification for disagreeing with the conclusion reached by the trial judge. We agree with him that the welfare of the minor children is best served by maternal care.

"The court may, from time to time afterwards, on the petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of the children, or any of them, and

make a new decree concerning the same, as the circumstances of the parents, and the benefit of the children shall require." CL 1948, § 552.17 (Stat Ann § 25.97).

The decree is affirmed, with costs to appellee.

BUTZEL, C. J., and CARR, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

POLANDER *v.* POLANDER.

1. HUSBAND AND WIFE—SEPARATE MAINTENANCE.
   Each case of separate maintenance based upon cruelty must be decided on its own merits (CL 1948, § 552.301).

2. APPEAL AND ERROR—SEPARATE MAINTENANCE—SUPREME COURT—EVIDENCE.
   The Supreme Court has the duty of exercising its own judgment in passing upon the evidence on appeal in suits for separate maintenance (CL 1948, § 552.301).

3. HUSBAND AND WIFE—SEPARATE MAINTENANCE—EVIDENCE.
   Plaintiff wife in suit for separate maintenance *held*, entitled to decree of separation, where evidence shows there is little possibility of reconciliation, that neither seeks a divorce because of their church affiliations, that the parties have not cohabited as husband and wife for over 4 years and that the accumulation of property has largely come about because of the industry of both parties and there were a number of acts of cruelty on the part of defendant husband (CL 1948, § 552.301).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 27 Am Jur, Husband and Wife §§ 404–406.
[1, 3] Defenses available to husband in civil suit by wife for support. 10 ALR2d 466.
[5] 27 Am Jur, Husband and Wife §§ 414, 415.

4. SAME—TITLE TO PROPERTY.

Courts do not award the wife title to any of the husband's property in statutory proceedings for separate maintenance (CL 1948, § 552.301).

5. SAME—SEPARATE MAINTENANCE — INCOME — AGE — HEALTH — MANNER OF LIVING.

The proper allowance for the wife in a suit for separate maintenance is determined by the court by taking into consideration the husband's income, the age and health of both parties, and the station in life and manner of living of the parties prior to the separation (CL 1948, § 552.301).

6. SAME—SEPARATE MAINTENANCE—REMAND—ALIMONY.

Case of separate maintenance is remanded to circuit court for allotting, assigning, setting apart and decreeing to plaintiff wife as alimony the use of such part of the defendant husband's real and personal estate, or such portion of his earnings, income or revenue as the court shall find equitable, where Supreme Court reverses decree dismissing bill and finds wife entitled to decree of separation (CL 1948, § 552.301).

Appeal from Wayne; Maher (Thomas F.), J. Submitted January 13, 1954. (Docket No. 20, Calendar No. 45,851.) Decided February 18, 1954. Rehearing denied April 5, 1954.

Bill by Marie R. Polander against Michael G. Polander for separate maintenance. Bill dismissed. Plaintiff appeals. Reversed and decree ordered to enter in this Court, with cause remanded for further proceeding in respect to allotment of alimony.

Garan, Lucow & Miller (*Albert A. Miller,* of counsel), for plaintiff.

George W. Bixler, for defendant.

SHARPE, J. Marie R. Polander, plaintiff, seeks separate maintenance from her husband, Michael G. Polander, by virtue of the statute CL 1948, § 552.301 (Stat Ann § 25.211). The trial court, after hearing

the evidence, entered an order dismissing plaintiff's bill of complaint. The principal issue in this case is whether plaintiff presented sufficient evidence to entitle her to a decree of separate maintenance.

The record shows that the parties were married in 1926 and that 3 children were born as a result of this marriage, namely, Robert James Polander, age 21, a member of the United States Air Force; Delores Irene Polander, age 19, and Thomas Mitchell Polander, age 7, both of whom are living with their mother in Detroit; that at the time of the marriage defendant was 27 years of age and had accumulated property of the value of from $3,000 to $4,000; that prior to the marriage plaintiff was employed and after the marriage became a beauty operator and soon thereafter opened a beauty shop. The parties separated in 1949 and at that time were the owners of real estate, stock, furniture, car and money in the bank, all of which had a value of approximately $133,000 as appraised by the friend of the court. The real estate consists in part of a hotel in Albany, New York, which has a value of about $95,000.

In plaintiff's amended bill of complaint it is alleged that defendant had stated to her on numerous occasions that he did not love her and that he no longer had any feeling or affection for her; that he drinks to excess; that for a period of several years he has shown an increasing neglect of interest in the welfare of plaintiff and the children; that he has a violent and uncontrollable temper; that he uses vile, obscene and abusive language towards her; that he struck her with great force and violence on numerous occasions, once in 1946 at a time when plaintiff was 7 months pregnant with child, wherein the defendant in a drunken rage, poked a broom handle into the abdomen of the plaintiff, causing her to suffer severe pain and anguish and almost causing the premature birth of the child she was

bearing; that in December of 1946 the defendant did again strike the plaintiff with his fist in the abdomen and stomach just prior to the time that the plaintiff was to depart to the hospital to give birth to her son, Thomas; and that on New Year's Eve in 1945 the defendant in a drunken rage did assault the plaintiff and did strike and beat her repeatedly, forcing her into the ice-covered street and tearing her fur coat off her body in strips so that only a bare lining remained; further that after the defendant left the plaintiff in July, 1949, he gave her no support money for a period of 7 months, despite the fact that his income from jointly held property was in excess of $2,000 per month; and that the defendant had carried on an illicit love affair with another woman in 1946.

Defendant filed an answer to plaintiff's bill of complaint in which he denied the several acts of cruelty charged therein, but does not ask for affirmative relief. The cause came on for trial and plaintiff offered evidence in support of the claims made in her bill of complaint. At the close of all testimony the trial court entered an order dismissing plaintiff's bill of complaint. The trial court filed a written opinion in which he gave his reasons for dismissing plaintiff's bill of complaint, the substance of which was that plaintiff contributed as much to the domestic turmoil as the defendant did.

We note that the principal witness for plaintiff was her daughter, Delores, who testified:

"When my mother was expecting a child, my father took a broom and started poking her in the stomach. He says, 'You don't have to wait 9 months for the brat to come out, you can have him now,' and started punching her in the stomach."

Concerning another instance, Delores testified:

"It was the night my father came home; my father came home at night and he had lipstick all over his shirt and vest and my mother asked him, 'Where did you get'—My mother asked him if that was lipstick. * * *

"I got out of bed. I heard them quarreling. Then my mother said, 'There is lipstick all over your Dad' and I took a good look, and then my father started hitting my mother and gave her a black eye and took a chair and hit her with it, and my mother ran to the bedroom. She opened the window and jumped out."

Each separate maintenance case based upon cruelty must be decided on its own merits, see *Miller* v. *Miller,* 320 Mich 43. In suits for separate maintenance, the Supreme Court is not relieved of the duty of exercising its own judgment in passing upon the evidence, see *Klumpp* v. *Klumpp,* 289 Mich 97. We have examined the evidence and find that the parties have not cohabited as husband and wife since 1949; that the accumulation of property has largely come about because of the industry of both parties; that neither party seeks a divorce because of their church affiliations; and that there is little possibility of reconciliation between the parties. We are of the opinion that the plaintiff, under the evidence in this case, is entitled to a decree of separation. In *Mackie* v. *Mackie,* 329 Mich 595, 600, we said:

"In the statutory proceeding for separate maintenance, courts do not award the wife title to any of the husband's property. In determining a proper allowance for the wife, courts should take into consideration the husband's income, the age and health of both parties, the station in life and manner of living of the parties prior to the separation."

A decree will be entered granting plaintiff separate maintenance and the cause remanded to the circuit

court of Wayne county to allot, assign, set apart and decree to her as alimony the use of such part of her husband's real and personal estate, or such portion of his earnings, income or revenue as the court shall find equitable. Plaintiff may recover costs.

BUTZEL, C. J., and CARR, BUSHNELL, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

KELLAR v. UNITED METAL PRODUCTS COMPANY.

1. APPEAL AND ERROR—COMMON PLEAS COURT—REVIEW BY CIRCUIT COURT.

   The circuit court reviews judgment entered in the common pleas court on a transcript of the testimony and proceedings had in the common pleas court and does not hear the case *de novo;* the review being in the same manner, as near as may be, as cases appealed from the circuit court are presently reviewed by the Supreme Court (CL 1948, § 728.4, as amended by PA 1949, No 149; Court Rule No 77, effective in 1949).

2. SAME—NONJURY CASE—PREPONDERANCE OF EVIDENCE.

   The Supreme Court does not reverse the finding of a trial court on an issue of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction.

3. SET-OFF AND RECOUPMENT—NONJURY CASES—FINDING OF COURT—EVIDENCE.

   Finding of common pleas court in nonjury action for performance of buffing, polishing and chrome plating operations on certain metal stampings for defendant that latter was not entitled to set-off and recoupment for charges made for defective workmanship and for value of stampings scrapped, as affirmed by the circuit court, is affirmed, where there is competent evidence to sustain such finding (CL 1948, § 728.4,

---

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 3 Am Jur, Appeal and Error § 896 *et seq.*

as amended by P.A. 1949, No 149; Court Rule No 77, effective in 1949).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted January 7, 1954. (Docket No. 30, Calendar No. 46,009.) Decided February 18, 1954.

Suit by Chris Kellar, doing business as Kellar's Metal Polishing & Buffing Company, against United Metal Products Company, a corporation, for plating services. Judgment for plaintiff in common pleas and circuit court. Defendant appeals. Affirmed.

Philip N. Christi, for plaintiff.

Lucking, Van Auken & Schumann, for defendant.

SHARPE, J. This case originated in the common pleas court of Detroit where plaintiff had judgment. On appeal to the circuit court of Wayne county, the judgment was affirmed. The record shows that plaintiff, Chris Kellar, doing business as Kellar's Metal Polishing & Buffing Company is in the business of buffing, polishing and chrome plating metal parts, and appellant, United Metal Products Company, is a manufacturer of kitchen step-stools. In April of 1952, United requested Kellar to perform buffing, polishing and chrome plating operations on certain metal parts which United had stamped out, and to pick up and deliver the same in a good and workmanlike manner according to samples inspected at agreed prices.

During April, May and June of 1952 plaintiff picked up some parts, and after working on them returned them to defendant. Some of the parts returned to defendant were again returned to plaintiff because of claimed defective workmanship. Upon failure to pay for work performed, plaintiff began an action in the common pleas court of Detroit, where

a judgment was rendered in his favor in the sum of $808.60, including costs. It also appears that defendant, in the common pleas court, filed a claim for a set-off and recoupment for charges made for defective workmanship in the amount of $422.82 and the value of stampings scrapped in the sum of $361.40. The claims for set-off and recoupment were denied, and upon appeal to the circuit court the judgment was affirmed. Defendant appeals and urges that the verdict is against the great weight of the evidence.

Plaintiff testified that when he delivered parts to defendant they were checked and received by defendant; that the parts he worked on were marked with a yellow or green chalk by his employees; that many of the parts returned to him as defectives were unmarked, showing that his shop did not do the polishing and buffing of them.

Defendant offered testimony to the effect that during April, May and June, 1952, they had 3 suppliers of polishing and plating, namely, Electroplating, Inc., Manufacturers Plating and plaintiff. It also appears that Electroplating, Inc., and Manufacturers Plating denied that any of the defective parts were parts that they had worked on. Plaintiff also states that the parts shipped by him consisted in part of 1,024 tops, but that defendant returned to him 1,440 tops claimed to be defective. This case was tried in the common pleas court without a jury. In *Michael* v. *Kircher,* 335 Mich 566, we said:

"The review of the judgments for plaintiffs entered in the common pleas court was based on a transcript of the testimony and proceedings had in the common pleas court. On such review, the circuit court does not hear the case *de novo.* PA 1929, No 260, § 4 (CL 1948, § 728.4), providing for the review of judgments of the common pleas court by the circuit court, was amended by PA 1949, No 149 (Stat.

Ann 1951 Cum Supp § 27.3654), and provides as follows:

" 'In all cases in which any of the parties to the litigation feel themselves aggrieved by the judgment, or final order of a judge or judges of the common pleas court, appeal or certiorari shall lie within 20 days of the date of such judgment or order, to the circuit court of said county for review, but not for trial *de novo,* where the case shall be reviewed in the same manner as near as may be, as cases appealed from the circuit court are now reviewed in the Supreme Court. * * *

" 'Transcripts of judgments rendered by the common pleas court may be taken and filed in the same manner and within the same time and with like force and effect as is provided by law.

" 'A reporter or stenographer may be employed in any case upon demand of either party to the case, or on order of the court.'

"See, also, Court Rule No 77, effective September 23, 1949, which defines the practice on appeals to circuit courts from the common pleas court in Detroit, and substantially follows the rules for practice on appeals from circuit courts to this Court. Said Court Rule No 77 is not contradictory of the statute above quoted, as applied to the question now before us. Such appeals are heard in the circuit court on settled records and filing of briefs. They are not heard *de novo.*"

This case involves a question of fact. In cases tried before a court without a jury we do not reverse unless the evidence clearly preponderates in the opposite direction. Having reviewed the record, we are not able to say that the trial court was in error. We find that there is competent evidence to support the finding of fact of the trial court. The judgment is affirmed, with costs.

BUTZEL, C. J., and CARR, BUSHNELL, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

MUSKEGON LUMBER & FUEL COMPANY *v.* JOHNSON.

1. HUSBAND AND WIFE—ESTATES BY ENTIRETIES—FRAUD.
   A husband has no right to a determinable moiety in entirety property and, in the absence of fraud, his interest cannot be reached by creditors of the husband alone (CL 1948, § 557.81).

2. SAME—PROCEEDS OF ENTIRETY PROPERTY.
   Proceeds from sale of entirety property, which were deposited in bank account standing in husband's name only were not subject to payment of his debts, where evidence shows husband and wife had definite understanding the funds were to be used for their joint use in acquisition of other property to be held as tenants by the entirety, since they had not, by such deposit, become the sole and separate property of the husband, every unity of person, time and estate continuing to exist.

3. SAME—ESTATES BY ENTIRETIES—SEPARATE PROPERTY OF WIFE.
   The interest of a wife in an estate by entireties is her separate property which she may hold free of her husband's debts.

4. BANKS AND BANKING—PROPERTY OF DEPOSIT.
   A bank deposit is prima facie the property of the person in whose name the deposit is made and an adverse claimant must show a clear and perfect title to it.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 26 Am Jur, Husband and Wife §§ 66 *et seq.*, 84, 85.
[1–3] Estates by entirety in personal property. 8 ALR 1017; 117 ALR 915.
Married Women's Act as affecting qualities and incidents of estates by entireties. 141 ALR 179.
Interest of spouse in estate by entirety as subject to satisfaction for individual debt. 166 ALR 969.
[4, 5] 7 Am Jur, Banks § 413.
[6, 7] 19 Am Jur, Estoppel § 85.

5. SAME—GARNISHMENT—WIFE AS CLAIMANT AGAINST HUSBAND'S ACCOUNT.

Evidence adduced in behalf of intervening wife of defendant in whose sole name garnisheed bank account had stood *held*, to have made a sufficient showing that such account was the property of the defendant and herself.

6. ESTOPPEL—PREJUDICE.

There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up.

7. HUSBAND AND WIFE—BANK DEPOSITS—ESTOPPEL—ESTATES BY ENTIRETIES—EXTENSION OF CREDIT.

Plaintiff who garnisheed defendant husband's bank account after proceeds of sale of entireties property had been deposited therein was not estopped by action of intervening claimant wife in indorsing check for making such deposit, where plaintiff had not extended credit to either defendant or claimant after such deposit.

Appeal from Muskegon; Lyons (Willis L.), J., presiding. Submitted January 12, 1954. (Docket No. 43, Calendar No. 45,998.) Decided February 18, 1954.

Assumpsit by Muskegon Lumber & Fuel Company, a corporation, against John S. Johnson with garnishment against Hackley Union National Bank. Vivian G. Johnson, wife, intervenes claiming garnisheed funds joint. Directed verdict and judgment for defendant and intervenor. Plaintiff appeals. Affirmed.

Harold H. Smedley, for plaintiff.

Alexis J. Rogoski and *Robert Bunker Rogoski,* for defendant and intervenor.

SHARPE, J. This case involves an appeal from a directed verdict in favor of defendant, John S. Johnson, and intervenor, Vivian G. Johnson. The essential facts are not in dispute. Plaintiff, Muskegon Lumber & Fuel Company, instituted an action against John S. Johnson, in his individual capacity,

for indebtedness for lumber and materials supplied him in connection with his contracting business. Prior to May 31, 1952, John S. Johnson and Vivian G. Johnson, his wife, had resided at 1945 Smith street, Muskegon, Michigan, they having jointly owned a vendee's interest in a land contract dated May 25, 1951. The contract provided:

"This contract, made the 25th day of May, A.D., 1951, between Tony Halma and Rica Halma, husband and wife, of Muskegon, Michigan, herein called the seller, and John S. Johnson and Vivian Johnson, husband and wife, as tenants by the entireties of Muskegon, Michigan, herein called the purchaser."

On May 31, 1952, the Johnsons sold the above premises to Robert Picard and wife on land contract, and, on the same day, purchased a farm from Lester Harmon and wife on a land contract. The contract with the Harmons for the purchase of the farm contained the following:

"It is further mutually agreed that upon receipt of payment to the second parties, above, of the balance owing on a certain land contract between the second parties and Robert A. Picard and Jennie Picard, second parties will pay to the first parties the sum of $2,000 forthwith, to be applied on the balance due hereunder."

The Picards contemplated paying the balance of the contract and on January 15, 1953, secured a loan from the National Lumberman's Bank of Muskegon and paid the Johnsons the balance due on the contract, which amounted to approximately $2,800. Out of this money the National Lumberman's Bank paid plaintiff the sum of $661.62 to apply on the debt John S. Johnson owed the plaintiff, and the balance of $2,110.57 was paid to the Johnsons in the form of a check payable to John S. Johnson and Vivian G. Johnson. At this time John S. Johnson had a check-

ing account in the bank showing a balance of $1.87. Vivian G. Johnson did not have a checking account in any bank. After indorsements, Vivian G. Johnson took the check to the Hackley Union National Bank and deposited it in the bank account of John S. Johnson. Checks were issued against this fund for the balance of the down payment on the farm and for other items connected with the farm, but before these checks cleared the bank plaintiff garnisheed the account on January 16, 1953.

On March 9, 1953, Vivian G. Johnson filed a petition in the circuit court of Muskegon county for leave to intervene in the garnishment proceedings. The cause came on for trial and at its conclusion the trial court directed a verdict in favor of Vivian G. Johnson, intervenor, and John S. Johnson, defendant.

Plaintiff appeals and urges that the deposit in the bank was not from the sale of real estate owned by the entireties. In *Battjes Fuel & Building Material Company* v. *Milanowski,* 236 Mich 622, we had occasion to construe PA 1925, No 126 (CL 1948, § 557.81 [Stat Ann § 26.191]). We there held that the above act negatives any right of the husband to a determinable moiety in entirety property, and, in the absence of fraud, his interest cannot be reached by creditors of the husband alone. Under the facts in this case the money deposited in the bank was derived from defendant and intervenor's interest in a land contract held by them as tenants by the entireties. Plaintiff also urges that when defendant and intervenor indorsed the check and she, the intervenor, deposited it in the account of defendant, the identity of the check changed from a joint check to an individual credit and thereby became the sole and separate property of the defendant, John S. Johnson.

Plaintiff relies on *McIntyre* v. *Farmers & Merchants' Bank,* 115 Mich 255. In that case it was held

that one who, with his wife's knowledge and consent, mingles his own funds with hers in a bank, with the understanding that the entire fund shall be treated as his, renders the entire fund subject to garnishment for his debt.

Vivian G. Johnson testified:

"*Q.* Before the deal was closed, did you and your husband have any discussion as to what was to be done with the money you were to get?

"*A.* Yes, sir. * * *

"*Q.* Did you consent to his making any other payments out of this joint fund, other than the joint payments on the farm? * * *

"*A.* I said whatever we had to pay that would be for the farm, was what I was willing to do.

"*Q.* Then, after you got the check, what happened to it?

"*A.* I took the check and deposited it. Then my husband drew some checks. We made out what we would do with the money, and he made checks that way right after we got the money deposited. After the checks were drawn, we gave them to different creditors—I was present when we gave the checks to some of them, and I wasn't present for a couple of them. I was present when most of those checks were given out. I delivered 2 of them, I believe. I delivered the check to the Harmons for the payment of the Ravenna property. One of the checks was for a drainage system on the property. My husband wrote the check but I was there. I consented to his writing those checks. I do not have a bank account of my own. My husband and I do not have any joint bank account; the only one is the one in which he had his work.

"*Q.* Did you ever say he could use any part of this money other than for making those payments that were evidenced by those checks?

"*A.* No, sir."

Under the above testimony there was no consent that any part of the money could be used to pay any

part of defendant's debts. It follows that *McIntyre* v. *Farmers & Merchants' Bank, supra,* has no application to the facts in the case at bar.

In *Carlisle* v. *Parker,* 38 Del 83 (188 A 67), the land was held by the husband and wife as tenants by the entireties. A joint mortgage was given by them and subsequently foreclosed, the mortgage paid and the balance of the proceeds deposited with the court. The First National Bank & Trust Company held a judgment against the husband and filed a petition with the court to reach the funds deposited with the court to satisfy the judgment against the husband. It was there held (pp 88, 91, 92):

"We know of no rule of law which would destroy an estate by entireties in a surplus arising from a foreclosure of a mortgage on an entirety estate. Both parties are now living and every unity of person, of time and estate which ever existed exists now.

"That the estate by entireties continues in the surplus fund arising from the sale has been determined by several cases. *Germania Savings Bank* v. *Jung,* 18 NYS 709; *Stretz* v. *Zolkoski,* 118 Misc 806 (195 NYS 46); *Servis* v. *Dorn,* 76 NJ Eq 241 (76 A 246). * * *

"The interest of a wife in an estate by entireties is her separate property which she may hold free of her husband's debts. One of the incidents of the estate is the power to sell it with her husband's consent. It is for this reason, the denial of her right of alienation, which makes invalid during their joint lives any deed or mortgage executed by the husband alone, and it is for this reason that a judgment against the husband is ineffective. * * *

"If, as we have held, the surplus of the proceeds of the foreclosure sale are to be considered in this case as the land itself, we see no reason why said fund is not to be governed or disposed of by the husband and wife, acting jointly, to the same degree or extent as they could have disposed of the real estate itself, just prior to the sale."

It is also urged that the intervenor did not overcome the prima facie case that the bank account was defendant's. It is the rule that a bank deposit is prima facie the property of the person in whose name the deposit is made and that an adverse claimant must show a clear and perfect title to it. See *Burch* v. *Barendsen,* 192 Mich 369. In the case at bar plaintiff did not offer any evidence relative to the bank deposit. The only evidence relating to the bank deposit and how it was to be expended was that given by Mr. and Mrs. Johnson. In effect they both testified that the account was to be considered as the property of the husband and wife as tenants by the entireties and to the extent that $2,110.57 was to be paid on the farm land contract and other matters incidental to the farm. It follows that under the record in this case intervenor made a sufficient showing that the bank account was the property of defendant and intervenor.

Plaintiff also urges that intervenor is estopped to claim that she has an interest in the bank account for the reason that when she deposited the check in the name of her husband, she, in effect, said that her husband was the owner of the account. In *Shean* v. *United States Fidelity & Guaranty Company,* 263 Mich 535, we said (p 541):

"There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up."

See, also, *Dobranski* v. *Lincoln Mutual Casualty Company,* 275 Mich 1.

In the case at bar plaintiff is not entitled to estoppel against the intervenor, as intervenor did nothing or said nothing to mislead plaintiff in any way. Plaintiff did not extend any credit to either Mr. or Mrs. Johnson after the check was deposited.

In our opinion the proceeds from the sale of vendee's interest in a land contract, held as tenants by

the entireties, is not subject to the debts of the husband. The judgment is affirmed, with costs to intervenor.

BUTZEL, C. J., and CARR, BUSHNELL, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

THE IRISHMAN'S LOT, INC., *v.* SECRETARY OF STATE.

1. STATUTES—CONSTITUTIONAL LAW—BURDEN OF PROOF.
   One asserting the unconstitutionality of a statute has the burden of proving such contention.

2. SAME—CONSTITUTIONAL LAW—CLASSIFICATION—POPULATION.
   Legislation containing a classification based on amount of population of counties may be sustained as being general and not special, where it applies to all counties which in the future attain the designated population and there is a reasonable relationship between the restriction and the population (Const 1908, art 5, § 30).

3. SAME—CONSTITUTIONAL LAW—PRESUMPTIONS.
   The existence of any state of facts that will sustain a classification contained in a statute, which can reasonably be conceived will be presumed when such classification is assailed; the party who assails it having the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.

4. AUTOMOBILES—SUNDAY—CLASSIFICATION—POPULATION.
   Statute prohibiting the dealing in automobiles on Sunday in counties having a population of 130,000 or over and pro-

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 11 Am Jur, Constitutional Law § 132.
[2, 4] 12 Am Jur, Constitutional Law § 489.
[3] 12 Am Jur, Constitutional Law § 521.
[5] 50 Am Jur, Sundays and Holidays § 9.
[6] 14 Am Jur, Costs § 91.

viding for extension of its application as to other counties as they acquire such population *held,* constitutional as a general act, where it appears that it applied to the counties where most of the sales are made and competition is the keenest and most needful of regulation (Const 1908, art 5, § 30; PA 1953, No 66).

5. SUNDAY—POLICE POWER—PUBLIC HEALTH.

The exercise of police power by prohibition of secular pursuits on Sunday is justified as a sanitary measure as experience has demonstrated that one day's rest is requisite for the health of most individuals whether or not they have the power to observe a day of rest of their own volition.

6. COSTS—CONSTRUCTION OF STATUTES.

No costs are allowed in suit to test the constitutionality of statute prohibiting the dealing in automobiles on Sunday in certain counties, the construction of a statute being involved (PA 1953, No 66).

Appeal from Macomb; Noe (Alton H.), J. Submitted January 14, 1954. (Docket No. 56, Calendar No. 46,045.) Decided February 18, 1954.

Bill by The Irishman's Lot, Inc., a corporation, against Owen J. Cleary, Secretary of State of Michigan, and various other law enforcement officers, praying that Sunday closing law be declared unconstitutional. Bill dismissed. Plaintiff appeals. Affirmed.

Francis W. McCauley (*Wayne A. Anderson,* of counsel), for plaintiff.

Frank G. Millard, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara* and *Gregory H. Frederick,* Assistant Attorney General, for defendants.

Amicus Curiae:

Colombo, Colombo & Colombo, Anthony A. Vermeulen, and *Frederick Colombo,* for Detroit Auto Dealers' Association.

SHARPE, J. This is a suit to test the constitutionality of PA 1953, No 66 (CL 1948, §§ 435.251–435.254 [Stat Ann 1953 Cum Supp §§ 9.2701–9.2704]). The act provides:

"Sec. 1. It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiation thereof, or attempt to buy, sell, trade or exchange any motor vehicle or interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday. * * *

"Sec. 4. This act shall not apply to counties having a population under 130,000 inhabitants according to latest or each succeeding Federal decennial census.

"This act is ordered to take immediate effect."

Plaintiff charges that the above act violates the provisions of article 5, § 30, of the Michigan Constitution (1908), which provides:

"The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act, excepting acts repealing local or special acts in effect January 1, 1909 and receiving a 2/3 vote of the legislature shall take effect until approved by a majority of the electors voting thereon in the district to be affected."

The facts have been stipulated and in substance are as follows:

"1. Eight counties are presently within the population designation of the bill, 4 more being between 115,000 and 130,000 population.

"2. The 8 counties included under the bill make 70% to 75% of the type of sale prohibited by the statute.

"3. The 8 counties have 41% of the dealers in the State, 63% of the State's population. Cars sold in these counties in 1951 was 73%, in 1952, 72.9%, and for the first 4 months of 1953, 74.4% of automobiles sold in the State of Michigan. The addition of the 4 counties over 115,000 but less than 130,000 shows that the 12 counties have consistently accounted for nearly 80% of all sales in the State of Michigan."

Plaintiff also urges that inasmuch as the act does not include a provision for a popular referendum in the affected counties, it cannot be sustained as special or local legislation, and that where the exercise of police power is based upon population classification, there must be a reasonable relation to the classification and the purpose of the statute. Plaintiff relies on *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich 329, and *Mulloy* v. *Wayne County Board of Supervisors,* 246 Mich 632. In the *Lacy Case, supra,* the act in question created the office of judge of the court of domestic relations. In holding the act unconstitutional, we said (pp 341, 342):

"The act is clearly unconstitutional, because it in terms (section 10) deprives the probate court of jurisdiction in certain cases of juvenile delinquents and dependents, which jurisdiction is expressly conferred upon the probate courts by section 13, art 7, of the Constitution.

"The act (section 4) is plainly in conflict with the last-named section, in that it deprives the circuit court of the county of Wayne, or at least the other judges thereof, of appellate jurisdiction in certain enumerated cases. This the legislature may not do. *People, ex rel. Allen,* v. *Kent Circuit Judge,* 37 Mich 474; *People, ex rel. Heath,* v. *Kent Circuit Judge,* 37 Mich 372. Circuit courts are constitutional courts, and the jurisdiction conferred by the Constitution cannot be diminished by legislative enactment.

Nichols v. *Judge of Superior Court,* 130 Mich 187, * * * and cases cited.

"The court of domestic relations is created by legislative enactment. A judge of that court cannot lawfully be clothed with a jurisdiction conferred by the Constitution upon a constitutional officer. *State* v. *Hastings,* 10 Wis 525; *Ex parte Corliss;* 16 ND 470 (114 NW 962). See, also, *People, ex rel. Allen,* v. *Kent Circuit Judge, supra; Allor* v. *Wayne County Auditors,* 43 Mich 76."

We also said, "A consideration of all the cases cited, as well as many others, convinces us that a classification by population can never be sustained where it is, as in the case at bar, a manifest subterfuge." In the *Mulloy Case, supra,* an action was instituted to enjoin the board of supervisors of Wayne county from instituting civil service among certain employees under the provisions of PA 1927, No 390.* The act in question pertained to counties having a population of 300,000. The act did not make any provisions for counties that may later have a population of 300,000. At the time the act became a law, only Wayne county had the required population. We there said (pp 637, 638):

"It evidently was framed for no other county than the one then containing a population in excess of 300,000, and was not intended to become operative in other counties as they reached the required population, otherwise some method and some time would have been specified by which the act could be put in force in these other counties. * * *

" 'The classification must be based upon substantial and real differences in the classes, which are germane to the purpose of the law and reasonably suggest the propriety of substantially different legislation, the legislation must apply to each member of the class, and the classification must not be based

* CL 1929, §§ 1446–1464 (Stat Ann §§ 5.1171–5.1189), repealed by PA 1944 (1st Ex Sess), No 29.—REPORTER.

on existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class.' *Bingham* v. *Board of Supervisors,* 127 Wis 344 (106 NW 1071).

" 'The classification should be prospective, calculated to embrace any change in population or circumstances, and should be complete, covering all kinds of subjects dealt with.' 36 Cyc, p 1006."

It is fundamental that one asserting the unconstitutionality of a statute has the burden of proving such contention, see *Detroit International Bridge Company* v. *Corporation Tax Appeal Board,* 287 US 295 (53 S Ct 137, 77 L ed 314). We have sustained legislation as being general and not special where it would apply to all counties which in the future would attain the designated population, see *People* v. *Brazee,* 183 Mich 259 (LRA 1916E, 1146), and *Hayes* v. *Auditor General,* 184 Mich 39. In *Sullivan* v. *Graham,* 336 Mich 65, we had occasion to construe PA 1939, No 311, as amended by PA 1945, No 315 (CL 1948, §§ 338.703, 338.704, 338.720 [Stat Ann 1949 Cum Supp §§ 18.85(3), 18.85(4) and 18.85 (20)]). This act in part provided that residential contractors or builders in counties having a population of more than 250,000, or those counties that may later attain a population of 250,000, must have a license to engage in such work. In holding this part of the act constitutional, we said (pp 68, 69):

"Moreover, we have to a material degree departed from the reasoning in the *Mulloy Case* and the *Attorney General, ex rel. Dingeman,* v. *Lacy Case,* in respect to restrictions in statutes of applicability to counties of a designated total of population. We are more inclined to uphold the act where there is a reasonable relationship between the restriction and the population. See *Hayes* v. *Auditor General,* 184 Mich 39; *Kates* v. *Reading,* 254 Mich 158; *Chamski*

v. *Wayne County Board of Auditors,* 288 Mich 238; and *Tribbett* v. *Village of Marcellus,* 294 Mich 607.

"We find the act in question in this case to be not a local or special act. In view of the provisions of section 20 of the act, above quoted, we consider that the act in question does not contravene article 5, § 30 of our State Constitution."

In *Fitzpatrick* v. *Liquor Control Commission,* 316 Mich 83, 94 (172 ALR 608), we quoted with approval from *Borden's Farm Products Company, Inc.,* v. *Baldwin,* 293 US 194, 209 (55 S Ct 187, 79 L ed 281):

" 'When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 US 61 (31 S Ct 337, 55 L ed 369, Ann Cas 1912C, 160); *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 US 392, 397 (47 S Ct 630, 71 L ed 1115); *Lawrence* v. *State Tax Commission of Mississippi,* 286 US 276, 283 (52 S Ct 556, 76 L ed 1102, 87 ALR 374).' "

In the case at bar the classification presently applies to the 8 counties where 41% of the dealers are located, most of the sales are made and competition keenest, and in the wisdom of the legislature needed regulation; moreover, statutes prohibiting the pursuit of occupations on Sunday, except those of necessity, have been held constitutional. In *People* v. *Bellet,* 99 Mich 151 (22 LRA 696, 41 Am St Rep 589), we said (p 155):

"The better reason for maintaining the police power to prohibit citizens from engaging in secular pursuits on Sunday is the necessity of such regulation as a sanitary measure. As to those employments

which are noiseless, and harmless in themselves, and conducted in a manner not calculated to offend those who, from religious scruples, observe Sunday as the Lord's day, this necessity appears to be the only valid source of legislative power; and this is based upon the fact that experience has demonstrated that one day's rest is requisite for the health of most individuals, and not all individuals possess the power to observe a day of rest of their own volition."

In our opinion the statute in question is within the police power of the State and not in conflict with any express provision of the Constitution. The decree dismissing plaintiff's bill of complaint is affirmed, but without costs as the construction of a statute is involved.

BUTZEL, C. J., and CARR, BUSHNELL, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

BORG *v.* THOMAS.

1. PLEADING—COURT RULES—REPLIES TO CROSS DECLARATIONS.
   Provision of court rule requiring replies to answers and answers to cross bills to be filed and served within 15 days after service of a copy of the answer or cross bill is construed to apply equally to answers to cross declarations (Court Rule No 27, § 4 [1945]).

2. SAME—DEFAULT—FAILURE TO ANSWER CROSS DECLARATION—TIME.
   The cross plaintiff may take the cross declaration as confessed by filing an affidavit showing cross defendant's failure to

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 31 Am Jur, Judgments § 507.
[3] 3 Am Jur, Appearance § 30.
[4] 31 Am Jur, Judgments § 515.

answer it and the manner of service on him, where the cross defendant has failed to answer within the time provided by law or court rule (CL 1948, § 620.1; Court Rule No 28, §§ 1, 3 [1945]).

3. APPEARANCE—NOTICE.
A party who has appeared in an action is entitled to notice of all future proceedings in the cause (Court Rule No 8, § 7 [1945]).

4. JUDGMENT—DEFAULT—PROOF OF SERVICE OF CROSS DECLARATION.
The defendants' entry of plaintiff's default as to their cross declaration was irregular, where at the time of such entry the files did not contain proper proof of service of such cross declaration upon plaintiff or his attorney (CL 1948, § 620.1; Court Rules No 27, § 4; No 28, §§ 1, 3 [1945]).

Appeal from Oakland; Doty (Frank L.), J. Submitted December 29, 1953. (Calendar No. 46,003.) Decided February 18, 1954.

Action by John Borg, doing business as Borg Heating, against Helen Thomas and Cornelius Thomas for labor and materials on installation of heating units. Cross declaration by defendants for breach of warranty. Default judgment for defendants. Plaintiff appeals. Default set aside and judgment vacated.

Balfour Peisner, for plaintiff.

Hutson, Merritt & Petermann (*Maurice A. Merritt,* of counsel), for defendants.

DETHMERS, J. Plaintiff's appeal, on leave granted and in the nature of mandamus, is from an order denying his motion to set aside a default judgment entered against him on defendants' cross declaration. The order of default filed by defendants recites that their cross declaration is taken as confessed by plaintiff for failure to answer the same within 15

days after receipt thereof by his attorney. The record and file contain no proof of service of defendants' cross declaration or of notice of proceedings to take the default or of any other proceedings on plaintiff, his attorney, or anyone else. This was urged on the trial court, as on appeal here, as grounds for setting aside the default.

Michigan Court Rule No 27, § 4 (1945), requires replies to answers and answers to cross bills to be filed and served within 15 days after service of a copy of the answer or cross bill on plaintiff. This must be considered to apply equally to answers to cross declarations.

Court Rule No 28, § 1 (1945), provides that if either party fails to file and serve any pleading within the time limited by the rules, the opposite party may file or enter a default. Section 3 of that rule provides that, if cross defendant has failed to answer, the cross plaintiff may take the cross declaration as confessed by filing an affidavit showing cross defendant's failure to answer it and the manner of service thereof on him.

CL 1948, § 620.1 (Stat Ann § 27.1351), provides that upon due proof of service of any declaration or process requiring an appearance, answer or plea, a default may be filed or entered for want thereof within the time provided by law or rule of court.

Court Rule No 8, § 7 (1945), provides that a party who has appeared shall be entitled to notice of all future proceedings in the cause.

The record fails to disclose compliance by defendants with the noted requirements of the rules and statute prerequisite to taking a default.

In *Dades* v. *Central Mutual Auto Insurance Co.*, 263 Mich 260, 262, this Court said:

"We have repeatedly held that unless the files of the court disclose proper proof of service of process

a default entered is irregular; and the test is the condition of the file 'on the day of default.' This is true notwithstanding service has been actually and lawfully made. *Whirl* v. *Reiner,* 229 Mich 114. To the same effect as being controlling in the instant case, see *Stanczuk* v. *Pfent,* 231 Mich 689; *Westlawn Cemetery Ass'n* v. *Wayne Circuit Judge,* 238 Mich 119; *Standard Oil Co.* v. *Brukwinski,* 242 Mich 49."

The quoted language relating to proof of service of process on a defendant applies with equal force to the necessity for proof in the file of service of defendants' cross declaration on plaintiff or his attorney before it may be taken as confessed for failure to answer. The judgment must be vacated, the default set aside and plaintiff permitted to plead and proceed to trial on the merits. If necessary, the writ will issue. Costs to plaintiff.

BUTZEL, C. J., and CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

KELLY, J., took no part in the decision of this case.

TAYLOR *v.* LINT.

1. APPEAL AND ERROR—REMAND—JURISDICTION—CONSENT DECREE—REHEARING.

   The trial court was without jurisdiction to vacate decree entered for the purpose of making a further or different determination and decree, where order of Supreme Court remanding the case was that further testimony might be taken in regard to disputed question as to whether the decree had been signed with the consent of plaintiff-appellant and the time within which a motion for rehearing might have been filed had long since expired without such motion having been filed (Court Rule No 48, § 1 [1945]).

2. PARTNERSHIP—DEATH—POSSESSION OF SURVIVOR—WINDING UP AFFAIRS.

   The surviving partner has the sole right to possession of the assets of the partnership to wind up the affairs of the partnership and pay over the results to the legal representative of the deceased partner's estate (CL 1948, § 449.25[2][d]).

3. DESCENT AND DISTRIBUTION—PERSONAL ESTATE.

   An intestate's personal estate does not descend to his next of kin or heirs-at-law but remains in abeyance until administration is granted upon his estate and is then vested in the administrator as of the time of the death of the intestate; no title vesting in the next of kin until the estate is administered and then only upon the surplus remaining after payment of intestate's debts and the expenses of administration.

4. SAME—PERSONAL ESTATE—NEXT OF KIN.

   The rights of a next of kin of possession and of action in respect

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 40 Am Jur, Partnership § 294.
[3, 4, 6] 16 Am Jur, Descent and Distribution §§ 8, 9, 21.
[5, 6] 21 Am Jur, Executors and Administrators §§ 24, 213, 221, 222; 40 Am Jur, Partnership §§ 296, 316.
[7] 14 Am Jur, Costs § 91.

to the personal property of an intestate's estate before distribution, are neither greater nor less than those of a mere stranger.

5. EXECUTORS AND ADMINISTRATORS—NEGLIGENCE IN COLLECTION OF ASSETS—REMEDY OF HEIRS AND LEGATEES.

The remedy afforded heirs and legatees when the legal representative neglects his duty to collect assets for an estate does not permit them to represent the estate in the prosecution of suits.

6. PARTNERSHIP—DISTRIBUTION OF DECEASED PARTNER'S ESTATE—JURISDICTION—RECEIVERSHIP.

The power to make orders for the distribution of a deceased partner's estate to his surviving minor children rests solely in the probate court in proceedings for the probating of his estate and not in the circuit court in receivership proceedings for winding up the partnership; hence, the only proper order the circuit court could make therein would be to require the receiver to pay over to the legal representative of the deceased partner, the latter's proportionate share of the partnership assets as the heirs have no standing as parties to receivership suit (CL 1948, § 449.25[2][d]).

7. COSTS—APPEARANCE—BRIEFS.

No costs are allowed parties claiming right to assets in a receivership, where they have not appeared or filed briefs in the Supreme Court.

Appeal from Wayne; Brennan (John V.), J. Submitted January 12, 1954. (Docket No. 52, Calendar No. 46,019.) Decided February 18, 1954.

Bill by Zetta Taylor, receiver of Taylor's Restaurant and Bakery, against Ida Lint, administratrix *de bonis non* of the estate of Paul E. Taylor, to determine business a partnership, wind up its affairs and divide proceeds. Decree directed payment of portions to children of deceased partner. Plaintiff appeals. Reversed in part and decree ordered entered in Supreme Court.

Donald W. Grant, for plaintiff.

DETHMERS, J. Some of the facts of this case are set forth in our opinion in *Taylor* v. *Wayne Circuit Judge,* 336 Mich 654, when it was before us on mandamus to compel the circuit judge to settle the bill of exceptions on appeal here. Since then the judge, purporting to act in conformity with language in that opinion, entered an order vacating and setting aside the decree appealed from and reopening the cause for taking of testimony and proceedings so that the court might make such disposition and file such decree as it might thereafter determine. Our opinion did not so provide, but only that further testimony might be taken in regard to the disputed question of whether the decree had been signed with the consent of plaintiff-appellant, so that this Court might make a determination thereof based on a supplemental record containing such testimony. No motion for rehearing having been filed and the time therefor, under Michigan Court Rule No 48, § 1 (1945), having long since passed, the trial court was, after the appeal taken here, without jurisdiction to vacate the decree for the purpose of making a further or different determination and decree. *Hughes* v. *Wayne Circuit Judge,* 239 Mich 110; *Miles* v. *Harkins,* 335 Mich 453.

As indicated in our former opinion, plaintiff and her son had been in the restaurant business together. Upon his death she filed her bill of complaint herein praying that the business be decreed to have been a partnership and for the appointment of a receiver, an accounting, appraisal, sale, payment of debts and division of remaining assets. She was appointed receiver and thereafter, upon hearing had, a decree and supplemental decree entered decreeing that the business had been a partnership, that the deceased partner had died intestate leaving 2 minor children surviving him, allowing the receiver's final account, and directing her to pay $1,200 to each of the

guardians of the 2 minor children as a distribution of partnership assets, together with the costs of suit and also $100 to one of the guardians for his fees as such and $300 to the attorney representing one of the guardians in this suit.

Plaintiff contends that the minor children of the deceased partner had only an equitable interest in the estate of their deceased father and, hence, no standing in this partnership suit; that the trial court erred in refusing so to hold and in ordering the receiver to pay said amounts to the guardians of said children and to pay said guardian and attorney fees.

In *Moore* v. *DuBard,* 318 Mich 578, 593, we said:

"The plaintiff, as surviving partner, would have the sole right to possession of the assets of the partnership to wind up the affairs of the partnership and pay over the net results to the legal representative of the defendant's estate. *Grigg* v. *Hanna,* 283 Mich 443."

In *Cullen* v. *O'Hara,* 4 Mich 132, 138, this Court said:

"It is well settled, both under our own and the English statutes, that when a man dies intestate, his personal property does not, like his real estate, descend to his next of kin or heirs-at-law. It remains in abeyance until administration granted upon his estate, and is then, as we have before remarked, vested in the administrator, as of the time of the death of the intestate. No title vests in his next of kin until his estate has been administered upon, and then they take the surplus remaining after payment of the debts of the intestate, and expenses of administration, each in his proportion, under the statute of distributions. * * * Until then, an heir or next of kin of the intestate, although having a right to his distributive share, has no right to the possession of either the whole or any specific portion of the personal property. Nor, until distribution, can he

maintain any action in respect to it, unless it be founded upon his own actual possession, and against a mere wrongdoer. *Muir* v. *Trustees of the Leake & Watts Orphan Asylum,* 3 Barb Ch R (NY) 477. In fact, his rights of possession and of action in respect to the personal property before distribution, are neither greater nor less than those of a mere stranger."

In *Re Svitojus' Estate,* 296 Mich 19, 24, we said:

"It is an order directing the administrator to pay the attorney for the heirs a sum of money to reimburse him for expenses of litigation on behalf of the heirs, not on behalf of the estate. Mr. Geib was employed by the heirs, not by the estate, and his claim should be against the heirs, not against the estate. The estate itself does not owe Mr. Geib any money. * * * If an administrator neglects his duty to collect assets for an estate, the law affords heirs or legatees a remedy, but it will not permit them to represent the estate in the prosecution of suits. *Hillman* v. *Schwenk,* 68 Mich 297."

CL 1948, § 449.25 (2) (d) (Stat Ann § 20.25 [2] [d]), reads as follows:

"(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose."

Rights in the specific partnership property vested in plaintiff as surviving partner, to possess for partnership purposes, including that of winding up the partnership. Upon having wound it up, the surviving partner is required to pay over an amount representing the deceased partner's proportionate share

to the legal representative of the latter's estate, and it is only such payment that the circuit court could require in these partnership proceedings. Accordingly, the heirs of the deceased partner had no standing as parties in this suit; and the power to make orders for the distribution of the deceased partner's estate to his surviving minor children rested solely in the probate court in proceedings for the probating of his estate and not in the circuit court in receivership proceedings for winding up the partnership.

Provisions of the decree requiring the receiver to pay a portion of the partnership assets to the deceased partner's minor children and to pay the fees of their guardians and the attorney representing them in this suit are in error. Other provisions of the decree, not questioned on appeal, are affirmed. A decree may enter in this Court in accord herewith. No costs, defendant and the guardians not having appeared or filed briefs in this Court.

BUTZEL, C. J., and CARR, BUSHNELL, SHARPE, BOYLES, REID, and KELLY, JJ., concurred.

SAUER *v.* RHOADES.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—OPINION TESTIMONY —COMPETENCY OF WITNESSES.

   Objection to competency of witnesses who gave opinion testimony comes too late, where first made on defendant's appeal from consent judgment for plaintiff.

2. SAME—QUESTIONS REVIEWABLE—CONSTRUCTION OF AGREEMENT.

   Defendant's claim on appeal that trial court erroneously failed to construe sales agreement relative to tavern and restaurant business in his favor because it had been drafted by plaintiff's attorney, *held*, without merit, where it does not appear that the trial court was called upon to construe the agreement or that a judgment for plaintiff must depend on a construction thereof contrary to any claimed by defendant.

3. FRAUD—PLEADING.

   Issue as to whether agreement relative to lease of tavern and restaurant business had been induced by fraud was not before the trial court for determination, where defendant's answer failed to raise such issue.

4. APPEAL AND ERROR—STATEMENT OF QUESTIONS INVOLVED—FRAUD —RECORD.

   Issue as to fraud concerning earnings of tavern and restaurant business in question, which was raised by defendant's answer *held*, not a basis for reversal on appeal, where the statement of questions involved does not present such issue and the record fails to disclose an affirmative showing as to such fraud in the trial court.

5. JUDGMENT—CONSENT—APPEAL.

   A judgment by consent that does not appear to have resulted from mistake, fraud or misrepresentation, cannot ordinarily

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur, Appeal and Error § 820.
[3] 24 Am Jur, Fraud and Deceit § 243.
[4] 3 Am Jur, Appeal and Error §§ 695, 820.
[5] 31 Am Jur, Judgments § 714.

be set aside or vacated by the court without the consent of the parties thereto, since it is not the judgment of the court but the judgment of the parties and an appeal therefrom will be dismissed on motion.

Appeal from Oakland; Doty (Frank L.), J. Submitted January 14, 1954. (Docket No. 69, Calendar No. 45,699.) Decided February 18, 1954.

Assumpsit by Philip R. Sauer against Joseph J. Rhoades for breach of contract to purchase tavern and restaurant business. Consent judgment for plaintiff. Defendant appeals. Affirmed.

Sauer & Girard, for plaintiff.

Hollis C. Martin, for defendant.

DETHMERS, J. Defendant appeals from a consent judgment entered against him. The issues raised by the statement, in his brief, of questions involved are: (1) error in receiving opinion testimony of witnesses whose competency therefor defendant now alleges was not shown; (2) the sales agreement upon which suit was brought, having been drafted by plaintiff's attorney, should have been construed in defendant's favor; (3) judgment for plaintiff was in error in view of the affirmative defense that the agreement sued on was induced by misrepresentations concerning a lease.

(1) On trial defendant raised no objection to the competency of the witnesses, but only to the materiality of their testimony, which clearly was material. The objection comes too late now. (2) It nowhere appears that the trial court was called upon to construe the agreement (nor need we on appeal), nor that a judgment for plaintiff must depend on a construction thereof contrary to any claimed by defendant. (3) Defendant's answer to plaintiff's declara-

tion failed to raise the issue of misrepresentations concerning a lease (as to which testimony was, accordingly, excluded), but raised it only concerning the earnings of the business in question, as to which the statement of questions involved raises no issue here and the record fails to disclose an affirmative showing below.

For the reasons noted, the appeal is without merit. No claim is made that defendant's consent to entering judgment was not voluntarily given or that it resulted from mistake, fraud or misrepresentation. For cases in which we have held that a party may not attack or appeal from a decree entered with his consent, see *Cameron* v. *Smith,* 171 Mich 333, and cases therein cited, and, in similar vein, *Burk* v. *Amos,* 262 Mich 332; and *Westgate* v. *Adams,* 293 Mich 559. No valid reason appears for a different rule in the case of consent judgments at law. For instances of recognition by this Court that "a judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto, since it is not the judgment of the court but the judgment of the parties", see *In re Estate of Meredith* (syllabus), 275 Mich 278 (104 ALR 348), and *Douzeff* v. *Soneff,* 330 Mich 295, 301.

"As a general rule a judgment entered by consent may not be complained of on appeal by the parties to it, and an appeal therefrom will be dismissed on motion." *Coolsaet* v. *Veblen,* 55 SD 485 (226 NW 726; syllabus 67 ALR 1499).

"In the absence of statute, a judgment or decree entered by the consent of the parties cannot be reviewed by appeal or by error proceedings." 2 Am Jur, Appeal and Error § 31.

Affirmed, with costs to plaintiff.

BUTZEL, C. J., and CARR, BUSHNELL, SHARPE, BOYLES, REID, and KELLY, JJ., concurred.

RIPPERGER *v.* CITY OF GRAND RAPIDS.

1. MUNICIPAL CORPORATIONS—SEWAGE CHARGES—WATER METERS.
   Trial court's finding of fact that water which passed through water meter during winter quarter would fairly represent for the whole year the amount of water entering the sewer is affirmed in suit to enjoin city's collection of sewage utility charges (City of Grand Rapids Ordinance No 1340).

2. SAME—SEWAGE CHARGES—TAXATION.
   Charges for sewage service furnished by a city and based upon consumption of water do not constitute taxes as no one is compelled to take such service unless he chooses although enforcement for payment is permitted to be made in the same method as payment for taxes is enforced (City of Grand Rapids Ordinance No 1340).

3. SAME—PUBLIC UTILITIES—TAXATION.
   Payments by users for the service rendered by a public utility *held,* not a tax within the meaning of constitutional provisions pertaining to taxation (City of Grand Rapids Ordinance No 1340).

4. SAME—WATER AND SEWAGE CHARGES—SHUTTING OFF WATER.
   The grant of power by the legislature to a city and exercise of power by the city to shut off water to those delinquent in paying either or both water and sewage charges *held,* neither

---

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 51 Am Jur, Taxation § 16.
[4] 43 Am Jur, Public Utilities and Services § 64.
[4] Right to cut off water supply because of nonpayment of water bill or charges for connections, et cetera. 28 ALR 472.
[5] 17 Am Jur, Drains and Sewers, § 15; 25 Am Jur, Health § 24; 56 Am Jur, Waters § 405 *et seq.;* 56 Am Jur, Waterworks § 49.
[5] Constitutionality and construction of statutes and ordinances for protection of municipal water supply. 72 ALR 673.
[6] Generally as to what is an administrative power, see 42 Am Jur, Public Administrative Law § 29.
[7] 14 Am Jur, Costs § 91.

unlawful nor unreasonable (CL 1948, § 141.101 *et seq.*, as amended by PA 1941, No 210; City of Grand Rapids Ordinance No 1340).

5. HEALTH—DISPOSAL OF SEWAGE.
The disposal of sewage into the streams of this State is a matter of importance to the public health, which concerns the health of the people of the State at large (CL 1948, § 123.241 *et seq.*).

6. MUNICIPAL CORPORATIONS—SEWAGE DISPOSAL—CITY MANAGER.
Grant of powers to city manager by city ordinance *held,* administrative in character and necessary and proper in order to carry out the regulations of ordinance relative to operation and maintenance of sewage system, where the ordinance itself fixed the rates and charges and the system had been installed at insistence of State water resources commission that the city construct adequate sewage disposal facilitites and refrain from further pollution of river (City of Grand Rapids Ordinance No 1340).

7. COSTS—PUBLIC QUESTION—SEWAGE CHARGES.
No costs are allowed in suit to restrain city from collecting charges for use of sewage facilities and testing validity of city ordinance, a public question being involved (City of Grand Rapids Ordinance No 1340).

Appeal from Superior Court of Grand Rapids; Taylor (Thaddeus B.), J. Submitted January 8, 1954. (Docket No. 38, Calendar No. 45,942.) Decided February 18, 1954.

Bill by Harry V. Ripperger, Kent County Taxpayers' League, Inc., a corporation, Evert De Zeuw, and others, against City of Grand Rapids, George E. Bean, City Manager, R. Stanton Kilpatrick, City Clerk, and others, to enjoin collection of sewage utility charges and test constitutionality of city ordinance. Bill dismissed. Plaintiffs appeal. Affirmed.

John M. Dunham, for plaintiffs.

Fred N. Searl, City Attorney, and *George R. Cook,* Deputy City Attorney, for defendants.

KELLY, J. The superior court of Grand Rapids granted a request of the water resources commission and decreed that the city of Grand Rapids construct adequate sewage disposal facilities and refrain from further pollution of the Grand river. The city commission complied by enacting ordinance 1340, thereby placing the entire sewage disposal service on a utility basis, and also prescribed rates for the use of same.

Plaintiffs do not question the commission's action in the passage of the ordinance, or the authorization or sale of the bonds. This appeal presents to this Court 2 questions:

1. Did the city of Grand Rapids have the right to pass an ordinance (section 11 hereinafter quoted) giving to its officials authority to shut off the water supply to a consumer for failure to pay sewage disposal charges?

2. Did the provisions of the ordinance, and more particularly section 8, violate the laws of this State?

The legislature passed what is commonly known as the revenue bond act (PA 1933, No 94, as amended [CL 1948, § 141.101 *et seq.* (Stat Ann 1949 Rev § 5.2731 *et seq.*)]). Section 21 of this act was amended by PA 1941, No 210, to include the following:

"In addition to any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to such premises and the payment of charges for sewage disposal service to any premises may be enforced by discontinuing either the water service or the sewage disposal service to such premises, or both. The inclusion of the above methods of enforcing the payment of charges for water and sewage disposal, in any ordinance heretofore adopted, is hereby validated." CL 1948, § 141.121 (Stat Ann 1949 Rev § 5.2751).

The commission of the city of Grand Rapids decided that the charge for sewage services would be based upon the water metered for the winter quarter, and so provided in the ordinance. We agree with the statement of the trial court as follows:

"It is evident therefore that in basing the use charge of this period that the city considered that it was during this time of the year that little if any water that passed through the meter would be used for outside purposes and would fairly represent for the whole year the amount of water entering the sewer."

Section 11 of ordinance 1340 provides for the enforcement of service charges in the following language:

"The charges for sewer service are hereby recognized to constitute a lien on the premises served thereby, in accordance with the provisions of section 33-1/2 of title 8 of the city charter of the city of Grand Rapids. Whenever any such charge against any piece of property shall be delinquent for 6 months the city officials in charge of the collection thereof shall certify to the tax assessing officer of the city the fact of such delinquency, whereupon such charge shall be entered upon the next tax roll as a charge against such premises, and shall be collected and the lien thereof enforced in the same manner as general city taxes against such premises are collected and the lien thereof enforced. Nothing in this section, however, shall be deemed to prevent the city from suing in a court of law to collect the amount due it for sewer service charges. In addition to the other remedies provided in this section, the city shall have the right to shut off and discontinue the supply of water to any premises for the nonpayment of the sewer service charges when due."

Plaintiffs contend that the charges for both water service and sewage disposal should be termed and

declared a tax and should as a tax be collected only by assessment against the property or by personal action against the consumer.

This Court has not passed on the question as to whether charges for sewage disposal should be considered a tax, but has decided that charges for water service is not a tax. In *Jones* v. *Water Commission of Detroit,* 34 Mich 273, this Court said (p 275):

"The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them."

We believe the same reasoning that was applied to water charges in the above-mentioned case should be applied to sewage charges in the present case.

This question has been presented and decided by the courts of other States. In *Laverents* v. *City of Cheyenne,* 67 Wyo 187 (217 P2d 877), the court dealt with the question and ruled against the plaintiff's contention that the issuance of revenue bonds for the construction of a sewage disposal system would cause the indebtedness of the city to exceed the constitutional limitation. In determining the service charges should not be considered a tax the court held (p 210):

"Thus a clear distinction exists between property subject to general taxes and property subject to the payment of service fees for the use of the sewer. True, the payment of a fee for the use of the sewer is,

practically speaking, substantially like the enforced obligation of a tax. But so are the bills for the use of electric lights, whether the electric-light system is publicly or privately owned; and so are the water bills sent out monthly by the city of Cheyenne. Water bills and bills for the use of the sewer are very much alike. A public sewer system is a public utility the same as a water system. *City of Edwardsville* v. *Jenkins,* 376 Ill 327 (33 NE2d 598, 134 ALR 891); *Payne* v. *City of Racine,* 217 Wis 550 (259 NW 437); and cases cited. In the case of *City of Harrison* v. *Braswell,* 209 Ark 1094, 1100 (194 SW2d 12, 165 ALR 845, 849), speaking of service charges for the use of a sewer and for water, the court said: 'Payments by the users for the service rendered is not a tax within the meaning of the constitutional provision of article 16, § 11.' "

We find that the legislature gave to the city of Grand Rapids the right to shut off water to those delinquent in paying either or both water and sewage charges, and that the grant by the legislature and the exercise of such power by the city was not unlawful or unreasonable.

The enactment of PA 1927, No 320 (CL 1948, § 123.241 *et seq.* [Stat Ann § 5.2661 *et seq.*]), established beyond all doubt the principle that the disposal of sewage into the streams of this State is a matter of importance to the public health, which concerns the health of the people of the State at large, and is so essential that, if the people of a city fail to meet their responsibility by bond issue, drastic steps may be taken.

We agree with the opinion of the trial court that the legislature gave to the city a choice of several methods of collecting its charges for disposal services and also a choice of procedure to fit the occasion. The privilege of shutting off the water affords the fastest and cheapest way of forcing a delinquent to pay the charges, thereby saving the city the loss

of much time, as would occur if required to pursue exclusively the other methods.

We have carefully examined the ordinance provisions to determine plaintiffs' charge that said ordinance unlawfully delegates judicial power to the city manager. This ordinance places the complete disposal system under the management, supervision and control of the city manager with the right to make such rules, orders and regulations as he may deem advisable and necessary to assure efficient management and operation of the system. The ordinance also establishes rates and charges to be effective, both as to a readiness-to-serve charge according to water-meter size and also in regard to the commodity charge, such as first 10,000 cubic feet at $.065 per cubic foot.

Many problems that could not be met and spelled out in an ordinance such as the provision in regard to sewage of unusual nature, where the manager with the approval of the city commission shall have the right to make an additional charge based on the strength and character of sewage and waste discharged into the system; such as the right of the manager to use the 3-months' water consumption previous to the winter months established (November 1st to April 30th) where he is of the opinion that said months more accurately would establish a yearly use of the system, are provided for in this ordinance. The grant of rights and powers to the manager are, in our opinion, administrative in character and necessary and proper in order to carry out the regulations of the ordinance.

The decree dismissing plaintiffs' bill of complaint is affirmed. No costs, a public question being involved.

BUTZEL, C. J., and CARR, BUSHNELL, SHARPE, BOYLES, REID, and DETHMERS, JJ., concurred.

FERTEL *v.* ADLER.

1. CONTRACTS—OFFER AND ACCEPTANCE.
   An offer does not become a binding contract until acceptance.

2. BROKERS—COMMISSION—OFFER TO BUY.
   Plaintiff real-estate broker was not entitled to commission for sale of real estate, where offer submitted to defendants did not carry out understanding and agreement of the parties in regard to the Federal income taxes payable by defendants.

3. EVIDENCE—JUDICIAL NOTICE—TAXATION.
   The Supreme Court takes judicial notice of the fact that the capital gains tax for an individual is far less than an income tax on dividends from a corporation (26 USCA, § 12[b] [1948], § 117[b], § 117[c][2] [1945]).

4. BROKERS—COMMISSIONS—ORAL CONTRACT—PERFORMANCE.
   A real-estate broker, seeking to recover commission for sale of property under an oral contract, has the burden of establishing the existence of, the definite terms of, and his own complete performance of the contract.

5. SAME—COMMISSION—ORAL CONTRACTS—PERFORMANCE.
   Jury's finding that plaintiff real-estate broker had sustained his burden of proof as to terms of oral agreement to sell real estate by exhibit containing an offer to purchase or performance of such agreement *held*, not sustained by evidence, where proposed sale of stock of corporation owning the property rather than the property was to reduce the tax liability and offer presented defendants was not such as to effect such reduction in tax liability.

6. SAME—COMMISSIONS—INSTRUCTIONS—EVIDENCE—CORPORATIONS—TAXATION.
   Failure of trial court to submit defendants' request to charge that transaction would be such as to subject them to but 1 income tax, a capital gains tax, from sale of stock of corpora-

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Contracts § 37.
[2, 4, 5] 8 Am Jur, Brokers §§ 174–176.
[4, 5] 8 Am Jur, Brokers § 222.

tion owning office and store building and that the securing of a mortgage by their corporation and distribution of proceeds thereof to them as owners of the stock would have constituted a dividend which was gross income and not a capital gain, hence, subject to a higher income tax was error in real-estate broker's action for commission, in view of the testimony adduced even when construed most favorably to plaintiff.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted January 5, 1954. (Docket No. 1, Calendar No. 45,869.) Decided February 18, 1954.

Assumpsit by Max Fertel against Leo Adler and Paul Monchnik for real-estate broker's commission claimed for procuring sale of their property. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

Shapero & Shapero, for plaintiff.

Arthur J. Hass, for defendants.

BUTZEL, C. J. Max Fertel, plaintiff, a licensed real-estate broker, brought suit against Leo Adler and Paul Monchnik, defendants, the owners of 40 shares each of the 80 shares constituting the entire issue and outstanding capital stock of the Tobin Building Corporation, a Michigan corporation, which owned a large 8-story building used for stores and offices at 1308 Broadway, Detroit, Michigan. By virtue of the ownership of all the stock, the defendants indirectly were considered the owners of the property although the corporation was the real owner. Plaintiff heard that the property was for sale and during the month of May, 1948, solicited a sales agency from defendants. In the original conversations in regard to the sale of the property, for which defendants asked a price of $250,000, it developed that the property belonged to the corporation which

would be obligated to pay a Federal income tax on the profit that the corporation would make in selling the property and that upon the subsequent payment of the proceeds from the sale as dividends to defendants as stockholders, they, in turn, would be obligated to pay an income tax upon that amount. During negotiations the parties determined that if the stock were sold instead of the property, the defendants would have to pay only one tax upon capital gains and that a sale could be made in this manner. Defendants agreed that they would accept $225,000 if such sale required the payment of only a capital gains tax. There was a $45,000 mortgage on the property. Evidently through negotiation a commitment or representation had been made by an agent of the mortgagee that a new mortgage loan of $130,000 would be made. This would enable the corporation to pay off the $45,000 mortgage and leave $85,000 in the treasury of the corporation which would be paid over to defendants. It was suggested that this be taken into consideration in the purchase price so that it would require only an additional $95,000 in cash from a purchaser to acquire the property subject to a $130,000 mortgage if the $85,000 surplus over the present mortgage were paid over to defendants in the form of a dividend. Defendants would thus receive $85,000 in dividends from the corporation and $95,000 from the purchaser of the stock. No agreement was reduced to writing except the admitted offer from one M. J. Saffir, referred to as exhibit 3, which stated as follows:

"Detroit, Michigan,
"July 19, 1948.

"Messrs. Leo Adler and Paul Monchnik,
"Detroit, Michigan.

"*Gentlemen:*

"The undersigned hereby submits the following offer for the purchase of all the outstanding and issued

shares of stock of the Tobin Building Corporation, a Michigan corporation, it being understood that there is now 80 shares of the said stock outstanding, 40 shares being owned by Leo Adler and 40 by Paul Monchnik and that there is no other outstanding stock, upon the following terms and conditions:

"(a) That the Tobin Building Corporation evidence the unencumbered ownership of the building at 1308 Broadway, Detroit, Michigan, except for a mortgage as hereinafter stated.

"(b) That the proper officers of the Tobin Building Corporation certify the facts and figures as set forth in the schedules contained in exhibit A.

"(c) That a certified statement be made by duly authorized officers of the Tobin Building Corporation that there are no existing building violations.

"(d) That the Tobin Building Corporation obtain a mortgage on the building owned by it known as 1308 Broadway, said mortgage to be in the sum of $130,000 and to be payable at the rate of $1,170 per month with interest at 4–1/2% per annum.

"(e) That upon the acceptance of this offer by you, the offerer or its duly designated accountants (Isenberg, Purdy and Donovan) shall have access to the books and records of the Tobin Building Corporation in order to check facts and figures as set forth in schedule A and as verbally conveyed to the offerer. At the completion of the said examination, the said accountants shall then designate a reasonable surety bond to be provided at the time of closing of this deal by the sellers, Adler and Monchnik, said bond to indemnify the purchaser against any tax liability which may be assessed against the Tobin Building Corporation for the period of operation up to and including the date of closing of this transaction.

"(f) The full purchase price of the said stock shall be $225,000 and the sum of $5,000 is herewith submitted as a deposit subject to the fulfillment of all the terms and conditions herein enumerated, and

upon such fulfillment the balance of $220,000 is to be paid on or before September 15, 1948.

"(g) In event the offerer desires an extension of 30 days to pay the balance of the purchase price, he shall pay an additional $10,000 on or before September 15, 1948, or at such time as he requests the said extension.

"In event that the Tobin Building Corporation pays any real-estate tax for the year of 1948, the purchase price of the said stock shall increase in the amount of the said tax.

"This offer to be null and void and ineffective unless duly accepted within 7 days from the date hereof.

"Very truly yours,
Corporation to be Formed
By: (sgd) M. J. SAFFIR

"Accepted by:

_____
Leo Adler

_____
Paul Monchnik"

The offer was never accepted by defendants.

One difficulty in the case arises from the fact that the transaction arose as a sale of real estate, then developed into one for the sale of securities or stock, and ended in a mixed transaction, the nature of which we shall not even try to determine. Exhibit 3 was an offer and never became a binding contract between defendants and the purchaser though so described in plaintiff's brief. Plaintiff admitted in his direct examination that when he delivered exhibit 3, together with a check for $5,000 referred to therein, to defendant Monchnik, plaintiff stated to the latter that plaintiff "had a bona fide offer for the

building according to my—our understanding." Monchnik read it over carefully and stated, as testified to by plaintiff:

"It seems to me everything is all right, as far as I know, except we will have to take it down to my attorney to see that the offer is prepared in such a manner that we won't have to pay any double taxation * * * that is income tax, except a capital gain, selling the stock in the corporation."

On cross-examination plaintiff also admitted that he knew that one of the essentials of the transaction was to save an income tax on a distribution by the corporation. When defendants presented the offer to their attorney, he asked plaintiff to withdraw from the room. The attorney evidently advised defendants that they would have to pay the tax on the distribution by the corporation and possibly also a capital gains tax. The payment of only a capital gains tax unquestionably was the fundamental basis of the entire negotiations. Defendants refused to proceed any further with the transaction although defendant Adler, according to testimony of plaintiff, said that he was willing to do so but that his associate had "reneged" on the deal. The use of the word is of no significance. The sale never was consummated. Defendants refused to sign an agreement to pay commission. Plaintiff brought suit.

Defendants deny liability on many grounds. They claim in the first instance that even viewing the transaction as one for the sale of securities plaintiff had never been licensed to sell securities under the provisions of the blue sky law, as amended. CL 1948, §§ 451.102, 451.103, 451.105 and 451.121 (Stat Ann §§ 19.742, 19.743, 19.745, 19.761). Plaintiff stresses the fact that he was not in the business of offering securities for sale; that this was the first transaction of that kind he had ever had; and that he was in the

real-estate business and not in the stock-brokerage business. It is further claimed that this was a single transaction by the owners of the stock and that the case is controlled by *Miller* v. *Stevens,* 224 Mich 626, and *Morris* v. *O'Neill,* 239 Mich 663.

Plaintiff claimed that exhibit 3, the offer submitted by plaintiff, signed "Corporation to be Formed, by M. J. Saffir," was an offer of a person who was ready, willing and able to perform. Plaintiff calls attention to the Michigan general corporation act, section 8 (CL 1948, § 450.8 [Stat Ann § 21.8]), which holds that a contract made by incorporators for and in behalf of any corporation to be formed should not be deemed invalid or ineffectual because made prior to the filing of the articles. Plaintiff also relies on the case of *Campbell* v. *Rukamp,* 260 Mich 43, showing the individual liability of a party representing to act for a corporation. Defendants claim that the tender of the $5,000 in the form of a check instead of currency was not a good offer. No objection was made to the form of the tender until the time of the trial. Further objection is made to the fact that paragraph (d) of exhibit 3 obligates the corporation to obtain a mortgage of $130,000 on the property. Defendants claim that any agreement pertaining to the placement of a mortgage on real property is within the statute of frauds and is required to be in writing, *Wardell* v. *Williams,* 62 Mich 50 (4 Am St Rep 814); *Tromley* v. *Lange,* 236 Mich 240, and that as the placing of a mortgage was a component part of the commission agreement, it was void since the entire contract was inseparable and there was no written contract to evidence the placing of a mortgage. *Colonial Brick Co.* v. *Zimmerman,* 255 Mich 655. Plaintiff, however, claims that the commitment for the mortgage of $130,000 had already been made and at most the commission agreement was a contract for services. We need not decide these ques-

tions or many others raised because the offer obviously did not carry out the understanding and agreement of the parties in regard to the Federal income taxes. Defendants requested the court to charge the jury that both plaintiff and the defendants agreed that they had an understanding that the defendants would be subject to only one income tax item, to-wit: the capital gains tax not to exceed 25% of their profit if a sale of the stock was effectuated and that if the corporation had accepted the mortgage loan of $130,000 on the Tobin Building and distributed the net proceeds of the loan to the defendants, such distribution would have constituted a dividend to the defendants and would have been gross income and not a capital gain. This refusal to charge is one of the many reasons and grounds for appeal.

Plaintiff testified as follows:

"Mr. Adler told me that 'if he would sell the building it would have to be a dividend to the stockholders. Then it would be a double taxation from income tax.'
* * *

"Mr. Monchnik said to Mr. Hass: 'I have an offer here which we would like to close the deal; I want you to look over the offer and see whether we are protected from any additional taxation beside the capital gains tax.' "

Although at other times plaintiff denied that a tax benefit or saving to the seller was the fundamental basis of the proposed sale, he testified he understood that to be one of the essentials of the sale he was to arrange for the defendants. In addition, plaintiff must have clearly understood the motive of the defendants in considering the sale since if a tax saving was not the very essential of the proposed transaction, the query arises why plaintiff who was in the real-estate business would for the first time have arranged for the sale of stock rather than the sale

of the building as was originally contemplated. We take judicial notice of the fact that the capital gains tax is far less than a tax on dividends when the recipient would have a dividend of $42,500, or one-half of the proceeds from the new mortgage of $130,000 after payment of the $45,000 mortgage. See 26 USCA, § 12(b) (1948), and 26 USCA, § 117(b), § 117 (c) (2) (1945), the applicable sections of the internal revenue code for the year 1948.

Plaintiff further testified on cross-examination:

"*Q.* Or was that $130,000 to be deducted from the $225,000?

"*A.* To be deducted.

"*Q.* I see; and a balance was to be paid by the Tobin Building Corporation to Leo Adler and Paul Monchnik; is that correct?

"*A.* The corporation's potential purchaser was to pay him the difference between $225,000 and $130,000.

"*Q.* Then will you explain to me and to this jury how Leo Adler and Paul Monchnik would get the $130,000?

"*A.* By simply getting the mortgage on the property.

"*Q.* But when the mortgage was placed the Tobin Building Corporation would receive that $130,000 and it would become cash on hand or in the bank of the Tobin Building Corporation; isn't that correct? You're an experienced real-estate man; you know that?

"*A.* I understood that that was the mechanics of negotiating the deal; that would only require say, $90,000 after the acquiring of the building, subject to the mortgage of $130,000, and the corporation would get a mortgage where the former shareholders would get the money from the mortgage proceeds. There was a small mortgage at the time.

"*Q.* And the small mortgage would be deducted from the big mortgage and that other mortgage money would be paid for Leo Adler and Paul Monchnik?

"*A.* Right.

"*Q.* By the Tobin Building Corporation?

"*A.* Right.

"*Q.* Now, you knew the very essentials of the way they wanted to make this deal was to save an income tax on a distribution on the corporation to them, didn't you?

"*A.* Yes.

"*Q.* You knew that the corporation would have to pay to them out of its funds $120,000 of its own money?

"*A.* The profits, if you please, was above the $160,000 purchase price that Mr. Leo Adler and Mr. Monchnik paid so therefore it wouldn't make any difference. The $130,000 mortgage, what they were interested in, is not to pay a big tax on the profit of the stock.

"*Q.* But the reason they wanted to sell their stock was because they only wanted to pay an income tax between what the stock cost them and what they sold it for; isn't that right?

"*A.* I presume so.

"*Q.* That is correct; they did not want to pay any income tax on any dividends received from the corporation?

"*A.* That part I don't know.

"*Q.* Well, they told you that?

"*A.* They claimed they didn't want to pay a double taxation.

"*Q. That is right, so they didn't want to pay an income tax on any dividend from the corporation?*

"*A. That is correct.*

"*Q.* Now, you knew that, didn't you?

"*A.* All I knew is what they told me. They told me they are not interested in selling the building because it would be a double taxation but if I could find a purchaser to buy the entire stock and then change the officers so the corporation would be still in existence and there is a mortgage available for $130,000 and therefore the new purchaser—all he would need is $95,000 cash to acquire the stock.

"*Q.* In other words, all that—and this is definite—Mr. Saffir would have to pay for the stock would be $95,000; is that correct?

"*A.* Yes." (Italics supplied.)

While plaintiff's attorneys in their brief stated this testimony is due to a "possible error" on plaintiff's part, and that under exhibit 3 defendants could have demanded the full price of $225,000 for their stock, and still be entitled to any distributions by the corporation made prior to the time the title to the stock passed, this would leave an absurd result. Defendants under this theory would withdraw in dividends the $85,000, the difference between the $130,000 under the new mortgage if made and the $45,000 mortgage on the property, and also receive $225,000, or in all $310,000 for the property, far more than they ever asked or were entitled to.

Plaintiff's right to recover his commission depended upon proof of the existence and performance of an oral contract. There was no written contract under which defendants agreed to pay plaintiff a commission. A performance by the plaintiff whereby the defendants would not receive the tax benefits contemplated by them, the inducing motive for their proposed sale, was not an act for which the defendants agreed to pay a commission. In more explicit terms, the defendants agreed to pay a commission to plaintiff if he furnished a purchaser who would buy the defendants' stock upon such terms that the sale of stock would constitute only a capital gains transaction.

To determine whether the proposed terms of purchase created this tax benefit, the defendants submitted the offer of purchase to their attorney. In his opinion the terms of purchase were unfavorable in regard to the tax position of the defendants. Upon his advice, the defendants refused to accept the offer submitted. According to the contract as established

by the evidence, the plaintiff, in this action for commission under the contract, had the duty of proving complete performance, that is, proving that the terms of purchase were such that the defendants would attain the beneficial tax position that they desired. Upon this point the plaintiff offered no proof but relied solely upon exhibit 3 as containing the complete agreement contemplated by the parties.

Plaintiff during cross-examination stated as follows:

"*Q.* But when the mortgage was placed the Tobin Building Corporation would receive that $130,000 and it would become cash on hand or in the bank of the Tobin Building Corporation; isn't that correct? You're an experienced real-estate man; you know that?

"*A.* I understood that that was the mechanics of negotiating the deal; that would only require say, $90,000 after the acquiring of the building, subject to a mortgage of $130,000, and the corporation would get a mortgage where the former shareholders would get the money from the mortgage proceeds. There was a small mortgage at the time."

Counsel for plaintiff in the brief on appeal now attempt to avoid the implication of plaintiff's testimony during the trial in regard to the agreed terms of the transaction. But one must not lose sight of or ignore the burden upon plaintiff of establishing the existence of, and the definite terms of, the oral contract which he alleged existed and was performed on his part. Plaintiff's clear testimony was in contradiction to the position now taken on appeal that the purchaser was obligated to pay the full stock purchase price of $225,000 from the purchaser's own funds. In effect, and it is admitted by plaintiff on appeal, plaintiff submitted an offer of purchase to the defendants which was capable of various interpretations or constructions. Defendants doubted

whether the offer incorporated the tax benefits they expected, and for that reason wanted to consult their attorney who advised them that it involved more than a capital gains tax.

The finding of the jury that the terms of the contract were fully set forth in exhibit 3 is not borne out by the evidence. Plaintiff's own testimony in direct and upon cross-examination was explicitly to the effect that he understood that the purpose of the proposed sale of stock rather than the property was to reduce the tax liability of the defendants.

Construing the evidence in the light most favorable to the plaintiff at the close of his case, it is clear that plaintiff did not prove the performance of the contract that he claimed had been entered into. There was no proof that the offer as submitted to the defendants would provide a sale of stock in which the Federal income tax liability of the defendants would be limited solely to that of a capital gains transaction. Proof of this performance was essential to the plaintiff's right to recover.

Defendants in their requests to charge asked that the jury be instructed as follows:

"I charge you further that both the plaintiff and the defendants agree that they had an understanding that the defendants would be subject to only 1 income tax, to-wit, a capital gains tax not to exceed 25% of their profit if a sale of the stock was effectuated. I charge you that the defendants had the legal right to minimize their income-tax liability. I charge you that if the corporation had secured a mortgage loan in the amount of $130,000 on the Tobin Building and had distributed the proceeds of such loan to the defendants, such distribution would have constituted a dividend to the defendants and would have been gross income and not a capital gain. I charge you further that the income-tax rate applicable to such income was higher than the rate applicable to taxes upon capital gains. I charge you further that the

incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step from the commencement of negotiations to the consummation of the sale is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title."

The trial judge neglected to give this charge or its contents as far as it affected the Federal taxes on the transaction. Defendants were entitled to such a charge and the failure to give it was error. In view of the plaintiff's testimony and admissions in the record before us in establishing the terms of the oral contract, this charge would have been the equivalent of directing a verdict for the defendants. A tax saving was the basic purpose and an essential element of the proposed transaction and plaintiff did not prove that the offer of purchase he procured for the defendants embodied a tax-saving transaction.

The judgment upon the verdict in the trial court is reversed, with costs to the defendants. An order will enter remanding the case to the trial court with directions to set aside the judgment in plaintiff's favor and to enter a judgment for defendants.

CARR, BUSHNELL, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

DePOLO *v.* GREIG.

1. LICENSES—BLUE SKY LAW—SALE OF UNVALIDATED STOCK—PRESIDENT.

   The president of a corporation who was its agent in making the sale of its unvalidated stock would be jointly and severally liable under the blue sky law (CL 1948, § 451.120).

2. PLEADING—AMENDMENT—RES JUDICATA.

   It was not error nor an abuse of discretion on part of trial court to allow defendant to amend answer so as to permit defense of *res judicata,* where there had been no final adjudication in Federal court theretofore in proceedings involving issues presented in instant case.

3. LICENSES—BLUE SKY LAW—UNVALIDATED STOCK—WAIVER.

   Waivers releasing corporation and its officers from all liability in connection with purchase of stock with knowledge that stock being purchased had not been validated, when considered with subsequent conduct including acceptance of directorship and vice-presidency and more or less active participation in management until huge loss sustained on one order forced the corporation into bankruptcy, established estoppel (CL 1948, § 451.120).

4. SAME—PRINCIPAL AND AGENT—HUSBAND AND WIFE—WAIVER.

   Wife, as principal on whose behalf plaintiff husband purchased unvalidated stock and executed waiver releasing corporation and its officers from all liability in connection with such purchase and thereafter participated more or less actively in management of the corporation, was estopped by the acts of her agent.

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur, Securities Acts § 46.
[1] Blue Sky Laws. 87 ALR 42.
Personal civil liability of corporate officers and directors in case of sale of bonds or stock in violation of statutory requirements. 144 ALR 1356.
[4] 19 Am Jur, Estoppel § 176.
[5–8] 30 Am Jur, Judgments § 248 *et seq.*

5. PRINCIPAL AND AGENT—RES JUDICATA.
The determination of the issue in a suit against the principal bars an action against the agent on the same cause of action.

6. JUDGMENT—RES JUDICATA—PRINCIPAL AND AGENT.
The unilateral character of the estoppel of an adjudication against a plaintiff in his action against a principal is justified by the injustice which would result in allowing a recovery against a defendant for the conduct of another, when that other has been exonerated in a direct suit and such rule is applied where the relation between the defendants in the 2 suits is that of principal and agent, master and servant, or indemnitor and indemnitee.

7. SAME—FEDERAL COURT—BANKRUPTCY—WAIVER—BLUE SKY LAW.
The Federal court's finding of waiver on part of purchasers of unvalidated stock of bankrupt corporation constitutes *res judicata* against president and agent of the corporation in the sale of the stock in action against him wherein such defense was interposed by amended answer after final determination in Federal court, it being unnecessary that there be a mutuality in the application of *res judicata* under the circumstances (CL 1948, § 451.120).

8. SAME—RES JUDICATA—BANKRUPTCY OF CORPORATION—ACTION AGAINST PRESIDENT.
Plaintiffs, husband and wife, in action against president and agent of corporation for sale to them of unvalidated stock, who had full opportunity to present same issues in bankruptcy proceeding of corporation and assert none was presented that is unavailable to defendant herein, were barred by adjudication had in bankruptcy proceeding (CL 1948, § 451.120).

Appeal from Wayne; Marschner (Adolph F.), J. Submitted January 13, 1954. (Docket No. 40, Calendar No. 45,690.) Decided February 18, 1954.

Case by Katherine DePolo and Bruno DePolo against William R. Greig for damages arising from sale of corporate stock. Judgment for defendant. Plaintiffs appeal. Affirmed.

Fildew, Degree & Fleming, for plaintiffs.

Armstrong, Essery, Helm & Marshall, for defendant.

BUTZEL, C. J. Bruno and Katherine DePolo brought suit against William R. Greig to recover the sum of $40,000, the purchase price of 40,000 shares of common stock of the Spline & Gear Machine Company, Inc., a Michigan corporation. The stock had never been validated for sale under the blue sky law, PA 1923, No 220, as amended (CL 1948, § 451.101 *et seq.* [Stat Ann § 19.741 *et seq.*]). Defendant was the president and agent of the corporation in making such sale and as such would be jointly and severally liable under the statute, CL 1948, § 451.120 (Stat Ann § 19.760).

Mr. DePolo was associated with a successful concern that manufactured screw-machine products, bolts and nuts. He drew a large salary from this concern and, over a period of 20 years, had invested a considerable amount in the stock market. He became interested in Mr. Greig, the defendant, and the Spline & Gear Machine Company, Inc., through a mutual friend and decided to make an original investment of $20,000 in the stock of that corporation. He admitted that he was told and knew that the corporate statement showed a deficit of $37,000 but he nevertheless was willing to invest in the corporation. DePolo also admitted that he was introduced to a member of the firm of accountants that prepared the corporation's accounts and that he had the opportunity to discuss the corporation's financial condition. At the time of the purchase he was told that the stock had never been validated. Testimony in behalf of the defendant showed that DePolo did not care to have the stock validated and that the attorney for the corporation expressed doubts as to whether the stock would be accepted for filing by the Michigan corporation and securities commission because of the large deficit. Whether it would have been accepted for filing for limited purposes is not before us. The corporation's attorney told DePolo

that in order to avoid the severe penalty under the statute he would have to sign a waiver that was prepared and which stated, in substance, that the stock had not been accepted for filing by the Michigan corporation and securities commission and was not exempt from the Michigan blue sky law, and that DePolo, having knowledge of such facts, had refused the voluntary offer of the officers of the corporation to take back the shares and to accept a refund of the full amount of the purchase price; and, further, that he waived all rights and benefits that he might otherwise have been entitled to under section 20 of the Michigan blue sky law (CL 1948, § 451.120 [Stat Ann § 19.760]) with respect to sales in violation thereof and that he released the corporation and its officers of any and all liability in connection therewith. DePolo not only signed the instrument but also swore to it before a notary public. The sale was made on or about the 26th of December, 1947. When the stock was issued in DePolo's name he asked that his wife's name be added to the stock certificate as a joint owner. About 2 weeks later DePolo bought, as a joint owner with his wife, an additional $20,000 worth of the shares and executed a similar waiver of purchaser's rights under the blue sky law. The stock in all cost him $40,000. He and defendant became friends; he joined the golf club of which defendant was a member; he paid his own membership fee but the corporation paid the tax on the fee as well as from $700 to $900 for his expenses at the club. The corporation also paid the cost of sending plaintiffs' children to a summer camp.

Plaintiff testified that he was never active in the corporation and went there about once a month but there is testimony that he visited the place at least once a week. Some 6 months after he purchased the stock he was elected director and vice-president. He claims that he did nothing in that capacity. Evi-

dently the directors' meetings were informal, the corporation being one with a limited number of stockholders. Notwithstanding DePolo's testimony to the contrary, it appears that he did often counsel with defendant and others in regard to orders, methods of manufacturing, production costs and labor. He was more than a passive stockholder who had made an investment without participating in the management in any way. He claims that he did not receive regular reports but this is denied. He was never refused access to the financial reports that were available. We find no evidence of fraud in inducing the purchase of the stock or thereafter. The corporation did make some profit for a short period after DePolo became interested but there were further losses and particularly so on a contract made with Montgomery Ward & Company, where there was a loss of over $100,000 on the order. This was more than the corporation could stand and it went into bankruptcy. DePolo resigned from the corporation as director and vice-president in March, 1949. When the corporation was in difficulties he and his wife tendered back the stock and demanded refund of the purchase price, which was refused.

DePolo and his wife brought suit in the Wayne county circuit court on July 5, 1949, against the corporation and Greig as defendants. On October 13, 1949, plaintiff filed a claim for $40,000 against the corporation in the United States District Court for the Eastern District of Michigan, Southern Division, in the bankruptcy matter that was pending. Evidently, as appears from the opinion of the referee in bankruptcy, the identical claims under the blue sky law, including the question of whether plaintiff was agent of his wife were presented and carefully considered by both the referee and the district judge who in a written opinion affirmed the referee's ruling disallowing plaintiffs' claim. On January 5, 1951,

plaintiffs moved to strike defendant's answer to their amended declaration in regard to the reference to the pending bankruptcy proceedings wherein the corporation asked for a plan of arrangement under chapter 11 of the Federal bankruptcy act. The motion set forth that such plan had been withdrawn; that the corporation had been adjudicated a bankrupt and that there had been a stipulation and order discontinuing the case against the corporation in the circuit court. The circuit judge granted such motion but gave defendant 10 days in which to file a new answer. Six months later, after there had been a motion to dismiss on the part of defendant on answer filed therein, the court permitted defendant to amend his answer to show the proceedings in the United States District Court and permitting the defense of *res judicata* which applied to the controversy in the instant case. We find no error in permitting such amendment as theretofore there had not been a final judgment in the United States District Court. The judge did not abuse his discretion.

It is claimed, in the first place, that the waiver signed by DePolo is of no force and effect; that it was a method of vitiating and emasculating the force of the blue sky law, *supra,* and that if it were of any legal effect it could be resorted to by everyone to avoid the provisions of the blue sky law. We realize the force of this argument but there is testimony that DePolo agreed that no steps be taken to validate the issuance of the stock and, further, with the knowledge that the stock had not been validated, he made a second purchase within 14 days after the first purchase. We believe that the signing of the instruments when considered with his subsequent conduct establishes an estoppel. See *Schrier* v. *B & B Oil Co.,* 311 Mich 118, and *Moore* v. *Manufacturers Sales Co.,* 335 Mich 606. DePolo was not

merely a purchaser of stock but he took an active interest in the corporation even though he did not participate to the degree that the purchasers of stock did in the *Schrier* and *Moore Cases, supra.* He waited until after the huge loss had been incurred on the Montgomery Ward contract and then first offered to surrender his stock and demanded his money back.

It is claimed, however, that even if DePolo's actions would estop him, they would not bind Mrs. DePolo whose name at DePolo's request had been entered on the stock certificates as a joint owner. According to her own testimony he was her agent at all times and was acting as her agent with her full authority and she is estopped by the acts of her agent.

Even if, however, there were any doubt about the question of estoppel, there is a further reason why plaintiffs cannot recover and on which the trial judge largely based his decision. Plaintiffs presented their claims in the bankruptcy court. From an adverse ruling by the referee in bankruptcy they appealed to the United States District Court for the Eastern District of Michigan, where the district judge reviewed the entire proceedings and held against the claim of plaintiffs. Defendant was active in the defense of the claim; the corporation was his principal. The ruling by that court established that there was no liability on the part of the corporation for whom the defendant, as officer and agent, acted. The present case is controlled by that of *Krolik* v. *Curry,* 148 Mich 214, where we said (p 222):

"Where a litigant has chosen to proceed against the agents of a corporation for misconduct on their part and has been defeated, he is thereby barred from litigating the same cause of action against the principal. *Emma Silver Mining Co. (Limited)* v. *Emma Silver Mining Co. of New York,* 7 F 401.

It follows that a determination of the issue in a suit brought against the principal bars an action against the agents. *Emery* v. *Fowler,* 39 Me 326 (63 Am Dec 627)."

Plaintiffs claim that the case against the corporation is against a different party; that there is a lack of mutuality and that it is not binding upon plaintiffs in the suit against the agent.

In a technical sense, the claim now asserted by plaintiffs against defendant is to be distinguished from that alleged as the basis of the claim in the bankruptcy proceedings. That claim was based upon a cause of action against the corporation. The present action is based upon the joint and several liability of the defendant as the corporation agent under the statute, CL 1948, § 451.120 (Stat Ann § 19.760). Plaintiff alleges that since the present defendant would not have been bound by a decision in the Federal court, not being a party to that action, plaintiff cannot now be bound by the decision against him; that is, the doctrine of *res judicata* must be applied only where there is mutuality.

The asserted necessity of mutuality in the application of *res judicata* has been the subject of extensive writing by legal commentators. See 65 Harv L Rev 818, 862; 64 Harv L Rev 509; 47 Mich L Rev 860; 35 Yale LJ 607; 91 U of Pa L Rev 467; 36 Va L Rev 963; 9 Va L Reg NS 241; 29 Ill L Rev 93; 18 NYULQR 565. Among the leading cases involving this issue are *Bernhard* v. *Bank of America National Trust & Savings Association,* 19 Cal2d 807 (122 P2d 892); *Coca Cola Company* v. *Pepsi-Cola Company,* 36 Del 124 (172 A 260); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 225 US 111 (32 S Ct 641, 56 L ed 1009); *Good Health Dairy Products Corporation of Rochester* v. *Emery,* 275 NY 14 (9 NE2d 758, 112 ALR 401).

Plaintiffs in their brief admit that an exception to the requirement of mutuality exists where the liability of the defendant is entirely dependent upon the culpability of one exonerated in a prior suit. This exception is recognized in the case cited by the plaintiffs, *Bigelow* v. *Old Dominion Copper Mining & Smelting Co., supra.* As stated in that case (p 128):

"The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the 2 suits has been that of principal and agent, master and servant, or indemnitor and indemnitee."

But conversely the rule applies where the principal has been exonerated in a prior suit which determined that the agent had committed no actionable wrong. In the present case the fact that the corporation and the defendant as its agents are, hypothetically, jointly and severally liable under the statute, does not remove the basis of the corporation's liability. The decision of the Federal court was based upon the finding that the plaintiffs had waived their rights under the statute. The finding of such a waiver was an adjudication of plaintiffs' rights against the corporation and constitutes *res judicata* against the present defendant who was acting as an agent of the corporation.

Aside from the principle of mutuality, plaintiffs have asserted no reasons why collateral estoppel should not be applied as barring their action against the present defendant. Defendant as president and principal stockholder of the corporation was a stranger to the bankruptcy proceedings in only the strictest sense of the term. Plaintiffs had full op-

portunity to present the same issues now presented against the defendant. They assert no defense available to the corporation that is unavailable to the defendant. The only inequity asserted by the plaintiffs is the denial of the opportunity to relitigate those same issues.

We are cognizant of the fact that plaintiff had no opportunity to select the forum for the original litigation of these issues. But, see *Maryland Casualty Co.* v. *United States,* 32 F Supp 746, and *Loughran* v. *Reynolds,* 70 Cal App2d 241 (160 P2d 904), where the denial of a claim in bankruptcy proceedings was held to be *res judicata* in a subsequent action involving the previously determined issues. Also, *Forest City Steel & Iron Co.* v. *Detroit & Toledo Shore Line Railroad Co.*, 154 Mich 182.

In *Walz* v. *Reliance Insurance Co. of Philadelphia,* 221 Mich 345, this Court indicated that the application of *res judicata* necessitated mutuality. At page 348, we stated:

"As the estoppel must be mutual, suppose that the judgment in the *Peninsular Case** had been adverse to plaintiffs, on this state of facts would it have been conclusive in all the cases? Surely not. Neither is the judgment conclusive as to defendant here."

In that particular case, plaintiffs were attempting to use affirmatively a judgment in a previous case as conclusive evidence of the liability of defendant. Such an application would have had the effect of depriving the defendant of a right to defend the case in court since the defendant had not been a party, or in privity with or an agent of the defendant in the previous suit.

---

* A companion case. *Walz* v. *Peninsular Fire Ins. Co.,* 221 Mich 326.—REPORTER.

In *Clark* v. *Naufel,* 328 Mich 249, this Court refused to permit defendant in a second suit to set up collateral estoppel against a plaintiff who, as defendant in a prior suit, had been found liable, even though the result of the first suit must have been based upon the negligence of the defendant in that case; that case did not involve the aspect of corporation and agent liability as in the present case.

We believe that the present case falls squarely within the rule of *Krolik* v. *Curry, supra,* and that plaintiffs are bound by the decision against them in the Federal court.

Judgment is affirmed, with costs.

Carr, Bushnell, Sharpe, Boyles, Reid, Dethmers, and Kelly, JJ., concurred.

INDEX.

ABANDONMENT—See DIVORCE (1).

ABDUCTION—See CONSPIRACY (1, 2); EVIDENCE (6); PARENT AND CHILD (2, 3).

ABUSE OF DISCRETION—See CRIMINAL LAW (27).

ACCELERATION CLAUSE—See VENDOR AND PURCHASER (3, 4).

ACCIDENT—See AUTOMOBILES (7, 8, 17, 22); MASTER AND SERVANT (1); NEGLIGENCE (1); TRIAL (8, 12); WITNESSES (1); WORKMEN'S COMPENSATION (9, 16).

ACCOUNTING.

1. Plaintiff's failure to produce note referred to in mortgage did not preclude finding of trial judge in suit for accounting that note and mortgage did exist, where execution of note and mortgage was admitted in defendant's answer and cross bill (Court Rule No. 17, § 10 [1945]). *James* v. *Milks,* 555.
2. An accounting, limited to receipts from property transferred by plaintiff's decedent to herself and defendant husband as tenants by the entireties by reason of his fraud, since her death and covering no other phase is ordered, where during the 6 years of her marriage the avails of such property appear to have been used largely in the reduction of an outstanding mortgage and use of other income of decedent seems to have been acquiesced in by her. *Schelbe* v. *Buckenhizer,* 602.

See MORTGAGES (4); PLEADING (4); PRINCIPAL AND AGENT (3).

ACCUSATIONS—See DIVORCE (14).

ACQUIESCENCE—See BOUNDARIES.

ACTION ON THE CASE.

Action of trespass on the case was proper form of action to recover sum left with defendant for purpose of settling a tax case with the Federal government but which never came into his possession as his money, his retention thereof constituting an unlawful conversion. *Cozadd* v. *Healy,* 157.

ACTS—See ESTOPPEL (1, 2).

ADMINISTRATIVE LAW—See CERTIORARI (1); CONSTITUTIONAL LAW (1, 2); HIGHWAYS AND STREETS (7–9); MUNICIPAL CORPORATIONS (7); TAXATION (9).

ADMISSIONS—ACCOUNTING (1); AUTOMOBILES (7, 8); COMPROMISE AND SETTLEMENT; EQUITY (3); ESTATES OF DECEDENTS (2); ESTOPPEL (2).

ADOPTION.

1. A release of a child for the purpose of adoption is something less than, but a part of, a consent given, in effect, by the signer of the release in conjunction with the licensed placement agency in whose favor the release was executed (CL 1948, § 710.3). *In re Spencer (Jones* v. *Wasama)*, 50.
2. The statutory authority conferred upon a guardian of the person of a child to consent to adoption of the child carries within it the implied and included authority to release the child for adoption (CL 1948, § 710.3). *Id.*
3. Consent to adoption of a child, executed by licensed placement agency to which duly appointed guardian of the child's person had released the child, was legally effective, where the agency's consent was executed after the release (CL 1948, § 710.3). *Id.*

See WILLS (1, 2, 7).

ADVERSE POSSESSION.

Title established through adverse possession is free from encumbrance and of a character to assure quiet and peaceful enjoyment of the property by the owner, but it is not a marketable title of record until there has been a judicial determination of such title. *Escher* v. *Bender*, 1.

See VENDOR AND PURCHASER (2).

ADVERSE WITNESS—See WITNESSES (2, 3).

ADVERTISEMENTS—See EVIDENCE (7); NEGLIGENCE (1, 3).

AFFIDAVITS—See PLEADING (6); TRIAL (14).

AFFILIATE UNION MEMBER—See LABOR RELATIONS (2).

AGE—See HUSBAND AND WIFE (4).

AGREEMENT OF PARTIES—See DIVORCE (7); VENUE.

AIR CONDITIONING—See NEGLIGENCE (3).

AISLES—See EVIDENCE (7); NEGLIGENCE (2, 4, 9).

ALIBI—See CRIMINAL LAW (16).

ALIENATION OF AFFECTIONS—See CONSPIRACY (1); EVIDENCE (5).

ALIMONY—See DIVORCE (3, 4, 13); HUSBAND AND WIFE (5).

ALLEYS—See BROKERS (3).

ALTERATION OF INSTRUMENTS—See DEEDS (1–3).

AMBIGUITY—See INSURANCE (10); STATUTES (4); TAXATION (3, 8).

AMENDMENT—See APPEAL AND ERROR (7); AUTOMOBILES (2); PLEADING (2, 7); STATUTES (1, 11, 13).

ANNULMENT—See MARRIAGE.

ANSWER—See ACCOUNTING (1); APPEAL AND ERROR (18); EQUITY (3); FRAUD (6); PLEADING (4–6).

ANTICIPATED DANGER —See NEGLIGENCE (9).

APPEAL AND ERROR.

1. The Supreme Court hears appeals from orders of the circuit court in review of orders of the public service commission regulating railroads as a chancery case, hence, determines the facts *de novo* and makes own determination of the equities. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Public Service Commission*, 9.
2. All material facts properly pleaded must be accepted as true on appeal from a motion to dismiss the declaration in an action at law. *Hyma* v. *Lee*, 31.
3. Defendant officers may not assert on appeal from order denying plaintiff a right to re-employment as a city policeman a reason not relied upon and administratively determined as a fact by defendant public employer previous to or at the time of its refusal to re-employ plaintiff (PA 1951, No 263), *Borseth* v. *City of Lansing*, 55.
4. A question not raised in appellants' statement of reasons and grounds for appeal nor in the statement of questions involved in their brief need not be determined by the Supreme Court. *Id.*
5. A question as to the constitutionality of an ordinance or statute, other than one which goes directly to the jurisdiction of the court, cannot be raised for the first time on appeal. *Mitchell* v. *Grewal (Same* v. *Hofweber)*, 81.
6. It is unnecessary to determine whether road construction contract created obligation on part of contractor for the benefit of those using the highway, where plaintiff's declaration did not show a breach of his contractual obligations having a causal relation to plaintiff's injuries. *Vanderwall* v. *Goodwin*, 109.
7. The Supreme Court will not interfere with the exercise of a trial court's discretionary power to allow or refuse an amendment of a pleading unless the discretion is abused. *Howard* v. *Burton (Simpson* v. *Same, Thomas* v. *Same)*, 179.
8. An improper ruling by a trial judge as to the existence of the attorney-client privilege in regard to testimony by a witness, not a party to the lawsuit, cannot be asserted by the plaintiff as reversible error. *Schaibly* v. *Vinton*, 192.
9. An improper ruling by a trial court upon a question of privilege of a witness who is not a party to the case, cannot be excepted to by a party as an error justifying an appeal and a new trial, if the ruling denies the privilege and compels the witness to testify. *Id.*
10. Ruling of trial judge in nonjury case admitting into evidence the testimony of witness, not a party to the case, as to communication between himself and an attorney *held*, not reversible error, where trial judge stated that the issue arising from the reception of such testimony would have no consideration in deciding the case and it is evident it did not. *Id.*
11. Appellant is not in a position to urge as basis for new trial the claimed error of the trial court in refusing to permit him

APPEAL AND ERROR—Continued.

to introduce testimony of average income of husband of woman for whose death in highway accident administrator of her estate sought damages, where the trial judge commented that such subject matter was not of material significance in the case and question was withdrawn. *Bramer* v. *Ames*, 227.

12. The Supreme Court reviews chancery cases by a trial *de novo*. *White* v. *Burkhardt*, 235.

13. Estate's claim that settlement agreement which had been executed by decedent was void as an attempt to change liquidated amount of an agreement relating to a security interest in real estate was void is not discussed where, although it was claimed to have been raised at the trial, it was not considered by the trial judge (CL 1948, § 566.1). *Faber* v. *Glashagen's Estate*, 240.

14. A suit to impose a constructive trust for an alleged breach of an agent's duty is a chancery case and facts are reviewed *de novo* by the Supreme Court. *Kren* v. *Rubin*, 288.

15. The Supreme Court gives deference to the findings of facts by a trial judge in a chancery case due to his opportunity to observe the witnesses and thereby judge their credibility. *Id.*

16. The Supreme Court does not reverse a nonjury case on issues of fact unless the evidence clearly preponderates in the opposite direction. *Ebert* v. *Prudential Insurance Company of America*, 320.

17. Testimony is reviewed by the Supreme Court in the light most favorable to the plaintiff on defendants' appeal from denial of motions to direct verdict in their favor and for new trial on the ground that injured plaintiff had been guilty of contributory negligence as a matter of law. *Rutledge* v. *Gillespie*, 335.

18. Appeal from entry of default, not taken simply as of course but after trial court had stricken defendant-appellant's answer, is considered and not dismissed, where plaintiff did not move to dismiss the appeal upon being served with notice thereof but delayed making such motion on ground now claimed for dismissal until after appellant had procured a copy of transcript of proceedings in the trial court, prepared and settled the record on appeal, printed the record, and prepared and printed brief on appeal, since plaintiff was estopped by its delay. *Ann Arbor Bank* v. *Weber*, 341.

19. Claims made for the first time on appeal in the Supreme Court will not be considered by it, since it had not been presented to the trial court. *In re Renz' Estate (Department of Revenue* v. *Beattie)*, 348.

20. It is unnecessary to discuss whether or not chattel mortgage was void, either in whole or in part, under the bulk mortgage act, where the mortgage was *ultra vires* and void *ab initio* in its entirety (CL 1948, § 442.51 *et seq.*). *Pratt* v. *Valliquette*, 397.

21. The testimony must be construed most strongly in favor of the plaintiff in determining whether or not judgment was properly

APPEAL AND ERROR—Continued.

entered upon granting defendant's motion for judgment notwithstanding the disagreement of the jury (CL 1948, § 691.-701). *Routhier* v. *City of Detroit,* 450.

22. Trial judge's questions put to witnesses and rulings he made upon repeated and frequent objections, motions to strike and the making of other comments which were mainly captious or frivolous *held,* not to show bias upon part of trial judge. *Brown* v. *Brown,* 493.

23. An objection made to the ruling of a trial court, which fails to clearly advise the trial judge of the specific ground on which it was made, does not justify reversal. *Id.*

24. Testimony must be construed as strongly as possible in favor of plaintiff on defendant's appeal from denial of motions for directed verdict and for judgment notwithstanding verdict. *Muth* v. *W. P. Lahey's, Inc.,* 514.

25. The Supreme Court bases its conclusions on appeal upon the record before it. *Zdero* v. *Briggs Manufacturing Company,* 550.

26. The Supreme Court, in reviewing a chancery case *de novo,* is not bound by the findings of the trial judge but does give consideration and weight to his conclusions. *James* v. *Milks,* 555.

27. The Supreme Court hears appeal as from the original decree, where defendants appealed from denial of a defendant's motion for rehearing and plaintiff sought dismissal of the appeal because not taken from the decree itself. *Schelbe* v. *Buckenhizer,* 601.

28. The Supreme Court does not reverse a nonjury case on a question of fact unless the evidence clearly preponderates against the finding on which the judgment was based. *Case* v. *Beech Lanes, Incorporated,* 631.

29. The Supreme Court may not consider whether or not plaintiff real-estate broker's lack of license to sell corporate stock affected his right to recover commission for sale of entire stock of corporation, where no question in that regard was raised by the trial court. *Id.*

30. The Supreme Court has the duty of exercising its own judgment in passing upon the evidence on appeal in suits for separate maintenance (CL 1948, § 552.301). *Polander* v. *Polander,* 646.

31. The circuit court reviews judgments entered in the common pleas court on a transcript of the testimony and proceedings had in the common pleas court and does not hear the case *de novo;* the review being in the same manner, as near as may be, as cases appealed from the circuit court are presently reviewed by the Supreme Court (CL 1948, § 728.4, as amended by PA 1949, No 149; Court Rule No 77, effective in 1949). *Kellar* v. *United Metal Products Company,* 651.

32. The Supreme Court does not reverse the finding of a trial court on an issue of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction. *Id.*

APPEAL AND ERROR—Continued.

33. The trial court was without jurisdiction to vacate decree entered for the purpose of making a further or different determination and decree, where order of Supreme Court remanding the case was that further testimony might be taken in regard to disputed question as to whether the decree had been signed with the consent of plaintiff-appellant and the time within which a motion for rehearing might have been filed had long since expired without such motion having been filed (Court Rule No 48, § 1 [1945]). *Taylor* v. *Lint*, 673.

34. Objection to competency of witnesses who gave opinion testimony comes too late, where first made on defendant's appeal from consent judgment for plaintiff. *Sauer* v. *Rhoades*, 679.

35. Defendant's claim on appeal that trial court erroneously failed to construe sales agreement relative to tavern and restaurant business in his favor because it had been drafted by plaintiff's attorney, *held*, without merit, where it does not appear that the trial court was called upon to construe the agreement or that a judgment for plaintiff must depend on a construction thereof contrary to any claimed by defendant. *Id.*

36. Issue as to fraud concerning earnings of tavern and restaurant business in question, which was raised by defendant's answer *held*, not a basis for reversal on appeal, where the statement of questions involved does not present such issue and the record fails to disclose an affirmative showing as to such fraud in the trial court. *Id.*

See COSTS (15); CRIMINAL LAW (9); DIVORCE (5, 7); ESTATES OF DECEDENTS (6); JUDGMENT (5).

APPEARANCE.

1. Court rule authorizing a trial court to call upon parties or witnesses to testify orally in open court, grant continuances of causes for such purpose and issue process to compel the appearance of such party or witness before the court does not expressly or impliedly authorize issuance of process enforceable outside of the State (Court Rule No 32 [1945]). *Ann Arbor Bank* v. *Weber*, 341.

2. It is proper for court rules to provide that courts in their discretion may require attorneys for parties to appear before the court yet not require that parties be directed to appear as parties, as attorneys are officers of the court and the court has a right to require their attendance (Court Rules Nos 32, 35, § 4 [1945]). *Id.*

3. A court of this State has no judicial authority to subpoena a defendant, not in this State, to attend the session of a court of this State or to make an order for personal appearance for the purpose of discovery (Washtenaw Circuit Court Rule No 21). *Id.*

4. A party who has appeared in an action is entitled to notice of all future proceedings in the cause (Court Rule No 8, § 7 [1945]). *Borg* v. *Thomas*, 670.

See COSTS (19); DISCOVERY (3, 4).

APPLICATION—See RAILROADS (3).

APPROVAL—See NEGLIGENCE (3).

ARGUMENT TO JURY—See PERJURY (3); TRIAL (10, 11).

ARISING OUT OF EMPLOYMENT—See WORKMEN'S COMPENSATION (9, 11, 12).

ARREST.

1. Whether an officer has reasonable cause to believe person arrested committed a felony must depend upon the situation in the particular case. *Hammitt* v. *Straley*, 587.
2. Probable cause for an arrest for a felony without a warrant is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *Id.*
3. Probable cause for an arrest for a felony without a warrant does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth of the accusation. *Id.* 588.
4. A peace officer may arrest without warrant any person whom he suspects, on reasonable grounds, of having committed a felony. *Id.*
5. The facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest. *Id.*
6. It is for the jury to determine which way the evidence preponderates or what inferences should be drawn therefrom where the evidence, as to whether or not a peace officer had probable cause to believe that person arrested for a felony without a warrant, was conflicting and such that reasonable minds might differ as to the inference to be drawn; but where the facts are conceded or the evidence uncontradicted and susceptible of but 1 reasonable inference, issues as to probable cause are for the court. *Id.*

See DAMAGES (1); FALSE IMPRISONMENT (2, 4); JUDGMENT (2).

ASSAULT WITH INTENT TO DO GREAT BODILY HARM—See FALSE IMPRISONMENT (4).

ASSUMPSIT—See MONEY RECEIVED (2).

ASSUMPTION OF RISK—See MASTER AND SERVANT (3–8).

ASSURED CLEAR DISTANCE—See AUTOMOBILES (13).

ATMOSPHERIC CONDITIONS—See AUTOMOBILES (17).

ATTORNEY AND CLIENT.

The privilege of secrecy as to what passes between an attorney and client is the privilege of the client and he may waive it if he chooses; the privilege not being that of the court or any third party. *Schaibly* v. *Vinton*, 191.

See APPEAL AND ERROR (8, 10, 35); APPEARANCE (2); CONSPIRACY (2); DISCOVERY (4).

ATTORNEY FEES—See DIVORCE (4, 16); EVIDENCE (3).

AUTHORITY—See ADOPTION (2).

AUTOMOBILES.

1. Lessor of trucks was not subject to license as a contract motor carrier of property under motor carrier act, where it furnished fuel, oil, lubricants, repairs, insurance, license tags, garage and other service for the equipment to a lessee who paid rental based largely on mileage, took sole possession, furnished its own driver and transported its own property (CL 1948, § 477.1 *et seq.*). *People* v. *Hertz Driveurself Stations, Inc.*, 139.
2. The regulation of the business of leasing motor equipment to a lessee over whom the lessor exercised no control whatsoever is not a business covered by the title of the motor carrier act or within the purpose of the act as stated elsewhere than in amendment seeking to regulate the business of such leasing, hence, such amendment is unconstitutional (Const 1908, art 5, § 21; CL 1948, §§ 475.1, 475.2, 479.1). *Id.*
3. The purpose of the motor carrier act is to promote safety and conserve the use of the highways of the State and to supervise, regulate and control the use of such highways by motor carriers of passengers and property for hire upon and over such highways, hence, does not cover the business of leasing motor equipment to a lessee by a lessor who did not itself transport passengers or property for hire (CL 1948, § 475.1 *et seq.*). *Id.* 140.
4. Whether the relationship between plaintiff passenger and defendant motorist is that of a passenger for hire or a guest passenger within meaning of the guest act depends on the facts of each case (CL 1948, § 256.29). *Wallace* v. *Skrzycki*, 164.
5. Motion for directed verdict on ground that plaintiff was a guest passenger in defendant's automobile *held*, properly denied, where testimony was conflicting as to whether or not plaintiff had paid for his transportation to and from work in defendant's car (CL 1948, § 256.29). *Id.* 165.
6. It was reversible error to follow an instruction that plaintiff passenger had the burden of proof of establishing his claim against defendant motorist by a preponderance of the evidence by a further instruction that such defendant had the burden of showing that plaintiff was a guest passenger without payment (CL 1948, § 256.29). *Id.*
7. Testimony of police officer as to physical facts and admissions made by defendant oncoming motorist whose car collided with defendant host motorist and injured plaintiff *held*, properly received in evidence notwithstanding motion to strike by defendant oncoming motorist on ground that such witness had, before taking the witness stand, refreshed his recollection by reviewing the official police report and his own notes, both prepared by him at the time of the accident, where the witness had a personal, independent recollection of the accident and motion to strike failed to identify testimony to be stricken (PA 1949, No 300, § 624). *Id.*

AUTOMOBILES—Continued.

8. The statutory bar to use in any court action of reports required in the motor vehicle code to be made with reference to cars involved in accidents applies to reports made by drivers of vehicles involved and garage keepers under certain circumstances and has no application to notes or to reports made by investigating police officers of physical facts they have observed and admissions made to them by drivers of motor vehicles at the scene of the accident for use either as evidence or refreshing a witness's recollection (PA 1949, No 300, § 624). *Id.*

9. Trial judge's finding in nonjury case that plaintiff southbound motorist on through highway was guilty of contributory negligence *held,* justified under record submitted. *Schaibly* v. *Vinton,* 191.

10. The privileges of a motorist on a through highway do not carry the right to go beyond the legal speed limit nor to disregard the necessity for caution, where there is a caution signal as evidenced by a yellow flashing signal (PA 1949, No 300, § 614). *Id.*

11. Trial court properly denied defendants' motions for directed verdict and for judgment *non obstante veredicto* in action under death act, where testimony was such that jury could find that driver of their eastbound tractor and trailer must have noticed oncoming car in eastbound lane, which had started to overtake and pass 2 westbound cars would not have room on 20-foot pavement to pass between defendants' equipment and the westbound cars in north lane unless eastbound driver drove off onto 13′ 10″ shoulder but that he failed to do so and did not start to decrease speed until 4′ from car in which plaintiff's decedent was a passenger (CL 1948, § 691.581 *et seq.*). *Bramer* v. *Ames,* 226.

12. Verdict for plaintiff in action by administrator of estate of passenger in westbound car against driver of overtaking westbound car and owner and driver of eastbound tractor and trailer *held,* supported by evidence from which each of the 3 defendants could be inferred to be negligent. *Id.*

13. Instruction relative to statute as to duty of operator of motor vehicle to drive so as to be able to stop within the assured clear distance ahead and have his vehicle under proper control *held,* not to have misled jury (PA 1949, No 300, § 627). *Id.*

14. A motorist having the right of way at an intersection is not relieved from the duty to use reasonable care under the circumstances. *Garvit* v. *Krebs,* 256.

15. Questions of negligence of eastbound defendant motorist and contributory negligence of northbound plaintiff motorist were properly left to jury, where it appears latter had stopped before entering intersection of the 2 country roads, neither of which was a preferred highway, started across while defendant was 300′ away and approaching at estimated speed of 30 to 35 miles an hour and although plaintiff shifted to second gear defendant collided with her machine without having seen it. *Id.*

AUTOMOBILES—Continued.

16. Injection into case of a foreign issue by charge to jury about the emergency doctrine, correct in that it stated that one in sudden peril need not act with the very best judgment, but failing to state qualification that the situation must be one not brought about by the plaintiff's own negligence, constituted reversible error, where given without having been requested by either party to action arising out of collision at intersection of country roads, neither of which was a preferred highway. *Id.*

17. The question of whether or not 18-year-old pedestrian crossing easterly on a 50-foot boulevard on a dark, rainy night in December was guilty of contributory negligence in failing to observe the approach of defendants' southbound taxicab was properly submitted to jury, where there was conflicting testimony as to how the accident happened, credibility of the witnesses being for the jury. *Rutledge* v. *Gillespie,* 335.

18. The matter of contributory negligence of plaintiff's decedent, an eastbound pedestrian who had reached center or perhaps the easterly portion of street approximately 35 feet wide when struck by defendant's southbound car traveling at an excessive rate of speed before daylight on a dark, cloudy December morning, was properly left to jury, where there is evidence from which it may be inferred that decedent had made proper observation as to approaching traffic, formed a judgment as to its distance away and speed, again observed traffic while crossing the street and had exercised that degree of care and caution which an ordinarily careful and prudent person would exercise, to reach a place of safety. *Hoffman* v. *Stickney,* 478.

19. A pedestrian owes a duty to maintain a reasonable and proper lookout for his own safety when crossing a street used by motor vehicles and his failure to do so constitutes contributory negligence as a matter of law. *McKenzie* v. *Sternicki,* 487.

20. Southbound pedestrian who crossed in front of 3 lanes of westbound traffic stopped some 100 feet east of traffic light as required by walk to 47–1/2-foot barricaded safety zone for streetcar passengers and who twice observed westbound defendant motorist while 40 and 20 feet east of end of safety zone was guilty of contributory negligence as a matter of law in failing to continue to observe defendant whom he knew would have to alter his course to avoid the safety zone and who could legally continue westward south of the zone on the streetcar tracks and was struck by defendant's car while on such tracks. *Id.*

21. Statute which authorizes retention of vehicle carrying an overweight load and for imposition of a lien for securing payment of fine and costs, which lien may be avoided by furnishing a bond as security for such payment does not contemplate a forfeiture of the vehicle involved, although the legislature has power to provide for the forfeiture of property devoted to an illegal use (PA 1949, No 300, § 724[b], as amended by PA 1952, No 13). *People* v. *Wolfe,* 529.

22. Automobile insurance policy which provided that it afforded insurance for bodily injury liability complying with the finan-

AUTOMOBILES—Continued.

cial responsibility law of any State during the period of the policy to the extent of the coverage and limits of liability required thereby, and which was issued to principal defendant while he was restricted in his driving his car to and from work, imposed liability upon the insurer for injuries negligently inflicted by insured upon plaintiff at a time other than while he was driving to or from work, where such limited coverage was not recognized by the financial responsibility law and restriction upon insured's right to drive had been removed prior to occurrence of accident (PA 1949, No 300, §§ 518, 520). *Judd* v. *Vollmer,* 581.

23. Statute prohibiting the dealing in automobiles on Sunday in counties having a population of 130,000 or over and providing for extension of its application as to other counties as they acquire such population *held,* constitutional as a general act, where it appears that it applied to the counties where most of the sales are made and competition is the keenest and most needful of regulation (Const 1908, art 5, § 30; PA 1953, No 66). *The Irishman's Lot, Inc.,* v. *Secretary of State,* 662.

See CARRIERS (1, 2); COSTS (14, 18); DIVORCE (16, 19); FALSE IMPRISONMENT (4); HIGHWAYS AND STREETS (5); TRIAL (9); WITNESSES (1); WORKMEN'S COMPENSATION (14, 15).

AVERMENTS OF FACT—See CRIMINAL LAW (19, 20).

BAD FAITH—See LABOR RELATIONS (4); MUNICIPAL CORPORATIONS (16, 17).

BANKRUPTCY—See JUDGMENT (7, 8); LICENSES (2).

BANKS AND BANKING.

1. The national bank act, in providing for and governing the establishment of branches by national banks and fixing the standard by which it must be determined as whether State law permits it to be done by State banks sets up a standard for the violation of which would be a Federal offense (12 USCA, § 36; CL 1948, § 487.34). *Attorney General, ex rel. State Banking Commissioner,* v. *National Bank of Detroit,* 610.

2. The State Supreme Court is without jurisdiction to enforce a Federal law against a federally-created corporation even though the Federal law employs State law as a measuring stick for its application; hence, such court may not prevent a national bank from establishing a branch in a city in which a State bank is already in operation although such action by a State bank is barred by State statute (12 USCA, § 36; CL 1948, § 487.34). *Id.*

3. A bank deposit is prima facie the property of the person in whose name the deposit is made and an adverse claimant must show a clear and perfect title to it. *Muskegon Lumber & Fuel Company* v. *Johnson,* 655.

4. Evidence adduced in behalf of intervening wife of defendant in whose sole name garnisheed bank account had stood *held,* to have made a sufficient showing that such account was the property of the defendant and herself. *Id.* 656

BANKS AND BANKING—Continued.

See COSTS (7); HUSBAND AND WIFE (7, 9); JOINT TENANCY; MONEY RECEIVED (6); TAXATION (1).

BARGAINING AGENT—See COSTS (6); LABOR RELATIONS (1).

BARNS—See MASTER AND SERVANT (1, 8, 11).

BARRICADE—See NEGLIGENCE (2).

BELTS—See TAXATION (10).

BENEFICIARIES—See TAXATION (5).

BERM—See AUTOMOBILES (11).

BIAS—See APPEAL AND ERROR (22); WITNESSES (3).

BICYCLE—See WORKMEN'S COMPENSATION (11).

BILL OF COMPLAINT—See EQUITY (3).

BILLS AND NOTES—See ACCOUNTING (1); PLEADING (4).

BINS—See TAXATION (9).

BISHOPS—See DEEDS (1, 3).

BLUE SKY LAW—See JUDGMENT (7); LICENSES (1, 2).

BOARD OF ZONING APPEALS—See MUNICIPAL CORPORATIONS (8, 9, 11, 13, 15–18).

BOAT—See DIVORCE (19).

BONDS.

1. Revenue bonds for construction of bridge do not constitute an indebtedness of the State within meaning of provision of the Constitution limiting State indebtedness for improvement of the highways, where statute providing for their issuance declared they were payable solely from revenues of the State agency constructing and operating the bridge and source of payment was stated on the face of the bonds as well as that they are not general obligations of the State (Const 1908, art 10, § 10; PA 1952, No 214, as amended by PA 1953, No 141). *Nichols* v. *State Administrative Board*, 617.
2. Revenue bonds of State agency do not become general obligation bonds of the State on the theory that the principal is liable for the acts of its agent, where the authorizing statute and the bonds both state they were payable solely from revenues and were not general obligations of the State (PA 1952, No 214, as amended by PA 1953, No 141). *Id.*

See AUTOMOBILES (21); COSTS (8, 11, 16); COUNTIES (2, 3, 6); DIVORCE (23); PROHIBITION; STATES (4); TAXATION (4, 5).

BOOKKEEPER—See INSURANCE (7).

BOUNDARIES.

1. Boundary line between adjacent parcels of land, as established by a fence or other marker that is acquiesced in by the owners

BOUNDARIES—Continued.

of the parcels, becomes the actual boundary line of the properties and will not be changed even though a subsequent survey shows error. *Escher* v. *Bender*, 1.

2. All land within a boundary line that has been established by acquiescence is included within the original description and passes with the property to which it has become attached. *Id.*
3. A boundary line may not be said to be established by acquiescence, where no fences, monuments or other man-made markers have been established. *Id.*

BRANCH BANKS—See BANKS AND BANKING (1, 2).

BRANCH LINE—See RAILROADS (2, 3).

BREACH OF CONTRACT—See SPECIFIC PERFORMANCE (4).

BRIDGES—See BONDS (1); DRAINS (1, 4, 5); MANDAMUS (3); PROHIBITION; STATES (1, 4).

BRIEFS—See COSTS (19).

BROKERS.

1. The burden of proof rests upon a broker who sues for commission for sale of corporate stock to establish a contract under which he was authorized to find a purchaser for the stock in question for the amount fixed by the owners or for such lesser amount as they might thereafter agree to accept and also to establish that he found a purchaser ready, willing and able to buy the stock on such terms. *Case* v. *Beech Lanes, Incorporated*, 631.
2. Plaintiff broker *held*, to have failed to sustain burden of proof as to contract for commission for sale of corporate stock or that he had found a purchaser ready, willing and able to buy the stock on terms fixed by defendants or acceptable to them. *Id.*
3. Real-estate broker who owned 10' x 200' strip of land at back of lots which was not dedicated for use as alley for lots for which he negotiated sales to defendants, who owned 2 other lots also adjacent to lots defendants purchased and the 10' strip and who obtained a deferral of action by defendant purchasers upon their discussion of the strip of land usable for alley purposes *held*, not to have become legally obligated to permit defendants' use of such strip. *Kern* v. *Schaar*, 637.
4. Plaintiff real-estate broker was not entitled to commission for sale of real estate, where offer submitted to defendants did not carry out understanding and agreement of the parties in regard to the Federal income taxes payable by defendants. *Fertel* v. *Adler*, 689.
5. A real-estate broker, seeking to recover commission for sale of property under an oral contract, has the burden of establishing the existence of, the definite terms of, and his own complete performance of the contract. *Id.*
6. Jury's finding that plaintiff real-estate broker had sustained his burden of proof as to terms of oral agreement to sell real

BROKERS—Continued.

estate by exhibit containing an offer to purchase or performance of such agreement *held*, not sustained by evidence, where proposed sale of stock of corporation owning the property, rather than the property, was to reduce the tax liability and offer presented defendants was not such as to effect such reduction in tax liability. *Id.*

7. Failure of trial court to submit defendants' request to charge that transaction would be such as to subject them to but 1 income tax, a capital gains tax, from sale of stock of corporation owning office and store building and that the securing of a mortgage by their corporation and distribution of proceeds thereof to them as owners of the stock would have constituted a dividend which was gross income and not a capital gain, hence, subject to a higher income tax was error in real-estate broker's action for commission, in view of the testimony adduced even when construed most favorably to plaintiff. *Id.* 690.

BUILDING PERMITS—See MUNICIPAL CORPORATIONS (13).

BUILDINGS—See CONTRACTS (1, 2); COUNTIES (2, 4–6).

BULK MORTGAGES—See APPEAL AND ERROR (20).

BURDEN OF PROOF—See AUTOMOBILES (6); BROKERS (1, 2, 5, 6); ESTATES OF DECEDENTS (9, 10); MORTGAGES (1); MUNICIPAL CORPORATIONS (25); SPECIFIC PERFORMANCE (3); STATUTES (15); WITNESSES (7); WORKMEN'S COMPENSATION (1, 2).

BURGLARY—See INSURANCE (6–9).

BURLAP—See TAXATION (10).

BUSES—See CARRIERS (1).

CAPITAL GAINS TAX—See BROKERS (7); EVIDENCE (9).

CARRIERS.

1. Issues of fact were presented for decision by jury against bus owner and operator for injuries sustained due to sudden stopping to avoid a collision with another motor vehicle, following driving at excessive speed and without having made proper observations for traffic passing through an intersection, where plaintiff's pleading and proof supported such theory of the case and was at variance with testimony on such matters presented by defendants, hence, it was error to grant defendant's motion for judgment notwithstanding disagreement of the jury. *Routhier* v. *City of Detroit*, 450.
2. Neither the lessor nor the lessee of motor vehicles nor the latter's driver who owned the truck and had leased it to the lessor are carriers of passengers or property for hire over the highways subject to the valid provisions of the motor carrier act, where the property carried in the leased equipment was the lessee's own merchandise (CL 1948, § 475.1 *et seq.*). *Lloyd A. Fry Roofing Company* v. *Public Service Commission*, 544.

See AUTOMOBILES (1–3); COSTS (4).

CASE—See ACTION ON THE CASE; MONEY RECEIVED (1).

CASH—See DIVORCE (16).

CAUTION SIGNALS—See AUTOMOBILES (10).

CERTIORARI.

1. A court does not determine administrative policies nor purely administrative questions when reviewing the action of an administrative tribunal on an appeal in the nature of certiorari. *Lenz* v. *Mayor of Detroit*, 384.
2. The office of the common-law writ of certiorari is to bring before the court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior tribunal has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law. *Id.*
3. The principal office of the writ of certiorari is to control the action of an inferior tribunal and to keep it within its jurisdiction. *Id.*
4. Well-stated allegations of fact in an application for a writ of certiorari must be taken as true for the purpose of determining whether or not the denial of a motion to dismiss the writ was proper. *Asta* v. *Department of Revenue*, 505.
5. A party is not bound to follow appeal procedure set up in the statute which he assails as unconstitutional, hence, he may resort to an independent attack on the statutory proceedings by the use of the writ of certiorari. *Id.*
6. The function of the writ of certiorari is to review the jurisdictional validity and errors of law of inferior tribunals and judicial bodies not according to the course of the common law. *Id.*
7. The issue as to whether the defendant department of revenue, in exercising a judicial function based upon statutory authority to confiscate alleged contraband cigarettes, was proceeding illegally because the statute creating the judicial authority was unconstitutional was properly determinable by certiorari (CL 1948, § 205.501 *et seq.*, as amended by PA 1951, No 78). *Id.*
8. The writ of certiorari is a discretionary one and its issuance by a court having authority will be upheld in the absence of an abuse of discretion. *Id.* 506.
9. The propriety of the issuance of the writ of certiorari is not properly raised on a motion to dismiss. *Id.*

See COSTS (6, 13); MUNICIPAL CORPORATIONS (20, 23, 24).

CHANCERY CASES—See APPEAL AND ERROR (12, 14, 15, 26); JURY; VENDOR AND PURCHASER (5–7).

CHANGE OF BENEFICIARY—See INSURANCE (1–3, 5).

CHANGE OF CONDITIONS—See RAILROADS (3).

CHANGE OF PLEA—See CRIMINAL LAW (17, 18).

CHARACTER—See WITNESSES (5).

CHARITABLE INSTITUTIONS—See LABOR RELATIONS (1).

CHARTERS—See MUNICIPAL CORPORATIONS (1, 3, 19, 24).

CHATTEL MORTGAGES—See APPEAL AND ERROR (20); CORPORATIONS (2); PARTIES.

CHECKS—See EVIDENCE (3); HUSBAND AND WIFE (9); MONEY RECEIVED (5, 6).

CHIEF OF POLICE—See FALSE IMPRISONMENT (4); JUDGMENT (2).

CHILDREN—See DIVORCE (6, 8–13, 17, 23); WILLS (1, 2).

CHURCHES—See DEEDS (5); FRAUD (5).

CIGARETTES—See CERTIORARI (7); COSTS (13).

CIRCUIT COURT—See APPEAL AND ERROR (1, 31); CONSTITUTIONAL LAW (4); COSTS (9); MUNICIPAL CORPORATIONS (7, 15); PARTNERSHIP (2).

CITY CLERK—See MUNICIPAL CORPORATIONS (22, 24).

CITY MANAGER—See MUNICIPAL CORPORATIONS (32).

CIVIL SERVICE COMMISSION—See CONSTITUTIONAL LAW (4); MUNICIPAL CORPORATIONS (19, 20, 24).

CLAIMS AGAINST ESTATES—See ESTATES OF DECEDENTS (1, 3, 5–14); INTEREST.

CLASSIFICATION—See AUTOMOBILES (23); STATUTES (16, 17).

CLEAN HANDS—See EQUITY (4).

COERCION—See CRIMINAL LAW (6).

COHABITATION—See HUSBAND AND WIFE (2).

COKE—See TAXATION (10).

COMMISSIONS—See APPEAL AND ERROR (29); BROKERS (1, 2, 4–7); PRINCIPAL AND AGENT (2); WORKMEN'S COMPENSATION (16).

COMMON LABOR—See WORKMEN'S COMPENSATION (5).

COMMON LAW—See CERTIORARI (2, 6).

COMMON-LAW MARRIAGE—See CRIMINAL LAW (26); WITNESSES (6).

COMMON PLEAS COURT—See APPEAL AND ERROR (31).

COMMUNICATION WITH SPIRITS OF DECEASED PERSONS—See FRAUD (3); WORDS AND PHRASES.

COMPLAINT—See CRIMINAL LAW (19–23); HIGHWAYS AND STREETS (9).

COMPROMISE AND SETTLEMENT.

A compromise with one person is in no sense an admission of liability to someone else. *Hayes* v. *Coleman*, 372.

COMPROMISE AND SETTLEMENT—Continued.

See APPEAL AND ERROR (13); ESTATES OF DECEDENTS (2, 3, 5, 7); INTEREST; TRIAL (11); WITNESSES (1).

CONCLUSIONS—See CRIMINAL LAW (19).

CONCRETE CONSTRUCTION—See DECLARATORY JUDGMENT; VENUE.

CONDITIONS—See Estates OF DECEDENTS (4); MUNICIPAL CORPORATIONS (2, 9, 11).

CONFESSIONS—See CRIMINAL LAW (2–7, 9, 10); LIBEL AND SLANDER.

CONFIDENTIAL RELATIONS—See FRAUD (3, 4).

CONFISCATION—See CERTIORARI (7).

CONGRESS—See CONSTITUTIONAL LAW (16, 17).

CONJECTURE—See EVIDENCE (3).

CONSENT—See ADOPTION.

CONSENT DECREE OR JUDGMENT—See APPEAL AND ERROR (33); JUDGMENT (5).

CONSIDERATION—See CONTRACTS (8); COUNTIES (4); DEEDS (7); ESTATES OF DECEDENTS (12).

CONSPIRACY.

1. Evidence presented in wife's action for damages against husband's relatives for conspiracy to break up their marriage and for conspiracy to abduct and deprive plaintiff of the custody of her 2 young children *held*, to have established such conspiracies and participation therein by each of the defendants against whom judgment was rendered therefor. *Brown* v. *Brown*, 492.
2. Testimony of Illinois lawyer in regard to professional services he had rendered in legal proceedings had in Illinois to regain custody of plaintiff's children for her was competent for purpose of proving an item of damages asserted in her declaration against former husband's relatives for conspiracy to abduct her children. *Id.*
3. Once a conspiracy is established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact that they did not actively participate therein or the extent to which they benefited thereby. *Id.* 493.
4. A joint action may be maintained against the conspirators for the damages caused by their wrongful acts, but all the conspirators need not be joined, as an action may be maintained against but one. *Id.*
5. The liability of conspirators to civil damages is joint and several, and, a conspiracy being shown *prima facie*, the plaintiff may give in evidence the acts and sayings of any

CONSPIRACY—Continued.

conspirator done or said in furtherance of the common purpose, whether that conspirator be a party defendant or not. *Id.*

See EVIDENCE (6).

CONSTITUTIONAL LAW.

1. Statute relative to re-employment of ex-servicemen, which requires determinations as to whether the employee was still qualified to perform the duties of his position and whether it is feasible to reemploy him to be made by employing administrative officials and imposes upon the court the judicial function and duty, upon petition, to require compliance with the act is not unconstitutional as an improper delegation of executive functions to the courts (Const 1908, art 4, §§ 1, 2; PA 1951, No 263, §§ 2, 5). *Borseth* v. *City of Lansing*, 53.
2. The role of the judiciary in reviewing controversies as to whether an administrative agency has made determinations as required by law is not to substitute judicial judgment for administrative judgment but to inquire whether the administrative agency has made the determination and, if so, to accept it if, and only if, it is supported by evidence and has a sufficient foundation (Const 1908, art 4, §§ 1, 2). *Id.*
3. The guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the State or nation, but rather one of equality of operation or applicability within the particular class affected, which classification must be reasonable (US Const, Am 14; Mich Const 1908, art 2, § 1). *Tomlinson* v. *Tomlinson*, 274.
4. The supervisory control of the circuit court over inferior tribunals is not a trial *de novo*, since such a trial would be unconstitutional as being the exercise of administrative and executive functions by the court. *Lenz* v. *Mayor of Detroit*, 383.
5. The legislative interpretation of a provision of the Constitution can give rise to a justiciable question. *Allen* v. *State Highway Commissioner*, 407.
6. The court would not ordinarily substitute its judgment for that of a city as to the control of its streets (Const 1908, art 8, § 28). *Id.*
7. The legislature is authorized to provide for the criminal jurisdiction of justices of the peace (Const 1908, art 7, § 16). *People* v. *Wolfe*, 526.
8. Whether or not a fine which is authorized by the legislature is excessive involves a consideration of the purpose sought to be accomplished by the legislature and of the seriousness of the problem with which it undertook to deal (Const 1908, art 2, § 15). *Id.* 528.
9. A statute providing for graduated fines based on the amount of overweight of vehicles beyond permissible statutory maximum so as to deter owners and operators of commercial vehicles from using the public highways for transporting overweight loads that destroy the highways and endanger traffic, did not provide excessive fines by way of punishment (PA 1949, No 300, § 724, as amended by PA 1952, No 13). *Id.*

CONSTITUTIONAL LAW—Continued.

10. A law may not be held invalid on the ground that in individual cases it may be difficult for one against whom the fine is assessed to make payment. *Id.*

11. Fact that fine imposable for operating an overweight vehicle on the public highway may effect a hardship upon the owner or operator would not render the statute unconstitutional as permitting an excessive fine in view of the purpose of the statute to deter such persons from such use of the highways and also in view of the fact that they may avoid any violation of the statute by the exercise of proper care (PA 1949, No 300, § 724, as amended by PA 1952, No 13). *Id.*

12. It is not essential to the validity of a penal statute that the court imposing sentence be permitted to exercise discretion to some extent, or within prescribed limitations. *Id.*

13. Statute *requiring* imposition of *prescribed* penalty upon finding as to amount of excessive weight transported by the equipment of one charged with operating overweight vehicles on the public highways is not unconstitutional because of such mandate (PA 1949, No 300, § 724, as amended by PA 1952, No 13). *Id.* 529.

14. The State legislature may provide for a lien upon property to secure the payment of a fine and costs for conviction of the user of such property for an illegal use made of it. *Id.*

15. The method to be followed in the enforcement of the penalty imposed for a violation of the vehicle code is for legislative determination as an incident of the authority it possessed over the general subject matter (PA 1949, No 300, as amended). *Id.*

16. A federally-created agency is subject to State law and enforcement thereof in State courts when there is no Federal law governing the subject and the State act. undertaking to do so, in nowise conflicts with paramount Federal law or with the purposes for which the federally-created agency was established. *Attorney General, ex rel. State Banking Commissioner,* v. *National Bank of Detroit,* 610.

17. A federally-created agency is subject to State law when congress has expressly delegated to the States power to legislate in the field and the States have done so, since then the States are not enforcing Federal, but State, laws and there is impliedly conferred upon State courts the power to enforce it. *Id.*

See APPEAL AND ERROR (5); AUTOMOBILES (2, 23); BONDS (1); CERTIORARI (5, 7); COSTS (13); COUNTIES (5); COURTS (2, 3, 7); CRIMINAL LAW (8, 21); DISCOVERY (2, 4); HIGHWAYS AND STREETS (6); JUSTICES OF THE PEACE (1); MUNICIPAL CORPORATIONS (26); STATES (1); STATUTES (9, 15–17); SUNDAY.

CONSTRUCTION CONTRACT—See CONTRACTS (1, 2, 7).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (5); MUNICIPAL CORPORATIONS (27).

CONSTRUCTION OF CONTRACTS—See APPEAL AND ERROR (35); CONTRACTS (2–4).

CONSTRUCTION OF COURT RULES—See COURTS (4).

CONSTRUCTION OF ORDINANCES—See MUNICIPAL CORPORATIONS (12, 13).

CONSTRUCTION OF POLICY—See COURTS (5); INSURANCE (10, 11).

CONSTRUCTION OF STATUTES—See COSTS (4, 5, 11, 18); COUNTIES (3); COURTS (6); DRAINS (1); ELECTIONS (2); MORTGAGES (2); STATUTES (1–7, 10, 11); TAXATION (2, 3, 7, 8); WORKMEN'S COMPENSATION (9).

CONSTRUCTION OF TERMS—See PLEADING (1).

CONSTRUCTION OF WILLS—See WILLS (3, 4, 6, 7).

CONSTRUCTIVE FRAUD—See TRUSTS (3).

CONSTRUCTIVE TRUSTS—See APPEAL AND ERROR (14); EQUITY (1); EVIDENCE (3); TRUSTS.

CONTINGENT REMAINDER—See WILLS (7).

CONTINUANCES—See APPEARANCE (1).

CONTRABAND—See CERTIORARI (7); COSTS (13).

CONTRACT CARRIERS—See AUTOMOBILES (1).

CONTRACTS.

1. Defendant general contractor had the right to direct and control the time and manner of doing the work covered by plaintiff's subcontract for roofing, sheet metal work and installation of metal siding on stamping plant under clause of subcontract providing that time was of the essence and requiring that work was to be done at such time or times and in such manner and in such quantities as may be required by defendant to meet its time schedule, where defendant's general contract with owner might be interfered with to some extent by operations of 3 other general contractors. *Arrow Sheet Metal Works, Inc., v. Bryant & Detwiler Company*, 68.
2. All provisions of a subcontract must be construed together in such manner, if possible, as to avoid conflict but if such avoidance is not possible, the express terms of the agreement must control as against implications based on reference to the plan and specifications contained in the general contract for construction of stamping plant, where controversy involved claimed breach by general contractor of his subcontract with plaintiff. *Id.*
3. Reference in subcontract to plans and specifications contained in general contract for construction of a stamping plant *held*, to have been made for the purpose of identifying the work to be done and the extent, scope, and purpose thereof. *Id.*
4. A reference by contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. *Id.*

CONTRACTS—Continued.

5. Plaintiff subcontractor was not entitled to recover damages for defendant general contractor's breach of provisions of its general contract with the owner for construction of a stamping plant and inserted therein for the benefit and protection of the latter, where subcontract granted the general contractor the right to direct and control the time and manner of doing the work covered by the subcontract. *Id.* 69.

6. Subcontractor was not entitled to invoke so-called third-party beneficiary act and obtain benefit of provisions of the general contract to which reference had been made in subcontract for plans and specifications, where subcontract specifically provided that general contractor should have the right to direct and control the time and manner of doing the work covered by the subcontract and provisions which subcontractor claimed had been breached were inserted for the benefit and protection of the owner (CL 1948, § 691.541 *et seq.*). *Id.*

7. Defendant general contractor was not liable to plaintiff subcontractor for breaches of general contract imposing duty upon defendant to organize the project, to provide proper supervision and co-ordination of work of the various subcontractors, to order and arrange delivery of materials so that plaintiff might perform its work within a reasonable time, to keep roadways to the project free from snow, ice and other obstructions so as to permit delivery of materials and personnel and to provide electric current for temporary power and light in view of specific provision of subcontract providing time was of the essence and granting to defendant the right to direct and control the time and manner of doing the work covered by the subcontract. *Id.*

8. An agreement to render services is a good consideration for a promise to pay for past services as well as those about to be rendered. *In re Dolgy's Estate (Appeal of Polate)*, 567.

9. An offer does not become a binding contract until acceptance. *Fertel* v. *Adler*, 689.

See APPEAL AND ERROR (35); BROKERS (1, 2, 4–6); COSTS (12); COUNTIES (4); LABOR RELATIONS (3); MORTGAGES (2); STATES; TAXATION (10).

CONTRIBUTIONS—See MUNICIPAL CORPORATIONS (6).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (17); AUTOMOBILES (9, 15, 17–20); EVIDENCE (7); MASTER AND SERVANT (1); NEGLIGENCE (4–6, 9); TRIAL (7).

CONTROL—See AUTOMOBILES (1, 2); NEGLIGENCE (3).

CONVERSION—See ACTION ON THE CASE.

CONVEYANCES—See BOUNDARIES (2).

CO-OWNERSHIP—See TAXATION (4).

CORONARY THROMBOSIS—See WORKMEN'S COMPENSATION (5).

CORPORATIONS.

1. A mortgage given by a corporation without express statutory authority, to secure payment of individual debts of its officers or stockholders, is not enforceable against the rights of creditors. *Pratt* v. *Valliquette*, 397.

2. A corporate chattel mortgage, given to secure the obligation of its individual stockholder, is *ultra vires* and void. *Id.*

See APPEAL AND ERROR (20, 29); BROKERS (1, 2, 6, 7); EVIDENCE (9); JUDGMENT (8); LICENSES; PARTIES.

CORRECTION OF ERRORS—See DEEDS (2); TRIAL (15).

COSTS.

1. No costs are allowed on review of circuit court decree affirming order of the public service commission denying permission to discontinue passenger train service on an intrastate branch line, a public question being involved. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Public Service Commission*, 10.

2. No costs are allowed either defendant widow or deceased insured's divorced wife in insurers' interpleader suit to determine right to proceeds of policies, where costs are allowed plaintiff insurers. *Prudential Insurance Company of America* v. *Irvine*, 19.

3. No costs are allowed in proceeding to compel reinstatement of former police officer to employment by defendant board of police and fire commissioners, a public question being involved (PA 1951, No 263). *Borseth* v. *City of Lansing*, 55.

4. No costs are allowed in criminal prosecution involving the construction of the motor carrier act, a public question being involved (CL 1948, § 475.1 *et seq.*). *People* v. *Hertz Driveurself Stations, Inc.*, 140.

5. No costs are allowed in mandamus proceeding involving issues of statutory construction and a question of general public concern. *Williams* v. *Secretary of State*, 203.

6. No costs are allowed on certiorari to determine power of labor mediation board to order an election at insistence of union, where employees do not seek the representation of such union and there is no jurisdictional dispute between unions, the aim of the union being to establish itself as bargaining agent by such election (PA 1939, No 176, § 23, as added by PA 1949, No 230). *Arnold Home, Inc.*, v. *Labor Mediation Board*, 315.

7. No costs are allowed in proceeding to recover an inheritance tax upon bank deposits transferred by decedent to the joint names of himself and niece, or survivor, upwards of 3 years prior to his death, a public question being involved (CL 1948, § 487.703). *In re Kenz' Estate (Department of Revenue* v. *Beattie)*, 348.

8. No costs are allowed in suit to enjoin issuance of bonds by county building authority, a question of public importance being involved (CL 1948, § 123.951 *et seq.*). *Rude* v. *Muskegon County Building Authority*, 364.

COSTS—Continued.

9. No costs are allowed in mandamus proceedings to compel reinstatement of a city employee, where such writ, issued by the circuit court, is quashed. *Lenz* v. *Mayor of Detroit,* 385.

10. No costs are allowed in suit testing the validity of statutes empowering the State highway commissioner and the State police commissioner to restrict parking on portion of State trunk line highways located within the limits of cities, a public question being involved (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675 [d]). *Allen* v. *State Highway Commissioner,* 408.

11. No costs are allowed on appeal in proceeding to recover inheritance tax on United States government savings bonds involving the construction of a statute, a public question (CL 1948, § 205.201, as amended). *In re DeWaters' Estate,* 458.

12. No costs are allowed in suit for declaration of rights as to liability of taxpayer for sales and use taxes on materials used in performance of contracts for construction of highway jobs for the State highway department but which never became a structural part of the real estate, a public question being involved (CL 1948, § 205.51 *et seq.;* § 205.91 *et seq.*). *Garavaglia* v. *Department of Revenue,* 468.

13. No costs are allowed on appeal from the denial of department of revenue's motion to dismiss petition for certiorari filed by party from whom department had taken possession of alleged contraband cigarettes by a proceeding authorized by a statute which petitioner claimed was unconstitutional (CL 1948, § 205.501 *et seq.,* as amended by PA 1951, No 78). *Asta* v. *Department of Revenue,* 506.

14. No costs are allowed in suits to restrain the public service commission from subjecting the drivers and lessee of leased motor vehicle equipment which carried lessee's own merchandise, to provisions of the motor carrier act, a public question being involved (CL 1948, § 475.1 *et seq.*). *Lloyd A. Fry Roofing Company* v. *Public Service Commission,* 544.

15. No costs are awarded either party where neither has prevailed in full on appeal. *Schelbe* v. *Buckenhizer,* 602.

16. No costs are allowed in proceeding to obtain a writ of prohibition involving the validity of revenue bond issue of a State agency, a public question being involved (PA 1952, No 214, as amended by PA 1953, No 141). *Nichols* v. *State Administrative Board,* 619.

17. No costs are allowed in proceeding to recover from estate of decedent for old age assistance which had been granted to decedent during his lifetime, a public question being involved (CL 1948, §§ 400.34a, 708.10). *In re Ryerson's Estate (State* v. *Pell),* 641.

18. No costs are allowed in suit to test the constitutionality of statute prohibiting the dealing in automobiles on Sunday in certain counties, the construction of a statute being involved (PA 1953, No 66). *The Irishman's Lot, Inc.,* v. *Secretary of State,* 663.

COSTS—Continued.

19. No costs are allowed parties claiming right to assets in a receivership, where they have not appeared or filed briefs in the Supreme Court. *Taylor* v. *Lint*, 674.

20. No costs are allowed in suit to restrain city from collecting charges for use of sewage facilities and testing validity of city ordinance, a public question being involved (City of Grand Rapids Ordinance No 1340). *Ripperger* v. *City of Grand Rapids*, 683.

See DIVORCE (5, 7); WORKMEN'S COMPENSATION (13, 15).

COUNTERPETITION—See ELECTIONS.

COUNTIES.

1. County building authority as provided for by statute is not the alter ego of the county, since, although it is in a sense a county-wide municipal corporation, it is limited in its scope of activities and is intended to be a separate body from the board of supervisors (CL 1948, § 123.951 *et seq.*). *Rude* v. *Muskegon County Building Authority*, 363.

2. Finding of trial court in suit, involving validity of county building authority's bond issue, that there was a compelling need for a building to house the welfare administration of the county *held*, supported by record presented (CL 1948, § 123.951 *et seq.*). *Id.*

3. Proviso of statute, permitting the establishment of a county building authority, that bonds issued by the authority were payable solely from the revenues of the property is construed as the reasonable annual rental for an absolute necessity but not a pledge of the full faith and credit of the county (CL 1948, § 123.961). *Id.*

4. Statutory power conferred upon county building authority to increase consideration specified in contract for use of buildings if necessary in order to provide funds to meet its obligations is construed as permitting such increase only up to a reasonable amount, if below what is reasonable, and if necessary to meet its debts (CL 1948, § 123.958). *Id.*

5. The assumption by a county building authority of a debt, repayable so far as the county is concerned only from reasonable rents necessary for the county to pay, is not a raising of the entire sum in the county within 1 year so as to exceed 1/10 of 1 mill as limited by the Constitution for county building construction or repair (Const 1908, art 8, § 10; CL 1948, § 123.951 *et seq.*). *Id.* 364.

6. County building authority's power to charge rent for use of its buildings is limited to charging not more than a minimum rental that is reasonable and the authority is required to be the sole obligor on its revenue bonds, lest the lease which it enters into with county exceed limit of county's permissible indebtedness without a vote of the electors (Const 1908, art 8, § 10; CL 1948, § 123.951 *et seq.*). *Id.*

COUNTY BUILDING AUTHORITY—See COSTS (8); COUNTIES.

COUNTY ROAD COMMISSIONER—See HIGHWAYS AND STREETS (7).

COURT RULES—See ACCOUNTING (1); APPEAL AND ERROR (31, 33); APPEARANCE; COURTS (2–4); DISCOVERY (1, 2, 4); JUDGMENT (4); NEW TRIAL; PLEADING (3–6); SET-OFF AND RECOUPMENT.

COURTS.

1. A case decided by an equally divided court does not constitute a binding precedent. *Le Vasseur* v. *Allen Electric Company,* 121.
2. The Supreme Court has inherent as well as constitutional rule-making power in the discharge of its general superintending control over all inferior courts (Const 1908, art 7, §§ 4, 5; CL 1948, § 601.14). *Tomlinson* v. *Tomlinson,* 274.
3. Court rule authorizing pretrial depositions and discovery is not unconstitutional, since it is within the rule-making power of the Supreme Court and does not violate equal protection clauses of the State and Federal Constitutions (US Const, Am 14; Mich Const 1908, art 2, § 1, art 7, §§ 4, 5; Court Rule No 35, § 6, as added in 1952). *Id.*
4. Remedial procedural rules should be broadly construed. *Id.* 275.
5. Provisions of insurance policies referring to total and permanent disability are construed in the light of previous decisions of the Supreme Court, where appeal called for opinion on issue of fact. *Ebert* v. *Prudential Insurance Company of America,* 320.
6. The mere fact that a statute of this State was adopted from the statute law of another State does not necessarily require that decision in the Supreme Court of this State be controlled by the prior construction placed upon the statute law of the other State by its courts but such decisions must be given weight in construing the statute in this State. *In re Renz' Estate (Department of Revenue* v. *Beattie),* 348.
7. The determination of the Supreme Court on the facts of a case and pertinent statutes under the Constitution stands as the law of such case. *Rude* v. *Muskegon County Building Authority,* 364.

See APPEARANCE (2); BANKS AND BANKING (2); CONSTITUTIONAL LAW (1, 2, 4, 6, 16, 17); LABOR RELATIONS (4); MUNICIPAL CORPORATIONS (15, 17, 18, 27).

COVENANTS—See VENDOR AND PURCHASER (3).

CREDIBILITY—See APPEAL AND ERROR (15); AUTOMOBILES (17); CRIMINAL LAW (1, 12); MONEY RECEIVED (1); WITNESSES (1).

CREDIT—See NEGLIGENCE (3).

CREDITORS—See CORPORATIONS (1).

CRIMINAL LAW.

1. The credibility of testimony of theater janitor who was overpowered incident to robbing safe and who identified the accused as his assailants *held,* for the jury under evidence pre-

CRIMINAL LAW—Continued.

sented as to statements he had made as to inability to identify the robbers shortly after the robbery. *People* v. *Louzon*, 146.

2. It was proper for trial judge in prosecution for robbery to conduct a preliminary examination in the absence of the jury to determine the voluntary character of confessions prior to their admission to the jury. *Id.*

3. Reception in evidence of 2 confessions by 1 of 3 defendants in prosecution for robbery and submitting question of their voluntary character to jury *held*, proper, in view of conflicting testimony. *Id.*

4. Preliminary testimony which makes it clear that the confession of one charged with crime was voluntary imposed a duty upon the trial court to admit it; that it was involuntary, to reject it; that it was doubtful as to whether or not it was voluntary, to admit it and have question of voluntariness submitted to jury under proper instructions. *Id.*

5. Interrogation by police officers of persons suspected of crime has social value in the solution of crime as the duty to disclose knowledge of crime rests upon all citizens, the limits of the inquiry being dependent upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. *Id.*

6. Confessions are inadmissible when secured by inflicting physical force or its equivalent by means of harsh or cruel treatment or false promises. *Id.* 147.

7. A confession, to be admissible, must be voluntary, but need not be volunteered. *Id.*

8. No one may be forced to be a witness against himself in a criminal case (Const 1908, art 2, § 16). *Id.*

9. The Supreme Court will examine the record on appeal to determine whether the trial judge and jury are both wrong in determining that a confession was voluntary if it finds the finding of the trial court in such matter was against the great weight of the evidence. *Id.*

10. The confessions made by 1 of 3 persons charged with committing a robbery were properly admitted as against the confessor, where trial court conducted a preliminary examination out of the presence of the jury, admitted them in evidence, submitted matter of voluntariness to the jury and restricted their use to proof of guilt of the confessor alone inasmuch as the other 2 accused did not confess and statements implicating them were not made in their presence and Supreme Court does not find that finding of voluntariness was against the great weight of the evidence. *Id.*

11. Conviction of lesser crime of robbery not armed was not error on charge of robbery armed. *Id.*

12. Trial court's refusal to permit submission to jury on *voir dire* examination of questions as to whether jury would be prejudiced if it were to develop that any 1 or all of the 3 defendants, charged with robbery armed, had been convicted of former offenses and whether guilt or innocence could be determined solely on facts presented entirely uninfluenced

CRIMINAL LAW—Continued.

by evidence of former police records *held,* proper, where defense attorneys brought out records of former convictions and a fair charge was given by the trial judge, since the jury could consider the character of men with criminal records in judging their credibility as witnesses; the questions not being complete. *Id.*

13. Convictions of 3 defendants of robbery not armed *held,* not against the great weight of the evidence. *Id.* 148.
14. Charge of the trial judge in prosecution of 3 defendants for robbery armed and in which they were convicted of robbery not armed *held,* to have been a very fair charge. *Id.*
15. The defendant in a prosecution for crime is not obliged to take the witness stand. *Id.*
16. Alibi on part of 1 of 3 defendants in prosecution for robbery armed and in which they were convicted of robbery not armed *held,* not established by testimony adduced. *Id.*
17. Generally, a defendant in a criminal prosecution has the privilege of changing a plea of guilty to one of not guilty at any time prior to sentence. *People* v. *Hollingsworth,* 161.
18. It was an abuse of discretion for trial judge to deny motion to withdraw plea of guilty to charge of uttering and publishing a worthless check, where motion for such purpose was made before trial judge pronounced sentence and reason for motion, that contents of probation report had not been treated as confidential information, was announced by defendant's counsel. *Id.*
19. The averments of fact in complaint, charging a misdemeanor, are controlling rather than the conclusion of the individual drawing it as to the particular section of the law on which the charge should be predicated. *People* v. *Wolfe,* 526.
20. Fact that complaint filed against defendant referred to section of vehicle code relative to weight restrictions instead of sections making it illegal to move overloaded vehicles on the highways and imposing wheel and axle load limits *held,* immaterial, where it was averred that defendant operated a vehicle that was carrying a load in excess of the weight restrictions imposed by law and section referred to declared such offense a misdemeanor (PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13). *Id.* 527.
21. Case involving prosecution for operation of overweight vehicles on the public highways is remanded to the circuit court which had quashed the proceeding, where the complaint and warrant were valid and sufficiently specific to advise the defendant as to the offense with which he was charged and none of the provisions of the statute involved was unconstitutional, the proceedings to be had to be in accordance with the statute and opinion rendered herein (PA 1949, No 300, as amended). *Id.* 529.
22. A complaint in a criminal prosecution which, upon its face, purports to be made upon the knowledge of the affiant, is a sufficient compliance with the pertinent statute and it is incompetent for the defendant, upon arraignment, to impeach the

CRIMINAL LAW—Continued.

complaint by showing a lack of knowledge by the complaining witness (CL 1948, §§ 766.2, 766.3). *People* v. *Mosley*, 559.

23. The positive statements of a complaining witness setting forth a crime charged in a sworn complaint give the examining magistrate jurisdiction to issue the warrant and the fact that it does not appear there was no examination of witnesses under oath, or that the complainant did not adhere to the truth, cannot avoid a warrant (CL 1948, §§ 766.2, 766.3). *Id.*

24. A warrant in a criminal case cannot later be impeached, once jurisdiction has attached for the issuance of such warrant (CL 1948, §§ 766.2, 766.3). *Id.*

25. The circuit court had jurisdiction to try case for inciting to commit perjury on May 21, 1952, where motion to quash information had been denied December 3, 1951, and a stay of 20 days granted, but record fails to show any extension thereof, notwithstanding defendant's application for leave to appeal from order denied was not denied by the Supreme Court until June 11, 1952. *Id.*

26. Exclusion of testimony of a woman whom it was sought to show was the legal wife of man who had been married to woman whom defendant in prosecution for inciting to commit perjury claimed as his common-law wife *held*, proper, since the marital status of such proposed witness was not a material issue in prosecution for inciting to commit perjury (CL 1948, § 750.425). *Id.* 560.

27. Court's ruling and statement to jury that defendant in criminal prosecution who recalled for further cross examination, after the people had rested, 2 witnesses who had testified for the people, made such witnesses his witnesses and that he was bound by their answers, *held*, not an abuse of discretion, the control of the presentation of proof being a matter within his discretionary power. *Id.*

28. The test to be applied in determining whether irregularities in a criminal trial are grounds for reversal is not whether there were some irregularities but whether defendant had a fair and impartial trial (CL 1948, § 769.25). *Id.*

29. The remand by the Supreme Court of a criminal case to the recorder's court upon setting aside an invalid sentence for failure to give parolee information of charge he was required to meet at summary hearing for violation of parole and revoking order of probation gave the recorder's court jurisdiction to hold a valid hearing and impose a valid sentence. *In re Rudnik*, 577.

30. Transcription of testimony of witness whose testimony was taken at an earlier hearing and as to whom an opportunity to cross-examine had been afforded was properly introduced, where such witness admittedly was not available at the trial (CL 1948, § 768.26). *Id.*

See CONSTITUTIONAL LAW (7, 9–12); FALSE IMPRISONMENT (1, 2); JUSTICES OF THE PEACE (2); LIBEL AND SLANDER; PERJURY; STATUTES (11); WITNESSES (6).

CROSS BILL—See ACCOUNTING (1); PLEADING (4, 5).

CROSS DECLARATIONS—See JUDGMENT (4); PLEADING (5, 6).

CROSS-EXAMINATION—See CRIMINAL LAW (27, 30); REFORMATION OF INSTRUMENTS; WITNESSES (1–4).

CROSSINGS—See DRAINS (1–4).

CUSTODY OF CHILDREN—See CONSPIRACY (1, 2); DIVORCE (8–13, 24); PARENT AND CHILD (1, 3).

DAMAGES.

1. Judgments for $2,500, $2,500 and $3,000 for plaintiffs in 3 consolidated actions for false arrest and imprisonment, as reduced by remittiturs from verdicts of $5,000 for each plaintiff are not further reduced on defendant's claim judgments were still excessive, since the law provides no exact standard for measuring damages for being taken from work or home, fingerprinted, held in jail and subjected to the ignominy of having been arrested for murdering a baby. *Howard* v. *Burton (Simpson* v. *Same, Thomas* v. *Same)*, 179.
2. Award of $20,000 for death of 42-year-old wife of 50-year-old man *held*, not excessive, where she left 5 children ranging in age from 5 to 20 years, $1,211.08 was paid for funeral expenses and testimony was introduced relative to cost of hiring others to perform duties deceased had performed but nothing appears to have occurred to improperly influence the jury in arriving at a verdict and jurors do not appear to have been actuated by prejudice or sympathy. *Bramer* v. *Ames*, 227.
3. Verdict of $5,000 in widow's action for death of 71-year-old husband whose hospital, medical and funeral expenses were $955.45, and who was her sole means of support *held*, within the reasonable range of proofs, the final verdict allowing her but $236.17 annually for food and clothing for duration of 8.07 years as his expectancy (CL 1948, §§ 691.581, 691.582). *Hoffman* v. *Stickney*, 479.

See CONSPIRACY; FALSE IMPRISONMENT (3); FRAUD (1); PARENT AND CHILD (3); PROHIBITION.

DANGEROUS CONDITION OF PREMISES—See EVIDENCE (7); NEGLIGENCE (3, 9).

DANGEROUS PLACE TO WORK—See MASTER AND SERVANT (1, 2).

DEATH—See APPEAL AND ERROR (11); AUTOMOBILES (11); COSTS (7); DAMAGES (2, 3); DESCENT AND DISTRIBUTION (1); ESTATES OF DECEDENTS (4, 8); INSURANCE (4); JOINT TENANCY (3); MARRIAGE (2); PARTNERSHIP (1); TAXATION (1, 5); WILLS (7); WORKMEN'S COMPENSATION (14).

DEBTS—See DIVORCE (4); ESTATES OF DECEDENTS (4, 15); COUNTIES (6).

DECLARATION—See FRAUD (5); PLEADING (2).

DECLARATORY JUDGMENT.

A suit for declaration of rights to ascertain liability for sales and use taxes on material used in concrete construction work but which never became a structural part of the real estate

DECLARATORY JUDGMENT—Continued.

was a proper procedure (CL 1948, § 205.51 *et seq.*). *Garavaglia* v. *Department of Revenue*, 467.

See COSTS (12); VENUE.

DEDICATION—See BROKERS (3).

DEEDS.

1. Alteration of deed whereby the wording designating the grantee was changed at the grantee's request but which left the grantee bishop, his office and designation as trustee the same, *held*, not an alteration of which daughters of grantors might complain in daughters' suit to cancel the deed. *Darmody* v. *Bishop of Lansing*, 473.
2. The fact that an immaterial alteration of a deed was made after its execution does not raise an inference that other alterations were also made at that time, especially where the changes corrected obvious errors. *Id.*
3. Alterations in deed to defendant bishop are presumed to have been made prior to its execution except such as were admittedly made afterwards and which were immaterial, where the deed does not purport to grant more than was needed for the use intended and there is no evidence of overreaching. *Id.*
4. The presumption of genuineness of a deed prevails in the absence of any testimony on the subject. *Id.*
5. Grantors in deed of land to be used as a site for purposes of church of which they were members *held*, to have been mentally competent to make the deed and not to have been subjected to undue influence or fraud upon the part of representatives of the church, under evidence presented. *Id.*
6. Decedent *held*, not to have been mentally incompetent to execute deed of property shortly after she married one of the defendants under evidence showing she was married to a first husband for about 34 years, was a widow for 6 years and then married to such defendant for 6 years without anyone having filed a complaint or petition to have a guardian appointed for her to free her from marriage ties or to conserve her property. *Schelbe* v. *Buckenhizer*, 601.
7. Deeds whereby title which plaintiff's decedent transferred to property which had theretofore stood in her own name so as to become vested in herself and one of the defendants, her second husband, as tenants by the entireties, for which he paid nothing and then transferred by him after her death without payment of anything to other defendants, his son, daughter-in-law and granddaughter are ordered set aside on the ground of fraud, where it appears that shortly before marriage to decedent, defendant had stripped himself of title to all of his realty, exercised a domination over decedent in property matters and abused trust reposed in him by her. *Id.*

See MORTGAGES (1).

DEFAULT—See APPEAL AND ERROR (18); DISCOVERY (4); JUDGMENT (4); MORTGAGES (3); PLEADING (6); VENDOR AND PURCHASER (3, 4).

DEFECTIVE APPLIANCES—See MASTER AND SERVANT (4, 5).

DEFECTIVE MACHINERY—See MASTER AND SERVANT (3, 4).

DELAY—See APPEAL AND ERROR (18).

DELEGATION OF POWER—See CONSTITUTIONAL LAW (1); MASTER AND SERVANT (9–11).

DELIVERY—See CONTRACTS (7); ESTATES OF DECEDENTS (2, 3).

DEMAND—See INTEREST; MONEY RECEIVED (1).

DE NOVO REVIEW—See APPEAL AND ERROR (1, 12, 14, 26); CONSTITUTIONAL LAW (4).

DEPARTMENT STORE—See NEGLIGENCE (3).

DEPENDENTS—See DIVORCE (17).

DEPOSITIONS—See COURTS (3).

DEPOSITS—See BANKS AND BANKING (3); ELECTIONS (1); HUSBAND AND WIFE (7, 9); INSURANCE (9); MONEY RECEIVED (6).

DESCENT AND DISTRIBUTION.

1. An intestate's personal estate does not descend to his next of kin or heirs-at-law but remains in abeyance until administration is granted upon his estate and is then vested in the administrator as of the time of the death of the intestate; no title vesting in the next of kin until the estate is administered and then only upon the surplus remaining after payment of intestate's debts and the expenses of administration. *Taylor* v. *Lint*, 673.
2. The rights of a next of kin of possession and of action in respect to the personal property of an intestate's estate before distribution, are neither greater nor less than those of a mere stranger. *Id.*

DESCRIPTION—See BOUNDARIES (2); DEEDS (3); EQUITY (1); PRINCIPAL AND AGENT (1); REFORMATION OF INSTRUMENTS.

DESERTION—See DIVORCE (1, 2).

DETROIT—See MUNICIPAL CORPORATIONS (8, 11, 13–15, 18–20, 24).

DEVIATION FROM DIRECT LINE OF TRAVEL—See WORKMEN'S COMPENSATION (16).

DIRECTED VERDICT—See APPEAL AND ERROR (17, 24); AUTOMOBILES (5, 11); ESTATES OF DECEDENTS (14); FALSE IMPRISONMENT (4); NEGLIGENCE (9); TRIAL (4, 5, 18).

DIRECTOR—See LICENSES (2).

DISABILITY—See OFFICERS; WORKMEN'S COMPENSATION (3, 4, 11, 12).

DISAGREEMENT OF JURY—See APPEAL AND ERROR (21); CARRIERS (1); TRIAL (14, 15, 17, 18).

DISCHARGE—See MUNICIPAL CORPORATIONS (19, 21, 24).

DISCONTINUANCE OF SERVICE—See COSTS (1); RAILROADS (1, 2).

DISCOVERY.

1. Court rule permitting pretrial depositions and discovery as to matters relevant to the subject matter involved in the pending action reposes discretion in the court as to its applicability and has the purpose of facilitating and expediting the trial of causes in circuits having a pretrial docket to alleviate their load and to obtain a better judicial administration (Court Rule No 35, § 6, as added in 1952). *Tomlinson* v. *Tomlinson*, 274.
2. Order for pretrial discovery as to defendant husband's assets, liabilities and financial standing, entered in suit for divorce, was not an unconstitutional invasion of his privacy or an abuse of discretion, where the order also provided for the ruling of the court in the event of dispute over the admissibility of any testimony or any other disputed matter and local circuit court rule authorized the suppression of pleadings upon showing made to presiding judge of good cause therefor (Court Rule No 35, § 6, as added in 1952; Third Judicial Circuit Court Rule No 12). *Id.* 275.
3. An order to make a personal appearance before a notary public in this State to make discovery cannot be made upon a person not within this State. *Ann Arbor Bank* v. *Weber*, 342.
4. Trial court's entry of default on plaintiff's motion based on defendant's nonappearance in person before notary in this State when subpoenaed for purpose of making discovery was error, where it appears defendant was then not in this State and had submitted certain documents by an attorney, since defendant's constitutional right to defend his suit by an attorney of his own choice was violated (Const 1908, art 2, § 12; Court Rules Nos 32, 35, § 4 [1945]; Washtenaw Circuit Court Rule No 21). *Id.*

See APPEARANCE (3); COURTS (3).

DISCRETION OF COURT—See APPEAL AND ERROR (7); APPEARANCE (2); CERTIORARI (8); CONSTITUTIONAL LAW (12); CRIMINAL LAW (18, 27); DISCOVERY (1, 2); DIVORCE (18); PLEADING (2, 7); SPECIFIC PERFORMANCE (2); VENDOR AND PURCHASER (6, 7).

DISCRETION OF OFFICERS—See DRAINS (2); MUNICIPAL CORPORATIONS (15, 17, 18).

DISMISSAL OF APPEAL—See APPEAL AND ERROR (27).

DITCHES—See HIGHWAYS AND STREETS (3).

DIVIDENDS—See BROKERS (7); EVIDENCE (9).

DIVISION OF PROPERTY—See DIVORCE (4, 15, 16, 19–23).

DIVORCE.

1. Evidence presented on behalf of wife whose husband obtained decree of divorce on cross bill on ground of desertion *held*,

DIVORCE—Continued.

not to have justified her abandonment of defendant and the home. *Reuter* v. *Reuter*, 46.

2. Record in suit wherein husband was granted divorce on cross bill on ground of desertion *held*, not to justify upsetting of finding of trial court that defendant's efforts to persuade plaintiff to return to him were spurned by her, that she had never been willing to consider coming back and that her absence from the home had been against his wishes. *Id.*

3. Award to wife of $25 per week for support of infant child of the parties and $10 weekly as permanent alimony to her in suit for divorce was not inadequate or improper under all the circumstances, where it appears husband's net take-home pay was $103 per week and $50 per month on land contract on which the unpaid balance then due was only $1,000. *Id.*

4. Equal division of $12,000 worth of undisputed property of husband, at termination of 17 months of married life, at least half of which property had been given him by his parents *held*, not unjust to plaintiff wife, where decree had been awarded to husband on cross bill on ground of desertion, even if defendant had more than a contingent interest in gift of property valued at $42,000 from his parents; it appearing that defendant had paid plaintiff temporary alimony, her attorney some $750, over $1,000 in doctor and hospital expense for the child and some $500 in debts which she incurred when she deserted defendant. *Id.*

5. No costs are allowed upon affirmance of decree of divorce granted husband, where wife appealed. *Id.* 47.

6. A decree of divorce to husband on the ground of extreme cruelty is affirmed, where there are no children of the marriage, a reconciliation had not been effected, parties are of different religious faiths, son of defendant wife by former marriage which had resulted in a divorce had been a frequent cause of quarrels, and there was testimony of physical violence by her, although plaintiff was not entirely blameless. *Boter* v. *Boter*, 187.

7. No costs are allowed either party upon affirmance of decree for plaintiff husband on wife's appeal. *Id.*

8. A court in a suit for divorce is not bound by any agreement of the parties in awarding the custody of children or making proper provision for their support. *Lewis* v. *Lewis*, 197.

9. The welfare of a child of parties to suit for divorce is paramount in determining matters of its custody and support and not the claims and personal rights and desires of the parents and each case must be decided on its particular facts. *Id.*

10. A girl of tender years should be with the mother upon decree of divorce, where there is not the slightest intimation that she is not a proper person. *Id.* 198.

11. A child of divorced parents is a ward of the court and if the court finds it conducive to the best interests of the child to do so, it may award custody to a mother residing without the State and charge the father with the child's maintenance and support. *Id.*

DIVORCE—Continued.

12. The privilege of visitation of a child by divorced parent denied custody is an important but not an absolute right and one which must yield to the good of the child. *Id.*

13. Order of court that child of divorced parents, presently in custody of mother residing out of the State, be placed in custody of father in this State for 2 weeks in the summertime provided he was not in arrears on alimony payments and paid traveling expenses of the child from her mother's home and the return trip *held,* proper. *Id.*

14. Extreme cruelty on part of husband *held,* established by wife, by showing of unreasonable accusations of infidelity. *Morrish* v. *Morrish,* 261.

15. There is no rigid rule for division of property in divorce actions, the security of a living for the wife being a major consideration. *Id.*

16. Division of property at termination of marriage lasting 6 years because of extreme cruelty of husband *held,* equitable under the circumstances, where husband is ordered to pay wife $20,000 cash, $300 for her attorney fee and such personal property as she chose and he was awarded real estate valued at $25,000, some other land and vacant lots, 700 shares of stock, life insurance totalling $25,000 and 2 automobiles, and while wife is unable to earn her own living he is receiving a disability income. *Id.* 262.

17. The financial status of the husband is material and relevant to the subject matter of divorce, since the proper support of the wife, in her accustomed station in life, commensurate with his ability, and especially the support of his children who may be dependents are the first concern of the court. *Tomlinson* v. *Tomlinson,* 275.

18. The order of proof in a divorce case is entirely within the discretion of the court. *Id.*

19. Trial court's division of tangible personal property of parties to suit for divorce *held,* fair and equitable, where wife was given household appliances and some of the furniture and husband other furniture, boat, motor and automobile. *Reitz* v. *Reitz,* 309.

20. Provision of decree of divorce giving each party an undivided 1/2 interest in real estate theretofore held as tenants by the entireties *held,* proper at termination of marriage of over 20 years' duration. *Id.*

21. There is no rigid rule of division of property in divorce proceedings, the major consideration being the security of living for the wife. *Id.*

22. A wife in suit for divorce may be entitled, under certain circumstances, to share in property owned by the husband prior to marriage or inherited after marriage. *Id.*

23. Wife is accorded $4,000 out of balance of bonds and securities worth $11,303, rather than $2,000 accorded by trial court, where joint holdings of $14,518 had been reduced by a disposal netting each party $1,607.50, husband had owned previously to marriage or inherited $6,000, marriage was of

DIVORCE—Continued.

20 years' duration, 1 child had been born, wife had worked outside of the home and had kept boarders and served meals to teachers and cessation of the family life was due to defendant husband's misconduct. *Id.*

24. Decree of divorce wherein custody of 3 children, 3 to 5 years of age, was awarded mother is not disturbed under record presented on father's appeal wherein he claimed it was detrimental to the paramount interests of the children to take them from the home of the paternal grandparents (CL 1948, § 553.17). *Webster* v. *Webster,* 644.

See COSTS (2); DISCOVERY (2); EVIDENCE (6); INSURANCE (1, 2, 5).

DOCTOR EXPENSE—See DIVORCE (4).

DRAIN COMMISSIONER—See DRAINS (2); MANDAMUS (3).

DRAINS.

1. Statutory requirement that "1 bridge or passageway across" a newly-constructed drain traversing a farm to connect the disconnected portions and provision that when drain is widened, deepened, straightened or relocated there "shall be constructed the necessary bridges or culverts as part of such improvements" are so construed as not having intended to provide a distinction between accommodations afforded it being reasonably clear that the legislature intended to insure that the property owner be afforded a reasonable and adequate means of proceeding from one portion of his farm across the drain to and upon the other portion (CL 1948, § 272.2). *Hartwick* v. *Sanilac Drain Commissioner,* 624.

2. The type of construction provided for crossing a public drain, newly-constructed or enlarged, does not rest wholly in the discretion of the drain commissioner under statute imposing upon him the duty to provide the necessary means of crossing such drain, the type of construction called for being an issue of fact (CL 1948, § 272.2). *Id.*

3. Passageway consisting of a slab of cement on bottom of drain 70′ in width at top, 40′ in width at bottom and 9′ deep *held,* not to constitute a compliance with provision of drain law that when drain traverses a farm the disconnected portions be connected with the necessary bridges or culverts, where testimony shows that large quantities of sand and silt are washed down the drain and proposed passageway would not be passable at certain seasons of the year (CL 1948, § 272.2) *Id.*

4. Owners of farm traversed by public drain 70′ wide at top, 40′ wide at bottom and at least 9′ deep in places *held,* entitled to such a bridge across the drain as will provide reasonable access from one part of the property to the other (CL 1948, § 272.2). *Id.* 625.

5. The remedy of mandamus to compel drain commissioner to construct a bridge across large drain which traversed plaintiff's farm is available to plaintiff under pertinent statute, the right to such remedy being clear and specific (CL 1948, § 272.2). *Id.*

See MANDAMUS (3).

EARMARKED FUNDS—See STATES (1, 4).

EASEMENTS—See TAXATION (10).

ELECTIONS.

1. Fact that statutory provisions specifically authorized repayment to petitioner for recount of an election of statutory deposit made only when he established fraud or mistake and party seeking recount receives a certificate of election would not preclude party who filed counterpetition from recovering deposit he had made after he had received certificate of election upon withdrawal of both petition and counterpetition (CL 1948, § 189.1, as amended by PA 1951, No 213, § 189.3). *Williams* v. *Secretary of State,* 203.
2. Statute relating to recounts of elections is construed as imposing equal obligations on, and giving like privileges to, candidates filing original recount petitions and those presenting counterpetitions (CL 1948, § 189.1, as amended by PA 1951, No 213, § 189.3). *Id.*

See COSTS (6); COUNTIES (6); LABOR RELATIONS (1).

ELECTRICIAN—See WORKMEN'S COMPENSATION (6).

ELECTRICITY—See CONTRACTS (7).

EMERGENCY—See AUTOMOBILES (16).

EMOTIONAL DISTRESS—See PARENT AND CHILD (3).

EMPHYSEMA—See WORKMEN'S COMPENSATION (4).

ENTRY MADE IN USUAL COURSE OF BUSINESS—See EVIDENCE (3).

EQUALLY DIVIDED COURT—See COURTS (1); LABOR RELATIONS (2); TAXATION (5).

EQUAL PROTECTION OF LAW—See CONSTITUTIONAL LAW (3); COURTS (3).

EQUITABLE ESTOPPEL—See ESTOPPEL (1).

EQUITY.

1. Plaintiffs were not guilty of laches in commencing suit to impose a constructive trust to gain title to land not included within description of land contract and deed, where they commenced suit less than a month after discovering defendant's claimed breach of agency agreement for purchasing the land. *Kren* v. *Rubin,* 289.
2. Plaintiff's claim that he was denied an existent equitable remedy *held,* untenable, where his bill of complaint was entertained and not dismissed until after he had concluded his proofs. *Zdero* v. *Briggs Manufacturing Company,* 549.
3. All properly alleged facts in a bill of complaint and uncontroverted facts well pleaded in defendant's answer are to be taken as admitted and considered in deciding a motion to dismiss the bill. *Id.* 550.

EQUITY—Continued.

4. Claim that real-estate broker came into court of equity without clean hands when he sought to enjoin defendants from using 10′ x 200′ strip of land which abutted rear of 2 lots for which he had previously negotiated sale to defendants *held*, without foundation under record presented. *Kern* v. *Schaar*, 637.

See DIVORCE (16, 23); FRAUDS, STATUTE OF (2); MONEY RECEIVED (2).

ESCROW—See ACTION ON THE CASE; MONEY RECEIVED (1).

ESTATES—See TAXATION (2).

ESTATES BY ENTIRETIES—See HUSBAND AND WIFE (6–9).

ESTATES OF DECEDENTS.

1. Claims against the estates of deceased persons must be proved by the claimants and judicially found as they cannot be established by concession of the decedent's representatives. *Faber* v. *Glashagen's Estate*, 240.
2. Delivery of a settlement agreement, signed by decedent, was not essential to make it binding upon him as an admission in proceeding by other party to recover thereon as a claim against the estate of the decedent in the absence of any showing that the presence of the instrument in court was secured by illegal means. *Id.*
3. Claimant against the estate of decedent on a settlement agreement proved to have been signed by decedent established a prima facie case of delivery of the agreement by reason of his possession of that instrument which was filed by him in probate court. *Id.*
4. Debt of decedent which matured when he had disposed of his real estate holdings matured upon his death because at that time his real estate holdings were disposed of by operation of law. *Id.* 241.
5. Claimant against estate of decedent *held*, real party in interest on claim under a settlement agreement which acknowledged indebtedness to claimant and which had been signed by decedent. *Id.*
6. Finding of trial court that there was neither novation nor nonjoinder of proper parties is concurred in on appeal in proceeding on claim against the estate of a decedent. *Id.*
7. Judgment in amount of 2 accounts against estate of decedent is ordered entered in favor of claimant on his appeal in nonjury action, where decedent had executed a settlement agreement in amount of such accounts, the testimony clearly preponderating in such direction. *Id.*
8. Claim against estate of deceased person for performance of services and expenditure of money is limited to 6 years prior to such person's death, where there is no evidence that plaintiff had obligated himself to perform services or expend money in the future when making his claim for services rendered antedating as well as within such 6-year period (CL 1948, § 609.13). *In re Dolgy's Estate (Appeal of Polate)*, 568.

ESTATES OF DECEDENTS—Continued.

9. The burden of establishing a right to recover as to each item of a claim against an estate is upon the claimant. *Id.*

10. Son-in-law claimant against an estate of decedent must prove that services were rendered and money expended with the expectation and intent on the part of both decedent and claimant that latter would be compensated therefor. *Id.*

11. A claimant against the estate of a decedent must establish by competent evidence the fair amount of each item for which he claims payment of compensation. *Id.*

12. Items claimant, a former son-in-law, presented against the estate of decedent widow which would have been proper items against her late husband's estate, such as his hospital and funeral expenses, but as to which there was no showing of an agreement on her part to repay claimant, supported by a valuable consideration, were properly disallowed. *Id.*

13. Items of claim against decedent's estate for services rendered and materials furnished which were such as must have been known to deceased but which were proved only by the testimony of claimant, deceased's former son-in-law, were properly disallowed, since such testimony was incompetent (CL 1948, § 617.65). *Id.*

14. Items of claim against the estate of a decedent as to which there was testimony supporting claim by witnesses other than claimant himself, formerly decedent's son-in-law, became matters for consideration of jury, hence, directed verdict for the estate as to such items was reversible error (CL 1948, § 617.65). *Id.* 569.

15. A claim by the State against the estate of a decedent for old age assistance grants to him during his lifetime must be allowed and paid as a claim of the fourth class as a debt due the State was clearly intended to have been created therefor under pertinent statutes (CL 1948, §§ 400.34a, 708.10). *In re Ryerson's Estate (State* v. *Pell),* 641.

See APPEAL AND ERROR (13); COSTS (17); INTEREST; TAXATION (4).

ESTOPPEL.

1. The vital principle of an equitable estoppel, or an estoppel *in pais,* is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Holt* v. *Stofflet,* 115.

2. An estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. *Id.*

3. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up. *Muskegon Lumber & Fuel Company* v. *Johnson,* 656.

ESTOPPEL—Continued.

See APPEAL AND ERROR (18); HUSBAND AND WIFE (9); JUDGMENT (6); LICENSES (2, 3); SPECIFIC PERFORMANCE (1); TRIAL (13).

EVIDENCE.

1. The Supreme Court takes judicial notice of the fact that limbs of trees do not fall without some intervening force unless they have rotted. *Le Vasseur* v. *Allen Electric Company*, 121.
2. A record of a past recollection, authenticated by proof, is competent, if not barred by statute. *Wallace* v. *Skrzycki*, 166.
3. Admission of cancelled check to defendant for payment of attorney fees incident to purchase of property by defendant for plaintiffs and offered in evidence as an entry made in the usual course of business was not prejudicial error in suit to impose a constructive trust upon such agent, where trial court did not allow recovery for the amount so paid (CL 1948, § 617.53). *Kren* v. *Rubin*, 290.
4. A finding as to particular fact may be based upon inferences fairly drawn from other facts established by proof, although a verdict may not rest upon bare conjecture. *Hoffman* v. *Stickney*, 478.
5. Reasonable inferences which may be drawn from affirmative facts proven are evidence, and not presumptions. *Id.*
6. The introduction of record in suit for divorce between plaintiff and her husband in action against his relatives for their conspiracy to break up the marriage and for their conspiracy to abduct her children whose custody had been awarded to her was not reversible error, where it had been introduced for purpose of showing the various orders, petitions and papers as had a bearing on instant case but without referring to testimony therein and defendant's counsel interposed only general objections and even assented to such limited use of the record. *Brown* v. *Brown*, 493.
7. Testimony of expert on lighting arrangements and visual perception was competent to assist jury in determining issues of negligence and contributory negligence in actions based on injuries received by customer as she fell through unguarded trap door opening in floor of aisle where, without warning of danger, lessee's shoe clerks had directed her to search for shoes on sale which were advertised by defendant lessor and sold by codefendant lessee. *Muth* v. *W. P. Lahey's, Inc.*, 515.
8. The court will take judicial notice that heavily loaded trucks and trailers may, and do, cause serious damage to public highways and endanger all who travel thereon. *People* v. *Wolfe*, 528.
9. The Supreme Court takes judicial notice of the fact that the capital gains tax for an individual is far less than an income tax on dividends from a corporation (26 USCA, § 12[b] [1948], § 117[b], § 117[c][2] [1945]). *Fertel* v. *Adler*, 689.

See ACCOUNTING (1); APPEAL AND ERROR (2, 8, 10, 11, 16, 17, 21, 24, 28, 30, 32, 33); ARREST (6); AUTOMOBILES (5, 7–9,

EVIDENCE—Continued.

11, 12); BANKS AND BANKING (4); BROKERS (1, 2, 6, 7); COMPROMISE AND SETTLEMENT; CONSPIRACY (1, 5); CONSTITUTIONAL LAW (2); CRIMINAL LAW (1, 3, 9, 10, 13, 16, 26); DAMAGES (2, 3); DEEDS (4–7); DIVORCE (1, 2, 6, 14); EQUITY (2); ESTATES OF DECEDENTS (7, 11–14); FALSE IMPRISONMENT (1, 2, 4); FRAUD (1); HIGHWAYS AND STREETS (10); HUSBAND AND WIFE (2, 7); INSURANCE (6–9, 13); JOINT TENANCY (1); LIBEL AND SLANDER; MANDAMUS (3); MARRIAGE; MASTER AND SERVANT (2); MONEY RECEIVED (1, 5, 6); MORTGAGES (3, 4); MUNICIPAL CORPORATIONS (5); NEGLIGENCE (1, 5); PERJURY (5); PRINCIPAL AND AGENT (1); REFORMATION OF INSTRUMENTS; SET-OFF AND RECOUPMENT; SPECIFIC PERFORMANCE (3, 4); STATUTES (16); TRIAL (1, 4, 5); TRUSTS (2, 3); WITNESSES (1, 4); WORKMEN'S COMPENSATION (2, 4, 10).

EXAMINING MAGISTRATE—See CRIMINAL LAW (23).

EXCEPTIONS—See MUNICIPAL CORPORATIONS (8–11, 13).

EXCESSIVE JUDGMENT—See DAMAGES (1).

EXECUTION OF INSTRUMENTS—See ACCOUNTING (1); DEEDS (2).

EXECUTORS AND ADMINISTRATORS.

The remedy afforded heirs and legatees when the legal representative neglects his duty to collect assets for an estate does not permit them to represent the estate in the prosecution of suits. *Taylor* v. *Lint*, 674.

See APPEAL AND ERROR (11); AUTOMOBILES (12); DESCENT AND DISTRIBUTION (1); ESTATES OF DECEDENTS (1); PARTNERSHIP.

EXPECTATION OF PAYMENT—See ESTATES OF DECEDENTS (10).

EXPERTS—See EVIDENCE (7).

EXTENSION OF CREDIT—See HUSBAND AND WIFE (9).

EXTENSION OF TIME—See CRIMINAL LAW (25).

EXTRANEOUS WRITING—See CONTRACTS (4).

EXTRAORDINARY RISK—See MASTER AND SERVANT (6).

EXTRA SESSION—See STATUTES (8).

EXTREME CRUELTY—See DIVORCE (6, 14); HUSBAND AND WIFE (1, 2).

FAIR TRIAL—See CRIMINAL LAW (28).

FALLING LIMBS—See EVIDENCE (1); WORKMEN'S COMPENSATION (6).

FALSE IMPRISONMENT.

1. That 3 plaintiffs, or any of them, were responsible for allegedly poisoned medicine on a previous occasion which was referred

FALSE IMPRISONMENT—Continued.

to in police report incident to the arrest of plaintiffs for murder of a 6-months-old baby *held*, not disclosed by any competent testimony in action for false arrest and imprisonment. *Howard* v. *Burton (Simpson* v. *Same, Thomas* v. *Same)*, 178.

2. Jury's finding in plaintiffs' actions for false arrest and imprisonment that defendant had done more than merely report what he believed to be the commission of a crime without any knowledge whatsoever that a crime had been committed and acting solely upon his own suspicions and initiative, proceeded to give false information and actively participated in the subsequent arrests of plaintiffs *held*, supported by sufficient testimony. *Id.*

3. Doubts should be resolved in favor of an honest discharge of duty by peace officers, if possible, and courts should not place such officers in fear of responding in damages for the lawful and proper discharge of that duty. *Hammitt* v. *Straley*, 587.

4. The trial court properly granted motion for directed verdict by defendant chief of police in action against him for illegal arrest and detention, where evidence was undisputed that complaint had been made by woman who claimed plaintiff had tried to run her down with an automobile in a threatening manner in such a way as to constitute a felonious assault or assault with intent to do great bodily harm, defendant's investigation showed plaintiff had a previous record of criminal conduct and arrest was made without a warrant, since defendant reasonably had probable cause to believe a felony had been committed. *Id.* 588.

See DAMAGES (1); JUDGMENT (2); PLEADING (2).

FALSE PROMISES—See CRIMINAL LAW (6).

FALSE REPORT—See FALSE IMPRISONMENT (2).

FARMER—See MASTER AND SERVANT (1, 2, 8, 11).

FARM HAND—See MASTER AND SERVANT (1, 8, 11).

FARMS—See DRAINS (1, 3-5).

FEDERAL COURT—See JUDGMENT (7).

FELLOW SERVANT—See MASTER AND SERVANT (9, 10).

FELONIOUS ASSAULT—See FALSE IMPRISONMENT (4).

FENCES—See BOUNDARIES (1, 3).

FERRIES—See STATES (1).

FIDUCARIES—See FRAUD (4); JOINT TENANCY (3).

FINANCIAL RESPONSIBILITY ACT—See AUTOMOBILES (22).

FINANCIAL STATUS OF HUSBAND—See DISCOVERY (2); DIVORCE (17).

FINES—See AUTOMOBILES (21); CONSTITUTIONAL LAW (8–11, 14).

FINGERPRINTING—See DAMAGES (1).

FIRE WARDEN—See WORKMEN'S COMPENSATION (5).

FITNESS OF MOTHER—See DIVORCE (10).

FORECLOSURE—See MORTGAGES (1–3); VENDOR AND PURCHASER (4–7).

FORFEITURES—See AUTOMOBILES (21); INSURANCE (8).

FORMER CONVICTIONS—See CRIMINAL LAW (12).

FORM LUMBER—See TAXATION (10).

FORM OF ACTION—See ACTION ON THE CASE (2).

FRAUD.

1. Actionable fraud is made out where it appears that defendant made a material representation that was false, which he then knew to be false or made it recklessly without any knowledge of its truth or as a positive assertion, made it with the intention that it should be relied on by plaintiff and was so relied on by plaintiff to his injury; it being necessary to prove each and all of such elements with a reasonable degree of certainty. *Hyma* v. *Lee,* 31.
2. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another, and irrespective of whether they actually profit therefrom or even sustain a loss. *Id.*
3. Allegations that defendant represented to plaintiffs that she was a "medium" who communicated with the spirits of deceased persons but did not and knew that she did not have the power to do so and knew that plaintiffs were deceived by her representations in such respect with the intention that they would rely on her representations, knowing they were deeply religious and intensely interested in the mystical manifestations of religion, and that plaintiffs relied on such representations to their damage *held,* sufficient to aver actionable fraud; there being an averment of a relation of trust and confidence in the light of which defendant's acts are to be construed. *Id.* 32.
4. The right to rely on a full and truthful statement by a person bearing a confidential relation toward him is not limited to relations held fiduciary as a matter of law but extends to wherever the circumstances induce one party to repose trust and confidence in the other, as where confidence is induced by the personal friendship of the parties. *Id.*
5. Averments of declaration in action for fraud *held,* insufficient to establish cause of action against church although sufficient to establish cause of action against individual defendant who claimed to be a "medium." *Id.*
6. Issue as to whether agreement relative to lease of tavern and restaurant business had been induced by fraud was not before the trial court for determination, where defendant's answer failed to raise such issue. *Sauer* v. *Rhoades,* 679.

FRAUD—Continued.

See ACCOUNTING (2); APPEAL AND ERROR (36); CRIMINAL LAW (6); DEEDS (5, 7); ELECTIONS (1); FRAUDS, STATUTE OF (2); HUSBAND AND WIFE (6); JUDGMENT (5); MARRIAGE (1); MONEY RECEIVED (6); MUNICIPAL CORPORATIONS (16, 17); PRINCIPAL AND AGENT (2); TRUSTS (1, 3).

FRAUDS, STATUTE OF.

1. An oral agreement relative to defendant's agency in the purchase of real estate on behalf of plaintiffs was not void and unenforceable because contrary to the statute of frauds as that statute does not apply to trusts *ex maleficio*, such trusts arising by operation of law and not by agreement or intention (CL 1948, § 566.106). *Kren* v. *Rubin*, 289.
2. The statute of frauds is meant to prevent frauds and not to encourage them and a court of equity will not permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud (CL 1948, § 566.106). *Id.*

See TRUSTS (3).

FRIVOLOUS OBJECTIONS—See APPEAL AND ERROR (22).

FUEL—See AUTOMOBILES (1).

FULL FAITH AND CREDIT—See COUNTIES (3).

FUNERAL EXPENSES—See DAMAGES (2, 3); ESTATES OF DECEDENTS (12).

FURNITURE—See DIVORCE (19).

FURTHER COMPENSATION—See WORKMEN'S COMPENSATION (13).

FURTHER PROOFS—See MANDAMUS (3).

GARAGES—See AUTOMOBILES (1).

GARNISHMENT—See BANKS AND BANKING (4); HUSBAND AND WIFE (9).

GASOLINE TAXES—See STATES (1).

GENERAL CONTRACTS—See CONTRACTS (1–3, 5–7).

GENERAL OBLIGATIONS—See BONDS; STATES (1).

GENERAL OPERATOR OF STORE—See NEGLIGENCE (3).

GIFTS—See JOINT TENANCY (2, 3); TAXATION (1).

GOOD FAITH—See SPECIFIC PERFORMANCE (1).

GOVERNOR'S MESSAGE—See STATUTES (8).

GRAND RAPIDS—See COSTS (20); MUNICIPAL CORPORATIONS (28–32).

GREASE—See TAXATION (10).

GREAT WEIGHT OF EVIDENCE—See CRIMINAL LAW (9, 10, 13).

GROUP INSURANCE—See INSURANCE (2, 5).

GUARDIAN AND WARD—See ADOPTION (2, 3); DEEDS (6).

GUESS—See WORKMEN'S COMPENSATION (3).

GUESTS—See AUTOMOBILES (4–6); TRIAL (1).

HABEAS CORPUS—See JUDGMENT (2).

HAND INJURY—See MASTER AND SERVANT (1, 11).

HARDSHIP—See CONSTITUTIONAL LAW (10, 11); MUNICIPAL CORPORATIONS (8, 9, 11).

HARMLESS ERROR—See APPEAL AND ERROR (8–10).

HAY—See TAXATION (10).

HAZARDS—See HIGHWAYS AND STREETS (2, 3).

HEALTH.

The disposal of sewage into the streams of this State is a matter of importance to the public health, which concerns the health of the people of the State at large (CL 1948, § 123.241 *et seq.*). *Ripperger* v. *City of Grand Rapids*, 683.

See HUSBAND AND WIFE (4).

HEARING—See MUNICIPAL CORPORATIONS (21).

HEAT—See NEGLIGENCE (3).

HEIRS—See DESCENT AND DISTRIBUTION (1); EXECUTORS AND ADMINISTRATORS; PARTNERSHIP (2).

HIGHWAYS AND STREETS.

1. The State highway commissioner is given supervision and control over the State highway system and has the responsibility to survey and plan for the construction and maintenance of those highways (CL 1948, § 250.31). *Vanderwall* v. *Goodwin*, 109.
2. Defendant road construction contractor was not under a legal obligation to warn of a hazardous condition on a public highway that it had no part in creating and in an area over which it had no supervision and control. *Id.*
3. Failure of road construction contractor to provide adequate lighting of stop sign at end of construction where road joined another State highway, as he was required to do by his contract, would not be a proximate cause of injuries to plaintiff, a passenger in a car operated over new construction, where such car had stopped and injuries occurred as car proceeded on across the previously constructed highway and into a ditch beyond the area of construction, since the stop sign had served its purpose irrespective of absence of lighting. *Id.*
4. A State assumes an obligation to the people of the State in general to see to it that a trunk line highway, which it establishes and which includes a part located within the limits of a city, is so maintained and controlled as to be reasonably available for the flow of traffic (CL 1948, § 750.498; PA 1949,

HIGHWAYS AND STREETS—Continued.

No 300, § 675 [d]). *Allen* v. *State Highway Commissioner*, 407.

5. Statutes authorizing State highway commissioner and State police commissioner to place signs prohibiting parking of vehicles upon State trunk line highways even within city limits, when such action is found to be in the interest of public safety and convenience *held*, not in violation of provision of the Constitution giving cities the "reasonable" control of the streets within their limits (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675 [d]). *Id.* 408.
6. Order issued jointly by State highway commissioner and State police commissioner, which prohibited parking on a portion of a State trunk line highway within the limits of a city, issued pursuant to State statutes *held*, not invalid as in contravention of provision of the Constitution giving cities the reasonable control of their streets (Const 1908, art 8, § 28; CL 1948, § 750.498; PA 1949, No 300, § 675[d]). *Id.*
7. Reasonable notice of an administrative order of the State highway commissioner or county road commission imposing weight restrictions upon vehicles using highways, except in March, April, and May, must be given to the public in such manner and form as the legislature may prescribe in order to be effective (PA 1949, No 300, § 722[f]). *People* v. *Wolfe*, 527.
8. An administrative order, made by the State highway commissioner, which imposed weight restrictions upon vehicles using a certain highway during February was inoperative, where the statute authorizing it failed to provide for a method of giving notice thereof to the public and no notice appears to have been given by the posting of signs or pursuant to the administrative code act (CL 1948, § 24.71 *et seq.*, as amended by PA 1949, No 90 and PA 1951, No 9; PA 1949, No 300, § 722 [f]). *Id.*
9. The fact that an administrative order imposing weight restrictions upon a certain highway during the month of February, inoperative for lack of notice thereof to the public, was not referred to in the complaint and warrant in prosecution for driving an overweight vehicle in violation of statute is immaterial but the sufficiency of the allegations in the complaint must be determined without reference to such order (CL 1948, § 24.71 *et seq.*, as amended by PA 1949, No 90 and PA 1951, No 9; PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13). *Id.*
10. The extent of the claimed overweight of a vehicle is a matter of proof in a prosecution for driving an overweight vehicle on the public highway in violation of statute (PA 1949, §§ 716, 722; § 724, as amended by PA 1952, No 13). *Id.*

See AUTOMOBILES (3, 9, 10, 15, 16, 18); BONDS (1); CONSTITUTIONAL LAW (6, 9, 11, 13); CONTRACTS (7); COSTS (10, 12); CRIMINAL LAW (21); EVIDENCE (8); MUNICIPAL CORPORATIONS (26, 27); STATES (1, 4); STATUTES (11); TAXATION (10); WORKMEN'S COMPENSATION (6, 7, 16).

HOME—See DIVORCE (1).

HOSPITAL EXPENSES—See DAMAGES (3); DIVORCE (4); ESTATES OF DECEDENTS (12).

HOUSEHOLD APPLIANCES—See DIVORCE (18).

HOUSING LAW—See MUNICIPAL CORPORATIONS (14).

HUSBAND AND WIFE.

1. Each case of separate maintenance based upon cruelty must be decided on its own merits (CL 1948, § 552.301). *Polander* v. *Polander*, 646.
2. Plaintiff wife in suit for separate maintenance *held*, entitled to decree of separation, where evidence shows there is little possibility of reconciliation, that neither seeks a divorce because of their church affiliations, that the parties have not cohabited as husband and wife for over 4 years and that the accumulation of property has largely come about because of the industry of both parties and there were a number of acts of cruelty on the part of defendant husband (CL 1948, § 552.301). *Id.*
3. Courts do not award the wife title to any of the husband's property in statutory proceedings for separate maintenance (CL 1948, § 552.301). *Id.* 647.
4. The proper allowance for the wife in a suit for separate maintenance is determined by the court by taking into consideration the husband's income, the age and health of both parties, and the station in life and manner of living of the parties prior to the separation (CL 1948, § 552.301). *Id.*
5. Case of separate maintenance is remanded to circuit court for allotting, assigning, setting apart and decreeing to plaintiff wife as alimony the use of such part of the defendant husband's real and personal estate, or such portion of his earnings, income or revenue as the court shall find equitable, where Supreme Court reverses decree dismissing bill and finds wife entitled to decree of separation (CL 1948, § 552.301). *Id.*
6. A husband has no right to a determinable moiety in entirety property and, in the absence of fraud, his interest cannot be reached by creditors of the husband alone (CL 1948, § 557.81). *Muskegon Lumber & Fuel Company* v. *Johnson*, 655.
7. Proceeds from sale of entirety property, which were deposited in bank account standing in husband's name only were not subject to payment of his debts, where evidence shows husband and wife had definite understanding the funds were to be used for their joint use in acquisition of other property to be held as tenants by the entirety, since they had not, by such deposit, become the sole and separate property of the husband, every unity of person, time and estate continuing to exist. *Id.*
8. The interest of a wife in an estate by entireties is her separate property which she may hold free of her husband's debts. *Id.*
9. Plaintiff who garnisheed defendant husband's bank account after proceeds of sale of entireties property had been deposited therein was not estopped by action of intervening claimant wife in indorsing check for making such deposit, where plaintiff had not extended credit to either defendant or claimant after such deposit. *Id.* 656.

HUSBAND AND WIFE—Continued.

See APPEAL AND ERROR (11); BANKS AND BANKING (4); DAMAGES (2); DEEDS (7); ESTATES OF DECEDENTS (12); LICENSES (3); WITNESSES (6).

IDENTIFICATION—See CRIMINAL LAW (1).

ILLEGAL USE OF PROPERTY—See AUTOMOBILES (21); CONSTITUTIONAL LAW (14).

ILLINOIS—See CONSPIRACY (2).

IMMATERIAL ISSUE—See CRIMINAL LAW (26).

IMPEACHMENT—See CRIMINAL LAW (22, 24); TRIAL (13).

IMPRISONMENT—See DAMAGES (1).

IMPROVEMENTS—See BONDS (1); STATES (1).

INCITEMENT TO COMMIT PERJURY—See CRIMINAL LAW (25, 26); PERJURY; WITNESSES (6).

INCOME—See ACCOUNTING (2); DIVORCE (3, 16); HUSBAND AND WIFE (4, 5).

INCOME TAXES—See BROKERS (4, 7); EVIDENCE (9).

IN COURSE OF EMPLOYMENT—See WORKMEN'S COMPENSATION (9, 11, 12, 16).

INDEMNITY—See JUDGMENT (6); NEGLIGENCE (10).

INDORSEMENT—See HUSBAND AND WIFE (9); MONEY RECEIVED (5, 6).

INFERENCES—See ARREST (6); AUTOMOBILES (12); DEEDS (2); EVIDENCE (4, 5); TRIAL (10, 11); WORKMEN'S COMPENSATION (2, 10).

INFIDELITY—See DIVORCE (14).

INGHAM—See VENUE.

INHERITANCES—See COSTS (7, 11); DIVORCE (22, 23); TAXATION (1–5).

INJUNCTION—See COSTS (8, 14, 20); EQUITY (4).

INSANE PERSONS—See MARRIAGE (1).

INSTRUCTIONS—See AUTOMOBILES (6, 13, 16); BROKERS (7); CRIMINAL LAW (10, 14); PERJURY (2); TRIAL (6–10).

INSURANCE.

1. Man insured under a life insurance policy who was divorced by a decree terminating wife's rights in the insurance and giving insured the sole and exclusive right to the policy had the right thereafter to change the beneficiary but only in the manner provided for in the policy (CL 1948, § 552.101). *Prudential Insurance Company of America* v. *Irvine*, 18.

INSURANCE—Continued.

2. Divorced wife who remained the nominal beneficiary under group life insurance certificates *held,* not entitled to proceeds thereof, where evidence fails to show that insured had affirmatively redesignated her as beneficiary after the divorce in accordance with the terms of the policy (CL 1948, § 552.-101). *Id.*

3. There must be substantial compliance with the terms of an insurance policy in order that a change of beneficiary thereunder be effected. *Id.*

4. The rights of the named beneficiary under an insurance policy cannot be affected by any act of the insurer subsequent to the death of the insured. *Id.*

5. Employee's widow was entitled to proceeds of group life insurance certificates, where employee had been divorced from named beneficiary without having affirmatively redesignated former wife or anyone else pursuant to terms of the policy (CL 1948, § 552.101). *Id.*

6. Provision of burglary insurance policy that insured should keep records in such manner that the insurer can accurately determine therefrom the amount of the loss by necessary implication excluded mere notations on envelopes in which the money was contained as being sufficient alone to afford a basis for recovery under the policy for any loss sustained. *Ever Krisp Food Products Company* v. *New Amsterdam Casualty Company,* 210.

7. Records of individual employees who had been permitted to leave money in employing company's safe for safekeeping, which records had been compared with notation on envelopes made by the bookkeeper the day before safe was burglarized *held,* competent to show amount of such money lost. *Id.*

8. Clause of burglary insurance policy requiring insured to keep records in such manner that the insurer could accurately determine therefrom the amount of the loss would be so construed as to permit the insured to present its best available proof in order to prevent a forfeiture. *Id.*

9. Records which insured under policy of burglary insurance had required its employees to keep as to deposits they were permitted to make in insured's safe for safekeeping *held,* sufficient to establish amount of loss for which judgment had been entered by trial court. *Id.* 211.

10. Ambiguous or obscure provisions in an insurance policy are liberally construed in favor of the insured. *Ebert* v. *Prudential Insurance Company of America,* 320.

11. Technical construction of insurance policies is not favored. *Id.*

12. Whether an insured is totally and permanently disabled entitling him to waiver of premiums and to disability benefits under a life insurance policy is a question of fact. *Id.*

13. Trial court's finding in nonjury case that plaintiff, an undertaker, insured under life insurance policies entitling him to certain benefits in the event he became totally and permanently disabled, had established that his disability was total and per-

INSURANCE—Continued.

manent in that he not only could not perform any substantial part of the undertaker business, but that his condition was such that he could not perform any other work for remuneration is not disturbed, where, although there were proofs from which a contrary conclusion could be drawn, the evidence does not clearly preponderate in the opposite direction. *Id.*

See AUTOMOBILES (1, 22); COSTS (2); DIVORCE (16); VENDOR AND PURCHASER (7); WORKMEN'S COMPENSATION (9).

INTENT—See FRAUD (1); FRAUDS, STATUTE OF (1); MUNICIPAL CORPORATIONS (14); STATUTES (3, 7, 11, 12); WILLS (2, 3, 7).

INTEREST.

Claim of statutory interest on claim against estate of decedent is disallowed, where payment of interest had been specifically waived by claimant in settlement agreement following demand for payment (CL 1948, § 438.101). *Faber* v. *Glashagen's Estate,* 241.

See ESTATES OF DECEDENTS (10); MONEY RECEIVED (1); VENDOR AND PURCHASER (3, 4, 7).

INTERFERENCE WITH TRIAL—See TRIAL (3).

INTERPLEADER—See COSTS (2).

INTERROGATION OF SUSPECTED PERSONS—See CRIMINAL LAW (5).

INTERSECTIONS—See AUTOMOBILES (14–16); CARRIERS (1); HIGHWAYS AND STREETS (3).

INTERVENORS—See BANKS AND BANKING (4); HUSBAND AND WIFE (9).

INTESTACY—See WILLS (5–7).

INTOXICATING LIQUORS—See LIBEL AND SLANDER.

INTRASTATE TRAINS—See COSTS (1).

INVESTIGATING POLICE OFFICER—See AUTOMOBILES (7, 8).

INVITEES—See NEGLIGENCE (1).

IRRECONCILABLE INCONSISTENCY—See STATUTES (12).

IRREGULARITIES—See CRIMINAL LAW (28).

ISSUE—See NEGLIGENCE (10); WILLS (1).

JANITOR—See CRIMINAL LAW (1); NEGLIGENCE (3).

JOINDER OF PARTIES—See ESTATES OF DECEDENTS (6).

JOINT ACCOUNTS—See COSTS (7); JOINT TENANCY; MONEY RECEIVED (6); TAXATION (1).

JOINT AND SEVERAL LIABILITY—See CONSPIRACY (2, 4); LICENSES (1).

JOINT JUDGMENT—See JUDGMENT (1).

JOINT TENANCY.

1. The husband of defendant was the actual owner of funds in a joint bank account, where evidence shows that the money in such account came from his earnings. *Trevor* v. *Fuhrmann*, 219.
2. The donor of a joint bank account can revoke it in his lifetime (CL 1948, § 487.703). *In re Renz' Estate (Department of Revenue* v. *Beattie)*, 347.
3. It is always competent for a donor, or his fiduciary after death, to show that the joint account was only made for agency purposes (CL 1948, § 487.703). *Id.* 348.

JUDGES—See DISCOVERY (2).

JUDGMENT.

1. A joint judgment against defendant host and oncoming motorists, which is set aside for error as to the host motorist, must also be set aside as to the oncoming motorist and new trial granted both defendants, although on record presented by such defendants whose appeals were based on different grounds, no error appears to have been made as to the oncoming motorist. *Wallace* v. *Skrzycki*, 166.
2. Release of plaintiff from custody by habeas corpus proceeding less than 14 hours after his arrest by defendant chief of police did not bar defense that he had reasonable cause to believe that a felony had been committed and that plaintiff had committed it, in action for illegal arrest and detention, where it appears defendant was not permitted to have the matter of probable cause passed upon in the habeas corpus proceeding although it was a question which could have been raised and passed upon. *Hammitt* v. *Straley*, 588.
3. A judgment, to constitute a bar to a claim in a subsequent action, must be rendered upon the merits, upon the same matter in issue, and between the same parties or their privies. *Id.*
4. The defendants' entry of plaintiff's default as to their cross declaration was irregular, where at the time of such entry the files did not contain proper proof of service of such cross declaration upon plaintiff or his attorney (CL 1948, § 620.1; Court Rules No 27, § 4; No 28, §§ 1, 3 [1945]). *Borg* v. *Thomas*, 670.
5. A judgment by consent that does not appear to have resulted from mistake, fraud or misrepresentation, cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto, since it is not the judgment of the court but the judgment of the parties and an appeal therefrom will be dismissed on motion. *Sauer* v. *Rhoades*, 679.
6. The unilateral character of the estoppel of an adjudication against a plaintiff in his action against a principal is justified by the injustice which would result in allowing a recovery against a defendant for the conduct of another, when that other has been exonerated in a direct suit and such rule is applied where the relation between the defendants in the 2

JUDGMENT—Continued.

suits is that of principal and agent, master and servant, or in-indemnitor and indemnitee. *DePolo* v. *Greig,* 704.

7. The Federal court's finding of waiver on part of purchasers of unvalidated stock of bankrupt corporation constitutes *res judicata* against president and agent of the corporation in the sale of the stock in action against him wherein such defense was interposed by amended answer after final determination in Federal court, it being unnecessary that there be a mutuality in the application of *res judicata* under the circumstances (CL 1948, § 451.120). *Id.*

8. Plaintiffs, husband and wife, in action against president and agent of corporation for sale to them of unvalidated stock, who had full opportunity to present same issues in bankruptcy proceeding of corporation and assert none was presented that is unavailable to defendant herein, were barred by adjudication had in bankruptcy proceeding (CL 1948, § 451.120). *Id.*

See APPEAL AND ERROR (35); MONEY RECEIVED (1); TRIAL (17).

JUDGMENT NOTWITHSTANDING VERDICT—See APPEAL AND ERROR (24); AUTOMOBILES (11).

JUDICIAL NOTICE—See EVIDENCE (1, 8, 9); STATUTES (17).

JURISDICTION—See APPEAL AND ERROR (6, 33); APPEARANCE (1, 3); BANKS AND BANKING (2); CERTIORARI (2, 3, 6); CONSTITUTIONAL LAW (7); COSTS (6); CRIMINAL LAW (23–25, 29); JUSTICES OF THE PEACE; LABOR RELATIONS (1, 2); MUNICIPAL CORPORATIONS (7, 18); PARTNERSHIP (2); STATUTES (11).

JURY.

Juries in chancery cases act in an advisory capacity only. *White* v. *Burkhardt,* 235.

See TRIAL (16).

JUSTICES OF THE PEACE.

1. The matter of the jurisdiction of justices of the peace is entirely subject to the control of the legislature and its right to enact specific provisions covering particular situations may not be denied (Const 1908, art 7, § 16). *People* v. *Wolfe,* 526.

2. The enactment of a proviso permitting justices of the peace to impose a fine of more than $100 for violation of weight restrictions imposed by the vehicle code was a proper method of modifying the general provisions as to the jurisdiction of such justices (Const 1908, art 7, § 16; CL 1948, § 774.1, as amended by PA 1952, No 14). *Id.*

See CONSTITUTIONAL LAW (7); STATUTES (11).

JUSTIFICATION—See DIVORCE (1).

LABOR MEDIATION BOARD—See COSTS (6); LABOR RELATIONS (1).

LABOR RELATIONS.

1. The labor mediation board has not the statutory authority to order that an election among employees of a charitable

LABOR RELATIONS—Continued.

institution for a "strike vote" be held to determine whether a certain union shall be the bargaining agent or representative of the employees, or a certain group of them, in labor matters, where there is no jurisdictional dispute between unions and no evidence of any desire or any request by any part of the employees that they be represented by the union seeking an election by a "strike vote", or that they be represented by any union at all, as their bargaining agent or representative in labor matters (PA 1939, No 176, § 23, as added by PA 1949, No 230). *Arnold Home, Inc.*, v. *Labor Mediation Board*, 315.

2. Plaintiff, a member of an affiliate union, who was replaced as a projectionist in a theater by a member of the local in whose jurisdiction the theater was located *held*, not entitled to complain of such action by the local union by an equally divided court. *Havens* v. *Detroit Motion Picture Projectionists, International Alliance, Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada*, 418.

3. Seniority rights are not inherent in employment, but exist solely by virtue of a contract, either between the employer and his employees or a union acting in their behalf and are subject to such contracts. *Zdero* v. *Briggs Manufacturing Company*, 549.

4. Courts do not interfere with the acts of officers of labor unions without proof that such officers acted in bad faith or in an arbitrary or negligent manner. *Id.* 550.

See COSTS (6); SPECIFIC PERFORMANCE (4).

LACHES—See EQUITY (1).

LAND CONTRACTS—See DIVORCE (3); EQUITY (1); PRINCIPAL AND AGENT (1); VENDOR AND PURCHASER (3–7).

LANDLORD AND TENANT—See EVIDENCE (7); NEGLIGENCE (3, 10); SPECIFIC PERFORMANCE (1).

LAW OF THE CASE—See COURTS (7).

LEASES—See AUTOMOBILES (1–3); CARRIERS (2); COSTS (14); COUNTIES (6); FRAUD (6); SPECIFIC PERFORMANCE (1).

LEAVE OF ABSENCE—See MUNICIPAL CORPORATIONS (2).

LEAVE TO APPEAL—See CRIMINAL LAW (25); MUNICIPAL CORPORATIONS (20).

LEGATEES—See EXECUTORS AND ADMINISTRATORS.

LEGISLATURE—See CONSTITUTIONAL LAW (5, 7, 8, 14, 15); MUNICIPAL CORPORATIONS (27); STATES (2).

LESSER OFFENSES—See CRIMINAL LAW (11).

LIBEL AND SLANDER.

Dismissal of action of libel against newspaper owner was justified, where the publication stated that defendant's conviction of

LIBEL AND SLANDER—Continued.

manslaughter on charge of murder when, he had in fact committed rape of wife of victim of homicide, was a shocking miscarriage of justice was amply justified by plaintiff's signed confession which indicated that he had not been so drunk but that he must have known what he was doing. *Noth* v. *Evening News Association*, 359.

LICENSES.

1. The president of a corporation who was its agent in making the sale of its unvalidated stock would be jointly and severally liable under the blue sky law (CL 1948, § 451.120). *DePolo* v. *Greig*, 703.
2. Waivers releasing corporation and its officers from all liability in connection with purchase of stock with knowledge that stock being purchased had not been validated, when considered with subsequent conduct including acceptance of directorship and vice-presidency and more or less active participation in management until huge loss sustained on one order forced the corporation into bankruptcy, established estoppel (CL 1948, § 451.120). *Id.*
3. Wife, as principal on whose behalf plaintiff husband purchased unvalidated stock and executed waiver releasing corporation and its officers from all liability in connection with such purchase and thereafter participated more or less actively in management of the corporation, was estopped by the acts of her agent. *Id.*

See APPEAL AND ERROR (29); AUTOMOBILES (1).

LIENS—See AUTOMOBILES (21).

LIFE EXPECTANCY—See DAMAGES (3).

LIFE INSURANCE—See DIVORCE (16); INSURANCE (1, 2, 5, 12, 13).

LIGHTS—See EVIDENCE (7); HIGHWAYS AND STREETS (3); NEGLIGENCE (3).

LIMITATION OF ACTIONS—See ESTATES OF DECEDENTS (8).

LOGS AND LOGGING—See MASTER AND SERVANT (1, 8, 11).

LOSS—See INSURANCE (6–9).

LUBRICANTS—See AUTOMOBILES (1).

MACHINERY—See MASTER AND SERVANT (3, 4, 7, 10).

MANDAMUS.

1. The writ of mandamus ought to be used upon all occasions where the law has established no specific remedy and where, in justice and good government, there ought to be one. *Lenz* v. *Mayor of Detroit*, 384.
2. Mandamus is a writ of grace and not of right. *Hartwick* v. *Sanilac Drain Commissioner*, 625.
3. Mandamus proceeding to compel drain commissioner to construct a bridge across large drain which traversed plaintiff's

MANDAMUS—Continued.

farm is ordered remanded for purposes of taking testimony in order to determine the precise character of the bridge to be constructed, where trial court had denied relief sought on erroneous ground that drain commissioner had complete discretion in providing the means of crossing the drain (CL 1948, § 272.2). *Id.*

See COSTS (5, 9); DRAINS (5); MUNICIPAL CORPORATIONS (22, 24).

MANSLAUGHTER—See LIBEL AND SLANDER.

MARKERS—See BOUNDARIES (1, 3).

MARKETABLE TITLE—See ADVERSE POSSESSION; VENDOR AND PURCHASER (1, 2).

MARRIAGE.

1. A marriage may be annulled on the ground of insanity or idiocy of a party thereto by bill authorized by statute but the statutes do not authorize annulment of a marriage for fraud, merely because it is shown that husband appears to have represented himself as being wealthier than he was and conveyed his realty to his children by a former marriage before subsequent marriage to plaintiff's decedent (CL 1948, §§ 552.35, 552.37). *Schelbe* v. *Buckenhizer*, 602.
2. Annulment of marriage between a defendant and his deceased wife, as decreed by trial court after her death is set aside, where no ground for annulment has been established by the evidence. *Id.*

MASONITE—See TAXATION (10).

MASTER AND SERVANT.

1. The matter of plaintiff farm hand's contributory negligence in the loss of his hand while acting as off-bearer at portable sawmill on defendant's farm incident to sawing logs to build a barn *held,* for jury, where it was the duty of defendant through his agent, the sawmill operator, to have informed plaintiff of the danger of removing pieces of wood from the saw while it was in operation inasmuch as plaintiff informed defendant he had not worked with such a saw before commencing with defendant 2 days before the accident. *Dennis* v. *Wilford*, 297.
2. Record presented evidence from which jury could find defendant farmer was guilty of negligence proximately causing loss of plaintiff's hand as he removed an edging from near 48-inch saw while it was in operation, where it appears that a part of the platform of the saw had become broken so as to permit edgings to fall around the saw and necessitating removal by an attendant, a dangerous place in which to work. *Id.*
3. An employee assumes the ordinary dangers of his employment and the risks of defective machinery and methods known to him, or so obvious that he should have known them, but the employee need not make a minute investigation of machines and methods to ascertain the danger though he does owe caution

MASTER AND SERVANT—Continued.

and care in such respects, in an activity not subject to the workmen's compensation act. *Id.* 298.

4. A workman in an activity not subject to the workmen's compensation act assumes the risks incident to his employment when he enters upon it, but he has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and the employee assumes no risks growing out of their defective character unless fully advised thereof. *Id.*

5. An employee in an activity not subject to the workmen's compensation act who did not appreciate the danger of the work he was doing, arising from the defective appliances, did not assume the risk which resulted in his injury if the employer was not justified in supposing he understood such danger. *Id.*

6. A servant does not assume the unusual and extraordinary risk of which the master knows or which he should know or foresee, unless such risks are obvious, or the servant has actual, or presumptive, knowledge of the danger. *Id.*

7. A servant does not assume the risk of danger from the failure of the master to exercise reasonable care to provide safe machinery and appliances, or a safe place in which to do his work, unless the danger is obvious, or he can acquire knowledge thereof in the exercise of ordinary care. *Id.*

8. The doctrine of assumption of risk *held,* not to apply, where defendant farmer who engaged portable sawmill for cutting logs into lumber for a barn had the duty of providing plaintiff farm hand with a safe place to work and give him proper instructions and warnings upon being advised of plaintiff's lack of experience in such activity. *Id.* 299.

9. Wherever the business conducted by the person selected by the master is such that the person selected is invested with full control over the action of the employees engaged in carrying on a particular branch of the master's business and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then the person selected stands in the place of the master and is not a fellow servant with those whom he controls. *Id.*

10. A servant to whom the master delegates his duty to provide other servants with a place reasonably safe to work in and to keep machinery and appliances used in carrying on the work in reasonably good repair, cannot be held to be a fellow servant, no matter what his grade or rank, so as to relieve the master of liability. *Id.*

11. Portable sawmill operator who was designated by defendant farmer to operate sawmill to cut logs into lumber for a barn had duty to direct plaintiff farmhand who assisted in such operation and defendant was bound by orders given by or negligence of the operator to plaintiff who lost his hand incident to such operation. *Id.*

See JUDGMENT (6); LABOR RELATIONS; MUNICIPAL CORPORATIONS (1, 2, 4–7); WORKMEN'S COMPENSATION.

MATERIAL WITNESSES—See PERJURY (1).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See ESTATES OF DECEDENTS (13); WITNESSES (7).

MAYORS—See MUNICIPAL CORPORATIONS (21–24).

MEDICAL EXPENSES—See DAMAGES (3).

MEDIUM—See FRAUD (5); WORDS AND PHRASES.

MENTAL COMPETENCY—See DEEDS (5, 6).

MESSAGE TO LEGISLATURE—See STATUTES (8).

METAL SIDING—See CONTRACTS (1).

MISDEMEANOR—See CRIMINAL LAW (20); STATUTES (11).

MISREPRESENTATION—See JUDGMENT (5); VENDOR AND PURCHASER (2).

MISTAKE—See ELECTIONS (1); JUDGMENT (5); REFORMATION OF INSTRUMENTS.

MODIFICATIONS—See MUNICIPAL CORPORATIONS (8, 13).

MONEY RECEIVED.

1. Trial judge in nonjury action of trespass on the case for recovery of sums placed with defendant in escrow, who observed the witnesses and appraised the value of their testimony *held*, not in error in rendering judgment for plaintiff for amount of sum left in escrow and interest thereon from date of demand. *Cozadd* v. *Healy*, 157.
2. The action of assumpsit for money had and received is essentially an equitable action and if it appear from the whole case that defendant has money which, according to the rules of equity and good conscience belongs to, or ought to be paid to, the plaintiff, he is entitled to recover. *Trevor* v. *Fuhrmann*, 219.
3. Defendant in an action of assumpsit for money had and received must have received the money in order to be held liable to plaintiff. *Id.*
4. An action of *indebitatus* assumpsit for money had and received will not lie against one who has not been personally enriched by the transaction. *Id.*
5. Defendant, indorsee of plaintiff's check, was entitled to show in action of assumpsit for money had and received that she did not actually receive plaintiff's money and was not "unjustly enriched" thereby. *Id.*
6. Testimony of defendant, indorsee of plaintiff's check, and other witnesses, received in nonjury action of assumpsit for money had and received subject to objection of plaintiff, *held*, competent and sufficient to establish that defendant had not actually received plaintiff's money and was not "unjustly enriched" thereby, where it appears that restrictive indorsement to defendant was to enable her to deposit it in joint bank account of herself and husband, that he actually owned the funds in the account and had previously paid therefrom such sum and more to drawee's stepdaughter who had directed its payment

MONEY RECEIVED—Continued.

to defendant's husband and which stepdaughter had procured issuance of check to drawee by fraud. *Id.* 220.

MONUMENTS—See BOUNDARIES (3).

MORTGAGES.

1. Plaintiff in suit to set aside sheriff's deed after mortgage foreclosure sale *held,* not to have sustained her burden of proof as to failure to post notice of foreclosure on the premises, hence, vacation of sheriff's deed was in error (CL 1948, § 692.3). *White* v. *Burkhardt,* 235.
2. Statutory foreclosure of a mortgage is a matter of contract, authorized by the mortgagor, and should not be set aside without some good reason therefor and ought not to be hampered by an unreasonably strict construction of the law (CL 1948, § 692.3). *Id.*
3. Statutory foreclosure is sustained and decree setting it aside reversed, where record shows requirements of statute have been met, that plaintiff was in default some 26 months, and period of redemption had expired before she filed her bill to set the foreclosure aside and proofs failed to support claim that notice of foreclosure had not been posted on the premises as required by statute (CL 1948, § 692.3). *Id.*
4. Finding of trial judge as to amount of mortgage indebtedness involved in suit for accounting is not overruled in view of testimony presented, there being no justification for so doing. *James* v. *Milks,* 555.

See ACCOUNTING; BROKERS (7); CORPORATIONS (1); PLEADING (4).

MOTION PICTURE PROJECTIONISTS—See LABOR RELATIONS (2).

MOTIONS AND ORDERS—See MUNICIPAL CORPORATIONS (16, 17).

MOTION TO DISMISS—See APPEAL AND ERROR (2, 18); CERTIORARI (4, 9); COSTS (13); EQUITY (3).

MOTION TO QUASH—See CRIMINAL LAW (25).

MOTOR CARRIERS—See AUTOMOBILES (1–3); CARRIERS (2); COSTS (4, 14).

MOTORS—See DIVORCE (19).

MOTOR VEHICLE TAXES—See STATES (1).

MULTIPLE DWELLINGS—See MUNICIPAL CORPORATIONS (13).

MUNICIPAL CORPORATIONS.

1. Defendant municipal board of police and fire commissioners was a necessary party to proceeding to compel it to re-employ plaintiff, an ex-serviceman, as a member of the police force, where the board was the employer, although not a corporate legal entity under the charter (CL 1948, § 613.35; PA 1951, No 263). *Borseth* v. *City of Lansing,* 54.

MUNICIPAL CORPORATIONS—Continued.

2. Ex-serviceman's right to re-employment as city policeman was not waived by virtue of fact that he had resigned rather than taken a leave of absence to perform military duty, where statute conferring right to re-employment did not make such right dependent upon manner of separation (PA 1951, No 263). *Id.*

3. No municipal board resolution nor municipal charter provision may supersede a statutory provision conferring a right. *Id.*

4. Contention that plaintiff, an ex-serviceman had not made a sufficient or proper application for re-employment as a city policeman *held*, without merit, where defendant board of police and fire commissioners did consider his informal application and determined not to reinstate him for an entirely different reason (PA 1951, No 263). *Id.*

5. Record in proceeding by ex-serviceman to compel municipal board of police and fire commissioners to re-employ him as a police officer *held*, to lack evidence that he was not still qualified and to establish that their refusal was for a different reason (PA 1951, No 263). *Id.*

6. Fact that plaintiff, an ex-serviceman, had resigned and withdrawn his contributions to pension fund before entering military service *held*, not to justify defendant municipal board of police and fire commissioners' refusal to re-employ him as a police officer, where it does not appear he was not still qualified or that it was not feasible for such defendant to do so and he offered reimbursement for contributions withdrawn (PA 1951, No 263). *Id.* 55.

7. The circuit court had power to compel defendant board of police and fire commissioners to comply with statute requiring it to re-employ employees who had severed employment to perform military service if still qualified to serve in former capacity and if it were feasible to do so, where defendant board had not made such determinations nor determination that it had or had not other available employment for applicant no longer qualified to serve in former position (PA 1951, No 263). *Id.*

8. Undue hardship or practical difficulty in complying with zoning ordinance need not be shown in order to obtain review by municipal board of zoning appeals, where zoning ordinance specifically provides for special exceptions in addition to variations and modifications, such exceptions being distinct from variations and modifications and authorized by statute (CL 1948, § 125.583a; Detroit Zoning Ordinance No 171–D, § 20.7). *Mitchell* v. *Grewal (Same* v. *Hofweber)*, 81.

9. The legislative body of a city is authorized to provide by zoning ordinance for the resumption, restoration, reconstruction, extension or substitutions of nonconforming uses or structures upon terms and conditions contained in the ordinance, thereby providing for exceptions distinct from power of boards of zoning appeals to grant variances where there are unnecessary hardships or practical difficulties; the power to grant variances being contained elsewhere in the enabling act (CL 1948, §§ 125.583a, 125.585[d]). *Id.* 82.

MUNICIPAL CORPORATIONS—Continued.

10. Conditions for an exception to a municipal zoning ordinance must be found within the ordinance itself and may not be varied but a variance in disregard of a literal enforcement of the ordinance may be permitted through an appeal from an administrative order. *Id.*

11. The municipal board of zoning appeals need not find that unnecessary hardship or practical difficulties exist as a prerequisite of granting a permit to the extension of a nonconforming building, structure or use, where neither the enabling statute nor zoning ordinance provide for such condition to the granting of a permit under the circumstances (CL 1948, §§ 125.583a, 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7). *Id.*

12. All provisions of an ordinance must be construed so as to give meaning to each provision. *Id.*

13. Provision of municipal zoning ordinance authorizing board of zoning appeals to permit an increase in the number of dwelling units in a multiple dwelling existing in 2 designated restricted residential zones does not prevent the issuance of a building permit to increase number of dwelling units in a nonconforming building in a zone other than in the designated zones pursuant to section authorizing board to grant special exceptions subject to certain limitations in addition to its power to allow proper variations and modifications (Detroit Zoning Ordinance No 171–D, §§ 3.6, 20.7). *Id.* 83.

14. A municipal board of zoning appeals is not empowered to waive provisions of any other statute, ordinance, rule, or regulation than as authorized by the zoning ordinance and its enabling act, hence, where expressly stated that it did not intend to waive provisions of any other statute, ordinance, rule, or regulation, an owner who violates the housing law acts at his peril (CL 1948, § 125.401 *et seq.;* Detroit Zoning Ordinance No 171–D, § 20.7). *Id.*

15. Neither the circuit nor Supreme Court may substitute its discretion for that of a municipal board of zoning appeals established under an ordinance setting forth that the decision of the board in matters involving its discretion or finding of facts should be final (Detroit Zoning Ordinance No 171–D, § 20.7). *Id.*

16. An order of a municipal board of zoning appeals which has been given immediate effect must be held to be final in the absence of fraud or bad faith (CL 1948, § 125.585[d]). *Id.*

17. Trial judge correctly refused to substitute his discretion for that of municipal board of zoning appeals in making an order involving an exercise of its discretion and then giving it immediate effect, where there was no evidence of fraud or bad faith in the making of the order (CL 1948, § 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7). *Id.*

18. The fact that trial and appellate courts might, on the same facts, arrive at different results than a municipal board of zoning appeals would not necessarily make the board's action erroneous, a different result being imposed by a court only where it is clear the board has exceeded its jurisdictional lim-

MUNICIPAL CORPORATIONS—Continued.

itations or abused the discretion lodged in it by statute or ordinance (CL 1948, §§ 125.583a, 125.585[d]; Detroit Zoning Ordinance No 171–D, § 20.7). *Id.* 84.

19. The civil service commission of Detroit may set aside a discharge of an employee, where it was made for religious or political reasons or for reasons other than the good of the service (Detroit Charter, title 4, chap 2, §§ 18, 18a). *Lenz* v. *Mayor of Detroit*, 383.

20. The judicial review of the action of the civil service commission of Detroit is solely by an appeal in the nature of certiorari in which leave must first be obtained. *Id.*

21. The mayor of a city is authorized to conduct a hearing and determine whether a discharged employee is guilty of 1 or more grounds set up in the veterans' preference act for removal and if he finds the employee should not have been discharged, he may order his reinstatement (CL 1948, § 35.402 *et seq.*). *Id.* 384.

22. The mayor of a city has no power to compel reinstatement of an employee in the office of city clerk, such action being by mandamus. *Id.*

23. A mayor's power to determine the validity of a discharge of a city employee under the veterans' preference act is reviewable solely by an appeal in the nature of certiorari (CL 1948, § 35.402 *et seq.*). *Id.*

24. The action of a mayor in failing to order the reinstatement of an employee in the office of the city clerk and in finding that his discharge by the city clerk and city civil service commission was proper may be reviewed solely by an appeal in the nature of certiorari, mandamus not being the proper remedy to determine the validity of the proceedings had (CL 1948, § 35.402 *et seq.*; Detroit Charter, title 4, chap 2, §§ 18, 18a). *Id.*

25. A party claiming an ordinance is arbitrary, unreasonable or discriminatory has the burden of so showing. *Allen* v. *State Highway Commissioner*, 407.

26. The reasonable control of streets reserved to cities under the Constitution does not give them exclusive control, preventing the State from assuming any control over State trunk line highways running through cities (Const 1908, art 8, § 28). *Id.*

27. The "reasonableness" of a city's control of its streets is not within the final determination of the city in all cases, but may be determined in accordance with the legislature's interpretation in some instances, provided such interpretation can be approved by the court (Const 1908, art 8, § 28). *Id.*

28. Trial court's finding of fact that water which passed through water meter during winter quarter would fairly represent for the whole year the amount of water entering the sewer is affirmed in suit to enjoin city's collection of sewage utility charges (City of Grand Rapids Ordinance No 1340). *Ripperger* v. *City of Grand Rapids*, 682.

MUNICIPAL CORPORATIONS—Continued.

29. Charges for sewage service furnished by a city and based upon consumption of water do not constitute taxes as no one is compelled to take such service unless he chooses although enforcement for payment is permitted to be made in the same method as payment for taxes is enforced (City of Grand Rapids Ordinance No 1340). *Id.*

30. Payments by users for the service rendered by a public utility *held,* not a tax within the meaning of constitutional provisions pertaining to taxation (City of Grand Rapids Ordinance No 1340). *Id.*

31. The grant of power by the legislature to a city and exercise of power by the city to shut off water to those delinquent in paying either or both water and sewage charges *held,* neither unlawful nor unreasonable (CL 1948, § 141.101 *et seq.,* as amended by PA 1941, No 210; City of Grand Rapids Ordinance No 1340). *Id.*

32. Grant of powers to city manager by city ordinance *held,* administrative in character and necessary and proper in order to carry out the regulations of ordinance relative to operation and maintenance of sewage system, where the ordinance itself fixed the rates and charges and the system had been installed at insistence of State water resources commission that the city construct adequate sewage disposal facilities and refrain from further pollution of river (City of Grand Rapids Ordinance No 1340). *Id.* 683.

See CONSTITUTIONAL LAW (6); COSTS (9, 10, 20); COUNTIES (1); HIGHWAYS AND STREETS (4–6).

MURDER—See DAMAGES (1); FALSE IMPRISONMENT (1); LIBEL AND SLANDER.

MUTUALITY—See JUDGMENT (7).

MUTUAL MISTAKE—See REFORMATION OF INSTRUMENTS.

NAILS—See TAXATION (10).

NATIONAL BANKS—See BANKS AND BANKING (2).

NEGLIGENCE.

1. Customer in shoe department of a store *held,* an invitee at place and time of accident alleged to be due to defendants' negligence, where it appears she had bought shoes there previously, inquired if her size was among shoes advertised as being on sale, clerks were then busy and 1 of them directed her to look at the shelves on which the shoes were located, since she was engaged in a mission for the benefit of both herself and the store operators. *Muth* v. *W. P. Lahey's, Inc.,* 513.

2. Lessee of shoe department of a store was bound by the active negligence of its clerks in leaving a trap door through the floor of an aisle along which shelves containing shoe boxes were located without having any barricades or warning to prevent persons falling through it and then directing plaintiff

NEGLIGENCE—Continued.

customer to examine shelves without warning her of the danger. *Id.*

3. Whether or not defendant general operator of department store was liable for installation and maintenance of a dangerous condition on premises leased to codefendant for conducting shoe department was properly left to jury, where lease provided that lessor agreed to furnish heat, light, janitor and local telephone services, air conditioning and cooling facilities, sales books and wrapping materials, required advertising to be carried in general operator's name and receipts to be paid to it and reserved control over all credit sales and purchases and the right to decide controversies between the lessee and its employees and customers and fitness of lessee's employees, and trap door through which plaintiff fell had been installed with the general operator's approval. *Id.*

4. Whether or not plaintiff customer in shoe department was guilty of contributory negligence was properly left to jury, where it appears that 1 of the clerks had left a trap door through the floor of an aisle unguarded and without warning plaintiff of the danger another clerk had directed plaintiff to search for her own size of shoes among the stock located on shelves along the aisle and she fell through the trap door opening while making such search. *Id.* 514.

5. Contributory negligence is ordinarily a question of fact for the jury, if there is one, unless the evidence so plainly and clearly establishes such contributory negligence that no reasonable man could come to any other conclusion. *Id.*

6. One in the exercise of ordinary care under all of the circumstances is not guilty of contributory negligence. *Id.*

7. What is ordinary care under the circumstances of a case is usually a question of fact. *Id.*

8. Ordinary care is the care which an ordinarily prudent person would exercise under the same or similar circumstances. *Id.*

9. Evidence adduced in shoe department customer's action for injuries sustained in fall through unguarded trap door opening in aisle where shoes were stored *held,* to have failed to suggest any possible reason why she should have anticipated an opening in the floor, hence, negligence will not be imputed to her as a matter of law for her failure to look out for such danger. *Id.*

10. Whether or not defendant general operator of store has a right to reimbursement from lessee of shoe department for payment of judgments arising out of injuries to lessee's customer from active negligence of lessee's clerks was not a proper issue in customer's action against such lessor and lessee, hence, trial court was not in error in so holding. *Id.* 515.

See AUTOMOBILES (12, 14–16); CARRIERS (1); EVIDENCE (7); EXECUTORS AND ADMINISTRATORS; LABOR RELATIONS (4); MASTER AND SERVANT (2, 11).

NEW DRAINS—See DRAINS (1, 2).

NEWSPAPER—See LIBEL AND SLANDER.

NEW TRIAL.

An opinion by the trial judge in denying a motion for a new trial is desirable and the proper practice but the court rule calling for such an opinion is directory and not mandatory and reversal will not be ordered merely for a trial judge's failure to file such an opinion (Court Rule No 47, § 3 [1945]). *Howard* v. *Burton (Simpson* v. *Same, Thomas* v. *Same)*, 179.

See APPEAL AND ERROR (11, 17); JUDGMENT (1).

NEXT OF KIN—See DESCENT AND DISTRIBUTION.

NIECES—See TAXATION (1).

NIGHTTIME—See AUTOMOBILES (17).

NONCONFORMING USES—See MUNICIPAL CORPORATIONS (9, 11, 13).

NONJURY CASES—See APPEAL AND ERROR (10, 16, 28, 32); AUTOMOBILES (9); ESTATES OF DECEDENTS (7); INSURANCE (13); MONEY RECEIVED (1, 6); SET-OFF AND RECOUPMENT.

NONRESIDENT MOTHER—See DIVORCE (11).

NOTARY PUBLIC—See DISCOVERY (3, 4).

NOTICE—See APPEAL AND ERROR (18); APPEARANCE (4); HIGHWAYS AND STREETS (7, 8); MORTGAGES (1); VENDOR AND PURCHASER (4).

NOVATION—See ESTATES OF DECEDENTS (6).

OBJECTIONS—See APPEAL AND ERROR (22, 23); EVIDENCE (6).

OBSERVATION—See AUTOMOBILES (19, 20); CARRIERS (1).

OBVIOUS DANGER—See MASTER AND SERVANT (7).

OFF-BEARER—See MASTER AND SERVANT (1).

OFFER AND ACCEPTANCE—See BROKERS (4); CONTRACTS (9).

OFFICERS.

A person who was holding a position as a public employee at time of entering into military service is presumed to have been qualified to hold such position, the lack of qualification to justify denial of statutory right to re-employment being confined to such as result from disability sustained during such service (PA 1951, No 263). *Borseth* v. *City of Lansing*, 54.

See APPEAL AND ERROR (3); APPEARANCE (2); CONSTITUTIONAL LAW (1); CORPORATIONS (1); DRAINS (2); HIGHWAYS AND STREETS (6); LABOR RELATIONS (4); LICENSES (1, 2); WORKMEN'S COMPENSATION (14).

OIL—See AUTOMOBILES (1).

OLD AGE ASSISTANCE—See COSTS (17); ESTATES OF DECEDENTS (15).

OLD AGE INSURANCE—See WORKMEN'S COMPENSATION (9).

ONCOMING CARS—See AUTOMOBILES (11).

OPERATING LOSS—See RAILROADS (2).

OPINIONS—See CRIMINAL LAW (21); NEW TRIAL.

OPINION TESTIMONY—See APPEAL AND ERROR (34).

OPTIONS—See SPECIFIC PERFORMANCE (1).

ORAL CONTRACT—See BROKERS (5, 6).

ORDER OF PROOF—See CRIMINAL LAW (27); DIVORCE (18).

ORDINANCES—See APPEAL AND ERROR (5); COSTS (20); MUNICIPAL CORPORATIONS (8–11, 13–15, 18, 25, 28–32).

ORDINARY CARE—See NEGLIGENCE (6–8).

OTHER STATE—See COURTS (6).

OVERREACHING—See DEEDS (3).

OVERTAKING CARS—See AUTOMOBILES (11, 12).

OVERWEIGHT VEHICLES—See AUTOMOBILES (21); CONSTITUTIONAL LAW (9, 11, 13); CRIMINAL LAW (20, 21); EVIDENCE (8); HIGHWAYS AND STREETS (9, 10); JUSTICES OF THE PEACE (2); STATUTES (11).

OWNERSHIP—See JOINT TENANCY (1).

PARDONS AND PAROLES—See CRIMINAL LAW (29).

PARENT AND CHILD.

1. The mother is entitled to the care and custody of her children who are under the age of 12 years in the event she and her husband are separated and a court has the right to make such disposition of the children as will be in their best interest (CL 1948, § 722.541). *Brown* v. *Brown*, 492.
2. One who, without a privilege to do so, abducts a minor child is liable to the parent, who is legally entitled to the child's custody. *Id.*
3. A parent who is wrongfully deprived of the custody of his child may recover for the loss of society of his child, for the emotional distress resulting from the abduction and for loss of services. *Id.*

See DAMAGES (2); WILLS (1).

PARKING—See COSTS (10); HIGHWAYS AND STREETS (5, 6).

PAROL EVIDENCE—See PRINCIPAL AND AGENT (1); TRUSTS (2, 3).

PARTIES.

The trustee in bankruptcy of a corporation was the proper party to bring suit for restoration of possession of property of which defendants had taken possession pursuant to void chattel mortgage which had been executed by the corporation. *Pratt* v. *Valliquette*, 397.

PARTIES—Continued.

See APPEARANCE (2); CONSPIRACY (4, 5); COUNTIES (6); ESTATES OF DECEDENTS (5, 6); EXECUTORS AND ADMINISTRATORS; MUNICIPAL CORPORATIONS (1); PARTNERSHIP (2); PROHIBITION; WITNESSES (8).

PARTNERSHIP.

1. The surviving partner has the sole right to possession of the assets of the partnership to wind up the affairs of the partnership and pay over the net results to the legal representative of the deceased partner's estate (CL 1948, § 449.25[2][d]). *Taylor* v. *Lint*, 673.
2. The power to make orders for the distribution of a deceased partner's estate to his surviving minor children rests solely in the probate court in proceedings for the probating of his estate and not in the circuit court in receivership proceedings for winding up the partnership; hence, the only proper order the circuit court could make therein would be to require the receiver to pay over to the legal representative of the deceased partner, the latter's proportionate share of the partnership assets as the heirs have no standing as parties to receivership suit (CL 1948, § 449.25[2][d]). *Id.* 674.

PASSAGEWAYS—See DRAINS (1, 3).

PASSBOOKS—See TAXATION (1).

PASSENGERS—See AUTOMOBILES (3–6, 11); TRIAL (1).

PAST CONSIDERATION—See CONTRACTS (8).

PAST RECOLLECTION—See EVIDENCE (2).

PAVEMENT—See AUTOMOBILES (11).

PAYMENT—See BONDS (1); ESTATES OF DECEDENTS (10); INTEREST; TAXATION (5).

PEACE OFFICERS—See FALSE IMPRISONMENT (3, 4); JUDGMENT (2).

PEDESTRIANS—See AUTOMOBILES (17–20).

PENSIONS—See MUNICIPAL CORPORATIONS (6).

PERFORMANCE—See BROKERS (5, 6); SPECIFIC PERFORMANCE (3).

PERJURY.

1. The reading of the names of witnesses indorsed on the information in a rape case was proper in prosecution for inciting a witness therein to commit perjury, since it was necessary for the prosecution to show that the rape case was pending and that the witness therein whom defendant was claimed to have attempted to incite to commit perjury was a material witness in the prosecution for rape (CL 1948, § 750.425). *People* v. *Mosley*, 559.
2. Charge to jury in prosecution for inciting to commit perjury *held*, fair and comprehensive (CL 1948, § 750.425). *Id.* 560.

PERJURY—Continued.

3. Prosecutor's argument to jury in prosecution for inciting to commit perjury *held,* not such as to require reversal (CL 1948, § 750.425). *Id.*
4. It is not necessary to show that witness whose testimony was sought to be procured knew that it was false, in prosecution for inciting and procuring one to commit perjury (CL 1948, § 750.425). *Id.*
5. Jury's verdict of guilty in prosecuting for inciting to commit perjury *held,* supported by sufficient testimony (CL 1948, § 750.425). *Id.* 561.

See CRIMINAL LAW (25, 26); WITNESSES (6).

PERMANENT DISABILITY—See COURTS (5); INSURANCE (12, 13).

PERSONALTY—See DESCENT AND DISTRIBUTION; DIVORCE (19).

PETITIONS—See CERTIORARI (4); COSTS (13); ELECTIONS.

PHYSICAL FACTS—See AUTOMOBILES (7, 8).

PLACEMENT AGENCY—See ADOPTION (1, 3).

PLANS—See CONTRACTS (2, 3).

PLEADING.

1. Undefined terms in a pleading are assumed to be used therein in their ordinary significance. *Hyma* v. *Lee,* 31.
2. Permission to amend declaration during course of trial to conform to the proofs rather than opening statement to which defendant in action for false arrest and imprisonment had objected was within discretion of trial court and did not result in error, where trial court permitted amendment to avoid any question as to sufficiency of declaration. *Howard* v. *Burton (Simpson* v. *Same, Thomas* v. *Same),* 179.
3. The failure to deny an allegation in defendant's answer constitutes an admission thereof by plaintiff (Court Rule No 24, § 1 [1945]). *Zdero* v. *Briggs Manufacturing Company,* 550.
4. The existence of note and mortgage involved in suit for an accounting did not need to be proved, where it was admitted by answer and cross bill (Court Rule No 17, § 10 [1945]). *James* v. *Milks,* 555.
5. Provision of court rule requiring replies to answers and answers to cross bills to be filed and served within 15 days after service of a copy of the answer or cross bill is construed to apply equally to answers to cross declarations (Court Rule No 27, § 4 [1945]). *Borg* v. *Thomas,* 669.
6. The cross plaintiff may take the cross declaration as confessed by filing an affidavit showing cross defendant's failure to answer it and the manner of service on him, where the cross defendant has failed to answer within the time provided by law or court rule (CL 1948, § 620.1; Court Rule No 28, §§ 1, 3 [1945]). *Id.*

PLEADING—Continued.

7. It was not error nor an abuse of discretion on part of trial court to allow defendant to amend answer so as to permit defense of *res judicata,* where there had been no final adjudication in Federal court theretofore in proceedings involving issues presented in instant case. *DePolo* v. *Greig,* 703.

See APPEAL AND ERROR (2, 7, 18); DISCOVERY (2); EQUITY (3); FRAUD (3, 5, 6).

PLEDGES—See STATES (1, 4).

PLYWOOD—See TAXATION (10).

POINTLESS REMARKS—See TRIAL (2).

POISONING—See FALSE IMPRISONMENT (1).

POLICE AND FIRE COMMISSIONERS, BOARD OF—See COSTS (3); MUNICIPAL CORPORATIONS (1, 4, 6, 7).

POLICEMAN—See COSTS (3); MUNICIPAL CORPORATIONS (2, 4–6).

POLICE POWER—See SUNDAY.

POLICE REPORT—See AUTOMOBILES (7); FALSE IMPRISONMENT (1).

POLLING JURY—See TRIAL (15, 17).

POPULATION—See AUTOMOBILES (23); STATUTES (16).

PORTABLE SAWMILL—See MASTER AND SERVANT (1, 2, 8, 11).

POSSESSION—See ACTION ON THE CASE; AUTOMOBILES (1); COSTS (13); DESCENT AND DISTRIBUTION (2); ESTATES OF DECEDENTS (2, 3); PARTIES; PARTNERSHIP (1); TAXATION (1, 2).

POSTING—See MORTGAGES (1, 3).

POWER—See CONTRACTS (7).

PRACTICAL DIFFICULTIES—See MUNICIPAL CORPORATIONS (8, 9, 11).

PRECEDENTS—See COURTS (1).

PREJUDICE—See CRIMINAL LAW (12); DAMAGES (2); ESTOPPEL (3); TRIAL (6); WITNESSES (3).

PRELIMINARY EXAMINATION—See CRIMINAL LAW (2, 4, 10).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (16, 28, 32); ESTATES OF DECEDENTS (7); INSURANCE (13).

PRESCRIPTIVE RIGHTS—See TAXATION (11).

PRESIDENT—See JUDGMENT (8); LICENSES (1).

PRESUMPTIONS—See DEEDS (4); EVIDENCE (5); MASTER AND SERVANT (6); OFFICERS; STATUTES (9, 17); WILLS (5, 6).

PRETRIAL—See COURTS (3); DISCOVERY (1, 2).

PRIMA FACIE CASE—See ESTATES OF DECEDENTS (3).

PRINCIPAL—See VENDOR AND PURCHASER (3, 4, 7).

PRINCIPAL AND AGENT.

1. Parol evidence was properly admitted to vary an unambiguous description in a land contract, where such evidence was offered to show that plaintiffs understood the land contract was in fulfillment of a defendant's agency obligation (CL 1948, § 566.106). *Kren* v. *Rubin*, 289.
2. An agent who has been guilty of fraud in the transaction of his principal's business forfeits his rights to a commission as such. *Id.* 290.
3. An agent's duty to his principal forbids him from disputing the principal's right or title to property when called upon to account for property received by him on the principal's account. *Id.*
4. The determination of the issue in a suit against the principal bars an action against the agent on the same cause of action. *DePolo* v. *Greig*, 704.

See APPEAL AND ERROR (14); BONDS (2); EQUITY (1); EVIDENCE (3); FRAUDS, STATUTE OF (1); JOINT TENANCY (3); JUDGMENT (6); LICENSES (3); MASTER AND SERVANT (1, 9–11); TRUSTS (1).

PRIORITIES—See LABOR RELATIONS (2).

PRIVACY—See DISCOVERY (2).

PRIVILEGES—See APPEAL AND ERROR (8, 9); ATTORNEY AND CLIENT.

PROBABLE CAUSE—See ARREST; FALSE IMPRISONMENT (4); JUDGMENT (2).

PROBATE COURT—See ESTATES OF DECEDENTS (3); PARTNERSHIP (2).

PROCESS—See APPEARANCE (1).

PROFIT—See FRAUD (2).

PROHIBITION.

Plaintiff has no standing in court to obtain writ of prohibition and stay of all proceedings to prevent the consummation of the sale and delivery of bridge revenue bonds by a State agency, where he sues as a taxpayer and user of highways but fails to show he will sustain a substantial injury or suffer loss or damage as a taxpayer through increased taxation and the consequences thereof (PA 1952, No 214, as amended by PA 1953, No 141). *Nichols* v. *State Administrative Board*, 618.

See COSTS (16).

PROOF OF SERVICE—See JUDGMENT (4).

PROPERTY—See AUTOMOBILES (3); BANKS AND BANKING (3); HUSBAND AND WIFE (3); INSURANCE (6).

PROVISOES—See JUSTICES OF THE PEACE (2); STATUTES (11–13).

PROXIMATE CAUSE—See APPEAL AND ERROR (6); EVIDENCE (1); HIGHWAYS AND STREETS (3); MASTER AND SERVANT (2); TRIAL (8); WORKMEN'S COMPENSATION (4, 5, 9, 11, 12).

PUBLIC CONVENIENCE—See RAILROADS (2).

PUBLIC HEALTH—See HEALTH; SUNDAY.

PUBLIC POLICY—See VENDOR AND PURCHASER (3).

PUBLIC QUESTION—See COSTS (1, 3–5, 7, 8, 10, 12, 14, 16, 17, 20).

PUBLIC SAFETY—See AUTOMOBILES (3); HIGHWAYS AND STREETS (5).

PUBLIC SERVICE COMMISSION—See APPEAL AND ERROR (1); COSTS (1, 14).

PUBLIC SERVICE COMMISSIONER—See WORKMEN'S COMPENSATION (14, 15).

PUBLIC UTILITIES—See MUNICIPAL CORPORATIONS (30).

QUALIFICATIONS—See MUNICIPAL CORPORATIONS (5–7); OFFICERS (1).

QUESTION FOR TRIER OF FACTS—See ARREST (6); AUTOMOBILES (15, 17); CARRIERS (1); CRIMINAL LAW (3, 4); DRAINS (2); INSURANCE (12); NEGLIGENCE (3, 5, 7); TRIAL (18).

QUESTIONING OF WITNESSES—See APPEAL AND ERROR (22); TRIAL (2, 3).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (3–6, 11, 13, 19, 20, 29, 34, 35).

QUIETING TITLE—See REFORMATION OF INSTRUMENTS.

RAILROADS.

1. Each case involving discontinuance of service by a railroad must be decided on its own facts. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Public Service Commission*, 9.
2. Plaintiff railroad *held*, entitled to discontinue passenger service on a 93-mile branch line, where public has virtually, but not completely, abandoned use of the line, even though a few people will be somewhat inconvenienced, and it appears that the branch has operated at a loss of from $53,304 in 1948 to $68,897 in 1951 and the railroad lost large sums in the State on intrastate business. *Id.*
3. Decree permitting discontinuance of passenger service on a 93-mile branch line is ordered entered on condition that there may be made an application to reinstate such service or any other substitute service not entailing loss should conditions change. *Id.* 10.

See APPEAL AND ERROR (1).

RAIN—See AUTOMOBILES (17).

RAPE—See LIBEL AND SLANDER; PERJURY (1).

REAL ESTATE—See APPEAL AND ERROR (13); COSTS (12); DECLARATORY JUDGMENT; DIVORCE (20); ESTATES OF DECEDENTS (4); TRUSTS (1, 3); VENUE.

REAL PARTY IN INTEREST—See ESTATES OF DECEDENTS (5).

REASONS AND GROUNDS FOR APPEAL—See APPEAL AND ERROR (4).

RECEIPT—See MONEY RECEIVED (2, 5).

RECEIVERS—See COSTS (19); PARTNERSHIP (2).

RECONCILIATION—See DIVORCE (2, 6); HUSBAND AND WIFE (2).

RECORD—See APPEAL AND ERROR (18, 25, 36); AUTOMOBILES (9); CERTIORARI (2); COUNTIES (2); CRIMINAL LAW (25); DIVORCE (2, 24); EQUITY (4); EVIDENCE (6); INSURANCE (6–9); JUDGMENT (1); TRIAL (8, 11); TRUSTS (1).

RECORDING—See ADVERSE POSSESSION; VENDOR AND PURCHASER (2).

RECOUNTS—See ELECTIONS.

REDEMPTION—See MORTGAGES (3); VENDOR AND PURCHASER (5–7).

RE-EMPLOYMENT OF SERVICEMAN—See APPEAL AND ERROR (3); CONSTITUTIONAL LAW (1); COSTS (3); MUNICIPAL CORPORATIONS (1, 2, 4–7); OFFICERS.

REFERENCE—See CONTRACTS (3, 4); CRIMINAL LAW (20); HIGHWAYS AND STREETS (9); STATUTES (11).

REFORMATION OF INSTRUMENTS.

Trial court's finding there had been a mutual mistake in the description of property conveyed by plaintiff's decedent to defendants whereby there was conveyed a total of 77 feet frontage of property rather than 52 feet and that defendants had intended to buy only the smaller amount *held*, supported by testimony in suit for reformation of deed and to quiet title to the 25 feet in plaintiff, including testimony elicited from defendants on cross-examination under the statute (CL. 1948, § 617.66). *Boerner* v. *Szabo*, 41.

REFRESHING RECOLLECTION—See AUTOMOBILES (7, 8).

REHEARING—See APPEAL AND ERROR (27, 33).

REIMBURSEMENT—See MUNICIPAL CORPORATIONS (6); NEGLIGENCE (10).

REINSTATEMENT—See COSTS (9); MUNICIPAL CORPORATIONS (21, 24); RAILROADS (3); SPECIFIC PERFORMANCE (4).

RELEASE—See ADOPTION.

RELIGION—See DIVORCE (6).

REMAND—See APPEAL AND ERROR (33); CRIMINAL LAW (21, 29); HUSBAND AND WIFE (5); MANDAMUS (3).

REMEDY—See EQUITY (2); EXECUTORS AND ADMINISTRATORS; MANDAMUS (1); SPECIFIC PERFORMANCE (4).

REMITTITURS—See DAMAGES (1).

RENT—See COUNTIES (3, 5, 6).

REPAIRS—See AUTOMOBILES (1); COUNTIES (5); MASTER AND SERVANT (10); STATES (1, 4).

REPETITION—See TRIAL (6, 8).

REPLIES—See PLEADING (5).

REPORTS—See AUTOMOBILES (7, 8); FALSE IMPRISONMENT (1).

REPRESENTATIONS—See ESTOPPEL (2).

REPUGNANCY—See STATUTES (13).

REQUESTS TO CHARGE—See BROKERS (7); TRIAL (8, 10).

RESCISSION—See VENDOR AND PURCHASER (2).

RESIDUE—See WILLS (5, 7).

RESIGNATION—See MUNICIPAL CORPORATIONS (2, 6).

RES JUDICATA—See JUDGMENT (2, 3, 6-8); PLEADING (7); PRINCIPAL AND AGENT (4).

RESOLUTIONS—See MUNICIPAL CORPORATIONS (3).

RESTAURANT—See APPEAL AND ERROR (35, 36); FRAUD (6).

REVENUE BONDS—See BONDS; COSTS (16); COUNTIES (3, 6); PROHIBITION; STATES (4).

REVENUE DEPARTMENT—See CERTIORARI (7); COSTS (13).

REVOCATION—See JOINT TENANCY (2).

RIGHT-OF-WAY—See AUTOMOBILES (13).

ROAD CONSTRUCTION CONTRACTOR—See APPEAL AND ERROR (6); HIGHWAYS AND STREETS (2, 3).

ROBBERY—See CRIMINAL LAW (1, 2, 10-14, 16).

ROOFING—See CONTRACTS (1).

ROOFING SALESMAN—See WORKMEN'S COMPENSATION (16).

RULES AND REGULATIONS—See MUNICIPAL CORPORATIONS (14); TAXATION (9).

SAFE PLACE TO WORK—See MASTER AND SERVANT (11).

SAFETY ZONE—See AUTOMOBILES (20).

SALES—See APPEAL AND ERROR (29); BROKERS (2, 6); EQUITY (4); EVIDENCE (7); LICENSES (1); NEGLIGENCE (1, 3); SPECIFIC PERFORMANCE (1); TAXATION (11); TRUSTS (1, 3); VENDOR AND PURCHASER (7).

SALES TAXES—See COSTS (12); DECLARATORY JUDGMENT; TAXATION (10); VENUE.

SAVING QUESTION FOR REVIEW—See APPEAL AND ERROR (11).

SAWMILL—See MASTER AND SERVANT (1, 2, 8, 11).

SCALES—See TAXATION (10).

SCANDAL—See WITNESSES (5).

SCAVENGER SALE—See TAXATION (11).

SECOND FRACTURE—See WORKMEN'S COMPENSATION (11, 12).

SECURITY OF LIVING FOR WIFE—See DIVORCE (15, 21).

SELF-INCRIMINATION—See CRIMINAL LAW (8).

SENIORITY RIGHTS—See LABOR RELATIONS (3); SPECIFIC PERFORMANCE (4).

SENTENCE—See CONSTITUTIONAL LAW (12, 13); CRIMINAL LAW (17, 18, 29).

SEPARATE ENTITY—See COUNTIES (1).

SEPARATE MAINTENANCE—See APPEAL AND ERROR (30); HUSBAND AND WIFE (1–5).

SEPARATE PROPERTY OF WIFE—See HUSBAND AND WIFE (8).

SEPARATION OF POWERS—See CONSTITUTIONAL LAW (1, 2).

SET-OFF AND RECOUPMENT.

Finding of common pleas court in nonjury action for performance of buffing, polishing and chrome plating operations on certain metal stampings for defendant that latter was not entitled to set-off and recoupment for charges made for defective workmanship and for value of stampings scrapped, as affirmed by the circuit court, is affirmed, where there is competent evidence to sustain such finding (CL 1948, § 728.4, as amended by PA 1949, No 149; Court Rule No 77, effective in 1949). *Kellar* v. *United Metal Products Company*, 651.

SEWAGE—See COSTS (20); HEALTH; MUNICIPAL CORPORATIONS (28, 29, 31, 32).

SHEET METAL—See CONTRACTS (1).

SHERIFFS AND CONSTABLES—See MORTGAGES (1).

SHOES—See NEGLIGENCE (1–4, 9, 10).

SHOULDER—See AUTOMOBILES (11).

SIGNATURES—See ESTATES OF DECEDENTS (3, 5).

SILENCE—See ESTOPPEL (2).

SINKERS—See TAXATION (10).

SPECIAL MISSION—See WORKMEN'S COMPENSATION (6).

SPECIFICATIONS—See CONTRACTS (2, 3).

SPECIFIC PERFORMANCE.

1. Lessees were estopped from specifically enforcing option to purchase, contained in their lease, where they not only stated orally and in writing they did not intend to exercise such option but took the initiative in suggesting and encouraging defendant landlords to sell to others, showed the property to defendants' prospective purchasers and defendants relied in good faith upon plaintiffs' actions and committed themselves to a sale. *Holt* v. *Stofflet*, 115.
2. Specific performance is an equitable remedy, not one of right, but of grace and rests in the sound discretion of the trial court, which is to be exercised in the light of the facts of the case. *Zdero* v. *Briggs Manufacturing Company*, 549.
3. The plaintiff in a suit for specific performance has the burden of showing by clear and convincing proof that his contract had been breached by the defendants and that he had fully performed his part or was excused on some legal ground from such performance. *Id.*
4. Plaintiff in suit for specific performance of his contract of employment and for reinstatement to his former or similar employment, with full seniority rights *held*, not entitled to such relief, where there is evidence that following termination of his disability from injury for which he had been paid workmen's compensation he had not made his request for re-employment within the requisite time, no evidence of breach of contract by either the employer or unions was involved nor proof of exhaustion of remedies within the union made before filing of bill of complaint. *Id.* 550.

SPEED—See AUTOMOBILES (10, 11, 13, 15, 18); CARRIERS (1); WITNESSES (1).

SPIRITUALISM—See WORDS AND PHRASES.

STAMPING MILL—See CONTRACTS (1).

STATE HIGHWAY COMMISSIONER—See COSTS (10); HIGHWAYS AND STREETS (1, 5–8).

STATEMENT OF QUESTIONS INVOLVED—See APPEAL AND ERROR (4, 36).

STATE POLICE COMMISSIONER—See COSTS (10); HIGHWAYS AND STREETS (5, 6).

STATES.

1. The payment of not to exceed $417,000 during any fiscal year from taxes earmarked for highway use and imposed on gasoline and motor fuels and motor vehicles registered in the State for operation, repair and maintenance of bridge which was to

STATES—Continued.

become a part of the highway system of the State, the same as ferries operating across the straits have been considered and which have been operated at an average annual loss of over $500,000 during past 5 years, constituted an irrevocable pledge of such earmarked funds but not a general indebtedness of the State subject to the limitation placed upon highway improvement by the Constitution (Const 1908, art 10, §§ 10, 11; PA 1952, No 214, as amended by PA 1953, No 141). *Nichols* v. *State Administrative Board,* 618.

2. A legislature may adopt a policy of contracting in respect to public business for a term longer than the life of the current session of the legislature. *Id.*

3. Statutes existing at the time of the issuance of bonds by a State agency and relevant thereto enter into and form a part of the contract as if they were expressly referred to and incorporated in its terms. *Id.*

4. The contract existing between the holders of bridge revenue bonds issued by a State agency, a bridge authority, pursuant to a statute wherein State agreed to pay to the authority from funds earmarked for highway use not to exceed the sum of $417,000 per year for maintenance, operation and repair of the bridge included the statutes authorizing the collection of taxes for such special fund for highway use (PA 1952, No 214, as amended by PA 1953, No 141). *Id.*

See BANKS AND BANKING (2); BONDS; CONSTITUTIONAL LAW (16, 17); COSTS (12); ESTATES OF DECEDENTS (15); PROHIBITION; TAXATION (10); WORKMEN'S COMPENSATION (14, 15).

STATUTES.

1. The legislature, in amending one section of a statute, is presumed to have intended that in its amended form such section should be construed in connection with other provisions of the law and in harmony therewith. *Williams* v. *Secretary of State,* 202.

2. The language of a particular section or sections of a statute must be read in the light of the purpose of the legislature in its enactment as indicated by provisions of the law relating to the subject matter. *Id.*

3. The primary purpose of interpreting a statute is to ascertain and give effect to the intention of the legislature. *Id.*

4. A bare reading of a statute suffices and no interpretation is necessary if the language employed in a statute is plain, certain and unambiguous. *Id.*

5. An entire act must be read and the interpretation given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole. *Id.*

6. One part of a statute must not be so construed as to render another part nugatory or of no effect. *Id.*

7. A construction may be put upon a part of a statute other than would be accorded by its ordinary meaning and grammatical construction, where latter leads to a manifest contradiction

STATUTES—Continued.

of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended. *Id.* 203.

8. Holding of decree that subject matter of legislation construed was properly contained within scope of governor's message to the legislature convened in extra session and that procedure enacting such statute was proper is affirmed (Const 1908, art 5, § 22; CL 1948, § 123.951 *et seq.*). *Rude* v. *Muskegon County Building Authority*, 364.
9. Statutes are presumed to be constitutional. *Allen* v. *State Highway Commissioner*, 408.
10. Pertinent provisions of a statute must be read together to determine the intent of the legislature. *People* v. *Wolfe*, 525.
11. Claim that proviso, added to section of the code of criminal procedure relating to jurisdiction of justices of the peace by an amendatory act which became effective on the same day as an act amending section of the vehicle code referred to in the proviso, did not confer on justices of the peace the power to hear and determine misdemeanors requiring the imposition of penalties in excess of $100 arising under other sections of the vehicle code not specifically referred to nor amended, *held*, without substantial merit, where it is apparent the legislature intended to enlarge the jurisdiction of such justices as to certain offenses and make expeditious disposition of proceedings for imposition of penalties for operating overweight vehicles on the public highways (CL 1948, § 774.1, as amended by PA 1952, No 14; PA 1949, No 300, §§ 716, 722; § 724, as amended by PA 1952, No 13). *Id.*
12. An irreconcilable inconsistency in the proviso of a statute takes precedence and controls the enactment, as expressing the latest legislative intent to the extent of the inconsistency. *Id.* 526.
13. Proviso of statute, as included by an amendatory act, was not repugnant to purview of statute amended, where it did not render prior provisions of such statute inoperative and was limited in its scope to a certain class of cases (CL 1948, § 774.1, as amended by PA 1952, No 14). *Id.*
14. The provisions of a statute must be construed together and, if possible, harmonized; the basic inquiry being as to the legislative purpose and intent. *Hartwick* v. *Sanilac Drain Commissioner*, 624.
15. One asserting the unconstitutionality of a statute has the burden of proving such contention. *The Irishman's Lot, Inc.*, v. *Secretary of State*. 662.
16. Legislation containing a classification based on amount of population of counties may be sustained as being general and not special, where it applies to all counties which in the future attain the designated population and there is a reasonable relationship between the restriction and the population (Const 1908, art 5, § 30). *Id.*
17. The existence of any state of facts that will sustain a classification contained in a statute, which can reasonably be conceived will be presumed when such classification is assailed; the

STATUTES—Continued.

party who assails it having the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Id.*

See ADOPTION; APPEAL AND ERROR (3, 5, 13, 20, 21, 30, 31); AUTOMOBILES (1–10, 12, 21–23); BANKS AND BANKING; BONDS; CARRIERS (2); CERTIORARI (5, 7); CONSTITUTIONAL LAW (1, 9, 11, 13, 15–17); CONTRACTS (6); CORPORATIONS (1); COSTS (3–8, 10–14, 16–18); COUNTIES; COURTS (6, 7); CRIMINAL LAW (19–24, 26, 28, 30); DAMAGES (3); DECLARATORY JUDGMENT; DIVORCE (24); DRAINS; ELECTIONS; ESTATES OF DECEDENTS (8, 13–15); EVIDENCE (2, 3, 9); FRAUDS, STATUTE OF; HEALTH; HIGHWAYS AND STREETS (1, 4–10); HUSBAND AND WIFE (1–6); INSURANCE (1, 2, 5); INTEREST; JOINT TENANCY (2, 3); JUDGMENT (4, 7, 8); JUSTICES OF THE PEACE; LABOR RELATIONS (1); LICENSES (1, 2); MANDAMUS (3); MARRIAGE (1); MORTGAGES (1–3); MUNICIPAL CORPORATIONS (2–9, 11, 14, 16, 18, 21, 23, 24, 31); OFFICERS; PARENT AND CHILD (1); PARTNERSHIP; PERJURY; PRINCIPAL AND AGENT (1); PROHIBITION; REFORMATION OF INSTRUMENTS; SET-OFF AND RECOUPMENT; STATES (1, 3, 4); TAXATION; TRIAL (1, 17); TRUSTS (3); VENDOR AND PURCHASER (6); VENUE; WITNESSES (7); WORKMEN'S COMPENSATION.

STAY OF PROCEEDINGS—See CRIMINAL LAW (25); PROHIBITION (1).

STOCK AND STOCKHOLDERS—See APPEAL AND ERROR (29); BROKERS (1, 2, 6, 7); CORPORATIONS; DIVORCE (16, 23); JUDGMENT (7, 8); LICENSES.

STOPPING—See AUTOMOBILES (13, 15); CARRIERS (1); HIGHWAYS AND STREETS (3).

STORES—See EVIDENCE (7); NEGLIGENCE (1–4).

STREAM POLLUTION—See HEALTH; MUNICIPAL CORPORATIONS (32).

STRIKE VOTE—See LABOR RELATIONS (1).

SUBCONTRACTS—See CONTRACTS (1–3, 5–7).

SUBPOENA—See APPEARANCE (3).

SUBSTANTIAL COMPLIANCE—See INSURANCE (3).

SUBSTITUTES—See DAMAGES (2).

SUDDEN STOPPING—See CARRIERS (1).

SUNDAY.

The exercise of police power by prohibition of secular pursuits on Sunday is justified as a sanitary measure as experience has demonstrated that one day's rest is requisite for the health of most individuals whether or not they have the power to observe

SUNDAY—Continued.

a day of rest of their own volition. *The Irishman's Lot, Inc.*, v. *Secretary of State*, 663.

See AUTOMOBILES (23); COSTS (18).

SUPERVISORS, BOARD OF—See COUNTIES (1).

SUPPORT OF CHILDREN—See DIVORCE (3, 8, 9, 11, 17).

SUPPRESSION OF PLEADING—See DISCOVERY (2).

SUPREME COURT—See APPEAL AND ERROR (1, 4, 7, 12, 14–17, 19, 25–30, 32, 33); BANKS AND BANKING (2); COSTS (19); COURTS (2, 3, 5–7); CRIMINAL LAW (9, 10, 25); EVIDENCE (1, 9); HUSBAND AND WIFE (5); MUNICIPAL CORPORATIONS (15); WORKMEN'S COMPENSATION (4, 8).

SURVEYS—See BOUNDARIES (1).

SURVIVORSHIP—See TAXATION (4).

SYMPATHY—See DAMAGES (2).

TAVERNS—See APPEAL AND ERROR (35, 36); FRAUD (6).

TAXATION.

1. Decedent donor who placed bank accounts in joint name of himself and his niece, or survivor, created a right of property in her not subject to taxation under the State inheritance tax law, where he did not before his death over 3 years later restrict her right thereto by any words or acts qualifying the gift and allowed her to have possession of the passbooks during some of the time which elapsed before his death (CL 1948, § 487.703). *In re Renz' Estate (Department of Revenue* v. *Beattie)*, 347.
2. The rule that an estate in possession is an estate in present enjoyment is generally recognized in construing inheritance tax laws (CL 1948, §§ 205.201, 205.221). *Id.* 348.
3. Provisions of the inheritance tax law are not to be extended by implication beyond the clear import of the words used since it is the duty of the taxing power to express the intent to impose such special burden in clear and unambiguous language (CL 1948, § 205.201 *et seq.*). *Id.*
4. United States government savings bonds payable to either of 2 persons as co-owners or survivor should not be included among the assets of the estate of the person who dies first for the purpose of determining the State inheritance tax (CL 1948, § 205.201, as amended). *In re DeWaters' Estate*, 457.
5. Order of circuit court holding that no inheritance tax was payable upon United States government savings bonds "payable on death" of owner to another person, designated as a beneficiary, is affirmed by an equally divided court (CL 1948, § 205.201, as amended). *Id.* 458.
6. Tax exactions, property or excise, must rest upon legislative enactment and collecting officers can act only within express authority conferred by law. *Garavaglia* v. *Department of Revenue*, 467.

TAXATION—Continued.

7. The scope of tax laws may not be extended by implication or forced construction. *Id.*
8. The language of a tax statute, if dubious, is not resolved against the taxpayer. *Id.* 468.
9. Liability for payment of the State sales tax is controlled by statute and cannot be imposed by administrative rulings and regulations (CL 1948, § 205.51 *et seq.*). *Id.*
10. Materials such as form lumber, nails, masonite, coke, grease, plywood, sinkers, burlap, hay, asbestos and rubber belts, aggregate bin and scale, interlock and elevator extension, used in the performance of contracts for construction jobs for State highway department are not subject to sales and use taxes, even though the materials sought to be taxed do not become a part of the highway (CL 1948, § 205.51 *et seq.*; § 205.91 *et seq.*). *Id.*
11. A quitclaim deed by the State to a purchaser of lands at a so-called scavenger sale conveys the title in fee free from any encumbrances such as easements which had existed for more than the period necessary for ripening into prescriptive rights (CL 1948, § 211.359). *Kern* v. *Schaar*, 637.

See BROKERS (4, 7); COSTS (7); EVIDENCE (9); MUNICIPAL CORPORATIONS (29, 30); PROHIBITION; STATES (1, 4); VENDOR AND PURCHASER (7).

TAXICABS—See AUTOMOBILES (17); TRIAL (9); WITNESSES (1).

TELEGRAPHS AND TELEPHONES—See NEGLIGENCE (3).

TENANCY BY ENTIRETIES—See ACCOUNTING (2); DEEDS (7); DIVORCE (20).

TENANCY IN COMMON—See DIVORCE (20).

THEATERS AND SHOWS—See LABOR RELATIONS (2).

THIRD-PARTY BENEFICIARY CONTRACT ACT—See CONTRACTS (6).

THROUGH HIGHWAYS—See AUTOMOBILES (9, 10).

TIME—See APPEAL AND ERROR (18, 33); CONTRACTS (1, 5–7); COSTS (7); CRIMINAL LAW (25); EQUITY (1); MORTGAGES (3); NEGLIGENCE (1); PLEADING (6); SPECIFIC PERFORMANCE (4); TAXATION (1).

TITLE—See ADVERSE POSSESSION; BANKS AND BANKING (3); DEEDS (6); DESCENT AND DISTRIBUTION (1); HUSBAND AND WIFE (3); PRINCIPAL AND AGENT (3); TAXATION (11); VENDOR AND PURCHASER (1, 2).

TITLE OF ACT—See AUTOMOBILES (2).

TOTAL DISABILITY—See COURTS (5); INSURANCE (12, 13).

TRACTORS—See AUTOMOBILES (11, 12).

TRAFFIC LIGHT—See AUTOMOBILES (20); WITNESSES (1).

TRAILERS—See AUTOMOBILES (11, 12).

TRANSCRIPT—See APPEAL AND ERROR (18); CRIMINAL LAW (30).

TRANSPORTATION—See WORKMEN'S COMPENSATION (14).

TRAP DOORS—See EVIDENCE (7); NEGLIGENCE (2–4, 9).

TRAVELING EXPENSES—See DIVORCE (13).

TRESPASS ON THE CASE—See ACTION ON THE CASE; MONEY RECEIVED (1).

TRIAL.

1. It was not error to submit to jury issue as to whether or not plaintiff was a guest passenger within meaning of guest act together with special question as to whether plaintiff had been transported by the defendant as his guest without payment for such transportation, in view of conflicting claims and discrepancies and contradictions in the testimony (CL 1948, § 256.29). *Wallace* v. *Skrzycki*, 164.
2. Trial judge's participation in questioning of witnesses and pointless remarks during course of trial, *held*, not to have constituted prejudicial and reversible error. *Howard* v. *Burton*, *(Simpson* v. *Same, Thomas* v. *Same)*, 179.
3. A trial judge should permit counsel to try a case and not repeatedly interfere by questioning a witness. *Id.*
4. A trial judge must construe plaintiff's testimony in a light most favorable to plaintiff in passing on a defendant's motion for a directed verdict. *Bramer* v. *Ames*, 226.
5. The testimony must be considered in the light most favorable to a plaintiff in passing on a defendant's motion for a directed verdict. *Garvit* v. *Krebs*, 256.
6. Excessive repetition of a point of law in a charge to a jury is unnecessary, argumentative and prejudicial. *Hayes* v. *Coleman*, 371.
7. The charge of a court to a jury must be considered in its entirety, and error will not lie upon detached sentences which, when construed with the rest of the charge, are not objectionable. *Id.*
8. Fact that trial court made 9 separate and individual references to rule that negligence of the plaintiff to bar recovery must be a proximate cause of the accident *held*, not reversible error, under the circumstances, where it appears the trial court accepted 3 sets of requests to charge and instructions given, covering some 20 pages of printed record, although more extended than necessary, did not indicate the court's opinion on factual issues. *Id.*
9. Identification of source of instructions given jury in pedestrian's action against southbound motorist and driver and owner of eastbound taxicab *held*, not to have detracted from weight to be accorded instructions, where it appears trial court tried to give equal consideration to each of 3 sets of requests to charge in addition to charge prepared by himself and neither counsel objected to instructions given or proffered others. *Id.*

TRIAL—Continued.

10. It is presumed that jurors are of at least ordinary intelligence and understood, from opening statement of instructions, that requests read to them were submitted as statements of rules of law governing the case. *Id.* 372.

11. Counsel are limited, in arguing to a jury, in subject matter to those matters before the court as disclosed by the testimony and reasonable inferences therefrom and may not express opinions or conclusions upon matters not found in the record. *Id.*

12. Remarks of plaintiff's counsel in argument to jury to effect that one of defendants' witnesses had changed her position because of settlement she had effected with defendants for her injuries which had been sustained in same accident *held,* not reversible error, where such inference was not wholly unreasonable. *Id.* 373.

13. Jurors are estopped from impeaching their verdict once it has been reached. *Routhier* v. *City of Detroit,* 449.

14. Affidavits of jurors are competent to show a want of assent to the verdict, where it appears some had been persuaded that it was only necessary for a majority to agree to the verdict. *Id.*

15. Order of court setting aside verdict of jury on day following rendition of verdict when jury was polled and discovery then that 1 of the jurors had not agreed to it was not improper, since it established the fact that no verdict had been reached by the jury by a proceeding in open court. *Id.*

16. It is proper to correct the form in which a verdict was returned, with the approval of the jury. *Id.*

17. Counsel for defendants had the right to move for judgment notwithstanding the disagreement of the jury, where a polling of the jury in open court disclosed that 1 of the jurors had not agreed to the verdict (CL 1948, § 691.701). *Id.*

18. A verdict cannot properly be directed for one party nor judgment entered for defendant after disagreement of jury when an issue of fact is presented for the jury's determination. *Id.* 450.

See DISCOVERY (1); NEGLIGENCE (10).

TRUCKS—See AUTOMOBILES (1); CARRIERS (2).

TRUNK LINE HIGHWAYS—See COSTS (10); HIGHWAYS AND STREETS (4–6); MUNICIPAL CORPORATIONS (26).

TRUSTEE IN BANKRUPTCY—See PARTIES.

TRUSTS.

1. Trial judge's finding that defendant husband had acted as an agent for the purchase of property and that by a violation of his trust he committed a fraud upon plaintiffs in that he purchased the entire property for less than he sold it to plaintiffs and then retained the rear 40 feet of it as he conveyed the front 100 feet to plaintiffs *held,* supported by record in suit to impose a constructive trust. *Kren* v. *Rubin,* 288.

TRUSTS—Continued.

2. A constructive trust may be established by parol evidence. *Id.* 289.

3. The statute of frauds does not bar proof of actual or constructive fraud in the sale of realty as parol evidence is admissible to establish a constructive trust even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive (CL 1948, § 566.106). *Id.*

See APPEAL AND ERROR (14); DEEDS (1); EQUITY (1); EVIDENCE (3); FRAUD (3, 4).

TRUSTS EX MALEFICIO—See FRAUDS, STATUTE OF (1).

ULTRA VIRES—See CORPORATIONS (2).

UNDERTAKER—See INSURANCE (13).

UNDUE INFLUENCE—See DEEDS (5).

UNHEALED FRACTURE—See WORKMEN'S COMPENSATION (12).

UNIONS—See COSTS (6); LABOR RELATIONS; SPECIFIC PERFORMANCE (4).

UNITED STATES BONDS—See COSTS (11); TAXATION (4, 5).

UNITED STATES COURT—See JUDGMENT (7).

UNJUST ENRICHMENT—See MONEY RECEIVED (4–6).

UNSAFE PREMISES—See EVIDENCE (7); NEGLIGENCE (2–4, 9).

UNUSUAL RISK—See MASTER AND SERVANT (6).

UNVALIDATED STOCK—See JUDGMENT (7, 8); LICENSES.

USE TAXES—See COSTS (12); DECLARATORY JUDGMENT; TAXATION (10); VENUE.

VALUE—See ESTATES OF DECEDENTS (11).

VARIANCES—See MUNICIPAL CORPORATIONS (8–10, 13).

VENDOR AND PURCHASER.

1. A title to real estate may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business; it being unnecessary that the title be actually bad in order to be unmarketable but only such a doubt or uncertainty as may reasonably form the basis of litigation. *Escher* v. *Bender*, 1.

2. Purchaser of tract of real estate was entitled to rescission on the basis of defendant's misrepresentation as to the amount of land to which he could give a marketable title of record, where title to a substantial portion of the land in area and value was claimed by him by adverse possession but such title had not been judicially determined. *Id.* 2.

3. An acceleration provision in a land contract which authorizes the vendor to declare the full balance of the principal sum

VENDOR AND PURCHASER—Continued.

and accrued interest due and payable upon buyer's failure to perform any of the covenants of the contract, although harsh, is not against public policy nor unenforceable. *Bedford* v. *Tetzlaff*, 102.

4. The land contract vendor need not give notice of election to declare entire balance of principal and accrued interest due prior to filing bill to foreclose land contract upon default of purchaser's assignees in making payment of principal due in the absence of any unusual circumstances. *Id.*

5. Foreclosures of land contracts in chancery differ from foreclosures of mortgages in chancery in that no period of redemption is required by law. *Id.*

6. The right to redeem from foreclosure of land contract in chancery exists independently of statute, rests entirely in the discretion of the court, and the vendee is not entitled to it as a matter of right. *Id.* 103.

7. Trial court did not abuse its discretion in not providing a period of redemption after sale under foreclosure of land contract in chancery, where purchaser's assignees had not kept up payment of insurance premiums and taxes, failed to make payment of principal and interest when due and during more than 10 months after bill to foreclose was filed they failed to pay the indebtedness to the vendor. *Id.*

See EQUITY (1); PRINCIPAL AND AGENT (1).

VENUE.

Institution of suit for declaration of rights as to liability for sales and use taxes on material used in concrete construction work but which never became a structural part of the real estate in Ingham county by a party not a resident thereof *held*, not subject to question, where prior to institution of suit, the parties, in conference, had agreed, that for the convenience of both the department of revenue and the taxpayer the suit should be instituted in such county (CL 1948, § 205.51 *et seq.*; § 205.91 *et seq.*). *Garavaglia* v. *Department of Revenue*, 467.

VERDICTS AND FINDINGS—See ACCOUNTING (1); APPEAL AND ERROR (15, 26, 28); AUTOMOBILES (9); CRIMINAL LAW (9); ESTATES OF DECEDENTS (6); FALSE IMPRISONMENT (2); INSURANCE (13); MORTGAGES (4); MUNICIPAL CORPORATIONS (15, 18, 24, 28); PERJURY (5); REFORMATION OF INSTRUMENTS; SET-OFF AND RECOUPMENT; TRIAL (13–18); TRUSTS (1); WORKMEN'S COMPENSATION (4).

VETERANS—See APPEAL AND ERROR (3); CONSTITUTIONAL LAW (1); COSTS (3); MUNICIPAL CORPORATIONS (1, 2, 4–7, 21, 23); OFFICERS.

VICE-PRESIDENT—See LICENSES (2).

VIOLATION OF PAROLE—See CRIMINAL LAW (29).

VISITATION—See DIVORCE (12, 13).

VOIR DIRE EXAMINATION—See CRIMINAL LAW (12).

VOLUNTARINESS OF CONFESSION—See CRIMINAL LAW (2–4, 7, 9, 10).

WAIVER—See ATTORNEY AND CLIENT; INTEREST; JUDGMENT (7); LICENSES (2, 3); MUNICIPAL CORPORATIONS (2, 14).

WARNINGS—See EVIDENCE (7); HIGHWAYS AND STREETS (2, 3); MASTER AND SERVANT (8); NEGLIGENCE (2, 4).

WARRANT—See CRIMINAL LAW (21, 23, 24).

WASHTENAW—See APPEARANCE (3); DISCOVERY (4).

WATER AND WATER CHARGES—See MUNICIPAL CORPORATIONS (31).

WATER METERS—See MUNICIPAL CORPORATIONS (28).

WATER RESOURCES COMMISSION—See MUNICIPAL CORPORATIONS (32).

WATERS AND WATERCOURSES—See HEALTH; MUNICIPAL CORPORATIONS (32).

WEIGHT OF EVIDENCE—See CRIMINAL LAW (9, 10, 13).

WEIGHT RESTRICTIONS—See CRIMINAL LAW (20); HIGHWAYS AND STREETS (7–9); JUSTICES OF THE PEACE (2); STATUTES (11).

WELFARE ADMINISTRATION—See COUNTIES (2).

WELFARE OF CHILD—See DIVORCE (9).

WIDENED DRAINS—See DRAINS (1).

WIDOWS—See COSTS (2); DAMAGES (3); ESTATES OF DECEDENTS (12); INSURANCE (5).

WILLS.

1. Children adopted by testator's daughter and her husband after death of testator cannot take as "issue" or "children" under remaindermen provisions of will. *In re Chapple's Estate (Trull* v. *Kalamazoo College)*, 246.
2. When a will provides for a child of some person other than the testator, an adopted child is not included unless the will makes it clear that the adopted child was intended to be included. *Id.*
3. The primary rule of construction of wills is to reach, if possible, the intent the testator had in mind and give effect to it, taking the whole will and giving effect to every part if possible. *Id.* 247.
4. All of the words used in a will must be taken into consideration in construing it. *Id.*
5. Intestacy will not be presumed, where there are bequests of residue in a will unless it is so provided in the will or the language or lack of language used necessitates such a result. *Id.*
6. The presumption against intestacy is so strong that courts will adopt any reasonable construction of the will to avoid it. *Id.*

WILLS—Continued.

7. Provision of will leaving portion of residue in trust for testator's daughter with contingent remainder to her issue her surviving and in certain events in part to a college for certain purposes may not be construed as intending to provide that should daughter die intestate the property should go to her heirs, hence, daughter's surviving husband and their children, adopted after death of testator, do not participate in such portion of the residue as her heirs. *Id.*

WINDING UP AFFAIRS—See PARTNERSHIP.

WITHDRAWAL OF PLEA OF GUILTY—See CRIMINAL LAW (18).

WITHOUT WARRANT—See ARREST (2-6).

WITNESSES.

1. Court's admission on cross-examination of defendants' witness of testimony relative to compromise she had made with such defendants as to her claim for injuries arising out of same accident *held*, not error, where the credibility of such witness was thereby affected by reason of discrepancy between her position at trial and that presented by her declaration in her action against the defendants relative to speed of defendants' taxicab and as to traffic light. *Hayes* v. *Coleman*, 372.

2. The right of cross-examination is an absolute right accorded to any litigant who finds himself confronted by an adverse witness, and it may not be denied nor unduly restrained nor interfered with by the court. *Id.*

3. It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other. *Id.*

4. The party producing a witness may not shield him from proper cross-examination for the reason that facts thus elicited may not be competent upon the merits of the cause. *Id.*

5. A trial judge has a duty to repress needless scandal and gratuitous attacks on character of a witness. *Id.*

6. It was not error to permit woman to testify in prosecution for inciting to commit perjury, where defendant claimed but failed to sustain his burden of proof that she was the common-law wife of defendant (CL 1948, § 750.425). *People* v. *Mosley*, 560.

7. The burden of showing that the evidence sought to be barred was equally within the knowledge of the deceased party against whose estate a claim is presented is upon the party invoking the statute (CL 1948, § 617.65). *In re Dolgy's Estate (Appeal of Polate)*, 568.

8. A party who calls a person not a party to the action as a witness, vouches for his integrity. *Case* v. *Beech Lanes, Incorporated*, 631.

WITNESSES—Continued.

See APPEAL AND ERROR (15, 34); AUTOMOBILES (17); CRIMINAL LAW (15, 23, 26, 27, 30); ESTATES OF DECEDENTS (13); MONEY RECEIVED (1); PERJURY (1, 4); TRIAL (12).

WORDS AND PHRASES.

"Spiritualism" is defined as the belief or doctrine that the spirits of the dead, surviving after the mortal life, can and do communicate with the living, especially through a person, such as a medium, particularly susceptible to their influence. *Hyma* v. *Lee*, 31.

See FRAUD (1); NEGLIGENCE (8).

WORKMEN'S COMPENSATION.

1. The burden of proving the right to workmen's compensation rests on the plaintiff. *Fries* v. *Kalamazoo Stove & Furnace Company*, 65.

2. Plaintiff failed to sustain burden of proving right to workmen's compensation, where 2 inferences are equally possible and plausible from the evidence, 1 favorable and 1 adverse to the plaintiff. *Id.*

3. The workmen's compensation commission may not award compensation on the basis of a mere possibility or guess that there is a disability due to employment. *Id.*

4. The Supreme Court may not disturb finding of workmen's compensation commission that plaintiff's emphysema was not a disability due to employment as molder, as distinguished from one due to old age, where there was competent evidence to sustain the finding (CL 1948, § 413.12). *Id.*

5. Disability due to coronary thrombosis of plaintiff fire warden for defendant conservation department found by workmen's compensation commission to have been due to strenuous efforts required in plaintiff's employment *held*, not a disability caused by a disease, due to causes and conditions characteristic of and peculiar to the business of the defendant employer nor to have arisen out of and in the course of his employment; the exertion involved not having been shown to have been unusual to, or greater than, that experienced in the general field of common labor. *McGregor* v. *Conservation Department*, 93.

6. Electrician who received call from employer while at home to proceed to a school to hook up a cable for an electric range in the home economics department, who would normally be entitled to pay from time he left home until his return thereto and who was injured en route by limb which fell from a tree suffered a compensable injury, since the employment required the employee to go upon the public street upon a special mission for the employer (CL 1948, § 412.1 *et seq.*). *Le Vasseur* v. *Allen Electric Company*, 121.

7. The fact that the public is also exposed to perils of the public streets does not preclude recovery of workmen's compensation for injuries to an employee who suffers injury by reason of street hazard while on a special mission of the employer. *Id.*

WORKMEN'S COMPENSATION—Continued.

8. The workmen's compensation commission is the sole trier of facts in a proceeding to recover workmen's compensation, the Supreme Court not being permitted to weigh the evidence (CL 1948, § 413.12). *Adkins* v. *Rives Plating Corporation*, 265.

9. The workmen's compensation act is to be construed liberally to provide indemnity for accidents peculiarly incidental to employment but it was not intended to be health, accident and old age insurance and spread general protection over risks common to all and not arising out of and in the course of employment. *Id.*

10. The workmen's compensation commission may draw legitimate and reasonable inferences from established facts and circumstances but may not draw inferences contrary to the established facts and the undisputed evidence. *Id.*

11. Disability due to second fracture of forearm was not compensable under the workmen's compensation act, where such fracture occurred as plaintiff fell off his bicycle while not at work for defendant employer, since it did not arise out of and in the course of his employment and there was no causal connection between second fracture and first one which had not completely healed. *Id.*

12. Award allowing workmen's compensation for a period of total disability, a period of partial disability and medical and hospital expenses after second fracture of forearm which fracture did not arise out of and in the course of employment was error insofar as there was allowance for disability and medical expenses directly resulting from such injury, although it appears that there had not been a complete healing of first fracture which had been sustained while in defendant's employ. *Id.* 266.

13. No costs are allowed in appeal in proceeding to recover further workmen's compensation, where neither party has prevailed. *Id.*

14. Dependents of member of public service commission who was killed while en route from commission office to his home in another city, in a State-owned car, on a Friday afternoon for the week end *held*, not entitled to recover workmen's compensation, where although it appears that the employer paid for such transportation, the mere fact that he took work home with him did not establish that such transportation was incident to and a part of his employment, conclusion that the commission had another office in deceased's home city was not justified and there does not appear to have been an agreement that such transportation was a part of his compensation. *White* v. *Public Service Commission*, 282.

15. No costs are allowed on reversal of award of workmen's compensation in favor of dependents of public service commissioner who was killed en route home with a file of work of the commission while in a State-owned car, the question presented involving the use of State property. *Id.*

16. Roofing salesman who worked on a commission basis did not suffer injury in the course of his employment, where highway accident occurred en route to an eating place and while he

WORKMEN'S COMPENSATION—Continued.

was away from direct line of travel between last place he had called and next place he was to stop on business of the employer. *Weersing* v. *Airseal Insulating & Roofing Company*, 400.

See MASTER AND SERVANT (3–5).

WORKMEN'S COMPENSATION COMMISSION—See WORKMEN'S COMPENSATION (4, 5, 8, 10).

WRAPPING—See NEGLIGENCE (3).

WRIT OF GRACE—See MANDAMUS (2).

ZONING—See MUNICIPAL CORPORATIONS (8–11, 13–15, 18).