# MICHIGAN REPORTS

---

CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

JUNE 2, 1952 to OCTOBER 6, 1952

HIRAM C. BOND
STATE REPORTER

VOL. 334
FIRST EDITION

ROCHESTER, NEW YORK
LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1953

*Copyright 1953, by Owen J. Cleary, Secretary of State for the State of Michigan.*

# SUPREME COURT.

---

CHIEF JUSTICES.

| | TERM EXPIRES |
|---|---|
| WALTER H. NORTH, BATTLE CREEK,[1] . . . | Dec. 31, 1953 |
| CLARK J. ADAMS, PONTIAC.[2] | |

---

ASSOCIATE JUSTICES.

| | |
|---|---|
| JOHN R. DETHMERS, HOLLAND, . . . . . | Dec. 31, 1953 |
| HENRY M. BUTZEL, DETROIT, . . . . . | 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 |

---

CLERKS—JAY MERTZ, LANSING.[3]
HUGH H. CARPENTER, LANSING.[4]

CRIER—DON M. CHILDS, LANSING.

---

ATTORNEY GENERAL—FRANK G. MILLARD, FLINT.

SOLICITOR GENERAL—EDMUND E. SHEPHERD, EAST LANSING.

---

[1] Died July 23, 1952.
[2] Appointed August 14, 1952.
[3] Resigned October 1, 1952.
[4] Appointed October 1, 1952.

## CIRCUIT JUDGES.

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

| | | |
|---|---|---|
| 14. | NOEL P. FOX, | MUSKEGON. |
| 15. | THEO T. JACOBS, | STURGIS. |
| 16. | ALTON H. NOE,<br>JAMES E. SPIER, | MOUNT CLEMENS. |
| 17. | WILLIAM B. BROWN,<br>DALE SOUTER,<br>LEONARD D. VERDIER, | GRAND RAPIDS. |
| 18. | KARL K. LEIBRAND, | 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, | BAD AXE. |
| 25. | GLENN W. JACKSON, | GLADSTONE. |
| 26. | ARTHUR W. WILCOX, | ALPENA. |
| 27. | EARL C. PUGSLEY, | HART. |
| 28. | HOWARD L. CAMPBELL, | CADILLAC. |
| 29. | PAUL R. CASH, | ALMA. |
| 30. | LOUIS E. COASH,<br>CHARLES H. HAYDEN,<br>MARVIN J. SALMON, | LANSING. |
| 31. | EDWARD T. KANE,<br>SHIRLEY STEWART, | ALGONAC.<br>PORT HURON. |
| 32. | THOMAS J. LANDERS, | IRONWOOD. |
| 33. | EDWARD H. FENLON, | PETOSKEY. |
| 34. | JOHN C. SHAFFER, | GLADWIN. |
| 35. | WILLIS L. LYONS, | HOWELL. |
| 36. | CARL D. MOSIER, | DOWAGIAC. |
| 37. | BLAINE W. HATCH,<br>HAROLD E. STEINBACHER, | MARSHALL.<br>BATTLE CREEK. |
| 38. | CLAYTON C. GOLDEN, | MONROE. |
| 39. | GEORGE A. RATHBUN, | ADRIAN. |
| 40. | GEORGE W. DESJARDINS,[1]<br>JOHN G. LIBBERS,[2] | LAPEER. |

[1] Died July 1, 1952.

[2] Appointed July 8, 1952.

# MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

JOSEPH A. GILLIS,
ARTHUR E. GORDON,[1]
GERALD W. GROAT,
O. Z. IDE,
PAUL E. KRAUSE,
GEORGE T. MURPHY,
JOHN D. WATTS,
JOHN J. MAHER,
GEORGE MURPHY,
JOHN A. RICCA,[2]
JOHN P. SCALLEN,
FRANK G. SCHEMANSKE,
W. McKAY SKILLMAN,

} TRAFFIC AND ORDINANCE DIVISION.

SUPERIOR COURT OF GRAND RAPIDS, THADDEUS B. TAYLOR.

[1] Resigned August 15, 1952.
[2] Appointed August 16, 1952.

# JUDICIAL CIRCUITS.

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

## TABLE OF CASES REPORTED.


PAGE

Allen *v.* Grand Trunk Western Railroad Company ..... 104
Anderson, Garwin *v.* ..... 287
Appeal of Oak Hill Cemetery Company ..... 392
——— School District of the City of Battle Creek ..... 392
Ashburn, Beyerlein *v.* ..... 13
Associates Discount Corporation *v.* Gear ..... 360
Attorney General *v.* Guy ..... 694
Attorney General, *ex rel.* Reuter, *v.* City of Bay City ..... 514

Badalamenti, Solomon *v.* ..... 17
Bailiff, Etherington *v.* ..... 543
Baker, Eaton *v.* ..... 521
Bannerman, People *v.* ..... 217
Baroda Manufacturing Company, Inc., Lorren *v.* 405
Barr, Hodgdon *v.* ..... 60
Battle Creek (City of), Appeal of the School District of the ..... 392
Bay City (City of), Attorney General, *ex rel.* Reuter, *v.* ..... 514
Bergin, LaBour *v.* ..... 437
Berkley Homes, Inc., Klug *v.* ..... 618
Beyerlein *v.* Ashburn ..... 13
Bilandzija *v.* Shilts ..... 421
Blumrosen *v.* Silver Flame Industries, Inc. ..... 441
Borr, Knoor *v.* ..... 30
Buchthal *v.* New York Central Railroad Company ..... 556

PAGE

Carothers, Rowerdink *v.* ..... 454
Chapel *v.* School District No. 8, Fractional, Parma Township, Jackson County ..... 176
Chapman *v.* Chapman ..... 297
City of Battle Creek, Appeal of the School District of the ..... 392
——— Bay City, Attorney General, *ex rel.* Reuter, *v.* ..... 514
——— Detroit, Watroba *v.* ..... 182
——— Grand Rapids, Clark *v.* ..... 646
——— Saginaw, House *v.* ..... 241
Clark *v.* City of Grand Rapids ..... 646
Coburn, Kelso *v.* ..... 43
Corpron *v.* Skiprick ..... 311
Cossins, Laude *v.* ..... 622
Crane, Employment Security Commission *v.* ..... 411
Crantz, Hopkins *v.* ..... 300
Crowley-Milner & Company, Pallas *v.* ..... 282

Dawson (Russ), Inc., *v.* Unemployment Compensation Commission ..... 82
Dax, Watson *v.* ..... 320
Dearborn Police and Fire Pension Board, O'Connell *v.* ..... 208
———, Rabideau *v.* ..... 208
Dearborn Township Clerk, Township of Dearborn *v.* ..... 673
Dearborn Township *v.* Dearborn Township Clerk ..... 673
Delta Broadcasting Company, Roman *v.* ..... 669
Department of Revenue, National Bank of Detroit *v.* ..... 132
———, Tucker *v.* ..... 380
Detroit Board of Election Commissioners, Moran *v.* ..... 234
Detroit (City of), Watroba *v.* ..... 182
Dodge, Kelley *v.* ..... 499

PAGE
Dow Chemical Company, Wieland *v.* ..... 427
Durgee *v.* Simons ..... 4
Dwelley *v.* Tom McDonnell, Inc. ..... 229

Eaton *v.* Baker ..... 521
Edwards *v.* Meinberg ..... 355
Eggebeen *v.* Red Top Cab Company of Grand Rapids ..... 490
Employment Security Commission *v.* Crane ... 411
Enders, *In re* ..... 710
Estate of Jones, *In re* ..... 392
——— Kanera, *In re* ..... 461
——— McKenna, *In re* ..... 368
——— Solomon, *In re* ..... 17
——— Stahl, *In re* ..... 380
Etherington *v.* Bailiff ..... 543

Fairman, Trisch *v.* ..... 432
Flood *v.* Welsh ..... 583
Freleigh, People *v.* ..... 306
Fuller, *In re* ..... 566

Gardineer, People *v.* ..... 663
Garwin *v.* Anderson ..... 287
Gear, Associates Discount Corporation *v.* ..... 360
Giant Super Market, Inc., Nightlinger *v.* ..... 90
Goff, Singer *v.* ..... 163
Grand Rapids (City of), Clark *v.* ..... 646
Grand Trunk Western Railroad Company, Allen *v.* ..... 104
Great American Insurance Company of New York, Reynolds *v.* ..... 1
Guy, Attorney General *v.* ..... 694

Hayward *v.* Marker ..... 659
Hensinger *v.* Hensinger ..... 344

PAGE

Hershel Radio Company *v.* Pennsylvania Railroad Company ..... 148
Hodgdon *v.* Barr ..... 60
Holt *v.* Stofflet ..... 272, 275
Hopkins *v.* Crantz ..... 300
House *v.* City of Saginaw ..... 241
Huber, *In re* ..... 100

*In re* Enders ..... 710
——— Fuller ..... 566
——— Huber ..... 100
——— Jones' Estate ..... 392
——— Joslin ..... 627
——— Kader ..... 339
——— Kanera's Estate ..... 461
——— McKenna's Estate ..... 368
——— Solomon's Estate ..... 17
——— Stahl's Estate ..... 380
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 406, Postma *v.* ..... 347

Jacox *v.* State Highway Commissioner ..... 482
Jaup *v.* Olmstead ..... 614
Johnson, People *v.* ..... 169
Jones' Estate, *In re* ..... 392
Joslin, *In re* ..... 627

Kader, *In re* ..... 339
Kanera's Estate, *In re* ..... 461
Kanera, Ten Cate *v.* ..... 461
Kelley *v.* Dodge ..... 499
Kelso *v.* Coburn ..... 43
Klug *v.* Berkley Homes, Inc. ..... 618
Knoor *v.* Borr ..... 30
Kokalis *v.* Whitehurst ..... 477

PAGE
Kruer *v.* Kruer ..... 641
Kuzee, Sterk & Vogel, Inc., *v.* ..... 249

LaBour *v.* Bergin ..... 437
Laude *v.* Cossins ..... 622
Lee, People *v.* ..... 217
Levenburg *v.* Merrill, Lynch, Pierce, Fenner & Beane ..... 508
Lippman's Tool Shop Sporting Goods Company, Shakespeare Company *v.* ..... 109
Lorren *v.* Baroda Manufacturing Company, Inc. 405

Macias *v.* Macias ..... 334
Marker, Hayward *v.* ..... 659
Marrobie *v.* Marrobie ..... 447
May, Vanden Bogert *v.* ..... 606
McCormick, Nelson *v.* ..... 387
McDonnell (Tom), Inc., Dwelley *v.* ..... 229
McKenna *v.* McKenna ..... 368
McKenna's Estate, *In re* ..... 368
Meinberg, Edwards *v.* ..... 355
Merrill, Lynch, Pierce, Fenner & Beane, Levenburg *v.* ..... 508
Mitchell *v.* Perkins ..... 192
Monteith Land Company, Pettengill *v.* ..... 632
Moran *v.* Detroit Board of Election Commissioners ..... 234

Napuche, Stewart *v.* ..... 76
National Bank of Detroit *v.* Department of Revenue ..... 132
Nelson *v.* McCormick ..... 387
New York Central Railroad Company, Buchthal *v.* ..... 556
Nightlinger *v.* Giant Super Market, Inc. ..... 90

PAGE
Oak Hill Cemetery Company, Appeal of ..... 392
O'Connell *v.* Dearborn Police and Fire Pension Board ..... 208
Olmstead, Jaup *v.* ..... 614

Pallas *v.* Crowley-Milner & Company ..... 282
Pennsylvania Railroad Company, Hershel Radio Company *v.* ..... 148
People *v.* Bannerman ..... 217
——— *v.* Freleigh ..... 306
——— *v.* Gardineer ..... 663
——— *v.* Johnson ..... 169
——— *v.* Lee ..... 217
——— *v.* Smith ..... 10
Perkins, Mitchell *v.* ..... 192
Pettengill *v.* Monteith Land Company ..... 632
Postma *v.* International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 406 ..... 347

Rabideau *v.* Dearborn Police and Fire Pension Board ..... 208
Red Top Cab Company of Grand Rapids, Eggebeen *v.* ..... 490
Reuter (Attorney General, *ex rel.*) *v.* City of Bay City ..... 514
Revenue Department, National Bank of Detroit *v.* ..... 132
———, Tucker *v.* ..... 380
Reynolds *v.* Great American Insurance Company of New York ..... 1
Roman *v.* Delta Broadcasting Company ..... 669
Rowerdink *v.* Carothers ..... 454
Russ Dawson, Inc., *v.* Unemployment Compensation Commission ..... 82

PAGE

Saginaw (City of), House *v.* ..... 241
St. Clair County Election Commission, Soutar *v.* 258
School District of the City of Battle Creek, Appeal of ..... 392
School District No. 8, Fractional, Parma Township, Jackson County, Chapel *v.* ..... 176
Shakespeare Company *v.* Lippman's Tool Shop Sporting Goods Company ..... 109
Shilts, Bilandzija *v.* ..... 421
Silver Flame Industries, Inc., *v.* Blumrosen .... 441
Simons, Durgee *v.* ..... 4
Singer *v.* Goff ..... 163
Skiprick, Corpron *v.* ..... 311
Smith, People *v.* ..... 10
Smith *v.* Smith ..... 56
Solomon *v.* Badalamenti ..... 17
Solomon's Estate, *In re* ..... 17
Soutar *v.* St. Clair County Election Commission 258
Stahl's Estate, *In re* ..... 380
State Highway Commissioner, Jacox *v.* ..... 482
State, Van Antwerp *v.* ..... 593
Stephenson *v.* Stephenson ..... 528
Sterk & Vogel, Inc., *v.* Kuzee ..... 249
Stewart *v.* Napuche ..... 76
Stofflet, Holt *v.* ..... 272, 275

Tackabury *v.* Tackabury ..... 157
Ten Cate *v.* Kanera ..... 461
Tom McDonnell, Inc., Dwelley *v.* ..... 229
Township of Dearborn *v.* Dearborn Township Clerk ..... 673
Trisch *v.* Fairman ..... 432
Tucker *v.* Department of Revenue ..... 380

Unemployment Compensation Commission, Russ Dawson, Inc., *v.* ..... 82

PAGE

Van Antwerp *v.* State ..... 593
Vanden Bogert *v.* May ..... 606

Watroba *v.* City of Detroit ..... 182
Watson *v.* Dax ..... 320
Welsh, Flood *v.* ..... 583
Whitehurst, Kokalis *v.* ..... 477
Wieland *v.* Dow Chemical Company ..... 427

Zielinski *v.* Zielinski ..... 276

87 Cases.

# TABLE OF CASES CITED.


PAGE

Achenbach *v.* Mears, 272 Mich 74 ..... 591
Acme Messenger Service Co. *v.* Michigan Unemployment Compensation Commission, 306 Mich 704 ..... 418
Adams *v.* Adams, 304 Mich 290 ..... 358
——— *v.* First Baptist Church of St. Charles, 148 Mich 140 653, 654
A. H. Andrews Co. *v.* Colonial Theatre Co., 283 Fed 471 ..... 446
A. J. Brown & Son, Inc., *v.* City of Grand Rapids, 265 Mich 465 4
Alabama *v.* King & Boozer, 314 US 1 ..... 143
Allen *v.* Rogers, 246 Mich 501 ..... 488
Alton *v.* Meeuwenberg, 108 Mich 629 ..... 657
Amberg *v.* Welsh, 325 Mich 285 ..... 525, 526
American Screw Products Co. *v.* Michigan Unemployment Compensation Commission, 311 Mich 440 ..... 418
Ames *v.* Cheyne, 290 Mich 215 ..... 458
Anderson *v.* Conductors Protective Assurance Co., 266 Mich 471 232
——— *v.* Levin, 218 Mich 225 ..... 518
——— *v.* Seelow, 224 Wis 230 ..... 206
Andrews (A. H.) Co. *v.* Colonial Theatre Co., 283 Fed 471 ..... 446
Anthony *v.* Cass County Home Telephone Co., 165 Mich 388 ..... 319
Anway *v.* Grand Rapids Railway Co., 211 Mich 592 ..... 683
Arctic Dairy Company *v.* Winans, 267 Mich 80 ..... 303
Argo Oil Corp. *v.* Atwood, 274 Mich 47 ..... 128
Arnold *v.* Nye, 23 Mich 286 ..... 266
Ashburn *v.* Ashburn, 329 Mich 314 ..... 14
Aslanian, *In re,* 318 Mich 55 ..... 579, 581, 582
Atlantic Delaine Company *v.* James, 94 US 207 ..... 591
Attorney General, *ex rel.* Cook, *v.* O'Neill, 280 Mich 649 ... 265, 683
———, ——— Trahair, *v.* Landel Metropolitan District, 318 Mich 376 ..... 519
——— (People, *ex rel.*) *v.* Sperry & Hutchinson Co., 197 Mich 532 127
Aukstales *v.* Klotz, 280 Mich 355 ..... 671, 672
Auto Rental Co., Ltd., *v.* Lee, 35 Hawaii 77 ..... 120

Bach *v.* Friden Calculating Machine Co. (CCA), 167 F2d 679 .... 154
Backer *v.* Gonder Ceramic Arts, Inc., 90 F Supp 737 ..... 155
Bailey *v.* Bailey, 25 Mich 185 ..... 7, 8
Baldwin *v.* Nall, 323 Mich 25 ..... 330
Balk's Estate, *In re,* 298 Mich 303 ..... 28
Banderob *v.* Wisconsin Central R. Co., 133 Wis 249 ..... 205
Barar *v.* Phillips, 328 Mich 267 ..... 592, 612
Barbour *v.* Hickey, 2 App DC 207 ..... 253
Barlum's Estate, *In re,* 240 Mich 393 ..... 28
Barnhart *v.* Stern, 182 Wis 197 ..... 274
Barrie *v.* Smith, 47 Mich 130 ..... 654
Baxter *v.* Szucs, 248 Mich 672 ..... 621
Bay City (City of) *v.* State Board of Tax Administration, 292 Mich 241 ..... 140

PAGE

Bayliss *v.* People, 46 Mich 221 ..... 225
Beach *v.* Gehl, 204 Wis 367 ..... 206
Bean *v.* Bean, 144 Mich 599 ..... 28
Bed *v.* Fallon, 307 Mich 466 ..... 621
Beecher *v.* Galvin, 71 Mich 391 ..... 197, 203, 204
Benjamin *v.* Bondy, 322 Mich 35 ..... 108
Bennett (People, *ex rel.*) *v.* Benfield, 80 Mich 265 ..... 519
Benson *v.* State Hospital Commission, 316 Mich 66 ..... 603
Bernard Thomas' Estate, *In re,* 274 Mich 10 ..... 468
Black *v.* Ambs, 307 Mich 644 ..... 316
Blanchard *v.* Detroit L. & L. M. R. Co., 31 Mich 43 ..... 654
Block *v.* Schmidt, 296 Mich 610 ..... 460
Blodgett's Estate, *In re,* 197 Mich 455 ..... 460
Board of Supervisors of Sanilac County *v.* Auditor General, 68 Mich 659 ..... 602
Bolthuis *v.* Bolthuis, 233 Mich 584 ..... 338
Bomze *v.* Nardis Sportswear, Inc. (CCA), 165 F2d 33 ..... 154
Boran *v.* New York Life Ins. Co., 274 Mich 638 ..... 333
Borden Co. *v.* Schreder, 182 Or 34 ..... 120
Bourjois Sales Corp. *v.* Dorfman, 273 NY 167 ..... 112, 129
Bower *v.* Town, 12 Mich 229 ..... 389
Bradburn (Voorhies, *ex rel.*) *v.* Nier, 222 Mich 374 ..... 518
Braendle *v.* Drum, 254 Mich 372 ..... 39
Brassel *v.* Railway Co., 101 Mich 5 ..... 204
Bricker *v.* Green, 313 Mich 218 ..... 565
Broff *v.* Silver Liquor Stores, Inc., 5 Conn Supp 238 ..... 120
Brookhouse *v.* Brookhouse, 286 Mich 151 ..... 59, 161
Brooks (Floyd), *In re,* 331 Mich 628 ..... 579
Brown (A. J.) & Son., Inc., *v.* City of Grand Rapids, 265 Mich 465 ..... 4
Brown (People, *ex rel.*) *v.* Parsons, 200 Mich 39 ..... 708
Brown's Estate, *In re,* 198 Mich 544 ..... 403
Bryant's Petition, *In re,* 323 Mich 424 ..... 600
Buchel *v.* Williams, 273 Mich 132 ..... 42
Buck *v.* Coward, 122 Mich 530 ..... 304
———, *In re,* 308 Mich 634 ..... 579
Buckhout *v.* Witwer, 157 Mich 406 ..... 303
Bumash *v.* Compton, 298 Mich 70 ..... 187
Burlage *v.* Radio Cab Co., 321 Mich 319 ..... 435
Burt *v.* Detroit, G. H. & M. R. Co., 262 Mich 204 ..... 564
——— *v.* Munising Woodenware Co., 222 Mich 699 ..... 671, 672
Burton *v.* United States, 202 US 344 ..... 224
Butrick *v.* Snyder, 236 Mich 300 ..... 40

Cabana *v.* City of Hart, 327 Mich 287 ..... 329
Cal-Dak Co. *v.* Sav-On Drugs, Inc., 110 Cal App2d 204 ..... 131
Campbell, *Ex parte,* 36 Cal App2d 221 ..... 103
Canada Dry Bottling Co. of Utah *v.* Utah Board of Review, — Utah —, 223 P2d 586 ..... 420
Canton *v.* Grinnell, 138 Mich 590 ..... 79
Carmichael *v.* Carmichael, 72 Mich 76 ..... 505
Carnahan *v.* M. J. & B. M. Buck Co., 250 Mich 198 ..... 409
Carpenter *v.* Shaw, 280 US 363 ..... 142
Carson *v.* Roane-Anderson Co., 342 US 232 ..... 144
Carter *v.* C. F. Smith Co., 285 Mich 621 ..... 187
Casella, *In re,* 313 Mich 393 ..... 309
Caswell *v.* Gibbs, 33 Mich 331 ..... 304
——— *v.* Pilkinton, 138 Mich 138 ..... 439

PAGE
Central Land Co. *v.* City of Grand Rapids, 302 Mich 105 ..... 654
C. F. Smith Co. *v.* Fitzgerald, 270 Mich 659 ..... 139, 140, 683
Chaddock (People, *for the use of*) *v.* Barry, 93 Mich 542 ..... 267
Chamberlain's Estate, *In re,* 298 Mich 278 ..... 600, 604
Chapin *v.* Chapin, 229 Mich 515 ..... 399
Chapman *v.* Bible, 171 Mich 663 ..... 327
Chas. Wolff Packing Co. *v.* Court of Industrial Relations of the State of Kansas, 262 US 522 ..... 116
Chemical Bank & Trust Co. *v.* County of Oakland, 264 Mich 673 ..... 128
Chisholm *v.* Chisholm Construction Co., 298 Mich 25 ..... 416, 417
Christensen *v.* Christensen, 295 Mich 203 ..... 346
Chubb *v.* Chubb, 297 Mich 501 ..... 59, 160, 338
Churchill's Estate, *In re,* 230 Mich 148 ..... 7, 8
City of Bay City *v.* State Board of Tax Administration, 292 Mich 241 ..... 140
——— Grand Rapids *v.* Crocker, 219 Mich 178 ..... 599
——— Kalamazoo *v.* Priest, 331 Mich 43 ..... 494
——— Wyandotte *v.* State Board of Tax Administration, 278 Mich 47 ..... 139
Civil Service Commission *v.* Auditor General, 302 Mich 673 683, 689
Clare County Savings Bank *v.* Featherly, 173 Mich 292 ..... 621
Clifford, *In re,* 303 Mich 84 ..... 579
Coates *v.* Coates, 327 Mich 444 ..... 256
Cohen *v.* Peerless Soda Fountain Service Co., 257 Mich 679 ..... 329
Cole *v.* Boyd, 47 Mich 98 ..... 204–206
——— *v.* Cole Realty Co., 169 Mich 347 ..... 617
Colorado National Bank of Denver *v.* Bedford, 310 US 41 ..... 142
Colton *v.* Duvall, 254 Mich 346 ..... 304
Cook *v.* Michigan Central R. Co., 189 Mich 456 ..... 79
——— (Attorney General, *ex rel.*) *v.* O'Neill, 280 Mich 649 .. 265, 683
Cooke *v.* Holland Furnace Co., 200 Mich 192 ..... 683
Cooley *v.* Cooley, 320 Mich 209 ..... 59
——— *v.* ———, 329 Mich 91 ..... 645
Cope-Swift Co. *v.* John Schlaff Creamery Co., 223 Mich 543 .... 410
Cosgriff *v.* Board of Election Commissioners of the City and County of San Francisco, 151 Cal 407 ..... 270
County of Oakland *v.* Mack, 243 Mich 279 ..... 654
Csiresu *v.* Muir, 303 Mich 323 ..... 333
Cundiff *v.* Chrysler Corp., 293 Mich 404 ..... 429

Daines *v.* Tarabusi, 246 Mich 419 ..... 390
Dasovich *v.* Longacre, 324 Mich 62 ..... 33
Dation *v.* Ford Motor Co., 314 Mich 152 ..... 573
Davidson *v.* City of Detroit, 307 Mich 420 ..... 565
Davis *v.* Farmers Cooperative Equity Co., 262 US 312 ..... 151, 152
——— *v.* Randall, 322 Mich 195 ..... 108
——— (Myrtle), *In re,* 277 Mich 88 ..... 579
DeMeerleer *v.* Michigan, 329 US 663 ..... 629
Detroit Free Press *v.* Miller, 217 Mich 118 ..... 481
Detroit Union Railroad Depot & Station Co. *v.* Fort Street Union Depot Co., 128 Mich 184 ..... 654
DeVries *v.* Owens, 295 Mich 522 ..... 198
Dinius *v.* Bolibruch, 270 Mich 618 ..... 327
Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 220 US 373 ..... 119, 123

PAGE

Dodge *v.* Detroit Trust Co., 300 Mich 575 ..... 302
——— *v.* Ford Motor Co., 204 Mich 459 ..... 640
Donaldson *v.* Donaldson, 134 Mich 289 ..... 612
Doty's Estate, *In re,* 212 Mich 346 ..... 28
Dowagiac Manufacturing Co. *v.* Schneider, 181 Mich 538 ..... 329
Draper *v.* Regents of University of Michigan, 195 Mich 449 .... 98
Dubois *v.* Karazin, 315 Mich 598 ..... 661, 662
Dunn *v.* Minnema, 323 Mich 687 ..... 439
Dunnebacke *v.* Detroit G. H. & M. R. Co., 248 Mich 450..... 303
Durfee *v.* Abbott, 50 Mich 479 ..... 206
Duval *v.* Aetna Casualty & Surety Co., 304 Mich 397 ..... 168

Eddinger, *In re,* 236 Mich 668 ..... 343
Edwards *v.* Common Council of Village of Three Rivers, 96 Mich 625 ..... 284
Ehinger *v.* Graham, 190 Mich 132 ..... 267
Eicholtz *v.* Grunewald, 313 Mich 666 ..... 612
Elbom *v.* Pavsner, 225 Mich 213 ..... 425
Elliott *v.* Secretary of State, 295 Mich 245 ..... 265
——— (People, *ex rel.*) *v.* O'Hara, 246 Mich 312 ..... 525, 527
Ely Lilly & Co. *v.* Saunders, 216 NC 163 .... 112, 123, 126, 127, 129
Employers Mutual Casualty Company, Inc. (Lather, *for use and benefit of*), *v.* Michigan Public Service Co., 332 Mich 683 . . 494
Epworth Assembly *v.* Ludington & Northern Railway, 236 Mich 565 ..... 654
Estate of Balk, *In re,* 298 Mich 303 ..... 28
——— Barlum, *In re,* 240 Mich 393 ..... 28
——— Bernard Thomas, *In re,* 274 Mich 10 ..... 468
——— Blodgett, *In re,* 197 Mich 455 ..... 460
——— Brown, *In re,* 198 Mich 544 ..... 403
——— Chamberlain, *In re,* 298 Mich 278 ..... 600, 604
——— Churchill, *In re,* 230 Mich 148 ..... 7, 8
——— Doty, *In re,* 212 Mich 346 ..... 28
——— Fraser, *In re,* 288 Mich 392 ..... 625
——— Haslick, *In re,* 195 Mich 432 ..... 27
——— Kaven, *In re,* 279 Mich 334 ..... 27
——— Keene, *In re,* 189 Mich 97 ..... 468
——— Lacroix, *In re,* 265 Mich 59 ..... 28
——— Moore, *In re,* 292 Mich 198 ..... 552
——— Oliff, *In re,* 283 Mich 43 ..... 399, 403
——— Paquin, *In re,* 328 Mich 293 ..... 476
——— Peterson, *In re,* 239 Mich 452 ..... 460
——— Shuler, *In re,* 242 Mich 576 ..... 28
——— Shumway, *In re,* 194 Mich 245 ..... 8
——— Taylor, *In re,* 271 Mich 404 ..... 468, 473
Esterline *v.* Kennicott, 277 Mich 130 ..... 107
*Ex parte* Campbell, 36 Cal App2d 221 ..... 103
——— Sichofsky, 201 Cal 360 ..... 103

Factor (Max) & Co. *v.* Kunsman, 5 Cal2d 446 ... 112, 124, 126, 127
Falvey *v.* Coats (CCA), 47 F2d 856 ..... 365
Farabaugh *v.* Rhode, 305 Mich 234 ..... 552
Faraci *v.* Fassulo, 212 Mich 216 ..... 480, 481
Farmers Fire Insurance Co. *v.* Johnston, 113 Mich 426 ..... 489
Faulks *v.* People, 39 Mich 200 ..... 686
Faust *v.* Kent-Moore Organization, Inc., 324 Mich 45 ..... 410

PAGE

Featherly *v.* Central Paper Co., 281 Mich 562 ..... 97
Federal Land Bank of New Orleans *v.* Crosland, 261 US 374..... 144
Federal Land Bank of St. Paul *v.* Bismarck Lumber Co., 314 US 95 ..... 143
Fidelity Trust Co. *v.* Saginaw Hotels Co., 259 Mich 254 ..... 167
Fidrych, *In re,* 331 Mich 485 ..... 579
Finch *v.* Haynes, 144 Mich 352 ..... 458
Finlayson *v.* Township of West Bloomfield, 320 Mich 350 ..... 518
Fiorella *v.* Baltimore & Ohio R. Co., 89 F Supp 850 ..... 155
First National Bank of Detroit *v.* E. T. Barnum Wire & Iron Works, 60 Mich 487 ..... 167, 168
Fisher *v.* Fisher, 224 Mich 147 ..... 390
——— *v.* Grand Trunk Western R. Co., 306 Mich 95 ..... 318
Fisher, Inc., *v.* Canfield, Colorado Dist. Ct. for City and County of Denver, Act A, Div 2 (CCH Trade Regulations Service, par 52,611) ..... 120
Fitzcharles *v.* Mayer, 284 Mich 122 ..... 40
Floyd Brooks, *In re,* 331 Mich 628 ..... 579
Foltz *v.* Foltz, 281 Mich 179 ..... 346
Ford *v.* City of Detroit, 273 Mich 449 ..... 656, 657
Forler *v.* Willaims, 242 Mich 639 ..... 460
Fosdick *v.* Van Arsdale, 74 Mich 302 ..... 284
Frankfort Distillers Corp. *v.* Liberto, 190 Tenn 478 ..... 120, 124
Fraser *v.* Collier Construction Co., 305 Mich 1 ..... 390
Fraser's Estate, *In re,* 288 Mich 392 ..... 625
Fred Macey Co. *v.* Macey, 143 Mich 138 ..... 625
Fulton Township School District, Gratiot County, *v.* School District No. 4 Fractional, Essex Township, Clinton County, 302 Mich 566 ..... 518

Gallagher *v.* Studebaker Corporation, 236 Mich 195 ..... 617
Gannon *v.* Stansfield, 216 Mich 440 ..... 254
Garbarino *v.* Lee C. Miller Company, 330 Mich 688 ..... 329
Gardner-White Co. *v.* State Board of Tax Administration, 296 Mich 225 ..... 140, 600
Gee *v.* Olson, 320 Mich 274 ..... 295
George L. Nadell & Co., Inc., *In re,* 294 Mich 150 ..... 592
G. F. Redmond & Co. *v.* Michigan Securities Commission, 222 Mich 1 ..... 128
Gibney *v.* Allen, 156 Mich 301 ..... 399
Gifford *v.* First National Bank of Menominee, 285 Mich 58 ..... 400
Gillett *v.* Michigan United Traction Co., 205 Mich 410 ..... 473
Gindorff *v.* Gindorff, 295 Mich 469 ..... 612
Ginsberg *v.* Burroughs Adding Machine Co., 204 Mich 130 ..... 97
Glinnan *v.* Judge of Recorder's Court, 173 Mich 674 ..... 225
Gloeser *v.* Moore, 284 Mich 106 ..... 327
Goebel Brewing Co. *v.* State Board of Tax Administration, 306 Mich 222 ..... 141
Goldsmith *v.* Mead Johnson & Co., 176 Md 682 ..... 112, 128
Goldstein *v.* Chicago, R. I. & P. R. Co., 93 F Supp 671 ..... 155
Gordon, *In re,* 301 Mich 224 ..... 579, 581
Grand Rapids (City of) *v.* Crocker, 219 Mich 178 ..... 599
Grant *v.* Lansdon, 15 Idaho 342 ..... 270
Graystone Ballroom, Inc., *v.* Baggott, 319 Mich 87 ..... 418
Green *v.* Chicago, Burlington & Quincy R. Co., 205 US 530.. 151, 155
Greene *v.* Anglemire, 77 Mich 168 ..... 662
Greenman *v.* Phillips, 241 Mich 464 ..... 403

PAGE

Greenman, *In re,* 212 Mich 687 ..... 575
Groesbeck *v.* Board of State Canvassers, 251 Mich 286 ..... 239
Grossman *v.* Langer, 269 Mich 506 ..... 565
Groth *v.* Singerman, 328 Mich 615 ..... 591
Gruber (John D.) Co. *v.* Montcalm Circuit Judge, 183 Mich 477 ..... 389
Guipe *v.* Jones, 320 Mich 1 ..... 79
Gustin *v.* Ziem, 289 Mich 219 ..... 233

Hagerty *v.* Hagerty, 222 Mich 166 ..... 15
Haines, *In re,* 315 Mich 657 ..... 578, 579, 581
Hannan *v.* Fisher, 82 Mich 208 ..... 254
Hanover Star Milling Co. *v.* Metcalf, 240 US 403 ..... 114, 126
Hanslovsky *v.* Township of Leland, 281 Mich 652 ..... 685
Harner *v.* Harner, 255 Mich 515 ..... 453
Harold H. Roberts, *In re,* 310 Mich 560 ..... 574, 581
Harper *v.* Brennan, 311 Mich 489 ..... 354
Harris *v.* Fry & Kain, 306 Mich 1 ..... 671, 672
Harter *v.* Harter, 307 Mich 258 ..... 346
Hartley *v.* A. I. Rodd Lumber Co., 282 Mich 652 ..... 206
Haslick's Estate, *In re,* 195 Mich 432 ..... 27
Hayes *v.* Livingston, 34 Mich 384 ..... 657
——— *v.* Ross, 236 Mich 208 ..... 391
Heidelmeyer *v.* Village of Oakwood, 222 Mich 331 ..... 518
Hempel *v.* Bay Circuit Judge, 222 Mich 553 ..... 390
Hensinger *v.* Hensinger, 319 Mich 645 ..... 345
Hesley (People, *ex rel.*) *v.* Ragan, 396 Ill 554 ..... 103
Hodges *v.* Beull, 134 Mich 162 ..... 426
Holland *v.* Adams, 269 Mich 371 ..... 686
Holman *v.* Cole, 242 Mich 402 ..... 197, 206
Houseman *v.* Kent Circuit Judge, 58 Mich 364 ..... 683
Howard Pore, Inc., *v.* State Commissioner of Revenue, 322 Mich 49 ..... 140
Hubbard *v.* Board of Trustees of Dearborn Retirement System, 319 Mich 395 ..... 215
——— *v.* Miller, 27 Mich 15 ..... 303
Hubbell *v.* Ohler, 213 Mich 664 ..... 425
Hudson *v.* Grand Trunk Western R. Co., 227 Mich 1 ..... 561
Hurd *v.* People, 25 Mich 405 ..... 173
Hynes *v.* Hickey, 109 Mich 188 ..... 475

*In re* Aslanian, 318 Mich 55 ..... 579, 581, 582
——— Balk's Estate, 298 Mich 303 ..... 28
——— Barlum's Estate, 240 Mich 393 ..... 28
——— Blodgett's Estate, 197 Mich 455 ..... 460
——— Brown's Estate, 198 Mich 544 ..... 403
——— Bryant's Petition, 323 Mich 424 ..... 600
——— Buck, 308 Mich 634 ..... 579
——— Casella, 313 Mich 393 ..... 309
——— Chamberlain's Estate, 298 Mich 278 ..... 600, 604
——— Churchill's Estate, 230 Mich 148 ..... 7, 8
——— Clifford, 303 Mich 84 ..... 579
——— Doty's Estate, 212 Mich 346 ..... 28
——— Eddinger, 236 Mich 668 ..... 343
——— Fidrych, 331 Mich 485 ..... 579
——— Floyd Brooks, 331 Mich 628 ..... 579
——— Fraser's Estate, 288 Mich 392 ..... 625

PAGE

*In re* George L. Nadell & Co., Inc., 294 Mich 150 ..... 592
——— Gordon, 301 Mich 224 ..... 579, 581
——— Greenman, 212 Mich 687 ..... 575
——— Haines, 315 Mich 657 ..... 578, 579, 581
——— Harold H. Roberts, 310 Mich 560 ..... 574, 581
——— Haslick's Estate, 195 Mich 432 ..... 27
——— Ives, 314 Mich 690 ..... 358
——— Joseph Nowack, 274 Mich 544 ..... 571, 572, 575
——— Joslin, 334 Mich 627 ..... 714, 715
——— Kaven's Estate, 279 Mich 334 ..... 27
——— Keene's Estate, 189 Mich 97 ..... 468
——— Kovacivich, 323 Mich 310 ..... 631
——— Lacroix's Estate, 265 Mich 59 ..... 28
——— Maffett, 304 Mich 173 ..... 575
——— Martin's Petition, 248 Mich 512 ..... 575
——— Moore's Estate, 292 Mich 198 ..... 552
——— Mould, 162 Mich 1 ..... 572
——— Myrtle Davis, 277 Mich 88 ..... 579
——— Norton, 34 App Div (NY) 79 ..... 270
——— Offill, 293 Mich 416 ..... 631
——— Oliff's Estate, 283 Mich 43 ..... 399, 403
——— Paquin's Estate, 328 Mich 293 ..... 476
——— Peterson's Estate, 239 Mich 452 ..... 460
——— Phillips, 158 Mich 155 ..... 574
——— Ryan, 291 Mich 673 ..... 579
——— Sanderson, 289 Mich 165 ..... 686, 687
——— Shuler's Estate, 242 Mich 576 ..... 28
——— Shumway's Estate, 194 Mich 245 ..... 8
——— Slattery, 310 Mich 458 ..... 687
——— Spangler, 11 Mich 298 ..... 708
——— Taylor's Estate, 271 Mich 404 ..... 468, 473
——— Thomas' Estate, 274 Mich 10 ..... 468
International Shoe Co. *v.* State of Washington, 326 US 310 ..... 153–155
Iowa Pharmaceutical Association *v.* May's Drug Stores, Inc., 229 Iowa 554 ..... 121
Ives, *In re,* 314 Mich 690 ..... 358

Jackson City Bank & Trust Co. *v.* Fredrick, 271 Mich 538 ..... 359
——— *v.* Townley, 268 Mich 340 ..... 29
Jaworski *v.* Detroit Edison Co., 210 Mich 317 ..... 40
Jepsen *v.* Marohn, 22 SD 593 ..... 254
John *v.* McNeal, 167 Mich 148 ..... 425
John D. Gruber Co. *v.* Montcalm Circuit Judge, 183 Mich 477 ..... 389
Johnson *v.* Burke, 167 Mich 349 ..... 359
——— *v.* Johnson, 314 Mich 376 ..... 161
Johnson & Johnson *v.* Weissbard, 121 NJ Eq 585 ..... 112, 128, 129
Jones *v.* Snyder, 218 Mich 446 ..... 458
——— *v.* Van Bochove, 103 Mich 98 ..... 654
Joseph Nowack, *In re,* 274 Mich 544 ..... 571, 572, 575
Joseph Triner Corp. *v.* McNeil, 363 Ill 559 ..... 112, 123, 127, 129
Joslin, *In re,* 334 Mich 627 ..... 714, 715

Kalonsky *v.* Goebel Brewing Co., 282 Mich 638 ..... 431
Kaven's Estate, *In re,* 279 Mich 334 ..... 27
Keene's Estate, *In re,* 189 Mich 97 ..... 468
Kellom *v.* City of Ecorse, 329 Mich 303 ..... 257

PAGE

Kelly *v.* Laing, 259 Mich 212 ..... 247
Kent County Board of Supervisors *v.* City of Grand Rapids, 61 Mich 144 ..... 657, 658
Kilpatrick *v.* Texas & P. R. Co. (CCA), 166 F2d 788 ..... 154
Kimmel *v.* Peach, 240 Mich 697 ..... 435
Kirchen *v.* Remenga, 291 Mich 94 ..... 656
Kirkwood *v.* Hoxie, 95 Mich 62 ..... 359
Klingensmith *v.* James B. Clow & Sons, 270 Mich 460 ..... 168
Knapp *v.* Palmer, 324 Mich 694 ..... 604
Knickerbocker *v.* Detroit, G. H. & M. R. Co., 167 Mich 596 ..... 563
Koffman *v.* Pack, 224 Mich 102 ..... 254
Kolberg *v.* Kolberg, 312 Mich 42 ..... 161
Kovacivich, *In re,* 323 Mich 310 ..... 631
Kress *v.* Department of Revenue, 322 Mich 590 ..... 141
Kroll Bros. Co. *v.* Rolls-Royce, Ltd., 126 F2d 495 ..... 114
Kutchai *v.* Kutchai, 233 Mich 569 ..... 452

Lacroix's Estate, *In re,* 265 Mich 59 ..... 28
Lake *v.* Township of North Branch, 314 Mich 140 ..... 518
Lambert *v.* Minneapolis, St. P. & S. S. M. R. Co., 209 Mich 107 ..... 564
Lambert Pharmacal Co. *v.* Roberts Bros., 192 Or 23 ..... 119
Lasky *v.* Norfolk & W. R. Co. (CCA), 157 F2d 674 ..... 154
Lather, *for use and benefit of* Employers Mutual Casualty Company, Inc., *v.* Michigan Public Service Co., 332 Mich 683 ..... 494
Lau *v.* Lau, 304 Mich 218 ..... 612
Leffingwell *v.* Bettinghouse, 151 Mich 513 ..... 28
Le Roy (People, *ex rel.*) *v.* Hurlbut, 24 Mich 44 ..... 685, 688
Levanen *v.* Seneca Copper Corp., 227 Mich 592 ..... 430
Levy *v.* City of Pontiac, 331 Mich 100 ..... 127
Lewicki *v.* Matulewicz, 321 Mich 388 ..... 708
Lewis J. Selznick Enterprises *v.* Harry I. Garson Productions, 202 Mich 111 ..... 625
Liberty Warehouse Co. *v.* Burley Tobacco Growers' Cooperative Marketing Ass'n, 276 US 71 ..... 126
Life Insurance Company of Detroit *v.* Burton, 306 Mich 81 ..... 358
Lilly *v.* Schmock, 297 Mich 513 ..... 460
Lilly (Ely) & Co. *v.* Saunders, 216 NC 163 ..... 112, 123, 126, 127, 129
Line *v.* Board of Election Canvassers of Menominee County, 154 Mich 329 ..... 516
Liquor Store, Inc., *v.* Continental Distilling Corp. (Fla), 40 So2d 371 ..... 112, 121
Lobato *v.* Paulino, 304 Mich 668 ..... 416
Local 170, Transport Workers Union of America, *v.* Genesee Circuit Judge, 322 Mich 332 ..... 690
Local 321, State, County & Municipal Workers of America *v.* City of Dearborn, 311 Mich 674 ..... 683, 690, 691

Macey (Fred) Co. *v.* Macey, 143 Mich 138 ..... 625
Mack *v.* Mack, 283 Mich 365 ..... 453
MacKenzie *v.* Union Guardian Trust Co., 262 Mich 563 ..... 403
Maclean *v.* Scripps, 52 Mich 214 ..... 204
Maffett, *In re,* 304 Mich 173 ..... 575
Malone *v.* Vining, 313 Mich 315 ..... 318
Manion *v.* State Highway Commissioner, 303 Mich 1 ..... 600
Markey *v.* S. S. Peter & Paul's Parish, 281 Mich 292 ..... 431

PAGE

Martin *v.* Jones, 302 Mich 355 ..... 79
———, *In re* Petition of, 248 Mich 512 ..... 575
Max Factor & Co. *v.* Kunsman, 5 Cal2d 446 ..... 112, 124, 126, 127
McCarthy *v.* Couzens, 214 Mich 501 ..... 213, 214
——— *v.* Thomas Township Board, 324 Mich 293 ..... 685
McCaslin *v.* Schouten, 294 Mich 180 ..... 439
McCreary *v.* Shields, 333 Mich 290 ..... 663
McDowell *v.* Warden of Michigan Reformatory at Ionia, 169 Mich 332 ..... 602
McEvoy *v.* City of Sault Ste. Marie, 136 Mich 172 ..... 604
McKey *v.* Swenson, 232 Mich 505 ..... 295, 296
McLean *v.* Fleming, 96 US 245 ..... 126
McNair *v.* State Highway Department, 305 Mich 181 ..... 601
McParlan *v.* Grand Trunk Western R. Co., 273 Mich 527 ..... 107
McQuesten (State, *ex rel.*) *v.* Hinkle, 130 Wash 525 ..... 270
Mead *v.* Michigan Public Service Commission, 303 Mich 168 ..... 601
Mechanics' Bank of Detroit *v.* Barnes, 86 Mich 632 ..... 204
Memphis Steam Laundry Cleaner, Inc., *v.* Mississippi State Tax Commission, 342 US 389 ..... 155
Michigan Good Roads Federation *v.* State Board of Canvassers, 333 Mich 352 ..... 400, 605
Michigan Minerals, Inc., *v.* Williams, 306 Mich 515 ..... 167
Michigan Public Service Company *v.* Cheboygan, 324 Mich 309 .. 246
Michigan Wolverine Student Co-Operative, Inc., *v.* Wm. Goodyear & Co., 314 Mich 590 ..... 687
Miles (Dr.) Medical Co. *v.* John D. Park & Sons Co., 220 US 373 ..... 119, 123
Miles Laboratories, Inc., *v.* Owl Drug Co., 67 SD 523 ..... 120, 127
——— *v.* Seignious, 30 F Supp 549 ..... 120
Miller *v.* Smith, 115 Mich 427 ..... 359
Miner *v.* Belle Isle Ice Co., 93 Mich 97 ..... 295, 296
Mitchell *v.* Bay Probate Judge, 155 Mich 550 ..... 625
Mittelstadt *v.* Kelly, 202 Mich 524 ..... 42
Moffit *v.* White Sewing Machine Co., 214 Mich 496 ..... 79
Monroe *v.* Rawlings, 331 Mich 49 ..... 662
Montgomery Ward & Co. *v.* Fry, 277 Mich 260 ..... 140
Morgan *v.* Detroit, Jackson & Chicago Railroad, 234 Mich 497 ... 561
Moore *v.* Moore, 231 Mich 209 ..... 505
——— *v.* Noorthoek, 280 Mich 431 ..... 42
Moore's Estate, *In re*, 292 Mich 198 ..... 552
Moross *v.* Moross, 129 Mich 27 ..... 452
Morris *v.* Montgomery, 229 Mich 509 ..... 190, 191
Moss *v.* Warns, 245 Wis 587 ..... 254
Mould, *In re*, 162 Mich 1 ..... 572
Mulliken *v.* City of Corunna, 110 Mich 212 ..... 476
Multiplex Concrete Machinery Co. *v.* Saxer, 310 Mich 243 ..... 617
Mulvaney *v.* New York Central R. Co., 233 Mich 350 ..... 561, 564
Myers *v.* United States, 272 US 52 ..... 692

Nadell (George L.) & Co., Inc., *In re*, 294 Mich 150 ..... 592
Nahikian *v.* Mattingly, 265 Mich 128 ..... 295, 296
Nashville, Chattanooga & St. L. R. Co. *v.* Alabama, 128 US 96 ... 224
National Coal Co. *v.* Cincinnati Gas Coke, Coal & Mining Co., 168 Mich 195 ..... 390
Newberg *v.* Donnelly, 235 Mich 531 ..... 525, 526
Newlove *v.* Callaghan, 86 Mich 297 ..... 439
New Orleans (Federal Land Bank of) *v.* Crosland, 261 US 374 .. 144

PAGE

Nicewander *v.* Diamond, 302 Mich 239 ..... 191
Nicholas *v.* Maxwell Motor Corp., 237 Mich 612 ..... 191
Nichols *v.* Judge of Superior Court of Grand Rapids, 130 Mich 187 ..... 683
Nickels *v.* Hallen, 247 Mich 291 ..... 318
Noble *v.* Grandin, 125 Mich 383 ..... 359
Nordman *v.* Calhoun, 332 Mich 460 ..... 418
Norton, *In re,* 34 App Div (NY) 79 ..... 270
Nowack (Joseph), *In re,* 274 Mich 544 ..... 571, 572, 575
Nowacki *v.* Escanaba Manfg. Co., 229 Mich 675 ..... 671, 672
Nyman *v.* Detroit Police Pension Committee, 302 Mich 520 ..... 214

Oakland County *v.* Mack, 243 Mich 279 ..... 654
Oakland County Drain Commissioner *v.* City of Royal Oak, 306 Mich 124 ..... 517
O'Brian *v.* Michigan Unemployment Compensation Commission, 309 Mich 18 ..... 418
O'Connell *v.* Menominee Bay Shore Lumber Co., 113 Mich 124 ... 687
O'Connor *v.* O'Connor, 281 Mich 640 ..... 367
Offill, *In re,* 293 Mich 416 ..... 631
Old Dearborn Distributing Co. *v.* Seagram-Distillers Corp., 299 US 183 ..... 112, 121, 124, 125, 127–129
Oliff's Estate, *In re,* 283 Mich 43 ..... 399, 403
Oliver *v.* Baldwin, 201 Mich 336 ..... 592

Palchi *v.* Robbins, 272 Mich 411 ..... 626
Pallas *v.* Crowley, Milner & Company, 322 Mich 411 ..... 283
Palmer *v.* Kleiner, 236 Mich 480 ..... 303
Paquin's Estate, *In re,* 328 Mich 293 ..... 476
Patrick *v.* Young Men's Christian Association of Kalamazoo, 120 Mich 185 ..... 657, 658
Patterson (State, *ex rel.*) *v.* Bates, 96 Minn 110 ..... 689
Paw Paw (Village of) *v.* Flook, 214 Mich 486 ..... 687
Pecor *v.* Home Indemnity Company of New York, 234 Wis 407 .. 205
Peninsular Stove Co. *v.* Burton, 220 Mich 284 ..... 127
People *v.* Arnett, 239 Mich 123 ..... 173
——— *v.* Bartelini, 285 NY 433 ..... 174
——— *v.* Bevenly, 108 Mich 509 ..... 173
——— *v.* Bradfield, 300 Mich 303 ..... 173
——— *v.* Christmas, 181 Mich 634 ..... 175
——— *v.* Coapman, 326 Mich 321 ..... 225
——— *v.* Cook, 147 Mich 127 ..... 309
——— *v.* Cummings, 88 Mich 249 ..... 308
——— *v.* De Meaux, 194 Mich 18 ..... 686
——— *v.* Denton, 312 Mich 32 ..... 173
——— *v.* Donovan, 228 Mich 149 ..... 666
——— *v.* Ferguson, 119 Mich 373 ..... 668
——— *v.* Fox, 312 Mich 577 ..... 310
——— *v.* Franczyk, 315 Mich 384 ..... 174
——— *v.* Fritch, 210 Mich 343 ..... 173
——— *v.* Gorman, 252 Mich 603 ..... 174
——— *v.* Hamaker, 92 Mich 11 ..... 666, 667
——— *v.* Henderson, 246 Mich 481 ..... 225
——— *v.* Hepner, 285 Mich 631 ..... 228
——— *v.* Hubbard, 86 Mich 440 ..... 225
——— *v.* Kennay, 391 Ill 572 ..... 103
——— *v.* Knapp, 26 Mich 112 ..... 173

PAGE

People *v.* Lee, 258 Mich 618 ..... 284
——— *v.* Lonsdale, 122 Mich 388 ..... 173
——— *v.* Mason, 63 Mich 510 ..... 12
——— *v.* McMurchy, 249 Mich 147 ..... 683
——— *v.* Peterson, 93 Mich 27 ..... 225
——— *v.* Pippin, 316 Mich 191 ..... 343
——— *v.* Simpson, 48 Mich 474 ..... 173
——— *v.* Smith, 177 Mich 358 ..... 284
——— *v.* Southwick, 272 Mich 258 ..... 225
——— *v.* Ulberg, 313 Mich 204 ..... 13
——— *v.* Victor, 287 Mich 506 ..... 112–115, 122–124, 126
——— *v.* Weaver, 108 Mich 649 ..... 173
——— *v.* Westerberg, 274 Mich 647 ..... 666
———, *ex rel.* Attorney General, *v.* Sperry & Hutchinson Co., 197 Mich 532 ..... 127
———, ——— Bennett, *v.* Benfield, 80 Mich 265 ..... 519
———, ——— Brown, *v.* Parsons, 200 Mich 39 ..... 708
———, ——— Elliott, *v.* O'Hara, 246 Mich 312 ..... 525, 527
———, ——— Hesley, *v.* Ragan, 396 Ill 554 ..... 103
———, ——— Le Roy, *v.* Hurlbut, 24 Mich 44 ..... 685, 688
———, ——— Royce, *v.* Goodwin, 22 Mich 496 ..... 686
———, ——— Sutherland, *v.* Governor, 29 Mich 320 ..... 682
———, ——— Valentine, *v.* Berrien Circuit Judge, 124 Mich 664 127
———, *for the use of* Chaddock, *v.* Barry, 93 Mich 542 ..... 267
Pepsodent Co. *v.* Krauss Co., 200 La 959 ..... 120, 123, 124
Perfect Cleaners & Dyers *v.* Kirschbaum, 257 Mich 430 ..... 54
Peterson's Estate, *In re,* 239 Mich 452 ..... 460
Petition of Bryant, *In re,* 323 Mich 424 ..... 600
——— Martin, *In re,* 248 Mich 512 ..... 575
Philadelphia & Reading R. Co. *v.* McKibbin, 243 US 264 ... 151, 155
Phillips, *In re,* 158 Mich 155 ..... 574
Piskorowski *v.* Detroit, G. H. & M. R. Co., 121 Mich 498 ..... 562
Pore (Howard), Inc., *v.* State Commissioner of Revenue, 322 Mich 49 ..... 140
Prentis *v.* Bates, 93 Mich 234 ..... 284
Puffer *v.* Clark, 202 Mich 169 ..... 654

Ranney *v.* Secretary of State, 316 Mich 637 ..... 267
Rathbun *v.* State of Michigan, 284 Mich 521 ..... 400
Rayess *v.* Lane Drug Co., 138 Ohio St 401 ..... 120
Redmond (G. F.) & Co. *v.* Michigan Securities Commission, 222 Mich 1 ..... 128
Reed *v.* Baker, 42 Mich 272 ..... 166
——— *v.* Secretary of State, 327 Mich 108 ..... 605
Renders *v.* Grand Trunk R. Co., 144 Mich 387 ..... 476
Renn *v.* Renn, 318 Mich 230 ..... 346
Republic Automobile Insurance Co. *v.* Maedel, 253 Mich 663 .... 390
Rhines *v.* Consumers' Power Co., 259 Mich 236 ..... 653
Rhode *v.* Hassler, 113 Mich 56 ..... 613
Ribnik *v.* McBride, 277 US 350 ..... 116
Rice *v.* Atkinson, Deacon, Elliott Co., 215 Mich 371 ..... 480
Rich *v.* Chamberlain, 104 Mich 436 ..... 310
Richfield Oil Corp. *v.* State Board of Equalization, 329 US 69 144, 145
Richmond *v.* Robinson, 12 Mich 193 ..... 426
Rinebold *v.* Bray, 248 Mich 321 ..... 671, 672
Robards *v.* P. Bannon Sewer Pipe Company, 130 Ky 380 ..... 79

PAGE
Robbins *v.* Shelby County Taxing District, 120 US 489 ..... 156
Roberts (Harold H.), *In re,* 310 Mich 560 ..... 574, 581
Robertson *v.* Baxter, 57 Mich 127 ..... 689
——— *v.* New York Life Insurance Co., 312 Mich 92 ..... 621
Robins *v.* Pitcairn, 124 F2d 734 ..... 562
Robinson *v.* Flint & P. M. R. Co., 79 Mich 323 ..... 562
Rotter *v.* Detroit United Railway, 205 Mich 212 ..... 71
Rowe *v.* Rowe, 291 Mich 451 ..... 346
Royce (People, *ex rel.*) *v.* Goodwin, 22 Mich 496 ..... 686
Rubin *v.* Fisher Body Corp., 205 Mich 605 ..... 98
Rudolphi *v.* Gilbert, 209 Mich 141 ..... 625
Rushford-Surine *v.* Grand Trunk R. Co., 239 Mich 19 ..... 563
Ruttle *v.* What Cheer Coal Mining Co., 153 Mich 300 ..... 410
Ryan, *In re,* 291 Mich 673 ..... 579

Saginaw Milling Co. *v.* Mower, 154 Mich 620 ..... 474
St. Paul (Federal Land Bank of) *v.* Bismarck Lumber Co., 314 US 95 ..... 143
Salway *v.* Secretary of State, 321 Mich 211 ..... 367
Sanderson, *In re,* 289 Mich 165 ..... 686, 687
Sandusky Grain Co. *v.* Sanilac Circuit Judge, 184 Mich 126 .... 489
Sanilac County Board of Supervisors *v.* Auditor General, 68 Mich 659 ..... 602
Schneider *v.* City of Grand Rapids, 211 Mich 399 ..... 651
Schulz *v.* Brohl, 116 Mich 603 ..... 458
Schwegmann Bros. *v.* Calvert Distillers Corp., 341 US 384 ..... 117, 118, 130, 131
Scott *v.* Arcadia Township Board, 268 Mich 170 ..... 685
——— *v.* Dow, 162 Mich 636 ..... 71
Scudder *v.* Security Trust Co., 328 Mich 318 ..... 403
Sears *v.* Western Thrift Stores of Olympia, Inc., 10 Wash2d 372 120, 123, 126, 129
Selznick (Lewis J.) Enterprises *v.* Harry I. Garson Productions, 202 Mich 111 ..... 625
Senior *v.* Braden, 295 US 422 ..... 384–386
Sewall *v.* Feller, 288 Mich 107 ..... 303
Sharrar *v.* Nestle, 222 Mich 538 ..... 252, 254
Shaw *v.* General Motors Corp., 320 Mich 338 ..... 98, 429
Sheaffer (W. A.) Pen Co. *v.* Barrett, 209 Miss 1 .. 120, 123, 128, 129
Shearer *v.* Board of Supervisors of Bay County, 128 Mich 552 .. 180
Shufelt *v.* Flint, P. M. R. Co., 96 Mich 327 ..... 562, 564
Shuler's Estate, *In re,* 242 Mich 576 ..... 28
Shumway's Estate, *In re,* 194 Mich 245 ..... 8
Sichofsky, *Ex parte,* 201 Cal 360 ..... 103
Silkworth *v.* Local No. 575 of the American Federation of Labor, 309 Mich 746 ..... 352
Simpson *v.* Pere Marquette Railway Co., 276 Mich 653 ..... 107, 108
Slattery, *In re,* 310 Mich 458 ..... 687
Sloss *v.* Young, 275 Mich 492 ..... 359
Smalley *v.* Railway Co., 34 Utah 423 ..... 365
Smart *v.* Florida East Coast Railway Company, 240 Mich 542 151, 152, 157
Smilgus *v.* Smilgus, 323 Mich 149 ..... 645
——— *v.* ———, 328 Mich 19 ..... 645
Smith *v.* Barrie, 56 Mich 314 ..... 654
——— (C. F.) Co. *v.* Fitzgerald, 270 Mich 659 ..... 139, 140, 683

PAGE

Smith *v.* Dental Products Co., Inc., 140 F2d 140, cert denied, 322 US 743 ... 114
——— *v.* Pontiac Motor Car Co., 277 Mich 652 ... 429
——— *v.* Smith, 144 Mich 139 ... 481
Solomon *v.* Neubrecht, 300 Mich 177 ... 55
Sonenfeld *v.* Sonenfeld, 331 Mich 60 ... 15, 391
Spangler, *In re,* 11 Mich 298 ... 708
Spector Motor Service, Inc., *v.* O'Connor, 340 US 602 ... 156
Sprister *v.* City of Sturgis, 242 Mich 68 ... 703
Stahmann *v.* Vidal, 305 US 61 ... 142
Standard Drug Store *v.* A. E. Wood & Co., 227 Mich 333 ... 97
Standard Grocer Co. *v.* Local No. 406 of the American Federation of Labor, 321 Mich 276 ... 352–354
Standard Oil Co. *v.* State of Michigan, 283 Mich 85 ... 140
State *v.* Holmes, 115 Mich 456 ... 8
———, *ex rel.* McQuesten, *v.* Hinkle, 130 Wash 525 ... 270
———, ——— Patterson, *v.* Bates, 96 Minn 110 ... 689
Stearns *v.* Vincent, 50 Mich 209 ... 610
Steggles *v.* National Discount Corporation, 326 Mich 44 ... 617
Steketee *v.* Steketee, 317 Mich 100 ... 612
Stratmann *v.* Stratmann, 287 Mich 94 ... 59, 161
Streat *v.* Vermilya, 268 Mich 1 ... 708, 709
Stuart *v.* Stuart, 311 Mich 30 ... 453
Sunbeam Corp. *v.* Civil Service Employees' Co-op. Ass'n (CCA), 192 F2d 572 ... 118
——— *v.* Wentling (CCA), 192 F2d 7 ... 114
Sutherland (People, *ex rel.*) *v.* Governor, 29 Mich 320 ... 682
Sutzer *v.* Allen, 236 Mich 1 ... 191
Swart *v.* Kimball, 43 Mich 443 ... 225

Taskey *v.* Paquette, 324 Mich 143 ... 329
Taylor *v.* Davarn, 191 Mich 243 ... 197, 203
——— *v.* Taylor, 310 Mich 541 ... 459
Taylor's Estate, *In re,* 271 Mich 404 ... 468, 473
Teft *v.* Hinchman, 76 Mich 672 ... 481
Thomas' (Bernard) Estate, *In re,* 274 Mich 10 ... 468
Thompson *v.* Michigan Mutual Benefit Association, 52 Mich 522 359
Thurston *v.* Detroit Asphalt & Paving Co., 226 Mich 505 ... 416
Tomes *v.* Detroit, T. & I. R. Co., 240 Mich 133 ... 563
Tozer *v.* Railroad Co., 195 Mich 662 ... 40
Trahair (Attorney General, *ex rel.*) *v.* Landel Metropolitan District, 318 Mich 376 ... 519
Triner (Joseph) Corp. *v.* McNeil, 363 Ill 559 ... 112, 123, 127, 129
Trombley *v.* Trombley, 313 Mich 80 ... 453
Tucker *v.* Chicago & Grand Trunk R. Co., 122 Mich 149 ... 562
Turner *v.* Calumet & Hecla Mining Co., 187 Mich 238 ... 640
——— *v.* Mutual Benefit Health & Accident Ass'n, 316 Mich 6 ... 365
Tyson *v.* Tyson, 283 Mich 192 ... 59
Tyson & Brother *v.* Banton, 273 US 418 ... 116

United Drug Co. *v.* Theodore Rectanus Co., 248 US 90 ... 114
United States *v.* County of Allegheny, 322 US 174 ... 144
——— *v.* Frankfort Distilleries, Inc., 324 US 293 ... 119
——— *v.* Sherwood, 312 US 584 ... 602
Up River Ice Co. *v.* Denler, 114 Mich 296 ... 304
Utica State Savings Bank *v.* Village of Oak Park, 279 Mich 568 688

PAGE

Valentine (People, *ex rel.*) *v.* Berrien Circuit Judge, 124 Mich 664 127
Van Camp *v.* Van Camp, 291 Mich 688 ..... 435
Vannett *v.* Michigan Public Service Co., 289 Mich 212 ..... 494
Vanover *v.* Cox (CCA), 136 F2d 442 ..... 103
Veek *v.* Wesley Freight Co., 306 Mich 485 ..... 97
Veldman *v.* City of Grand Rapids, 275 Mich 100 ..... 240
Village of Paw Paw *v.* Flook, 214 Mich 486 ..... 687
Voorhies, *ex rel.* Bradburn, *v.* Nier, 222 Mich 374 ..... 518
Vukich *v.* City of Detroit, 325 Mich 644 ..... 33

Wanstead *v.* Fisher, 278 Mich 68 ..... 403
Ward *v.* Hunter Machinery Co., 263 Mich 445 ..... 390
W. A. Sheaffer Pen Co. *v.* Barrett, 209 Miss 1 ... 120, 123, 128, 129
Weco Products Co. *v.* Reed Drug Co., 225 Wis 474 .... 112, 124, 129
Weiser *v.* Welch, 112 Mich 134 ..... 476
Welch Grape Juice Co. *v.* Frankford Grocery Co., 36 Pa Dist and Co 653 ..... 120
Wells *v.* Wells, 330 Mich 448 ..... 161, 338
Wessborg *v.* Merrill, 195 Mich 556 ..... 399
Western Electric Co. *v.* Department of Revenue, 312 Mich 582 .. 141
Westgate *v.* Dunn, 291 Mich 286 ..... 359
——— *v.* Westgate, 291 Mich 18 ..... 60, 161
White *v.* Makela, 304 Mich 425 ..... 191
Whitehead *v.* Barker, 288 Mich 19 ..... 555
Whittenberg *v.* Carnegie, 328 Mich 125 ..... 621
Wilcox *v.* Board of Commissioners of Sinking Fund of City of Detroit, 262 Mich 699 ..... 180
Williams *v.* Detroit Fire & Marine Insurance Co., 280 Mich 215 3
——— *v.* Riley, 280 US 78 ..... 141
——— *v.* Standard Oil Co. of Louisiana, 278 US 235 ..... 116
Wiseman *v.* Musgrove, 309 Mich 523 ..... 295, 296
Wolff (Chas.) Packing Co. *v.* Court of Industrial Relations of the State of Kansas, 262 US 522 ..... 116
Wolgamood *v.* Village of Constantine, 302 Mich 384 ..... 240
Wolverine Sign Works *v.* Powers, 248 Mich 371 ..... 303
Wood *v.* State Administrative Board, 255 Mich 220 ..... 683
Wyandotte (City of) *v.* State Board of Tax Administration, 278 Mich 47 ..... 139

Yampolsky *v.* Smith, 329 Mich 647 ..... 39
Youells *v.* Morrish, 218 Mich 194 ..... 518

Zachary *v.* Milin, 294 Mich 622 ..... 410
Zart *v.* Singer Sewing Machine Co., 162 Mich 387 ..... 79
Ziegel *v.* Genesee Board of County Road Commissioners, 241 Mich 161 ..... 488
Zimmerman *v.* Feldman, 217 Mich 390 ..... 591

# LAWS CITED AND CONSTRUED.

CONSTITUTION OF THE UNITED STATES.


| | PAGE |
|---|---|
| Art 1, § 8 | 150 |
| Art 4, § 4 | 683 |
| Am 14, § 1 | 111 |


UNITED STATES STATUTES.


| | PAGE |
|---|---|
| Miller-Tydings Act of 1937 | 117 |
| R. S. § 5219 | 134 |
| Sherman anti-trust law, § 1 | 117, 119 |
| 26 Stat 209 | 117 |
| 48 Stat 598 | 142 |
| 50 Stat 693 | 117 |
| 54 Stat 4 *et seq.* | 289 |
| 56 Stat 244 *et seq.* | 294 |
| 56 Stat 982 *et seq.* | 294 |
| 60 Stat 755 | 144 |
| 12 USCA, § 548 | 134 |
| 15 USCA, § 1 | 117 |
| 15 USCA, § 1051 *et seq.* | 113 |
| 22 USCA, § 441 *et seq.* | 289 |
| 26 USCA, § 23 (c) (3) | 145 |
| 42 USCA, § 1801 *et seq.* | 144 |
| 50 USCA, App, § 1191 *et seq.* | 294 |


MICHIGAN CONSTITUTION 1835.


| | PAGE |
|---|---|
| Art 1, §§ 9, 10 | 225 |


MICHIGAN CONSTITUTION 1850.


| | PAGE |
|---|---|
| Art 4, § 47 | 308 |
| Art 6, § 28 | 225 |
| Sched § 1 | 680 |
| —— § 5 | 680 |


MICHIGAN CONSTITUTION 1908.


| | PAGE |
|---|---|
| Art 2, § 16 | 111, 112 |
| ——, § 19 | 225 |
| Art 4, §§ 1, 2 | 679 |
| Art 5, § 21 | 603 |
| ——, § 28 | 308, 309 |
| Art 6, § 9 | 308, 310 |

MICHIGAN CONSTITUTION 1908—Continued.


| | PAGE |
|---|---|
| Art 7 | 679 |
| ——, § 1 | 682, 686 |
| ——, § 4 | 518 |
| ——, § 15 | 686 |
| ——, § 16 | 686, 687 |
| ——, § 18 | 686, 688 |
| ——, § 23 | 262, 265–268 |
| Art 8, § 17 | 681, 682, 684 |
| ——, § 18 | 690 |
| Art 10, § 21 | 243 |
| Art 16, § 3 | 702 |
| Sched § 1 | 680 |


REVISED STATUTES 1846.


| | PAGE |
|---|---|
| Ch 16, § 70 | 677–680, 682, 684, 690, 692, 693 |


COMPILED LAWS 1871.


| | PAGE |
|---|---|
| § 6026 | 204 |


HOWELL'S STATUTES.


| | PAGE |
|---|---|
| § 7606 | 204 |


COMPILED LAWS 1915.


| | PAGE |
|---|---|
| § 11812 | 481 |


COMPILED LAWS 1929.


| | PAGE |
|---|---|
| §§ 6888 | 570, 581 |
| 13512, 13513 | 401 |
| 15865 | 399 |


COMPILED LAWS SUPPLEMENT 1940.


| | PAGE |
|---|---|
| § 13862–24 | 600 |


COMPILED LAWS SUPPLEMENT 1945.


| | PAGE |
|---|---|
| § 13862–24 | 603 |


COMPILED LAWS 1948.


| | PAGE | | PAGE |
|---|---|---|---|
| §§ 38.551 *et seq.* | 215 | §§ 117.28–117.33 | 697 |
| 41.70 | 678 | 125.281 | 686 |
| 41.201 | 685 | 125.351 | 686 |
| 41.444 | 685 | 145.1 *et seq.* | 262 |
| 117.1 *et seq.* | 516, 697 | 157.3 | 264 |
| 117.3(g) | 248 | 157.14 | 267 |
| 117.5 | 702 | 157.22 | 264, 266 |
| 117.21 | 516 | 165.3 | 238 |

COMPILED LAWS 1948—Continued.


| | PAGE |
|---|---|
| §§ 177.15 | 237 |
| 177.20 | 237 |
| 117.21 | 246 |
| 191.2 | 237 |
| 191.6 | 237, 238 |
| 201.101 | 526 |
| 201.101 *et seq.* | 523, 524 |
| 201.103 | 527 |
| 205.51 *et seq.* | 134 |
| 205.54 | 137 |
| 205.54a | 137 |
| 205.73 | 137 |
| 205.91 *et seq.* | 141 |
| 205.201 | 384 |
| 213.171 *et seq.* | 487 |
| 213.174–213.176 | 488 |
| 213.189 | 486 |
| 213.197 | 488 |
| 256.29 | 41 |
| 256.114 | 367 |
| 256.305 | 69 |
| 256.305(a) | 317 |
| 256.318 | 64, 71 |
| 257.401 | 42 |
| 257.632 | 494 |
| 257.653 | 493 |
| 330.21 | 570, 598 |
| 352.3, 352.4 | 178 |
| 353.23 | 178, 179 |
| 357A.1 | 179 |
| 411.10 | 670 |
| 413.12 | 98 |
| 421.1 *et seq.* | 413 |
| 421.22 | 87 |
| 421.22(2) | 419 |
| 421.40 | 416–418 |
| 421.41(2) | 415, 418 |
| 421.41(3) | 419 |
| 423.17 | 355 |
| 436.1 *et seq.* | 685 |
| 440.76 | 445 |
| 445.151 *et seq.* | 111 |
| 445.766 | 303 |
| 450.11 | 232 |
| 450.13(5) | 409 |
| 466.13 | 563 |
| 552.8 | 453 |
| 552.27 | 280 |
| 552.28 | 345 |
| 552.121 | 388 |
| 552.121–552.123 | 391 |
| 552.301 | 158 |
| 554.351 *et seq.* | 397 |
| 566.11 *et seq.* | 440 |
| §§ 566.106 | 435 |
| 566.110 | 435 |
| 617.65 | 48, 670 |
| 617.66 | 185, 251 |
| 618.39 | 202 |
| 623.46 | 613 |
| 623.73 *et seq.* | 440 |
| 623.85 | 55 |
| 623.90 | 55 |
| 626.19 | 389 |
| 628.1a | 16 |
| 628.11 | 391 |
| 637.7 | 103 |
| 637.9 | 571 |
| 638.1 | 520 |
| 638.26 | 517 |
| 638.27 | 517, 520 |
| 638.28, 638.29 | 518 |
| 650.21 | 15 |
| 666.10 | 357 |
| 691.101 *et seq.* | 599 |
| 691.108 | 599 |
| 691.141 | 604 |
| 691.231 | 629, 714 |
| 691.432 | 319 |
| 691.501 *et seq.* | 134 |
| 691.691 | 328 |
| 691.691 *et seq.* | 63, 184, 363, 466 |
| 701.19 | 398 |
| 704.1 | 377, 398 |
| 704.2 | 377 |
| 704.3 | 398 |
| 730.101 *et seq.* | 697 |
| 730.102 | 700, 707 |
| 730.103 | 707 |
| 730.321 | 705 |
| 730.321 *et seq.* | 701 |
| 730.325 | 706 |
| 730.326 | 705 |
| 730.327 | 707 |
| 750.110 | 711 |
| 750.183 | 666 |
| 750.316 | 219 |
| 750.377a | 667 |
| 750.380 | 667 |
| 750.529 | 628 |
| 762.8 | 224, 226 |
| 767.39 | 224 |
| 769.10–769.13 | 309 |
| 769.10 *et seq.* | 711 |
| 769.14 | 307 |
| 780.501 *et seq.* | 341, 342 |

MICHIGAN STATUTES ANNOTATED.


| | PAGE |
|---|---|
| §§ 5.191 | 685 |
| 5.274 | 685 |
| 5.2073(g) | 248 |
| 6.1 *et seq.* | 262 |
| 6.248 | 238 |
| 6.365 | 237 |
| 6.566 | 237 |
| 6.570 | 237, 238 |
| 6.771 *et seq.* | 523, 524 |
| 8.171 *et seq.* | 487 |
| 9.1446 | 41 |
| 14.811 | 570 |
| 15.374 | 178 |
| 18.971 *et seq.* | 685 |
| 19.316 | 445 |
| 21.11 | 232 |
| 22.272 | 563 |
| 25.88 | 453 |
| 25.105 | 280 |
| 25.106 | 345 |
| 25.141 | 388 |
| 25.141–25.143 | 391 |
| 25.211 | 158 |
| 26.881 *et seq.* | 440 |
| 26.906 | 435 |
| 26.910 | 435 |
| 26.1191 | 401 |
| 26.1191 *et seq.* | 397 |
| 27.501 *et seq.* | 134 |
| 27.561 | 629, 714 |
| §§ 27.914 | 48, 670 |
| 27.915 | 185, 251 |
| 27.1019 | 202 |
| 27.1039 | 319 |
| 27.1461 *et seq.* | 63, 184, 363, 466 |
| 27.1546 | 613 |
| 27.1572 *et seq.* | 440 |
| 27.1584 | 55 |
| 27.1589 | 55 |
| 27.1779 | 389 |
| 27.2250 | 103 |
| 27.2252 | 571 |
| 27.2315 | 520 |
| 27.2340 | 517 |
| 27.2341 | 517, 520 |
| 27.2342, 27.2343 | 518 |
| 27.2611 | 15 |
| 27.3831 *et seq.* | 697 |
| 28.66 | 303 |
| 28.305 | 711 |
| 28.380 | 666 |
| 28.548 | 219 |
| 28.612 | 667 |
| 28.797 | 628 |
| 28.851 | 224 |
| 28.979 | 224 |
| 28.1082–28.1085 | 309 |
| 28.1082 *et seq.* | 711 |


MICHIGAN STATUTES ANNOTATED 1942 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| § 27.3548(24) | 600 |


MICHIGAN STATUTES ANNOTATED 1943 REVISION.


| | PAGE |
|---|---|
| §§ 27.3178(19) | 398 |
| 27.3178(251) | 377, 398 |
| 27.3178(252) | 377 |
| 27.3178(253) | 398 |


MICHIGAN STATUTES ANNOTATED 1943 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| § 14.811 | 581 |


MICHIGAN STATUTES ANNOTATED 1944 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| § 27.3548(24) | 603 |

MICHIGAN STATUTES ANNOTATED 1946 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| §§ 17.524(a) | 87 |
| 17.524(62) | 85 |


MICHIGAN STATUTES ANNOTATED 1947 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| §§ 7.561 | 384 |
| 9.1482 | 367 |
| 9.1565 | 69 |
| 9.1565(a) | 317 |
| 9.1578 | 64 |


MICHIGAN STATUTES ANNOTATED 1949 REVISION.


| | PAGE |
|---|---|
| §§ 5.2071 *et seq.* | 516, 697 |
| 5.2084 | 702 |
| 5.2100 | 246, 516 |
| 5.2107–5.2113 | 697 |
| 5.2963(11) | 686 |
| 5.2973(1) | 686 |
| 5.3375(1) *et seq.* | 215 |


MICHIGAN STATUTES ANNOTATED 1949 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| §§ 9.2353 | 493 |
| 18.971 *et seq.* | 685 |
| 28.967(1) *et seq.* | 341, 342 |


MICHIGAN STATUTES ANNOTATED 1950 REVISION.


| | PAGE |
|---|---|
| §§ 7.521 *et seq.* | 134 |
| 7.524, 7.525 | 137 |
| 7.544 | 137 |
| 7.555(1) *et seq.* | 141 |
| 17.150 | 670 |
| 17.454(18) | 355 |
| 17.501 *et seq.* | 413 |
| 17.524(2) | 419 |
| 17.542 | 416–418 |
| 17.543(2) | 415, 418 |
| 17.543(3) | 419 |


MICHIGAN STATUTES ANNOTATED 1951 CUMULATIVE SUPPLEMENT.


| | PAGE |
|---|---|
| §§ 5.62 | 678 |
| 6.1 *et seq.* | 262 |
| 6.123 | 264 |
| 6.133 | 267 |
| 6.141(1) | 264, 266 |
| 6.359 | 237 |
| 8.171 *et seq.* | 487 |
| 8.174 | 488 |
| 8.176, 8.177 | 488 |

MICHIGAN STATUTES ANNOTATED 1951 CUMULATIVE SUPPLEMENT —Continued.


| | PAGE |
|---|---|
| §§ 8.190 | 486 |
| 8.198 | 488 |
| 14.811 | 570, 598 |
| 15.375 | 178 |
| 15.427(2) | 178, 179 |
| 15.477(11) | 179 |
| 17.186 | 98 |
| 17.501 *et seq.* | 413 |
| 19.321 *et seq.* | 111 |
| 21.13(5) | 409 |
| 27.1461 | 328 |
| 27.1461 *et seq.* | 63, 184, 363, 466 |
| 27.1572 *et seq.* | 440 |
| 27.1855(1) | 16 |
| 27.1865 | 391 |
| 27.3188 | 357 |
| 27.3548(1) *et seq.* | 599 |
| 27.3548(8) | 599 |
| 27.3548(41) | 604 |
| 27.3831 *et seq.* | 697 |
| 27.3832 | 700, 707 |
| 27.3833 | 707 |
| 27.4071 | 705 |
| 27.4071 *et seq.* | 701 |
| 27.4075 | 706 |
| 27.4076 | 705 |
| 27.4077 | 707 |
| 28.609(1) | 667 |
| 28.1082–28.1085 | 309 |
| 28.1085(1) | 307 |


MICHIGAN STATUTES ANNOTATED 1952 REVISION.


| | PAGE |
|---|---|
| §§ 9.2101 | 42 |
| 9.2327 | 317 |
| 9.2332 | 494 |


SESSION LAWS.


| | PAGE |
|---|---|
| 1899, Act 188 | 384 |
| ——, ——, § 1 | 384 |
| 1909, Act 279 | 697 |
| ——, ——, § 5 | 702 |
| ——, ——, § 21 | 246 |
| ——, ——, §§ 28–33 | 697 |
| 1911, Act 299, § 1 | 705 |
| ——, ——, § 2 | 707 |
| ——, ——, § 3 | 707 |
| ——, ——, § 5 | 706 |
| ——, ——, § 6 | 705 |
| ——, ——, § 7 | 707 |
| 1911, Act 299, § 21 | 706 |
| 1915, Act 217 | 363, 466 |
| ——, Act 280 | 397, 399–403 |
| ——, Act 302 | 603, 604 |
| 1923, Act 151, § 11 | 598 |
| 1925, Act 283 | 598 |
| ——, Act 351, pt 3, ch 3, § 22 | 266 |
| ——, ——, ——, ch 4, § 12 | 239 |
| ——, ——, ——, ch 11, § 3 | 239 |
| ——, Act 352 | 487, 488 |
| ——, ——, § 4 | 484 |
| ——, ——, §§ 4–6 | 488 |

SESSION LAWS—Continued.


| | PAGE |
|---|---|
| 1925, Act 352, § 27 | 488 |
| 1927, Act 175, ch 9, §§ 10–13 | 307, 309 |
| ——, Act 313, § 1 | 629 |
| ——, Act 318, § 18(a) | 64 |
| 1929, Act 36 | 134 |
| ——, ——, § 1 | 146 |
| ——, ——, § 7 | 146 |
| 1931, Act 328, § 529 | 628 |
| 1933, Act 167 | 134, 139 |
| ——, ——, § 1(a) | 135 |
| ——, ——, § 1(l) | 136 |
| ——, ——, § 2 | 136 |
| ——, ——, § 4 | 136, 137 |
| ——, ——, § 4a | 136, 137 |
| ——, ——, § 23 | 136, 137, 139 |
| ——, Act 265 | 139 |
| ——, Act 269 | 697 |
| ——, ——, § 2 | 700 |
| 1933 (Ex Sess), Act 8 | 685 |
| 1935, Act 19 | 677 |
| 1936 (Ex Sess), Act 1 | 413 |
| ——, ——, § 22 | 85 |
| ——, ——, § 22, subd (a) (1) | 87 |
| ——, ——, § 22(c) | 86, 88 |
| ——, ——, § 22(2) | 419 |
| ——, ——, § 40 | 418 |
| ——, ——, § 41 | 419 |
| ——, ——, § 41(2) | 418 |
| ——, ——, § 41(3) | 419 |
| 1937, Act 50 | 111 |
| ——, Act 81 | 677 |
| ——, Act 94 | 141 |
| 1939, Act 135 | 599, 600 |
| ——, ——, § 8 | 599, 604, 605 |
| ——, ——, § 24 | 600, 602–605 |
| ——, Act 165 | 341 |
| ——, ——, §§ 6, 7 | 342 |
| ——, Act 279 | 246 |
| 1941, Act 137 | 599, 604 |
| ——, Act 348 | 266 |
| 1943, Act 31 | 266 |
| ——, Act 86 | 266 |
| ——, Act 237 | 602, 603 |
| ——, Act 246 | 85, 87 |
| ——, Act 250 | 570, 581 |
| 1945, Act 23 | 678 |
| ——, Act 87 | 602, 603, 605 |
| ——, ——, § 1 | 605 |
| ——, Act 90 | 266 |
| ——, Act 199 | 599, 604, 605 |
| 1947, Act 1 | 246 |
| ——, Act 87 | 246 |
| ——, ——, § 21 | 516 |
| ——, Act 109 | 701 |
| ——, Act 360 | 87 |
| 1948 (1st Ex Sess), Act 44 | 248 |
| ——, Act 47 | 599 |
| 1949, Act 9 | 678 |
| ——, Act 44 | 357 |
| ——, ——, § 10 | 357 |
| ——, Act 56 | 307, 309 |
| ——, Act 211 | 267 |
| ——, Act 229 | 409 |
| ——, Act 230 | 355 |
| ——, Act 253 | 599 |
| ——, Act 272 | 135, 137 |
| ——, Act 300 | 317 |
| ——, ——, § 401 | 42 |
| ——, ——, § 627(a) | 317 |
| ——, ——, § 632 | 494 |
| ——, ——, § 653 | 493 |
| ——, Act 313 | 570, 598 |
| 1950, Act 25 | 341 |
| 1951, Act 159 | 307–309 |
| ——, Act 174 | 178, 179 |
| ——, Act 199 | 179 |
| ——, Act 251 | 413, 415, 417–419 |
| 1952, Act 58 | 341 |
| ——, Act 171 | 262, 267 |


NORTH DAKOTA.


| | PAGE |
|---|---|
| Laws 1937, ch 249, § 6 | 143 |


CHARTERS.


| | PAGE |
|---|---|
| Dearborn City Charter, ch 10 | 697 |
| ——, ——, § 10.2 | 698, 699 |
| ——, ——, § 10.10 | 698, 699, 704 |
| ——, ——, § 10.17 | 698, 700 |
| ——, ch 21 | 212 |

CHARTERS—Continued.

PAGE

Dearborn City Charter, ch 21, § 21.16 ..... 210, 212
——, ——, § 21.17 ..... 210
——, ——, § 21.27 ..... 211, 215
——, ——, § 21.27(a) ..... 212, 213
——, ——, § 21.28 ..... 211

ORDINANCES.

PAGE

Detroit Compiled Ordinances, 1945, ch 103, § 4 ..... 374
Detroit Traffic Ordinance No. 115-D, §§ 14(b), 16 ..... 64

ADMINISTRATIVE RULES AND REGULATIONS.

PAGE

Department of Revenue Rule No 22 ..... 137

MICHIGAN COURT RULES (1945).

PAGE

No 20, § 5 ..... 328
No 23, § 3 ..... 435
No 30 ..... 621
No 31, § 2 ..... 298
No 66 ..... 367, 626

# TEXTS CITED.


PAGE

16 Am & Eng Encyc of Law (2d ed), pp 79–83 ..... 555
11 Am Jur, § 182, p 880 ..... 692
12 Am Jur, p 1027, § 444 ..... 446
14 Am Jur, pp 929, 930 ..... 224
18 Am Jur, p 263 ..... 270
——, Elections, p 340, § 243 ..... 181
37 Am Jur, p 886 ..... 240
40 Am Jur, p 972 ..... 215
49 Am Jur, pp 315, 316 ..... 601
15 ALR 901 ..... 107
40 ALR 903 ..... 166
43 ALR 1340 ..... 166
56 ALR 1114 ..... 107
72 ALR 1271–1279 ..... 104
76 ALR 1035 ..... 225
96 ALR 621 ..... 174
99 ALR 1454 ..... 107
169 ALR, p 105 *et seq.* ..... 601
Black's Law Dictionary (3d ed), p 1325, "park" ..... 658
14A CJ, p 358 ..... 410
12 CJS, p 224 ..... 254
33 CJS, p 242 ..... 611
51 CJS, p 638 ..... 274
——, p 640 ..... 275
62 CJS, p 1212 ..... 213, 214
1 Elliott on Evidence, § 91, p 114 ..... 473
——, § 93, p 116 ..... 473
24 Fed Digest, § 107, Criminal Law ..... 224
46 Illinois Law Review, pp 349, 380–382 ..... 119
LRA1916D, p 281 *et seq.* ..... 611
McCrary, Elections (4th ed), § 208 ..... 180
3 McQuillin, Municipal Corporations (3d ed), § 12.143 ..... 214
1 Underhill on Wills, § 94 (at p 439) ..... 27
61 Yale Law Journal, pp 381, 396–398 ..... 119

# AMENDMENTS TO MICHIGAN COURT RULES 1945

## Addition to Michigan Court Rule No. 35.

SEC. 6.

(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 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.

(c) Examination and cross-examination of deponents may at the request of either party proceed at any pretrial hearing and rulings on the admissibility of testimony shall be made on request of either party in the same manner as permitted at the trial of the cause.

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) That the deponent is an expert witness; or (b) that the witness is dead; or (c) that the witness is at a greater distance than 50 miles from the place of trial or hearing, or is out of the United States, unless it appears that the

absence of the witness was procured by the party offering the deposition; or (d) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or (e) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (f) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the

use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(Adopted June 27, 1952; effective June 27, 1952.)

# APRIL TERM, 1952.*

## REYNOLDS *v.* GREAT AMERICAN INSURANCE COMPANY OF NEW YORK.

1. APPEAL AND ERROR—MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING VERDICT—EVIDENCE.

   The evidence must be construed in the light most favorable to plaintiff on defendant's appeal from denial of its motions for directed verdict and for judgment notwithstanding the verdict.

2. INSURANCE — EXPLOSION — PROXIMATE CAUSE — EVIDENCE — SLIP JOINT ON HOT WATER PIPE.

   Evidence presented in insured's action under insurance policy to recover for loss alleged to be due to explosion *held,* not to have shown that improperly made slip joint on hot water pipe at washbowl in the bathroom had become separated due to explosion.

3. TRIAL—VERDICT—EVIDENCE—CONJECTURE.

   A jury's verdict may not rest on sheer conjecture and guess.

Appeal from Shiawassee; Lyons (Willis L.), J. Submitted April 10, 1952. (Docket No. 52, Calendar No. 45,427.) Decided June 2, 1952.

Action by Winston R. Reynolds and wife against Great American Insurance Company of New York on policy of insurance. Verdict and judgment for

---

* Continued from Volume 333.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 947.
[2] 22 Am Jur, Explosions and Explosives § 2.
[3] 20 Am Jur, Evidence § 1178.

plaintiff. Defendant appeals. Reversed without new trial.

*V. O. Braun* and *Kenneth B. Kelly,* for plaintiffs.

*Norman L. Des Jardins,* for defendant.

DETHMERS, J. Plaintiffs owned household furnishings located in their home and insured by defendant against loss by explosion. During midwinter they left their home unoccupied for 9 days. It was locked up and no one had access to it except a caretaker engaged to look after the furnace, who had access to the basement only. He was not called as a witness at trial, nor was his whereabouts then known. When plaintiffs returned they found carpeting, furniture, and walls wet, plaster and wallpaper loosened, paint on woodwork chipped, water, steam and vapor on the windows, and evidence that water had come down through the ceiling and along the walls. In the bathroom the washbowl, which was attached to the wall by wood screws, was somewhat loosened and ajar about three eighths of an inch; a faucet on the bowl had become disconnected from the hot water pipe and it was evident that water had sprayed out from the latter.

The disconnection of the pipe from the faucet had occurred at a slip joint. This was not a threaded joint, nor had the pipe been screwed onto the faucet but merely slipped into it and held in place by pressure from packing and a packing nut around the pipe. The pipe had been inserted only one half to three fourths of an inch, while in good plumbing practice it is customary to insert it about 2 inches. The pipe, as inserted in the slip joint, could have been pulled out by exerting pressure on it and a gradual separation could have resulted from constant exertion of internal pressure, which would not

necessarily be an explosion. It would also have been possible for an explosive separation to occur if there had been internal pressure of steam or expanding hot water.

The hot water pipe ran to an electrically heated, 52-gallon hot water tank, which was controlled by a thermostat set at 150 degrees. Thermostats can get out of order and thus permit steam to be created, but there was no proof that this had occurred. The thermostat apparently was working all right. There was no evidence that the bowl was any looser on the wall or more ajar when plaintiffs returned to their home than it had been at the time of their departure. There is not one shred of affirmative proof to show what caused the pipe to separate from the faucet at the slip joint. Plaintiffs not only failed to prove internal pressure or explosion but even to produce any evidence from which the same could reasonably have been inferred. The most that can be said for their case, construing the evidence, as we must, in the light most favorable to them, is that the pipe was disconnected at the slip joint, that it could have been caused by an explosion from the internal pressure of steam or water expansion, had these factors existed as they might have had the thermostat failed to function, and that it was not shown that the separation was caused in some other way, thus leaving it within the realm of possibility that it was caused by explosion. This, apparently, was the reasoning employed by the jury in arriving at its verdict for plaintiffs. As such, the verdict rests on sheer conjecture and guess.

For utter lack of proof of explosion or showing of any facts from which an explosion could reasonably have been inferred, the court should have granted defendant's motions for a directed verdict and judgment *non obstante veredicto*. See *Williams* v. *Detroit Fire & Marine Insurance Co.*, 280 Mich. 215,

and *A. J. Brown & Son., Inc.*, v. *City of Grand Rapids*, 265 Mich 465.

Judgment for plaintiffs entered upon jury verdict, from which defendant appeals, is reversed without new trial, and with costs to defendant.

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

---

## DURGEE *v.* SIMONS.

1. ESTATES—EARLIEST POSSIBLE VESTING FAVORED.
   The law favors the earliest possible vesting of estates.

2. SAME—LIFE ESTATE IN SPOUSE—INTENT—REMAINDER.
   The devise of a life estate to a spouse does not necessarily disclose an intent to bar the latter from sharing in the remainder.

3. SAME—LIFE ESTATES—VESTING OF REMAINDER.
   The fact that a life tenant can never come into the remainder does not change the time when title to the remainder vests.

4. WILLS—TIME EFFECTIVE.
   A will speaks at and takes effect from the time of the testator's death.

5. SAME—LIFE INTEREST—INTEREST IN REMAINDER.
   The fact that a will may operate so as to convey a life interest to the spouse of the deceased and a half interest in the remainder is not a repugnancy.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 33 Am Jur, Life Estates, Remainders, and Reversions §§ 102, 103, 105, 106.
[2] 33 Am Jur, Life Estates, Remainders, and Reversions § 60.
[4] 57 Am Jur, Wills § 1209.
[6] 57 Am Jur, Wills § 1133.
[7] 57 Am Jur, Wills § 1171.
[7] Devise of life estate without complete or effective disposition of remainder as negativing right of life tenant to take as heir or next of kin. 128 ALR 446.

6. SAME—CONSTRUCTION—INTENT.
The manifest intent of the testator should govern when construing a will.

7. SAME—LIFE INCOME TO HUSBAND—INTESTATE REMAINDER.
Will whereby testatrix gave husband the life income from her estate and made several other small bequests but made no provision for remainder over nor disposition of the residue or remainder, operated to vest a half interest in the remainder in the husband at the death of the testatrix, where her only other heir was her half sister.

Appeal from Genesee; Elliott (Philip), J. Submitted April 15, 1952. (Docket No. 67, Calendar No. 45,196.) Decided June 2, 1952.

Bill by Flora Durgee against Lucian L. Simons, successor trustee of estate of Katherine C. Warner Patterson, deceased, and Leo L. Leighton, executrix of the estate of Richard E. Patterson, deceased, to set aside probate proceedings and order assigning residue. Decree entered assigning residue in same manner as probate order. Plaintiff appeals. Affirmed.

*Guy W. Selby* and *Harold H. Bobier,* for plaintiff.

*Cook & Michelson,* for defendant.

DETHMERS, J. Plaintiff filed a bill of complaint praying that the entire probate proceedings and particularly the order assigning residue in the estate of Katherine C. W. Patterson, deceased, hereinafter called testatrix, be set aside and held for nought for lack of jurisdiction because plaintiff had not been served with notice in the proceedings, that the circuit court construe the will of testatrix, and that plaintiff be decreed to be entitled to the entire residue and remainder of the estate as sole heir at law. From decree which failed to grant plaintiff relief as

prayed but awarded the residue and remainder, 1/2 to plaintiff and 1/2 to the surviving husband of testatrix, plaintiff appeals.

When testatrix died the only relatives left surviving her were plaintiff, who was a half sister, and the husband, Richard E. Patterson, since deceased, the executrix of whose estate is named as one of the parties defendant. By will testatrix devised and bequeathed the use of her estate to her husband as trustee and executor, empowering him to sell and convey assets of the estate when he deemed it for the best interests of the trust, the proceeds to be placed in funds of the estate and the trustee to give bond for the faithful performance of his duties as such. The will directed payment of expenses of the estate and its management, to be paid out of income, the balance of income to be used by the husband for his personal use so long as he should live. At his death the will provided for a successor trustee to complete distribution of the estate. There followed 5 small, specific bequests to others, conditioned upon the beneficiaries being alive or in existence at termination of the trust. The will concluded by giving the husband the use of the home and furnishings as long as he should live, or, in the event he should elect not to occupy it, the net income therefrom, and, if not so used, the furnishings were to be sold and proceeds placed in the account of the estate. The will did not provide for remainder over after termination of the life estate nor make disposition of the residue or remainder. Neither did it mention plaintiff or otherwise refer to heirs.

The husband now having died, the question presented is whether the entire residue and remainder goes to plaintiff alone or half to plaintiff and half to the husband or his heirs.

Plaintiff claims that testatrix, in giving to her husband the use and net income of her estate for life,

clearly expressed, by the terms of her will, an intent that he should take nothing beyond the life estate. Plaintiff contends such intent is further emphasized by the provision that upon the husband's failure to use the household furnishings during his lifetime they were to be sold and the proceeds placed in the estate account. In support of this contention plaintiff cites *Bailey* v. *Bailey,* 25 Mich 185, and *In re Churchill's Estate,* 230 Mich 148. In both cases the will expressly disposed of the residue or remainder in question—in the *Bailey Case* "to my lawful heirs" and in the *Churchill Case* "to be disposed of under the laws of the State of Michigan." In the *Bailey Case* the claim of testator's widow to a life interest in certain lands not specifically devised depended, under the statutes then in force, upon her establishing that the husband had intended to die intestate in relation thereto. This Court found from the entire will that he had not so intended and, hence, that the widow was entitled only to the specifically devised life estate in certain lands as provided in the will and no more. In that case and more particularly in the *Churchill Case* the question of whether a life tenant (in the former case a wife; in the latter a daughter) was entitled to share in the remainder, under a residuary clause devising same to testator's heirs, may be considered to have been treated as dependent upon whether the remainder vested at testator's death or upon termination of the life estate. In both cases the fact that the will provided that the corpus, or so much thereof as might be necessary, should or might be expended for the care and support of the life tenant, leaving it a matter of contingency what, if any, remainder or residue would be left for distribution, appears to have been persuasive to this Court that the testator intended vesting thereof to be deferred until termination of the life estate, at which time the life tenant, no longer living, could not be

considered to be included among those described in the residuary clause as testator's heirs at law. So considered, the cases are clearly not in point here. In the instant case only the use and net income of the estate was devised and bequeathed to the husband for life by express terms of the will, and he was not permitted to expend any portion of the corpus for his own use. Under such circumstances, no reason exists nor intention can be said to appear in the will, as in *Bailey* and *Churchill,* for nonadherence to the general rule that the law favors the earliest possible vesting of estates. In support of that rule see cases cited in the *Churchill Case.* The case at bar must, then, be considered as following within the lines of *State* v. *Holmes,* 115 Mich 456, and *In re Shumway's Estate,* 194 Mich 245 (LRA1918A, 578). In the *Holmes Case* the husband's will gave the wife a life estate in lands, with a devise of the remainder which this Court found to be invalid. Having concluded that the remainder was, thus, intestate property, this Court held that the wife could take in relation thereto as an heir at law. In *Shumway* the husband devised his real estate to his wife for life and after her death to his legal heirs in accord with the statute. In holding there that the wife was entitled to share in the residue and remainder, this Court expressly rejected the very argument here advanced by plaintiff, that the devise of a life estate to the spouse disclosed an intent to bar the latter from sharing in the remainder, and said, in language decidedly applicable here, the following:

"The fact that a life tenant can never come into the remainder does not change the time when title to the remainder vests. * * *

"We find no confusing provisions in the first paragraph of testator's will to which well-seasoned rules of construction are inapplicable. His wife, to whom he gave a life estate in the realty, was one of his

several legal heirs amongst whom he directed division of the remainder in fee 'according to the provisions of the statute.' The will spoke at and took effect from the time of his death, at which time, under the statute to which he made reference, the legal heirs were to be determined and title to their interests vested in them, unless undoubtful language in the will plainly provided otherwise. The only words of futurity found are of a kind presumed to relate particularly to the time of enjoyment of the remainder, rather than when the estates shall vest, and are to be so construed. The fact that by the will the widow took both a life estate in the whole and a fee to the half was not an inconsistent or repugnant provision, but simply operated to merge her 2 estates as to the one-half, investing her with an absolute title in fee to that portion.

"It, however, is strenuously urged that the intent of the testator as expressed in the will, taken as a whole, plainly indicated otherwise and under the cardinal rule of construction the manifest intent of the testator should govern. Of this rule of construction there can be no question, but the intent must be tangibly expressed somewhere in the instrument in such language as plainly conveys the thought beyond mere surmise, conjecture, or supposition, and makes evident that Nathan Shumway intended that his wife should be disinherited as to the half of the real estate which the law gave her, and his distinct direction that his real estate, subject to the life estate, be divided amongst his legal heirs (of whom she was one) according to the provisions of the statute should be ignored. * * *

"That he intended to leave her what the statute would have given her and a little more is, we think, as reasonable an inference from this will, considered in its entirety, as that he intended to exclude her from this substantial interest in the real estate which the statute gave her."

We hold that a half interest in the residue and remainder vested in the husband at testatrix's death.

Other errors and defects complained of by plaintiff need not be considered inasmuch as they did not, in view of our holding above, operate to prejudice plaintiff's rights.

Decree affirmed, with costs to defendants.

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

---

PEOPLE *v.* SMITH.

1. CRIMINAL LAW—CONTINUANCE—UNSWORN STATEMENT.
Denial of motion for continuance of prosecution for drunk driving was not an abuse of discretion, which motion had been made by defendant's attorney but was supported by unsworn statement of defendant's employer that it was necessary that defendant be elsewhere on the date set for trial, hence forfeiture of bond and issuance of capias were proper.

2. SAME—CONTINUANCE—DRUNK DRIVING—DISCRETION OF COURT.
Validity of claim on defendant's presence elsewhere than in court on date set for trial of charge of drunk driving was a matter for determination by the trial judge rather than defendant's employer, hence, denial of continuance was not an abuse of discretion.

Appeal from Recorder's Court of Detroit, Traffic and Ordinance Division; Murphy (George T.), J. Submitted April 17, 1952. (Docket No. 86, Calendar No. 45,405.) Decided June 2, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 12 Am Jur, Continuances §§ 5, 14, 23.

Frank E. Smith was charged with drunk driving. On failure to appear, bond was forfeited and capias issued. Defendant appeals. Affirmed.

*Harold H. Emmons, Jr.*, for appellant.

*Frank G. Millard*, Attorney General, *Edmund E. Shepherd*, Solicitor General, *Gerald K. O'Brien*, Prosecuting Attorney, and *Garfield A. Nichols* and *Joseph A. Sullivan*, Assistant Prosecuting Attorneys, for the people.

DETHMERS, J. On December 22, 1951, defendant was arrested on a drunk driving charge. Upon arraignment in the recorder's court of the city of Detroit on December 24th, trial was set for January 2, 1952. On Friday, December 28th, the president of defendant's employer, Overhead Conveyor Company, located in Detroit, wrote a letter to defendant's attorney, received during the middle of the afternoon on Monday, December 31st, stating that defendant was one of its valued engineers and that it would be necessary for him to be in Gary, Indiana, on January 2d in connection with the installation, inspection and completion of an overhead conveyor system in a defense plant, and that such installation was essential to national defense requirements. Defendant's attorney immediately called the judge's office to request an adjournment. Neither the judge nor the assistant prosecutor involved was available, whereupon the attorney called the police officer in charge of the case and understood from him that a continuance would be arranged.

At opening of court on January 2d, defendant's attorney appeared, presented the employer's letter, and asked for an adjournment. The judge read the letter, asked whether that was the only excuse for defendant's not being in court and, upon the attor-

ney's affirmative reply, forthwith denied the motion for continuance and ordered forfeiture of bond and issuance of a capias. Defendant's attorney's motion for approval of a bond on appeal and stay of proceedings was denied. Thereafter this Court granted leave to appeal and stayed proceedings upon filing of approved bond.

Defendant claims abuse of discretion in the refusal of a continuance. Cases cited in support of defendant's claim involve situations in which denial of continuance worked to the prejudice of a defendant's right to a fair trial. Such is not the present situation. While we find nothing in the trial court's actions or demeanor to commend, we cannot hold it to have been an abuse of discretion to deny a continuance on the mere unsworn statement of defendant's employer that, on the basis of its own determination and conclusions, it would be necessary for him to be elsewhere on the date set for trial. The validity of the claim on defendant's presence elsewhere was a matter for determination by the court rather than by his employer. The motion was unsupported by affidavit or any other showing from which it might be determined when the alleged need for defendant's presence in Gary first became known to him or that defendant could not, in the exercise of due diligence, have arranged to be present for trial or have moved for a continuance seasonably before the prosecution, with 6 witnesses, was present in court and ready for trial. In *People* v. *Mason,* 63 Mich 510, this Court said:

"A mere statement of counsel that the respondent is not prepared for trial is not sufficient basis for a continuance of the cause. The practice and rules of court require such applications to be supported by affidavit showing the necessity for delay, and, in the absence of such showing, it was not error to overrule the motion."

Under the circumstances, forfeiture of bond and issuance of capias were proper. *People* v. *Ulberg*, 313 Mich 204.

Affirmed, with costs to plaintiff.

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

---

BEYERLEIN *v.* ASHBURN.

1. DIVORCE—ARREARS IN ALIMONY—DEATH OF WIFE.
   The right to enforce payment of arrears in alimony provided in decree of divorce for support of wife does not abate upon death of the wife, although courts may ease the burden upon the husband, under appropriate circumstances.

2. GARNISHMENT—SUPERSEDEAS BOND—STAY OF PROCEEDINGS—APPEAL FROM ORDER OF DISMISSAL.
   The filing of a supersedeas bond is a prerequisite to stay of proceedings of an order dismissing a writ of garnishment but not to the consideration by the Supreme Court of the correctness of the trial court's order dismissing garnishment (CL 1948, § 650.21).

3. APPEAL AND ERROR—MOTION TO DISMISS APPEAL—QUESTIONS REVIEWABLE—GARNISHMENT.
   Question raised by motion to dismiss appeal from order dismissing writ of garnishment because of plaintiff's failure to file a bond is not moot, where subsequent to such order the principal defendant proceeded to judgment against the garnishee defendant but latter has an appeal pending from judgment against him, hence evidently still has possession of the money (CL 1948, § 650.21).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation §§ 609, 662.
[2] 3 Am Jur, Appeal and Error §§ 541, 548.

4. GARNISHMENT—COSTS—SUPREME COURT.

Garnishment is a proper remedy for recovery of costs taxed under decree of the Supreme Court (CL 1948, § 628.1a).

Appeal from Wayne; Miller (Guy A.), J. Submitted April 15, 1952. (Docket No. 87, Calendar No. 45,418.) Decided June 2, 1952.

Divorce proceedings between Dewane Ashburn and John F. Ashburn. On petition of Gerald W. Beyerlein, administrator of the estate of Dewane Ashburn, deceased, to have defendant adjudged guilty of contempt of court. Petition denied and writ of garnishment issued and petition of deceased dismissed. Plaintiff appeals. Reversed and remanded.

*Bloom & Bloom,* for plaintiff.

DETHMERS, J. In conformity with our opinion in *Ashburn* v. *Ashburn,* 329 Mich 314, a decree was entered in this Court vacating an order of the trial court which modified the alimony provisions of a decree of divorce, the effect of this Court's decree being to require defendant husband to continue payment of permanent alimony at the rate of $25 per week and to award costs of appeal to plaintiff, with a remand of the cause to the trial court for further proceedings. Plaintiff then brought garnishment to collect costs of appeal. The trial court, *sua sponte,* dismissed the writ of garnishment by an order entered in this cause. Subsequently plaintiff wife died. There was then due her on account of unpaid alimony, $795. The administrator of deceased wife's estate, having been substituted as plaintiff herein, filed a petition for an order to show cause why defendant should not be held in contempt of court for nonpayment of alimony and praying for a writ of execution for collection thereof. The trial court en-

tered an order denying plaintiff's petition, holding that "the issues involved are controlled by the case of *Sonenfeld* v. *Sonenfeld,* 331 Mich 60" and that "the arrearage of alimony due is abated by the death of the said decedent and is therefore not collectible by the administrator." From such order and the order dismissing writ of garnishment, plaintiff appealed.

Defendant has filed no brief in this Court, but since submission of the case has filed a motion to dismiss that portion of the appeal relating to garnishment on the ground that plaintiff has filed no supersedeas bond to stay enforcement of the order dismissing the writ of garnishment.

We are not confronted here, as in the *Sonenfeld Case,* with undue delay by the wife in seeking to enforce her rights to alimony or a trial court order requiring payment to a full grown son of the alimony arrears due a living wife. That case is in no sense authority for the proposition that the right to enforce payment of alimony arrears abates upon the wife's death. We hold that it does not so abate (see *Hagerty* v. *Hagerty,* 222 Mich 166), although the courts may, under appropriate circumstances, modify the decree to ease the burden on the husband as relates to alimony arrears, as was done in the *Sonenfeld Case.* No reason appears for doing so here.

In support of his motion to dismiss appeal from the order dismissing writ of garnishment, defendant points to the requirement of CL 1948, § 650.21 (Stat Ann § 27.2611) for filing of a bond in order to stay proceedings on appeal and says that, because plaintiff has filed no such bond, defendant has properly proceeded to judgment against the garnishee defendant and that, in consequence, plaintiff's appeal in regard to the garnishment has become moot. The bond is a prerequisite to stay of proceedings but not to consideration by this Court on appeal of the correctness of the trial court's order dismissing garnish-

ment. The affidavit of garnishee defendant's attorney, on file herein, discloses that an appeal by garnishee defendant from defendant's judgment against it is now pending. Nothing to the contrary appearing in the record, garnishee defendant is evidently still in possession of the money. The question raised in relation to the garnishment on this appeal is, therefore, not moot. Garnishment is a proper remedy for recovery of costs taxed under decree of this Court. CL 1948, § 628.1a (Stat Ann 1951 Cum Supp § 27.1855[1]). The order dismissing the writ was in error and is, together with the order denying plaintiff's right to recover alimony in arrears at the time of decedent's death, reversed, vacated and set aside. The cause is remanded for further proceedings in conformity herewith. Costs to plaintiff.

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

*In re* SOLOMON'S ESTATE.

SOLOMON *v.* BADALAMENTI.

1. WILLS — MENTAL COMPETENCY — EVIDENCE — REMISSION FROM PEMPHIGUS.

   No substantial evidence *held,* to have been adduced to rebut presumption that at the time of making the will testatrix was in full possession of her mental faculties, where it appears will was executed during period of remission between attacks of rare but fatal disease known as pemphigus.

2. SAME—INSANE DELUSIONS.

   An insane delusion invalidating a will exists when a person persistently believes supposed facts which have no real existence, and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed.

3. SAME—INSANE DELUSIONS—EVIDENCE.

   Capricious and arbitrary dislikes, unjust suspicions against relatives or mistaken beliefs as to their feelings and designs towards a testator and his property, however visionary, or belief of acts or facts which have any evidential basis, do not constitute insane delusions.

4. SAME—INSANE DELUSIONS—EVIDENCE.

   Testatrix who practically disinherited 2 of her 4 children, may not be said to have done so as the result of an insane delusion, where such action was based upon her belief that such children had stolen money from her, a belief which was substantiated by some facts supporting it, even though it may seem illogical and foundationless to the court, since a will should not be overturned merely because the testator has not reasoned correctly.

---

REFERENCES FOR POINTS IN HEADNOTES

[2–5] 57 Am Jur, Wills § 82 *et seq.*
[2–5] Insane delusion as invalidating will. 175 ALR 882.

5. SAME—INSANE DELUSIONS—BURDEN OF PROOF.

Contestants who seek to defeat a will on ground of insane delusions of testatrix have burden of proving that she believed her statements, had no reasonable information or evidence supporting them and would not have disinherited them but for such belief.

Appeal from Monroe; Golden (Clayton C.), J. Submitted April 15, 1952. (Docket No. 69, Calendar No. 45,436.) Decided June 2, 1952. Rehearing denied September 3, 1952.

Leo Solomon presented the alleged will of Josephine Solomon for probate. Mary Badalamenti and others objected thereto on the ground of mental incompetency of deceased to execute a will. Contest certified to circuit court. Judgment for contestants. Proponent Kelley, executor named in will, appeals. Reversed and remanded for entry of judgment sustaining will and for remand to probate court for further proceedings.

*William J. Mullaney,* for proponents.

*Haas & McCormick,* for contestants.

BUTZEL, J. Josephine Solomon of Monroe, Michigan, testatrix, died March 27, 1950, at the age of 70 or thereabouts. In her will executed on August 15, 1949, she left her daughters Mary Badalamenti and Anna Migliore, contestants, only a nominal bequest of $5 each. She left 2 parcels of property to the local Catholic church; a life estate in 6 houses and lots to her son Jacob with remainder to the Infantile Paralysis Foundation; a life estate in 4 houses, stores and lots, with a frame building at the rear of one location, to her son Leo with remainder to the cardinal of the archdiocese of Michigan, for secular purposes. She left a house and lot with the

furniture and personal effects of her home to a granddaughter.

Upon the will being presented for probate by testatrix's son Leo, the daughter Mary filed objections claiming mental incompetency of testatrix both before and after and at the time of the execution of the will. No claim of undue influence was made. The contest was certified to the circuit court for the county of Monroe where it was heard by the judge without a jury. He made no direct finding as to general incompetency but in disallowing the will he based his opinion upon the ground that during the 6 months preceding August 15, 1949, the date of the will, testatrix had insane delusions in regard to the daughters, whom she practically disinherited. Proponent has appealed.

Testatrix came to this country from Italy at the age of 14 and, after living in Louisiana for a number of years, moved to Monroe, Michigan, with her husband, the father of the 4 children. He died in 1920. By dint of industry, economy and ability, testatrix amassed considerable real estate. For a long period she ran a grocery store. She looked after her home and managed her various properties, acquiring one after another. Her estate was inventoried at about $50,000. Her son Jacob lives in Texas, the other 3 children in Monroe, Michigan. Leo seems to have been close to her as he assisted with the handling of the property, did some painting, minor repairs, et cetera. For a short time he helped run the grocery store and in 1936 testatrix gave him the grocery business, which he ran for a while and later sold, realizing the net sum of $300 from the proceeds of the grocery stock. He did a few odd jobs for others but apparently lived partly on what his mother paid or gave him. The testimony does not indicate the degree of intimacy and affection between the mother and daughters prior to the time when she became

sick. It is quite significant, however, that James Kelley, Sr., attorney for testatrix for many years and who drafted the will in question, testified that at the time it was drawn:

"I did call her attention to the fact that she was leaving practically nothing to the girls and nothing to Jake although when I made a will for her before there was a similarity."

In February, 1949, testatrix became afflicted with a dangerous skin disease, later found to be *pemphigus vulgaris,* which is characterized by numerous large suppurating blisters of the skin and mucous membranes, a sapping of the blood, itching, intense discomfort and pain. The disease usually is fatal although there may be a period of remission as there was in the present case. At this time, testatrix was also suffering from obesity, high blood pressure, and hardening of the arteries. On February 17, 1949, accompanied by 1 of her daughters, testatrix consulted Dr. James, a dermatologist in Toledo, Ohio, who tentatively diagnosed her plight as pemphigus. He testified for contestant, stating that he could not understand testatrix's incoherent statements, even making allowance for her English interspersed with Italian, that she did not have the mental capacity to make a will, that she would neither know what property she possessed, consider and know the natural objects of her bounty, nor understand the disposition thereof she was making in her will. The testimony of what occurred in August completely shows that Dr. James was mistaken in his diagnosis of testatrix's mental capacity during a period of remission, for he stated that the disease becomes progressively worse and the patient does not recover his or her mental faculties. He did not see her from February 17, 1949, to February 20, 1950, when she again visited him. Testatrix was dissatisfied with

the prescription Dr. James gave her on her first visit, and threatened to sue him; it was only with the utmost difficulty that her family dissuaded her from her purpose.

Following her first visit to Toledo on February 17, 1949, testatrix went to the Monroe Hospital where the 2 daughters visited her regularly. She constantly complained of the hospital treatment and quarreled violently with one nurse. After consultation by the doctors and at her own request she was transferred by ambulance to the University Hospital at Ann Arbor, Michigan, where Dr. Curtis, the head of the dermatology department, looked after her. She was an extremely difficult patient. Although it was against the precepts of her religion, she asked to be killed. She was in pain, exceedingly unhappy away from home, intractable, uncooperative, and extremely disoriented, although Dr. Curtis could not recall any delusions indicated by her conversation with him. He stated that her physical ailments could result in mental disturbances as she did have such and could easily develop various types of delusions, hallucinations or fixations, and that most fixations of this type are directed against intimate friends, relatives, attorneys, et cetera, and from what he knew March 17, 1949, he felt there was little possibility of her being competent to make an unbaised will the following August. He did state, however, that he did not ever see her again after March 17, 1949, some 5 months before she made her will. One of the daughters testified that when she went to the University Hospital testatrix stated that the hospital staff were trying to kill her and that they were neglecting her. She complained that she had not seen her son Leo. She refused injections and bandages, was belligerent and extremely uncooperative. The daughters had her transferred from a ward to a private room. It was finally arranged to have her

returned on March 17, 1949, to the Monroe Hospital where Dr. Pinkus, a specialist in dermatology, recommended by Dr. Curtis, took charge of her in conjunction with a general practitioner.

Upon her return to the Monroe Hospital she for some time continued similar accusations against the hospital personnel, told her daughter there were "cops" in her room, that people were trying to hit her on the head with a stick, that she was drowning, and that she wanted to use a nonexistent gun in her purse. At one time Dr. Pinkus discussed the possibility of consulting an Italian-speaking psychiatrist with the children. On April 18, 1949, she sent for Mr. Kelley, her attorney, to make arrangements to have money withdrawn from her safety deposit box and placed in her checking account while she was ill in bed. Kelley suggested that the 2 daughters accompany him as witnesses but at first testatrix objected, saying that her daughters did not care for her anyhow and she did not want them to have anything to do with it. She said that she wanted someone to handle her business because she could not trust her children. She accused her daughters of stealing money from her. It appears that Mary during her mother's illness had been handling certain of her mother's finances, using cash found in her possession, withdrawing money from her savings account on signature of testatrix, and at one time, taking money from the safe with permission of testatrix. At one time upon returning from the bank, testatrix accused Mary in front of her sister and brother of always trying to get money from her and that she owed her $300 which she had never returned, that Mary had a private nurse give her an injection so as to make her sign a note to obtain money from a savings bank. Testatrix told Leo that she had told the sisters to hold the $300 and later when she asked for it they refused to return it. Aft-

er these accusations Mary completely stopped handling the affairs of testatrix, although she continued to visit her until she left the Monroe Hospital. Anna thereupon took over the handling of affairs of testatrix until she left the hospital and resumed management of her own affairs. No direct accusations were made by testatrix against Anna, although during the summer months she repeated to Leo that the daughters had stolen $300 from her. Evidently testatrix felt that Mary was primarily responsible but that Anna was also involved. When Leo informed Anna of the accusations in the latter part of July, 1949, Anna stopped any attempt to help her mother.

Testatrix returned to her home the latter part of May, 1949, and resumed a normal life from that time until the early part of 1950. Dr. Pinkus visited her on June 17, 1949, and found her in a good mental condition. Neighbors and women she had in to do her work testified that she was handling her property with her old competence. There is some testimony that she was dissatisfied with her help, alleging that they stole soap and perfume from her, and that she was depressed and in poor spirits most of the time but there is no indication that this impaired her faculties. Significantly, the lady who lived above testatrix's apartment testified that Leo was the one often called when testatrix was ill at night and unable to move around during this period. On September 19, 1949, Dr. Pinkus again visited her and found that a few blisters were reappearing at that time. However, from his limited conversation he felt that her mental condition was still good. Dr. Pinkus stated that although pemphigus eventually is a fatal disease, there may be periods of remission, when blisters dry up and the patient lives a perfectly normal life until the next attack, that from his observation the patient was going through this period of remission. Drs. Curtis and James did not see the

decedent at the time Dr. Pinkus did. It is quite significant that she was able to leave the hospital, return home and tend to her own affairs and did not have occasion to call on Dr. Pinkus again until after the middle of September, 1949. From his testimony, we are inclined to give much credibility to his conclusions. It is true that he stated he had attended only 20 cases of pemphigus during his medical career, but it is shown that it is a rare disease, although its characteristics are well known.

On August 15, 1949, during the period of remission and over 2 months after testatrix left the hospital, she went to Mr. Kelley's office to have a new will drawn. Mr. Kelley had been her attorney for over 20 years, had performed legal services for her at various times including some also after the will was drawn. She had previously spoken to him about making a new will. He was familiar in general with her affairs; she gave him all the data in regard to the provisions of the proposed will and they were carefully discussed. Testatrix stated that she did not want to leave her daughters anything but at Mr. Kelley's suggestion she left them nominal bequests. Mr. Kelley testified that the mental condition of testatrix was very good; she knew exactly what she wanted; she stated that she did not want to leave her daughters anything because they had stolen money from her and had lied to her, and also because she had already given them considerable money. The will states that the sole reason for leaving them only the nominal bequest was that she "had already given them considerable money." After the will was dictated and transcribed Mr. Kelley called in his secretary and in her presence carefully read the will to testatrix before she executed it. Mr. Kelley testified that testatrix discussed the details of the will and that she had an excellent memory, even knowing the street numbers of the many houses she owned with-

out the use of memoranda, which she later consulted to make sure that she was correct.

After testatrix suffered a recurrence of the disease in February, 1950, she again visited Dr. James. He then found her physically and mentally in a very bad condition. She was almost completely irrational. Significantly, she at first put her 2 girls out of her room, but later allowed them to come and see her. They had not visited testatrix since the dispute of the summer before. Anna stated that this was because Leo said that their mother wanted to kill them, or have them arrested because of the alleged theft. There is some testimony also that Leo had told Mary that their mother was satisfied about the $300. She died in Mercy Hospital in Toledo on March 27, 1950.

Although the trial court did not pass on the issue of general mental incompetence, contestants argued that testatrix's general state of mind was such that she was incapable of making a will. A careful examination of the record shows that such conclusion is not warranted about her condition during the period of remission. Upon her return from the hospital in May or June, 1949, she resumed a normal life, handled all of her business affairs, collected her rentals, ran her household without the assistance of her children, despite somewhat understandable fits of depression due to her weakened physical condition. No substantial evidence was adduced to rebut the presumption that at the time of making the will she was in full possession of her mental faculties.

During the direct examination of Mary Badalamenti she was asked by her counsel the leading question of whether her mother had accused her of stealing $3,000 at one time. She replied in the affirmative and stated that her sister and brother and sister-in-law were present. When the other contestant was examined and was asked about being present she made no reference to the amount at issue. The

amount claimed was $300 as shown by all the other testimony even if Mary named the first sum as $3,000 in response to a leading question. Testatrix undoubtedly was convinced that her daughters had stolen or withheld some money from her during the time they handled her affairs while she was in the hospital. Her daughters categorically deny the charge and proponent has no witness or any kind of proof to sustain it. However, the record does indicate a number of transactions involving withdrawals from the savings account, from the safe, and cash moneys. Even with the figures that were brought out at the trial we cannot determine whether $300 was or was not missing. It would take an accounting.

Wide latitude was given by the judge in the taking of the testimony and that of the 2 contestants was received without objection. We have frequently commented on the unsatisfactory nature of testimony of this character. The lips of testatrix are sealed by death so that there is no way of knowing on what she based her conclusion that $300 was missing and that her daughters had taken it. Without testatrix's testimony it was not proven that $300 was taken or was missing but there appear sufficient circumstances so as to show that any such belief of testatrix was not an insane delusion. Testatrix in this regard might have possessed mistaken beliefs but we do not believe they were insane delusions in view of the confused state of her finances during the time she was in the hospital. Again, the claim that testatrix had already given contestants considerable money is denied by them. There was no other proof. Without testatrix's testimony there was no way of rebutting the testimony of contestants given after the death of testatrix. It is quite significant that contestants gave no testimony as to the prior relationship between themselves and testatrix, although it was shown that they lived in the same city for many

years and were on speaking terms. We have heretofore called attention to the fact that testatrix had previously made a will which her attorney said was a "similarity" to the new will. From the very beginning of her illness, testatrix at various times indicated a distrust of her daughters. In view of the distrust, it is not surprising that she drew the conclusion she did.

We have examined the number of decisions cited to us concerning the instant problem. Many, by reason of their facts, are not controlling here. There are, however, certain tests laid down by the decisions which will aid us in reaching a correct result.

We said in *Re Kaven's Estate,* 279 Mich 334 (quoting syllabus 2):

"An insane delusion exists when a person persistently believes supposed facts which have no real existence, and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed."

What will be considered sufficient foundation or reason for a mistaken belief? In *Re Haslick's Estate,* 195 Mich 432 (Ann Cas 1918D, 466), we said on p 438:

"In considering this question it is to be borne in mind that no capricious or arbitrary dislikes, unjust suspicions or prejudice against relatives, or mistaken beliefs as to their feelings and designs towards him and his property, however visionary, nor belief of acts or facts which have any evidential basis constitute in law insane delusions,"

and cited with approval 1 Underhill on Wills, § 94 (at p 439):

*"If there are any facts, however little evidential force they may possess, upon which the testator may in reason have based his belief, it will not be an in-*

*sane delusion,* though on a consideration of the facts themselves his belief may *seem* illogical and foundationless to the court; for a will, it is obvious, is not to be overturned merely because the testator has not reasoned correctly." (Italics ours.)

That such facts exist in the instant case cannot be denied.

The lack of information as to the past relations between the contestants and the testator has been a subject of notice by the courts. In *Bean* v. *Bean,* 144 Mich 599, we said (pp 625, 626):

"I do not understand how it can be determined that the opinion of a father that a son has no regard for him, and is waiting for him to die in order to get a portion of his estate, can be said to have no foundation in fact, and to be the result of insane delusion, except it may be, in cases where relations, induced by a lifetime of dutiful conduct on the one side and of continued and known affection on the other, are suddenly and without known cause interrupted and succeeded by an attitude on the part of the father utterly inconsistent with past conduct."

A review of our numerous past decisions on insane delusions clearly indicates that there must be a great deal of proof that the suspicions or belief of a testator are completely unfounded before they can be held to be an insane delusion. Indeed in the confused financial situation of the testatrix herein, we find some justification for a belief, even though mistaken, and not present in many of the former problems before us. See, for example, *Leffingwell* v. *Bettinghouse,* 151 Mich 513; *In re Doty's Estate,* 212 Mich 346; *In re Barlum's Estate,* 240 Mich 393; *In re Shuler's Estate,* 242 Mich 576; *In re Lacroix's Estate,* 265 Mich 59; and *In re Balk's Estate,* 298 Mich 303, cases where a testator's will was sustained against a claim of insane delusions.

In *Jackson City Bank & Trust Co.* v. *Townley,* 268 Mich 340, it was alleged that the testatrix disinherited her son because she believed her daughter-in-law was immoral and the latter's mother ran a house of ill fame. Although those were accusations not lightly made, we held at pp 346, 347:

"Contestant had the burden of proving that testatrix believed her statements, *she had no reasonable information or evidence supporting them, and, but for such belief, she would not have disinherited him.*" (Italics ours.)

The last 2 tests were not met by contestants herein. The will should have been allowed.

Judgment is reversed, with costs to proponent, and the case is remanded to the circuit court to enter judgment sustaining the will and remanding it to the probate court for further proceedings.

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

KNOOR *v.* BORR.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.

The testimony and legitimate inferences therefrom must be construed as favorably to plaintiff as is reasonably possible, where plaintiff appeals from directed verdict for defendant.

2. AUTOMOBILES—OVERTAKING VEHICLES—HILLS—LIGHTS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Showing made that due to bright headlights of westbound defendants, as they started to overtake and pass westbound truck and trailer while progressing uphill on a 20-foot 2-lane pavement in the rain at night an eastbound defendant motorist, driving at 50 or more miles per hour, lost control of his car and first hit the truck and later westbound plaintiff whose car followed behind westbound defendants' car that had finally returned to westbound lane between plaintiff and the truck, presented an issue of fact as to negligence of westbound defendant driver who was himself driving some 50 to 60 miles an hour.

3. APPEAL AND ERROR — DIRECTED VERDICT — INCONSISTENCIES IN TESTIMONY.

Inconsistencies or contradictory statements in the testimony of party against whom verdict was directed do not prevent application as to rule requiring interpretation of testimony most favorably toward such party.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 945.
[2] 5 Am Jur, Automobiles § 282.
[2] Reciprocal duties of drivers of automobiles or other vehicles proceeding in the same direction. 24 ALR 507; 47 ALR 703; 62 ALR 970; 104 ALR 485.
[3] Generally as to inferences upon direction of verdict, see 53 Am Jur, Trial § 340.
[4] 5 Am Jur, Automobiles § 362.
[4] Liability of wife for husband's torts. 12 ALR 1459.

4. AUTOMOBILES—WIFE AS CO-OWNER—STATUTORY PRESUMPTION—EVIDENCE.

Defendant wife, as co-owner of car operated by her husband was subject to liability for injuries inflicted due to his negligence in the absence of any testimony tending to rebut statutory presumption as to her knowledge and consent that it be used by him on the occasion in question (CL 1948, § 256.29).

Appeal from Kent; Brown (William B.), J. Submitted April 8, 1952. (Docket No. 1, Calendar No. 45,222.) Decided June 2, 1952.

Action by Martin Knoor against Harold Borr and wife and Jack Rowe for injuries received in automobile accident. Directed verdict and judgment for defendants Borr. Disagreement of jury as to defendant Rowe. Plaintiff appeals. Reversed and new trial granted.

*Leo J. Henry* (*Harold Knoor*, of counsel), for plaintiff.

*Mitts & Smith*, for defendants Borr.

CARR, J. Plaintiff brought this suit in circuit court to recover damages for injuries to his person and his property suffered in a traffic accident. It was his claim, as set forth in his declaration, that defendant Harold Borr and defendant Jack Rowe were guilty of concurring acts of negligence resulting in the automobile of Rowe striking and injuring plaintiff and his vehicle. Said accident happened in the early morning hours of August 28, 1949. Plaintiff was at the time driving on US-16 in a westerly direction about 5 miles east of Cascade, in Kent county. Defendant Harold Borr was operating an automobile immediately preceding that of plaintiff, which was owned by himself and the defendant Pauline Borr.

A short distance ahead of the car of defendants Borr was a truck or tractor to which was attached a trailer.

Plaintiff alleged in his declaration that defendant Harold Borr while ascending a hill undertook to pass the truck and trailer, and that in doing so he drove across the center line of the road so that his automobile was entirely on the south side, that is, in the eastbound lane of traffic. The pavement at such point was 20 feet in width. It was plaintiff's claim that at the time an automobile driven by defendant Rowe came over the crest of the hill at a high rate of speed, that Rowe was blinded by the lights from Borr's vehicle, which was a short distance ahead of him and blocking the south side of the pavement, that as a result defendant Rowe lost control of his automobile, struck the tractor or trailer, or both, and then crashed into the car driven by plaintiff. Defendant Borr had in the meantime returned to the north side of the pavement ahead of plaintiff's vehicle. As a result of the impact plaintiff claimed that he sustained severe personal injuries, that his automobile was damaged beyond repair, and that he also sustained other property loss.

The case was tried before a jury in circuit court, plaintiff asserting liability on the part of defendants Mr. and Mrs. Borr as well as defendant Rowe. At the conclusion of his proofs counsel for defendants Borr moved for a directed verdict in their favor, such motion being based principally on the claim that no negligence on the part of defendant Harold Borr had been shown. The motion was denied. Following the introduction of defendants' proofs a motion for directed verdict was made on behalf of Mrs. Borr, and was granted on the ground that she was not liable for possible negligence on the part of her husband and that such liability could not be predicated on her part ownership of the car. A

motion was also submitted and granted for a directed verdict in favor of defendant Harold Borr. The case was then submitted to the jury against defendant Rowe alone, the jury being told that Mr. and Mrs. Borr were not liable. A disagreement resulted. Plaintiff's motion for a new trial against defendants Borr was denied, and he has appealed.

The principal question at issue in the case is whether the trial court was correct in directing a verdict as to defendant Harold Borr. A verdict having been directed against plaintiff, the testimony and the legitimate inferences therefrom must be construed as favorably to him as is reasonably possible. *Dasovich* v. *Longacre,* 324 Mich 62; *Vukich* v. *City of Detroit,* 325 Mich 644. It was his claim on the trial and testimony was offered tending to show that defendant Borr pulled entirely out of the lane of westbound traffic and was on the south side of the road as Rowe's automobile came over the crest of the hill up which the tractor and trailer were proceeding, that the Borr car occupied the eastbound traffic lane, and that the lights were of such intensity as to blind defendant Rowe, causing him to lose control of his vehicle. On behalf of plaintiff it was insisted that Borr and Rowe were guilty of acts of negligence that together resulted in the collision of Rowe's car with that of plaintiff, and that in any event the negligence of defendant Borr was a proximate cause of the accident.

As a witness in his own behalf, plaintiff testified in part as follows:

"*Q.* You say you suddenly saw Mr. Borr's car get on the left side of the lane. You mean that he pulled over on the left lane of the highway?

"*A.* The left lane of the highway. That would be the southern part of the highway, the highway running west.

"*Q.* Was he completely over on the left lane of the highway?

"*A.* He was completely over and attempted to pass the truck.

"*Q.* You mean he had pulled up alongside the truck when you say he attempted to pass?

"*A.* He started to pull up next to it. I didn't say he was way toward the front of the truck. He was just at the rear half of the truck there attempting to pass the truck."

On cross-examination he gave the following testimony:

"*Q.* What you saw Mr. Borr do ahead of you was swing out and swing right back?

"*A.* No, he was completely out; he put on his brakes and came back.

"*Q.* Now, Mr. Borr's car was following behind this truck in a perfectly normal way up to the time it turned out, wasn't it?

"*A.* He wasn't—he was trying to pass it. I mean —Mr. Borr's car wasn't following behind this truck in a perfectly normal way up to the time it turned out—he was trying to pass it. * * * When he turned out I wasn't close enough to see any car in front of him going the other way, my vision was completely blocked by Mr. Borr's car and the truck. I didn't see any headlights coming when he turned out. Reflection is all I saw. I saw the reflection about the same time that he turned out, I would say.

"*Q.* And just as soon as you saw the reflection of the lights, he swung back on his own side of the road, didn't he?

"*A.* No. That is what alarmed us.

"*Q.* How far did he travel when you could see those lights on the opposite side of the road coming the other direction with this car there; how far did he travel?

"*A.* I don't know how many feet he traveled. I would say that he traveled a quarter of the distance of the semi-trailer on the other side of the road.

Possibly 8 or 10 feet. The truck was moving all of the time."

Plaintiff's witness Ernest Van Dam, who was a passenger in plaintiff's car, in testifying to his observations immediately preceding the impact, said:

"I was looking ahead when he started to pass. I didn't see a vehicle coming from the other direction at that time. All I saw was the reflection of lights over the crest of the hill. They were shining up in the air. It was raining that evening. I didn't see the headlights; I saw the reflection. I wouldn't know where the car coming from the opposite direction was when I saw the reflection. Before Mr. Borr started to pass I could have seen down the left-hand side if I had looked but I didn't look. The first time I looked was after he was out there, and after he was out there alongside the truck, all I could see was some reflection of lights that were shining up in the air down the road some distance. I did not hear a crash immediately afterwards. It was a matter of seconds. I can't say how many seconds. A car traveling 60 miles an hour goes over 80 feet a second. I can't determine how fast this car was traveling. We probably traveled 200 or 300 feet possibly during that interval, and we traveled that 200 or 300 feet while Mr. Borr's car was on the left-hand side of the highway with these lights reflecting up in the air in front of us."

The witness further stated, on re-cross-examination:

"The last time I saw the Borr car and the trailer before the impact was when they were right side by side completely blocking the entire highway and the only opening was the shoulder between the guardrail and the cement and at that time I could see just the reflection of headlights up in the air of this car coming towards me. You would just see the beams, like somebody shining a flashlight. We didn't see them over the Oldsmobile or anything.

I do not know whether the Oldsmobile had its top up or down, I don't remember. The hill where this accident happened is upgrade for quite a ways and the hill is high enough so that it would be over the top of a regular car at the base of this hill. The Oldsmobile started to pass on the hill where the yellow marks were. The yellow marks were on the north side of the center line. I looked that night. I possibly could be mistaken but I doubt it. I have never gone back since to see if there were yellow marks on that highway."

Defendant Rowe was called by plaintiff for cross-examination. The following excerpts from his testimony indicate his claim as to how the accident happened and defendant Borr's connection therewith.

"When I reached the top of the hill I blinked my lights and the truck blinked its lights, and right afterwards there was another set of lights on the opposite side of the road from the truck. That other set of lights was parallel to the truck and was on the south portion of the highway on which I was traveling. I was driving east on the south portion of the highway and that other set of lights was on the south portion. At that time I was driving at least 50 miles an hour and I was just starting to go down the hill. When I first saw this other set of lights on my side of the highway I blinked my lights just as fast as I could, thinking that the other car was going back in. I thought for a second he had just passed.

"*Q.* Just a moment, let me ask you this question before you go on. How far away from you was this truck and the other set of lights, when you first saw it?

"*A.* I would say when I first met the truck, I was approximately 500 feet.

"*Q.* You saw the truck when you were 500 feet away, is that right?

"*A.* Or possibly a little farther.

"*Q.* And the truck was driving on what portion of the highway?

"*A.* On his own side.

"*Q.* That would be the north portion, is that right?

"*A.* North side, correct.

"*Q.* And how far away from you was the second set of lights when you first saw them?

"*A.* I couldn't determine the distance because I was staring into the 4 lights. And when I blinked my lights, why, there was no response from the car on my side of the lane."

After testifying to striking the truck and attempting to pull off the highway on the right side, the witness proceeded as follows:

"*Q.* And at that time that you were pulling off the highway, were the headlights of this other automobile still shining in your eyes?

"*A.* As near as I can recall, they were because I had been blinded, and it looked like they were still there. * * *

"When I first got over the hill and saw the truck headlights on the north side of the road and the other set of headlights on the south side of the road I was blinded by the bright lights. I didn't strike the rear wheel of the tractor until I put my brake on and started to swerve. Then I hit the rear wheels of the truck-tractor as near as I can recall. Then I swerved off the road.

"*Q.* And as you cut back on to the road, you were still blinded by the same set of bright lights, is that right?

"*A.* I was blinded by lights.

"*Q.* And you struck the rear end of the truck at this time, isn't that right?

"*A.* I don't know what. I struck something; I don't know what it was.

"*Q.* Well, you remember striking somewhere?

"*A.* Yes.

"*Q.* And you were cutting back on the road, you were still blinded by bright lights?

"*A.* That's correct.

"*Q.* And as you swerved off the road, you were blinded by bright lights?

"*A.* That's right."

As a witness in his own behalf, defendant Borr testified that at the time he turned out to pass the tractor and trailer he was driving "about 50 or 60 miles an hour" and that he was not aware that the vehicle that he was seeking to pass consisted of a tractor and trailer until he "got alongside." It was his claim that he returned to the westbound lane of traffic when he saw the reflection of headlights coming over the hill. He admitted also that his automobile was entirely across the center line of the pavement, on the eastbound lane of traffic.

Without referring specifically to other proofs, we think it must be said that the testimony offered on behalf of plaintiff was of such character as to raise an issue of fact as to the negligence of defendant Borr. He doubtless realized that he was operating his automobile on a 2-lane highway. Before undertaking to pass the vehicle ahead of him, he was charged with the duty of making reasonable observations to determine if he could do so in safety. According to plaintiff's proofs, at the time defendant left his position in the westbound lane of traffic and drove ahead beside the trailer, the reflections from the headlights of Rowe's automobile were visible over the crest of the hill. If the witnesses for plaintiff could see such reflections, obviously defendant might have done likewise had he made careful observations. The exercise of due care should have prompted also a determination as to the approximate length of the vehicle that he was undertaking to pass. The testimony of defendant Rowe indicates that the headlights of the Borr car were directly before him

on the south part of the pavement, and that they were of such intensity as to blind him. If Rowe's testimony is correct, this caused him to lose control of his car and resulted in the accident.

An examination of the record brings us to the conclusion that it cannot be said there were no proofs in plaintiff's behalf from which the jury might have found that defendant Borr was guilty of the negligence charged against him, and that such negligence was a proximate cause of the injuries and property damage suffered by plaintiff. Construing the testimony in accordance with the rule above stated, we think that the determination of the question should have been left to the jury. It may not be said as a matter of law that the physical facts were such as to destroy any probative value of the testimony tending to support plaintiff's claims. Inconsisttencies or contradictory statements in the testimony of witnesses do not prevent the application of the rule as to the interpretation of the testimony by the court in passing on the correctness of a directed verdict. *Yampolsky* v. *Smith,* 320 Mich 647. The court was in error in directing a verdict as to the defendant Harold Borr.

The facts in the case are somewhat analogous to those involved in *Braendle* v. *Drum,* 254 Mich 372. In that case a bus operated for one of the defendants undertook to pass an automobile, about 9 o'clock in the evening, on US-16 a few miles west of Farmington. The night was dark and rainy. The pavement at the place where such passing was attempted was approximately 18 or 20 feet in width. The bus drove up beside the automobile that the bus driver was seeking to pass and at the same time an automobile driven by another defendant in the case approached from the opposite direction. Said driver claimed that he undertook to stop when he saw the bus in front of him, that his car skidded, and

that as a result he came in contact with the automobile in which the plaintiffs were riding. The trial court directed a verdict in favor of the operator of the bus line, on the ground that no negligence on the part of his driver had been shown. In reversing the judgment entered on the directed verdict, it was said:

"The question presented on the motion to direct a verdict was whether, under the circumstances, it was negligence on the part of the driver of the bus to turn to the left and attempt to pass the Voght car, and, if so, whether such negligence was the proximate cause of the collision and the injuries to the plaintiffs resulting therefrom.

"Had the driver of the bus been watchful, as it was his duty to be, in view of the darkness and the condition of the pavement at the time, due to the rain which was falling, he would necessarily have seen the approach of the car driven by Yeip when he turned out to pass the Voght car. By doing so he occupied that part of the pavement which Yeip would necessarily travel on in passing the 3 cars. He could not have planned on taking a position behind the Braendle car as the distance between it and the Voght car was only about 25 feet. These facts being considered, the jury might well have found that the driver was guilty of negligence in turning his bus to the left at the time he did.

"In our opinion they might also have found that his negligence in this respect was the proximate cause of the collision. *Tozer* v. *Railroad Co.,* 195 Mich 662, 666; *Jaworski* v. *Detroit Edison Co.,* 210 Mich 317, 320; *Butrick* v. *Snyder,* 236 Mich 300, 308."

In *Fitzcharles* v. *Mayer,* 284 Mich 122 (3 NCCA NS 565), a judgment for plaintiff under similar facts was upheld. There the question at issue was the liability of the owners and the driver of a taxicab. The driver, while operating such vehicle in the usual course of business, made a U-turn ahead of an auto-

mobile driven by another defendant in the case, which was approaching at a rate of approximately 60 miles per hour. The driver thereof, in attempting to avoid striking the taxicab, swerved his car to the left and collided with plaintiff's vehicle which was approaching from the opposite direction. It was held that under the circumstances whether there was negligence on the part of the taxicab driver was an issue for the jury. The court pointed out that there may be more than one proximate cause of an accident. Under the facts in the case and prior decisions the Court declined to say that there was any error of law in holding the owners and driver of the taxicab jointly liable with the owner of the vehicle that actually struck and injured the plaintiff.

This brings us to a consideration of the question whether the record indicates any proper basis for liability on the part of Mrs. Borr. No claim is made that she was in any way responsible for the manner in which her husband operated his automobile on the occasion in question. The claim of liability on her part is based on provisions of CL 1948, § 256.29 (Stat Ann § 9.1446) in force at the time of the accident involved in this case. Said section reads in part as follows:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists of a violation of the provisions of the statutes of the State or in the failure to observe such ordinary care in such operation as the rules of the common law require. The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge. It shall be presumed that such motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of said injury by his or her

father, mother, brother, sister, son, daughter, or other immediate member of the family."

The provisions quoted are now contained in the present motor vehicle code, PA 1949, No 300, § 401 (CL 1948, § 257.401 [Stat Ann 1952 Rev § 9.2101]). The presumption created by the statute is not, as a matter of law, overcome by the proofs in the case. We find no testimony tending to throw light on the question as to the manner of exercise of rights of ownership and control by defendants Borr with reference to the operation of their automobile. There is no showing of any fact or facts inconsistent with the statutory presumption of knowledge and consent by Mrs. Borr to its use by her husband on the occasion in question, nor to establish that he was entitled to such use without regard to her knowledge and consent. The trial judge, in granting the motion, apparently relied on *Mittelstadt* v. *Kelly,* 202 Mich 524. In that case proofs were introduced with reference to the use and ownership of an automobile claimed to belong to the defendants, father and son. The former in fact denied any interest in the vehicle which the son used when and as he pleased. There is no comparable showing in the instant case. Under the record here we are impressed that the decision in *Moore* v. *Noorthoek,* 280 Mich 431, in which it was held that a married woman was liable for the negligent operation of an automobile by her husband, the title of the vehicle having been issued in their joint names, is directly in point. See, also, *Buchel* v. *Williams,* 273 Mich 132. The primary question at issue is the interpretation of the statutory provisions above quoted. On the record before us it may not be said that, as a matter of law, there is no liability on the part of Mrs. Borr. We are constrained to hold, therefore, that the trial court was in error in directing a verdict in her favor.

The judgment entered by the trial court in favor of defendants Harold and Pauline Borr is reversed, and the case remanded with directions to vacate such judgment and to grant a new trial. Plaintiff may have costs.

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

---

## KELSO *v.* COBURN.

1. WITNESSES—PARTNERSHIP—DEATH—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
   The testimony of surviving partner as to matters equally within knowledge of deceased partner is barred in suit between them for an accounting (CL 1948, § 617.65).

2. PARTNERSHIP—ACCOUNTING—FINDING OF COURT—PARTNERSHIP—OTHER BUSINESS INTERESTS.
   Finding of trial court in suit for accounting between partners that 2 wrecking businesses and a contracting business were parts of lumber business for which partnership was formed *held,* proper.

3. SAME—FINDING OF COURT—INTEREST IN OTHER PARTNERSHIPS.
   Determination of trial court in suit for accounting that plaintiff surviving partner had no interest in a sales company, a partnership organized by deceased partner and 3 relatives, nor in other business transactions of the deceased partner *held,* fully justified by record.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 6, 7] 58 Am Jur, Witnesses § 338.
[5] 40 Am Jur, Partnership §§ 89 *et seq.,* 97 *et seq.*
[9] 21 Am Jur, Executions § 188 *et seq.*
[10, 11] 3 Am Jur, Appeal and Error §§ 765–767.

4. SAME—VENDEE INTEREST IN LAND CONTRACT—EVIDENCE.
Finding of court that vendee interest in land contract belonged to partnership rather than surviving partner alone *held,* supported by proofs, including testimony that such interest was carried as an asset of the partnership and the unpaid balance as a liability and that payments on the contract were made by the partnership.

5. SAME—VENDOR INTERESTS IN LAND CONTRACTS—EVIDENCE.
Vendor interests in land contracts were properly found not to be assets of partnership in suit for accounting between partners, where it does not appear that partnership assets were used in acquiring such interests nor that the deceased partner and his wife executed the contracts for and on behalf of the partnership or in connection with its business.

6. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—AGENT OF SURVIVING PARTNER.
Conclusion of court that one of the defendants in suit for an accounting had been an agent of plaintiff and that he was in fact an agent of plaintiff, thus not competent as a witness as to matters equally within knowledge of partner who died prior to trial, *held,* supported by the record (CL 1948, § 617.65).

7. SAME—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—WAIVER OF RIGHT TO OBJECT—QUESTIONS TO DETERMINE STATUS.
Counsel for defendants in suit for accounting between partners did not waive the right to object to testimony of a witness as relating to matters equally within the knowledge of a deceased partner by the asking of questions to determine the status of such witness, also a defendant, in his dealings with the parties, and between them, where defendants claimed such witness was an agent of plaintiff and plaintiff that he supervised to some extent the accounts of the partnership (CL 1948, § 617.65).

8. ACCOUNTING—PARTNERSHIP—EQUITY—EVIDENCE.
Decree entered by trial court in suit for accounting between partners *held,* not unfair to appellant plaintiff nor inequitable on the basis of facts established by competent proofs, where books of account and other data were unsatisfactory for purposes of audit.

9. EXECUTION—OMISSION TO GIVE NOTICE OF SALE—EFFECT.
The omission by an officer to give notice of execution sale required does not affect validity of such sale, if made to a

purchaser in good faith and without notice of the omission (CL 1948, §§ 623.85, 623.90).

10. APPEAL AND ERROR—PREJUDICE—NONCOMPLIANCE WITH STATUTE AS TO POSTING NOTICE OF SALE OF REALTY UNDER COURT ORDER.

Failure of officer to comply with statute as to posting of notices of sale of real property in 3 public places in township where premises were situated, pursuant to order of court to receiver in suit for accounting between partners, will not be assumed to have come to knowledge of purchaser at the sale and where such purchaser is not shown to have had notice of such omission and plaintiff fails to show in what way he has been prejudiced, such sale is not disturbed (CL 1948, §§ 623.85, 623.90).

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

Whether or not trial court was in error in excluding testimony of a defendant as incompetent because equally within knowledge of deceased partner of plaintiff-appellant is not passed upon by Supreme Court on appeal, where such matter is not referred to in appellant's statement of reasons and grounds for appeal (CL 1948, § 617.65).

12. COSTS—BRIEFS.

Costs are allowed only such appellees as have filed briefs on appeal, where decree is affirmed.

Appeal from Wayne; Murphy (George B.), J. Submitted April 16, 1952. (Docket No. 40, Calendar No. 45,138.) Decided June 2, 1952. Rehearing denied September 3, 1952.

Bill by Joseph R. Kelso against Milan D. Coburn and others to terminate partnership interest, appointment of receiver and accounting. Cross bill by defendants Coburn against plaintiff and another for same relief. Decree terminating partnership and fixing amounts due parties and partnership. Plaintiff appeals. Affirmed.

*Daniel P. Cassidy,* for plaintiff.

*Fildew, De Gree & Fleming,* for defendants Coburn.

CARR, J. On or about January 1, 1941, the plaintiff and Milan D. Coburn formed a partnership to carry on business under the name of Reliable Lumber Company. Said business consisted of the purchase and sale of new and used lumber and other building materials, and eventually was extended to include the salvaging of old buildings and the sale of materials obtained therefrom. The parties operated under the name indicated until 1946, when difficulties arose between them.

Under date of May 8, 1946, plaintiff Kelso filed suit in the circuit court of Wayne county in equity for an accounting of partnership dealings and transactions between himself and Coburn. The appointment of a receiver of the business was asked, together with incidental injunctive relief. The bill charged that Coburn acted as office manager of the business and that as such he failed to keep complete and accurate records of business transactions, and without the knowledge or consent of plaintiff caused assets of the copartnership to be placed in the names of others, particularly his wife and daughter. It was alleged that Coburn had improperly withdrawn assets of the partnership without paying therefor and without keeping a record of such transactions. The defendants named in the bill of complaint, other than Milan D. Coburn, were joined on the theory that they might, because of the manner in which the business had been conducted, claim some interest in the partnership assets, or that they had in their possession or under their control money or property belonging to the partnership.

Milan D. Coburn filed answer to the bill of complaint, in which defendants Laurel M. Coburn and Doris E. Coburn joined, denying the allegations of wrongful conduct made by plaintiff. A cross bill was filed by said parties in which Kelso was charged with having made withdrawals from partnership

funds in excess of the amounts received therefrom by Coburn, that Kelso had exercised poor judgment in conducting partnership business, and that he had withdrawn assets for his personal use for which he had not accounted. The cross bill also alleged that cross-plaintiffs had sought from Kelso and his agent, Clarence M. Elwert, a complete disclosure of their transactions in connection with the business, that the requests had been refused, and that plaintiff had withdrawn from the business substantially all the interest that he had in the assets. Cross-plaintiffs sought an accounting from the plaintiff and cross-defendant, the appointment of a receiver, a dissolution of the partnership, and injunctive relief against the removal of partnership assets or records; and the collection or concealment of accounts due to the partnership, by plaintiff or his agent Elwert. Answers to the bills of complaint were duly filed and also pleadings on behalf of the other parties named as defendants in plaintiff's bill of complaint. Specific consideration thereof is not required in the determination of the material issues involved in the controversy.

The record before this Court contains a stipulation entered into by and between counsel for plaintiff Kelso and counsel appearing for defendants Coburn, from which it appears that Milan D. Coburn died January 6, 1947, and that his daughter Doris E. Coburn, as administratrix of his estate, was substituted for him in the litigation. On May 17, 1946, C. Upton Shreve was appointed receiver of the assets of Reliable Lumber Company, and also of assets and books of account of other organizations referred to as Reliable Sales Company, Reliable Construction Company, Reliable Wrecking Company, and Reliable Contracting Company, which are claimed to have functioned in connection with, and as a part of, the business of Reliable Lumber Com-

pany. It further appears that the court on May 28, 1947, appointed a certified public accountant to make an audit of the books and records of the businesses involved in the litigation and to submit such audit to the receiver. It is stipulated that by order of the court dated February 11, 1949, certain preferred claims of the Michigan unemployment compensation commission were allowed and directed to be paid out of receivership funds.

The trial of the case was begun in circuit court on December 9, 1947. Because of the death of Milan D. Coburn prior thereto, the testimony of plaintiff Kelso as to matters equally within the knowledge of the deceased was barred under the provisions of the statute (CL 1948, § 617.65 [Stat Ann § 27.914]). The testimony of defendant Clarence M. Elwert, which plaintiff sought to introduce, was excluded on the ground that he was an agent of the plaintiff in the dealings between the latter and Milan D. Coburn, and that the statute, above cited, rendered his testimony incompetent. After listening to the proofs and arguments of the parties, the trial judge entered a decree determining the issues involved, specifically finding that there was no basis for plaintiff's claim that Milan D. Coburn had fraudulently appropriated partnership property to his own use, and that defendant Clarence M. Elwert had, in transactions material to the controversy, acted as agent for the plaintiff. The court further found that plaintiff was indebted to the partnership in the sum of $242.32 and that the estate of Milan D. Coburn was entitled to a credit in the sum of $24,639.19.

The determination as to the financial situation included a specific finding that the accounts of the organization known as Reliable Wrecking Company, which was evidenced by an assumed name certificate filed January 20, 1942, in the office of the county clerk of Macomb county, had been merged with and

included in the records of the partnership, and the accounting was made on that basis. It was also decreed that Reliable Lumber Company was entitled to ¼ of the profits of Reliable Contracting Company, but that the proofs failed to establish that the operation of that organization had resulted in profits. The trial court further found that Reliable Lumber Company was entitled to a like portion of the profits of the copartnership ostensibly formed between Milan D. Coburn and defendant Maurice Melnick in October, 1944, referred to in the record as the "second" Reliable Wrecking Company. Dissolution of Reliable Lumber Company, and also of the first partnership known as Reliable Wrecking Company, was ordered, and the interest of defendant Sidney McNeil was decreed to be that of a creditor of Reliable Lumber Company. Plaintiff has appealed from the decree, asserting that the findings of the trial judge are not in accordance with the proofs.

Due to the death of Milan D. Coburn and the consequent inability of the plaintiff to testify concerning the transactions between the partners, definite proof on numerous matters in controversy on the trial was impossible. Apparently some records of the business had been kept under the supervision of defendant Elwert, but the testimony of the auditor appointed by the order of the court, as well as the testimony of another auditor who made an examination of such records, indicates that they were incomplete and otherwise not in a satisfactory condition. The testimony further indicates that Coburn kept some records with which Elwert was not familiar. The proofs are lacking in desirable clarity and certainty.

It clearly appears that plaintiff was not precluded by the partnership agreement from carrying on other business activities in which Coburn had no interest. The latter was entitled to like privileges.

Each acted accordingly. There had been prior business dealings between them not entirely of a friendly nature, but apparently they concluded they could operate without the formality of a written contract. The formation of Reliable Wrecking Company, as evidenced by certificate filed January 20, 1942, which was signed by defendants McNeil and Elwert, likewise rested on a verbal understanding. Apparently neither Milan D. Coburn nor plaintiff Kelso desired his name to appear on the record as a partner. It is a fair inference that the business of Reliable Lumber Company, as actually conducted, included a wrecking business, and it may be assumed that the second partnership was thought expedient for the purposes of the wrecking and salvaging operations. The trial court properly found that it was in practical effect a part of Reliable Lumber Company, and that the profits of its business should be treated accordingly. The further conclusion that ¼ of the profits of Reliable Contracting Company and of the second Reliable Wrecking Company formed in 1944, the certificate of copartnership being signed by Milan D. Coburn and defendant Melnick, should be credited to Reliable Lumber Company was based on an admission in the pleadings filed by defendants Coburn indicating that such an agreement had been made.

Reliable Sales Company was formed in April, 1941, the certificate of conducting business under an assumed name being signed by defendants Laurel M. Coburn and Doris E. Coburn, and also by C. C. Coburn. Plaintiff insists that its business was included within the scope of the operations of Reliable Lumber Company, and that its profits and assets should be treated accordingly. The record indicates that such partnership was formed for the purpose of handling bank deposits of Reliable Lumber Company and also such deposits belonging to Milan D. Coburn. It is claimed by defendants Co-

burn that the accounts were kept separately, and that any deposits made for purposes of convenience in the individual account of Milan D. Coburn were immediately thereafter transferred to the partnership account in a Mt. Clemens bank. There is no showing that funds of the partnership known as Reliable Lumber Company were appropriated by Coburn, or that Reliable Sales Company, or any of the ostensible members thereof, has, or have, assets belonging to Reliable Lumber Company. We are in accord with the conclusion of the trial court that plaintiff has no interest in Reliable Sales Company. We think that the conclusions reached, as evidenced by the provisions of the decree, with reference to the connection between Reliable Lumber Company and other business transactions to which Milan D. Coburn was a party, are fully justified by the record. The determination of the matters at issue rests wholly on the proofs introduced by the parties on the trial.

The business of Reliable Lumber Company was transacted at a yard located at 24155 Schoenherr road, East Detroit. Prior to the formation of the partnership on January 1, 1941, plaintiff was a vendee under a contract for the purchase of the land from the owner of the record title. Apparently there had been some prior litigation with reference to the property, but it does not appear that such fact has any materiality in the present controversy. It is claimed by defendants Coburn that when the partnership was formed the vendee's interest of Kelso was turned over to the partnership as a part of his contribution thereto. The proofs disclose that the property was carried as an asset of the partnership and that the amount of the unpaid balance on the contract was treated as a liability. Payments on said contract were made by the partnership. Notwithstanding such facts Kelso claimed before the trial court, and asserts on this appeal, that he con-

tinued to be the owner of the vendee's interest and, hence, was entitled to have the land treated accordingly. The trial court determined otherwise, concluding from the proofs that it was the intention of the copartners that the vendee's interest under the contract should become a partnership asset and should be handled thenceforth as such. The proofs are in accord with such determination. Under the facts appellant is not entitled to claim the property.

Complaint is also made by appellant because the trial court found that the vendors' interest under certain land contracts, executed by Milan D. Coburn and his wife, should not be regarded as assets of Reliable Lumber Company but, rather, should be assigned to Mrs. Coburn as survivor. There is no evidence in the record before us tending to establish that partnership funds were used in connection with acquiring such property interests, or that the contracts were executed by Mr. and Mrs. Coburn for and on behalf of the partnership, or in connection with its business. Under the situation presented, appellant is not in position to complain that the trial court erred in dealing with such property interests in the manner indicated.

As before noted, plaintiff called defendant Elwert as a witness in his behalf. After certain preliminary questions the trial court came to the conclusion that Elwert was in fact the agent of plaintiff in dealings between the latter and Milan D. Coburn, and that, in consequence, he was not a competent witness as to matters equally within the knowledge of the deceased. There had been business associations between Elwert and appellant prior to the partnership arrangement between Kelso and Coburn. It is significant in this connection that neither of the partners signed the certificate of assumed name filed at the outset of the operations of Reliable Lumber Company. It was, in fact, executed by Elwert, Mrs. Coburn, and

Walter T. Welch. It seems to be conceded that Welch had no interest in the matter, and likewise that neither Elwert nor Mrs. Coburn were parties to the partnership arrangement. It is suggested that neither partner wished his name to appear for reasons concerning his financial situation. In any event, it clearly appears that Mrs. Coburn was acting for her husband and that Elwert was acting for Kelso. It is further in evidence that for the first 2 years following the formation of Reliable Lumber Company Elwert made an income tax return to the Federal government in which he listed as his own income Kelso's receipts from the business and paid a tax accordingly. This would suggest a rather close and confidential relation between Kelso and Elwert. The latter claimed he was reimbursed subsequently by the partnership. If so, it may be assumed that such payments were charged to Kelso's account.

While Elwert contended that he supervised to some extent at least the accounts of the partnership, it is a fair inference, since Coburn kept records of his own, that actually Elwert was acting for plaintiff. The situation suggested by the record was not one in which the partners appear to have evinced confidence in one another. It is apparent also from the questions propounded by the court to Elwert that the latter remained in the courtroom during the trial and manifested an attitude of loyalty to plaintiff. It cannot be said that the conclusion of the court with reference to the matter of agency is not supported by the record.

The further contention by appellant that defendants Coburn waived the right to object to Elwert's testimony because of the questions asked by counsel is without merit. The purpose of such questions was obviously to determine the status of Elwert in his dealings with the parties, and between them. The trial court was not in error in holding that El-

wert was precluded by the statute from testifying to matters concerning the dealings between the partners and equally within the knowledge of Coburn. *Perfect Cleaners & Dyers* v. *Kirschbaum,* 257 Mich 430.

While the auditors, above referred to, were not in accord in all respects in their conclusions from such records as were available to them, it is somewhat significant that the final results reached were similar. Each testified as to the unsatisfactory nature of the books of account and other data relied on in the attempt to prepare a satisfactory audit. The trial court determined the respective accounts of the copartners from such proofs as were presented. Appellant questions such determination, but we are impressed that the objections raised are not supported by the evidence introduced on the trial. We do not think it can be said that the decree entered is shown to be unfair to plaintiff or inequitable on the basis of the facts established by competent proof.

The trial court, by order entered in the proceeding, directed the receiver to sell real estate constituting an asset of the receivership. The stipulation of counsel for the parties, hereinbefore referred to, sets forth that the notice of sale was duly published in the Detroit Legal News for a period of 7 successive weeks. It was also published in the Daily Monitor Leader, a newspaper published and circulated in Macomb county, for 6 successive weeks beginning on May 6, 1949, and ending on June 17, 1949. Three notices of the sale were posted in Wayne county in public and conspicuous places, and 4 in Macomb county. One of the last named notices was placed at the southerly entrance of the county building in Mt. Clemens, 1 on a box outside the sheriff's office, 1 on the office building at 24155 Schoenherr road, in East Detroit, and 1 on the lumber yard in East Detroit. It is the claim of appellant that such

posting did not comply with the applicable statute (CL 1948, § 623.85 [Stat Ann § 27.1584]) because of the failure to post notices in 3 public places in the township in which the premises were situated. It is also asserted that the decree was enrolled prior to the expiration of the time within which plaintiff could appeal or ask for a rehearing, and, therefore, that the order of the trial court confirming the sale was fatally defective.

With reference to such objections it may be noted that under CL 1948, § 623.90 (Stat Ann § 27.1589) the omission by an officer to give the notice of sale required does not affect the validity of such sale if made to a purchaser in good faith and without notice of the omission. In the instant case there is no showing that the purchaser of the property at the receiver's sale had notice of the omission to post notices in 3 public places in the township where the premises were situated, nor may such knowledge be assumed. Furthermore, there is no claim that plaintiff was in any way injured or aggrieved by the proceeding that he now undertakes to attack. If he has been prejudiced in any way this record fails to show it. Under the circumstances we do not think that he is in position to seek relief in this equitable proceeding. *Solomon* v. *Neubrecht,* 300 Mich 177.

Other matters referred to by counsel in their oral arguments and briefs, incidental to the issues above considered, do not require specific discussion. They are controlled by the conclusions above stated. Appellant's further objection that the court was in error in excluding the testimony of defendant Melnick, on the ground that it was incompetent because equally within the knowledge of Milan D. Coburn in his lifetime, is not referred to in appellant's statement of reasons and grounds for appeal. It is, therefore, unnecessary to pass on the question.

We are in accord with the disposition of the case made by the trial court. The decree is affirmed. Appellees Coburn, being the only defendants who have filed briefs in the case, may have costs.

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

---

SMITH *v.* SMITH.

1. DIVORCE—DIVISION OF PROPERTY—VALUES.
   Decree of divorce providing for sale of the home of the parties at public auction and equal division of the proceeds between the parties is not disturbed on appeal, where it appears to be in accord with the just rights of the parties and division made recognized husband's claim that while the value of the home in the wife's name at the time of the marriage was $3,500 and the present value of their equity was $11,000, the husband had made payments on the mortgage and expended labor exceeding 1/2 the present net value of the property.

2. SAME—CREDIBILITY OF WITNESSES.
   The trial judge in a suit for divorce is in a better position than is the Supreme Court to pass upon the credibility of witnesses.

3. SAME—DIVISION OF PROPERTY—EVIDENCE.
   The division of property in a divorce case must be determined on the basis of the facts established by the proofs and is not governed by any mathematical formula or by fixed rules.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 17 Am Jur, Divorce and Separation § 445.
[2, 4] 3 Am Jur, Appeal and Error §§ 858, 885, 897, 912.

4. SAME—DE NOVO REVIEW—FINDINGS OF COURT—CREDIBILITY OF WITNESSES.

The Supreme Court on *de novo* review of a suit for divorce is not restricted by the findings of the trial court but gives especial consideration to such findings that are largely based upon the credibility of the witnesses and will not reverse findings made unless convinced it must have reached a different conclusion had it occupied the position of the lower court, under like circumstances.

5. SAME—COSTS.

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

Appeal from Muskegon; Campbell (Howard L.), J., presiding. Submitted April 11, 1952. (Docket No. 56, Calendar No. 45,389.) Decided June 2, 1952.

Bill by Alden Smith against Julia Smith for divorce on ground of extreme and repeated cruelty. Cross bill by defendant against plaintiff for divorce on ground of extreme and repeated cruelty. Decree granting divorce to defendant and making provision for settlement of property. Defendant appeals. Affirmed.

*Robert A. Carr, Jr.*, for plaintiff.

*Leo W. Hoffman*, for defendant.

CARR, J. The parties to this case were married in August, 1945, and separated in November, 1949. One child was born of the marriage, a son now 6 years of age. Following the separation plaintiff instituted suit for divorce and defendant filed a cross bill asking like relief. Answers to said pleadings were filed and the case proceeded to trial. Following the introduction of part of the proofs the parties stipulated in open court for the withdrawal of plaintiff's bill of complaint and his answer to the

cross bill, and to permit defendant and cross-plaintiff to proceed on her cross bill, with the matters of property settlement and support of the minor child of the parties subject to determination by the court.

On the submission of the proofs the trial court granted a decree of divorce to the cross-plaintiff awarding her the custody of the child and requiring cross-defendant to pay $10 per week for the support thereof. Cross-plaintiff was also given the household furniture, with certain minor exceptions. The home of the parties, which they owned as tenants by the entireties, was ordered to be sold at public auction under the direction of a circuit court commissioner of the county, and the proceeds divided equally between cross-plaintiff and cross-defendant. The provision so made for cross-plaintiff was declared to be in lieu of her dower rights and in full satisfaction of all her claims in property owned by the cross-defendant or which he may hereafter acquire.

Cross-plaintiff has appealed, claiming that the provisions of the decree relating to the sale of the home and the equal division of the amount realized therefrom are not in accord with her just rights. The other provisions of said decree are not questioned. Appellant emphasizes the fact that at the time of the marriage she owned the property in question, subject to a mortgage. The record indicates that the home was not fully completed at the time, and it is the claim of cross-defendant that he expended money and labor in improving the property, thereby enhancing its value. It further appears that he made substantial payments on the mortgage. By action of the parties title was vested in them as tenants by the entireties.

On the trial in circuit court it was the claim of cross-defendant, in substance, that the value of his labor on the property, together with the expendi-

tures made by him, equalled or exceeded ½ the present net value of the equity of the parties in the property, which is approximately $11,000. Cross-defendant testified, also, that the value of the home at the time of the marriage was approximately $3,500. Such estimate and the claim as to the amount of the increase in value due to cross-defendant's labor and expenditures are challenged by appellant. The opinion of the trial judge indicates that he decided the disputed issues of fact in favor of the cross-defendant. His conclusions are fully supported by the record. He was in better position than is this Court to pass on the credibility of the witnesses in the case.

The division of property in a divorce case must be determined on the basis of the facts established by the proofs. It is not governed by any mathematical formula or by fixed rules. *Tyson* v. *Tyson,* 283 Mich 192; *Cooley* v. *Cooley,* 320 Mich 209. It is apparent from the record that the trial judge considered carefully and fully the testimony before him and the claims of the parties. We are not prepared to say that had we been in his position we would have reached a different conclusion. It cannot be said that the property division decreed is not in accord with the just rights of the appellant.

In *Chubb* v. *Chubb,* 297 Mich 501, 506, it was said:

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

*mann,* 287 Mich 94; *Westgate* v. *Westgate,* 291 Mich 18."

The language, above quoted, is applicable under the facts in the case at bar. The decree is affirmed, but in view of the nature of the controversy no costs are allowed.

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

---

HODGDON *v.* BARR.

1. AUTOMOBILES—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   Contributory negligence of plaintiff southbound pedestrian who collided with southwesterly bound taxicab near west side of street after latter had turned oblique corner from north *held,* for jury.

2. NEGLIGENCE—VIOLATION OF CITY TRAFFIC ORDINANCE.

   Violation of a city traffic ordinance is not negligence *per se,* but is evidence of negligence presentable to the trier of the facts (Detroit Traffic Ordinance No 115-D, §§ 14[b], 16).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur, Automobiles § 452.
[1] Contributory negligence of pedestrian at street crossing as affected by statute or ordinance. 96 ALR 786.
Duty of pedestrian before crossing street to look for vehicles approaching on intersecting street. 9 ALR 1248; 44 ALR 1299.
[3] 5 Am Jur, Automobiles § 282.
[3] Reciprocal duties of drivers of automobiles or other vehicles proceeding in the same direction. 24 ALR 507; 47 ALR 703; 62 ALR 970.

3. AUTOMOBILES—RIGHT TURN—NEGLIGENCE—QUESTION FOR JURY. It was error for trial court to charge jury that defendant taxicab driver was guilty of negligence as a matter of law in failing to keep behind preceding panel truck in making right turn with traffic light around oblique corner, where there is evidence from which a jury might find that, due to protrusion of defendant's taxicab behind the truck into street from which turn was being made, it was impracticable to keep in right-hand lane and collision with plaintiff pedestrian at left of the truck occurred a few feet west of 11-foot wide crosswalk which perpendicularly crossed street into which taxicab had entered and about 25 or 30 feet from nearer curb line of street from which turn had been made (CL 1948, § 256.318).

Appeal from Wayne; Miller (Guy A.), J. Submitted April 9, 1952. (Docket Nos. 4, 5, Calendar Nos. 45,194, 45,195.) Decided June 2, 1952.

Separate actions by Catherine Hodgdon and Fred Hodgdon against Stanley M. Barr and another for damages suffered when Catherine Hodgdon was struck by taxicab. Cases consolidated. Verdicts and judgments for plaintiffs. Defendants appeal. Reversed and new trial granted.

*W. J. McBrearty* and *James M. Wienner,* for plaintiffs.

*Edward N. Barnard,* for defendants.

SHARPE, J. Defendants, Stanley M. Barr and Jim Stankye, appeal from 2 judgments in favor of plaintiffs, Catherine Hodgdon and Fred Hodgdon. The judgments are for damages for personal injuries suffered by Catherine Hodgdon in a collision with a taxicab at or near the intersection of Van Dyke and Gratiot avenues in the city of Detroit, on August 27, 1948, about 10:50 a. m.

Gratiot avenue runs in a northeasterly and southwesterly direction, while Van Dyke avenue runs in

a more or less northerly and southerly direction. There is a traffic light at each corner of the intersection. Van Dyke avenue has a width of 47 feet; Gratiot avenue has a width of 90 feet, with 2 sets of streetcar tracks in the center of the street.

There is a crosswalk extending across Gratiot avenue. The northerly end of the crosswalk begins approximately 42 feet west of the west curb line of Van Dyke avenue, and runs in a southeasterly direction. The crosswalk is perpendicular to the northwest curb of Gratiot avenue until it reaches the center of Gratiot avenue, when it follows a line parallel to the curb line of Van Dyke avenue. The crosswalk is approximately 11 feet wide. There is a safety zone located to the south of the intersection on Gratiot avenue next to the more southeasterly set of streetcar tracks. The safety zone is just south of the crosswalk.

Plaintiff, Catherine Hodgdon, left the Michigan Bell Telephone office on the northerly side of Gratiot avenue at a point 5 stores west of the intersection of Van Dyke, with the intention of going to the safety zone to take a Gratiot avenue bus. She walked towards Van Dyke on the northerly side of Gratiot avenue to a point at or near the crosswalk. She made observations of traffic conditions on Gratiot avenue, and with the green light in her favor started to cross the northerly half of Gratiot avenue at a point about 42 feet west of Van Dyke avenue.

About this time a panel truck was parked on the westerly side of Van Dyke and north of Gratiot avenue, waiting for the green light; behind the panel truck was a city bus waiting to cross Gratiot avenue and proceed in a southerly direction on Van Dyke; behind the city bus was the Checker cab driven by defendant, Stanley M. Barr. When the light turned green for passage on Van Dyke avenue, the truck proceeded in a southerly direction and turned west

on Gratiot avenue. The city bus proceeded on and across Gratiot avenue. Defendant, Stanley M. Barr, moved up behind the truck, followed it around the corner, then stopped when not completely around the corner, then pulled out and proceeded to the left of the truck and went far enough around the corner to clear the intersection. When the truck approached the crosswalk it stopped and defendant Barr did likewise, as people were crossing in a southerly direction on the crosswalk. While making the crossing plaintiff passed in front of a vehicle that was stopped to let pedestrians cross on the crosswalk. She passed in front of the truck heretofore mentioned, which was also stopped. After passing the second vehicle she was struck by the cab driven by defendant Barr. At this time the cab was traveling at a speed of not to exceed 8 to 10 miles per hour. At the time plaintiff was injured she had reached a point from 5 or 6 feet to 12 feet north of the northerly car track on Gratiot avenue.

Plaintiff was seriously injured. The cause came on for trial, the issues were submitted to a jury who returned a verdict of $10,000 for Catherine Hodgdon and $2,000 for Fred Hodgdon, her husband, for expenses incurred.

During the trial and at the close of plaintiff's testimony defendant made a motion for a directed verdict on the theory that plaintiff was guilty of contributory negligence, and a lack of evidence showing defendant Barr guilty of any negligence which was a proximate cause of the injury. The trial court took the motion under advisement under the statute* and later denied it. Defendant appeals and urges that the trial court was in error in failing to grant his motion for a directed verdict at the close of plaintiff's proofs.

* CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—REPORTER.

The record shows that when plaintiff entered Gratiot avenue on the crosswalk she had the green light in her favor. Before entering Gratiot avenue she made observations for approaching traffic to her left and to her right. Other pedestrians were crossing ahead of her on the crosswalk. Having in mind that PA 1927, No 318, § 18(a), as amended (CL 1948, § 256.318 [Stat Ann 1947 Cum Supp § 9.1578]), provides that in making a right turn a driver shall "approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway" and that the Traffic Ordinance No 115–D, §§ 14(b), 16, of the city of Detroit, provide:

"Sec. 14(b). Green alone or 'go'. Vehicular traffic facing the signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn: Provided, that vehicular traffic shall yield the right-of-way to other vehicles lawfully within the intersection and to pedestrians lawfully within a crosswalk at the time such signal is exhibited. Pedestrians facing the green signal may proceed across the highway within any marked or unmarked crosswalk. * * *

"Sec. 16. Operators may make a right turn at all times from the moving traffic lane nearest the right curb when proceeding with traffic, except where prohibited by traffic control devices or traffic officers, provided that the operator shall yield the right of way to pedestrians lawfully within the crosswalk. The operator shall not make a right turn when facing a red traffic control signal unless such turn is permitted by right-turn arrow, or other traffic control devices."

We are of the opinion that the contributory negligence of plaintiff, Catherine Hodgdon, presented a question of fact to be submitted to the trier of facts.

On the question of the negligence of defendant Barr, the court gave the following instructions:

"What are the duties that were imposed upon these parties? I think the logical order to take up for that discussion is what was the duty of the driver of the taxicab, Mr. Barr. He had imposed upon him 3 duties which I think are involved in this case. First, the State statute provides that when a driver of a motor vehicle is making a right-hand turn at an intersection, he must make it from the right-hand avenue or traffic lane of the street off from which he is going, and he must make it into the right-hand lane available to traffic on the street into which he is turning. Therefore, in this case, to apply this case to the undisputed facts as set forth by the defendant, he was going south on Van Dyke avenue. He was behind a truck, and on his testimony, a city bus. They stopped on a red light at the north line of Gratiot avenue. The light changed. The truck ahead turned to the right, and in turning to the right there is evidence to indicate that it had to move out from the curb sufficiently far to miss another vehicle that was parked at the curb between Van Dyke avenue and the east line of the crosswalk marked by that line on the pavement. So that the truck turned to the right into what we might call the second lane, under the defendant's testimony, of traffic. The bus proceeded directly south on Van Dyke, and went out of the picture as it did so. It was then the duty of the defendant driving his taxicab to follow the truck so as to get into the right-hand lane of traffic that was open for use on Gratiot avenue going west. The truck went into that lane. Under the testimony, it did subsequently cross the crosswalk for pedestrians. And, under the State statute it was the duty of the taxi driver to follow the truck in that first lane to the south of the parked car at the north curb of Gratiot avenue. There is no dispute in the testimony that the taxi driver did not do that. On his own testimony, because some cars honked at him

from behind, he went past the rear of the truck which was ahead of him, and then proceeded to make his turn into Gratiot avenue. Now that I consider to be a violation of the duty which is imposed upon him by a State statute, and a violation of a duty imposed by a State statute is in and of itself negligence.

"In further consideration of exactly what was done by the cab driver, Mr. Barr, is the testimony as to where the cab stopped after either it ran into Mrs. Hodgdon, or Mrs. Hodgdon walked into it, which represents the difference between the plaintiff's testimony and the defendant's testimony, because that has a bearing upon the closeness with which the defendant, Barr, followed out his statutory duty to make his turn into the right-hand available lane of traffic. The plaintiff testified that when she was struck she was 5 or 6 feet north of the north rail of the streetcar track. That would put her something like 30 feet or more south of the north curb, and that would put her well out of the second traffic lane going west on Gratiot avenue. The witness Nitz testified that he thought that she was about 12 or 15 feet north of the north rail. The defendant, Barr, testified that his taxicab was at a standstill when Mrs. Hodgdon ran into it. I take it that his left-hand front wheel was about a half a foot or a foot from the north rail of the streetcar track, and that would put the cab,—the right-hand side of the cab,—something like 30 odd feet from the north curb, exactly where Mrs. Hodgdon said that she was struck. The witness, Mrs. Jacobson, who was a passenger in the cab, testified that the cab was 2 or 3 feet north of the north rail. Therefore, there is practically no dispute in the testimony that at the time when Mrs. Hodgdon and the cab came into collision the cab was anywhere from 23 feet south of the north curb of Gratiot, to 30 odd feet south of the north curb of Gratiot. In any event, it was farther south than the State law says it had a right to be in making a right-hand turn. From the undis-

puted testimony in the case, it was the duty of the driver of the taxicab to follow the truck that was ahead of it down the first available traffic lane on the north side of Gratiot avenue. Therefore, on that consideration of that duty, the testimony is conclusive, because there is no dispute about it, that the defendant, Barr, was guilty of negligence because he did not observe the express provisions of a State statute which is part of the State motor vehicle law, and which was in effect at that time and still is in effect.

"That consideration, of course, does not conclusively close the matter as far as he was concerned, because the question of proximate cause is still to be considered. The second duty that he owed was a duty under a city ordinance. If you violate a city traffic ordinance, that violation is not conclusive that you have been negligent the way that a violation of a State statute is; but it is evidence that you have been negligent; and it is evidence from which a jury is justified in finding that you have been negligent. The city ordinance is adopted in accordance with a grant of power from the State legislature to cities to impose traffic regulations. Those traffic regulations must be consistent with the State law. Therefore, the traffic regulation I am about to speak of must be construed as being consistent with the State law I have just been telling you about, which requires people making right-hand turns to stay in the nearest available right-hand lane. The city has laid out, and rightfully, a traffic lane for pedestrians to go across Gratiot avenue from north to south. That traffic lane, as far as its easterly line is concerned, leaves the sidewalk on the north side of Gratiot avenue at a point about 42 feet distant from the junction of the curb line of Van Dyke and Gratiot. It runs at right angles across Gratiot avenue. Van Dyke does not run at right angles across Gratiot. It enters Gratiot at a long oblique angle. Much stress has been laid upon that distance of 42 feet from Van Dyke avenue to the pedestrian cross-

walk. It is to be remembered, and it is in evidence upon the map which has been so much before you, that the east line of the crosswalk converges toward the line of the Van Dyke curb; that is, it converges towards the intersection of Van Dyke and Gratiot, and while it is 42 feet from the northwest curb of Gratiot and Van Dyke at the curb line, when the crosswalk reaches the line of the north streetcar rail, according to the map drawn to scale, the line of the crosswalk is only 10 feet from the west line of Van Dyke; and the distance from the intersection at the point where the collision took place, somewhere between 12 and 5 or 6 feet north of the curb line, instead of being 42 feet, is, by measurement on the map not more than 12 or 13 feet distant from the intersection, about the length of a taxicab.

"The ordinance that I have reference to is one passed by the city council of the city of Detroit. You have heard it read, and it provides that at intersections where there are traffic lights vehicles may make right-hand turns on the green light when, and only when, they can do so without interfering with traffic. 'Traffic' means not only other vehicular traffic. It means also pedestrian traffic, because it is to be borne in mind that even though people are walking upon the streets of the city, they are still citizens, and they have the right to have other people pay attention to their safety, and they have as good a right upon the streets as drivers of automobiles do.

"If this cab driver made a right-hand turn at a time that there was danger that he would interfere with traffic on the crosswalk, he was doing something that the city ordinance forbids. That there was danger of interfering with pedestrian traffic on the crosswalk is evidenced by the fact that Mrs. Hodgdon did come in contact with the right front fender of his taxicab. That is evidence from which you, in connection with the ordinance, may, if you see fit, find that he was guilty of negligence in the way he made a right-hand turn down Gratiot avenue; and

it is evidence from which you would have a right to conclude that he did undertake to make a turn at a time when he could not do so without interfering with other traffic on that intersection.

"The third duty that every automobile driver owes at all times is to keep a sufficiently sharp lookout ahead of him so as to stop his car within the assured clear distance ahead.* That is a duty which means that he must be vigilant enough to see what there is to be seen. That he may not see it is no excuse. If it was visible, and if it was something that was likely to get into the line of his traffic, it was his duty to see what was there to be seen; and he is held liable for any violation of that duty.

"Now as to this case, under that duty imposed upon all automobile drivers upon all highways, is there any evidence of a failure on his part to perform that duty? I think that there is. He testified that the first time that he saw Mrs. Hodgdon was when she stepped out from in front of the truck which was to his right. Mrs. Jacobson testified that she saw Mrs. Hodgdon on the other side of the truck while Mrs. Hodgdon was on the curb, and she saw her step down from the curb, and she saw her upper half as she walked along from in front of the truck, passing from in front of the truck. If Mrs. Jacobson saw that, Mr. Barr could have seen it; and if he did not see it, he is guilty of negligence for not seeing it.

"On these 3 points—in the first place, under the undisputed testimony offered by the defense, he is guilty of negligence as a matter of law because he did not stay in the proper lane of traffic in making a right-hand turn. The evidence is such that the jury would be warranted in finding that he would be guilty of negligence for failing to observe the traffic ordinance as to the right to make a right-hand turn when the green light is in his favor, which is limited to making a right-hand turn when he can

* See CL 1948, § 256.305 (Stat Ann 1947 Cum Supp § 9.1565).—REPORTER.

do so without interfering with other traffic. And, the evidence is such as to warrant a finding at your hands, if you see fit, that he is guilty of negligence in not keeping a sufficiently keen outlook ahead of him as a reasonably prudent man would have done under the circumstances as they existed at that time and place. I charge you as a matter of law that on his own testimony he is guilty of negligence for his violation of this statutory duty. You would be justified in finding him guilty of negligence for the violation of the other 2 duties, if you find it necessary to do so, or if you see fit to do so. That is up to you when you come to consider the questions in the case."

Defendant urges that the trial court was in error in charging the jury that defendant Barr was guilty of negligence as a matter of law, in violating the statutory provisions relative to making a right turn at an intersection. In order to get a clear picture of what actually occurred it is necessary to follow the movement of defendant Barr from the time he stopped on Van Dyke to await a green light, to a point on Gratiot avenue where the accident actually occurred.

As defendant Barr traveled south on Van Dyke he stopped behind a Detroit street railway bus and in front of this was a panel truck. As the lights turned green for traffic to move across Gratiot avenue, the panel truck turned right on Gratiot avenue and stopped before it came to the crosswalk. Defendant Barr followed the panel truck as it made its turn on Gratiot avenue, and when the truck stopped, the rear end of defendant's cab extended into Van Dyke avenue. Because defendant's cab interfered with traffic going south on Van Dyke avenue, he, defendant Barr, eased around the truck on its left side and stopped his cab with its front end about midway of the truck, and at a distance of 2 or 3 feet from it.

At this time other pedestrians were passing in a southerly direction across Gratiot avenue on the crosswalk. Plaintiff, Catherine Hodgdon, also was crossing the northerly half of Gratiot avenue at a distance of from 3 to 6 feet west of the crosswalk. When defendant brought his cab to a stop its left front wheel was within 6 inches of the northerly rail of the streetcar track, and across the crosswalk to such an extent that it came in contact with plaintiff, Catherine Hodgdon. It clearly appears that defendant Barr, in his operation of the cab, violated the city ordinance in failing to yield the right-of-way to pedestrians crossing on a crosswalk with the green light in their favor, but violation of a city ordinance is not negligence *per se*. It is, however, evidence of negligence for presentment to the trier of the facts. See *Scott* v. *Dow*, 162 Mich 636, and *Rotter* v. *Detroit United Railway*, 205 Mich 212.

Defendant urges that the court was in error in giving the following instruction to the jury:

"It was the duty of the driver of the taxicab to follow that truck that was ahead of it down the first available traffic lane on the north side of Gratiot avenue. Therefore, from that consideration of that duty, the testimony is conclusive, because there is no dispute about it, that the defendant, Barr, was guilty of negligence."

It is apparent that the above instruction was inspired by CL 1948, § 256.318, which provides that in making a right turn a driver should—"approach such intersection in the lane of traffic nearest to the right-hand side of the highway, and in turning should keep as closely as practicable to the right-hand curb or edge of the highway."

Defendant Barr testified:

"I was to the left of the panel truck. The crosswalk,—I would say, at the time I did that I was

about 25 or 30 feet. The truck stayed there. Then I waited until the street cleared of pedestrians, and pedestrians were going across both ways. * * *

"*Q.* How far back of the panel truck were you? Assume my finger is the panel truck, and you are stopped here. How far were you back of the panel truck?

"*A.* My front end was about the middle.

"I was at a dead stop. I looked to the right. Then the panel truck began moving, and I looked to the left, and started. Then the panel truck was moving, and then I started. Then I looked again to the right, and I saw he was beginning to stop. The panel truck. At around the crosswalk he started to stop, and so did I. I looked and I saw this lady come out from in front of the truck. I had not seen her before. She was coming from around the front of the truck. I was going at that time 8 or 10 miles an hour. When I saw the lady come from in front of the panel truck, I immediately applied my brakes and swung to the left. The panel truck got just about across before he started to stop. He was astride the crosswalk, across the crosswalk. When I saw he proceeded and saw he stopped on the crosswalk, I was 3 or 4 feet west of the crosswalk.

"I did not see this lady at any time up to the time she had appeared in front of the panel truck.

"*Q.* Did you hit her or did she hit you?

"*A.* I would say she walked into the right-hand corner of the cab. She fell immediately and then rolled. She was kind of rolling when I got out of the cab. I am absolutely sure I was not exceeding 8 or 10 miles an hour. I came to a dead stop because I saw her. * * *

"*The Witness:* I was right on the curb before I started to make a turn, 3 or 4 feet from the street curb. After I rounded the corner I was about 12 or 13 feet.

"*The Court:* The right-hand side of your cab was about 12 or 13 feet south of the north curb of Gratiot avenue?

"*The Witness:* After I completed the turn and stopped. That is when I came to a stop.

"*Q.* When that was 13 feet, was the panel truck to the right of you?

"*A.* To the right. I was trying to get distance between the panel truck and me.

"There was the panel truck and me, and that is the way I figure the distance."

LaVerne Nitz, a witness produced by plaintiff, testified:

"*Q. (By Mr. McBrearty):* Tell us, in your own words, how the accident happened. Tell us what you saw.

"*A.* I was standing in the safety zone going east, waiting for a streetcar on Gratiot avenue. Just before the streetcar came a lady was stepping off the curb traveling from north to south. There was a truck parked next to the north curb obstructing her view from crossing the street. After she approached 3 or 4 paces from the curb she looked to the right—her left, to see if there was approaching traffic coming. At that point a taxicab was coming around the corner. She varied to the west of the crosswalk as she was walking. In my opinion they seemed to both hesitate. In other words, the cab slowed down, and then she proceeded too. Then they both had the same idea, and the taxicab driver stepped on the gas, and she walked ahead. I couldn't tell you whether she walked into the right side of the cab, or if the cab struck her, because my vision was obstructed.

"*Q.* When you say 'right side,' you mean the right corner?

"*A.* The right-front fender of the cab.

"*Q.* You don't know whether she walked into it or whether the cab's right-front fender hit her?

"*A.* I couldn't say that, because the side of the cab was obstructing my view.

The witness Nitz also testified that the following statement, given by him and dated April 26, 1950, was true:

"LaVerne Nitz, 14379 Dacosta. Accident, Van Dyke and Gratiot. On August 27, 1948, about 10:50 a.m., I was standing in the eastbound safety zone at Gratiot and Van Dyke when I witnessed an accident in which a Checker cab struck a woman pedestrian with its right-front fender and the woman fell to the pavement, falling to the right of the cab and still in front of the cab but to the cab's right when the cab came to a stop. The woman was not knocked any distance. She just fell down when struck. The light was green for Van Dyke when this happened and the woman started across Gratiot from the north curb and a short distance west of the westerly crosswalk line. She was not between the crosswalk lines when struck. I had noticed this Checker cab pull around the corner off of Van Dyke making a right turn to go west on Gratiot and when the woman was struck the cab was not traveling faster than 8 miles an hour.

"There was a truck to the right of the cab and it was about a half-width of a car from the north curb and was headed west, and whether the truck was in motion before the woman walked in front of it, I couldn't say, but I thought that the woman was going to walk into the front of the truck. She was that close to the front end of the truck, and when I saw the cab going by the truck on its left, I hollered, 'Look out,' as I thought she would be struck. The traffic was moving on Van Dyke when she was struck, and I don't know where the truck came from."

It is signed, "LaVerne N. Nitz."

There is evidence in this case that the distance from the westerly edge of Van Dyke measured on the northerly curb line of Gratiot avenue to the crosswalk is 42 feet, and that the width of the crosswalk is 11 feet; that the easterly edge of the cross-

walk at its intersection with the northerly streetcar rails is approximately 13 feet from the westerly line of Van Dyke avenue; that the point of impact between plaintiff, Catherine Hodgdon, and the cab is a distance of from 5 or 6 feet to 13 feet north of the northerly rail of the car track; that at the moment of impact plaintiff, Catherine Hodgdon, was 5 or 6 feet west of the crosswalk, and defendant Barr was traveling 8 to 10 miles per hour. There is also evidence that he had brought his cab to a stop at the moment of impact. There is evidence that as defendant Barr made a westerly turn on Gratiot avenue, there was a truck standing and facing westerly on Gratiot avenue at a distance of about a half-width of a car from the north curb of Gratiot avenue.

It is evident that the trial court in instructing the jury that defendant Barr was guilty of negligence as a matter of law, had in mind that it was the duty of defendant Barr to keep behind the panel truck as it made a right turn on Gratiot avenue.

"It was then the duty of the defendant driving his taxicab to follow the truck so as to get into the right-hand lane of traffic that was open for use on Gratiot avenue going west."

The statute as above quoted, provides that a driver making a right-hand turn at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning *shall keep as closely as practicable to the right-hand curb or edge of the highway.*

There is evidence from which a jury could find that it was not practicable for defendant to go to the right of the panel truck, as there was some testimony that the distance between the curb and the panel truck was about a half width of a car. There is evidence that when defendant Barr was behind the panel truck while negotiating the turn, the rear end

of his taxicab extended into Van Dyke avenue, and interfered with traffic going south on Van Dyke avenue. Under these circumstances the action of defendant Barr in making a left turn around the panel truck presented an issue of fact as to whether he violated the statute by failing to get into the right-hand lane of traffic, or whether he kept as close as practicable to the right-hand curb in making the turn into Gratiot avenue. In view of our decision on this issue we do not find it necessary to discuss other issues presented.

The judgment is reversed and remanded for a new trial with costs to defendant.

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

---

STEWART *v.* NAPUCHE.

1. APPEAL AND ERROR—NONJURY CASE—FINDINGS OF FACT—PREPONDERANCE OF EVIDENCE.

   The Supreme Court does not reverse judgment in a nonjury case, based on findings of fact by the trial court, unless the evidence clearly preponderates in the opposite direction.

2. MASTER AND SERVANT—SCOPE OF EMPLOYMENT.

   Generally, a master is liable for the acts of a servant while the servant is acting within the scope of his employment.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 896.
[2] 35 Am Jur, Master and Servant § 532.
[3–5] 28 Am Jur, Innkeepers § 53; 35 Am Jur, Master and Servant §§ 574, 575.
[3–5] Liability of employer other than carrier for a personal assault by employee upon customer, patron, or other invitee. 40 ALR 1212; 114 ALR 1033.

3. SAME—EVICTION FROM PREMISES—EXCESSIVE FORCE.
The master is liable for acts of servant if latter uses more force than he was authorized to use in evicting a party from his master's premises.

4. SAME—MASTER'S RESPONSIBILITY FOR SERVANTS' ACTS—EXCEEDING AUTHORITY.
The master who puts his servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another; doubt as to whether the servant exceeded his authority being resolved against the master.

5. INTOXICATING LIQUORS—EVICTION OF INTOXICATED PERSON—UNPROVOKED ASSAULT—MASTER AND SERVANT.
Act of bartender in defendant's tavern in making an unprovoked assault upon plaintiff patron who had been refused further drinks because of his intoxicated condition was properly found by trial court to have been made in furtherance of defendant master's business and fact that the bartender used more force than necessary to evict plaintiff does not relieve defendant from liability.

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 17, 1952. (Docket No. 9, Calendar No. 45,278.) Decided June 2, 1952.

Action by Edgar Stewart against Christo Napuche for injuries suffered when he was assaulted by defendant's employee. Judgment for plaintiff. Defendant appeals. Affirmed.

*Michael A. Guest,* for plaintiff.

*Griffiths, Williams & Griffiths* (*Helen Theut Bevens,* of counsel), for defendant.

SHARPE, J. Plaintiff, Edgar Stewart, brought an action in the circuit court of Wayne county against

defendants James Miner and Christo Napuche, for injuries suffered while a guest in defendant Christo Napuche's tavern in the city of Detroit, Michigan. From a judgment in favor of plaintiff, defendant appeals.

It appears that on June 4, 1949, plaintiff, after having visited several bars, arrived at defendant Napuche's place about 4:30 p. m. He was served beer by an attendant, and by defendant Napuche. Defendant Miner came on duty at 5 p. m., and shortly thereafter defendant Napuche left to go to his home. At or about the hour of 6 p. m., plaintiff asked Miner for another bottle of beer and was refused. At this time plaintiff had consumed 18 bottles of beer during the afternoon. Upon being refused another bottle of beer plaintiff made some remark to Miner, which apparently angered Miner to the extent that he came from behind the bar and struck plaintiff. Defendant Miner testified:

"I had a conversation with Mr. Stewart. We just had a few words and I goes around and picks him up—after having a few short words, I hit Stewart, then I walked around the end of the bar very quickly, picked him up, using a full Nelson—that is a wrestling grip—and started to take him out when someone in the bar interfered, and I put more pressure on his neck; that must have been when I hurt him.

"At no time during that time do I remember Mr. Stewart threatening to strike me; he may have used one or so curse words, I don't remember. That didn't bother me, I hear that every day. I struck him in an attempt to get him out of the place. I didn't want him in there. I wanted him out of there because he was highly intoxicated and was going to cause trouble, I thought."

As a result of this altercation plaintiff was severely injured, and lost approximately 5 months' work and incurred hospital and doctor bills. The cause

came on for trial before the court without a jury. At the close of plaintiff's proofs Napuche's attorney made a motion for a directed verdict, basing his reasons on the claims that Miner was not acting within the scope of his authority when he committed the assault upon plaintiff. The trial court denied the motion, and at the close of all testimony rendered judgment in favor of plaintiff in the sum of $7,500. Subsequently defendant, Christo Napuche, made a motion for a new trial, based upon the following:

"4. Because the evidence failed to establish that the injury complained of was inflicted by the defendant Miner within the scope of his agency as an employee of the defendant Napuche."

This motion was denied and defendant, Christo Napuche, appeals.

In law cases tried before the court without the aid of a jury, we do not reverse the judgment based on findings of fact of the trial court, unless the evidence clearly preponderates in the opposite direction. It is a general rule that the master is liable for the acts of a servant while the servant is acting within the scope of his employment. See *Canton* v. *Grinnell,* 138 Mich 590; *Zart* v. *Singer Sewing Machine Co.,* 162 Mich 387; *Moffit* v. *White Sewing Machine Co.,* 214 Mich 496; *Martin* v. *Jones,* 302 Mich 355; and *Guipe* v. *Jones,* 320 Mich 1.

It is also the rule that if the servant uses more force than he was authorized to use in evicting a party from his master's premises, the master is liable. In *Cook* v. *Michigan Central R. Co.,* 189 Mich 456, we quoted with approval from *Robards* v. *P. Bannon Sewer Pipe Company,* 130 Ky 380 (113 SW 429, 18 LRA NS 923, 132 Am St Rep 394):

"The master who puts the servant in the place of trust or responsibility, or commits to him the management of his business or the care of his property,

is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

It was further said in this connection that:

"Furthermore, the law, under such circumstances, will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong."

The difficulty begins when an attempt is made to apply the rule to the facts of the case. Miner testified that plaintiff said something to him after he had refused him another drink that made him angry; that he thought he should get him off the premises; that he didn't like what plaintiff said, so he hit him for the purpose of subduing him. He testified:

"That is the reason I struck him, to subdue him and put him out. I didn't put him out. Someone prevailed upon me to leave him alone. The reason I struck him was to put him out, not because I was angry. That is on my instructions from Mr. Napuche."

The trial court in denying the motion for a directed verdict stated:

"As far as the plaintiff is concerned, I think that the assault was unprovoked, but from the testimony in the case it shows that he was in furtherance of his master's business. He was peeved because he had been served drinks there when he, the bartender, thought he shouldn't have been, and he goes around from behind the bar for the purpose of put-

ting him out, for the purpose of doing something in furtherance of the master's business. * * *

"This case is where the employee comes around, under the testimony, from behind the bar for the purpose of putting this man out, because he was a nuisance and because he had become peeved because he had been served drinks when he didn't think he should have been; as the bartender said, served by the owner, and the owner, of course, may deny that, but it doesn't change the facts in the case, that he came around there in the course of his employment solely for the master's business, nothing else.

"The testimony is very clear that he came around there to put that man out, and he even said he was going to put him to sleep so he could put him out easier. Everything he did, everything that that bartender did, from the minute he left his post behind the bar until this thing happened, under this testimony, not just of the bartender, but under the testimony of the plaintiff, this other witness who was in the bar, and the bartender, the testimony is clear in this case, the record, I mean, is clear, that what he did, he was doing in furtherance of his master's business."

In our opinion there is competent evidence to support the finding of facts of the trial court that the actions of Miner were in furtherance of his master's business, and under the rule heretofore announced we do not reverse. The fact that Miner used more force than was necessary does not change the rule of liability of the master. The judgment is affirmed, with costs.

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

## RUSS DAWSON, INC., *v.* UNEMPLOYMENT COMPENSATION COMMISSION.

1. UNEMPLOYMENT COMPENSATION—SUCCESSOR EMPLOYER—EXPERIENCE RECORDS.

   Compliance with the unemployment compensation act's provisions as to when a successor employer is entitled to the transfer of the experience records of its predecessor is necessary in order to obtain right to such experience records (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246).

2. SAME—SUCCESSOR EMPLOYER—EXPERIENCE RECORD—STATUTES.

   Successor employer, a corporation, which took over a business that had paid only 75% of the total wages paid by predecessor employer, a partnership, during the preceding year was not entitled to the transfer of the experience record of the partnership, where unemployment compensation act provided that the successor employer would not be so entitled unless it acquired operating establishment paying 95% or more of the aggregate wages payable during such preceding year (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246).

3. SAME—SUCCESSOR EMPLOYER—EXPERIENCE RECORD—IMPROPER ENHANCEMENT OF VALUES.

   A trial court in making a determination involving values of a business may not place a value upon an asset so as to enhance assets sufficiently to comply with provisions of employment compensation act relative to transfer of experience record of predecessor employer to successor employer, contrary to the stipulated facts as contained in the record (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246).

---

REFERENCES FOR POINTS IN HEADNOTES

[3, 4] Generally as to court proceedings as to unemployment insurance matters, see 48 Am Jur, Social Security, Unemployment Insurance and Retirement Funds § 45 *et seq.*

[5] 14 Am Jur, Costs § 91.

4. SAME—SUCCESSOR EMPLOYER—EXPERIENCE RECORD—VALUES—EVIDENCE—STATUTES.

Trial court's inclusion of value of automobile sales agency contract in determination as to whether corporation, as successor employer to partnership, was entitled to the transfer of the experience record of the predecessor, was error, where record is void as to the value of such contract and statutory standard for determining right to such experience record was not otherwise met (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246).

5. COSTS—PUBLIC QUESTION—UNEMPLOYMENT COMPENSATION—EXPERIENCE RECORD.

No costs are allowed in proceeding involving determination as to whether successor employer was entitled to the transfer of predecessor employer's experience record under unemployment compensation act under circumstances presented, a public question being involved (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246).

Appeal from Wayne; Toms (Robert M.), J. Submitted April 9, 1952. (Docket No. 23, Calendar No. 45,159.) Decided June 2, 1952. Rehearing denied September 3, 1952.

Certiorari by Russ Dawson, Inc., to review order of Appeal Board of Unemployment Compensation Commission denying plaintiff right to use experience record of partnership which it succeeded in part. Judgment for plaintiff. Defendant Commission appeals. Reversed.

*Griffin, Emery & Seely* (*Robert C. Boyer,* of counsel), for plaintiff.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *John J. Long,* Assistant Attorney General, for defendant.

SHARPE, J. Russ Dawson, a copartnership, composed of the members of the Russ Dawson family, operated an automobile sales and service agency con-

sisting of 2 places of business, one located at 16231 Woodward avenue, and the other at 4400 Cass avenue, both in the Detroit metropolitan area, but separated from each other by a distance of about 2 or 3 miles. This employer had been subject to the Michigan employment security act for a sufficient length of time to entitle it to an adjusted contribution rate for the year 1946.

On April 1, 1946, the Russ Dawson partnership sold, for $33,000, to a newly-formed partnership, which is not a party to these proceedings, all of its assets located at the Cass avenue branch, including the lessee's interest in an unexpired lease covering the premises at Cass avenue.

The sale of the Cass avenue branch included only the physical assets at that address plus the unexpired portion of a lease covering the premises there, but it did not cover good will, the name of Russ Dawson, or an assignment of the Ford Motor Company automobile agency franchise outstanding in the partnership name. These intangible assets were transferred to the corporation on May 1, 1946.

On May 1, 1946, the Russ Dawson partnership sold, for $210,000, to Russ Dawson, Inc., a newly-formed Michigan corporation, all of the remaining assets of the partnership which consisted of those assets in the Woodward avenue place of business. Included in this transaction was an assignment by the partnership to the corporation of the automobile agency franchise. The stockholders of the corporation were the same individuals who were members of the predecessor partnership.

The aggregate wages paid by the Russ Dawson partnership for the period from April 1, 1945, through March 31, 1946, at the Woodward avenue place of business represented approximately 75%, and at the Cass avenue place of business approx-

imately 25% of the total amount of wages paid during that period by the partnership.

In July, 1946, the Michigan unemployment compensation commission issued a determination combining the experience records of Russ Dawson, Inc., and the Russ Dawson partnership under the provisions of section 22 of the Michigan unemployment compensation act, PA 1936 (Ex Sess), No 1, as amended by PA 1943, No 246 (Stat Ann 1946 Cum Supp § 17.524 [62]). On October 3, 1946, the commission issued a redetermination declaring the previous determination void and held that the experience record of the corporation could not be combined with that of the predecessor partnership. On May 20, 1947, the commission issued a notice of assessment to Russ Dawson, Inc., for additional contributions on the basis of a rate of 3% as a result of the decision not to combine the experience record of the corporation and the predecessor partnership. The matter was appealed to the appeal board, which held that the experience records could not be combined. The matter was then taken for review by writ of certiorari to the circuit court of Wayne County. On October 13, 1950, the circuit court reversed the decision of the appeal board, and held that the experience records could be combined.

The trial court in an opinion stated:

"The present litigation arises out of the claim of that corporation to the benefit of the experience records of the former partnership and the consequent maintenance of the contribution level enjoyed by the partnership. The position of the commission is that the corporation must start its contributions at the maximum level of 3%, as if it were just starting in business. This involves a construction of section 22 of the statute. There is no question (and it is conceded) that the corporation is the successor, within the meaning of the act, of the partnership,

and that it has accepted responsibilty for any unpaid contributions of the partnership as of May 1, 1946.

"The immediate question involves an interpretation of subsection (c) of section 22, reading as follows:

" 'In the interpretation of this section, substantially all of the employing enterprises of a predecessor employer shall be deemed to be continued solely through a single employer as successor thereto if the commission finds that the successor has acquired business establishments or properties, or other trade or assets, the operation of which during the last 4 completed calendar quarters involved more than 95% of the aggregate wages payable for employment by the predecessor employer during such period.' * * *

"The proper question to be determined is the percentage of wages arising from the operation of 'business establishments or properties, or other trade or assets,' wherever located. It is entirely conceivable that the operation of only 50% of the property or assets might involve 75% of the wages, and conversely, that the operation of 75% of the property or assets might involve only 50% of the wages. The fact in the instant case is, that the operation of the Ford agency franchise coupled, of course, with the physical properties necessary to implement it, involved all the wages under the partnership, regardless of the geographical location of the buildings where the various employees worked. It is apparent to the court that the predominant and indispensable asset and property which produced all the wages paid to the plaintiff's employees when it was a partnership, was its agency contract with the Ford Motor Company. It is quite true that this alone would produce no wages, and that physical assets such as buildings and machinery were necessary to give it value. It is equally true that these physical assets without the franchise would have produced only a small fraction of the wages which were paid. This lucrative and wage-producing asset was retained by the part-

nership after the separation of Lare and West on April 1st, and passed on directly to the corporation on May 1st. It is apparent, then, that the successor corporation on May 1st acquired properties and assets, the operation of which during the preceding year involved more than 95% (in fact, 100%) of the aggregate wages paid by the partnership.

"It follows, therefore, that the successor corporation, the plaintiff in this case, succeeded to all of the benefits of the experience records of its predecessor, the partnership, and that the decision of the appeal board of the unemployment compensation commission must be reversed. A judgment in accordance herewith may be entered."

Defendant appeals and urges that the trial court was in error in holding that the experience records of the corporation and the partnership could be combined in order to determine a rate for the corporation.

The statute provides that under certain conditions a successor employer shall be entitled to a transfer of the experience record of its predecessor employer. The provisions for the transfer of an experience record are contained in section 22 of the act, PA 1936 (Ex Sess), No 1, § 22, subd (a) (1), as amended by PA 1943, No 246* (Stat Ann 1946 Cum Supp § 17.524 [a]) reads as follows:

"(1) That an employer has acquired the organization, trade or business, or substantially all the assets thereof, of a predecessor employer which at the time of such acquisition was an employer subject to this act, and immediately after such acquisition substantially all the employing enterprises of such predecessor employer are continued solely through the employer which has acquired such organization, trade or business, and has accepted responsibility for any

* This section was amended by PA 1947, No 360 (CL 1948, § 421.22), but the quoted subdivisions of the section were not altered.—REPORTER.

unpaid contribution due and payable at the time of such acquisition; or"

The statute also provides in section 22, subd (c):

"(c) In the interpretation of this section, substantially all of the employing enterprises of a predecessor employer shall be deemed to be continued solely through a single employer as successor thereto if the commission finds that the successor has acquired business establishments or properties, or other trade or assets, the operation of which during the last 4 completed calendar quarters involved more than 95 per cent of the aggregate wages payable for employment by the predecessor employer during such period."

The above section is a mandate from the legislature providing a basis for determining when a successor employer is entitled to the experience records of its predecessor. In the case at bar the stipulated facts show:

"The aggregate wages paid by the Russ Dawson copartnership for the period from April 1, 1945, through March 31, 1946, was $294,411.87, these wages being paid for services rendered at both the principal place of business and the branch establishment at Cass avenue. Of this amount $219,985.39 was paid during that period for employment in the operation of the Woodward avenue place of business, which amount represents a fraction more [less?] than 75% of the total wages paid by the partnership during that period. The balance represents wages for employment in the Cass avenue branch."

Under the above-stipulated facts the corporation, in taking over the assets of the Woodward avenue place of business, took over a business that paid only 75% of the total wages paid by the partnership during the preceding year, and under the above sub-

division (c) the corporation was not entitled to the experience record of the partnership.

The trial court in determining that the corporation was entitled to the experience record of the partnership took into consideration that the corporation took over the agency contract with the Ford Motor Company, and held that the value of this contract as an asset enhanced the assets of the Woodward avenue business sufficient to comply with the statutory requirement.

The record is void of any evidence as to the value of the Ford Motor Company contract. The trial court was in error in placing a value upon an asset contrary to the stipulated facts as contained in the record. It follows that the plaintiff has not made a sufficient showing to enable it to claim the benefit of the experience record of the former partnership. The judgment is reversed, but without costs as a public question is involved.

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

## NIGHTLINGER *v.* GIANT SUPER MARKET, INC.

1. WORKMEN'S COMPENSATION—BURDEN OF PROOF.
   The burden of proving a right to workmen's compensation is on the party asserting that right.

2. SAME—COMMISSION—GUESS—INFERENCES.
   The workmen's compensation commission may not indulge in the assumption of a mere possibility in the nature of a guess as to whether a plaintiff is entitled to compensation but it may draw reasonable inferences from established facts.

3. SAME—FINDINGS OF FACT—SUPREME COURT.
   Findings of fact and legitimate inferences drawn from established facts as found by the workmen's compensation commission are binding upon the Supreme Court (CL 1948, § 413.12).

4. SAME—OSTEOGENIC SARCOMA—AMPUTATION OF LEG—PROXIMATE CAUSE—REPEATED TRAUMA.
   Record in proceeding to recover workmen's compensation which showed plaintiff's leg was amputated above the knee because of osteogenic sarcoma near the knee joint but failing to show such tumor was caused by repeated trauma while plaintiff was at work as a packer at checking counter in grocery did not support finding of fact as to proximate cause even with testimony showing that some pathologists were of the opinion such traumas might have something to do with that type of tumor.

Appeal from Workmen's Compensation Commission. Submitted April 18, 1952. (Docket No. 92, Calendar No. 45,398.) Decided June 2, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 433.
[2] 58 Am Jur, Workmen's Compensation § 450.
[3, 4] 58 Am Jur, Workmen's Compensation § 530 *et seq.*

John Nightlinger presented his claim for compensation against Giant Super Market, Inc., employer, and State Accident Fund, insurer, for injuries sustained while in its employ. Award to plaintiff. Defendants appeal. Reversed and remanded for entry of award for defendant.

*Currie & Currie* and *Gilbert A. Currie, Jr.* (*Weston L. Sheldon,* of counsel), for plaintiff.

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

SHARPE, J. This is an appeal by the employer and the insurer from an award of compensation to plaintiff, John Nightlinger.

The essential facts are as follows: Plaintiff worked as a grocery packer for defendant, Giant Super Market, Inc., from June, 1949, until June 17, 1950. He only worked on Thursdays and Fridays from 4:30 p. m. to 9 p. m., and all day on Saturday. He was 18 years of age, and a student in school.

In his job as a grocery packer he stood at a stand, the top of which was 22 inches above the floor, and part of the time he stood with his feet turned out and the inside of his knees pressing against the top of the stand. At times his knees bumped the top of the stand. Plaintiff noticed some redness on the knee when he first worked for defendant. Plaintiff did not have any medical attention for the knee until June 26, 1950, when he consulted Dr. Donald C. Durman. He informed Dr. Durman at that time that the pain and swelling in the vicinity of the right knee had been present for about a month. On June 26, 1950, Dr. Durman found "a swollen area on the right leg, on the inner aspect of the leg, just below the knee, which was red, very tender to pressure,

hard, firm." The swollen area extended from the upper end of the tibia down a distance of 2 or 3 inches on the inner side of the leg. Dr. Durman made a diagnosis of osteogenic sarcoma of the tibia. The leg was amputated at the lower third of the thigh on July 24, 1950. After the operation it was diagnosed as a "Periesteal osteofibrochondro sarcoma," which appears in young people more often than in older people.

On November 28, 1950, plaintiff filed an application for hearing and adjustment of claim with the workmen's compensation commission. The deputy commissioner granted plaintiff an award of $18.66 per week for total disability for the specific loss of a leg for a 200-week period, together with an amount for medical expenses. Upon appeal the commission affirmed the award, based upon the following taken from an opinion filed in the cause:

"We recognize that the causes for the various types of cancer are not definitely known. We also recognize that medical men differ in their opinion, as Dr. Durman indicated, as to whether trauma can be a factor in development of cancer. However, we do not feel inclined to categorically conclude that trauma is not a factor in the development of cancer simply because the causes of cancer are not definitely established or because medical men are in disagreement on the relation of trauma to cancer. We think each case must be decided on its facts. In the instant case plaintiff had never had any trouble with his right leg prior to his employment by defendant company. In the course of his employment he repeatedly bumped his right leg on the counter and a redness appeared at the site of the repeated bumping. The red area was caused by the repeated bumping of the leg against the counter. He felt a pain in his right leg after working for 3 or 4 months. Later a swelling appeared on the leg in the area where it was bumped against the counter. Finally

the malignant tumor developed at that spot. To exclude the repeated bumping as a causative factor for the tumor, we would have to disregard those undisputed facts and conclude that the repeated trauma and the formation of the tumor in the very area which was subjected to the trauma were purely coincidental. We do not believe such a conclusion is justified because the symptons first appeared following trauma to the leg and progressed with the repeated trauma. In our opinion it is more reasonable to conclude that the repeated trauma was a factor in the development of the sarcoma and we so find."

Defendants appeal and urge that plaintiff failed to show competent evidence that he received a personal injury arising out of and in the course of his employment.

Plaintiff testified:

"*Q.* John, you worked for the Giant Super Market and when did you first begin your employment with them? Just approximately?

"*A.* Approximately June, 1949.

"*Q.* What were your duties? What did you do in working for the Giant Super Market?

"*A.* I was a packer.

"*Q.* Would you please explain just what you mean by a packer?

"*A.* A packer you got to—you have a checker unload the groceries from the over-stand and the packers stack them up and put them in boxes. * * *

"*Q.* And would you just explain just what that picture is of your stand, where they come up, where the cash register is?

"*A.* They have a high place there where they set the canned goods and food, and groceries, on the stand and down below they have a place where they set groceries on the side, a little lower. * * *

"*Q. The Commissioner:* What did you say about the inside of your leg?

"*A.* I said the inside of your leg hits the counter. * * *

"*Q.* Describe to us, as you are operating what we will call the checkout counter, would you just describe what your process is in packing these groceries?

"*A.* Well, in order to get up close to it and reach, your left leg was down on the floor and sort of bringing your right leg up where it cuts on the corner-shaped counter, sort of a sharp corner there.

"*Q.* Are you talking about the top of the stand?

"*A.* The top of the lower part of the stand.

"*Q.* Can you tell us how high this part where you are working is?

"*A.* Approximately about 22 inches.

"*Q.* John, what is your height?

"*A.* My height is about 5 feet, 9 1/2.

"*Q.* And when did you first notice any sign or trace of your injury complained of?

"*A.* When I complained.

"*Q.* When did you first notice any sign of it?

"*A.* Well, it was sort of reddish skin for quite a while back.

"*Q.* What do you mean by that?

"*A.* When I first started working there it was reddish.

"*Q.* Then what was the next indication you had of injury?

"*A.* Well, it started swelling.

"*Q.* And when would you say that was?

"*A.* Well, approximately 2 months before the operation."

Dr. Donald C. Durman, a witness produced by plaintiff, testified:

"*Q.* When did you first see him?

"*A.* June 26, 1950.

"*Q.* And did you examine him at that time?

"*A.* Yes.

"*Q.* Will you tell us what you found?

"*A.* I found a swollen area on the right leg, on the inner aspect of the leg, just below the knee, which was red, slightly red, very tender to pressure, hard, firm.

"*Q.* Which knee was that?

"*A.* The right knee. * * *

"*Q.* Now, what did you do after you located this?

"*A.* Made an X-ray examination of the leg. * * *

"*Q.* And will you tell us what you found in these X-rays?

"*A.* On the anterior posterior view the femur and tibia and fibula are normal. The knee joint itself, the knee joint space is normal. On the tibia, on the medial condyle there is an area of decreased density of the bone, and just below it there is an area of rather marked increase in density of the bone and at that point on the surface of the bone, due to the level of the epithelial plate or line, there is an area of destruction of the cortex of the bone. The lateral view shows normal appearance of the femur, patella and fibula, but also shows this area of diminished density of the upper portion of the tibia and shows below it an irregular area of marked increased density of bone.

"*Q.* What does this area and existence of bone indicate to you?

"*A.* Indicates increased density of calcium in the bone from some cause or other. * * *

"*Q.* What was your diagnosis?

"*A.* Osteogenic sarcoma of the tibia.

"*Q.* Will you tell us laymen just what that means so we can understand it?

"*A.* It is a malignant tumor of the bone.

"*Q.* Where did you find that malignant tumor on the bone, was it on the outer surface or inner or both?

"*A.* Both and inside the bone. It had gone through the cortex and the tumor tissues outside of the bone in the soft tissues had radiated from the outside in. You couldn't tell at the time where it had originated. * * *

"*Q.* Where did you amputate the leg?

"*A.* Lower 1/3 of the thigh.

"*Q.* Is there some reason why you went that high?

"*A.* The first is that this tumor was very close to the joint, so that in order to be sure of getting above it we would have to get above the knee. * * *

"*Q.* Now, Doctor, based upon the history given you, and the condition that you found there, the malignant condition you found there, and your examination and your diagnosis of that condition, can you tell us whether there might be or could be a causal relationship between the malignant condition found and the injury complained of by the boy?

"*A.* I don't know.

"*Q.* Would you say there could be or might be a causal relationship there?

"*Mr. Dodge:* After the Doctor has answered as he did it is speculation.

"*Mr. Sheldon:* I can speculate on it, I think.

"*The Commissioner:* He may answer.

"*A.* It is the opinion of a good many pathologists that repeated trauma or injury to a certain area over a long period of time may have something to do with the development of this type of tumor, but, on the other hand, I think there are probably an equal number of very competent pathologists that say it has no causal relationship whatever.

"*Q.* Well, are you telling us that there could be a causal relationship?

"*A.* I really don't know.

"*Q.* Well, I am not asking you whether there would be; I am asking you whether there could be?

"*A.* Well, I suppose it is possible to conceive of repeated bumping producing enough stimulation of the tissues or change in the tissues so that some abnormal growth might take place. That is about as near as I can answer that question.

"*The Commissioner:* * * * Is there anybody actually knows what brings on these cancers, or sarcomas?

"*A.* I don't believe so.

"*By the Commissioner:* Your position is, in this, that this change could occur by a series of traumas but as to whether it did you, yourself, have no knowledge and are not able to tell us?

"*A.* That is right. * * *

"*Q.* What does the pathological report show as to the depth of it?

"*A.* He says, 'Sections show an inflamed or infected considerable portion proximal end of the bone extending for a distance of 2 or 3 centimeters under the cortex.'"

Plaintiff bases his claim for compensation on testimony showing repeated trauma followed by a tumor in the area where the trauma occurred, and the testimony of Dr. Durman, who testified:

"Well, I suppose it is possible to conceive of repeated bumping producing enough stimulation of the tissues or change in the tissues so that some abnormal growth might take place. That is about as near as I can answer that question."

The burden of proving a right to compensation is on the party asserting that right, see *Veek* v. *Wesley Freight Co.,* 306 Mich 485. In awarding compensation the commission may not indulge in the assumption of a mere possibility in the nature of a guess as to whether plaintiff is entitled to compensation, see *Ginsberg* v. *Burroughs Adding Machine Co.,* 204 Mich 130, but the commission may draw reasonable inferences from established facts; see *Standard Drug Store* v. *A. E. Wood & Co.,* 227 Mich 333.

In *Featherly* v. *Central Paper Co.,* 281 Mich 562, plaintiff fell and injured himself in September, 1933. He continued to work until August, 1935, when it was found that he had osteo sarcoma, which caused total disability. We approved the following taken from an opinion of the department:

"The department has carefully reviewed the medical testimony offered to show a causal relationship between the accident and the disability and the most that may be said is that there is a possibility that the accident might have had some connection with the disability. All the doctors admit that the cause of osteo sarcoma is unknown; that osteo sarcoma may occur without trauma; that osteo sarcoma is the cause of plaintiff's disability. 'Legal liability may not be predicated on mere guess or probability. *Draper* v. *Regents of University of Michigan*, 195 Mich 449.' *Rubin* v. *Fisher Body Corp.*, 205 Mich 605."

It is also the rule that the findings of fact and legitimate inferences drawn from established facts as found by the department are binding upon the Supreme Court.* See *Shaw* v. *General Motors Corp.*, 320 Mich 338. In the case at bar plaintiff testified that when he first started working for Giant Super Market, the subsequent traumatic area was "reddish," and that while at work he had a series of traumas at or near the swollen place on his leg. Whether there is proof of a causal connection between the trauma and the subsequent cancerous condition depends upon the testimony of Dr. Durman, who testified that he did not know whether there could be a causal relationship between the malignant condition found and the injury complained of.

He also testified that it is the opinion of many pathologists that repeated trauma to a certain area over a long period of time may have something to do with this type of tumor. It also appears that the following questions and answers were given:

"*By the Commissioner:*

"*Q.* Your position is, in this, that this change could occur by a series of traumas but as to whether

* See CL 1948, § 413.12 (Stat Ann 1951 Cum Supp § 17.186).—REPORTER.

it did you, yourself, have no knowledge and are not able to tell us?

"*A.* That is right."

The only reasonable interpretation of the doctor's testimony is that he does not know whether there is a causal relationship between the malignant condition and the injury suffered. His testimony of what some pathologists believe is not testimony upon which an award can be anchored. In granting an award the commission had to find that there was a causal connection between the injury and the resulting condition of plaintiff's leg. The record does not support such a finding of fact. The failure of plaintiff to furnish evidence from which the inference can be legitimately drawn that the injury resulted in the later amputation precludes the granting of an award. The case is remanded for entry of an order denying compensation. Defendant may recover costs.

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

# JUNE TERM, 1952.

*In re* HUBER.

1. HABEAS CORPUS—PURPOSE OF WRIT.
   The office of the writ of habeas corpus is to inquire into the cause of the imprisonment or restraint of the petitioner (CL 1948, § 637.7).

2. CRIMINAL LAW—SENTENCES—STATE AND FEDERAL COURTS.
   Sentences for crime by State and Federal courts do not run concurrently.

3. SAME—SENTENCE—TIME.
   The essential part of a sentence of imprisonment for crime is not the time when it begins to run, but the serving of the sentence as required by law.

4. SAME—SENTENCE—DELAY IN COMMENCEMENT—SERVICE OF FEDERAL SENTENCE.
   Delay in taking a prisoner into custody after conviction and sentence, occasioned by his service of sentence imposed by a Federal court, does not release him from serving the full term of his sentence imposed by a State court.

Habeas corpus by Michael M. Huber with accompanying certiorari to Recorder's Court for the City of Detroit to obtain his release from State prison of Southern Michigan. Submitted March 27, 1952. (Calendar No. 45,295.) Writ dismissed June 3, 1952.

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Habeas Corpus § 2.
[2–4] 15 Am Jur, Criminal Law §§ 464–472.
[2–4] Sentences of different courts as concurrent. 5 ALR 380; 53 ALR 625.

*Michael M. Huber, in pro. per.*

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,* Prosecuting Attorney, *Ralph Garber,* Chief Assistant Prosecuting Attorney, and *Garfield A. Nichols* and *George W. Miller,* Assistant Prosecuting Attorneys, for the people.

SHARPE, J. On April 9, 1946, petitioner, Michael M. Huber, was arraigned on 2 complaints and warrants, one charge being that of carrying a concealed weapon and the other in which he was joined with 2 other codefendants, charged with breaking and entering a dwelling in the nighttime with a second count of grand larceny. Petitioner waived examination on both complaints, and on April 24, 1946, pleaded guilty to the charge of carrying concealed weapons and also to the charge of breaking and entering a dwelling in the nighttime.

On April 30, 1946, petitioner was sentenced in the district court of the United States, eastern district of Michigan, southern division, on 3 separate indictments; each sentence was for a term of 5 years, and were to run concurrently.

On May 7, 1946, petitioner was returned to the recorder's court for the city of Detroit and was sentenced to a minimum term of 1 year and a maximum term of 5 years on the charge of carrying concealed weapons, and a minimum term of 5 years and a maximum term of 15 years on the charge of breaking and entering a dwelling in the nighttime.

The court ordered that the above State sentences were to run concurrently.

On December 27, 1949, petitioner was delivered into the custody of the warden of the State prison of southern Michigan, according to the certification of the sheriff of Wayne county, Michigan. On Oc-

tober 20, 1950, petitioner petitioned for a writ of habeas corpus in the recorder's court for the city of Detroit, where he questioned the validity of his sentence in the recorder's court because they were indefinite as to date of beginning. On December 1, 1950, the trial judge denied petitioner's petition for a writ of habeas corpus, giving as his reason that the recorder's court was without jurisdiction to determine such issue.

Subsequently petitioner filed a petition for leave to appeal from the order entered in the recorder's court. We have considered the petition as an application for a writ of habeas corpus. In determining the issue involved in this cause we have in mind that the sentence of the trial judge did *not* provide that the sentence would begin at the expiration of petitioner's confinement in a Federal prison.

The mittimus in part reads as follows:

"And upon said conviction, the said court, at a session thereof, held as aforesaid, did, on the 7th day of May, 1946, adjudge and determine that the said Michael Matthew Huber, who is now the age of 25 years, should be committed to the State prison of southern Michigan, in the county of Jackson, and therein safely kept and employed according to the laws thereof, for the period of not less than 5 years from and including this date to 15 years."

"This sentence to run concurrently with sentence imposed on A-43281."

The mittimus on the other sentence also contained the above, except that it read from 1 to 5 years.

In a brief filed petitioner admits that the mittimus in each case makes no mention of his claim that the sentences were to begin at the expiration of his Federal sentence, but urges that the minutes of the trial court and the records of the State prison state that sentences are to begin on December 2, 1949, the date of his release from Federal custody.

The office of the writ of habeas corpus is to inquire into the cause of the imprisonment or restraint of the petitioner—see CL 1948, § 637.7 (Stat Ann § 27.2250). There is nothing in the code of criminal procedure relative to the time when a sentence upon conviction for a crime is to begin, nor have we been able to find any adjudicated cases in Michigan determining this issue. In the case at bar the delay in beginning the State sentence was because petitioner was serving a Federal sentence.

In *People, ex rel. Hesley,* v. *Ragan,* 396 Ill 554 (72 NE2d 311), one Hesley was convicted of robbery in the Federal court and sentenced to a term of 25 years. After delivery of the prisoner to the penitentiary he was indicted in Illinois for murder. He was returned for trial in Illinois and convicted of the crime of murder. He was sentenced to a term of 25 years by the State court of Illinois.

Upon serving his sentence as a Federal prisoner he was returned to Illinois to begin serving his State sentence. Under habeas corpus proceedings petitioner sought release from his State sentence and urged that his Federal sentence and State sentence ran concurrently.

The court held that petitioner was not entitled to credit on the State sentence for time served in prison on his Federal conviction. In an opinion the court said:

"We also held in *People* v. *Kennay,* 391 Ill 572 (63 NE2d 733), that sentences of imprisonment to different places of confinement do not run concurrently. This rule of law that State and Federal sentences do not run concurrently would appear to be definitely settled by many adjudicated cases. *Vanover* v. *Cox* (CCA), 136 F2d 442; *Ex parte Campbell,* 36 Cal App2d 221 (97 P2d 482); *Ex parte Sichofsky,* 201 Cal 360 (257 P 439, 53 ALR 615)."

For effect of delay in taking defendant into custody after conviction and sentence, see 72 ALR 1271–1279.

In our opinion the essential part of a sentence of imprisonment is not the time when it begins to run, but the serving of the sentence as required by law. Delay in taking petitioner into custody after conviction and sentence does not release him from serving the full term of his sentence. Petitioner is not entitled to be discharged and the relief prayed for is denied and the writ dismissed.

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

---

ALLEN *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. RAILROADS—CROSSING—PRESENCE OF TRAIN—WARNINGS.
   The presence of a railroad train on a crossing is notice and warning to those using the highway and railroads will only be chargeable with negligence if there are unusual conditions which require additional warnings.

2. SAME—BLACK GONDOLA CAR ON CROSSING ON DARK NIGHT—CUSTOMARY CROSSING SIGN.
   Fact that night was dark, horizon black and railroad gondola car blocking highway crossing was also black was not such

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 44 Am Jur, Railroads §§ 395–400.

[1, 2] Liability of railroad for injury due to road vehicle running into train or car standing on highway crossing. 15 ALR 901; 56 ALR 1114; 99 ALR 1454; 161 ALR 111.

Customary or statutory signals from train as measure of railroad's duty as to warning at highway crossing. 5 ALR2d 112.

[3] 3 Am Jur, Appeal and Error § 896.

an unusual combination of circumstances as to require railroad to provide more than the customary railroad crossing sign.

3. APPEAL AND ERROR—NONJURY CASE—PREPONDERANCE OF EVIDENCE. The Supreme Court does not reverse in a nonjury case wherein the controlling issue is one of fact, unless the evidence clearly preponderates in the opposite direction.

Appeal from Oakland; DesJardins (George W.), J., presiding. Submitted April 17, 1952. (Docket No. 22, Calendar No. 45,113.) Decided June 3, 1952.

Case by Preston Allen against Grand Trunk Western Railroad Company for injuries sustained when automobile in which he was riding ran into defendant's train stopped across highway. Judgment for defendant. Plaintiff appeals. Affirmed.

*Edward J. Fallon* and *Howarth & Allen*, for plaintiff.

*H. V. Spike, Forbes B. Henderson* and *J. P. Tryand* (*Patterson & Patterson*, of counsel), for defendant.

BUSHNELL, J. Plaintiff Preston Allen, who was injured while a guest passenger in an automobile owned and operated by Dr. Earle W. Spohn, has appealed from a judgment of no cause of action entered on the verdict of the trial judge sitting without a jury.

On August 10, 1946, Allen and his wife were invited to be the guests of Dr. Spohn and his family at their cottage on the Canadian side of Lake Huron. Dr. Spohn came to Allen's home northeast of Rochester, Michigan, about 8 o'clock in the evening, and they proceeded towards Port Huron. When they reached Richmond, Michigan, they inquired of a police officer regarding the shortest route, and they

were advised to proceed directly ahead on Division, a black-top road, also known as 32-Mile road.

The Grand Trunk railroad tracks cross Division about one-half mile east of Richmond. According to one of plaintiff's witnesses, a surveyor, the highway has a gradual rise of 3 feet 3 inches from a point 250 feet west of the tracks, to the highway crossing. However, another of plaintiff's witnesses, also a surveyor, testified from an examination of certain photographs introduced in evidence, that the road was approximately level at the tracks. There were no crossing gates or automatic flashers, the crossing being marked by a warning sign and the usual railroad-crossing sign. Neither the doctor nor Allen was familiar with the road, and neither was aware of the location of the tracks. The bright headlights of the automobile were on and there were no other lights of any kind in the vicinity or on the eastern horizon.

About 4 minutes before the accident a locomotive with its bell ringing and headlights on had crossed the road, drawing an 85-car freight train. When the train was about halfway over the crossing, it stopped to take on water. The conductor, who was riding in the caboose, testified that he alighted when the train stopped and then saw an automobile approaching from the west at what he claimed was an excessive rate of speed.

Plaintiff testified that Dr. Spohn was driving at about 30 to 35 miles per hour, and that he did not hear any sounds indicating the presence of a train, and saw no lights. Allen insists that the gondola car into which they crashed was not observable within the beam of the automobile headlights, because of the elevation of the tracks; that he shouted a warning to Dr. Spohn, who was unable to stop before the collision.

The conductor testified that after the automobile struck the train he lighted a fusee and ran 45-car

lengths to the intersection. He then broke the air hose to prevent movement of the train, and stopped an automobile approaching from the east, and told the occupants to get an ambulance and a doctor.

The hood of Dr. Spohn's automobile was jammed under the body of the gondola. Allen sustained a fracture of the right hip and the neck of the femur, and received severe lacerations about the face resulting in permanent scars. At the time of trial his injured leg was a quarter of an inch shorter than the other, and further surgery was indicated.

The trial judge sitting without a jury concluded that plaintiff had failed to show any negligence on the part of defendant. Allen argues on appeal that it is negligence to permit an unlighted freight train to obstruct a heavily-traveled highway without giving motorists any warning of its presence; that defendant's operating crew was negligent in failing to use the lanterns, flares, and other signal devices with which the train was equipped.

The cases hold that the presence of a railroad train on a crossing is notice and warning to those using the highway, and that railroads will only be chargeable with negligence if there are unusual conditions which require additional warnings. *McParlan* v. *Grand Trunk Western R. Co.*, 273 Mich 527, 533; and *Esterline* v. *Kennicott*, 277 Mich 130, 133. See, also, *Simpson* v. *Pere Marquette Railway Co.*, 276 Mich 653, and authorities annotated in 15 ALR 901, 56 ALR 1114, 99 ALR 1454.

Plaintiff relies on the fact that the night was dark, the horizon black, as was the surface of the road and the gondola car blocking the crossing. This combination of circumstances is not unusual. He also claims that fog or mist at an elevated crossing on a heavily-traveled highway added to the risk. However, there is conflicting testimony as to these facts.

The trial judge relied on the *Simpson Case, supra.* In that case the driver of the automobile, after observing a crossing sign 500 feet from the track, had slowed down to 10 miles an hour, and was on the alert for the train. Notwithstanding this exercise of caution, recovery was denied. The trial judge here concluded that, unless he imposed a continuous and permanent duty greater than that required by statute or decision, he was unable to find proof of defendant's negligence. His conclusion was that no condition existed at the time of the collision that would require the imposition of additional duties upon defendant railroad company other than those required under ordinary conditions.

In cases tried by the court without a jury, we do not reverse unless the evidence clearly preponderates in the opposite direction. *Benjamin* v. *Bondy,* 322 Mich 35, 40, and *Davis* v. *Randall,* 322 Mich 195, 198.

The judgment is affirmed, with costs to appellee.

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

## SHAKESPEARE COMPANY *v.* LIPPMAN'S TOOL SHOP SPORTING GOODS COMPANY.

1. TRADE-MARKS AND TRADE NAMES—STATUTES—FAIR-TRADE AGREEMENTS—NONSIGNERS.

   State statute declaring that advertising, offering for sale or selling of a commodity which bears the trade-mark, brand, or name of the producer or owner and which is in fair and open competition with commodities of the same general class at a price that is less than that set by the producer or vendor is unfair competition and actionable at the suit of any person damaged thereby is unconstitutional as applied to persons who have not signed a so-called fair-trade agreement whereby they agree to abide by the producer's minimum prices on the products, since it constitutes a deprivation of property without due process of law (Const 1908, art 2, § 16; CL 1948, § 445.151 *et seq.*).

2. SAME—FUNCTION.

   Trade-marks and brand names, together with the good will attendant thereon, are protected in certain respects by act of Congress the function of a trade-mark being to designate the goods as the product of a particular manufacturer or trader and to protect his good will against the sale of another's product as his; to prevent confusion of the public regarding the origin of goods of competing vendors (15 USCA, § 1051 *et seq.*).

3. CONSTITUTIONAL LAW—FAIR-TRADE AGREEMENTS—MONOPOLY.

   Whether price-fixing arrangement is vertical or horizontal, important as bearing on question of whether a monopoly, trust or restraint of trade exists, is of no consequence in determining whether fair-trade statute bears any reasonable relation to public health, safety, morals or the general welfare (CL 1948, § 445.151 *et seq.*).

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5, 7] 52 Am Jur, Trademarks, Tradenames, and Trade Practices § 177.

[1, 4, 5, 7] Right of manufacturer, producer, or wholesaler to control resale price. 125 ALR 1335.

[1, 4, 5,7] Comment Note.—Application of State "fair trade" law to nonsigning reseller as violation of Federal anti-trust laws. 19 ALR2d 1139.

[2] 52 Am Jur, Trademarks, Tradenames, and Trade Practices §§ 2, 3.

[6] 36 Am Jur, Monopolies, Combinations, and Restaint of Trade § 28.

4. TRADE-MARKS AND TRADE NAMES—FAIR-TRADE AGREEMENTS—CUT-RATE SALES.

Trade-mark rights of trade-mark owner are not breached by sale of commodity at less than price set by owner, where sold by party who had not signed so-called fair-trade agreement to sell at price set by manufacturer (CL 1948, § 445.151 *et seq.*).

5. SAME—BUSINESS AFFECTED WITH PUBLIC INTEREST—PRICE-FIXING—GOOD WILL.

The business of manufacturing and selling trade-marked fishing tackle is not affected with a public interest, hence the State legislature may not interfere with the right of a party to fix the price at which the owner of such property may sell it merely to protect the good will of the manufacturer.

6. SAME — PRICE-FIXING AGREEMENTS — INTERSTATE COMMERCE — SIGNERS.

Price-fixing agreements involving or affecting interstate commerce applicable to signers thereof are legal, where permitted under local law (26 Stat 209; 50 Stat 693; CL 1948, § 445.151 *et seq.*).

7. SAME—PRICE-FIXING AGREEMENTS—INTERSTATE COMMERCE—NONSIGNERS.

Price-fixing agreements involving or affecting interstate commerce do not restrain nonsigners from cut-rate sales even when such agreements are permitted by local law (26 Stat 209; 50 Stat 693; CL 1948, § 445.151 *et seq.*).

Appeal from Wayne; Murphy (George B.), J. Submitted October 12, 1951. (Docket No. 81, Calendar No. 45,272.) Decided June 27, 1952.

Bill by Shakespeare Company, a Michigan corporation, against Lippman's Tool Shop Sporting Goods Company, a Michigan corporation, to restrain selling articles at lesser amount than required by fair trade agreement. Bill dismissed. Plaintiff appeals. Affirmed.

*Watson, Lott & Wunsch,* for plaintiff.

*Schmier & Schmier* (*John Sklar,* of counsel), for defendant.

DETHMERS, J. Plaintiff is a Michigan corporation, manufacturing in Michigan a line of fishing tackle and related equipment. Its products bear its trademark, brand or name. It advertises and sells its products, both in Michigan and nationally, through ordinary distributor, dealer and retail channels in fair and open competition with commodities of the same general class produced by others. Its products are sold and distributed in Michigan by about 500 dealers of whom over 400 have entered into written, so-called fair-trade agreements with plaintiff, pursuant to PA 1937, No 50 (CL 1948, § 445.151 *et seq.* [Stat Ann 1951 Cum Supp § 19.321 *et seq.*]), under and in accord with which it has established minimum prices on its products. Plaintiff has such contracts with dealers and has similarly fixed minimum prices in other States under comparable fair-trade laws there in effect.

Defendant is a sporting goods retailer in Detroit. It has not entered into a fair-trade agreement with plaintiff. It willfully and knowingly advertises, offers for sale and sells plaintiff's branded and trademarked articles at prices below the minimum fair-trade prices known by it to have been fixed thereon by plaintiff. This course of conduct plaintiff seeks to enjoin.

While admitting that it has made such sales, defendant claims that, because it is a nonsigner of a fair-trade agreement, as applied to the facts of this case, enforcement of the act against it would be violative of its rights under the equal protection and due process clauses of the Federal* and the due process clause of the State Constitutions† and, further, that the transactions in question were in or affected interstate commerce and, for that reason, subject only to Federal and not to State regulation,

* US Const, Am 14, § 1.—REPORTER.

† Mich Const (1908), art 2, § 16.—REPORTER.

so that the attempted price fixing by plaintiff violated the Sherman anti-trust law. Plaintiff appeals from an order dismissing its bill of complaint.

The trial court, desiring, as it stated, to dispose of the case solely on what it terms "the broader grounds" of constitutionality under the provisions of the State Constitution, treated the transactions involved, for the purpose of the motion before it, as being exclusively in intrastate as distinguished from interstate commerce. Recognizing that the constitutionality of similar legislation, as applied to signers and nonsigners of fair trade agreements alike, had been upheld in most of the States considering the question, *e.g., Bourjois Sales Corp.* v. *Dorfman,* 273 NY 167 (7 NE2d 30, 110 ALR 1411); *Max Factor & Co.* v. *Kunsman,* 5 Cal2d 446 (55 P2d 177); *Joseph Triner Corp.* v. *McNeil,* 363 Ill 559 (2 NE2d 929, 104 ALR 1435); *Ely Lilly & Co.* v. *Saunders,* 216 NC 163 (4 SE2d 528, 125 ALR 1308); *Weco Products Co.* v. *Reed Drug Co.,* 225 Wis 474 (274 NW 426); *Goldsmith* v. *Mead Johnson & Co.,* 176 Md 682 (7 A2d 176, 125 ALR 1339); *Johnson & Johnson* v. *Weissbard,* 121 NJ Eq 585 (191 A 873); and by the United States supreme court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 US 183 (57 S Ct 139, 81 L ed 109, 106 ALR 1476), the trial court, nevertheless, considered, as do we, that the better reasoned view is that of the Florida supreme court in *Liquor Store, Inc.,* v. *Continental Distilling Corp.,* 40 So2d 371, holding an act of that character unconstitutional. As applied to nonsigners of fair-trade agreements that is the only view consistent with our reasoning in *People* v. *Victor,* 287 Mich 506 (124 ALR 316). We there held a statute forbidding the giving of a premium with the retail sale of gasoline unconstitutional under Constitution 1908, art 2, § 16, as constituting a deprivation of property without due process of law for the reason that the legisla-

tion was outside the scope of the police power of the State inasmuch as it bore no reasonable relation to public morals, health, safety or the general welfare. Whether the statute prohibits, despite the absence of any contractual inhibition, the giving of such premium with a retail sale or prohibits the sale, by a nonsigner, of an article below the price fixed by the manufacturer is of small moment. The principle involved and the effect are the same. It is urged, however, that the instant case is distinguishable from the *Victor Case* in that it involves not alone the sale by defendant of an article owned by it, but as well "the wrongful appropriation of a person's property, to-wit, his good will and the recognized value of his trademarks and established brand names." This is followed by the suggestion that laws prohibiting theft, larceny or conversion do bear a relation to public morals and welfare and that, by the same token, so does the act in question. But is plaintiff's good will, trade-mark or brand name wrongfully appropriated or stolen by defendant by means of its cut-rate retail sales? It may be that they are adversely affected thereby as, indeed, they would be by a competitor's placing a better product on the market for less money. Does such adverse effect in and of itself constitute a violation of plaintiff's rights or a wrongful appropriation of its good will? We think not. Trade-marks and brand names, together with the good will attendant thereon, are protected in certain respects by act of Congress. 15 USCA, § 1051 *et seq.* The function of a trade-mark is simply to designate the goods as the product of a particular manufacturer or trader and to protect his good will against the sale of another's product as his; to prevent confusion of the public regarding the origin of goods of competing vendors. It was for that purpose that the law created a protective shield around trade-marks, brand names and the

good will connected therewith. See *Kroll Bros. Co.* v. *Rolls-Royce, Ltd.*, 126 F2d 495; *Smith* v. *Dental Products Co., Inc.*, 140 F2d 140, certiorari denied, 322 US 743 (64 S Ct 1146, 88 L ed 1576); *Hanover Star Milling Co.* v. *Metcalf*, 240 US 403 (36 S Ct 357, 60 L ed 713); *United Drug Co.* v. *Theodore Rectanus Co.*, 248 US 90 (39 S Ct 48, 63 L ed 141). Defendant's cut-rate sales have breached no such trade-mark rights of plaintiff. Plaintiff's trade-mark rights do not go as far as urged by it. *Sunbeam Corp.* v. *Wentling* (CCA), 192 F2d 7. They do not enable it to sell its cake and have it, too.

In seeking to distinguish this from the *Victor Case* Mr. Justice BUTZEL emphasizes that the latter involved horizontal price-fixing while here it is vertical. In the cases he cites and the many others on the subject the distinction between vertical and horizontal price-fixing arrangements is made as bearing on the question of whether a monopoly, trust or restraint of trade results and is pertinent to that question alone. The consideration of whether the price fixing be vertical, horizontal, or even diagonal, or whether the regulation relates to all of a certain type of commodity as in *Victor*, or only to a certain brand thereof as here, although relevant when the question of monopoly needs to be determined, is of no consequence in determining the point of difference between us, namely, whether the statute in question, as applied to nonsigners, bears any reasonable relation to public health, safety, morals or the general welfare. Neither is any relevancy to the latter question to be found in the interesting contemplation of whether the competition which most benefits the public is that between rival products or between retailers of the same product. If the act does not bear the mentioned relationship, then, as we held in *Victor*, it cannot be sustained as a lawful exercise of the State's police power, impairment of defendant's

rights under the due process clause results from its enforcement, and it is our duty to deny such enforcement and brand the act for what it is, unconstitutional.

Mr. Justice BUTZEL likewise distinguishes the *Victor Case* in that there the restriction was "automatic by legislative decree," while here, he states, it results from "voluntary agreement between the manufacturer and dealer." But defendant never entered into the agreement. As to it, the restriction is as "automatic by legislative decree" as in the *Victor Case*. The statement that the fair-trade act merely affords legislative protection to private contractual relations, true enough as relates to signers, overlooks the fact that the act ventures further, upon an unchartered sea of enforcement of contracts against those not party thereto. My Brother suggests that defendant's constitutional rights are not impaired by the statute because defendant is not obligated to buy or sell plaintiff's products if it does not desire to adhere to the minimum price fixed by plaintiff and enforced by statute. As much might have been said in the *Victor Case* in which the defendant was not obligated to engage in the business of buying and selling gasoline if he did not desire to comply with the restrictions of the statute.

Mr. Justice BUTZEL views the act as a valid exercise of the State's police power because, as he says, it is aimed at "destructive price cutting" and "the evils of a price war." Can it be said that by the process of reducing prices either war, destruction or evil are visited upon the public health, safety, morals or the general welfare? (That is the controlling question.) Such is not the concept upon which America's competitive economy was developed. It is further suggested by my Brother that the act serves, by placing an artificial weight on the one, to equalize the uneven race between the small

retailer and the large. While the relationship between that objective and the public health, safety, morals and the general welfare is hardly made to appear, there would be more force to the suggestion if my Brother did not limit its application, as he must under above noted decisions, to branded and trade-marked goods. Is not the survival of the small retailer made as difficult by the large retailer's cut-rate sales of bulk, unbranded and nontrade-marked staples as by the like sale of branded and trade-marked goods? The difference, if any, is scarcely such as to render the restriction on price-cutting valid in the one instance and invalid in the other. The difference in effect upon the general welfare in the 2 cases is difficult to discern.

Mr. Justice BUTZEL appears to concede that the business in question is not affected with a public interest and, clearly, it is not. See *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas,* 262 US 522 (43 S Ct 630, 67 L ed 1103, 27 ALR 1280); *Williams* v. *Standard Oil Co. of Louisiana,* 278 US 235 (49 S Ct 115, 73 L ed 287, 60 ALR 596). He does not question that, ordinarily, a person has the right to fix the price at which he sells his own property. That such is his right under the due process clause of the Federal Constitution, and that the power of a State legislature to restrict that right is limited to instances in which the business involved is affected with a public interest was held in *Tyson & Brother—United Theatre Ticket Offices, Inc.,* v. *Banton,* 273 US 418 (47 S Ct 426, 71 L ed 718, 58 ALR 1236); *Ribnik* v. *McBride,* 277 US 350 (48 S Ct 545, 72 L ed 913, 56 ALR 1327); *Williams* v. *Standard Oil Co. of Louisiana, supra.* The nub of Mr. Justice BUTZEL'S contention, however, is that, despite that general rule, the minimum price restriction imposed by statute against nonsigners is sustainable as relates to branded and trade-marked articles because it there-

by protects the good will of the manufacturer; that this is a substantial property right which may be protected by legislative enactment. Against what action may the State protect it? Against theft, slander, simulation and the like, no doubt. The relationship between State action in that field and public health, safety, morals and the general welfare is obvious and has long been recognized. The attribute of good will which constitutes the property right which the State may, in certain respects, protect, is not the nebulous something calculated merely to inflate the owner's ego or satisfy his pride, but, rather, its propensity for producing business or sales. May every injury thereto or adverse effect be prevented by statute? This appears to be Mr. Justice BUTZEL's contention. The sales and business accruing to plaintiff by reason of its good will would undoubtedly be affected adversely by the manufacture and sale of a competitive product. Can it be contended successfully that a State statute prohibiting such competition and thus protecting plaintiff's sales accruing from its good will would bear a reasonable relation to public health, safety, morals and the general welfare? Obviously the answer must be no.

Price-fixing agreements involving or affecting interstate commerce were illegal under the Sherman anti-trust law (26 Stat 209) until certain exceptions were carved out under the amendment of section 1 thereof by the Miller-Tydings act of 1937 (50 Stat 693 [15 USCA, § 1]). See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 US 384 (71 S Ct 745, 95 L ed 1035, 19 ALR2d 1119). In that case it was held that the Miller-Tydings exemption from the operation of the Sherman act applies only to cases of signers of fair-trade agreements, when permissible under local law, but does not extend to cases of nonsigners of such agreements; that, lacking, thus, the

approval of Congress, the provision of the State statute making the fixed minimum resale price binding on nonsigners is invalid as relates to interstate commerce. Plaintiff seeks to avoid the effect of that holding on the ground that the transactions here involved are solely in intrastate commerce because they represent the sale by defendant in Michigan of articles manufactured by plaintiff in Michigan. This overlooks the full reach of the *Schwegmann* decision. In that case plaintiff shipped, from out-state, and sold its product to wholesalers in Louisiana who resold it, in intrastate commerce, to retailers and the latter sold it, in intrastate commerce to retail customers. In denying plaintiff the right to restraint of such retail sales at cut-rate prices the court looked to the effect on interstate commerce of the restraints on the intrastate, retail sales and held the latter, accordingly, subject to the reach of the Sherman act. Similarly, in *Sunbeam Corp.* v. *Civil Service Employees' Co-op Ass'n* (CCA), 192 F2d 572, plaintiff contended that, because defendant conducted only a local business, its retail sales were all in intrastate commerce subject to the State fair trade law and beyond the reach of the Sherman act. There, as in the *Schwegmann Case,* the goods originally came from without the State but came to rest in the hands of the wholesalers to whom plaintiff had sold, were resold by them in intrastate commerce to retailers and by the latter in intrastate commerce to retail customers. The court held that under the *Schwegmann* decision the local retail sales so affected interstate commerce as to come within the Federal purview, saying:

"It is the interstate character of Sunbeam's commerce that is crucial and governing for it is Sunbeam's price-fixing scheme which constitutes a trade restraint. This is the plan Sunbeam seeks to make nationwide by enforcing the nonsigner provisions

of local law in each of the States where a fair-trade act has been established. This marketing plan is quite similar to the one struck down by the supreme court in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.* (1911), 220 US 373 (31 S Ct 376, 55 L ed 502), where the pressure was applied against local stores making local sales."

To the same effect is *Lambert Pharmacal Co.* v. *Roberts Bros.*, 192 Or 23 (233 P2d 258). In that case the court said:

"And it is enough to bring the transactions complained of within the scope of the Sherman act that they substantially affect interstate commerce. * * *

"Nor does the fact that price-fixing or price maintenance applies only to intrastate retail sales remove the conduct from the reach of the statute if such conduct be 'an inseparable element of a larger program dependent for its success upon activity which affects commerce between the States.' *United States* v. *Frankfort Distilleries, Inc.*, 324 US 293, 297 (65 S Ct 661, 663, 89 L ed 951)."

In the instant case plaintiff has placed in operation a price-fixing scheme, national in scope, of which the Michigan phase is but a part. Success of the attempt at restraint on local sales is dependent upon success thereof as applied to national sales, and vice versa, so long as plaintiff's products are in fair and open competition with the products of others manufactured elsewhere than in Michigan. The restraint on local retail sales is a cog in the wheel imposing restraints on national sales. As such it affects interstate commerce and, accordingly, comes within the inhibition of the Sherman act. See 61 Yale Law Journal, pp 381, 396–398, and 46 Illinois Law Review, pp 349, 380–382.

Affirmed, with costs to defendant.

NORTH, C. J., and CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with DETHMERS, J.

BUTZEL, J. (*concurring*). The facts as far as developed by the pleadings and without a hearing have been presented by Mr. Justice DETHMERS. The sole question decided by the trial court is whether a Michigan manufacturer may invoke the Michigan fair-trade law as to sales of its products by a nonsigning retailer. I dissent from his holding in so far as it holds that the Michigan fair-trade act is invalid as to nonsigners of fair-trade agreements in intrastate commerce.

The legislatures looking after the general welfare have adopted laws in the various States approving "fair trading" and the courts have almost uniformly held them constitutional. Mr. Justice DETHMERS has cited the decisions of the highest courts in 7 States and the United States supreme court to that effect. There should, also, be added the following decisions: *Fisher, Inc.*, v. *Canfield, Colorado Dist. Ct. for City and County of Denver,* No A 22837, Div 2 (CCH Trade Regulation Service, par 52,611); *Broff* v. *Silver Liquor Stores, Inc.,* 5 Conn Supp 288; *Auto Rental Co., Ltd.*, v. *Lee,* 35 Hawaii 77; *Pepsodent Co.* v. *Krauss Co.,* 200 La 959 (9 So2d 303); *W. A. Sheaffer Pen Co.* v. *Barrett,* 209 Miss 1 (45 So2d 838); *Rayess* v. *Lane Drug Co.,* 138 Ohio St 401 (35 NE2d 447); *Borden Co.* v. *Schreder,* 182 Or 34 (185 P2d 581); *Welch Grape Juice Co.* v. *Frankford Grocery Co.,* 36 Pa Dist and Co 653; *Miles Laboratories, Inc.*, v. *Seignious,* 30 F Supp 549 (applying South Carolina law); *Miles Laboratories, Inc.*, v. *Owl Drug Co.,* 67 SD 523 (295 NW 292); *Frankfort Distillers Corp.* v. *Liberto,* 190 Tenn 478 (230 SW2d 971); *Sears* v. *Western Thrift Stores of Olympia, Inc.,* 10 Wash2d 372 (116 P2d 756). Thus in a total of 20 State or Federal and Territorial courts, the nonsigner provision has

been upheld, and in but 1 jurisdiction—Florida—has it been declared unconstitutional. In the other 27 States in which fair trade laws are now in existence, they seem to have been applied without discussion of their constitutionality. For example, see *Iowa Pharmaceutical Association* v. *May's Drug Stores, Inc.*, 229 Iowa 554 (294 NW 756).

Examining the 1 dissent in the field, the Florida decision in *Liquor Store, Inc.*, v. *Continental Distilling Corp.*, 40 So2d 371, we find that the controlling reason for the court's determination was its re-examination of the economic soundness of fair-trade pricing in the light of changed economic conditions. The Florida holding was rejected in 2 later decisions, which, incidentally, were rendered at a time of similar economic conditions. The Mississippi and Tennessee courts, while noting the Florida dissent, aligned themselves with the majority authority on the issue and refused to re-examine the position of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 US 183 (57 S Ct 139, 81 L ed 109, 106 ALR 1476), and the leading State cases subsequent thereto.

Our own determination must, of course, be made after an examination of our own Constitution and governing law. However, believing as we do that the decisions of our sister States on identical issues, particularly when rendered in such overwhelming numbers, and the decision of the supreme court of the United States, should not be lightly disregarded, we should be inclined to rest our decision on the weight of authority alone if there were not reasons just as compelling for our ruling.

There is a presumption of constitutionality of every act of the Michigan legislature that entitles it to the highest respect by this Court. It is not our province to repeal a law which is constitutionally sound although it represents a change in the eco-

nomic public policy of the State of which certain of us may or may not approve. The only question is whether the restrictions of the statute have a reasonable relation to a proper purpose, in this case, the general welfare.

In *People* v. *Victor,* 287 Mich 506 (124 ALR 316), we laid down the test of reasonability of an economic regulation (syllabi):

"The right to engage in any business not harmful to the public is guaranteed by the Constitution.

"A business practice which has no detrimental effects to the public health, morals, safety and general welfare may not be prohibited by the legislature without resulting in a deprivation of property and liberty without due process of law.

"The constitutional right to engage in business is subject to such regulation as may be necessary to the public welfare, health, morals and safety."

Justice DETHMERS relies heavily on *People* v. *Victor* as authority that the instant legislation, attempting to regulate price, and bearing no reasonable relation to public health, morals, safety or the general welfare is not a legitimate exercise of the police power and violates the due process clause of our Constitution. The result of *People* v. *Victor,* however, is not controlling here.

At the outset, I emphasize that we are here concerned with *vertical* restrictions as to prices imposed by the manufacturer, not with *horizontal* agreements between retailers to regulate prices in intrastate commerce. Enforcement of the statute in the *Victor Case* which forbade the giving of a premium with the retail sale of gasoline, if we assume its result to be minimum price-fixing (the Court treated it as the forbidding of an unfair trade practice) would have had the effect of enforcing a *horizontal* price-fixing agreement between retailers of gasoline and without the consideration of the interests of the manufac-

turer. It is on this distinction that many courts have upheld fair-trade laws against constitutional objections going to the scope of the police power. See *Joseph Triner Corp.* v. *McNeil,* 363 Ill 559 (2 NE2d 929, 104 ALR 1435); *Pepsodent Co.* v. *Krauss, supra; W. A. Sheaffer Pen Co.* v. *Barrett, supra; Ely Lilly & Co.* v. *Saunders,* 216 NC 163 (4 SE2d 528, 125 ALR 1308); *Sears* v. *Western Thrift Stores of Olympia, Inc., supra,* for instances where this distinction was made.

*People* v. *Victor* concerned the regulation of all of a certain type of commodity. The fair trade acts apply only to those commodities in "fair and open competition" with other commodities of the same general class and do not serve to stifle the most desirable competition, that between different brands of the same commodity. Manufacturer's price-fixing under the authority of the fair-trade act concerns only all of one brand or trade-marked commodity; not all of the commodity itself whatever its origin. Price-fixing is allowed for those commodities which are in fair and open competition with those produced by others. See dissent of Mr. Justice Holmes in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 US 373 (31 S Ct 376, 55 L ed 502); for an early statement of the view that it is an economic fallacy to assume that the competition which benefits the public is between retailers of the same product; it is between rival articles, a competition in excellence. See, also, discussion in *Ely Lilly & Co.* v. *Saunders, supra.*

Unlike the controls struck down in the *Victor Case,* control of minimum price under the fair trade laws is not automatic by legislative decree but comes about as a result of voluntary agreement between the manufacturer and dealer which is then enforced against a nonsigner with notice as a means of protecting the value of the manufacturer's trade-mark

or brand. The nonsigner is neither obligated to buy or sell the manufacturer's products if he does not wish to adhere to such voluntarily-established prices. For this reason, many courts have held that the result of the fair-trade act is merely the legislative protection of a private contractual relation. See *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp., supra; Max Factor & Co.* v. *Kunsman,* 5 Cal 2d 446 (52 P2d 177); *Pepsodent Co.* v. *Krauss Co., supra; Frankfort Distillers Corp.* v. *Liberto, supra;* and *Weco Products Co.* v. *Reed Drug Co.,* 225 Wis 474 (274 NW 426).

In the *Victor Case* we emphasized that there was no showing that the blanket prohibition of the practice of giving premiums would tend to alleviate destructive price cutting; indeed, the Court implied that a statute directly aimed at the evils of a gasoline price war might be constitutional. Here, there is a considerable body of opinion to indicate that the use of brand name products for "loss leaders" and destructive price cutting is an evil which may validly be regulated by the manufacturer with the aid of the State through the fair-trade laws.

The bases of the fair-trade regulations under the police power are 2: (1) Right of the plaintiff-manufacturer to be free from injury to the good will of his business as a result of price cutting on distinctive goods; (2) Right of the plaintiff to protect one retailer from the price-cutting tactics of another with regard to such product, as a means of promoting that good will.

The Michigan fair-trade law was passed, like those in the vast majority of States, to protect the manufacturer in the sale of his individual product, when identified by some kind of distinctive markings on the product or package delivered to the consumer. The protection of the good will of the manufacturer is a legitimate object of the fair-trade act. It is not

an agreement between retailers to fix a price. It protects the manufacturer who seeks to maintain the excellence of his product. The public is not obliged to buy it; it may purchase competitive products. It prevents price wars in a particular product which are harmful or disastrous to the manufacturer's business. It also protects the small retailer, who must meet the competition of the larger store dealing in general merchandise and which is able to cut prices below cost of fair-trades merchandise or sell it at a minimum or no profit, and thus attract trade, possibly permanently, for the purchase of other articles. The use of what are commonly known as "loss leaders" thus may become ruinous to the small retailer. It necessarily will have a harmful effect on the manufacturer who is trying to protect his business.

Mr. Justice DETHMERS argues that plaintiff's trade-mark rights were not breached by defendant's cut-rate sales. It is true that a cut-rate sale does not represent the theft or appropriation of a trade-mark in itself, but it represents an injury to the good will attached thereto which might be as serious to the manufacturer. There exists, therefore, a substantial property right which may be protected by the legislative enactment. The United States supreme court expressed itself on the subject in the *Old Dearborn Case, supra,* as follows:

"Nor is section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with the commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or good will that the mark symbolizes. The good will is property in a very real sense, injury to which, like injury to any other

species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, without his consent and authority.' *McLean* v. *Fleming,* 96 US 245, 252 (24 L ed 828). 'Courts afford redress or relief on the ground that a party has a valuable interest in the good will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Star Milling Co.* v. *Metcalf,* 240 US 403, 412 (36 S Ct 357, 60 L ed 713). The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity had been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statutes denominated 'unfair competition.' See *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Cooperative Marketing Ass'n,* 276 US 71, 91, 92, 96, 97 (48 S Ct 291, 72 L ed 473)."

See, to similar effect: *Max Factor & Co.* v. *Kunsman, supra; Ely Lilly & Co.* v. *Saunders, supra; Sears* v. *Western Thrift Stores of Olympia, Inc., supra.* I conclude that this legislation aids the manufacturer in the protection of a valuable property and contractual right and, therefore, unlike the legislation we struck down in the *Victor Case,* such regulation is proper for the public welfare.

Defendant argues that the Michigan fair-trade law constitutes a discriminatory protection of only one class of commodities against price cutting; that it is merely an attempt to fix prices for the private benefit of one class as against others. Does the protection of brand, trade-marked, or otherwise distinctive merchandise against price cutting amount to an unconstitutional classification? In ordinary pursuits unaffected with a public interest, a classification which confers upon one category of businessmen special privileges is discriminatory and invalid as class legislation. See *People, ex rel. Valentine,* v. *Berrien Circuit Judge,* 124 Mich 664 (50 LRA 493, 83 Am St Rep 352); *People, ex rel. Attorney General,* v. *Sperry & Hutchinson Co.,* 197 Mich 532 (LRA 1918A, 797); *Peninsular Stove Co.* v. *Burton,* 220 Mich 284; and *Levy* v. *City of Pontiac,* 331 Mich 100. Such, however, is not the present case.

There are several decisions from other jurisdictions applying similar constitutional provisions to fair-trade laws. In *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp., supra,* it was held that such classification was not invalid, for, in fact, trade-marked and branded goods are in a class by themselves. In *Max Factor & Co.* v. *Kunsman, supra; Joseph Triner Corp.* v. *McNeil, supra; Ely Lilly & Co.* v. *Saunders, supra;* and *Miles Laboratories, Inc.,* v. *Owl Drug Co., supra,* this objection was also held to be unfounded. The Illinois court stated in the *Joseph Triner Case:*

"[The classification is] based on a real and substantial difference having a rational relation to the subject of the particular legislation."

There is no problem under the equal protection clause. Other courts, and numerous ones, merely followed the rule of the *Old Dearborn Case* without further discussion of the issue. The Florida court

was the sole dissenting voice when it held that trade-marked goods were being given special protection unconstitutional in nature.

I am in accord with the holding of the *Old Dearborn Case* and those following it. The manufacturer possesses a property right in identifiable goods which does not exist in nonidentifiable goods and this may properly be made the basis of regulation protecting one class and not the other.

Defendant argues that the fair-trade law represents an unlawful delegation of price-fixing power to private persons. That legislative power may not be delegated in Michigan was settled by *G. F. Redmond & Co.* v. *Michigan Securities Commission,* 222 Mich 1; *Chemical Bank & Trust Co.* v. *County of Oakland,* 264 Mich 673; and *Argo Oil Corp.* v. *Atwood,* 274 Mich 47. However, we do not have here an instance of such unlawful delegation.

I find unfounded defendant's argument that—

"Except for the Florida court, *supra,** little consideration is given in the decisions to the fact that the effect of the act is to delegate price-fixing power to individual manufacturers or suppliers without any standards or criteria controlling the exercise of such powers."

In *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp., supra,* it was stated that no unlawful delegation of power existed as only sales by the manufacturer made subsequent to the establishment of the fair-trading system could be subject to its provisions, and that no retailer therefore needed to be bound by it unless he so desired. Similar contentions were rejected in *Goldsmith* v. *Mead Johnson & Co.,* 176 Md 682 (7 A2d 176); *W. A. Sheaffer Pen Co.* v. *Barrett, supra; Johnson & Johnson* v. *Weiss-*

* Reference is to *Liquor Store, Inc.,* v. *Continental Distilling Corp.*—REPORTER.

*bard*, 121 NJ Eq 585 (191 A 873); *Bourjois Sales Corp.* v. *Dorfman*, 273 NY 167 (7 NE2d 30, 110 ALR 1411); *Weco Products Co.* v. *Reed Drug Co., supra; Joseph Triner Corp.* v. *McNeil, supra;* and *Ely Lilly & Co.* v. *Saunders, supra.* Florida was again the only dissenter when it held that there was no review of the act of price fixing and it was, therefore, an illegal delegation.

The standards governing the delegation of power are inherent in the act itself. The manufacturer's prices are controlled by competition or the act is not brought into play. Fair trading of articles is permissible only when there exists "free and open competition." We have here a grant of power over the conduct of others growing out of a basic property right, and then and only then may it be exercised. I am, therefore, in accord with majority authority that there has been no unlawful delegation of price-fixing power.

It has been said that freedom of contract of the retailer is violated by the nonsigner provision of the act. But no retailer is obliged to buy any identifiable commodity and upon doing so with knowledge he should be held to have accepted the consequence. He is only punished if he advertises at below fair-trade prices wilfully and knowingly. He is privileged to sell if the commodity is not identified with its trade-mark or brand name on the commodity or the package or wrapper. See *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp., supra; W. A. Sheaffer Pen Co.* v. *Barrett, supra; Johnson & Johnson* v. *Weissbard, supra;* and *Sears* v. *Western Thrift Stores of Olympia, Inc., supra,* for further discussion.

Defendant has other objections going to the validity of this legislation as an exercise of police power under the due process clause. It contends that the legislative labeling of simple price reduction as "un-

fair competition" is not binding on the court. This might well be true if there were shown us "simple" price reduction with no other circumstances; but price reduction under circumstances which tend to injure a property right of the manufacturer may properly be a subject of regulation. For the same reason, the issuance of an injunction under these circumstances may be made mandatory by legislative fiat without a violation of the due process clause if the legislature feels such to be desirable.

I have carefully examined all of defendant's arguments going to the constitutionality of the statute herein and have rejected them for the reasons stated above or set forth in other leading cases I have cited on identical issues, which it would be useless to further review. Our conclusion then should be that this act is a valid exercise of the police power of this State as applied to wholly intrastate transactions; that it is wholly constitutional and is properly enforceable by a court of equity in cases coming within its purview. I am, therefore, in total disagreement with the decision of the trial court which was based on the constitutionality of the fair-trade act under the Constitution of the State of Michigan.

The question of the validity of the application of the fair-trade act under the laws of the United States was first raised in the briefs of both parties in the instant case, and I am in accord with the opinion of Mr. Justice DETHMERS to the extent that it holds that the act cannot be enforced against nonsigners of fair-trade agreements concerning articles sold in interstate commerce. This was the holding of the majority of the United States supreme court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 US 384 (71 S Ct 745, 95 L ed 1035, 19 ALR2d 1119). Additional cases cited by Mr. Justice DETHMERS would indicate that all of plaintiff's goods sold in a nationwide distribution program are to be construed

as goods sold in interstate commerce even though the actual sale was an intrastate one, and thus that the *Schwegmann* decision applies to plaintiff's goods sold in Michigan, since plaintiff sold in interstate as well as intrastate commerce, as well as to those sold out of the State. A very recent case decided by an intermediate appellate court in California is to a like effect. *Cal-Dak Co.* v. *Sav-On Drugs, Inc.*, 110 Cal App2d 204 (242 P2d 333).

There is legislation pending in the United States Congress which would legalize enforcement of fair-trade agreements against nonsigners in interstate commerce, and restore the situation which existed before the *Schwegmann* decision, making fair-trade laws of a State effective also as to fair-trade articles of interstate commerce sold within the State. If such a law is passed the Michigan fair-trade law, if upheld under the State Constitution, would be effective in both intrastate and interstate commerce. The decision, as to its validity under the Michigan Constitution is, therefore, important, and it can be only assailed at the present time on the ground that it offends the present Federal law as set forth in the *Schwegmann Case*.

For the reasons above stated, I concur in the result reached by Mr. Justice DETHMERS.

REID, J., concurred with BUTZEL, J.

## NATIONAL BANK OF DETROIT *v.* DEPARTMENT OF REVENUE.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—NATIONAL BANK—STATE SALES TAX.

   Contention that since plaintiff national bank is a Federal instrumentality the imposition of a State sales tax upon purchases and sales of tangible personal property made by it is in conflict with its Federal statutory and constitutional immunity is not discussed, where not presented on appeal (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272).

2. TAXATION—SALES TAX—ECONOMIC BURDEN ON CONSUMER.

   It was the intent of the legislature that the economic burden of the State tax on retail sales of tangible personal property be passed on chiefly to the consumer (CL 1948, § 205.23).

3. SAME—SALES TAX—ECONOMIC BURDEN ON RETAILER.

   Economically speaking, the State general sales tax is a tax on the privilege of doing a retail business in this State by virtue of the fact that the collection of such tax is in some degree an economic burden upon the retailer (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272).

4. SAME—SALES TAX—PRIVILEGE TAX ON RETAIL SALES.

   The State general sales tax is a privilege tax imposed upon the privilege of making retail sales, measured by the gross proceeds of such sales, less deductions allowed by statute and the use tax is imposed upon the privilege of using, storing

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 812.
51 Am Jur, Taxation § 254.
[2, 3, 4] 47 Am Jur, Sales and Use Taxes §§ 2, 14.
[5] 47 Am Jur, Sales and Use Taxes § 42.
[6] 51 Am Jur, Taxation § 408.
[7] 51 Am Jur, Taxation § 304.
[8] 27 Am Jur, Income Taxes § 109.
[9] 16 Am Jur, Declaratory Judgments § 49.
[9] Tax questions as proper subject of action for declaratory judgment. 132 ALR 1108.
[10] 16 Am Jur, Declaratory Judgments § 75.
[10] Declarations of rights or declaratory judgments. 12 ALR 52, supplemented 19 ALR 1124; 50 ALR 42; 68 ALR 110, and 87 ALR 1205.

and consuming tangible personal property brought from out of the State after it has come to rest, being intended to reach purchases not covered by the sales tax act (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 205.91 *et seq.*).

5. SAME—SALES TAX—USE TAX.

The presence of the State use tax in the State tax system supports the proposition that retailers are used only as a conduit or means of collection from consumers of a sales tax, since the 2 acts imposing the 2 taxes intercorrelate and are complementary (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 205.91 *et seq.*).

6. SAME—REAL TAXPAYER.

The person liable for a tax, primarily, cannot always be said to be the real taxpayer, since the real taxpayer is the one ultimately liable for the tax itself.

7. COURTS—CONSTRUCTION OF TAX STATUTES.

The determination of a State supreme court as to the incidence of a tax imposed by the State has great weight with the supreme court of the United States, when it follows logically the language of the act.

8. TAXATION—SALES TAX DEDUCTIONS—INTERNAL REVENUE ACT.

Amounts paid for sales tax by a consumer to his vendor may be deducted under the internal revenue law the same as if the tax had been imposed upon and paid by the consumer (26 USCA, § 23[c] [3]).

9. ACTION—ACTUAL CONTROVERSY—NATIONAL BANKS—STATE SALES TAX—IMMUNITY.

Whether or not national banks can assert Federal immunity from State sales and excise taxes, regardless of whether or not the legal incidence of the tax falls upon such a bank is a justiciable question determinable under the declaratory judgment act, since there is an actual controversy as to whether there is or is not immunity from the economic burden of the tax (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 691.501 *et seq.*).

10. COSTS—PUBLIC QUESTION—NATIONAL BANKS—IMMUNITY FROM STATE SALES TAX.

No costs are allowed in suit under declaratory judgment act to determine whether or not a national bank was immune from payment of State sales tax on purchases and sales made by it of tangible personal property, a public question being

involved (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 691.501 *et seq.*).

Appeal from Wayne; Ferguson (Frank B.), J. Submitted April 16, 1952. (Docket No. 19, Calendar No. 45,340.) Decided June 27, 1952.

Bill by National Bank of Detroit against Department of Revenue of the State of Michigan for declaration of rights relative to liability of plaintiff for sales tax. Order striking certain parts of bill not relating to plaintiff's operation of restaurant business and other sales at retail. Plaintiff appeals. Reversed and remanded.

*Dickinson, Wright, Davis, McKean & Cudlip,* for plaintiff.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for defendant.

BUTZEL, J. Plaintiff, National Bank of Detroit, on behalf of itself and also of all national banking associations in Michigan, filed a petition under the declaratory judgment act (PA 1929, No 36 [CL 1948, § 691.501 *et seq.* (Stat Ann § 27.501 *et seq.*)]) for a declaration of rights as to their liability for payment of Michigan sales tax, alleging that the provisions of the Michigan sales tax act (PA 1933, No 167, as amended [CL 1948, § 205.51 *et seq.* (Stat Ann 1950 Rev § 7.521 *et seq.*)]) conflict with section 5219 of the Revised Statutes of the United States (12 USCA, § 548) as to retail purchases made by plaintiff from Michigan vendors, and to retail sales made by plaintiff to Michigan vendees. Defendant, Michigan department of revenue, is charged with the administration of the sales tax system. Prior to

July 1, 1949, it was recognized that sales of personal property at retail both to and by national banking associations were exempt from the imposition of the sales tax. However, since the sales tax act was amended by PA 1949, No 272, it has been interpreted to mean that both types of sales are subject to the tax. It is alleged, and not denied, that without paying such sales taxes, plaintiff would be unable to purchase in Michigan personal property necessary for its business; and that it is also required to collect such tax from its vendees whether in the conduct of running a restaurant for its employees or reselling personal property it acquires by foreclosure of liens or otherwise in the conduct of its business.

Plaintiff contends that it is a Federal instrumentality and that the imposition of such sales tax is in conflict with its Federal statutory and constitutional immunity. That question is not presented on this appeal so we shall not discuss it.

Defendant in a motion alleged, and the trial court found, that as plaintiff is not the taxpayer under the sales tax act, and is not the real party in interest, it is not entitled to institute an action to the extent of determining whether or not taxes could be levied on sales to it. Accordingly, an order was entered dismissing that portion of plaintiff's petition concerned with the imposition of the sales tax on sales to plaintiff by Michigan vendors. Plaintiff appeals from that order.

Provisions of the sales tax act material to the present issue are (as amended by PA 1949, No 272):

"Sec. 1. That when used in this act:

"(a) The term 'person' includes any individual firm, copartnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, State of Michigan, county, or any

other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. * * *

"(1) The word 'taxpayer' means any person subject to any tax hereunder. * * *

"Sec. 2. There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent. of the gross proceeds thereof, plus the penalty and interest when applicable as hereinafter provided, less deductions allowed in sections 4 and 4a. * * * The taxes levied hereunder shall be a personal obligation of the taxpayer. * * *

"Sec. 4. In computing the amount of tax levied under the provisions of this act for any month, * * *

"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.

"Sec. 4a. No person subject to tax under this act need include in the amount of his gross proceeds used for the computation of the tax any sales of tangible personal property [enumerating numerous exemptions not material here]. * * *

"Sec. 23. No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly, or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself

by adding to his sale price any tax levied hereunder: Provided, however, That no person other than the State may enrich himself or gain any benefit from the collection or payment of such tax."

Other sections of the act, not material here, concerning the administration and collection of the tax, consistently refer in the context to the "taxpayer" as the retailer. It is alleged and not denied, however, that the economic burden of the tax is always passed on to the consumer, and that such was the intent of the legislature when formulating the sales tax act, as evidenced by section 23 thereof, *supra* (CL 1948, § 205.73, as amended by PA 1949, No 272 [Stat Ann 1950 Rev § 7.544]).

It is significant that the Michigan department of revenue has stated its understanding of the true incidence of the tax in regulation 22 of its rules and regulations, as follows:

"A taxpayer must include the sales tax as part of the selling price of tangible personal property sold by him. He is not required to state the tax as a separate item to the consumer, but he may not advertise or hold out to the public in any manner directly or indirectly that the tax is not considered as an element in the price to the consumer."

Although exemptions from the operation of the sales tax are now stated in sections 4 and 4a (CL 1948, §§ 205.54, 205.54a, as amended by PA 1949, No 272 [Stat Ann 1950 Rev §§ 7.524, 7.525]), concerning permissible deductions from gross proceeds, prior to 1949 there was a provision in section 4, subd (b), which read in part:

"As a consumer, the United States * * * shall not be liable for the payment of the tax." *

It is obvious from a reading of regulation 22 that the change in the wording of section 4 was made

* See CL 1948, § 205.54, prior to amendment.

merely for the purpose of clarity in the operation of the act and did not change its substantive effect.

The parties discuss at some length whether or not an actual case and controversy exists here; who is the real party in interest in the action, retailer or consumer; whether the retailer should not have been the party plaintiff; and whether or not plaintiff is entitled to seek a declaration of rights under the declaratory judgment act. The main question presented in this appeal is whether a justiciable question is presented, when the court is asked to consider the economic realities of the situation, and treat the plaintiff as the real "taxpayer" under the Michigan sales tax act, for the purposes of an action in which it claims immunity as a Federal instrumentality.

We assume that the direct *legal* incidence of the Michigan sales tax act falls upon the retailer. Indeed, no other conclusion can be reached after examining carefully the method in which the sales tax operates. It is expressly termed a tax on gross proceeds and is paid to defendant in bulk, not per transaction, by the retailer who is entitled to a discount on the amount collected and paid to defendant. The retailer is personally obligated for the payment of the tax due. However, he is authorized to collect an amount equal to the tax levied by adding it to the purchase price of his goods, and he is forbidden to hold out to the consumer that such is not being done. It is, therefore, clear that it was the intention of the legislature that the general sales tax is a tax whose economic burden falls chiefly on the consumer. That the collection of such tax from the consumer is in some degree an economic burden upon the retailer cannot be denied and it is in this sense, economically speaking, that the general sales tax is a tax on the privilege of doing a retail business in the State. It may seem paradoxical to say that the re-

tailer only is an interested party when there is properly and legally added to the sales price to the consumer the 3% sales tax on almost every purchase and this amount is remitted to the State by the retailer after the deduction of a discount.

We made this economic distinction in *C. F. Smith Co.* v. *Fitzgerald,* 270 Mich 659. Therein we said, in answer to a challenge to the validity of the chain store tax (pp 676, 677, 685, 686):

"The tax is not void because it constitutes double taxation. The tax in question is a license tax,—a tax upon the privilege of operating chain stores or mercantile establishments. It is contended it constitutes double taxation because there is already imposed under the law of Michigan a sales tax based upon the amount of business done. PA 1933, No 167. The tax imposed by PA 1933, No 265 is upon the privilege to operate chain stores. *The sales tax is a tax imposed upon consumption, a tax upon commodities sold, a tax which is usually and ordinarily paid not by the person who operates the business, but by the customer who purchases and pays for merchandise.* PA 1933, No 167, § 23. (Italics added.)
* * *

"The chain store tax is a franchise tax or fee imposed for the privilege of establishing, opening, maintaining or operating 2 or more stores. * * * The general sales tax is a privilege tax imposed upon the privilege of making retail sales, measured by the gross proceeds of such sales, less deductions allowed by statute."

Defendant relies on *City of Wyandotte* v. *State Board of Tax Administration,* 278 Mich 47, in which we considered the question as to whether sales to nonexempt individuals from municipally-operated utilities should be exempt from taxation. After finding that a municipality was not subject to the sales tax, we held that such sales were also exempt, saying (p 53):

"The tax is not imposed upon the consumer, but upon those 'engaged in the business of making sales at retail as hereinbefore defined,' et cetera (Section 2)."

The case refers to *C. F. Smith Co.* v. *Fitzgerald, supra,* and does not overrule it.

Subsequent Michigan cases reaffirmed the "legal incidence" doctrine, that the sales tax is a privilege tax exacted for the privilege of engaging in the business of selling tangible personal property and measured by the gross proceeds of such sales. However, none are determinative here. In *Montgomery Ward & Co.* v. *Fry,* 277 Mich 260, mail order sales in which the goods were sent from a mail order house in another State were held to be in the course of interstate commerce and beyond the taxing power of the State. In *Standard Oil Co.* v. *State of Michigan,* 283 Mich 85, it was held that the sales tax was not payable on Federal gasoline tax and that certain deductions would not be allowable on trade and quantity discounts. *City of Bay City* v. *State Board of Tax Administration,* 292 Mich 241, held that it was in the power of the State to impose the sales tax upon the operation of municipally-owned utilities when they are in the exercise of a proprietary function. In *Gardner-White Co.* v. *State Board of Tax Administration,* 296 Mich 225, we held that upon conditional sales the retailer should compute the tax on the full sale price and upon recapture of property for nonpayment of instalments there is no refund or right to credit. *Howard Pore, Inc.,* v. *State Commissioner of Revenue,* 322 Mich 49 (4 ALR2d 1041), dealt with the problem of how to measure "gross proceeds" when trade-in property was involved. It must be noted that none of these cases deal with a claimed Federal immunity, nor did consumers ask for an adjudication of their rights.

Before passing on to Federal decisions on this issue, however, it is well to note the existence of the Michigan use tax, PA 1937, No 94 (CL 1948, § 205.91 *et seq.* [Stat Ann 1950 Rev § 7.555(1) *et seq.*]). This has been held to be a tax for the privilege of using, storing and consuming tangible property brought from out of the State after it has come to rest. *Goebel Brewing Co.* v. *State Board of Tax Administration,* 306 Mich 222; *Western Electric Co.* v. *Department of Revenue,* 312 Mich 582. Its intent is to reach those purchases by Michigan consumers not reached by the sales tax act. The 2 acts peculiarly intercorrelate and in some respects the latter is complementary to the former. *Kress* v. *Department of Revenue,* 322 Mich 590. The presence of a use tax in our tax system lends further support to the proposition that retailers are used only as a conduit or means of collection from consumers of a sales tax; for when that method is not effective, other and more direct collection from the consumer is accomplished by the use tax if the purchase is made out of the State. This would be obviously unnecessary if the purpose of a sales tax were merely to exact the tax from Michigan retailers and the consumer was not a party in interest.

Counsel have cited numerous authorities from United States jurisdictions possessing similar sales tax acts. The most that can be said after a study of the authorities is that the courts are divided, and that even the decisions of an individual State may vary from the time to time.

We turn to the decisions specifically involving the immunity of Federal instrumentalities from such a tax to determine what theories have been applied, and most particularly to the decisions of the United States supreme court.

In an earlier case, *Williams* v. *Riley,* 280 US 78 (50 S Ct 63, 74 L ed 175), it was held that the pur-

chaser of motor vehicle fuel cannot question the constitutionality of a tax imposed on distributors, whereby the cost to him was enhanced. The distributor was legally liable for the tax, but the entire burden of the tax was passed on to the consumer. Six justices felt that no direct injury was threatened and that the purchaser had no standing. Three justices, however, dissented. In *Carpenter* v. *Shaw*, 280 US 363 (50 S Ct 121, 74 L ed 478), decided soon thereafter, however, it was held that the characterization given to a State tax by State courts or legislatures is not binding where a Federal right is concerned and did not relieve the court from considering the real nature of the tax and its effect upon a Federal right. The court went on to hold a tax on oil royalties actually a tax on real estate of the kind forbidden in certain Federal leases. A similar situation developed in *Stahmann* v. *Vidal*, 305 US 61 (59 S Ct 41, 83 L ed 41), where the court looked into the purpose of the Bankhead cotton act* and found that it was to place a burden on the producer thereof by taxation in an attempt to restrict production even though the ginner was given the legal responsibilty for collection and payment of the tax, and that the producer could maintain an action to challenge the act.

*Colorado National Bank of Denver* v. *Bedford*, 310 US 41 (60 S Ct 800, 84 L ed 1067), involved a Colorado "service tax" which assessed a percentage tax against users of safety deposit services. The banks were required to collect such taxes in a manner similar to that existing under the Michigan sales tax act today. It was held that the collection of the tax did not impose an unconstitutional burden on a Federal instrumentality. The court said, on p 52:

* 48 Stat 598.—REPORTER.

"The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the Federal instrumentality, the bank. The Colorado supreme court holds the user is the taxpayer. The determination of the State court as to the incidence of the tax has great weight with us, and, when it follows logically the language of the act, as here, is controlling."

*Alabama* v. *King & Boozer,* 314 US 1 (62 S Ct 43, 86 L ed 3, 140 ALR 615), held there was no immunity from paying added costs attributable to taxes on those who furnish supplies to the government and who have been granted no tax immunity even though the government by reason of the contract eventually bore the economic burden thereof, because cost-plus construction contracts had not been granted immunity by act of Congress. No question was raised as to who was the "real party in interest." That such a ruling was not intended to apply to Federal land banks was made clear by a holding in *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 US 95 (62 S Ct 1, 86 L ed 65). Involved was the North Dakota sales tax act* which is similar to the Michigan sales tax act with the additional provision that "Retailers shall add * * * to the sales price * * * and when added * * * shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts." The North Dakota court construed the sales tax as imposed upon the purchaser. The United States supreme court accepted the construction of the North Dakota court and exempted the Federal land bank from taxes paid on materials bought in aid of its lending functions.

* ND Laws 1937, ch 249, § 6.—REPORTER.

*United States* v. *County of Allegheny,* 322 US 174 (64 S Ct 908, 88 L ed 1209), and *Federal Land Bank of New Orleans* v. *Crosland,* 261 US 374 (43 S Ct 385, 67 L ed 703, 29 ALR 1), decisions in which it was held that the validity of the tax was not dependent upon the ultimate resting place of the economic burden of the tax, may be distinguished as both involved direct property taxes on instrumentalities of the Federal government.

The most recent decision as to the rights of the consumer claiming a Federal immunity was *Richfield Oil Corp.* v. *State Board of Equalization,* 329 US 69 (67 S Ct 156, 91 L ed 80). It is particularly significant because in previous cases involving privilege taxes measured by gross proceeds, the State court's interpretation of the effect of the tax was accepted. Here, however, the United States supreme court indicated that such was not the determining factor. The Richfield Oil Corporation argued that the tax was a tax on exports when placed on oil to be delivered out of the State. The California supreme court held that no question of exports was involved as the tax was levied on the retailer, who was authorized to collect the tax from the consumers, and that the tax was not laid on the consumer and not a tax on the sale or because of the sale. The question of whether the tax deprived the taxpayer of a Federal right, however, said the court, "turns not on the characterization which the State has given the tax, but upon its operation and effect."

*Carson* v. *Roane-Anderson Co.,* 342 US 232 (72 S Ct 257, 96 L ed 257), decided this year, held that all activities of the Atomic Energy Commission were exempt from the payment of Tennessee sales tax, by reason of a provision of the atomic energy act* granting such immunity. Although there appeared to be some doubt in the State court as to whether

* 60 Stat 755 (42 USCA, § 1801 *et seq.*).—REPORTER.

the taxes were to be considered as levied on the retailers who sold to the AEC or the persons who bought for the use of the AEC, this question was not mentioned by the court, who evidently assumed the determination to be immaterial when a Federal right was involved as decided in the *Richfield Case, supra.*

In sections 4 and 4a of the amended sales tax law, *supra,* certain persons, institutions, and articles are exempted from the sales tax and the proceeds from such sales need not be included in the returns to the State. The query arises, assuming sales to national banks are exempt from sales tax by Federal law, is not such immunity as effective as if it were expressly included in sections 4 and 4a *supra?* We see no reason why the effect of the immunity, whether granted by Michigan statute or by the Federal law, should not be the same.

It is of interest to note that the internal revenue code permits the deduction of the amounts paid for sales tax by the consumer to his vendor, the same as if such amount constituted a tax imposed upon and paid by the consumer. 26 USCA, § 23(c) (3). It thus recognizes the legal incidence of the tax and the economic burden on the consumer, who pays the tax.

The conclusion we draw from the above review of the facts and authorities is as follows: It is a justiciable question whether or not national banks can assert Federal immunity from State sales and excise taxes, regardless of whether or not the legal incidence of the tax falls upon a national bank. The consumer bank may plead that it has been deprived of a Federal right especially when the burden of the tax falls upon it in an economic sense, and will not be deprived of a hearing as to the claimed Federal immunity.

The plaintiff calls attention to the fact that as vendee at retail it is called upon to tax, and that as

vendor and retailer of other articles, it again is asked to pay the tax, though in the latter case it may collect it from the vendees. This indicates how closely the 2 problems are involved in the instant suit and how proper it is to include them both in plaintiff's petition.

We find, therefore, that a purchaser of tangible personal property at retail within this State, claiming a Federal immunity from the provisions of the Michigan sales tax act, may invoke the jurisdiction of this Court to determine the question of the taxability of the proceeds of a retailer derived from its sales, which tax in turn is passed on under the law to the purchaser or consumer. An actual controversy does exist between the parties: Plaintiff claiming immunity from the economic burden of the tax, and defendant contending that no immunity exists.

The Michigan declaratory judgment act states at section 1:

"The court may, in cases of actual controversy, make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination at the instance of anyone interested in the controversy, of the construction of any statute, * * * and a declaration of the rights of the parties interested."

Section 7 provides:

"This act is declared to be remedial, and is to be liberally construed and liberally administered with a view of making the courts more serviceable to the people."

It should need no further citation of authority to indicate, in view of what has been said above, that an actual controversy within the scope of the declaratory judgment act exists.

Defendant contends, and the lower court decided, that the instant suit was improper as the results of it would not be binding on the retailer-taxpayer who is not joined in this suit. The retailer, however, has no interest in this action beyond that of a mere collection agent or intermediary and will abide by the final determination of the question. We have carefully considered defendant's other contentions herein, and have found them to be without merit.

The order dismissing that portion of plaintiff's petition concerned with the imposition of the sales tax on sales to plaintiff by Michigan vendors is reversed, without costs, a public question being involved. The case is remanded for further proceedings.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not participate in this decision.

## HERSHEL RADIO COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

1. COURTS—FEDERAL CONSTITUTION—DECISIONS OF FEDERAL SUPREME COURT BINDING ON STATE COURTS.

   In a case presenting assertion of rights secured by the Federal Constitution, the State courts are bound by the decisions of the supreme court of the United States.

2. COMMERCE—RAILROADS—SOLICITATION OF TRAFFIC—INTERSTATE COMMERCE.

   The solicitation of traffic by railroads, in States remote from their lines, is a recognized part of the business of interstate transportation.

3. SAME—ADJUSTMENT OF CLAIMS—BURDEN ON INTERSTATE COMMERCE.

   The adjustment of claims against a railroad for damage to freight, involving the appearance of employees in courts away from their customary occupation, impairs efficiency in operation and constitutes a burden on interstate commerce to which the railroad may not be subjected without its consent in a State where it merely solicits business but conducts no other operations.

4. CORPORATIONS—MERE SOLICITATION OF INTERSTATE BUSINESS—PROCESS.

   Mere solicitation of interstate transportation business by a railroad company in a State in which it has no tracks and runs no trains is not doing business within such State so as to make it amenable to process therein.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 11 Am Jur, Constitutional Law § 104.
[2] 11 Am Jur, Commerce §§ 45–48.
[3, 4] 23 Am Jur, Foreign Corporations § 381.
[3, 4] Foreign transportation company as subject to service of process in State in which it merely solicits interstate or extra-state business. 46 ALR 570, supplemented 95 ALR 1478.

Appeal from Wayne; Brennan (John V.), J. Submitted April 18, 1952. (Docket No. 29, Calendar No. 44,990.) Decided June 27, 1952.

Action by Hershel Radio Company, a copartnership, against Pennsylvania Railroad Company, a Pennsylvania corporation, and Southern Pacific Company, a Delaware corporation, for damages to goods shipped over defendant carriers. Motion by Southern Pacific Company to dismiss granted. Plaintiff appeals. Affirmed and remanded.

*Rosenbaum, Nathanson & Victor,* for plaintiff.

*Dyer, Angell, Meek & Batten* (*A. D. Ruegsegger,* of counsel), for defendant Southern Pacific Company.

BUTZEL, J. Plaintiff, Hershel Radio Company, a partnership whose 2 members are residents of the State of Michigan, brought suit against defendants Pennsylvania Railroad Company, a Pennsylvania corporation, and Southern Pacific Railroad Company, a Delaware corporation. Plaintiff claims damage to its goods that were shipped from Stockyards, California, to Detroit, Michigan, and for which the defendant Southern Pacific Company issued its bill of lading to plaintiff on August 7, 1948, at Stockyards, California. The shipment in question was routed over the lines of the Southern Pacific Company by reason of the previous solicitation of business by agents of the Southern Pacific in Detroit at its Detroit offices. These agents made arrangements for the delivery of the goods to Detroit over a connecting carrier, the Pennsylvania Railroad Company.

Defendant Pennsylvania Railroad entered a general appearance, but the Southern Pacific Company,

hereinafter referred to as defendant, appeared specially and moved to quash service of summons and to dismiss the action as to it. Defendant made its motion on the grounds that it is a foreign corporation and that it was not, at the time of service of the summons or at the time of the transaction, engaged in business in the State of Michigan, and that to subject that company to suits in the State of Michigan without its consent would impose an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution.* The trial court granted the motion, and plaintiff appeals.

Southern Pacific sets forth the facts in regard to its activities in Michigan as follows: It maintains an office in Detroit employing 10 men for the purpose of soliciting business, both passenger and freight, from those whose transportation needs could be served by it. It acts as a bureau of information regarding routings, rates and other pertinent facts. Its office address and telephone number in Detroit are listed under the company name. Its Detroit agents have no authority to adjust claims or to issue regular bills of lading. The company operates and owns no track or railroad equipment within the State of Michigan, the most eastern terminus of its operations being New Orleans, Louisiana. No tickets are sold in Michigan, and no other contracts entered into; there is no employee in the State who is authorized to accept service of summons. The Detroit office may also issue exchange bills of lading in place of the original ones. These are either to provide for export shipments and involve charges to be paid for the overseas transportation, or for a diverting of the shipment to a different destination or consignee at the request of the shipper. Any

* US Const, art 1, § 8.—REPORTER.

moneys paid for such exchange bills of lading are deposited to the credit of the Southern Pacific Company in a bank, but no person in Michigan is authorized to draw upon such bank account, the funds being transferred periodically to the office of the Southern Pacific in California. Plaintiff, on these facts, contends that such activity within the State constitutes presence within the State and doing business within the State, and thus makes the Southern Pacific amenable to process in an action *in personam* by a citizen of the State, where the cause of the action arises from the very activity of such foreign corporation within the jurisdiction.

The trial court found that the issue herein was determined by *Smart* v. *Florida East Coast Railway Company,* 240 Mich 542. The facts therein are quite similar to those in the instant case. Southern Railway Company and B & O Railroad Company brought motions to set aside service of process in action for damages done to plaintiff's household goods in transporting them from Florida to Detroit over the lines of defendants. Both were foreign corporations, not operating in Michigan. Both maintained offices in Detroit for the solicitation of business, employing clerks, with offices and telephones listed under their names. The B & O sold tickets over its lines outside of Michigan in cooperation with the Pere Marquette Railroad. The Michigan Supreme Court, citing *Green* v. *Chicago, Burlington & Quincy R. Co.,* 205 US 530 (27 S Ct 595, 51 L ed 915); *Philadelphia & Reading R. Co.* v. *McKibbin,* 243 US 264 (37 S Ct 280, 61 L ed 710); and *Davis* v. *Farmers Cooperative Equity Co.,* 262 US 312 (43 S Ct 556, 67 L ed 996), and most particularly relying on the latter, held that the statute authorizing service on the defendants, as applied, was in conflict with the commerce clause of the Federal Constitution and invalid, because defendants were not "doing business" within the State.

*Smart* v. *Florida East Coast Railway Company* will control our decision here unless there has been a substantial change in the prevailing Federal law concerning service on interstate carriers. We said, in the *Smart Case* (at p 544):

"The case presents the assertion of rights secured by the Federal Constitution, and by the decisions of the final interpreter of that Constitution, the supreme court of the United States, we are and should be bound."

First we turn to an examination of the case upon which we previously relied, *Davis* v. *Farmers Cooperative Equity Company, supra.* A Minnesota statute provided that any foreign corporation having an agent in the State for the solicitation of freight and passenger traffic on lines without the State might be served by delivering copy of the summons to such agent. Defendant, Atchison, Topeka & Santa Fe Railroad, maintained a Minnesota soliciting division similar to that with which we are here concerned. Mr. Justice Brandeis, who wrote for the court, said:

"Solicitation of traffic by railroads, in States remote from their lines, is a recognized part of the business of interstate transportation. * * *

"That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden * * * imposed specifically by the statute here assailed is

a heavy one; and that the resulting obstruction to commerce must be serious."

No subsequent determination applying to service of process upon an interstate carrier has been made by the United States supreme court.

Plaintiff, however, contends that the result reached by the high court in *International Shoe Co.* v. *State of Washington,* 326 US 310 (66 S Ct 154, 90 L ed 95), and its application in the lower court decisions, dictate an opposite result in the instant case. In the *International Shoe Company Case,* the company had its home offices in Missouri, but employed 11 to 13 salesmen, residents of Washington, for the purpose of soliciting orders from prospective Washington buyers. Each salesman was provided with a line of shoe samples for the display of which temporary and occasionally permanent display rooms were rented. Their activities resulted in a large volume of business and were systematic and continuous. Process was served on one of the salesmen and notice was given by registered mail to the corporation at its home office, pursuant to Washington statute. It was held that the corporation was "doing business" in Washington. Citing former decisions as to amenability of the corporation to service it was reaffirmed that mere solicitation alone was not a basis for jurisdiction, but that a systematic and continuous course of business, in the solicitation of orders and the shipment of a large volume of merchandise and the maintenance of permanent display rooms and residence of salesmen did constitute "doing business" in the jurisdictional sense. The court said:

"It is evident that these operations establish sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial jus-

tice, to permit the State to enforce the obligations which appellant has incurred there."

It should be noted that the court's decision was predicated on an examination of the due process clause and not on an examination of a possible burden on interstate commerce.

It is obvious that there existed a scope and permanency of activity in the *International Shoe Case* not present here. Even if we concede that it manifests a somewhat broadened concept it is significant that no case has decided that a foreign railroad which only solicits business within the State of the forum is amenable to process therein. That there has been no case directly overruling the *Davis Case* is apparent from the examination of lower court decisions.

*Lasky* v. *Norfolk & W. R. Co.* (CCA), 157 F2d 674, involved suit brought in the Northern District of Ohio against a defendant railroad operating only in the Southern District of Ohio. Although the court considered the activities of the railroad in the Northern District and held that it was doing business therein, the basis of its decision was the Federal Rules of Civil Procedure which have been construed to mean that in such a situation, service may properly be had in any district of a proper State.

*Bomze* v. *Nardis Sportswear, Inc.* (CCA), 165 F2d 33, relied on by plaintiff, is not applicable here as it involves the problem of whether or not a finding of agency could be made to justify process. It did not deal with the soliciting activities of a carrier. Similarly, see *Bach* v. *Friden Calculating Machine Co.* (CCA), 167 F2d 679. *Kilpatrick* v. *Texas & P. R. Co.* (CCA), 166 F2d 788, although it involved a foreign railroad corporation soliciting freight and passenger business, involved a decision predicated

on the provisions of the Federal employers' liability act and thus is not applicable here.

Defendants cite *Fiorella* v. *Baltimore & Ohio R. Co.*, 89 F Supp 850, and *Goldstein* v. *Chicago, R. I. & P. R. Co.*, 93 F Supp 671. These seem to indicate that the *International Shoe Case* has not changed the rules applicable to service of process on interstate carriers. *Fiorella* v. *Baltimore & Ohio R. Co.* involved action by a resident plaintiff in a Pennsylvania district court against the Chicago, Milwaukee, St. Paul & Pacific Railroad. Defendant had a Philadelphia office with 7 employees engaged in the solicitation of business in the customary fashion.

The court in the *Fiorella Case* noted that "the supreme court established the 'solicitation doctrine'—that is, a railroad company which has no tracks and runs no trains within a district is not doing business within that district for the purpose of service of process merely because it rents an office, hires an agent, and advertises these facts in order to solicit freight and passenger traffic over its lines in other States."

In *Goldstein* v. *Chicago, R. I. & P. R. Co.*, a New York plaintiff, brought suit in a New York forum against the Rock Island, a foreign carrier. The Rock Island had 3 permanent employees in New York State engaged in the usual business of solicitation. Citing the *Green* and *McKibbin Cases*, the court applied the "mere solicitation" rule and denied jurisdiction. *Backer* v. *Gonder Ceramic Arts, Inc.*, 90 F Supp 737, cited by the plaintiff, also involved a finding of agency and did not involve a carrier.

The very recent case of *Memphis Steam Laundry Cleaner, Inc.*, v. *Mississippi State Tax Commission*, 342 US 389 (72 S Ct 424, 96 L ed 436), decided by the United States supreme court on March 3, 1952, involves an entirely different question but indicates how far the court has gone in considering the effect

of solicitation in interstate commerce. The case involved the right to demand a privilege fee by the State of Mississippi to be paid by a transient vendor or dealer for the privilege of soliciting business in Mississippi, and exacted a fee of $50 for each vehicle used in carrying on such business. The laundry company operated a laundry and cleaning establishment in Memphis, Tennessee. It sent 10 of its trucks into Mississippi where its drivers picked up, delivered and collected for laundry and cleaning and also sought to acquire new customers. The laundry resisted the payment of such license fees. A number of questions arose but the amenability of the laundry company to process was not considered. However, in holding in favor of the laundry company, the court held that the solicitation of business by a nonresident corporation in a foreign State did not of itself constitute doing business therein as it was a necessary function in interstate commerce. The court said:

"In the long line of 'drummer' cases, beginning with *Robbins* v. *Shelby County Taxing District,* 120 US 489 (1887) (7 S Ct 592, 30 L ed 694), this court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the court has not permitted State taxation to carve out this incident from the integral economic process of interstate commerce. As the court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'

"If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the commerce clause. *Spector Motor*

*Service, Inc.*, v. *O'Connor*, 340 US 602, 608, 609 (1951) (72 S Ct 425, 95 L ed 573), and cases cited therein."

We have made a lengthy examination of pertinent decisions and find no reason why our decision in *Smart* v. *Florida East Coast Railway Company, supra,* should be overruled.

The order of the trial court setting aside process as to defendant Southern Pacific Company will be affirmed, with costs to appellee, and the case remanded to the trial court for further proceedings in the main case.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not participate in this decision.

---

## TACKABURY *v.* TACKABURY.

1. DIVORCE—DE NOVO REVIEW—CREDIBILITY OF WITNESSES.
   The finding of trial judge in a suit for divorce, who has the opportunity to observe the parties and listen to their claims, will not be reversed by the Supreme Court, even though it is not restricted by such findings on its *de novo* review, where the findings are based upon the credibility of witnesses who have presented conflicting testimony, unless convinced that it must have reached a different conclusion had it occupied the position of the lower court under like circumstances.

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 17 Am Jur, Divorce § 401.
[3] 3 Am Jur, Appeal and Error § 858; 27 Am Jur, Husband and Wife § 404.
[4] 2 Am Jur, Appeal and Error § 119.
[5] 17 Am Jur, Divorce and Separation §§ 580, 581.

2. SAME—EXTREME CRUELTY—EVIDENCE.
   Conduct of wife who sought separate maintenance by husband, who filed cross bill for absolute divorce, *held*, to have justified decree for defendant on ground of extreme cruelty, where it appears she was emotionally unstable, 2 of the children left the home and she persistently embarrassed defendant by complaints to his employers.

3. HUSBAND AND WIFE—SEPARATE MAINTENANCE—EVIDENCE.
   Evidence failed to sustain claim of plaintiff wife that she was entitled to decree of separate maintenance on grounds of desertion and nonsupport.

4. DIVORCE—ALIMONY—HEALTH.
   Award to cross-defendant wife of $20 per week permanent alimony until death, remarriage or further order of the court is not disturbed on her appeal from decree of divorce on claim of insufficiency, where it appears she is not incapacitated from working although she claims not to be in good health.

5. SAME—COSTS.
   No costs are allowed wife on her appeal from decree for divorce, where decree is affirmed.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted June 4, 1952. (Docket No. 18, Calendar No. 45,245.) Decided June 27, 1952.

Bill by Eva K. Tackabury against Nathaniel J. Tackabury for separate maintenance. Cross bill by defendant against plaintiff for divorce on ground of extreme cruelty. Decree for defendant. Plaintiff appeals. Affirmed.

*Vandeveer & Haggerty* (*Samuel A. Garzia,* of counsel), for plaintiff.

*Walter A. Mansfield* (*David S. DeWitt,* of counsel), for defendant.

CARR, J. Plaintiff brought suit for separate maintenance under the provisions of CL 1948, § 552.301 (Stat Ann § 25.211), alleging in her bill of complaint

desertion and nonsupport as the bases for the relief sought. Defendant by answer denied the charges made against him. He also filed a cross bill alleging that plaintiff and cross-defendant had been guilty of conduct constituting extreme and repeated cruelty as to him. Cross-defendant filed answer denying such charges; and the case was heard on the pleadings and proofs of the parties. The trial judge came to the conclusion that plaintiff had failed to establish her right to the relief sought by her, and that her conduct had been such as to justify and require the granting of an absolute decree of divorce to defendant and cross-plaintiff. A decree was entered accordingly and plaintiff has appealed.

The parties were married in 1922. Of such marriage 3 children were born, the youngest now being 19 years of age. Cohabitation in the marital relation ceased in 1932, following the birth of the youngest child, but the parties continued to live under the same roof until on or about May 1, 1942, at which time defendant and cross-plaintiff left the home. On the trial of the case it was his claim in substance that cross-defendant's attitude toward him was such that the situation was intolerable and that no course was open to him other than to establish a residence elsewhere.

Although defendant earned good wages during the time that the parties lived together it does not appear that they accumulated any property. It is a fair conclusion from the proofs in the case that prior to 1942 he supported his family in a reasonable manner, and that after he left the home he contributed to the support of plaintiff and the then minor children who remained in the home. The son of the parties, then 16 years of age, left his mother during the year 1942. On the trial of the case he testified that he did so because of her irritating attitude toward him, claiming that she was "hard to

get along with." Prior to the starting of the present case in April, 1949, the younger daughter of the parties also left her mother, thereafter making her home with her father and being supported by him.

The decree entered by the trial court granted to cross-defendant as permanent alimony the sum of $20 per week, such payments to continue for the duration of her life, or until her remarriage, or until the further order of the court. It was also provided that cross-plaintiff pay to her the sum of $500 to help her defray the fees and expenses of the attorneys who represented her on the trial, and other attorneys appearing in her behalf at different stages of the proceeding. In the event that cross-defendant deemed herself in need of medical or dental care, she was authorized by the decree to file a petition with the friend of the court to the end that her claim for such assistance might be investigated and a determination reached as to whether cross-plaintiff should be required to furnish the requested medical or dental care.

It is the claim of the appellant that the trial court was in error in denying relief to plaintiff and in granting a decree of absolute divorce to cross-plaintiff. It is argued in substance that the conclusions on which the decree was based were not in accord with the proofs. The testimony on the trial as to the conduct of the parties resulting in their marital difficulties and separation was in conflict. The determination of disputed issues rested largely on the matter of credibility of witnesses, especially the parties to the case. The trial judge having had opportunity to observe the parties and to listen to their claims was in better position than is this Court to determine the weight to be given to specific testimony. In *Chubb* v. *Chubb,* 297 Mich 501, 506, it was said:

"While we are not restricted by the findings of the circuit court, a divorce case on appeal being

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

The statement, above quoted, has been referred to in many subsequent decisions of this Court. *Kolberg* v. *Kolberg,* 312 Mich 42; *Johnson* v. *Johnson,* 314 Mich 376; *Wells* v. *Wells,* 330 Mich 448.

The proofs in the case fully justify the conclusion that plaintiff habitually indulged in conduct that made the home life of the parties extremely unpleasant. The trial judge concluded that she was "emotionally unstable." It was defendant's claim that he sought to avoid quarrels by staying away from home on occasions when otherwise he would have been with his family. The difficulties between plaintiff and the 2 younger children, resulting in their leaving her home, are indicative to some extent at least of her general attitude as a wife and mother.

It also appears that after cross-plaintiff left the home in 1942 plaintiff procured his arrest on a warrant charging nonsupport, such proceeding resulting in the entering of an order in the recorder's court of the city of Detroit for the making of weekly payments by him for her support. He complied with the order but notwithstanding such fact plaintiff procured the issuance of a second warrant, the proceedings on which were dismissed when the situation was called to the attention of the court. Evidence was also introduced in the case showing that she had complained to cross-plaintiff's employers concerning his alleged conduct, causing him em-

barrassment. We are in accord with the conclusion of the trial court that cross-plaintiff's conduct was not commendable in all respects, but that the situation created by plaintiff was, in the main, responsible therefor. Her actions were such as to indicate a total lack of affection for him on her part and a desire to cause him embarrassment and injury. We think that the proofs in the case did not sustain the claim of the plaintiff that she was entitled to separate maintenance on the grounds of desertion and nonsupport as alleged in her bill of complaint, and that the action of the trial court in granting a decree to cross-plaintiff is fully supported by the record.

Appellant also contends that the amount of alimony provided in the decree is insufficient for her needs and that the earning ability of the cross-plaintiff is such as to justify a larger payment per week. As before noted, the prescribed payments at the rate of $20 per week are to continue, under the decree entered, until the death or remarriage of the plaintiff, or "until the further order of this court." If conditions change in such manner as to render necessary an increase in the payments of alimony plaintiff will have her remedy by way of petition for modification of the decree.

The claim was stressed in the trial court, and also on this appeal, that plaintiff is not in good health. The trial judge, as is indicated by his opinion in the case, came to the conclusion that she was not incapacitated from working and, further, that it would be much better for her if she were suitably employed. Inasmuch as the decree, as above pointed out, is subject to modification under changed circumstances, we think that the alimony provision therein should not be modified at this time by an increase in the amount of the weekly payment.

The decree of the trial court is affirmed, without costs.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not sit.

---

SINGER v. GOFF.

1. RECEIVERS—POSSESSION OF PROPERTY—STRANGERS TO RECORD.
Ordinarily a receiver may not in a summary manner take property from the possession of strangers to the record who claim adverse right therein.

2. SAME—JURISDICTION—POSSESSION.
Receiver appointed by trial court had jurisdiction to take possession of property from party named as defendant in suit for accounting, the fact that such defendant came into possession of the personalty prior to the appointment of the receiver being immaterial.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 45 Am Jur, Receivers § 203.
[1] Right of receiver to take property in summary manner or by summary proceedings from strangers to the record. 40 ALR 903, supplemented 43 ALR 1340.
[2] 45 Am Jur, Receivers § 204.
[3] 45 Am Jur. Receivers § 18.
[4, 5] 45 Am Jur. Receivers § 183.
[6] 12 Am Jur, Contracts § 241.
[7] 24 Am Jur, Gas and Oil § 113.
[8] 45 Am Jur, Receivers § 210.
[9] 14 Am Jur, Costs § 11.

3. SAME—APPOINTMENT—EQUITY.
Equity courts have inherent power to appoint a receiver.

4. SAME—CONTINUANCE OF RECEIVERSHIP—DISCRETION OF COURT.
It is a matter of discretion with the appointing court as to whether a receivership shall be continued or discontinued.

5. SAME—IMPLIED CONTINUANCE.
Issuance of various orders to receiver after expiration of term for which receiver was originally appointed implied a continuance of the receivership.

6. CONTRACTS—CONSTRUCTION AS A WHOLE.
Contracts must be construed as a whole and harmonious effect given, if possible, to each word and phrase.

7. SAME—OIL-WELL DRILLING AGREEMENT—APPORTIONMENT OF EXPENSES.
Agreement relative to drilling oil well is construed as providing that holders of interests would not be obliged to pay more than they had originally contributed toward cost of drilling in the event the well proved to be a dry hole and driller would be liable for additional expenses but that in the event a commercially-producing well resulted costs were to be deducted from proceeds of sale of oil.

8. RECEIVERS—ACCOUNTING BY TRUSTEE UNDER OIL-WELL DRILLING AGREEMENT.
A receiver occupies the same position as the person named as trustee under agreement as to sharing cost of drilling oil well and distribution of proceeds from sale of oil, where receiver was appointed incident to suit for accounting against trustee as defendant, hence latter must account to the receiver as to undistributed moneys on hand.

9. COSTS—ACCOUNTING—FAILURE OF EITHER SIDE TO PREVAIL IN FULL.
No costs are allowed on appeal in suit for accounting, where neither side has prevailed in full.

Appeal from St. Joseph; Arch (Charles O.), J., presiding. Submitted April 17, 1952. (Docket No. 28, Calendar No. 44,800.) Decided June 27, 1952.

Bill by Daniel C. Singer and others against C. C. Goff, trustee, and individually and others for accounting, appointment of receiver and injunction.

Petition by receiver against C. C. Goff for money decree. Decree for receiver. Defendant Goff appeals. Affirmed in part, reversed in part.

*C. L. Stickler,* for receiver.

*Anderson & Anderson,* for defendant.

BUSHNELL, J. This is an appeal by defendant C. C. Goff, individually and as trustee, and his wife, from an order denying their motion to vacate a decree under which Goff was required to pay certain moneys into court.

Goff, the owner of an oil and gas lease in Bloomingdale township, Van Buren county, entered into trust agreements with plaintiff Daniel C. Singer and others. Singer's agreement, dated March 3, 1942, provides in part as follows:

"It is agreed by the first party [Goff] that he will drill a well for oil or gas on the above described lands to the traverse limestone or to the approximate depth of 1,300 feet and furnish all necessary drive pipe, casing necessary to drill said well.

"The second party [Singer] hereby agrees to pay the sum of $58 for the 1/48 of the 7/8 working interest in said lease and well.

"It is agreed by the first party as TRUSTEE that after the cost of labor, casing, drive pipe, tubing, rods, tanks and other necessary equipment has been fully paid for out of any proceeds derived from the sale of oil or gas by said TRUSTEE, that he will turn over to the second party 1/48 of the 7/8 of all remaining revenues received by him. * * *

"It is agreed by C. C. Goff that he will retain for himself at least 3/8 of the 7/8 working interest.

"It is understood that the above moneys paid are in full for the drilling of well No 1 and in case of commercial production the costs of casing, tubing,

rods, pumps, tanks, and all other necessary equipment are to be paid for by the trustee out of the funds derived from the sale of oil; and after discontinuing operations the proceeds derived from the sale of equipment shall be paid to the different parties of this agreement as their interest appear."

On September 16, 1943, plaintiffs filed a bill of complaint in which they stated that Goff had drilled a producing well but had failed to account for the proceeds of the sale of oil therefrom. They sought an accounting, the appointment of a receiver, and an injunction restraining defendants from unlawfully using or disposing of funds or property.

On March 3, 1944, Singer was appointed receiver with "power to act in all things relating to such receiver(ship) not exceeding 1 year." Singer later filed a bill of particulars in which he stated that Goff, contrary to the "trust articles," had wrongfully charged plaintiffs $1,296.63 for his cost of drilling the well, and that he also had on hand $929.23, for which he had not accounted.

The sale of the leasehold interest and personal property by Singer for $2,375 was confirmed and the residue ordered distributed. Singer later filed a petition asking for a money decree against Goff, and on November 4, 1949, Goff was ordered to pay into court the $1,296.63 and $929.23 items, totaling $2,225.86.

On appeal, Goff argues that the court was without jurisdiction to require him to pay funds over to the county clerk in the absence of a hearing on the merits, and he denies that Singer proved the claimed indebtedness.

Ordinarily a receiver may not in a summary manner take property from the possession of strangers to the record who claim adverse rights therein. *Reed* v. *Baker,* 42 Mich 272, 40 ALR 903, 43 ALR

1340. Goff, however, is not a stranger to the receivership proceedings. He is named therein as a defendant both as trustee and individually. The fact that he came into possession of the money and personal property prior to the appointment of Singer is immaterial. *Fidelity Trust Co.* v. *Saginaw Hotels Co.*, 259 Mich 254.

Singer's appointment, limited by the terms of the order to 1 year from March 3, 1944, was never extended. Goff, therefore, claims that Singer lacked authority to file the 1949 petition. Equity courts have inherent power to appoint a receiver, *Michigan Minerals, Inc.*, v. *Williams*, 306 Mich 515, 525, and it is a matter of discretion whether a receivership shall be continued or discontinued. *First National Bank of Detroit* v. *E. T. Barnum Wire & Iron Works*, 60 Mich 487, 499. The record in the instant case shows that, after the expiration of the 1-year period, the court issued various orders which necessarily imply a continuance of the Singer receivership.

The principal question concerns the item of $1,296.63, which Goff deducted from the proceeds of the sale of oil and used to reimburse himself for expenses incurred in bringing in a producing well. Plaintiffs argue that the moneys paid by them were to cover the entire cost of development.

Under the trust agreement, Goff was required to drill a well and furnish all necessary drivepipe, casing, et cetera. He agreed to retain for himself at least a 3/8 of the 7/8 working interest in the lease. Moneys paid him by others were to be in full payment for their share of the cost of drilling. Net proceeds from the sale of oil were to be distributed. Necessary equipment was to be paid for by Goff out of funds derived from the sale of oil; and after the discontinuance of the operation the proceeds result-

ing from the sale of equipment were to be paid proportionately to the interested parties.

Plaintiffs' construction of the agreement is in conflict with the cardinal principle which requires us to construe this contract as a whole and give harmonious effect, if possible, to each word and phrase. *Duval* v. *Aetna Casualty & Surety Co.*, 304 Mich 397, 401. The trust agreement clearly provides that the expenses as listed therein, which would be incurred primarily in the drilling of the well, were to be deducted from the proceeds of the sale of oil. The agreement, fairly construed, can have but one meaning, namely, that if the well proved to be a dry hole, others holding interests in the leasehold would not be obliged to pay more than they originally contributed, and that Goff would be responsible for any additional expenses. Other methods of apportioning costs and distributing proceeds were provided in the event the well proved to be commercially successful. We do not agree with plaintiffs or with the trial court that Goff should be required to pay $1,296.63 into court for distribution to the interested parties.

Goff, however, admitted that he had on hand undistributed funds amounting to $929.23. The trial judge correctly determined that this amount should be paid into court. Goff argues that if any money is due, it should be paid to the owners of the respective interests rather than to the receiver. He insists that there are several interested holders who are not parties to the receivership action. Singer, as receiver, however, represents all interested parties who have already or may establish any rights in the matter, and, therefore, he stands in the position formerly occupied by Goff. *First National Bank of Detroit* v. *E. T. Barnum Wire & Iron Works, supra,* 499, and *Klingensmith* v. *James B. Clow & Sons,* 270 Mich 460.

The decree of the trial court is vacated as to the $1,296.63 item, and affirmed as to the $929.23 item. A modified decree may be entered here. Neither party having prevailed in full, no costs will be allowed.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not participate in this decision.

---

PEOPLE v. JOHNSON.

1. EVIDENCE—DYING DECLARATION—BELIEF IN IMPENDING DEATH.
   A "dying declaration" is inadmissible in evidence unless made under a solemn belief of impending death.

2. SAME—DYING DECLARATION—ADMISSIBILITY.
   The fact that person who made a "dying declaration" lived for several days after making the statement is not controlling as to its admissibility as such a declaration.

3. SAME—DYING DECLARATION—TIME OF TAKING—NOTICE TO ACCUSED.
   It is unnecessary to take a so-called "dying declaration" immediately after the declarer has been injured or to give notice to person accused of inflicting the injury of an intention to take the statement.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 26 Am Jur, Homicide §§ 406, 407.
[2] 26 Am Jur, Homicide § 408.
[3] 26 Am Jur, Homicide § 396.
[4, 5, 8–10] 26 Am Jur, Homicide §§ 416, 417.
[6] 26 Am Jur, Homicide § 413.
[7] 20 Am Jur, Evidence § 1256.

4. SAME—DYING DECLARATION—PRELIMINARY INVESTIGATION.

The trial court must make a preliminary investigation in order to determine whether the person who made an alleged "dying declaration" was in fact *in extremis* at the time of making it and believed that his death was impending before admitting such hearsay testimony in evidence.

5. SAME—DYING DECLARATION—IN EXTREMIS—BELIEF IN IMPENDING DEATH.

Whether or not person who made a so-called "dying declaration" was *in extremis* and believed that his death was impending may be proved like any other facts in the case and in the light of the existing and surrounding circumstances.

6. SAME—DYING DECLARATION—FEAR OF PERJURY—CROSS-EXAMINATION.

Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, hence the necessity for extreme caution in admitting them in evidence.

7. CRIMINAL LAW—GUILT MUST BE ESTABLISHED BEYOND A REASONABLE DOUBT.

The guilt of one charged with crime must be established beyond a reasonable doubt.

8. EVIDENCE—DYING DECLARATION—IN EXTREMIS—BELIEF IN IMPENDING DEATH.

It must be clearly established that person making a dying declaration was *in extremis* at the time of making it and that he had a belief in his impending death before such hearsay testimony may be admitted in evidence in prosecution for crime.

9. SAME—DYING DECLARATION—IN EXTREMIS—BELIEF IN IMPENDING DEATH.

It was not established that person who made so-called dying declaration was either *in extremis* or had a belief in his impending death by testimony that he had been stabbed in the abdomen, had just been operated on and it is not shown he had any fear that his death was impending and answered "yes" to 3 leading questions as to whether he realized he was a pretty sick man, whether he made the statement in fear of impending death and whether he would make the same statement if he thought he was going to get well, and that he died from pneumonia 3 days later.

10. CRIMINAL LAW — MURDER — HEARSAY — DYING DECLARATIONS — PREJUDICE.

Admission in evidence in prosecution for murder of hearsay statements of victim of stabbing, made the next day to an assistant prosecuting attorney in the presence of a stenographer, *held,* prejudicial error, where it does not clearly appear that the victim was, at time statements were made, either *in extremis* or under a sense of impending death, and while there is no doubt that the accused did stab the victim, there is some doubt as to whether the stabbing constituted murder or manslaughter or was done in self-defense.

Appeal from Recorder's Court of the City of Detroit; Ide (O. Z.), J. Submitted April 18, 1952. (Docket No. 91, Calendar No. 44,871.) Decided June 27, 1952.

Walter Johnson was convicted of murder in the second degree. He appeals from denial of delayed motion for new trial. Reversed and new trial granted.

*George Squire,* 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 *Garfield A. Nichols* and *Thomas J. Foley, Jr.,* Assistant Prosecuting Attorneys, for the people.

BUSHNELL, J. Defendant Walter Johnson was granted leave to appeal from a life sentence imposed after his conviction by a jury of murder in the second degree and from the denial of his delayed motion for a new trial.

On October 13, 1937, while working at the Briggs Manufacturing Company, Johnson injured his finger. Shortly thereafter, at about midnight, there was a change of shift. Johnson, a negro, who was

the last man to check out, was confronted by a mumbling hostile group of white men standing around the door. The testimony is not too clear as to what happened, except that Johnson and John Ozinkowski, whom he had charged with responsibility for his injury, exchanged words and blows. Another employee, Reed Rogers, intervened and either kicked or struck Johnson, or tried to do so. During the affray, Johnson struck Rogers twice with a knife, and walked away. Neither man had known the other prior to the assault.

Rogers did not realize that he had been seriously wounded. However, he was given first aid, and then taken to the receiving hospital. It was determined that he had a lacerated ear and a wound in his abdomen which required an operation.

The next day Rogers was questioned by an assistant prosecuting attorney in the presence of a stenographer. In response to a question he said:

"So he made one lick at the white fellow, and I caught his arm, and he didn't touch him, and he turned around and said, 'You want some, you son-of-a-bitch,' and that's when he stabbed me in the belly, and I didn't realize I was stabbed for a second until I went to raise up my clothes and there was a clot of blood falling out of them."

He was then asked if he realized that he was a pretty sick man, whether he made "this statement" in fear of impending death, and whether he would make the same statement if he thought he was going to get well. To all these questions, Rogers answered "Yes." Johnson was then brought in by a police officer and Rogers identified him as the man who cut him.

Rogers died 3 days later. A Wayne county medical examiner who performed the autopsy stated: "The cause of death was a right upper lobar pneumonia following a stab wound of the abdomen."

Johnson, on appeal, attacks the admission of the so-called "dying declaration," and the court's instructions to the jury. He argues denial of due process, the confusion of the trial judge regarding the verdict and the sentence and failure of proof beyond a reasonable doubt.

It is fundamental that a "dying declaration" is inadmissible in evidence, unless made under a solemn belief of impending death. *People* v. *Simpson,* 48 Mich 474, 477, and *People* v. *Bradfield,* 300 Mich 303, 307. That the declarer lived for several days after making the statement is not controlling. *People* v. *Denton,* 312 Mich 32, 35. Neither is it necessary that such statement be taken immediately after the injury nor that notice of an intention to take the statement be given the accused. *People* v. *Beverly,* 108 Mich 509, 511. Before admitting the hearsay statement as a dying declaration, the court must make a preliminary investigation in order to determine whether the person making the statement was in fact *in extremis* at the time and believed that his death was impending. *People* v. *Fritch,* 210 Mich 343, 347. These essential facts may be proved like any other facts in the case and in the light of the existing and surrounding circumstances. *People* v. *Simpson, supra,* 477.

The opinions of this Court vary as to the quantum of proof necessary to establish these preliminary facts. Some seem to indicate that any evidence in this respect is enough. *Hurd* v. *People,* 25 Mich 405, 417; *People* v. *Knapp,* 26 Mich 112, 117; and *People* v. *Lonsdale,* 122 Mich 388. Others say that the court must be "satisfied." *People* v. *Simpson, supra,* 478; *People* v. *Weaver,* 108 Mich 649; and *People* v. *Fritch,* 210 Mich 343. Others seem to indicate a degree of satisfaction. For example: "To say he did not sense impending death would accord him less than ordinary intelligence." *People* v. *Arnett,* 239

Mich 123, 132, and *People* v. *Gorman,* 252 Mich 603, 605. Other courts have accepted 3 widely divergent views. See annotated cases in 96 ALR at page 621.

A well stated rule by the New York court of appeals reads as follows:

" 'Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth.' * * * It is for those salutary reasons that extreme caution is required of the trial court before a dying declaration is received in evidence—the fundamental requirement being that 'preliminary to the admission of such evidence * * * there must be clear proof of the certainty of speedy death, and that the declarant had no hope of recovery.'" *People* v. *Bartelini,* 285 NY 433 (35 NE2d 29, 167 ALR 139).

The guilt of one charged with a crime must be established beyond a reasonable doubt. *People* v. *Franczyk,* 315 Mich 384. Because of the dangerous nature of dying declarations, the public policy of according an accused every possible safeguard consistent with justice and the constitutional guaranties of a fair trial, those preliminary matters necessary to be determined before the admission of a dying declaration should be clearly established.

The only evidence here, tending to show that Rogers believed he was confronted by impending death, is the testimony regarding the serious nature of his wounds and his affirmative answers to 3 leading questions put to him by the assistant prosecutor. There is no other evidence in this record regarding Rogers' condition at the time his statement was taken. His wound had been operated upon and the cause of death, 3 days later, is stated to be "pneumonia following a stab wound of the abdomen." The record is silent as to when the pneumonia developed or when Rogers became in fact *in extremis.* He did

not volunteer any fear of impending death and his answers were apparently prompted by the prosecutor's questions. It may be that Rogers expected to recover at the time he made the statement.

A critical examination of this phase of the evidence does not clearly show, as a matter of law, that Rogers spoke *in extremis* and under a sense of impending death. The situation presented here is comparable to that in *People* v. *Christmas,* 181 Mich 634, 646, where the Court said:

"It is apparent from the proceedings quoted above that the only evidence the court had of the fact that the declaration was made by Cadarean under circumstances entitling it to admission was such as was afforded by the declaration itself. A careful analysis of this paper in our opinion falls far short of establishing the fact that at the time of Cadarean's examination he believed himself to be dying."

We are constrained to hold that it was prejudicial error to admit in evidence the so-called dying declaration in this case. While there is no doubt that Johnson actually wounded Rogers with a knife, the witnesses were extremely hazy as to what actually happened in the affray. The admission of the statement of Rogers might have easily influenced the jury to find that Johnson was guilty of murder rather than the lesser crime of manslaughter, or that he acted in self-defense. In the light of our conclusion, it is unnecessary to discuss the other claims of error.

The conviction is set aside, the sentence is vacated, and a new trial is granted to the defendant, who is remanded to the custody of the sheriff of Wayne county for further proceedings not inconsistent with this opinion.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not participate in this decision.

## CHAPEL *v.* SCHOOL DISTRICT NO. 8, FRACTIONAL, PARMA TOWNSHIP, JACKSON COUNTY.

1. SCHOOLS AND SCHOOL DISTRICTS—ANNEXATION—SPECIAL ELECTIONS.

   The number of special elections for the purpose of annexing primary school districts to second or third class school districts and the time between such elections is not restricted by statute (CL 1948, §§ 352.3, 352.4 and § 353.23, as amended by PA 1951, No 174).

2. CONSTITUTIONAL LAW—SUPREME COURT—STATUTES—LIMITATIONS.

   It is not the province of the Supreme Court to legislate limitations into existing statutes.

3. APPEAL AND ERROR—EQUITY—MOTION TO DISMISS—PLEADING.

   Material allegations in a bill of complaint must be taken as true on appeal from dismissal of bill on motion.

4. SCHOOLS AND SCHOOL DISTRICTS—PRIMARY DISTRICTS—REGISTRATION OF ELECTORS.

   A primary school district does not have a registration of school electors such as is provided for other school districts (CL 1948, § 357A.1, as added by PA 1951, No 199).

5. SAME—ELECTIONS—ANNEXATION—MAJORITY VOTE.

   "Majority vote," as that term is used in statute pertaining to election for approval of annexation of a primary school district to an adjoining second or third class school district, is construed as requiring approval of electors voting on the proposition, not a majority of the qualified electors in the district, especially where there is no public record of those entitled to vote (CL 1948, § 353.23, as amended by PA 1951, No 174).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur, Schools § 18.
[3] 19 Am Jur, Equity § 361.
[5] 18 Am Jur, Elections §§ 242, 243.

6. COSTS—PUBLIC QUESTION—ANNEXATION OF PRIMARY SCHOOL DISTRICT.

No costs are allowed in suit to determine validity of election relative to annexation of primary school district to a second or third class school district, a public question being involved (CL 1948, § 353.23, as amended by PA 1951, No 174).

Appeal from Jackson; Simpson (John), J. Submitted June 3, 1952. (Docket No. 11, Calendar No. 45,440.) Decided June 27, 1952.

Bill by Monica I. Chapel and others against Charles J. Allen, moderator, and others, officers of School District No. 8, Fractional, Parma Township, Jackson County, Michigan, to restrain the defendant from turning property of school district over to Parma Union School District. Bill dismissed on motion. Plaintiffs appeal. Affirmed.

*Robert Crary* and *Robert Crary, Jr.* (*Rosenburg, Painter & Davidson,* of counsel), for plaintiffs.

*McKone, Badgley, Kendall & Domke,* for defendants.

BOYLES, J. On January 21, 1952, a majority of the voters who voted at a school election held in District No 8, Fractional, in Parma township, Jackson county, a primary school district, voted affirmatively to annex said district to the Parma Union School District. When the district board proposed to turn over all the property of said District No 8 to the Union School District in accordance with the statute, the plaintiffs herein, who are qualified school electors of said district, filed the instant bill of complaint to enjoin such action. The circuit judge on motion dismissed the bill of complaint and the plaintiffs appeal. Two grounds are alleged for reversal.

1. At a previous election held earlier in the same month the voters at that election, called for the same purpose, had voted against such annexation. Appellants claim that the school board had no right to call the second election and that for that reason the second election is null and void. No authority in point is cited to support the claim. The statute governing the annexation of the primary school district to the larger Union School District (CL 1948, § 353.23), as amended by PA 1951, No 174,* to be decided at either an annual or a special election called for that purpose, does not limit the time between elections or the number of special elections which may be called by the school board for that purpose. Nor is there any such limitation in the provisions of the school code prescribing the powers, duties and requirements of school districts in general.† It is not the province of the Court to legislate such limitations into the school code.

2. According to the bill of complaint, the material allegations of which must be taken as true, there were 111 qualified electors in District No 8, Fractional, Parma township, at the time of the second election. The vote was 49 for and 47 against annexation. Appellants claim that the election did not carry affirmatively for annexation because it resulted only in the approval of a majority of the electors voting thereon, whereas (appellants claim) the school code requires a majority of all the qualified school electors in the district. This would require 56 affirmative votes.

District No 8, being a primary school district, does not have, nor can it have, a registration of school electors such as the school code provides for other

* Stat Ann 1951 Cum Supp § 15.427(2).

† CL 1948, §§ 352.3, 352.4 (Stat Ann § 15.374, Stat Ann 1951 Cum Supp § 15.375).

school districts.* There is no method prescribed by the statute for determining how many qualified school electors there were in said district when the election was held. The essential part of the statute† governing this election provides:

"Any primary, * * * school district shall be annexed to an adjoining second or third class school whenever the board of education of such second or third class school district shall, by resolution, so determine and a majority of the qualified school electors of the primary, * * * district have approved such annexation at an annual or special meeting called for that purpose. * * * Within 10 days after the electors of said primary * * * district have voted affirmatively on the purposed annexation the director or secretary of such district shall certify the results of said election to the secretary of the board of education of the second or third class district. Such annexation shall become effective 30 days following the adoption of such resolution *by a majority vote at the annexation election of the district to be annexed.* Upon the effective date of such annexation all real and personal property belonging to the district so annexed shall become the property of the second or third class school district. Within 15 days after the effective date of such annexation, the members of the district board or board of education of the annexed district shall account to the board of education of the second or third class school district for the funds and property in their hands as such officers, and shall turn over the same to the second or third class school district." (The italicized language was added by PA 1951, No 174.)

The trial court held that the statute required only the affirmative vote of a majority of the qualified voters voting at such election. We agree that the

* CL 1948, § 357A.1, as added by PA 1951, No 199 (Stat Ann 1951 Cum Supp § 15.477[11]).

† CL 1948, § 353.23, as amended by PA 1951, No 174 (Stat Ann 1951 Cum Supp § 15.427[2]).—REPORTER.

statute does not require a majority vote of all the qualified electors of the district. The Court has passed upon the question under comparable circumstances:

"It is further insisted that the vote by which it was determined by the electors of the county of Bay to adopt the county road system was never legally adopted, for the reason that a majority of all the electors in the county did not vote affirmatively upon the proposition. It does appear that a majority of all those who availed themselves of the opportunity to vote, voted affirmatively; and the question presented is whether, under the language of the Constitution above quoted, a majority of the votes cast at the election is sufficient. * * * In the present case there is no machinery provided, and the result could never be definitely ascertained, if the construction contended for by complainants is to prevail, until an investigation *aliunde* the record. * * * In McCrary, Elections (4th ed), § 208, it is laid down that:

"'Where a statute requires a question to be decided or an officer to be chosen by the votes of "a majority of the voters of a county," this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by the majority of the votes cast.'" *Shearer* v. *Board of Supervisors of Bay County,* 128 Mich 552.

A somewhat similar question was before the Court in *Wilcox* v. *Board of Commissioners of Sinking Fund of City of Detroit,* 262 Mich 699, in considering a constitutional amendment limiting the amount of taxes assessable in any 1 year in connection with local municipal financing. The Court said:

"The provision is purely a local-option law, and it is contrary to our system of government to count electors on a question who are not sufficiently interested to vote.

"There are practical difficulties to another construction. There is no public record of all the electors of any taxing district, nor means of ascertaining them except by census, which would be costly, subject to interested manipulation, and certainly inaccurate. Registration of electors could not have been intended as test of the vote, because in some assessing districts, as school districts, there is no registration of electors. We hold that 'electors' means those voting on the question."

The general rule is stated in 18 Am Jur, Elections, p 340, § 243, as follows:

"In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. * * * It is generally held that the term 'qualified voter' in a provision as to the proportion of voters necessary for the adoption of a measure refers, not to those qualified and entitled to vote, but to those qualified and actually voting."

The order dismissing the bill of complaint is affirmed and the order entered by this Court restraining the defendants from transferring the property of District No 8 to the Parma Union School District until further order of this Court is set aside. No costs, the question involved being of a public nature.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

NORTH, C. J., did not sit.

## WATROBA *v.* CITY OF DETROIT.

1. AUTOMOBILES—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Contributory negligence of plaintiff, a 12-year-old boy who had just alighted from northbound streetcar, had let it pass and then proceeded westerly part way across tracks in center of 28-foot street on west side of which parking was not permitted *held*, question for jury, where evidence is in conflict as to just how the accident happened and as to where plaintiff was when he came into contact with defendant's southbound car.

2. SAME—SPEED—NEGLIGENCE—QUESTION FOR JURY.

Issue of negligence of defendant's southbound driver in street paved 28 feet between curbs and in the center of which was a single set of streetcar tracks was properly left to jury, where there is testimony that defendant's car was driven partially on such tracks and injured plaintiff, a 12-year-old boy, who had shortly theretofore alighted from a northbound streetcar and was proceeding westerly after it had passed on when hit by defendant's car being driven at speed variously estimated at from 25 to 40 miles an hour, since plaintiff was not bound to anticipate defendant's car would follow a course partly over the tracks or that it would approach at an excessive speed without keeping a reasonable and proper outlook.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur, Automobiles § 450.
[2, 3] 5 Am Jur, Automobiles § 215.
[4] 20 Am Jur, Evidence § 388 *et seq.*
[4] Admissibility of evidence, and propriety and effect of questions, statements, comments, et cetera, tending to show that defendant in personal injury or death action carries liability insurance. 4 ALR2d 761.

3. SAME—GREAT WEIGHT OF EVIDENCE—NEW TRIAL.

Verdict for 12-year-old boy against city for injuries he sustained when he came into contact with defendant's automobile *held,* not against the great weight of the evidence, hence denial of motion for new trial based in part on such claim was proper.

4. APPEAL AND ERROR—AUTOMOBILES—MISTRIAL—REFERENCE TO INSURANCE.

Reference by witness in trial of personal injury case that person in room of her injured son, the plaintiff, was "from an insurance" *held,* prejudicial but not reversible error, where remarks of court in presence of jury clearly indicate such remark was improper but court made no finding of bad faith on the part of counsel, and it does not appear that the matter of insurance was referred to in the instructions or that a request to instruct the jury was made; hence denial of motion for mistrial, instantly made, and later motion for new trial because of such occurrence, was proper.

Appeal from Wayne; Webster (Arthur), J. Submitted June 4, 1952. (Docket No. 28, Calendar No. 45,321.) Decided June 27, 1952.

Case by Ralph Watroba, a minor, by Vincent Watroba, his next friend, against City of Detroit for injuries sustained when struck by an automobile owned by defendant and driven by one of its employees. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Elmer H. Groefsema* and *Sidney K. Meyer* (*Cornelia Groefsema,* of counsel), for plaintiff.

*Paul T. Dwyer,* Corporation Counsel, and *James R. Walsh,* Assistant Corporation Counsel (*Markle & Markle,* of counsel), for defendant.

CARR, J. The accident out of which this case arose occurred on Junction avenue in the city of Detroit about 5 o'clock in the afternoon of June 4, 1948. The street in question is 28 feet in width from curb to curb. A streetcar track is located in the center, on which cars are operated only in a northerly direction.

Immediately prior to the accident plaintiff, then 12 years of age, alighted from a northbound streetcar on which he had been a passenger. He waited for the car to continue its course, and then started across the track in a westerly direction. He was at the time carrying a sack or bundle. It is his claim that he looked to the north, where his view was in part obstructed by the moving streetcar, and saw no traffic approaching. He then looked to the south, where he discovered an automobile some distance away. The proofs disclose that automobiles were permitted to park on the east side of Junction avenue, but not on the west, and that as a result northbound traffic frequently, and perhaps customarily, used a portion of the space between the rails of the streetcar track.

Plaintiff further claims that having made his observation for vehicles coming from the south he, while still standing in the center of the street and between the rails of the streetcar track, started to turn to the north to make an observation in that direction. At that instant a Ford 2-door automobile, owned by defendant and driven by one of its employees in a southerly direction, came in forcible contact with plaintiff, resulting in serious injuries to him. The present suit for damages was brought on the theory that the driver of defendant's car was guilty of negligence constituting the proximate cause of the accident.

At the conclusion of plaintiff's proofs on the trial, counsel for defendant moved for a directed verdict, claiming that plaintiff had failed to establish his freedom from contributory negligence. Said motion was taken under advisement under the provisions of the Empson act (CL 1948, § 691.691 *et seq.* [Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*]). It was renewed after the introduction of defendant's proofs. Decision was again reserved, and

the case was submitted to the jury which returned a verdict in plaintiff's favor in the sum of $15,000. Motions for judgment notwithstanding the verdict and for a new trial were denied, and defendant has appealed.

The principal question in the case has reference to the alleged contributory negligence on the part of plaintiff. Emphasis is placed on the fact that he apparently came in contact with the side of defendant's automobile rather than with the front. The testimony, however, is in conflict as to exactly how the accident happened and where the plaintiff was at the time of the impact. A police officer of the city of Detroit, who was called to the scene of the accident shortly after it occurred and examined the automobile, gave the jury the results of his observations. He stated in substance that there were scratches along the side of the car beginning at a point near the extreme rear skirt of the left front fender, then along the door and on to the rear of the car. The witness further testified that the handle of the door was bent out. It is not disputed that plaintiff's right arm was lacerated to such an extent that amputation subsequently became necessary. It is a fair conclusion that the handle of the door caught plaintiff's arm, with the result indicated.

The driver of defendant's car was called by plaintiff for cross-examination under the statute,* and testified that when he first saw plaintiff the latter was "within a step" of the car. He testified that he was driving between 25 and 30 miles per hour, but there is other testimony indicating a speed of 40 miles. The conclusion of the jury that he was guilty of negligence is not questioned, the claim being stressed, as before noted, that plaintiff was guilty of contributory negligence as a matter of law. The trial

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

judge in denying defendant's motion for judgment notwithstanding the verdict stated in substance that because of the conflicting proofs on the trial the issues of negligence were for the determination of the jury.

It is a fair conclusion from all the evidence in the case that the plaintiff was at the time of the accident a normal lad in all respects, and fully capable of exercising for his own safety the measure and degree of care that the ordinary boy of his age and his physical and mental development may reasonably be expected to exercise under circumstances of the character here involved. The following excerpt from his testimony fairly indicates his claim as to his position and conduct at the time he was struck by defendant's car:

"*Q.* Then at that time whereabouts were you with regard to the rails of that streetcar track?

"*A.* Just about midway of the rails.

"*Q.* Midway between the rails?

"*A.* Yes.

"*Q.* Then what did you do?

"*A.* I was standing there, I turned to look to my right.

"*Q.* You had been looking south.

"*A.* That is right.

"*Q.* You were standing there and then you did what?

"*A.* I turned to look to my right, to the north, then that is when I was hit.

"*Q.* You were at that time about where?

"*A.* Just between the rails.

"*Q.* Between the 2 rails?

"*A.* Yes, sir.

"*Q.* Approximately where with regard to the 2 rails?

"*A.* You mean how far in between them?

"*Q.* Yes.

"*A.* It must have been just, well, I think just about midway.

"*Q.* Just about midway?

"*A.* I couldn't give you the exact measurements.

"*Q.* At the time you were struck were you moving west or were you otherwise?

"*A.* I wasn't moving."

He testified further that he was not completely turned around at the instant of the impact, and that he did not see the defendant's car. The testimony of plaintiff to the effect that he was between the rails of the streetcar track at the time the accident occurred was corroborated by a witness in his behalf, Lorene Kama, who stated positively that plaintiff was not across the west rail of the streetcar track. Defendant's driver stated that he stopped his car following the accident, went back to the place where it had occurred, and found plaintiff lying between the rails of the streetcar track in a position that the witness described as "the middle of the tracks."

While other testimony introduced on the trial was not in accord with the claim of the plaintiff, it was within the province of the jury to find that he was in the center of the street, between the rails of the streetcar track, and standing still, at the moment of the impact. If such was the situation, the inference clearly follows that defendant's driver, after meeting the streetcar from which plaintiff had alighted, veered to his left and operated his car in such manner that the left side of the vehicle extended across the west rail of the streetcar track. It may not be said as a matter of law that plaintiff was bound to anticipate that the driver of a southbound vehicle would follow such a course, or that he would approach at an excessive rate of speed without keeping a reasonable and proper outlook. *Carter* v. *C. F. Smith Co.,* 285 Mich 621; *Burnash* v. *Compton,* 298

Mich 70. The trial judge was not in error in denying the motion for judgment notwithstanding the verdict.

It is also claimed that the verdict was against the great weight of the evidence, and that for such reason the motion for a new trial should have been granted. We are not in accord with such contention. Under the testimony in the case the conclusion of the jury to the effect that plaintiff was exercising due and proper care for his own safety, in view of his age and of all other circumstances involved in the case, finds adequate support in the record. The disputed issues of fact relating to questions of negligence were properly submitted to the jury for determination, and the verdict reached should not be set aside for the reason claimed.

Appellant further insists that the trial court was in error in not granting a motion to declare a mistrial based on a claimed improper and prejudicial reference to the matter of insurance. For the purpose of impeaching the testimony of the plaintiff, defendant offered the testimony of a shorthand reporter as to questions propounded to plaintiff while he was in the hospital, apparently shortly following the amputation of his arm, and the answers thereto. Such questions were asked by a Mr. Lawrence, who was referred to by counsel for defendant in his cross-examination of the plaintiff as "an investigator." The reporter testified that the questioning was done in the presence of the parents of the plaintiff. Subsequently plaintiff's mother was called as a witness in his behalf and was questioned with reference to what occurred in connection with the interview by the investigator. After testimony to the effect that the witness undertook to enter plaintiff's room after his return from the operating room, and was requested to remain outside temporarily, the following occurred:

"*Q.* Who did you see?

"*A.* Then when I walked out there were 2 men standing there.

"*Q.* Who were they?

"*A.* I believe this man said he was from an insurance—

"*Mr. Markle* (interposing): Now, just a moment.

"*Q.* Who were —

"*Mr. Markle:* Just a minute. I would like to challenge counsel's good faith in that matter.

"*Mr. Groefsema:* I didn't expect that answer.

"*Mr. Markle:* I think it is a deliberate attempt—this is a suit against the city. They are afraid they are not going to recover against the city. They are trying to bring in something outside that has nothing to do with this case.

"*Mr. Groefsema:* There isn't any such purpose at all. I just wanted to know who the men were in the hall.

"*The Court:* Mr. Groefsema, you should warn your witness. You understand that very well.

"*Mr. Groefsema:* Pardon?

"*The Court:* It is your duty to warn the witness.

"*Mr. Groefsema:* I certainly—there is no reason for having any question like that in this lawsuit, your Honor. I openly admit there is no reason for it.

"*Mr. Markle:* There is no other reason for Mr. Groefsema to ask that question. He must know the answer. He isn't putting the witness on there without knowing what she is going to say. That is the mother of his client.

"*Mr. Groefsema:* I didn't know that answer. I don't practice law that way. Counsel can sustain me on that.

"*Mr. Markle:* I would like the court to instruct this jury on that, or, if not, to declare a mistrial.

"*The Court:* Well, counsel here on both sides are trial lawyers of long experience and they understand that any reference to any outside thing of that kind is improper in the trial of a case.

"Now, if by one method or another it is brought in, it becomes a question of good faith and whether or not a mistrial should not be declared on that account. I don't like, under the circumstances, to say that this was anything that resembled bad faith but certainly you should have been careful in instructing your witness with reference to things of that kind which you know are apt to come out in the trial of a case.

"*Mr. Groefsema:* I appreciate that, your Honor.

"*The Court:* This idea of bringing it in at the last moment is prejudicial undoubtedly, but I think under the circumstances we will proceed with the trial of the case.

"*Mr. Markle:* I move for a mistrial. I take it then the motion for mistrial is denied?

"*The Court:* Denied."

The charge of the trial court submitting the case to the jury is not contained in the record before us. In consequence we do not know whether the matter of insurance was referred to therein. Neither does it appear that any request for an instruction on the matter was presented by counsel for defendant. It is apparent that the trial judge, who had the advantage of observing the witness at the time the statement was made, did not believe that a finding of "bad faith" was justified. We think it may be said also that the statements of the court, together with the remarks of counsel, were of such nature as to reasonably inform the jury that any reference to the matter of insurance was highly improper and as such not entitled to consideration in the determination of the case.

In *Morris* v. *Montgomery,* 229 Mich 509, the reference in the plaintiff's testimony to the matter of insurance was, on motion, stricken out by express direction of the trial court. In discussing the question whether such reference constituted reversible error, it was said:

"Plaintiff testified to a conversation with defendant at a hospital and stated an insurance adjuster was present. The testimony about an insurance adjuster was struck out. This cured the error. The time has come when probably a majority of persons on every jury own automobiles and the policy of carrying insurance is so common that it is not surprising if jurors sense the fact. The rule of exclusion, perhaps, ought to continue, even though everyday affairs have moved beyond its original reason, but it ought not to be employed to set aside judgments except in cases of flagrant violation."

In *White* v. *Makela,* 304 Mich 425, 436, the position that this Court has taken in prior decisions with reference to the matter of insurance was summarized as follows:

"We have had occasions to discuss the question here raised, and our conclusions have quite uniformly been that the mere fact that the defendant has insurance has reached the ears of the jurors during the trial does not constitute reversible error, unless an improper use of it is made by counsel for the evident purpose of inflaming the passions of the jury and thereby affecting the result or increasing the size of the verdict, or unless such testimony was designedly injected into the case for such purpose or purposes. See *Sutzer* v. *Allen,* 236 Mich 1; *Nicholas* v. *Maxwell Motor Corp.,* 237 Mich 612; *Morris* v. *Montgomery,* 229 Mich 509; *Nicewander* v. *Diamond,* 302 Mich 239. In the instant case, the issue of defendants' liability was not involved, and the record of the trial and proceedings is barren of prejudicial error."

Under the circumstances here involved, we think that the trial court was not in error in denying the motion to declare a mistrial, or in subsequently denying a motion for a new trial based in part on such alleged error. The record does not justify a conclusion that the matter of insurance was deliber-

ately injected into the case by counsel for the plaintiff. The statements of the trial judge as set forth in the excerpt from the record, above quoted, could scarcely have failed to indicate to the jury that whether defendant carried insurance against public liability resulting from the operation of its automobiles was not involved in the case, and that in consequence the use of the term by the witness should be disregarded.

We find no reversible error in the case, and the judgment is affirmed, with costs to plaintiff.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not sit.

---

MITCHELL *v.* PERKINS.

1. TRIAL—SPECIAL QUESTIONS—INSTRUCTIONS—GENERAL VERDICT—STATUTES.

Instruction by court which is given in such a way as to indicate to the jury what answer should be given to a special question if their general verdict is to be a certain way was error, since the purpose of special questions is to ascertain whether the jury has, in making up their general verdict, properly applied the law, as given by the court, to the facts in the case and the statute requires that the answers to the special questions shall control the general verdict (CL 1948, § 618.39).

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 638.

2. SAME — ARGUMENT OF COUNSEL — INSTRUCTIONS — SPECIAL QUESTIONS—GENERAL VERDICT—CONTRIBUTORY NEGLIGENCE.

It was reversible error for the trial court to permit counsel for plaintiff to argue to the jury how to answer special questions as to plaintiff's contributory negligence if they returned a general verdict in favor of plaintiff and then follow such argument with an instruction whereby their general verdict would be permitted to control the answers to the special questions (CL 1948, § 618.39).

NORTH, C. J., and REID, J., dissenting.

Appeal from Muskegon; Sanford (Joseph F.), J. Submitted April 11, 1952. (Docket No. 63, Calendar No. 45,388.) Decided June 27, 1952.

Case by Egbert J. Mitchell against William O. Perkins for injuries sustained in automobile accident. Manufacturers & Merchants Indemnity Company, a corporation, intervened as party plaintiff. Verdict and judgment for plaintiffs. Defendant appeals. Reversed and new trial granted.

*George D. Stribley* (*R. W. Nebel,* of counsel), for plaintiff.

*Alexander, Cholette, Buchanan, Perkins & Conklin,* for intervening plaintiff.

*Alexis J. Rogoski* and *Robert Bunker Rogoski,* for defendant.

REID, J. (*dissenting*). Plaintiff Mitchell (hereinafter referred to as plaintiff) brought this suit against the defendant to recover for personal injuries with resulting loss of earnings and wages and for pain and suffering and permanent injuries and for damages to plaintiff's automobile not subrogated and the intervening plaintiff sues for the subrogated damages to plaintiff's automobile. Defendant denied liability and in his cross-declaration claims dam-

ages because of injuries to his person and resultant expenses for services of physician, surgeons, nurses' care, hospitalization, X-ray services, medicines, ambulance and other such similar charges, beside lost wages. The jury rendered a verdict in favor of plaintiffs and from the judgment entered thereon, defendant Perkins appeals.

About 6:15 a.m., September 20, 1948, plaintiff was proceeding westerly on a trunk line highway known as US–31, at the rate, as he testified, of 35 to 40 miles per hour. Plaintiff testified that when he reached a point 200 feet easterly of Getty street, he saw defendant's car at a point 35 or 40 feet north of US–31, going southerly 5 or 6 miles per hour, and knew that if he, plaintiff, proceeded as he was then proceeding and the other car continued as it was then going, that there would likely be a collision. Plaintiff continued his course without slackening his speed until he was about 40 feet easterly of the point where the collision occurred and seeing that the defendant's car had continued its course without stopping and had entered the intersection and knowing that a collision was imminent, plaintiff endeavored to apply his brakes and to turn his car to the left but testified that he does not know whether he succeeded in either decelerating his car or changing its course. Getty street at the point of the intersection is a dead-end street, ending up with its connection on the northerly side of US–31. US–31 is a through street at the point in question. On Getty street, about 60 feet northerly of the side line of US–31, there was a stop sign for traffic going south on Getty street. Inevitably traffic going south on Getty street was required to turn either right or left on arriving at the intersection. Under undisputed facts, defendant was clearly guilty of negligence in entering and proceeding in the intersection.

The court submitted to the jury the question of whether plaintiff was guilty of contributory negligence because he did not promptly apply his brakes or sound his horn on noting the approach of defendant's car.

To contradict plaintiff's testimony that he first saw defendant's car when it was 35 or 40 feet north of the intersection, defendant produced a witness, Kenneth Sedgwick, a stenotypist, who testified that he took the statement of plaintiff in stenotype notes and that plaintiff stated:

"*Q.* About how far would you say, in feet, * * * [he was] from the route you were traveling on?
"*A.* Oh, 7 or 8 feet."

And further,

"*Q.* When you first saw him 7 or 8 feet from the intersection, how far were you then?
"*A.* Maybe a couple of hundred feet.
"*Q.* About 200 feet east, that would be, wouldn't it?
"*A.* Yes."

Upon the giving of this testimony of witness Sedgwick, the following occurred on cross-examination by Mr. Nebel, attorney for plaintiff, to which defendant objects and on which he predicates a claim of error:

"*Q.* Who was there at the time you claimed that you—that Mr. Mitchell, the plaintiff, was interrogated?
"*Mr. Rogoski* [attorney for defendant]: I object to that as incompetent, irrelevant and immaterial.
"*The Court:* Overruled.
"*The Witness:* Well, at this time I can only say positively 3 people; the gentleman who I was with to take this statement, and Mr. Mitchell, and myself.
"*Q.* Who was the gentleman that was with you at the time the statement was taken?

"*Mr. Rogoski:* I object to that as incompetent, irrelevant and immaterial and it is an offer for an ulterior motive.

"*The Court:* I think the objection would be good except that the accuracy of the statement is questioned. You may answer.

"*The Witness:* Mr. Walter Naglekirk.

"*Mr. Nebel:* And who is Mr. Naglekirk?

"*A.* He is claims adjuster for the Triple A Insurance.

"*Mr. Rogoski:* I move for a mistrial. This was intentional and deliberate to inject insurance into the case.

"*The Court:* No, you injected it in. You called this witness and there is a question of the accuracy of the statement and the question of interest.

"*Mr. Rogoski:* He is the one who took the statement.

"*The Court:* I overrule the objection.

"*Mr. Nebel:* How do you spell the last name of the person with you?

"*The Witness:* N-a-g-l-e-k-i-r-k.

"*Q.* Where does he live?

"*A.* In North Muskegon, that is all I can say.

"*Q.* Were you employed by him to officiate, to take down what was said there that day?

"*A.* Yes.

"*Q.* You didn't ask any questions yourself?

"*A.* No.

"*Q.* What business is Mr. Naglekirk in?

"*A.* As I said, he is the claims adjuster for the Muskegon area of the Triple A Insurance Company."

Plaintiff's justification for introducing the testimony about the presence of Mr. Naglekirk, claims adjuster for the AAA Insurance Company, is that Mr. Naglekirk asked the questions and Mr. Sedgwick is shown thereby to be the servant of the defendant or at least of the defendant's insurer and therefore an interested witness.

It was permissible to show the interest of the witness Sedgwick and we find no reversible error on this account.

Defendant offered and the court submitted to the jury for their written answer, as part of their verdict, 2 typewritten questions: One, could plaintiff, after he first saw defendant's automobile approaching the intersection, by the exercise of ordinary care have prevented a collision with defendant's automobile? Two, did the failure of plaintiff to sound his horn between the time he first saw defendant's automobile approaching the intersection and the time when defendant's automobile entered the intersection amount to negligence which proximately contributed to cause the collision in which plaintiff was injured?

During the arguments of the case to the jury, the court (against the objection of defendant) permitted plaintiff's attorney to state to the jury that plaintiff requested the jury to answer both questions in the negative. The court was in error in so ruling. See *Beecher* v. *Galvin,* 71 Mich 391, and *Taylor* v. *Davarn,* 191 Mich 243, and cases therein cited. However, from *Holman* v. *Cole,* 242 Mich 402, it appears that such error is not necessarily reversible.

Question number one, in the instant case, is improper and of doubtful construction. The court and jury were not necessarily interested in a determination of what plaintiff *could* have done. The issue was whether the exercise of ordinary care on the part of plaintiff *would* have prevented the collision.

As to the second question, it is to be observed that we have no statute requiring the driver of a motor vehicle intending to claim a superior right of way through an intersection to sound his horn to warn a driver on an intersecting highway approaching the intersection. The second question is confusing to a jury, *e.g.,* the words "proximately contributed" have

an established meaning to bench and bar, but it is not to be considered that such technical meaning in absence of explanation or instruction would be fairly well known to a layman serving as juror. The court did not commit reversible error by permitting plaintiff to request the jury to vote "no" on the 2 questions.

Plaintiff had a right to expect that defendant would stop for the intersection. Plaintiff could further consider that defendant by going so slowly as 5 or 6 miles per hour, showed an intention to stop at the intersection. Under these circumstances, plaintiff could properly be found by the jury not guilty of contributory negligence for not slowing up for the intersection until plaintiff saw that defendant actually was entering the intersection, at which time (plaintiff claims) it was too late to prevent the collision. Under all the circumstances, plaintiff was not as a matter of law, guilty of contributory negligence; it was a jury question. Among other cases, see *DeVries* v. *Owens,* 295 Mich 522.

During the taking of the testimony of plaintiff's witness, Dr. Anderson, plaintiff's attorney, after reciting some of the personal history of plaintiff as to his physical condition and injuries shown to have been apparent immediately after the accident and condition and symptoms of plaintiff's condition since the accident, asked the witness:

"Could the accident complained of have produced the condition that the person then complained of, the conditions now suffered by that person?

"*A.* I think that—

"*Mr. Rogoski:* I object to that one for the reason it is too complicated.

"*The Court:* I will overrule the objection.

"*The Witness:* I think the accident was the sole cause of these conditions.

"*Mr. Rogoski:* I move the answer be stricken as invading the province of the jury. It is voluntary and not in answer to the question.

"*Mr. Nebel:* I am the only one who can object—

"*Mr. Rogoski:* I object to it as voluntary and incompetent and invading the province of the jury.

"*The Court:* I think the doctor can state his opinion, assuming the facts in the question being correct.

"*Mr. Nebel:* Could, doctor, these facts stated in this hypothetical question stated to you, could the physical condition of that person be the result of that accident complained of?

"*A.* I think it is the result.

"*Mr. Rogoski:* I move the answer be stricken.

"*The Court:* The question is 'could it be?' Answer the question.

"*A.* Yes, sir."

We consider the court correctly ruled that the question was "Could it be?" and by that ruling correctly and sufficiently gave the jury to understand that the last answer and not the answer objected to, was the answer the jury should pay attention to.

Defendant claims the damages were excessive. The trial court in his opinion summarizes testimony showing that the total for doctor and hospital bills, damages to automobile and loss of wages to date of trial, amounted to $5,535. The verdict for plaintiff was for a total of $9,323. The balance of $3,788 must therefore be for past and future pain and suffering and permanent injuries.

There was testimony from which the jury could find that the plaintiff (then 26 years of age) suffered injuries from which he will continue to have headaches for some considerable time in the future, that he will have trouble with his right arm because of the injuries to the brachial plexus there, which is probably permanent, and that the sacroiliac strain caused by the accident will probably be permanent

and that plaintiff is going to need medical care for several years; that upon going back to work about 1 year after the accident, his wages were reduced because of his decreased ability to work, from $2 per hour as a skilled mechanic to work as common laborer at $1.20 1/2 per hour.

The court properly submitted to the jury the question of personal injuries probably continuing into the future and probable future pain and suffering and medical expenses and consequent future damages. We cannot say that the part of the verdict, $3,788, remaining after deducting computable damages is excessive nor that the entire verdict is against the overwhelming weight of the evidence.

The judgment appealed from should be affirmed. Costs to plaintiff.

NORTH, C. J., concurred in the result.

SHARPE, J. I am for reversal and a new trial for reasons hereinafter stated.

Before the cause was submitted to the jury the following special questions were presented to the jury, at the request of defendant's counsel:

"1. Could plaintiff, after he first saw defendant's automobile approaching the intersection, by the exercise of ordinary care have prevented a collision with defendant's automobile?

"2. Did the failure of plaintiff to sound his horn between the time he first saw defendant's automobile approaching the intersection and the time when defendant's automobile entered the intersection amount to negligence which proximately contributed to cause the collision in which plaintiff was injured?"

We note that no objection was made to the form of the questions. During the argument of plaintiff's counsel to the jury the following occurred:

"*Mr. Rogoski:* I object to counsel referring to any special questions in his argument as improper.

"*Mr. Nebel:* These are requests on the part of the defendant.

"*Mr. Rogoski:* It is improper for him to make any reference to them.

"*Mr. Nebel:* I certainly can. It would be highly improper of me if I didn't.

"*Mr. Rogoski:* I will ask for a ruling of the court.

"*The Court:* No. I am going to present these questions to the jury for their answer, and I believe counsel would have the right to discuss them in connection with his argument.

"*Mr. Nebel:* Thank you, your Honor.

"*Mr. Rogoski:* I take exception to his argument as improper and prejudicial. May I have an exception?

"*Mr. Nebel:* If you are going to give Mr. Mitchell something for his damages, then you will answer both of these questions 'No.'

"*Mr. Rogoski:* I take exception to counsel telling the jury how to answer the questions.

"*The Court:* He may comment on the points raised in the special questions.

"*Mr. Nebel:* The first question that will be asked for you to determine is 'Could plaintiff, after he first saw defendant's automobile approaching the intersection, by the exercise of ordinary care, have prevented a collision with defendant's automobile?' We submit if you give a verdict to plaintiff, the answer to that is 'No.'

"*Mr. Rogoski:* I object to the argument as improper and prejudicial.

"*The Court:* I will overrule the objection.

"*Mr. Nebel:* The second one: 'Did the failure of plaintiff to sound his horn between the time he first saw defendant's automobile approaching the intersection and the time when defendant's automobile entered the intersection amount to negligence which proximately contributed to cause the collision in which plaintiff was injured?'

"And again we submit that special question should be answered 'No.'

"*Mr. Rogoski:* I object to the argument as improper and prejudicial.

"*The Court:* I will overrule the objection."

The trial court instructed the jury as follows:

"Members of the jury, I am going to hand these questions to you for you to answer. Discuss them. Read them over carefully. If you are unanimous in answering yes or no, make the answer. You will see a line for the foreman to sign. If the foreman signs that, that will mean you were unanimous. The first question is: 'Could plaintiff, after he first saw defendant's automobile approaching the intersection, by the exercise of ordinary care, have prevented a collision with defendant's automobile?' If plaintiff has convinced you from the evidence received here in court that he could not have avoided the accident despite the fact, if it be a fact, he exercised ordinary care, then the answer would be 'No'. If he could have avoided the collision by the exercise of ordinary care, the answer would be 'Yes'. The second question: 'Did the failure of plaintiff to sound his horn between the time he first saw defendant's automobile approaching the intersection and the time when defendant's automobile entered the intersection amount to negligence which proximately contributed to cause the collision in which plaintiff was injured?' In other words, if you find plaintiff, by sounding his horn, could have avoided the collision but he failed to do so, then his failure to sound his horn—if ordinary care and prudence called for it—there would be contributory negligence on his part. If you find plaintiff's failure to sound his horn was contributory negligence."

The statute relating to special questions reads as follows—CL 1948, § 618.39 (Stat Ann § 27.1019):

"Sec. 39. In all cases where an issue of fact is tried before any court of record, the court shall at the request in writing of the counsel of either party,

instruct the jury if they return a general verdict, also to find upon particular questions of facts, respecting which the issue is joined, to be stated in writing, and shall direct a written finding thereon: Provided, such special questions shall not exceed 5 in number, and shall be each in single, short sentences, readily answered by yes or no. The special verdict, or finding, shall be filed with the clerk, and entered upon the minutes, and when any special finding of facts shall be inconsistent with a general verdict, the former shall control the latter, and the court give judgment accordingly."

In *Beecher* v. *Galvin,* 71 Mich 391, we had occasion to discuss the object of the statute relating to special questions. We there said:

"The object of the statute in allowing such specific questions to be submitted to the jury, and requiring them to make answer thereto, was to ascertain whether the jury had, in making up their general verdict, properly applied the law, as given by the court, to the facts in the case. This can never be done if the jury are to be directed by the court what answer shall be made to each question asked, in the event the general verdict is a certain way. This direction by the court was error, and it was also error for the court to decline to require the jury to make answer to the plaintiff's questions so submitted when asked to do so by plaintiff's counsel."

In *Taylor* v. *Davarn,* 191 Mich 243, plaintiff recovered a civil damage judgment against defendant, a saloon keeper. The following question was submitted to the jury:

"Was the plaintiff's husband, Benjamin Taylor, intoxicated at the time he came to his death on the 1st day of April, 1913?"

After the jury had deliberated for some time, they requested further instructions with reference to the special question.

The court gave the following instruction:

"As you will recall from the instructions I gave you, in order to find for the plaintiff you must find that her husband, Benjamin Taylor, was intoxicated at the time he came to his death. So if you find for the plaintiff your answer to the question would be 'Yes'. If you should find for the defendant you would find that he was not intoxicated at the time he came to his death, and your answer therefore would be 'No'. * * *

"*A Juror:* Nothing difficult, but if it has to be signed all 'Yes' or all 'No'.

"*The Court:* Yes; all 'Yes' or all 'No'. If he was not intoxicated at the time he met his death the plaintiff cannot recover, as I told you. If he was intoxicated at the time he met his death the plaintiff may recover, the other conditions existing to which your attention was called in the general charge. If you should find for the plaintiff it would not be a difficult thing to find the necessary elements to entitle her to recover, namely, he was intoxicated, because, if you do not find he was intoxicated, your verdict cannot be for the plaintiff. If you should find he was not intoxicated at the time of his death, your verdict necessarily must be for the defendant. You may take the paper and retire to your jury room."

We there said:

"We are of the opinion that the error is well assigned under the holdings of this Court in the cases of *Cole* v. *Boyd,* 47 Mich 98; *Maclean* v. *Scripps,* 52 Mich 214; *Beecher* v. *Galvin,* 71 Mich 391; *Mechanics' Bank of Detroit* v. *Barnes,* 86 Mich 632; *Brassel* v. *Railway Co.,* 101 Mich 5.

"It was said in *Maclean* v. *Scripps, supra,* that:

" 'The object of the statute (CL 1871, § 6026; How Stat 1882, § 7606) requiring the jury to answer specifically questions giving their conclusions on the facts necessary to be found to entitle a party to recover, was to ascertain whether or not they had found sufficient facts from the evidence to support

their general verdict under the law as given them by the court. It is the province of the jury to find these facts from the evidence, without aid or suggestion from the court, and this can never be done if the jury are told in advance what facts are necessary to be found to support the verdict, or what answers to the questions propounded will be consistent therewith, or what they must find in order to answer a question propounded in the negative or affirmative. This practice will make the general verdict control the findings, instead of the findings control the general verdict; and thereby the object of the framers of the statute will be defeated. This was the result of the practice indulged in this case. The effect is to make the court, and not the jury, decide the main issues in the case. *Cole* v. *Boyd,* 47 Mich 98. The special findings of the jury were sufficient to support the general verdict, had the proceedings upon which they were based not been erroneous.'

"The question submitted in this case was an important one. The question as to whether Taylor was intoxicated at the time of his death was the pith of plaintiff's case. Unless plaintiff was able to establish that fact, the jury were instructed that no recovery could be had. In view of the importance of the question, the instruction that their answer to the special question must be in harmony with their general verdict, and advising them what their answer should be under certain circumstances, was clearly error because it violated the rule laid down in the foregoing cases."

In *Pecor* v. *Home Indemnity Company of New York,* 234 Wis 407 (291 NW 313), the court said:

" 'It is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.' *Banderob* v. *Wisconsin Cen-*

*tral R. Co.,* 133 Wis 249, 287 (113 NW 738); *Beach* v. *Gehl,* 204 Wis 367, 371 (235 NW 778); *Anderson* v. *Seelow,* 224 Wis 230, 233 (271 NW 844).

"There is an abundance of authority to the proposition that it is reversible error for either the court or counsel to inform the jury of the effect of their answer or answers upon the ultimate result of their verdict. If single instances of prejudicial statements and arguments be held reversible error, repeated instances multiply the gravity of the error."

The purpose of special questions is to enable the court to learn what view the jury takes of the material issues and their ability to make correct inferences from existing facts. See *Cole* v. *Boyd,* 47 Mich 98; *Durfee* v. *Abbott,* 50 Mich 479; and *Hartley* v. *A. I. Rodd Lumber Co.,* 282 Mich 652.

Mr. Justice REID relies upon *Holman* v. *Cole,* 242 Mich 402, to sustain his theory that instructions from the court to the jury as to how they should answer special questions is not necessarily reversible. It is significant to note that the judgment in that case was reversed because plaintiff's counsel asked each juror on his *voir dire* examination whether he was interested in a particular insurance company. The following is quoted from the opinion for the purpose of showing what the court said relative to the issue of the court instructing the jury on special questions:

"In the instructions given relative to the special questions when the jury came into court and announced a verdict for plaintiff, the trial judge coupled up the answers which they should give with the conclusion they had reached as to plaintiff's right to recover. They were told that if they meant by their verdict that defendant was guilty of negligence, it would follow that he had neglected to do what an ordinarily prudent man would have done under like circumstances. In effect, he said to them,

that, unless they changed their general verdict, the second question should be answered in the affirmative. When a proper question is submitted, it should be answered as the jury find the fact to be. They should not be instructed what effect their answer will have on the general verdict they have announced, or on which they may later agree. We are impressed that they might have understood from what the court said to them that if they desired their general verdict to stand they must answer the second question in the affirmative. Were this the only error complained of, we should, however, be loath to reverse because of it."

It can readily be seen that what the court said on this issue was unnecessary and clearly is *obiter dicta* and as such is not a precedent upon which rights of parties should be determined.

Because the court permitted plaintiff's counsel to argue to the jury how to answer the special questions if they returned a verdict in favor of plaintiff, and because the court gave the jury the following instruction:

*"The Court:* If plaintiff's failure to sound his horn was contributory negligence on his part, then you would answer that question 'Yes'. If there wasn't contributory negligence on his part, then you would answer that question 'No'."

reversible error was committed. It follows that the judgment must be reversed and a new trial granted. Defendant may recover costs.

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

## O'CONNELL *v.* DEARBORN POLICE AND FIRE PENSION BOARD.

## RABIDEAU *v.* SAME.

1 OFFICERS—REVERSAL OF ACTION BY COURTS.

Reversal or disturbance by the courts of an administrative board's decision is limited to want of jurisdiction, fraud, bad faith, abuse of discretion, or arbitrariness.

2. MANDAMUS—DISCRETION OF OFFICERS—COURTS.

A court has no right to substitute its judgment or discretion by way of a writ of mandamus for that exercised by an administrative board or commission.

3. MUNICIPAL CORPORATIONS — PENSIONS — CONSTRUCTION — AMBIGUITY.

Municipal pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby, ambiguous provisions being so construed, if reasonably permissible, to give vitality and efficiency in the accomplishment of the obvious purposes and objects sought to be attained.

4. SAME—PENSIONS.

A judicially administered pension fund may be a potent agency in securing and retaining the services of the most faithful and efficient class of persons connected with municipal services in which property owners and residents of a municipality are most vitally interested.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 42 Am Jur, Public Administrative Law § 206.
[2] 34 Am Jur, Mandamus § 126.
[3] 40 Am Jur, Pensions § 4.
[4] 40 Am Jur, Pensions §§ 13, 16.
[5] 42 Am Jur, Public Administrative Law § 30.
[6] 40 Am Jur, Pensions §§ 23, 40.
[7] 35 Am Jur, Mandamus § 393.

5. SAME—DISCRETION OF OFFICERS.

The powers of a board, created by a city ordinance, to exercise discretion must be found in the ordinance itself and are subject to its limitations thereon.

6. SAME—FIREMEN—PENSIONS—DISCRETION OF OFFICERS.

City firemen who had each served more than 20 years were entitled to be placed on pension roll under charter provisions granting firemen the option to retire after such length of service and the police and fire pension board had no discretion to exercise, where no factual issues were presented, hence mandamus to place names of plaintiffs on the roll was properly granted (Dearborn Charter, §§ 21.16, 21.17, 21.28).

7. COSTS—PUBLIC QUESTION—MANDAMUS—PENSIONS.

No costs are allowed in mandamus proceeding to compel defendant municipal officers to place plaintiffs' names on pension roll, a question of public importance being involved.

Appeal from Wayne; Brennan (John V.), J. Submitted April 15, 1952. (Calendar No. 45,362.) Decided June 27, 1952.

Separate petitions by Thomas R. O'Connell and LeRoy E. Rabideau for writs of mandamus to compel the Police and Fire Pension Board of the City of Dearborn and the City of Dearborn, a municipal corporation, to place them on pension roll. Cases consolidated. Writs granted. Defendants appeal. Affirmed.

*Kassoff & Young* (*Norman W. Stern,* of counsel), for plaintiffs.

*Dale H. Fillmore* (*Robert E. Childs,* of counsel), for defendants.

REID, J. The separate petitions of the 2 petitioners have been consolidated for the purpose of consideration on this appeal. Each petitioner petitioned the circuit court for a peremptory writ of

mandamus requiring defendant board to meet and approve of his petition filed with the defendant board for the purpose of placing him on service retirement annuity or "pension roll" of the defendant city.

Each petitioner claims and defendants admit that he had served over 20 years of creditable service as fireman in the employ of defendant city.

The only question in this case is whether the defendant board is vested with discretion and on what grounds to grant or to deny the applications of plaintiffs who are eligible for retirement so that each petitioner "shall receive [or not receive] a service retirement annuity."

At the first meeting of defendant board at which plaintiffs' petitions were considered, it seems that not all members were present, but at a later meeting held October 9, 1951, all members were present, but the petitions were not approved by the required majority.

The sections of the amended charter of the city of Dearborn which are of importance in determining the issue in this case are as follows:

"Sec. 21.16. Each trustee shall be entitled to one vote in the meetings of the board. Five members of the board shall constitute a quorum. At least 5 concurring votes shall be necessary for a decision by the trustees at any meeting of the board. The members of the board shall serve without additional compensation.

"Sec. 21.17. The mayor of the city shall be ex-officio chairman of the board, and the mayor pro-tem shall be ex-officio vice-chairman. The board shall adopt its own rules of procedure and shall keep a record of its proceedings. The board shall hold meetings regularly, at least 1 in each month, and shall designate the time and place thereof. All meetings of the board shall be public. * * *

"Sec. 21.27. (a) Any member in service may file with the board his written application for retirement setting forth on what date not less than 30 days nor more than 90 days subsequent to the execution and filing thereof he desires to be retired; provided that the said member at the time so specified for his retirement shall have 20 or more years of creditable service as a policeman or fireman in the employ of the city.

"(b) Any member who has attained age 60 shall be retired forthwith, or on the first day of the calendar month next succeeding that in which the member shall have attained age 60. On recommendation of the department head, the board may continue such a member in service for periods not to extend beyond the attainment of age 65. This paragraph shall not apply to any member until 5 years from the effective date of this charter amendment.

"Sec. 21.28. Upon retirement from service according to the provisions of section 21.27 of this chapter, a member shall receive a service retirement annuity equal to 1/50 of his average final compensation multiplied by his total years of creditable service; provided, however, the service retirement annuity of a member or beneficiary shall not exceed 1/2 his average final compensation, or 7/10 of the annual rate of pay received by a patrolman first class, or a fireman first class, whichever amount is the lesser."

Defendants' answer to plaintiff O'Connell's petition for mandamus among other things alleges:

"Defendants allege that petitioner O'Connell was on the date of filing said application for retirement 44 years of age, was in excellent health and was in the prime of life; that he had received upwards of 20 years of training in the Dearborn fire department at city expense, and because of these facts the discretion of the defendant retirement board existed whereby the city should not lose the benefit of the investment which it had made in plaintiff O'Con-

nell; that no clear legal right was alleged to be existing in the plaintiff to the relief prayed for and no clear legal duty was alleged to be existing and none in fact existed in the defendants to grant plaintiff's application for retirement; that chapter 21 of the charter of the city does not in any place impose upon defendants the duty of granting retirement to an applicant, but on the contrary, the language is clearly discretionary with the defendant retirement board as to whether the application for retirement will be allowed, particularly when the applicant is strong and able bodied and has ability to continue as an employee of the city."

The trial court in his opinion, among other things, stated:

"Reading the provisions of section 21.27 (a) with a view to a fair meaning of the context of the section itself, as well as in relation to the provisions of the other sections hereinbefore set forth, it seems to the court a fair conclusion that eligibility for retirement of an able bodied policeman or fireman is complete when he has completed 20 or more years of creditable service, and that when he has done so, he has fulfilled all requirements necessary to such eligibility, and is entitled to be retired, unless some special circumstance or event takes his case out of the purview of the section of the charter relative to such retirement. That the board has discretionary power, within limits, is evident from the language of certain provisions of the retirement act itself, more particularly section 21.16. The reason given by defendants for refusal to act favorably in the instant case, namely, the city's investment by reason of its training of a fireman or policeman for a period of 20 years or more, does not seem to the court to rest upon any reasonable basis either in law or equity. When placed against the background of the present case, such claimed reasoning is too shallow to merit credence. Retirement allowance of a pension is controlled by the provisions of the retirement act itself

and not by theories, worthy or otherwise, foreign to a fair construction of the prescribed terms of the act itself. * * *

"To hold that petitioners are not entitled to favorable action by the board for the novel reasons set forth by defendant in his pleadings and in his presentation of the case is, in the opinion of the court, to do violence to the fair intent of the language set forth in section 21.27 (a), and is, in effect, arbitrary and captious to a point bordering on fraud. The petitioners have fulfilled every requirement set out by the charter. No emergency or unusual circumstance has been shown to exist. If, in addition to the 20 or more years of creditable service, a policeman or fireman must also meet some other requirement not mentioned in the retirement act, then, in reason, appropriate language to that effect should be added to the aforementioned policemen's and firemen's retirement act. In the absence of such language, the board cannot assume that such exists nor can the court supply the deficiency."

"The scope of judicial review is limited and the courts will not review or disturb the decision of the [pension] board except for want of jurisdiction, fraud, bad faith, abuse of discretion, or arbitrariness." 62 CJS, p 1212, citing cases in California, Colorado, Connecticut, Missouri, New York and Ohio.

In *McCarthy* v. *Couzens,* 214 Mich 501, mandamus was sought by the plaintiff in that case, to compel the pension committee of the fire department of the city of Detroit to grant a pension. We say at pages 506, 507:

"In passing upon the issue of fact before the commission at its hearing of April 20, 1916, its action is not shown to have been fraudulent, arbitrary or capricious. In the absence of such showing the action of the commission must be deemed final and we have no right to interfere by mandamus, no right to

substitute our judgment or discretion for that of the commission."

In *Nyman* v. *Detroit Police Pension Committee,* 302 Mich 520, in reversing an order of a circuit court granting a mandamus ordering the defendant committee to grant a pension, we say at page 521:

"The committee after a full hearing had determined that the officer did not die from the effect of injuries received in the performance of his duties, and that, therefore, plaintiff was not entitled to a pension."

We further say at page 525:

"We shall not discuss the testimony except to state that it fully sustains the committee in its third and final denial of plaintiff's petition for a pension. * * * The determination of the committee, being neither arbitrary, capricious nor fraudulent, was final."

Eligibility to receive a pension was the issue in dispute in the *McCarthy* and *Nyman Cases.*

By fair implication, if we had found the determination of the committee in the *Nyman Case* or in the *McCarthy Case,* to be arbitrary, capricious or fraudulent, we would not have treated the determination as final. It may therefore be said that our decisions in the *Nyman Case* and *McCarthy Case* are fairly in line with the rule as laid down in 62 CJS, p 1212, above cited.

Plaintiffs cite 3 McQuillin, Municipal Corporations (3d ed), § 12.143 (in part), as follows:

"Pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby. If a provision is ambiguous and uncertain, the courts will consider the obvious purposes and objects sought to be attained and will construe the language used, insofar as it reasonably

permits, to the end of giving it vitality and efficiency in the accomplishment of such purposes and objects."

"A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with those arms of the municipal service in which every property owner and resident of the city is most vitally interested." 40 Am Jur, p 972.

The State has recognized the propriety and desirability of fire and police department pensions by the enactment (with later amendments) of CL 1948, § 38.551 *et seq.* (Stat Ann 1949 Rev § 5.3375 [1] *et seq.*). Neither the plaintiffs nor the defendants state any claim that the State statute limits the amendment to the charter of defendant city of Dearborn nor affords a rule for decision of the matter herein litigated.

In *Hubbard* v. *Board of Trustees of Dearborn Retirement System*, 319 Mich 395, we say (per syllabus 1):

"The powers of a board, created by a city ordinance, to exercise discretion must be found in the ordinance itself and are subject to its limitations thereon."

Plaintiffs are not of the age of 60 years and each had the option under section 21.27 of the charter above cited, each having more than 20 years of creditable service as firemen, to apply for retirement under the charter provisions.

The reasons given by the defendant board are not sufficient reasons for refusal of the service retirement annuity.

The charter provisions seem to imply that all employees eligible under those provisions to receive service retirement annuities, shall be treated alike. To hold otherwise would render the retirement funds

subject to personal and political favoritism, which it cannot be considered the voters intended by adopting the charter provisions in question. Such favoritism in the administration of public funds could not be tolerated by the court. The action of defendant board in the instant case must be deemed arbitrary or capricious or the result of insufficient reasons not disclosed in the record. There was no issue of fact as to the eligibility of plaintiffs to receive a "pension."

The trial court ordered the issuance of a writ of mandamus, in each of the 2 consolidated cases, which orders were appealed from by defendants, and are affirmed by us. No costs, a question of public importance being involved.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

NORTH, C. J., did not participate in this decision.

## PEOPLE v. LEE.

## SAME v. BANNERMAN.

1. CRIMINAL LAW—AIDING AND ABETTING—PUNISHMENT.
   One who aids and abets in the commission of an offense in this State may be prosecuted and, on conviction, punished as if he had directly committed the offense (CL 1948, § 767.39).

2. SAME—TWO OR MORE ACTS CULMINATING IN A FELONY—JURISDICTION.
   A felony which consists of or is the culmination of 2 or more acts done in its perpetration may be prosecuted in any county in which any one of the acts was committed (CL 1948, § 762.8).

3. SAME—VENUE—CONSTITUTIONAL LAW—VICINAGE.
   The legislature may fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed, since the elimination of the provision in the Constitution restricting the trial to the vicinage (Const 1835, art 1, §§ 9, 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19).

4. SAME—VENUE.
   The trial of a criminal prosecution should be by a jury of the county or city where an offense was committed except as the legislature has otherwise provided (Const 1908, art 2, § 19).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Criminal Law § 107.
[2–8] 14 Am Jur, Criminal Law § 234.
[2–8] Constitutionality of statute for prosecution of offense in county other than that in which it was committed. 76 ALR 1034.
[10] Generally as to corroboration, see 58 Am Jur, Witnesses § 805 *et seq.*

5. SAME—VENUE—STATUTES—CONSTITUTIONAL LAW—TWO OR MORE ACTS CULMINATING IN A FELONY.

A statute providing for venue of prosecution for crime in any county in which one or two or more acts culminating in a felony was committed is not unconstitutional as depriving the accused of a right to trial by jury (Const 1908, art 2, § 19; CL 1948, § 762.8).

6. SAME—MURDER—JURISDICTION—STATUTES.

Statute conferring jurisdiction to prosecute crime in any county in which any one of two or more acts culminating in felony took place conferred jurisdiction upon recorder's court of the city of Detroit to try prosecution for murder, where victim was inveigled into automobile within city limits by 2 of 5 defendants, pursuant to a prearranged plan, and transported to another county where appellants participated in killing him (CL 1948, §§ 750.316, 762.8).

7. SAME—MURDER—DUE PROCESS—VENUE.

A want of due process was not shown by appellants because of their prosecution for murder in which they had participated, where they were prosecuted in city of their residence and in which victim was inveigled into car and they failed to show they were put to disadvantage in procuring witnesses or attending trial there as compared with trial in county in which the killing took place (CL 1948, §§ 750.316, 762.8).

8. SAME—MURDER—CONSPIRACY—VENUE.

Appellants were properly found guilty of murder in recorder's court of the city of Detroit, where there was evidence showing that they and other conspirators had participated in the formation of a conspiracy before the commission in Detroit of the act of inveigling the victim into an automobile by other members of the conspiracy and taking him to another county where appellants participated in shooting him (CL 1948, §§ 750.316, 762.8).

9. HOMICIDE—INCLUDED OFFENSES—CONSPIRACY—VENUE.

Charge to jury that their verdict must be either murder in the first degree or not guilty was not error, because jury was not allowed to find defendants guilty of any lesser included offense, where theory of prosecution was based on carrying out of a conspiracy to murder in county other than that of prosecution and in which conspiracy had been formed and at least 1 act culminating in murder performed (CL 1948, §§ 750.316, 762.8).

10. SAME—CORROBORATION OF DISCREDITED WITNESS—EVIDENCE. Evidence was sufficient to permit jury to find appellants guilty of murder in the first degree, where there was corroboration of a discredited witness' testimony and some of his testimony gave details difficult to fabricate (CL 1948, § 750.316).

Appeal from Recorder's Court for the City of Detroit; Ide (O. Z.), J. Submitted April 17, 1952. (Docket Nos. 82, 83, Calendar Nos. 44,955, 45,026.) Decided June 27, 1952.

Ervin Lee and John Bannerman were convicted of murder in the first degree. Both appeal from denial of delayed motion for new trial. Cases heard on same record. Affirmed.

*Richard Nahabedian,* for defendant Lee.

*Lee C. McManus,* for defendant Bannerman.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,* Prosecuting Attorney, *Ralph Garber,* Chief Assistant Prosecuting Attorney, and *Garfield A. Nichols* and *George W. Miller,* Assistant Prosecuting Attorneys, for the people.

REID, J. On leave granted, defendant Ervin Lee appealed from his conviction and sentence pronounced December 4, 1936, for murder in the first degree.* Defendant John Bannerman, who had also, on leave granted, appealed from his conviction and sentence for complicity in and guilt of the same offense, stipulated and agreed that his cause be consolidated with and governed by the same decision as may be rendered in the Lee case. One record but separate briefs for the 2 defendants have been filed

* CL 1948, § 750.316 (Stat Ann § 28.548).—REPORTER.

and the 2 appeals are herein considered and disposed of.

Beginning on November 18, 1936, defendant Ervin Lee together with codefendants Harvey Davis, John Bannerman, Roy Lorance and Charles Rouse, were tried by a jury in the recorder's court for the city of Detroit on an information charging (in part) that the said defendants:

"Heretofore, to-wit, on the 25th day of May A.D. 1936 at the said city of Detroit, in the county aforesaid feloniously, wilfully and of their malice aforethought, did kill and murder one Silas Coleman; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

On arraignment defendants refused to plead; a plea of not guilty was entered by court order.

All of the defendants were convicted of first-degree murder by the jury and sentenced to life imprisonment by the court. In 1937, a motion for new trial was denied by the original trial judge. Approximately 10 years later a motion for new trial was filed with the successor trial judge on September 10, 1947. An amended motion for new trial dated March 16, 1948, was filed by present counsel, heard, taken under advisement and denied on October 12, 1948.

On the trial before court and jury, the people's witness, Dayton Dean, testified as follows: In the week of May 25, 1935 [1936], one Dayton Dean (not a defendant), Harvey Davis and Charles Rouse conspired together to obtain a negro to take out to the lake (Rush lake, Livingston county, Michigan) where Harvey Davis was going to have a party "with some of the boys in his outfit;" he (Davis) wanted to get hold of a negro "to have a little target practice and have a little excitement out there." On Wednesday or Thursday night of that week the witness Dayton

Dean talked to defendant Charles Rouse and told him that Davis and some of the boys were going to have a party out at the lake and that they wanted to get hold of a negro and take him out and "they were going to kill him." Rouse stated that he had "just the man for you;" that the fellow was working for him and he had not been working very long; that he would be able to take him out all right; that Rouse would make the arrangements. This conversation took place at 19179 Irvington avenue at the city of Detroit. On Friday of the same week, Dean informed Davis of the arrangements with Rouse. Davis said he would be out to Rush lake if he was not at home when Dean went over to his home on Saturday night. On Saturday night, May 25th, Charles Rouse picked up the witness, Dayton Dean, at 2764 Second avenue in the city of Detroit; the 2 drove over to the home of Harvey Davis, 775 Ferdinand, city of Detroit; Davis was not at home but the witness, Dayton Dean, knew the way to the lake; Rouse told the witness, Dayton Dean, about Silas Coleman, the negro that he was to meet at 9:30 in the evening on the corner of Meyers road and Grand River in the city of Detroit; the 2 of them then drove to Meyers and Grand River where they found Silas Coleman waiting for them; Dayton Dean got in the back seat and Silas Coleman got in the front seat with Charles Rouse, and they proceeded out Grand River; Coleman said he had a couple of cases of beer at his landlady's place and he was going to have a party when he came back; Charles Rouse told Coleman that "the contractor" [the identity of the contractor being otherwise undisclosed] went out to the lake, and that he [Coleman] "would have to go out there to get his money and that he could go along with us."

The witness, Dayton Dean, further testified: Rouse, Dean and Silas Coleman, the deceased, went

to Brighton, turned at the red light there and drove out to Rush lake to the cottage. Dean got out of the car, entered the kitchen and saw a long table at his right where Harvey Davis and his wife, Jack Bannerman and his wife, Lorance and his wife and Ervin Lee and his wife were seated at the table drinking. Dean told Harvey Davis he wanted to see him in the front room; Dean told Harvey Davis that "we had the colored fellow out there in the car," and explained to him that Charley (Rouse) had got him to the lake by telling him he was going to get his money; Davis called Lee, Lorance and Bannerman into the other room and told them, "We've got the fellow we were talking about;" Davis told Dean to go out and tell Charley Rouse that this contractor had gone out on the lake fishing and they would lead the way; Davis told the boys (Lee, Lorance and Bannerman) to get their guns and see that they were loaded; they got their guns—38's, and Dean had his gun, a .45 automatic, with him; Davis told Jack Bannerman to get into the car with Dean and that Lee and Davis would ride in Lorance's car; the defendants got into the 2 cars, drove back on the highway and went to the town of Pinckney, turned left and went up the first road, turned right and drove about a mile; turned right on another road and drove possibly a half a mile or mile, until they came to a bridge that "crossed like a big marsh" and stopped with the rear wheels of Lorance's car on the bridge.

Dean further testified: Davis, Lorance and Lee got out of the car and walked back to the car occupied by Dean, Bannerman, Rouse and Silas Coleman; Bannerman and Dean got out of the car and walked over on the opposite side of the bridge where Davis, Lee and Lorance were; Davis said, "Well, let's go and get him;" as they started back across the bridge, Silas Coleman came around the back of the car facing them and Davis fired first; then Lorance, Lee

and Bannerman fired; the negro attempted to say something, gave a half-right-about face and ran down the road in the direction the cars were facing; the defendants began shooting after him as he ran; he (Coleman) gave a left-face and jumped in the swamp; they emptied their guns after him when he jumped in the swamp; they then drove back to the cottage, had a drink and then Charley Rouse and the witness, Dayton Dean, drove back to Detroit; on the way back Charles Rouse gave Dayton Dean $10 of Silas Coleman's money and told him to divide it up among the boys; there was $8 for Charles Rouse; Monday morning when Dean went to work he told Davis that he had the money and that Davis said not to say anything to the other fellows about it, so Dean gave him $5 and kept $5.

The defendant John Bannerman claims he was not in the city of Detroit and county of Wayne at the time the alleged murder was committed and he claims he was not in the jurisdiction of the recorder's court for the city of Detroit at the time the alleged plan to commit the murder was arranged.

The court charged the jury that the defendant John Bannerman could be found guilty of murder in the first degree if he committed an overt act or participated in the plan within the jurisdiction of the recorder's court. The trial court charged the jury with regard to the included offenses of murder in the second degree or manslaughter as follows:

"I, therefore, charge you that you cannot find the defendants guilty of either one of the lesser offenses, but that your verdict must be either one of guilty of murder in the first degree or not guilty."

The prosecution claims that there was a conspiracy to commit the murder, and that an act necessary to and a step toward its accomplishment was committed in the city of Detroit; that defendants

were conspirators in the conspiracy though not present in the city of Detroit when the act aforesaid was committed in the city of Detroit, which act consisted of inveigling the murdered man, Coleman, into an automobile and conveying him on the road toward the place where he was afterwards murdered, all within the purview of the conspiracy.

The first question we are to consider is whether the recorder's court of the city of Detroit, acquired jurisdiction of the murder, if the prosecution's aforesaid claim has been proven to the satisfaction of the jury.

Our statute, CL 1948, § 767.39 (Stat Ann § 28.979), provides:

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

Our statute further provides, CL 1948, § 762.8 (Stat Ann § 28.851):

"Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed."

"By the provisions of the Federal Constitution, criminal trials must take place in the State and district wherein the crime was committed, but it was long ago determined that these provisions apply only to prosecutions in Federal courts." 14 Am Jur, pages 929, 930, citing *Burton* v. *United States,* 202 US 344 (26 S Ct 688, 50 L ed 1057, 6 Ann Cas 362), and other cases.

See, also, *Nashville, Chattanooga & St. L. R. Co.* v. *Alabama,* 128 US 96 (9 S Ct 28, 32 L ed 352), cited in 24 Fed Digest, § 107, Criminal Law.

"In the absence of any limitation by constitutional provision, it seems to be generally recognized that the power of a State legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted." 76 ALR 1035.

The Constitution of Michigan of 1835 contained the provision in article 1, § 9, "The right of trial by jury shall remain inviolate," and in article 1, § 10, "In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage."

The Constitution of 1850 (art 6, § 28) omitted the words "of the vicinage" and the present Constitution, 1908 (art 2, § 19), likewise does not have the words "of the vicinage" qualifying a jury to try a criminal case. The evident purpose of leaving out of the Michigan Constitution the words "of the vicinage" is to permit the legislature some latitude in legislating as to venue of criminal cases.

Defendants cite and rely upon *Swart* v. *Kimball,* 43 Mich 443, which opinion has been criticized on the ground that Justice COOLEY overlooked the fact that the Michigan Constitution of 1850 had omitted the words, "of the vicinage."

In any event, since the decision of the *Swart Case, supra,* the following cases have shown a departure in certain instances from a strict application of the rule that the jury must be of the vicinage, or of the county, so far that there have been upheld as constitutional, 4 statutes of this State creating exceptions or modifications of the rule as to trial by jury of vicinage: *Bayliss* v. *People,* 46 Mich 221; *People* v. *Hubbard,* 86 Mich 440; *People* v. *Peterson,* 93 Mich 27; *Glinnan* v. *Judge of Recorder's Court,* 173 Mich 674 (a change of venue case); *People* v. *Henderson,* 246 Mich 481; *People* v. *Southwick,* 272 Mich 258; *People* v. *Coapman,* 326 Mich 321. We consider that

except as the legislature for the furtherance of justice has otherwise provided reasonably and within the requirements of due process, the trial should be by a jury of the county or city where the offense was committed.

The defendants were tried, not for conspiracy, but for murder. The prosecution claims that a conspiracy was formed by all of the defendants in Detroit to murder some negro, by taking him out to Livingston county and there using him as a target and shooting him; that in pursuance of the conspiracy, Coleman was inveigled into an automobile in the city of Detroit, and transported to Livingston county, where the conspirators, including defendants Lee and Bannerman, fired at the negro, Silas Coleman, and that the death of Coleman was caused by the shots of the conspirators, including both defendants Lee and Bannerman.

Defendant Lee claims that because the information charges that the murder was committed in the city of Detroit, which city is the territorial limit of the criminal jurisdiction of the trial court, the trial court did not have jurisdiction of murder actually committed in Livingston county.

The statute, last above quoted, CL 1948, § 762.8, is not invalid under the provisions of either the Federal Constitution or the Constitution of the State, so far as concerns any reasons advanced by defendants in this case.

The information falls within the meaning of the statute, CL 1948, § 762.8.

The statute validly confers on the trial court venue of the offense in question in this case.

Further, the defendants in this case were prosecuted in the city of Detroit where they lived. It is not shown that they were put to disadvantage in procuring witnesses or attending the trial in Detroit as compared with a trial in Livingston county. There

was no want of due process occasioned by the bringing of the prosecution in Detroit.

Defendant Lee claims the evidence produced on the trial was not sufficient to show defendant Lee implicated in a conspiracy formed in Detroit. There was testimony that the 2 defendants Lee and Bannerman were in Livingston county when Davis said to them (and a claimed co-conspirator Lorance): "We've got the fellow [*i.e.,* Coleman] we were talking about;" and that defendants Lee and Bannerman went with the other alleged conspirators to the place where Coleman was killed, and participated in the killing. There was testimony to support the claim of the prosecution that defendants Lee and Bannerman had made themselves parties to the conspiracy before the commission in Detroit of the act of inveigling Coleman into the automobile and conveying him to Livingston county.

There was testimony to show that 1 act, at least, in carrying out the conspiracy was performed in Detroit, *i.e.,* Coleman was inveigled into the automobile of 1 of the conspirators in Detroit and started toward the scene of his murder.

Defendant Lee further claims that the trial court erred in charging the jury that they could not find the defendants guilty of any of the lesser offenses and that their verdict must be either guilty of murder in the first degree or not guilty. The venue depended on the theory of the prosecution that the murder in Livingston county was committed in carrying out a conspiracy and that 1 act to accomplish the murder occurred in the city of Detroit. The necessary implication was that it was murder of the first degree. If it was found to be not murder of the first degree, in practical effect such finding would eliminate the theory of conspiracy in the form and manner relied on by the prosecution and there would be

no offense of which the trial court could have venue. There was no error.

Defendant Lee claims that because we treated witness Dean as discredited, in *People* v. *Hepner,* 285 Mich 631, there is not sufficient testimony in the record in the instant case, to warrant the sustaining of a verdict of guilty. While in the instant case there is not sufficient testimony to convict defendants Lee and Bannerman without Dean's testimony, yet the testimony of Dean herein is in several phases corroborated. Dean's testimony, in the instant case, seems not so inconsistent as his testimony was found to be in the *Hepner Case, supra.* Dean's testimony in the instant case gave details difficult to fabricate of the shooting of Coleman, and actions of the parties leading up to the shooting.

The record shows sufficient grounds for the jury's belief that Dean was telling the actual truth as to the murder of Coleman and the parties participating in the murder.

We do not conclude to set aside the verdict on the ground that it is not supported by sufficient testimony.

In each case, the conviction and judgment is affirmed.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

NORTH, C. J., did not participate in this decision.

## DWELLEY *v.* TOM McDONNELL, INC.

1. CORPORATIONS—LANDLORD AND TENANT—AVAILABILITY OF PLEA OF ULTRA VIRES.

   The plea of *ultra vires* is not available to landlord of defendant corporate lessee, where it is not shown plaintiffs were directors or officers of defendant or knew of the *ultra vires* character of the act of defendant in entering into lease involved (CL 1948, § 450.11).

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—VIOLATION OF LEASE.

   Claim that defendant corporate lessee of plaintiffs had violated lease which plaintiffs sought not to renew in accordance with provisions therefor, made for the first time on appeal, is not considered by the Supreme Court as a case will not be reviewed in the Supreme Court on a theory different from that on which it was tried in the trial court.

Appeal from Oakland; Holland (H. Russel), J. Submitted June 6, 1952. (Docket No. 42, Calendar No. 45,505.) Decided June 27, 1952.

Summary proceedings by George M. Dwelley and wife against Tom McDonnell, Inc., a Michigan corporation, to recover possession of real estate. On appeal to circuit court, judgment was for defendant. Plaintiffs appeal. Affirmed.

*John J. Gafill* (*H. V. Spike,* of counsel), for plaintiffs.

*Francis W. McCauley,* for defendant.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 13 Am Jur, Corporations § 758 *et seq.*
[2] 3 Am Jur, Appeal and Error §§ 820, 830.

REID, J. Plaintiffs appeal from a judgment of the circuit court, which judgment affirmed the judgment for the defendant rendered by a circuit court commissioner, in a summary ouster proceeding brought by plaintiffs against the defendant corporation.

Plaintiffs are the owners of the property involved in the proceeding, situate at 467 South Woodward, Birmingham, Michigan. The building on this property was constructed for automobile business.

On December 31, 1945, defendant entered into an agreement with plaintiffs to lease the premises for a term of 5 years commencing September 1, 1946, to be used for conducting a Lincoln and Mercury sales and service business. The agreement to lease provided that defendant should have possession of parts of the building as soon as plaintiffs should be able to dispossess the then tenants of various parts of the building, and not later than August, 1946. Defendant was to have possession of all of the building not later than September 1, 1946, at which time a lease for 5 years was to be executed, which lease was to be for $350 rent per month and defendant at the end of the 5-year period was to have the option of renewal for another 5-year period, at the same rent. Defendant obtained possession of part of the premises in the spring of 1946 and thereafter paid a proportionate part of the rent. Defendant in June, 1946, after obtaining possession of part of the building but before obtaining full possession of all the building, leased another building more suitable for defendant's business, and notified plaintiffs that defendant would not be able to use the premises as originally intended. In the ensuing discussion, plaintiffs were not willing to release defendant from its agreement to lease the property. A lease between plaintiffs and defendant was signed September 1, 1946, and contained the provision that the premises were to be "used and occupied only for the

purpose of conducting an automobile dealership, for any lawful purpose in accordance with any city ordinance," and among other things also provided that the "landlord hereby agrees that the tenant may assign or sublet the above premises or any part thereof." Thereafter and on October 29, 1946, defendant informed plaintiff George M. Dwelley by letter that defendant had arranged to sublease the premises to Berry Door Company and that defendant sought Dwelley's written approval, and George M. Dwelley's approval was signed at the bottom of the letter.

On August 24, 1951, a few days before the lease of September 1, 1946, expired, defendant wrote to plaintiffs that it "elects to exercise the option to renew, for an additional period of 5 years, the lease from you to it, dated September 1, 1946." Plaintiffs refused to extend the lease for the additional 5-year period and instead, brought the summary ouster proceeding which is before this Court on appeal herein.

Plaintiffs claim that the subletting is beyond and outside of the scope of defendant's charter, and that by the subletting defendant rendered the lease from plaintiffs void. The trial court found that defendant fully performed the lease on defendant's part and timely exercised defendant's option to renew the lease.

Article 2 of the defendant's incorporation is as follows:

"The purpose or purposes of this corporation are as follows:

"To buy, sell, own, lease, deal in and deal with, store and repair automobiles, trucks, and all other types of motor vehicles;

"To manufacture, buy, sell, deal in and deal with parts and accessories used in and about motor vehicles, together with all articles and supplies used

in connection with the purchase, sale, storing and repairing of motor vehicles of all descriptions;

"To buy, sell, own, lease and operate garages, service stations, and repair shops for all types of motor vehicles.

"(In general to carry on any business in connection therewith and incident thereto not forbidden by the laws of the State of Michigan and with all the powers conferred upon corporations by the laws of the State of Michigan.)"

Plaintiffs cite and rely upon *Anderson* v. *Conductors Protective Assurance Co.*, 266 Mich 471, 476, 477, as upholding plaintiffs' claim as to effect of *ultra vires*. The *Anderson Case* was decided April 3, 1934.

Our statute, CL 1948, § 450.11 (Stat Ann § 21.11), effective June 6, 1935, provides:

"The plea of *ultra vires* shall not be made by anyone except by (1) the corporation in an action between it and a director or officer thereof or a person having actual knowledge of the *ultra vires* character of the act or (2) by either party in an action between a shareholder and the corporation. The foregoing provision shall be construed as a limitation on the power of a corporation.

"The plea of *ultra vires* shall not be made by any foreign corporation or any other party in any action brought in this State except (1) between such corporation and a director or officer thereof or a person having actual knowledge of the *ultra vires* character of the act or (2) by either party in an action between a shareholder and the corporation."

The *Anderson* decision is not considered by us as preventing the application of the later enacted statute just cited above to the case at bar. Plaintiffs are barred by the above-cited statute, CL 1948, § 450.11 (Stat Ann § 21.11), from availing themselves of the claim that the lease in question was *ultra vires* as to defendant corporation.

Plaintiffs seek in this Court, for the first time, to raise the question that defendant violated the lease, and plaintiffs claim here and now the right to have the lease declared void and terminated by reason of breach by defendant.

Plaintiff George M. Dwelley in his letter to defendant dated July 12, 1951, complained of defendant as breaching the covenants of the lease.

Plaintiffs' attorney made the claim and position of plaintiffs known to the circuit court, at the beginning of the trial, as follows:

"The reasons which Mr. Dwelley gave as to why it should be given up we will not go into because we have decided that the legal question should control in this matter, and the legal question is that at the time the defendant corporation made this contract they were not empowered to make it, it was *ultra vires* and void and is void and being void from its inception, no right of renewal exists in the defendant."

The question as to whether defendant breached the lease will not be considered in this Court where it was not raised in the trial court.

"We have repeatedly held that a case in the Supreme Court will not be reviewed on a theory different from that on which it was tried below." *Gustin* v. *Ziem,* 289 Mich 219, 224.

Judgment for defendant is affirmed, with costs to defendant.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

NORTH, C. J., did not sit.

MORAN *v.* DETROIT BOARD OF ELECTION COMMISSIONERS.

1. MUNICIPAL CORPORATIONS—VOTING MACHINES—STATUTES.
   A city is granted the power to purchase and use voting machines meeting statutory standards and requirements (CL 1948, §§ 191.2, 191.6).

2. ELECTIONS — VOTING MACHINES — BALLOTS — ARRANGEMENT OF NAMES OF CANDIDATES.
   That names of candidates for nomination to any political office by a political party are to be placed upon the party *row* of such party on a voting machine is a different requirement than placement in a separate *column* on a ballot (CL 1948, §§ 177.16, 191.6).

3. SAME—INADEQUACY OF MACHINES—USE OF PAPER BALLOTS.
   Paper ballots may be used when election commissioners are confronted with an election at which all of the names of candidates cannot be accommodated on the voting machines (CL 1948, § 191.6).

4. SAME—VOTING MACHINES—ROTATION OF NAMES.
   The rotating of names of candidates by precincts using voting machines is a sufficient rotation to comply with statutory requirements and obviates the presumed advantage of placement in the top row (CL 1948, § 165.3).

5. SAME—VOTING MACHINES—SUITABILITY FOR USE BY CERTAIN VOTERS.
   Whether or not voting machines tend to confuse the voter or are not suitable for use by the aged or infirm voters are matters for consideration by the legislature and not grounds for judicial interference with election officers.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–5, 7] 18 Am Jur, Elections § 213.
[1–5, 7] Constitutionality of statutes providing for use of voting machines. 66 ALR 855.
[6] 3 Am Jur, Appeal and Error § 823.
[8] 43 Am Jur, Public Officers § 255.
[9] 14 Am Jur, Costs § 91.

6. APPEAL AND ERROR — INJUNCTION — PARTIES — SUFFICIENCY OF PLEADING.

Whether or not an alleged taxpayer and voter is a proper party in suit to enjoin purchase of voting machines by city election officials is not determined, where allegations in bill are insufficient upon which to base injunction against contemplated action.

7. INJUNCTION—VOTING MACHINES—IMPROPER MANIPULATION—MALFUNCTIONING—STATUTES.

Purchase and use of voting machines *held,* not subject to restraint by injunction, where allegations as to capacity for improper manipulation and malfunctioning are insufficient to show the machines fail to meet statutory and charter standards and requirements (CL 1948, §§ 191.2, 191.6).

8. OFFICERS—DISCRETION—COURTS—FRAUD—ABUSE OF DISCRETION.

The judgment of municipal officers in the execution of powers conferred on them by law or charter for a public purpose is not subject to control and correction by the courts in the absence of fraud or a clear abuse of discretion.

9. COSTS—PUBLIC QUESTION—INJUNCTION—VOTING MACHINES.

No costs are allowed in suit to enjoin purchase of certain voting machines by defendant city, a public question being involved.

Appeal from Wayne; Murphy (George B.), J. Submitted June 10, 1952. (Docket No. 57, Calendar No. 45,512.) Decided June 27, 1952.

Bill by Edward J. Moran against Thomas D. Leadbetter and others, individually and as Board of Election Commissioners of the City of Detroit, and others to restrain purchase of certain voting machines. Decree for defendants. Plaintiff appeals. Affirmed.

*Thompson & Moran,* for plaintiff.

*Paul T. Dwyer,* Acting Corporation Counsel, and *James R. Walsh,* Assistant Corporation Counsel, for defendants.

REID, J. Plaintiff's original and amended bill of complaint was filed for the purpose of enjoining officials of the city of Detroit from purchasing and from using certain automatic voting machines in public elections to be held in the city of Detroit. Plaintiff states in his bill of complaint that he is a resident taxpayer and voter in the city of Detroit. Defendants answered and moved to dismiss the bill. Without hearing on the merits, the court granted the motion to dismiss the bill, on the ground that the bill did not state a cause of action.

On or about May 22, 1951, the city of Detroit through defendant Hazen L. Funk, commissioner of purchases and supplies, received bids for furnishing 300 to 500 voting machines, pursuant to a request for bids authorized by the common council of the city of Detroit. The Engineering Society of Detroit was appointed by the common council of the city of Detroit to make a study of the voting machines upon which bids had been submitted; the said society reported among other things to the common council that the automatic voting machines manufactured by the Automatic Voting Machine Corporation of Jamestown, New York, intervening defendant, were so constructed that the officer's latch is depressed to unlock the voter's lever; this arrangement permits the officer's latch to be leaned against by a careless officer and thus held in such a position that multiple voting is possible; and further that under certain circumstances it is possible to examine the counters of the machine during the course of an election and to return the machine to a voting condition without this improper action having been exposed by malfunctioning of the machine, which reported facts plaintiff relies on as grounds for the injunction prayed for by him.

Plaintiff further claims that prior experience with the automatic voting machine in question revealed

that it was deficient in that it was inadequate to provide for the ballot used in some elections in the city of Detroit, particularly in the primary election held in 1950, and in the nomination for members in the State legislature where 21 candidates are nominated.

Plaintiff further claims that the construction and operation of the machine so confused voters that candidates appearing upon the top row received votes actually intended for candidates in the second row, because of nonrotation of names.

Plaintiff further claims that the horizontal arrangement of offices on the voting machine violates the requirements of CL 1948, §§ 177.20 and 191.6 (Stat Ann §§ 6.365 and 6.570).

Plaintiff further claims that notwithstanding the defects reported by the Engineering Society, and other defects otherwise found out by experience, the common council recommended the purchase of the said automatic voting machines and intended to authorize the purchase of 500 of the machines for approximately $600,000 as an initial installation; and that the total cost including other future installations would be $4,500,000.

No dishonesty or fraud is claimed regarding the actions or contemplated actions of the defendants. The authority and power of the officials to purchase and use voting machines is not subject to doubt. By the statute of this State, CL 1948, §§ 191.2 and 191.6 (Stat Ann §§ 6.566 and 6.570), the city is granted the power to purchase and use voting machines, and standards and requirements are set forth.

The statute prescribes (CL 1948, § 191.6 [Stat Ann § 6.570]) that the names shall be "in the same order" on the machines that the names are required to be upon printed ballots.

It is to be noted that the statute, CL 1948, § 177.15 (Stat Ann 1951 Cum Supp § 6.359), as to paper ballots, prescribes, "The names of all candidates

of each political party shall be placed in a separate *column* on said ballot," whereas the statute, CL 1948, § 191.6 (Stat Ann § 6.570), apparently contemplating that machines may be used, prescribes, "The name of each candidate for nomination to any office by a political party shall be placed upon the party *row* of such party." We italicize and emphasize the 2 words "column" and "row," to indicate that we differentiate between column and row, whereas plaintiff seems to argue that the 2 words mean the same thing, as to being vertical or horizontal.

Respecting the defect that all the names of candidates at some primary elections cannot be placed on the voting machines, it is to be noted that the statute, CL 1948, § 191.6 (Stat Ann § 6.570), further provides:

"Where voting machines are purchased or are used the election commissioners of the county, city or village or township shall not be required to print and furnish paper ballots for election districts using voting machines, *except for* any question or *matter that cannot be provided for by the voting machines.*" (Italics supplied.)

No question is raised in this case but that the election commissioners could provide paper ballots when confronted with a primary or general election, in which it shall be found that the voting machine cannot accommodate all the names of candidates.

In connection with plaintiff's contention respecting nonrotation of names and that the top candidate received votes actually intended for second row candidates, it is to be noted that the statute, CL 1948, § 165.3 (Stat Ann § 6.248), provides for rotating names of candidates by precincts, *i.e.*, the machine in one precinct has the order of names of candidates changed from the order in another precinct.

In *Groesbeck* v. *Board of State Canvassers,* 251 Mich 286, we say (per syllabus 17):

"Neglect of election officials to alternate names of candidates on ballots, as required by election law (part 3, chap 4, § 12), does not invalidate ballots."

Also (per syllabus 18):

"Use of voting machines at primary election, as authorized by election law (part 3, chap 11, § 3), and failure to alternate names of candidates thereon, did not invalidate the vote cast thereon."

Where there are several candidates, the name in the top row, or first on the list, has presumably some advantage to such candidate. We consider the statutory provision proper which provides for rotation of names on the machines by precincts, and that said statutory provision disposes of plaintiff's objection as to nonrotation of names.

Plaintiff further claims that the use of the machine tended to confusion of the voters, and that it is inconvenient for use by aged or infirm voters because of the size and shape of the lever, which 2 questions, we consider, are legislative and discretionary, and not so set forth in the bill of complaint as to indicate grounds for judicial interference, and do not merit detailed discussion.

The allegations of the bill of complaint are insufficient to show that the actions or contemplated actions of the defendants are *ultra vires,* contrary to the Constitution, the statute or the city's charter, or fraudulent, malicious or corrupt, and so it is unnecessary to rule on plaintiff's request that he be declared a proper party to bring this suit.

In view of the foregoing, we find the purchase and use of the machines in question not violative of the statutes or charter and there is no sufficient allegation in the bill to show that the machines are not in compliance with statutory requirements.

"In accordance with the general rules governing judicial control over the acts of public officers, the judgment of municipal officers in the execution of powers conferred on them by law or charter is not subject to control and correction by the courts in the absence of fraud or a clear abuse of discretion." 37 Am Jur, p 886.

"Where a municipality has the power to engage in an activity for a public purpose, the courts will not interfere with the discretionary acts of its municipal officials. * * * [Citing cases.] In *Veldman* v. *City of Grand Rapids,* 275 Mich 100, 113, we said:

" 'In order to warrant the interposition of a court of equity in municipal affairs, there must be a malicious intent, capricious action or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them.' " *Wolgamood* v. *Village of Constantine,* 302 Mich 384, 395.

We affirm the decree appealed from dismissing the bill of complaint. No costs, a public question being involved.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

NORTH, C. J., did not sit.

## HOUSE *v.* CITY OF SAGINAW.

1. MUNICIPAL CORPORATIONS — CHARTER AMENDMENT — SEPARATE STATEMENT OF PROPOSITIONS—STATUTES—PROPERTY TAX LIMITATION—INCOME TAX.

   Statute requiring statement of propositions to be voted upon by municipal electors so that each proposition may be voted upon separately was not complied with, where proposition for approval of tax limitation upon real and personal property was coupled with an income tax proposition on ballot as a single proposition, hence, amendment of charter and implementing ordinances were not validly adopted (CL 1948, § 117.21).

2. COSTS—PUBLIC QUESTION—VALIDITY OF CHARTER AMENDMENT.

   No costs are allowed in suit to enjoin collection of an income tax by city under charter amendment claimed to be invalid because of failure to comply with statute requiring separate statement of propositions to be voted upon by electors, a public question being involved (CL 1948, § 117.21).

Appeal from Saginaw; Boardman (Harry D.), J., presiding. Submitted April 18, 1952. (Docket No. 70, Calendar No. 45,441.) Decided June 27, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Elections § 181; 28 Am Jur, Initiative, Referendum, and Recall § 20; 37 Am Jur, Municipal Corporations § 214.

[1] Validity of special election as affected by publication or dissemination of matter or information, extrinsic to the question as submitted, regarding nature or effect of the proposal. 122 ALR 1142.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects. 90 ALR 572.

Applicability of constitutional requirements as to legislation or constitutional amendments, to statutes or constitutional amendments under provision conferring initiative or referendum powers. 62 ALR 1349.

[2] 14 Am Jur, Costs § 91.

Bill by Malcolm G. House, Edward H. Corson and others against City of Saginaw and others to restrain the levying or collecting of an excise tax. Decree for plaintiffs. Defendants appeal. Affirmed.

*Murphy & Murphy,* for plaintiffs.

*W. Vincent Nash, Russell A. Schafer* and *R. James Harvey,* for defendants.

*Amici Curiae:*

*Edward N. Mack,* Adrian City Attorney.

*Dale H. Fillmore,* Dearborn Corporation Counsel.

*H. Winston Hathaway,* Muskegon Assistant City Attorney.

*William J. Balgooyen,* Muskegon Heights City Attorney.

*William A. Ewart,* Pontiac City Attorney.

*Richard H. Paulson,* Kalamazoo City Attorney.

*Roscoe O. Bonisteel.*

*Ballard, Jennings, Bishop & Fraser.*

DETHMERS, J. The city of Saginaw is a home-rule city. On February 5, 1951, section 45 of chapter 7 of its charter entitled "Adoption of Budget, Tax Limit" provided:

"The council shall, by resolution, determine and adopt the budget and make the appropriations for the next fiscal year and shall provide, by resolution, for a tax levy of the amount necessary to be raised

by taxation, which shall not exceed 1 1/2% of the assessed value of all real and personal property subject to taxation in the city, in conformity with and subject to section 21, article 10, of the Constitution of Michigan and the State law pertaining thereto."

The council adopted a resolution proposing to amend said section as follows:

"Adoption of Budget, Tax Limit, Excise Tax

"Sec. 45(a) The council shall, by resolution, determine and adopt the budget and make the appropriations for the next fiscal year. It shall provide, by resolution, for a tax levy of the amount necessary to be raised by taxation, for city purposes, on real and personal property, which shall not exceed 1% of the assessed value of all real and personal property subject to taxation in the city.

"Sec. 45(b) For a period of 10 years beginning January 1, 1952, the council may, by ordinance, provide for the levy and assessment of a specific excise tax of not to exceed 1% per annum upon the following: (1) All salaries, wages, commissions and other compensation earned (a) by residents of the city and (b) by nonresidents of the city for work done or services performed or rendered in the city; (2) the net profits of all businesses, professions or other activities (a) conducted by residents of the city and (b) conducted in the city by nonresidents; and (3) that part of the net profits earned as a result of work done or services performed or rendered and business or other activities conducted in the city by corporations having an office or place of business in the city.

"The council may prescribe by ordinance all things it may deem necessary to exercise effectively the authority herein granted, including but not limited to the following: A penalty of not to exceed 5% of the amount of any unpaid tax for each month or fraction of a month for the first 5 months of nonpayments; interest on any tax not paid when due at not more than the rate of 1/2 of 1% per month; the

collection of any tax, including interest and penalties, herein authorized without respect to said 10-year period and by any method available for the collection of a debt owed to the city; and the examination of books, records and paper necessary to determine tax liability thereunder."

(Section 45[c]. This subsection defined "association," "business," "corporation," "net profits," "nonresident" and "resident.")

"Sec. 45(d) The net receipts from the tax authorized by section 45(b) hereof, after providing for all costs of collection, shall be accumulated in each fiscal year until March 31st, and as soon thereafter as possible such net receipts shall be distributed as follows:

"First, an amount equal to 3/10 of 1% of the assessed valuation of the real and personal property subject to taxation in the city shall, insofar as funds are available, be transferred to the general fund, and the tax limit created by section 45(a) hereof shall, for the next fiscal year be reduced by the amount so transferred.

"Second, there shall be next set aside, insofar as funds are available, an amount sufficient to defray the debt service requirements of the next fiscal year, including principal and interest, of any bonds issued by the city to finance the construction of a sewage disposal system and appurtenances.

"Third, the amount remaining after the payments above required have been made shall be transferred to a fund to be known as the public improvement fund and shall be used solely for the acquiring, extending, altering or repairing of public improvements which the city may, by the provisions of its charter or the general law, be authorized to acquire, alter or enlarge."

(Section 45[e]. This subsection contained the usual severability provision.)

At an election held on May 22, 1951, the proposed charter amendment was submitted to the qualified electors. Of the 14,462 ballots cast thereon, 9,030 were in favor and 5,432 opposed to adoption. The proposal was submitted upon a ballot which was in form as follows:

"Proposed amendment to section 45 of chapter 7 of the city charter.

"Proposed by resolution of the council, adopted February 5, 1951.

"Shall section 45 of chapter 7 of the city charter be amended: To authorize a tax lavy on property of not to exceed 1%; to authorize for 10 years only an excise tax of not more than 1% on salaries, wages, commissions, other compensation and profits of both residents and nonresidents; and to provide for the use of the net proceeds of such excise tax to reduce property taxes, defray annual sewage disposal bond expense, and for public improvements?

"YES ( )

"No ( )"

The plaintiffs are residents and electors of the city of Saginaw; at least 1 of them is a taxpayer on real property therein, and it is admitted that both would be prospective taxpayers under the tax provided for in the charter amendment. Plaintiffs' bill of complaint alleged the invalidity of the proposed tax both because of the form of the charter amendment and because of the tax itself. From decree holding the amendment and implementing ordinance adopted thereunder invalid and void and permanently enjoining defendant city from levying or collecting any tax authorized thereunder, defendants appeal.

Involved is the question stated in plaintiffs' brief as follows:

"Are the charter amendment and implementing ordinance entirely void because the ballot embraced

more than one related proposition and did not state each proposition separately to afford an opportunity for an elector to vote for or against each such proposition, as required by PA 1909, No 279, § 21, as amended by PA 1939, No 279, being CL 1948, § 117.21 (Stat Ann 1949 Rev § 5.2100)?"*

The mentioned section of the statute reads in part as follows:

"The form in which any proposed charter amendment or question shall appear on the ballot, unless provided for in the initiatory petition, shall be determined by resolution of the legislative body, and when provided for by the initiatory petition, the legislative body may add such explanatory caption as shall be deemed advisable. Any proposed amendment shall be confined to 1 subject and in case a subject should embrace more than 1 related proposition, each proposition shall be separately stated to afford an opportunity for an elector to vote for or against each such proposition."

The effect of the quoted language of the statute has been considered by this Court but once, namely, in *Michigan Public Service Company* v. *Cheboygan,* 324 Mich 309, from which defendants quote as follows, p 334:

"Hence, it was proper to submit the terms of the franchise in the proposition to authorize the issuance of mortgage bonds. If they were to be submitted separately, the authority to issue bonds might be approved while the constitutional requirement for a franchise to set up terms in event of a default might be rejected."

We fail to find in the *Cheboygan Case* support for defendants' claim that the amendment in the instant case was submitted to the electors in conformity with the requirements of the statute. In Cheboygan

* This section was also amended by PA 1947, Nos 1 and 87.—REPORTER.

there was submitted to the electors, separately, 2 related propositions, which were, as we stated in that case:

"In effect:

"1. The establishment of charter power to acquire and operate a municipal electric utility; and

"2. The establishment of charter power to finance its acquisition."

The objection raised in that case was that the second proposition contained 2 separate proposals, *i.e.,* (a) authority to issue revenue bonds; and (b) provision for a franchise to operate the electric plant and distribution system as security for payment of the bonds in case of default. The answer to that objection was simply that, upon analysis, proposition (2) presented but 1 proposal, namely, the issuance of revenue bonds secured by a mortgage which pledged not only the physical equipment involved, but, as well, a franchise to operate it in the event of default. Submission of the terms of the mortgage was not a proposition separate and apart from the proposal to issue bonds secured by such mortgage.

Defendants also rely on *Kelly* v. *Laing,* 259 Mich 212, decided before 1939 when the statute was amended to require, as now, that related propositions embraced within the same subject be submitted separately. Authorities from other jurisdictions cited by defendants are scarcely in point because they do not involve that precise statutory requirement.

It is clear that subdivisions (a), (b) and (d) of the proposed amendatory section 45 and the condensed statement thereof appearing on the ballot, even were they conceded to involve but 1 subject, embrace 3 separate propositions, namely, (1) a tax limitation on real and personal property; (2) an income tax; and (3) disposition of revenues accruing

from the income tax. In this connection we note defendants' suggestion that the 10-mill tax limitation for city purposes provided for in proposition (1) was meaningless because already in effect in defendant city by virtue of the provisions of PA 1948 (1st Ex Sess), No 44 (CL 1948, § 117.3[g] [Stat Ann § 5.2073(g)]). Plaintiffs deny this because of the express provision of the old section 45 of the charter which fixed a limitation of 15 mills for all purposes, contending that under the express terms of the statute the presence of that provision in the charter prevented the 10-mill provision of the statute from becoming effective in defendant city. A number of theories are advanced concerning the actual legal effect of adoption of proposition (1). The legal questions presented in this connection need not be determined here nor should the electors have been expected to wrestle with them at the polls. Suffice it to say that proposition (1), providing for a tax limitation on real and personal property, even though included in and germane to the general subject of the entire amendment, was, insofar as the proposed income tax is concerned, a related proposition, regardless of whether its adoption by the electors had any legal effect or was merely an idle gesture, placing the stamp of approval on existing law, and was, accordingly, placed on the ballot for no other purpose than to serve as attractive bait to win approval of the income tax. It was the intent and purpose of the statute that, as applied to the facts in this case, the electors should have had the opportunity to adopt or reject the proposed income tax independent of their approval or disapproval of any particular tax limitation on real and personal property. This was denied them on the ballot in question.

Affirmed, without costs, a public question being involved.

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

NORTH, C. J., did not participate in this decision.

---

## STERK & VOGEL, INC., *v.* KUZEE.

1. BROKERS—COMMISSIONS—LISTING AGREEMENT—OFFER PRESENTED.
   Verdict was properly directed for owners of property listed by plaintiff broker, suing for commission, where offer received by broker and proposed to owner was not substantially identical to offer contained in listing agreement.

2. SAME—COMMISSIONS—COMPLIANCE WITH LISTING AGREEMENT.
   A broker has the duty to show compliance with the terms of listing agreement in order to be entitled to commission.

3. SAME—REFUSAL OF OWNER TO ACCEPT OFFER.
   An owner of property in this State who has listed it for sale with a real estate broker is not limited to grounds of refusal stated at time he refuses to accept an offer presented by the broker.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—MATTER RAISED ON APPEAL FOR FIRST TIME—OWNERS' REFUSAL OF OFFER—ESTOPPEL.
   Claim that defendant owners who refused offer presented by plaintiff broker was precluded at the trial from justifying refusal of offer on ground other than that stated at time offer was refused came too late when presented for first time on appeal, where the trial court has not had an opportunity to pass upon such question.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 8 Am Jur, Brokers § 176.
[4] 3 Am Jur, Appeal and Error § 820.

Appeal from Kent; Brown (William B.), J. Submitted June 12, 1952. (Docket No. 22, Calendar No. 45,439.) Decided June 27, 1952.

Action by Sterk & Vogel, Incorporated, against Ray Kuzee and wife for real estate commission. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

*Searl, White & Block,* for plaintiff.

*Warner, Norcross & Judd,* for defendants.

CARR, J. The material facts in this case are not in dispute. On February 5, 1951, the defendants were the owners of certain real estate, in the city of Grand Rapids, subject to a mortgage. On that date they signed an agreement authorizing plaintiff to find a purchaser for such property on the terms set forth therein, and to list it with members of the Grand Rapids Real Estate Board. The agreement as written undertook to give to plaintiff the exclusive right and privilege, for a period of 6 months, to find a purchaser. Defendants agreed to pay a commission of 5% of the sale price if plaintiff, or any member of the Grand Rapids Real Estate Board, produced a purchaser ready, willing, and able to carry out the contemplated transaction.

Claiming that it had performed its undertaking as evidenced by the listing agreement, plaintiff brought suit in circuit court to recover the sum of $1,900, the amount of the commission agreed to be paid. In its declaration it based its right to recover on the following allegations:

"That pursuant to said listing and agreement plaintiff proceeded to exercise his best efforts and ability in and about the sale of said property, and did, on or about the 31st day of July, 1951, find a

purchaser ready, willing and able to meet and comply with the terms upon which defendants had listed such property for sale with plaintiff, and so advised the defendants.

"That plaintiff performed all things by him to be done and performed under the terms of said contract."

In support of the claim, proof was offered establishing that a few days before the expiration of the 6-months period of the listing agreement, plaintiff obtained an offer from a prospective purchaser who was ready, willing, and able to perform for the purchase of the property for the sum of $38,000 in cash. The defendants refused to accept the offer, it being the testimony of defendant Ray Kuzee, who was called by plaintiff for cross-examination under the statute,* that the reason given for the refusal was because defendants did not wish to sell. The testimony of witnesses for the plaintiff indicates that the offer was not accepted because defendants desired time to consider it.

The listing agreement signed by defendants specified the selling price as $38,000 on the following terms:

"Payable $20,000 cash inventory extra, balance $310 plus int. at 5% or more including interest at —% (or with my consent for a lesser sum or on other terms), which price includes all encumbrances, taxes, assessments, and balances owing on furnaces, heaters and other equipment."

At the conclusion of plaintiff's proofs defendants moved for a directed verdict in their favor, based in part on the claim that the plaintiff was not incorporated until after the listing agreement was signed, and in part on the fact that the offer to purchase for the sum of $38,000 in cash was not in accordance with the terms of sale as set forth in the

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

language of the listing agreement, above quoted. The trial court did not pass on the first question but came to the conclusion that under the decision of this Court in *Sharrar* v. *Nestle,* 222 Mich 538, the motion should be granted on the second ground alleged therefor. A verdict in defendants' favor was directed, and judgment entered in accordance therewith.

Plaintiff has taken an appeal, alleging as the reasons and grounds therefor that the trial court was in error in directing a verdict in defendants' favor because, under the evidence, it had performed its agreement, was entitled to recover the commission, and the question of its right to recover should have been submitted to the jury. The further ground is alleged that the trial court was in error in refusing to permit plaintiff, after it had rested its case, to put in further proofs for the purpose of showing its efforts to dispose of the property listed and to controvert certain allegations in defendants' answer.

Plaintiff's assignments of reasons for its appeal as well as the averments of its declaration indicate clearly that in seeking to recover the commission claimed to be due it relied on the theory that in procuring a purchaser ready, willing, and able to pay the sum of $38,000 in cash for defendants' property it had complied with the terms of the listing agreement. Statements made in plaintiff's behalf during the course of the trial clearly indicate that it was relying on the theory of performance, in other words, that the offer received by it and declined by defendants was substantially identical with the terms on which defendants had agreed to sell. The trial court was correct in holding that, under the undisputed proofs, plaintiff had failed to sustain its claim.

The factual situation involved in *Sharrar* v. *Nestle, supra,* is analogous to that in the case at bar. There, action was brought to recover a commission claimed

by the plaintiffs to be due to them by virtue of a listing agreement under which the defendants agreed to sell their farm for the sum of $14,000 net to them, of which amount $3,000 was to be paid in cash and the balance to be paid in 10 years with the privilege of paying any amount on any interest day with interest at the rate of 6% per annum from the date of delivery of possession. By way of commission plaintiffs were to receive, after they performed their undertaking, all over and above the sum of $14,000 that might be received from a purchaser. An offer to purchase was obtained for the sum of $14,800, payable $500 on the signing of the contract, $3,300 or more on March 1, 1921, and the sum of $500 or more on the 1st of March of each year thereafter until the entire consideration payable, with interest at the rate of 6% from March 1, 1921, had been paid, the entire amount being payable in 10 years from said date.

In sustaining a directed verdict for the defendants, it was pointed out in the opinion of this Court that under the terms specified in the listing agreement the defendants would have been entitled to have $11,000 of their money drawing interest at 6% for at least 1 year, while the terms of the offer submitted to them gave the purchaser the right to make payment in full at the time the payment in the sum of $3,300 would become due in accordance with the terms of the offer. It was further stated that:

"The right of defendant to have his $11,000 invested for at least a year at 6% interest was a valuable right. See *Barbour* v. *Hickey,* 2 App DC 207 (24 LRA 763)."

Counsel for appellant argue in their brief that inasmuch as defendants did not assign as a reason for their nonacceptance of the offer submitted by plaintiff that the terms thereof were not in accord with

the listing agreement they should have been held precluded on the trial from making such claim. In support of the contention, decisions from other States are cited, of which *Moss* v. *Warns,* 245 Wis 587 (15 NW2d 786, 156 ALR 598), is typical. Said case, and other cases cited in the opinion therein and in 12 CJS, p 224, supports the theory that under circumstances of the character involved in the case at bar an owner of property may not justify his refusal to accept an offer submitted to him by a real estate broker, under a listing agreement entitling such broker to a commission if he complies therewith, for any reason or reasons other than as stated at the time of the refusal. Such decisions are clearly not in accord with the position that this Court has heretofore taken. In *Sharrar* v. *Nestle, supra,* it was said with reference to an argument of the character in question:

"We have already said enough in relation to the failure to make the reservations mentioned in the listing contract. It was no part of the duty of defendant to show the plaintiffs wherein they had failed to comply with the listing contract, but it was the duty of the plaintiffs to show they had complied with the conditions before they were entitled to their commission. *Hannan* v. *Fisher,* 82 Mich 208; *Gannon* v. *Stansfield,* 216 Mich 440, and the cases cited therein."

See, also, *Koffman* v. *Pack,* 224 Mich 102. We think it must be said that the authorities on which appellant relies are not in accord with prior decisions of this Court.

The case of *Jepsen* v. *Marohn,* 22 SD 593 (119 NW 988, 21 LRA NS 935), is analogous on the facts to *Sharrar* v. *Nestle, supra.* It was there held that a real estate broker was not entitled to recover a commission by producing a buyer ready, willing, and able to pay for the property in cash, the listing

agreement signed by the owners authorizing a sale for a certain amount down with the remainder in annual instalments with interest. In reaching such conclusion it was said, in part:

"The plaintiff was only authorized to sell the property upon the terms specified, and until he should find such a purchaser ready, willing, and able to comply with those terms he was not entitled to any commission. No such purchaser was produced by the plaintiff, but it appears from the evidence that he did produce a purchaser who was willing to take the property at the price of $4,200, specified in the contract, but only ready to take the property and pay therefor in cash. As to such a purchaser the minds of the parties had never met. The defendants may have been willing to dispose of the property upon the terms specified in the contract, *viz.*, $2,200 cash and the balance in 1 and 2 years at 10% interest; but they might not have been willing to make any contract authorizing the plaintiff to sell the property for $4,200 in cash. Hence they were not bound to give any reasons for their refusal to accept a purchaser on terms entirely different from those proposed by them in their contract. The learned circuit court seems to have adopted the erroneous theory that if the defendants refused to accept the money and refused to accept the contract proposed to them by the plaintiff, at the time of the tender, they were estopped from denying that they made such a contract because they failed to give as the reason for not accepting the tender that the amount tendered was in cash and not in accordance with the terms of the contract. This position was clearly untenable, and the fact that the defendant Marohn stated 'it wasn't enough' is not in our view of the case material. The contract, as will be seen, was executed by the defendants and the plaintiff and kept by the plaintiff, and he knew therefore what the terms on which he was authorized to make the sale were, and he is presumed to know that until those terms were complied with he had no right to make a tender of any other sum

or in any other manner than that specified in the contract, unless the terms of the contract were changed by the consent of the defendants.

"There was no question of estoppel involved in this case; the only question being as to whether or not the plaintiff had produced a purchaser ready, willing, and able to comply with the terms of the contract. Clearly he produced no such purchaser, but sought to substitute an entirely different contract from that he was authorized to make, which latter substitute was not accepted by the defendants."

As before pointed out, plaintiff's right to recover was based in its declaration and in its proofs on the theory that it had performed the contract, and, hence, was entitled to the specified commission. The reasons alleged for the taking of the appeal do not specifically set forth any claim that the defendants were precluded from asserting on the trial failure on the part of the plaintiff to procure and submit an offer in accordance with the listing agreement. Neither does it appear from the record that the claim that is now sought to be advanced in this Court was in any way called to the attention of the trial judge. There was, in consequence, no specific determination by him with reference to the matter now urged in plaintiff's behalf. Without reference to the merits of the issue, we think that the attempt to raise it in this Court comes too late. In *Coates* v. *Coates,* 327 Mich 444, which was an action to foreclose a lien, it was said:

"Defendants Meeks claim that the recordation in miscellaneous records does not constitute constructive notice. This question was not raised by the pleadings or argued or considered by the trial court in its opinion. Under such circumstances we do not consider the question raised in this Court for the first time on appeal."

See, also, *Kellom* v. *City of Ecorse,* 329 Mich 303, 309, in which defendant sought to raise, by argument in its brief on appeal to this Court, the defense of nonliability based on the exercise of an alleged governmental function. In denying the right to have such issue determined, it was said:

"The question was not raised in the trial court and will not be considered here."

In view of the conclusions reached on the questions above considered, it becomes unnecessary to discuss incidental issues raised by counsel. We find no reversible error and the judgment entered in the trial court is affirmed, with costs to defendants.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORTH, C. J., did not sit.

SOUTAR *v.* ST. CLAIR COUNTY ELECTION COMMISSION.

1. JUDGES—PROBATE JUDGES—NOMINATION PETITIONS—FEES.

   Printing of name of a candidate for the office of probate judge on a ballot may not be obtained without filing petitions therefor with the required number of signatures and in the form, as specified, prescribed by the secretary of State, no provision being made for payment of a fee in lieu of filing the required nomination petitions for such office (Const 1908, art 7, § 23, as amended in 1947).

2. SAME—STATUTES—FEE IN LIEU OF NOMINATING PETITIONS—PROBATE JUDGES.

   The statutory provision permitting a candidate of a political party to pay a fee in lieu of filing nomination petitions is not available for use with respect to the nonpartisan office of probate judge (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.3).

3. SAME—NAMES ON BALLOT—CONSTITUTIONAL LAW—AFFIDAVIT OF IDENTIFICATION.

   The Constitution, insofar as it sets forth the steps required to obtain the printing on ballot of the name of a candidate for nomination for a judicial office, is self-executing and other obligations may not be imposed; hence a candidate for such an office need not file an affidavit of identification (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.22).

4. SAME—CERTIFICATION OF NAME TO ELECTION COMMISSION—AFFIDAVIT OF IDENTIFICATION.

   The right of an unopposed candidate for judicial office to have his name certified to the board of election commissioners arises immediately following expiration of the time set for filing nominating petitions and is not conditioned or contingent on the filing of the statutory affidavit of identification in ensuing 3-day period (Const 1908, art 7, § 23; CL 1948, § 157.22).

5. SAME—EXECUTIVE CONSTRUCTION OF STATUTES—AMENDMENT OF CONSTITUTION.

   Executive construction of statutes relating to time for filing nominating petitions in effect at time amendment to Consti-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 18 Am Jur, Elections § 174 *et seq.*
[2, 5–10] 18 Am Jur, Elections § 118 *et seq.*
[2, 5–10] Constitutionality of election laws as regards nominations by petition. 146 ALR 668.
[11] 14 Am Jur, Costs § 91.

tution was adopted relating to nomination and election of judges must be given due consideration (Const 1908, art 7, § 23).

6. SAME—PROBATE JUDGES—TIME OF FILING NOMINATING PETITIONS.
Nominating petitions for office of probate judge, filed on July 1, 1952, were timely filed, where primary election was set for August 5, 1952, the filing having taken place on the 35th day preceding the primary (Const 1908, art 7, § 23, as amended in 1947).

7. SAME—PROBATE JUDGES—TIME OF FILING NOMINATING PETITIONS—HOUR OF DAY.
Statutory provision restricting officers who are authorized to receive nominating petitions from accepting petitions after 4 o'clock on the last day of acceptance does not concern the holding or conducting of an election, hence does not apply to petitions for office of probate judge (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.14, as amended by PA 1952, No 171).

8. MANDAMUS—FILING OF NOMINATING PETITIONS—COUNTY CLERK.
Mandamus may not be granted to compel a county clerk to accept nominating petitions for the office of probate judge unless it was the clear legal duty of the clerk to receive the petitions.

9. JUDGES—PROBATE JUDGES—NOMINATING PETITIONS—ACCEPTANCE BY COUNTY CLERK—TIME.
Defendant county clerk should have received plaintiff's nominating petitions for filing, subsequent examination and checking, that were presented at 4:55 p.m. on 35th day preceding date set for primary election, where, although office door was locked, tendered petitions were rejected because of mistaken application of an inapplicable statute and office was subsequently opened that day for transaction of other business (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.14, as amended by PA 1952, No 171).

10. SAME—PROBATE JUDGES—NOMINATING PETITIONS—NAME ON BALLOT.
Nominating petitions for office of probate judge, timely presented by plaintiff to defendant county clerk, are ordered received for examination and checking and, if found sufficient and in proper form, his name is ordered printed on the ballot, following certification by the defendant county clerk to defendant county election commission (Const 1908, art 7, § 23, as amended in 1947).

11. COSTS—PUBLIC QUESTION—PRIMARY ELECTION BALLOT—PROBATE JUDGES.

No costs are allowed in mandamus proceeding by incumbent probate judge to compel defendant county clerk to accept nominating petitions for his office and to compel the county election commission to cause his name to be printed on the ballot following certification, a matter of public concern being involved.

Mandamus by Robert M. Soutar against St. Clair County Election Commission and others to require placing of petitioner's name on nonpartisan ballot for office of probate judge. Submitted July 22, 1952. (Calendar No. 45,589.) Writ granted conditionally July 23, 1952.

*C. J. Sullivan* and *Howard J. Clyne,* for plaintiff.

*Delmar L. Cleland,* for defendants.

CARR, J. Pursuant to legislative action a general primary election for the nomination of candidates for various State and county offices will be held on August 5, 1952. The plaintiff is at the present time the judge of probate of St. Clair county, having been appointed to fill a vacancy in said office until the next general election. It is his claim that he has complied with the provisions of law relating to the filing of nomination petitions, and that he is entitled to have his name printed on the nonpartisan ballot used at such election as a candidate for nomination for said office to fill the unexpired term and also as a candidate for nomination for the full term beginning January 1, 1953. The defendant commission has denied his request that his name be so printed, and he has instituted this proceeding for the purpose of compelling said defendant to take such action.

The case has been submitted on plaintiff's petition, the answer thereto, the briefs of counsel for the respective parties, and an agreed statement relating to

certain of the facts in the case. During the afternoon of July 1, 1952, plaintiff had some conversation with the county clerk with reference to filing nomination petitions. It is conceded that at that time plaintiff did not have sufficient signatures but he indicated that he expected to have such before 4 o'clock. At that time he paid to the clerk the sum of $200 in the belief that such payment would obviate the necessity for filing petitions for nomination as a candidate for the offices sought by him.

At approximately 4:55 in the afternoon of July 1st, after the clerk had left his office and was proceeding down the stairs to a lower floor in the courthouse, he met plaintiff who stated that he had sufficient petitions with him to qualify him as a candidate for the nominations in question. The clerk stated in substance that the "deadline" had passed, and that he could not in consequence accept the petitions. The agreed statement of facts discloses that at the time the clerk believed that all nomination petitions were required to be filed before 4 o'clock. Although the clerk had apparently locked the door to his office, he reopened it for the accommodation of a third party who wished to correct a document, that had been filed, by inserting a date therein. Plaintiff, however, did not enter the office with the clerk, apparently regarding the statement of the latter as a definite refusal to accept the tendered petitions.

Subsequently further conversations were held between the parties concerned. During the afternoon of July 5th plaintiff re-tendered his petitions to the clerk, who declined to file them. The papers, including an affidavit made by plaintiff setting forth that he was the candidate referred to in his petitions, were left in the office of the county clerk and in his physical possession. Thereafter the names of other candidates for nomination to the office in question were certified to the election commission. The clerk

did not include therein the name of plaintiff, but in substance stated what had occurred with reference to plaintiff's attempts to qualify. Concluding that plaintiff was not entitled to have his name printed on the ballot, the commission accepted the certification as made.

The controversy involves the construction of article 7, § 23, of the State Constitution which was added by amendment adopted at the general election in April, 1939. Certain provisions were incorporated therein at the April election of 1947 with reference to certifying the name of a candidate for a judicial office whose petitions had been properly filed and who had no opposition therefor, a primary election as to such office being, in that event, rendered unnecessary. Also involved is the interpretation and application of certain provisions of the Michigan election law.*

The section of the Constitution cited is declared therein to be self-executing. Its provisions material in the present case are as follows:

"Nomination petitions for candidates at any primary election hereunder, in form as designated by the secretary of State, shall be filed at least 35 days before such primary election. Nomination petitions for judge of the circuit court shall be filed with the secretary of State, and for all other judicial offices affected hereby with the county clerk. Petitions shall contain the signatures, addresses and dates of signing of a number of qualified voters equal to not less than 2 per cent, nor more than 4 per cent, of the total number of votes cast for secretary of State at the last preceding November election in the judicial district or county, as applicable. * * *

* See CL 1948, § 145.1 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 6.1 *et seq.*). Amendments thereto, other than by PA 1952, No 171, effective April 24, 1952, which fixed the date of the primary election herein referred to, are not material to any issue in the instant case.

"If upon the expiration of the time for filing petitions for the primary election of said judicial officers, it shall appear that as to any such judicial office on any nonpartisan ticket there is no opposition, then the officer with whom such petitions are filed shall certify to the proper board of election commissioners the name of such candidate for said judicial office whose petitions have been properly filed, and such candidate shall be the nominee for such judicial office and shall be so certified. As to such judicial office there shall be no primary election and such judicial office shall be omitted from the judicial primary election ballot. The provisions of this paragraph shall likewise apply where more than 1 candidate is to be nominated for any judicial office and there are no more candidates than there are persons to be nominated."

The section also contains the following declaration:

"Except as in the Constitution otherwise provided, all primary election and election laws, including laws pertaining to partisan primaries and elections, shall, so far as applicable, govern primary elections and elections hereunder."

It will be noted that the language of the Constitution, above quoted, is silent with reference to the payment of a fee by a candidate in lieu of the filing of nomination petitions. In terms the printing of the name of a candidate on a ballot may be obtained by filing petitions therefor, with the required number of signers, and in the form, as specified, prescribed by the secretary of State. That the language of the Constitution is controlling is not open to question. The procedure there outlined is exclusive. Neither does it appear that the legislature has by statute attempted to grant to a candidate for nomination for a judicial office on a nonpartisan ballot the right to pay a fee in lieu of filing the required

nomination petitions. Presumably in making the payment above referred to plaintiff and the county clerk had in mind the provisions of CL 1948, § 157.3 (Stat Ann 1951 Cum Supp § 6.123). Said section, however, refers to printing the name of a candidate of any *political party* on the payment of the prescribed fee. The privilege granted, being restricted in the manner stated, was not in terms available to plaintiff. The payment made by him to the county clerk did not entitle him to have his name printed on the ballot as a candidate for nomination for the office of probate judge.

As before noted, plaintiff, at the time he left his nomination petitions in the office of the county clerk on July 5, 1952, left also an affidavit of identification, presumably tendered under CL 1948, § 157.22 (Stat Ann 1951 Cum Supp § 6.141[1]). Said section in terms requires that any candidate filing petitions in any primary election for any county, State, or national office must, within 3 days after the last day for such filing, file also with the county clerk or with the secretary of State 2 copies of an affidavit setting forth that he is the person filing petitions for such office, his address, whether qualified to vote at the primary election, number of years of residence in the State and/or county, and such other information as may be required to satisfy the officer with whom the affidavit is filed as to the candidate's identity. Apparently plaintiff relied on the county clerk to furnish him a suitable form of affidavit, and such was prepared, being executed, as stated, on July 5th. It was not accepted for filing at that time. The nomination petitions tendered by plaintiff having been rejected, it is apparent that under the language of the statute cited the affidavit could not have been properly filed, even had it been offered for that purpose within the period of 3 days following July 1st.

It will be noted that article 7, § 23, of the Constitution does not refer in any way to an affidavit of identification. Counsel for defendant stresses the provision, hereinbefore quoted, declaring that primary election and election laws shall, so far as applicable, govern primary elections and elections pursuant to the section of the Constitution in question. Obviously the reference is to pertinent provisions of statutes governing *elections*. The statutory provision requiring the identification affidavit does not relate in any way to the conduct of an election but, rather, in terms imposes an obligation on a candidate as a condition prerequisite to having his name printed on the ballot. It may not be assumed that in the framing and adoption of article 7, § 23, and the amendment thereto as ratified at the general election in April, 1947, it was intended that more should be required of a candidate for a nonpartisan judicial office than the filing of sufficient petitions in the prescribed form. Insofar as the steps required to obtain the printing of the name of a candidate for nomination for a judicial office on the nonpartisan primary ballot are concerned, the language of the Constitution is self-executing. Obligations other than those so imposed may not be added.

The situation here presented is wholly different in character from that involved in *Elliott* v. *Secretary of State,* 295 Mich 245. The statutory provision there in issue related to the conduct of the election, specifically the matter of rotation of names on the official ballot. As before noted, the so-called identification affidavit does not concern the calling, conducting, or regulating of elections, or the determination of the results thereof. See, also, *Attorney General, ex rel. Cook,* v. *O'Neill,* 280 Mich 649.

It may be noted further that the final paragraph of the section of the Constitution, above quoted in part, was added in 1947, after the enactment of the

statutory provision relating to the identification affidavit in PA 1941, No 348.* Under the specific language of the Constitution, if it appears on the expiration of the time for filing petitions that a candidate for nomination for a judicial office is without opposition at the primary his name shall be certified accordingly to the board of election commissioners. This is a right that arises immediately following the expiration of the time set for filing nomination petitions. It is not conditioned or contingent on the filing of the statutory affidavit within the ensuing period of 3 days. We conclude that plaintiff herein was not required to file such affidavit.

Article 7, § 23, of the Constitution requires that nomination petitions thereunder shall be filed at least 35 days before the primary election. Counsel for defendant contends in the instant case that this means that a period of 35 days shall intervene between the last day for filing petitions and the day on which the primary is held. Such a method of computation would lead to the conclusion that the petitions should have been filed on June 30th and not thereafter. This argument is at variance with the executive construction that has been placed on the specific language in question. Under date of July 21, 1948, the then attorney general of the State rendered an opinion, in response to a request from the secretary of State, to the effect that petitions for the nomination of candidates for judicial offices subject to the provisions of article 7, § 23, of the Constitution, may be filed on or before the 35th day preceding the primary election. In reaching such conclusion reliance was placed on the decisions of this Court in *Arnold* v. *Nye,* 23 Mich 286;

* This act added section 22 to chapter 3 of part 3 of PA 1925, No 351. It was amended by PA 1943, Nos 31, 86; PA 1945, No 90. It is CL 1948, § 157.22 (Stat Ann 1951 Cum Supp § 6.141[1]).—REPORTER.

*People, for the use of Chaddock,* v. *Barry,* 93 Mich 542 (18 LRA 132); and *Ehinger* v. *Graham,* 190 Mich 132. Apparently such interpretation has been followed by public officials concerned with the administration of the election laws. In the case at bar it does not appear that the county clerk questioned at the time that plaintiff's petitions could be filed on July 1st provided that they were so filed before 4 o'clock in the afternoon.

In *Ranney* v. *Secretary of State,* 316 Mich 637, this Court accepted such an interpretation as correct, saying:

"The State Constitution (1908), art 7, § 23, requires the nominating petitions for candidates for the office of circuit judge to be filed with the defendant as secretary of State on or before January 13, 1947, that being 35 days before the third Monday in February, on which day the primary election is by law required to be held."

It appears that the third Monday in February, 1947, was February 17th. For obvious reasons the executive construction referred to must be given due consideration. The acceptance of the argument now advanced on behalf of defendant might well result in confusion and other consequences that should be avoided if possible. We adhere to the method of computation approved in the *Ranney Case.*

The opinion of the county clerk that he could not properly receive nomination petitions on July 1st after 4 o'clock, eastern standard time, was presumably based on the provisions of CL 1948, § 157.14, as amended by PA 1949, No 211, and PA 1952, No 171 (Stat Ann 1951 Cum Supp § 6.133, as amended by PA 1952, No 171), which specifically requires that the secretary of State, the various county clerks, and city clerks of cities in which officers are elected at the November election, shall receive nomination pe-

titions filed in accordance with the election law up to 4 o'clock in the afternoon of the 7th Tuesday preceding the September primary. No reference is made therein to petitions filed by persons seeking nomination as candidates for judicial offices, under article 7, § 23, of the Constitution. Such constitutional provision does not fix a specific hour after which nomination petitions may not be received on the final day for filing. The limitation in this respect as set forth in the statute does not concern the holding or conducting of the election. It is not, therefore, within the scope of the provision of the Constitution, above quoted and discussed, with reference to statutes declared to govern elections thereunder insofar as applicable. It is unnecessary to repeat what is said above as to the construction that must be placed on the language of article 7, § 23, of the Constitution. Without discussing the matter in further detail, it is our conclusion that the provision of the statute requiring that petitions shall be received until 4 o'clock of the final day for filing has no application in the instant case.

Assuming that the petitions tendered by plaintiff for filing on July 1st were in proper form and were signed by a sufficient number of qualified voters to satisfy the requirement of the Constitution, he is not entitled to the relief sought unless it was, under all the circumstances, the clear legal duty of the clerk to receive the petitions. On behalf of the defendants it is contended that without reference to the statutory 4 o'clock "deadline" on which the clerk relied, plaintiff was required to present the nomination petitions during reasonable office hours and before the closing of the clerk's office at 4:45 p.m. The argument is predicated on the claim that such closing hour was definitely fixed and, inferentially at least, was observed by other county officers. Reliance is placed on action by the county board of su-

pervisors taken at its January, 1949, session. A copy of the official proceedings of said board has been submitted with defendants' answer, from which it appears that the expenditures committee presented a report relating to county business. Among other matters contained therein was a recommendation that the hours of employees and of county offices should be from 8:30 a.m. to 4:45 p.m., with an hour at noon for lunch, and Saturday closing at 12:15 p.m. The form of the report indicates that the purpose of the recommendation was to fix the total hours per week for each employee at 40. It was adopted by the board. It further appears that the different county officers were advised of the action taken and requested by the chairman of the board of county auditors to comply therewith.

The record before us does not show affirmatively that following the action of the board of supervisors the various offices of the county were closed as contemplated by the report of the expenditures committee. Neither does it appear that the action of the board was intended to establish a definite rule that should remain in force and effect unless and until modified, or that it has been customarily observed, particularly by the county clerk, to and including the present time. It is significant in this regard that on the 1st of July, following his conversation with the plaintiff, the clerk returned to his office and reopened it for the purpose of assisting a person who wished a document previously filed to be corrected. It is also significant that the clerk, as the agreed statement of facts indicates, would have accepted plaintiff's petitions if he had considered that he had the legal right to do so. It is a fair conclusion that he did not think that in the conduct of his office he was required to close at 4:45 and transact no further business of a public nature.

It has been held that a public official is not subject

to a duty to keep his office open after regular and reasonable closing hours for the purpose of receiving nomination petitions. *State, ex rel. McQuesten,* v. *Hinkle,* 130 Wash 525 (228 P 299). It must be said, however, that there is no unanimity of decisions on the question. If in the instant case the county clerk had accepted the petitions tendered to him by plaintiff and had duly filed them, the weight of authority clearly supports the view that such action would have been legal and proper. *Cosgriff* v. *Board of Election Commissioners of the City and County of San Francisco,* 151 Cal 407 (91 P 98); *Grant* v. *Lansdon,* 15 Idaho 342 (97 P 960); *In re Norton,* 34 App Div 79 (53 NYS 1093). In 18 Am Jur, p 263, it is said:

"Nomination papers are on time if filed at any time up to midnight of the last day of the specified number, in the absence of any regulation to the contrary."

It may fairly be said that each decision dealing with the matter in issue has turned on the facts involved and the language of pertinent statutory or constitutional provisions. Assuming that the county clerk might properly have accepted the petitions from the plaintiff, the precise question for determination here is whether it was his clear legal duty to do so. Under the facts as disclosed by the record before us, we think that such question should be answered affirmatively. The clerk did not refuse to receive the petitions because the door to his office had been closed. It is apparent that he was ready and willing to reopen the office for the transaction of any business that he considered within the limits of his authority. The mistaken belief as to the application of the statutory 4 o'clock "deadline" should not be permitted to defeat plaintiff's right to file his petitions. It is our conclusion that the clerk

should have received them for filing and subsequent examination and checking.

The record in the case does not disclose affirmatively that the petitions tendered by plaintiff were in proper form or that they contained the required number of signatures of qualified voters. Unless they complied with the requirements of the Constitution in these respects, plaintiff is obviously not entitled to have his name printed as a candidate for nomination on the nonpartisan ballot to be used at the August 5th primary election. It appears that when the petitions were left with the clerk on July 5th they were placed in a suitable container which was sealed. Under the record here it cannot be said that they are, or are not, sufficient to entitle plaintiff to the relief sought.

An order will enter directing the defendants to receive, examine and check the petitions in question. If it is determined that they are sufficient as to signatures and are in proper form, the defendant election commission will cause the name of the plaintiff to be printed on the ballot, following certification by the county clerk. If the issue is not determined in plaintiff's favor, then the relief sought by him is denied. In the event that further action by this Court is found necessary, either party to the case may apply therefor. Inasmuch as the matters involved herein are of public concern, no costs are allowed.

DETHMERS, BUSHNELL, SHARPE, and REID, JJ., concurred.

BUTZEL and BOYLES, JJ., and the late Chief Justice NORTH did not sit.

HOLT *v.* STOFFLET.

1. LANDLORD AND TENANT—OPTION IN LEASE—CONSTRUCTION—TIME.
   Option to purchase, contained in lease, and reading "at any time within 1 month of the expiration of the said lease term" is construed as one which could be exercised at any time prior to 1 month before the expiration of the lease.
2. SAME—OPTION IN LEASE—CONSTRUCTION.
   An option to purchase, being inserted in the lease for the benefit of the tenant, must be construed with that purpose in view.
3. VENDOR AND PURCHASER—ACCEPTANCE OF OFFER—REQUEST FOR DEED AND ABSTRACT.
   Acceptance of offer contained in option that was incorporated in lease, which was coupled with "request" for deed and abstract of title was not ineffectual because not accepted according to terms of offer, the "request" being construed as a mere request that the lessors might grant or refuse.
4. SAME—OPTION—TENDER.
   Right of lessees to take up option to purchase was not lost by them because of failure to make tender in a proper amount, where it appears lessors, by refusing to accept registered letter in which was stated the amount placed in escrow for payment of purchase price, were intent on refusing to acknowledge a tender even if it were in the proper amount.
5. LANDLORD AND TENANT—OPTION TO PURCHASE—SUBSEQUENT RENT.
   The relation of landlord and tenant ceased when the option to purchase contained in the lease was properly exercised, hence, there was no obligation to pay rent for the month starting after the option was exercised.

ON APPLICATION FOR REHEARING.

6. APPEAL AND ERROR—MOTION TO DISMISS—PLEADING.
   Well-pleaded allegations of bill of complaint are accepted as true only for purposes of considering motion to dismiss plaintiffs' bill on appeal from order denying such motion before introduction of proofs.

Appeal from Calhoun; Steinbacher (Harold E.), J. Submitted May 26, 1952. (Docket No. 95, Calendar No. 45,390.) Decided September 3, 1952. Rehearing denied October 17, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[4] 32 Am Jur, Landlord and Tenant § 307.

Bill by George M. Holt and wife against Lawrence M. Stofflet and wife for specific performance of agreement to sell land. Motion to dismiss granted. Plaintiffs appeal. Reversed and remanded.

*Alfred P. Stuart,* for plaintiffs.

*Cobb, Wilder & Nielsen,* for defendants.

NORTH, C. J. On June 30, 1948, George M. Holt and Dorothy E. Holt, husband and wife, plaintiffs and appellants herein, entered into a written lease of a certain parcel of land located in Marshall, Michigan, for the term of 3 years, with Lawrence M. Stofflet and Patricia Stofflet, husband and wife, defendants and appellees herein. Plaintiffs were the lessees and defendants were the lessors. This lease contained the following option to purchase:

"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, 1 month and 3 days prior to the expiration of the lease, plaintiffs served upon the defendants a written notice that they were exercising their option. The pertinent portion of said notice is quoted:

"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 refused to recognize this notice as being a legally effective exercise of plaintiffs' option. Plaintiffs brought suit for specific performance. After hearing on defendants' motion to dismiss, an order was entered granting defendants' motion. From that order this appeal was taken.

The first question to be considered is whether the plaintiffs' alleged exercise of their option was legally effective to bind the defendants in a contract to convey. We are constrained to hold that it was. The time limit in the option as to when it could be exercised is ambiguous. The words "at any time within 1 month of the expiration of the said lease term," could, standing alone, reasonably be interpreted to mean either that the option could be exercised at any time prior to 1 month after the expiration of the lease, or at any time within the period of 1 month before and 1 month after, or at any time prior to 1 month before the expiration of the lease. We conclude that the latter interpretation is the most reasonable. To hold otherwise would deprive plaintiffs of the option which both parties intended plaintiffs should have, and which plaintiffs have diligently and in good faith sought to exercise.

"An option to purchase, being inserted in the lease for the benefit of the tenant, must be construed with that purpose in view." 51 CJS, p 638 (citing *Barnhart* v. *Stern*, 182 Wis 197 [196 NW 245]).

The trial judge held that the exercise of option was ineffectual because plaintiffs had not accepted it according to its terms, in that they demanded an abstract of title when the option itself did not call for one. We do not so construe plaintiffs' acceptance. Rather, we construe plaintiffs' statement "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," as a mere request, which defendants were free to grant or refuse.

Defendants also contend, and the trial judge so held, that plaintiffs' exercise of option was not legally effective because no effective tender was made at the time notice of exercise of option was given. With this we cannot agree. The option itself was silent on the question of when tender of the purchase price should be made. On May 29, 1951, plaintiffs placed

in escrow with the Michigan National Bank, of Marshall, Michigan, an amount claimed to be due as the full purchase price under plaintiffs' option to purchase; and sent a registered letter to defendants notifying them of such fact. In this letter plaintiffs stated that they had agreed with the Michigan National Bank that they would assume the mortgage on the property, to which the bank had agreed. Defendants refused to accept this registered letter, so they had no way of knowing whether the amount deposited in escrow was the correct amount due or not. Defendants' refusal to so accept the registered letter makes it appear that they were intent on refusing to acknowledge a tender, even if it were in the proper amount. Under the circumstances we cannot say that plaintiffs failed to make a proper tender, and thereby lost their right to take up the option. Since this is an equity case and plaintiffs have shown that they were and are ready to pay the proper amount of the purchase price, they are entitled to a deed upon paying into court the correct purchase price to be determined by the trial court.

Defendants are not entitled to $92 for the last month's rent, because at the time the option was exercised on May 28, 1951, the relation of landlord and tenant ceased and the obligation to pay rent with it. See 51 CJS, p 640.

The decretal order of the trial court is reversed and a decree will be entered in this Court remanding the case to the trial court with instructions to proceed in accordance with this opinion. Costs of both courts to appellants.

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

ON APPLICATION FOR REHEARING.

PER CURIAM: Defendants move for rehearing, contending that, as appears from our opinion herein, we have, on appeal from an order granting a motion to dismiss plaintiffs' bill of complaint,

disposed of the case on the merits. Particular reference is made to the statement in the opinion that plaintiffs have shown that they were and are ready to pay the correct amount of the purchase price and are entitled to a deed upon payment thereof into court. That statement and the entire opinion are to be viewed not as a final finding of facts or conclusive determination of plaintiffs' right to the relief prayed, but, rather, as an acceptance of the well-pleaded allegations of plaintiffs' bill of complaint as true only for purposes of considering the motion to dismiss plaintiffs' bill and the order dismissing, which we reversed. The cause is remanded for filing of such further pleadings as may be necessary and proper and trial on the merits.

Rehearing denied.

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

The late Chief Justice NORTH took no part in the decision of this case on application for rehearing.

---

## ZIELINSKI *v.* ZIELINSKI.

1. DIVORCE — ALIMONY — RECEIVERS — STATUTES — TEMPORARY ALIMONY.

   Statute authorizing appointment of receiver for property of husband in suit for divorce to obtain payment of alimony or allowance for the support and education of minor children did not contemplate the appointment of a receiver before decree of divorce, especially where plaintiff had obtained an order for temporary alimony shortly theretofore and was in possession of property of defendant affording her an income greatly in excess of temporary alimony awarded (CL 1948, § 552.27).

2. RECEIVERS—APPOINTMENT—DIVORCE—EVIDENCE—TEMPORARY ALIMONY.

   Plaintiff wife, suing for divorce, made no case for appointment of receiver under inherent power of chancery court to do so, where she showed husband had failed to make payments of $15 per week temporary alimony for support of child whose paternity he denied and it was shown she had possession of property of the husband affording her an income greatly in excess of temporary alimony awarded her.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 45 Am Jur, Receivers §§ 43, 150.

[1–3] Power of court to appoint receiver in suit for divorce or separation. 95 ALR 902.

[4] 3 Am Jur, Appeal and Error § 820.

3. SAME—APPOINTMENT—ABUSE OF DISCRETION—DIVORCE.
Appointment of receiver of property of defendant husband in suit for divorce was an abuse of discretion, if merely because trial court may have thought receiver could manage the property better than the husband or because husband appeared uncooperative about informing court as to the extent of his property or that purchasers entitled to a deed could not obtain it, in the absence of any showing defendant was likely to dissipate or dispose of his property in such a way as to prejudice rights of plaintiff or minor child whose paternity he denied or that the appointment was necessary to secure payment of the temporary alimony as ordered.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—RECEIVERS—APPOINTMENT—ESTOPPEL.
Receiver's claim that defendant husband was estopped from questioning validity of receiver's appointment because of failure to challenge it for over a year and because of agreement as to amount of fee, raised for first time on appeal in the Supreme Court, is not discussed.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 3, 1952. (Calendar No. 45,205.) Decided September 3, 1952.

Divorce proceedings between Edith Aker Zielinski against Bernard Joseph Zielinski. John G. David was appointed receiver. Order fixing compensation of receiver and authorizing him to mortgage property entered. Defendant appeals. Order vacated.

*D. Bruce Wistrand,* for defendant.

*Herbert Devine,* for receiver.

DETHMERS, J. Presented is the question of the validity of an order appointing a receiver in a divorce case.

On August 23, 1949, plaintiff filed her bill for divorce and obtained an injunction restraining defend-

ant from disposing of his property. On September 15, 1949, she obtained an order for temporary alimony in the amount of $15 per week for support of herself and a minor child. On September 21, 1949, defendant petitioned for modification of the injunction to permit him to mortgage any of his property to raise funds for redemption from tax sale of property occupied by the wife and moved that the alimony order be vacated on the grounds that defendant was not the father of the minor child and that plaintiff was receiving a substantial income from the property occupied by her and owned by defendant. Hearing on defendant's petition was had on September 26, 1949. Plaintiff testified that her income from said property was $165 per month and that her expenses totaled $175 monthly. The court found that her figures relating to expenses were erroneous and that the mentioned income afforded sufficient support. Defendant testified that said property, aside from quarters occupied by plaintiff, had produced $360 per month when he had been in charge of it; that it had been sold on tax sale; that he did not know how many pieces of property he had, but that they were listed in his cross bill; that the county had a lien on all his property by reason of his business as a professional bondsman; that he had made no payments on the temporary alimony order entered 2 weeks before. It also developed in open court that purchasers of property under a land contract from defendant had completed payments and that defendant was willing to give a deed but plaintiff refused to sign it. Although neither party to the case had requested it, the trial court, at that juncture, ordered appointment of a receiver to take over and control defendant's assets. The court stated as its reasons for such appointment; (1) the necessity for ascertaining the extent of defendant's property holdings; (2) the danger that at least one piece of property

would be lost for nonpayment of taxes; (3) that persons purchasing from defendant under land contract had been unable to obtain a deed when entitled thereto; (4) that defendant was not supporting the minor child, whose paternity defendant denied; (5) that a receiver would be able to collect rents, pay debts, obtain discharge of liens, and "take control of all of this property and clean it up."

On May 4, 1950, the receiver filed his final account, which listed all of defendant's real estate holdings and disclosed that the doings of the receiver consisted of the collection of $1,331.63 on a land contract, the expenditure of approximately $160 in connection with that transaction, the payment of about $400 to a loan company and retention of a cash balance of over $700. Despite sizeable assets, the account reveals no payments by the receiver for support of the plaintiff or minor child, nor for redemption or saving of any of defendant's property.

On August 18, 1950, the receiver filed a petition for determination of his fees. The court then took the receiver and the defendant into his chambers and made it clear to defendant that the receiver was going to be paid and that $2,000 was the amount asked. A fee of $1,500 was arrived at, defendant agreeing because it was better than $2,000, not because he felt he owed it.

"An order was entered allowing such a fee and further authorizing the receiver to mortgage property of defendant to pay said fee."

On December 15, 1950, defendant filed a motion requesting that the order appointing a receiver be vacated and set aside for the reasons, *inter alia;* (1) that the court had been without jurisdiction to appoint a receiver; and (2) the appointment amounted to an abuse of discretion. Plaintiff did not oppose

the motion, but the court appointed counsel to represent the receiver (also an attorney) in opposition to defendant's motion. An answer was filed, consisting merely of a denial of defendant's allegations. From an order denying his motion defendant, upon leave granted, took this appeal on June 26, 1951. Plaintiff has taken no part in the appeal. In the meanwhile, a decree was entered on January 2, 1952, denying a divorce to either party, but providing that the cause should not be dismissed until determination by this Court of the legality of the receivership.

CL 1948, § 552.27 (Stat Ann § 25.105), provides as follows:

"In all cases where alimony or allowance (for the support and education of minor children) shall be decreed to the wife, the amount thereof shall constitute a lien upon such of the real and personal estate of the husband as the court by its decree shall direct, and in default of payment of the amount so decreed the court may decree the sale of the property against which such lien is decreed in the same manner and upon like notice as in suits for the foreclosure of mortgage liens; or the court may award execution for the collection of the same, or the court may sequester the real and personal estate of the husband and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied to the payment thereof or the court in lieu of a money allowance may decree such a division between the husband and wife of the real and personal estate of the husband or of the husband and wife by joint ownership or right as he shall deem to be equitable and just."

When the receiver was appointed the situation contemplated by the statute was not before the court. There was no decree of divorce; the order for temporary alimony at the rate of $15 per week had been entered a scant 2 weeks before and plaintiff was in possession of property of defendant affording her

an income greatly in excess thereof. If, as claimed, courts of chancery are possessed of an inherent power, independent of the statute, to appoint receivers in divorce cases, no showing was made to warrant its exercise in this case. The mere fact that the court may have thought that a receiver could do a better job of handling defendant's property than the latter could himself, or that he appeared uncooperative on the witness stand when questioned about the extent of his holdings, or that purchasers entitled to a deed could not obtain it, constituted no grounds for appointment of a receiver in a divorce action. There was no showing that defendant was likely to dissipate or dispose of his property to the extent that plaintiff's rights or those of the child would be prejudiced or that sequestration was necessary to secure payment of temporary alimony as ordered. The suggested need for a receiver to save defendant's property from loss was not established on hearing and is refuted by the receiver's final account. The appointment amounted to an abuse of discretion.

On appeal the receiver urges for the first time that defendant is estopped from questioning the validity of the appointment because of his failure to challenge it for over a year and his agreement in chambers to a receiver's fee of $1,500. The facts in connection therewith are best left without comment. Suffice it to say that the receiver cannot be heard to claim an estoppel for the first time on appeal in this Court.

The order appealed from is reversed and the order appointing a receiver is vacated, set aside and held for nought. Costs in this Court are awarded to defendant against the receiver.

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

The late Chief Justice NORTH did not sit.

## PALLAS *v.* CROWLEY-MILNER & COMPANY.

1. TRIAL—OPENING STATEMENT—STATEMENT OF CLAIM OF LAW.

   Trial court's restrictive ruling upon plaintiff's attorney in his opening statement wherein he attempted to tell jury what the court's instructions would be and what the law was did not result in error, where the attorney was permitted to state his claim of the law in the opening statement.

2. TORTS—INSTRUCTIONS—DIRECTED VERDICT—INVASION OF PRIVACY—PUBLICATION OF LIKENESS.

   Instructions amounting to a directed verdict for plaintiff were properly denied in her action for damages for alleged unauthorized publication of her photograph, where a question of fact was presented as to whether there had been an unreasonable and serious interference with her right of privacy by testimony showing that picture in question was taken by a commercial photographer at the instance of her employer for publicity purposes in connection with her employment as a show girl and that it was available, with her consent, to the photographer, with whom she had registered as a photographic model, in an effort to get a start as a model.

3. SAME—INVASION OF PRIVACY—WAIVER.

   Whether or not an invasion of plaintiff's right of privacy was waived may depend on whether she had in any particular or degree abandoned her strictly private character and waived to any extent the right to absolute privacy when seeking damages solely for an invasion of her right of privacy.

---

REFERENCES FOR POINTS IN HEADNOTES

[2–4, 6] 41 Am Jur, Privacy § 18 *et seq.*

[2–4, 6] Right of privacy. 138 ALR 22; 168 ALR 446; 14 ALR2d 750.

4. SAME—PUBLICATION OF LIKENESS OF SHOW GIRL—INVASION OF PRIVACY.

Fact that plaintiff was a professional show girl or model was evidence that she had abandoned her strictly private character and justified jury in finding that commercial use of her picture in connection with advertising cosmetics was not a serious or unreasonable invasion of her right of privacy.

5. SAME—INVASION OF PRIVACY—INSTRUCTIONS—DAMAGES.

Court's instruction to jury in action for invasion of plaintiff's right of privacy caused by unauthorized publication of her photograph *held,* free from prejudicial error in respect to damages, when taken as a whole, and not contradictory and ambiguous, as claimed.

6. SAME—INVASION OF PRIVACY—UNAUTHORIZED PUBLICATION OF PHOTOGRAPH.

The unauthorized publication of plaintiff's likeness in connection with the sale of cosmetics, did not, under circumstances presented, constitute a serious or unreasonable invasion of her privacy as a matter of law.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted June 3, 1952. (Docket No. 1, Calendar No. 45,192.) Decided September 3, 1952.

Action by Bernice Pallas against Crowley-Milner & Company, a Michigan corporation, for damages caused by unauthorized publication of photograph. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

*Donald W. Grant* (*Jack Newcombe,* of counsel), for plaintiff.

*Dykema, Jones & Wheat,* for defendant.

DETHMERS, J. This case makes its second appearance here. Previously we reversed the trial court's order dismissing plaintiff's declaration and remanded the cause for trial. 322 Mich 411. Plaintiff now

appeals from judgment for defendant entered upon a verdict of no cause for action.

Suit was brought for damages allegedly occasioned by claimed interference with plaintiff's right of privacy by means of publication of her picture in a newspaper advertisement of certain cosmetics without her previous knowledge or consent. Some of the facts may be gathered from our previous opinion. Others will be mentioned in discussion of the questions to which they are pertinent.

Plaintiff first assigns as error the court's claimed refusal to permit her attorney to state his theory of the law in his opening statement to the jury, citing *Fosdick* v. *Van Arsdale,* 74 Mich 302; *Edwards* v. *Common Council of Village of Three Rivers,* 96 Mich 625; *People* v. *Smith,* 177 Mich 358; *Prentis* v. *Bates,* 93 Mich 234 (17 LRA 494); *People* v. *Lee,* 258 Mich 618. Examination of the record discloses that counsel attempted to tell the jury what the court's instructions would be and, next, what the law was; that, upon defendant's objection thereto and insistence that plaintiff's attorney limit himself to a statement of what he claimed the law to be, the court ruled that counsel might state his claim accordingly, but not *argue* the law in his opening statement. The effect of the court's ruling was not contrary to the cited cases inasmuch as it did not deprive plaintiff's attorney of the right to state his claim of the law in his opening statement.

Plaintiff made a request to charge, the substance of which was given except for statements therein contained that "defendant is liable to plaintiff in money damages" and "plaintiff is entitled to an award of 'substantial' damages." Instructions to that effect, amounting to a directed verdict for plaintiff, were properly denied because inconsistent with the holding of our previous opinion that plaintiff's right to recover depends upon showing, as a matter

of fact, an unreasonable and serious interference with her right of privacy. On that point a question of fact was presented by testimony showing that the picture in question was taken by a commercial photographer at the instance of plaintiff's employer for publicity purposes in connection with her employment as a show girl and that it was available, with plaintiff's consent, to the photographer, with whom she had registered as a photographic model, in an effort to get a start as a model.

Plaintiff complains of the court's submission to the jury of the question of her waiver of the right to privacy. In this connection it must be observed at once that the case at bar does not involve libel or slander nor is it an action for compensation for the unlawful taking or use of plaintiff's property right in the appearance of her face or features or in the picture itself. Not in point, therefore, are the holdings in cases of that character to the effect that a waiver for 1 purpose or to 1 class or individual does not constitute a waiver for all purposes and to all classes and individuals. Here action is brought solely for damages claimed to have resulted from invasion of plaintiff's right of privacy. As we held when the case was here before, recovery is dependent upon a showing of an unreasonable and serious interference with that right. Whether a claimed interference therewith is in fact unreasonable or serious may well depend on whether plaintiff had in any particular or degree abandoned her strictly private character and waived to any extent the right to absolute privacy. The testimony in the case warranted submission to the jury of the question of whether plaintiff had cast aside the cloak of privacy of the ordinary, private person, embraced a public or professional role as show girl or model and thereby waived her right to be free from an invasion of privacy which the jury evidently found, under appro-

priate instructions, to be neither serious nor unreasonable.

With regard to plaintiff's complaint that the court's charge in respect to damages was contradictory and ambiguous, we think that, taken as a whole, it fully and fairly stated the law applicable to the case, and was free from prejudicial error.

Other claims of error in the charge of the court or in admission of testimony are founded on plaintiff's concept of an absolute liability for the unauthorized publication of her picture. Such is not the rule announced in our previous decision.

Affirmed, with costs to defendant.

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

The late Chief Justice NORTH did not sit.

## GARWIN *v.* ANDERSON.

1. CORPORATIONS—CONSENT TO ASSIGNMENT OF UNDERWRITING CONTRACT FOR SALE OF STOCK—FIDUCIARY DUTY.

   Directors' and officers' consent to assignment of contract for sale of stock of defendant corporation, engaged in manufacturing airplane parts for the Federal government, from underwriter corporation to underwriter partnership constituted no betrayal of interests of defendant corporation, where default under underwriting agreement as altered prior to assignment was not shown so as to give defendant corporation right to cancel its agreement and sell its stock at then substantially higher price as disclosed by record of stock exchange transactions.

2. SAME—PLEDGE OF STOCK FOR LOAN TO UNDERWRITER.

   Consent by defendant directors and officers of defendant corporation to pledge of its stock for loan to underwriter did not constitute a breach of their fiduciary duty, where corporation was engaged in manufacturing airplane parts for the Federal government, had been required to eliminate certain persons as stockholders as a condition precedent to further contracts which were essential to the corporation's survival, and made an agreement with an underwriter for disposal of such stock, and as a result of the pledge the corporation received payment for the stock in amount corporation paid for it with safeguards for keeping the stock from falling into hands objectionable to the Federal government.

3. SAME—OFFICERS' SALARIES—COMPROMISE.

   Action of directors and officers of defendant corporation in compromising and settling claims of president and man-

---

REFERENCES FOR POINTS IN HEADNOTES

[5, 6] 13 Am Jur, Corporations §§ 1036; 1039.

Court's right to interfere with amount of salaries voted to officers of private corporations by directors. 27 ALR 300. 44 ALR 570.

Participation by corporate director in vote or meeting fixing compensation for his own services. 175 ALR 577.

ager of parachute division for salaries based in part on percentage of net profits did not constitute an actionable breach of fiduciary duty, where there was a genuine dispute as to whether net profits should be computed before or after renegotiation of contracts with the Federal government and the legal rights of the parties were in serious doubt.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ACCOUNTING—CORPORATE OFFICERS' SALARIES—EVIDENCE.

Consideration of claim in suit for accounting as to payment of excessive salaries only to president of defendant corporation is made, where there is no proof as to payment of any specific amount to any of the other officers involved or the number of persons to whom a total amount was paid.

5. CORPORATIONS—COMPENSATION OF DIRECTORS—BURDEN OF SHOWING REASONABLENESS.

The burden of proof is on directors of a corporation who have fixed their own compensation for services to the corporation to establish the reasonableness of the sum paid when such matter is called into question in a stockholders' derivative suit, unless the majority of those voting on the question are disinterested.

6. SAME—SALARY OF PRESIDENT—BURDEN OF PROOF.

Action of board of directors in setting salary of defendant president, not a director, not shown to have been accomplished by defendant or upon the vote of any individual benefited is assumed to be valid until person attacking it has sustained his burden of establishing unreasonableness of compensation.

7. SAME—COMPROMISE AND SETTLEMENT OF CREDITOR'S CLAIM.

Stockholder who complained of action of defendant officers and directors of defendant corporation whereby they had settled a creditor's claim for compensation for alleged commissions *held*, not to have sustained burden of proving that defendants had acted recklessly or breached their fiduciary duty in effecting the compromise and settlement of a claim, where conclusion of corporation's comptroller that there was an amount due somewhat less than amount paid and that creditor claimed an amount considerably in excess of sum paid was not shown to have been inaccurate.

Appeal from Wayne; Toms (Robert M.), J. Submitted June 3, 1952. (Docket No. 15, Calendar No. 45,325.) Decided September 3, 1952.

Bill by Esther Garwin against Archie A. Anderson and others, directors and officers of defendant Hayes Manufacturing Company, for an accounting as to corporate funds. Moe Greisman intervened as party plaintiff. Bill dismissed. Plaintiff and intervenor appeal. Affirmed.

*Karbel & Eiges* (*Sidney L. Garwin* and *Norman Annenberg,* of counsel), for plaintiff.

*Butzel, Eaman, Long, Gust & Kennedy* (*Frank D. Eaman* and *A. H. Williams,* of counsel), for defendants.

DETHMERS, J. This is a stockholders' derivative suit brought against corporate directors and officers to recover for alleged breach of fiduciary duty in the following respects: (1) Sale of stock of the corporation at less than market price; (2) compromise settlement of excessive bonus claims of the corporation's president and another; (3) payment of excessive salaries to corporate officers; (4) compromise settlement of excessive commission claims of a creditor. From decree for defendants dismissing plaintiffs' bill of complaint the latter appeal.

In 1943 defendant corporation, hereinafter called Hayes, was engaged in manufacturing aircraft parts for use by the United States government. A fractional interest in Hayes, to-wit, 100,000 shares of its $2 par value common stock, was owned by 3 persons who were objectionable to the war department because they had violated the Federal neutrality act.* The government required their elimination

* See 54 Stat 4 *et seq.* (22 USCA, § 441 *et seq.*).—REPORTER.

as stockholders as a condition precedent to granting further contracts which were essential to Hayes' survival. Attempts to find purchasers for the stock proved fruitless. Finally, on December 21, 1943, in order to satisfy the war department, Hayes, under authorization of its directors, purchased the stock with corporate funds for $200,000. This left its capital structure correspondingly impaired. The directors deemed it essential to successful operations that the stock be resold at once so that the sum used for the purchase might be restored immediately to working capital. Not only had all previous efforts to find a market failed, but, likewise, potential underwriters and brokers had been solicited without success, due, in all probability, to Hayes' consistent record of losses in operations and the fact that no dividends had been paid since 1929. On 3 previous occasions, under similarly difficult circumstances, one A. W. Porter, a New York dealer in stocks and securities, had underwritten and been surprisingly successful in marketing Hayes stock when the company had been in need of money. Although they had not ascertained his financial strength, defendants had reason to and did repose confidence in his integrity, business acumen and ability as an underwriter to move such stock and obtain the desired proceeds for Hayes. He was contacted and an attempt made to interest him in the stock at $2.50 per share. He was not interested at a price greater than $2 per share. There is no showing that the 100,000 shares could have been sold at that time for more. Every fair inference from the record is to the contrary. On December 21, 1943, Hayes sold the 100,000 shares at $2 per share to A. W. Porter Associates, Inc., a corporation controlled by Porter, as underwriter, for distribution to the public. Payment was agreed to

be made in stipulated instalments and Hayes retained the stock as security.

On March 16, 1944, the agreement was modified and extended in relation to instalment due dates by a new agreement under which the stock was sold, as of that date, for distribution to the public, to the Porter corporation for $200,000, but retained by Hayes as security for performance of the contract and payment of the purchase-price promissory note due on or before 8 months from date thereof. The latter agreement provided that public distribution of the stock by the underwriter should be begun within 240 days and completed within 300 days in any 1 or more of the following methods, that is: "(a) A public offering, (b) sale thereof upon the New York Stock Exchange, and (c) such other method as shall be approved in writing by Clark (Hayes' president) in advance." Hayes was empowered to cancel if the Porter corporation defaulted in payment of the note or in performance of its obligations under the contract.

The Porter corporation was not licensed as an underwriter, but at the time of the agreement it was contemplated that it would register as a dealer. Subsequently, as appears from minutes of a meeting of directors of the Porter corporation, the latter was advised by counsel that it was inadvisable for it to secure registration as a dealer and it was concluded to take out registration in the name of A. W. Porter & Company, a partnership, of which A. W. Porter was a partner (testimony was to the effect that a more favorable income tax status could thus be effectuated). Accordingly, on June 26, 1944, on which date such shares were bringing over $4 per share on the market, the underwriting agreement was assigned by the Porter corporation to the Porter partnership with the written consent of Hayes' president.

On July 11th defendants permitted the 100,000 shares to be delivered to a bank as security for a $200,000 loan to the Porter partnership, whereupon the proceeds were paid forthwith to Hayes as purchase price of the stock. A pledge agreement was signed by the bank, the Porter partnership and Hayes, which provided for release by the bank to the partnership of such pledged shares as it might from time to time sell, upon payment to the bank of $2 for each share so released; further, that Porter partnership should sell at least 30,000 shares within 60 days and upon default therein and notice by the bank to Hayes, the latter might exercise an option to pay the bank and recover the shares. On September 9th, when the 60 days had expired, no shares had been sold by the partnership. The bank did not elect to treat this as a default or to exercise its rights under the pledge agreement to sell the stock, but, on the contrary, appeared to waive it and, consequently, served no notice of default on Hayes. At that time Hayes' shares were of a value of $6.50 per share on the New York stock exchange.

Plaintiffs claim defendants breached their fiduciary duty as relates to sale of the stock in 3 respects: (1) Consenting to assignment from the Porter corporation to the Porter partnership at a time when such shares were bringing considerably more than $2 per share on the market; (2) permitting the stock to be pledged to the bank as security for a loan to Porter partnership; (3) failure to retake the stock after September 9th upon Porter partnership's failure to have sold 30,000 shares to the public.

Plaintiffs' claim concerning the assignment is predicated on the theory that the Porter corporation was then in default on its contract with Hayes and could not carry it out because it was not and could not be licensed as a dealer so as to function

as an underwriter; that, therefore, Hayes then could have cancelled the agreement with Porter corporation and retaken the stock, worth over $4 per share on the market, and that defendants' failure so to do and to obtain the market price on the shares constituted a waste of corporate assets and, hence, a breach of fiduciary duty. Plaintiffs failed to establish the default and corresponding right of Hayes to terminate the contract and retake the stock as of June 26th, the date of the assignment. Under the March 16th agreement the Porter corporation had 240 days to initiate and 300 days to complete distribution of the shares to the public. Lack of a dealer's license on June 26th constituted no breach or default. There is no showing that Porter corporation could not have obtained a license. Even if it had been established that Porter corporation could not have obtained such license, the fact remains that, under the terms of the agreement, it could have disposed of the stock on the New York stock exchange, through some member thereof, thus obviating the need of a dealer's license on the part of Porter corporation. The latter had a right, under the contract, to assign it with the approval of Hayes' president. There was no right in Hayes at that time to cancel or terminate the agreement or to retake the shares and consent to the assignment is in nowise shown to have constituted a betrayal of Hayes' interests.

Prior to and at the time the stock was pledged Hayes had but 2 interests therein or objectives in relation thereto: The first, receipt of payment therefor, and, second, that it be distributed to persons not objectionable to the war department. When the stock was pledged Hayes received payment in full simultaneously. The pledge agreement contained safeguards against the eventuality of the stock falling into objectionable hands. The trans-

action is not shown to have defeated either one of the two interests of Hayes sought to be secured by the underwriting agreement. The provision in the pledge agreement for sale of 30,000 shares within 60 days after July 11th was intended for the protection of the bank, being more rigid in its requirement than the provisions of the agreement between Hayes and Porter corporation. Failure to sell the 30,000 shares within 60 days was not treated as a default by the bank, no notice of default was served by the bank upon Hayes, and, hence, the eventuality against which Hayes was to be protected under such circumstances, namely, indiscriminate sale, upon forfeiture, by the bank, so that the shares might have fallen into hands objectionable to the war department, never occurred. In consequence, the right did not accrue to Hayes on September 9th or thereafter to pay the bank and retake the stock. Plaintiffs have failed to establish a breach of fiduciary duty by defendants in this respect.

The next claim of breach relates to defendants' compromise settlement of bonus claims of the corporation's president and of the manager of its parachute division. Under contracts of employment entered into as of December, 1940, and March of 1942, respectively, each was entitled to a stipulated salary and, in addition, to a bonus to be determined by specified percentages of net profits. Later, congress enacted the renegotiation act of 1942.* Thereafter dispute arose as to whether the bonuses should be computed on the basis of net profits before or after renegotiation. Ultimately a compromise settlement was concluded with both. Plaintiffs cite cases from other jurisdictions in support of their contention that the computations should have been

* See 56 Stat 244 *et seq.*; 982 *et seq.* (50 USCA, App, § 1191 *et seq.*).—REPORTER.

on the basis of net profits after renegotiation. The trial court, relying upon *Gee* v. *Olson,* 320 Mich 274, ruled that the computation should not have been affected by renegotiation. While the latter case is not directly in point, its implications might be viewed as favorable to the trial court's position. We need not determine, however, on which of the 2 bases the computation should have been made. At all events, a genuine dispute existed, with the legal rights of the parties in serious doubt. Under such circumstances, we cannot hold that the action of defendants in compromising and settling the claims constituted actionable breach of fiduciary duty.

Plaintiffs complain of payment of excessive salaries to the corporate president and other officers, and present a set of figures representing salaries paid to the president individually and another set representing totals paid to all officers and directors without itemizing or indicating the number of individuals involved or the amounts paid to each. Having failed to establish the payment of any specific amount to any of the officers or directors other than the president, we need consider only the claim as relates to salary paid him. No proofs were offered by either side to establish what would have amounted to reasonable and proper compensation. Plaintiffs rely on *McKey* v. *Swenson,* 232 Mich 505, for the proposition that the burden rested upon defendants to establish the reasonableness of the compensation. Defendants urge that under *Wiseman* v. *Musgrove,* 309 Mich 523, the burden rested upon plaintiffs to establish the unreasonableness thereof. Reading of the 2 cases and of 2 others therein cited, namely, *Nahikian* v. *Mattingly,* 265 Mich 128, and *Miner* v. *Belle Isle Ice Co.*, 93 Mich 97 (17 LRA 412), discloses that the rule imposing the burden of proof on defendants is applicable in

cases where the action of the directors in fixing their own compensation is held void for the reason that it was accomplished by the vote of those benefiting thereby. As said in the *Miner Case* (p 110):

"All the authorities agree that it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matters voted upon."

In the instant case the president was not a director and played no official part in the fixing of his salary. It was not shown that the fixing of salaries of other officers or directors was in any instance accomplished by or dependent upon the vote of the individual thereby benefited. Accordingly, the case presents a situation in which the action in question was not void as in the *McKey Case,* but is comparable to that in the *Nahikian Case,* in which this Court said, as later quoted with approval in the *Wiseman Case,* the following:

"In *McKey* v. *Swenson,* 232 Mich 505, we held action in fixing salaries wholly void and cast the burden upon the officers to give the court information upon which reasonable compensation could be fixed. Such, however, is not the case at bar, for here we do not have wholly void action but only assertion of unreasonable compensation and the burden is on plaintiff to establish the charge."

Plaintiffs failed to establish a case in this regard.

Finally, plaintiffs complain of defendants' settlement of a creditor's claim for alleged commissions due, under a contract, on business obtained for Hayes. Plaintiffs present an analysis of Hayes' books purporting to show nothing was then due the creditor. Hayes' comptroller's analysis was to the contrary, showing a sum due somewhat less than the compromise settlement, while the creditor claimed an amount considerably in excess thereof.

We are not satisfied on the entire record that plaintiffs have established the accuracy of their own and inaccuracy of the comptroller's conclusions from the figures contained in Hayes' books. Under all the facts established by the record, it cannot be said that plaintiffs have sustained the burden of proving that defendants acted recklessly or breached their fiduciary duty in effecting the compromise and settlement.

Affirmed, with costs to defendants.

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

The late Chief Justice NORTH did not sit.

---

## CHAPMAN v. CHAPMAN.

1. DEPOSITIONS—APPEARANCE—PARTIES—WITNESSES.
   The appearance called for by court rule authorizing party receiving a notice of taking a deposition to tax reasonable expenses actually incurred against moving party when latter fails to appear calls for the appearance by the moving party and his witness (Court Rule No 31, § 2 [1945]).

2. EXECUTORS AND ADMINISTRATORS—NOTICE OF TAKING DEPOSITIONS—TAXATION OF COSTS.
   Whether or not plaintiff, who appears as an administrator, can be held personally liable for costs incident to notice he had given for the taking of an out-of-State deposition is not before the Supreme Court on his appeal from order granting defendant's motion for taxation of such costs when plaintiff's witness failed to appear (Court Rule No 31, § 2 [1945]).

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 14 Am Jur, Costs § 55.
[3] 14 Am Jur, Costs § 92.

3. COSTS—BRIEFS.

No costs in Supreme Court are allowed appellee on affirmance of order for defendant, where he filed no brief on appeal.

Appeal from Wayne; FitzGerald (Frank), J. Submitted June 3, 1952. (Calendar No. 45,358.) Decided September 3, 1952.

Action by Edward M. Chapman, administrator of the estate of Marie Chapman, deceased, against Russell Chapman to recover amount alleged to have been loaned to defendant by decedent. On motion of defendant for taxation of reasonable costs incurred as result of notice of taking deposition in the State of New York and for stay of proceeding. Order granting motion. Plaintiff appeals. Affirmed.

*M. Manuel Merzon,* for appellant.

BUTZEL, J. Edward M. Chapman, administrator of the estate of Marie Chapman, deceased, plaintiff, sought to recover $2,500 from Russell Chapman, defendant, which sum plaintiff claims decedent loaned defendant in 1946. Plaintiff claimed that Dorothy Vieau, one of the children of decedent and Edward M. Chapman, was a material witness and gave notice of the taking of her deposition in Syracuse, New York. At the time and place the hearing was noticed for, counsel for both plaintiff and defendant were present and waited for Mrs. Vieau to appear. She sent word that she would not appear at any time so the deposition was not taken. Plaintiff claims that he had no idea that Mrs. Vieau would refuse to testify.

Defendant moved to tax costs in accordance with Court Rule No 31, § 2 (1945), and the motion was granted. The rule reads as follows:

"When due notice of taking a deposition is given, and the party giving such notice fails to appear, or, having taken such deposition, fails to file the same, all reasonable expenses actually incurred by the party receiving such notice by reason thereof shall be taxed by the court on motion, and the payment thereof shall be a condition precedent to such party proceeding with his cause of action or defense."

Plaintiff contends that his appearance at the time and place noticed for the taking of deposition was a legal appearance; that the failure of the witness to appear was due to causes beyond his control and not chargeable to him; that there was consequently no reason for the costs incurred by defendant through sending his attorney to attend the taking of the deposition to be taxed against him. We find, however, that for the purposes of the court rule a legal appearance means an appearance by the moving party and his witness.

It will be noted that Edward M. Chapman, as administrator and not individually, is the plaintiff. Whether he can be held personally liable or not is not before us. The order entered provides that no further proceedings shall be taken in the cause until the costs have been paid. The court allowed $348.75 costs for legal fees in connection with the preparation of questions, travel expenses and attendance in Syracuse, New York. No question is raised as to the reasonableness of these fees. The order was entered in accordance with the rule heretofore quoted. We find no error.

The order is affirmed, but without costs in this Court, as appellee filed no brief.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## HOPKINS *v.* CRANTZ.

1. PLEADING—CONCLUSIONS UNSUPPORTED BY ALLEGATIONS OF FACT.
   Allegation of a conclusion in pleadings, without any facts being stated in its support, will be disregarded.

2. INJUNCTION—TEMPORARY INJUNCTION—RES JUDICATA.
   Decision on a motion for a temporary injunction is not *res judicata* as to action which may be taken on a final decree.

3. MONOPOLIES—COVENANT NOT TO COMPETE—FURTHERANCE OF VENDEE'S BUSINESS.
   A covenant not to compete is permitted when its object is to protect a vendee in the furtherance of his business (CL 1948, § 445.766).

4. SAME—COVENANT NOT TO COMPETE—LIMITATION ON AREA BY DECREE.
   Decree limiting area in which defendant who sold his stock in corporation to plaintiff and covenanted not to engage in same business for period of 10 years to county in which corporation had its office from which it conducted business of surfacing buildings with simulated brick *held*, seemingly reasonable under record presented, notwithstanding covenant failed to specify any limitation as to area (CL 1948, § 445.766).

5. SAME—REASONABLE RESTRICTION ON AREA.
   An equity court has authority to limit the area of restriction under a covenant not to compete to make the area of restriction a reasonable one according to the facts.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 16.
[2] 30 Am Jur, Judgments § 197.
[3] 36 Am Jur, Monopolies, Combinations, and Restraints of Trade § 58 *et seq.*
[3–6] Territorial scope permissible in covenants ancillary to sale of business or corporate stock against engaging in similar business. 78 ALR 1038.
[4–6] 36 Am Jur, Monopolies, Combinations, and Restraints of Trade § 68.

6. SAME—MODIFICATION OF DECREE AS TO AREA—EVIDENCE.

Trial court's decree, entered on the pleadings in suit to enforce covenant not to engage in competing business with that purchased by plaintiff by which area of noncompetition was restricted to county in which plaintiff's business was conducted without testimony having been taken, is affirmed subject to right to hearing on motion therefor with right to take testimony as to whether the territory should be enlarged or restricted and to modification of decree accordingly.

Appeal from Wayne; Brennan (John V.), J. Submitted June 3, 1952. (Docket No. 7, Calendar No. 45,309.) Decided September 3, 1952.

Bill by James F. Hopkins against Theodore I. Crantz to restrain him from entering into a business in competition with that of corporation of which plaintiff had purchased defendant's interest. Decree for plaintiff as to Wayne county. Defendant appeals. Affirmed conditionally.

*Cohen & Koney,* for plaintiff.

*Harry Cohen* (*Harry M. Nayer,* of counsel), for defendant.

BUTZEL, J. Plaintiff James F. Hopkins and defendant Theodore I. Crantz each owned 48½% of all of the common stock of West Detroit Brickote, Inc., a Michigan corporation, engaged in the business of surfacing buildings with simulated brick. Crantz because of illness and inability to work desired to sell his stock, consisting of 122 shares of the par value of $12,200, to Hopkins for $10,700. A written agreement to that effect was entered into. In the preamble it was stated that one of the considerations of the purchase by plaintiff was that defendant would refrain from re-entering the business in any way as provided in a covenant in the body of the contract.

The covenant read:

"As a further consideration for this agreement Crantz agrees that he will not enter into the business or the type of business heretofore conducted by the West Detroit Brickote Company, or any similar brick siding business for a period of 10 years, in any capacity whatsoever, either as an owner or employee, unless it is for some company, copartnership, or individual holding a franchise from Brickote, Inc., a Michigan corporation."

Other provisions of the contract are not material to the issue.

Plaintiff in a bill of complaint, alleging that defendant had breached the quoted covenant, sought injunctive relief, both temporary and permanent, against further violations. Defendant in answer did not deny the agreement or that he breached it but alleged that the covenant is "contrary to public policy and constitutes a restraint of trade," giving no reason for such conclusion. Such an allegation in the pleadings, without any facts being stated in its support, will be disregarded. See *Dodge* v. *Detroit Trust Co.*, 300 Mich 575.

A circuit judge, shortly after the bill was filed, heard the motion for a temporary injunction and denied it. Subsequently the case came before another judge on a motion for decree on the pleadings. The latter, after argument by counsel, rendered an opinion in which he held that plaintiff was entitled to the relief prayed for. However, upon objections to the proposed decree, the circuit judge modified his opinion and entered a decree restricting the territory in which the covenant would be operative to Wayne county, Michigan, a large portion of which is occupied by the city of Detroit in which the office of the company was located and from which the business was conducted.

Defendant appeals and claims that inasmuch as

the circuit judge who first heard the case on a motion for temporary injunction dissolved it, therefore, the question became *res judicata*. Decision on a preliminary motion in no way affects a final decree. See *Palmer* v. *Kleiner*, 236 Mich 480; *Dunnebacke* v. *Detroit G.H. & M.R. Co.*, 248 Mich 450.

Defendant alleges that the covenant is illegal in that it tends to create a monopoly, is in restraint of trade, is unreasonable, and imposes a hardship on defendant. We have so repeatedly upheld, under somewhat similar circumstances, a covenant not to compete that it is unnecessary to more than cite CL 1948, § 445.766 (Stat Ann § 28.66), which states that a restraint is permitted when its object is to protect a vendee, et cetera, in the furtherance of his business. This has been applied to the purchase of stock in a corporation, accompanied by an agreement on the part of the vendor not to compete. *Buckhout* v. *Witwer*, 157 Mich 406 (23 LRA NS 506); *Wolverine Sign Works* v. *Powers*, 248 Mich 371; *Arctic Dairy Company* v. *Winans*, 267 Mich 80 (94 ALR 334); *Sewall* v. *Feller*, 288 Mich 107.

Defendant contends that it is not permissible for the trial court to restrict the territorial scope of the injunction as no territorial limits were specified in the covenant. In *Hubbard* v. *Miller*, 27 Mich 15, a leading case referred to by both parties, a somewhat similar restrictive covenant was upheld, Mr. Justice CHRISTIANCY writing the opinion. In the restrictive covenant in that case, the vendors agreed not to engage in a similar business but did not limit it either as to time or territory. The court stated that where a consideration recognized by law as being valuable is paid, the law very properly allows parties to judge for themselves of the sufficiency of value of such consideration for their contracts. The court granted injunctive relief but limited the scope of the injunction to the city of Grand Haven where

the vendor's business had theretofore been conducted and for some distance beyond the city limits. This was in 1873 before metropolitan districts of large cities were known. In the instant case, while the business was being conducted in the city of Detroit, the metropolitan area had been built up far beyond the city and county limits, the limitation to the county of Wayne, as stated in the decree, seems reasonable on the record. The trial court so held after listening to the arguments of counsel. Similarly, a restriction to a smaller area might have appealed to the court though a business of the kind conducted by plaintiff is necessarily not confined to a neighborhood and probably seeks to draw trade from a very wide area. Similar provisions have been upheld where no particular area was set forth in the contract. See *Up River Ice Co.* v. *Denler,* 114 Mich 296 (68 Am St Rep 480); *Buck* v. *Coward,* 122 Mich 530; and *Colton* v. *Duvall,* 254 Mich 346. Defendants cite *Caswell* v. *Gibbs,* 33 Mich 331, as authority for their contention, but in that case the terms of the contract were too indefinite, the court denying an injunction without prejudice to the parties bringing further proceedings. The court has the authority to enter a decree according to the facts so as to make the area of restriction a reasonable one.

Defendant claims that a judgment on the pleadings was improper in the instant case although the allegations in regard to the contract itself, payments, et cetera, were admitted. In the objections to the proposed decree defendant claimed that the cause required the taking of testimony and that, therefore, a decree should not be entered on the pleadings and more specifically alleged that the court should have inquired as to whether the agreement was conscionable, whether or not plaintiff would be materially benefited or defendant harmed by the entry of decree and numerous other prin-

ciples applicable in chancery cases, which principles were not set forth. The pleadings seem sufficient to fully justify the judge in coming to his conclusions. It is true that in the cases cited where the contract did not limit the restricted territory, testimony was taken.

In affirming the decree we do so subject to the right of either party to move for modification of the decree within 30 days after this decision is handed down and in that event testimony may be taken to show why the territory should be enlarged or restricted, and the decree may be so modified by the trial court if it so decides if such timely motion is made and testimony taken. In the meantime, however, the injunction on the decree heretofore rendered shall stand unless and until the decree is modified by the court.

Subject to the right to move for modification as provided above, the decree is affirmed, with costs to plaintiff.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

PEOPLE *v.* FRELEIGH.

1. CRIMINAL LAW—COMMUTATION OF SENTENCE.
   The power of pardon and commutation of sentence rests in the governor alone and any law which restricts such power is unconstitutional (Const 1908, art 6, § 9).

2. SAME—AMENDMENT OF PARTIALLY-EXECUTED VALID SENTENCE.
   To permit a trial court to amend a valid sentence after the prisoner has served a part of it would infringe upon the exclusive power of the governor under the Constitution to commute a sentence (Const 1908, art 6, § 9).

3. SAME—COMMUTATION OF SENTENCE—COURTS—LEGISLATURE—GOVERNOR.
   The Constitution by implication forbids the judiciary to commute a sentence and does not enable the legislature to pass a law that will infringe upon the exclusive power of the governor to commute a sentence (Const 1908, art 6, § 9).

Appeal from Recorder's Court of the City of Detroit; Murphy (George), J. Submitted June 12, 1952. (Docket No. 69, Calendar No. 45,359.) Decided September 3, 1952.

Fred Freleigh was convicted under the habitual criminal act. From order denying application to review sentence pursuant to PA 1951, No 159, amending the code of criminal procedure, because such amendatory act was unconstitutional, defendant appeals. Affirmed.

*James E. Haggerty, Harry Cohen,* and *William Bramson,* for appellant.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 39 Am Jur, Pardon, Reprieve, and Amnesty §§ 17, 34, 63, 65.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, *Gerald K. O'Brien,* Prosecuting Attorney, *Ralph Garber,* Chief Assistant Prosecuting Attorney, and *Garfield Nichols* and *George W. Miller,* Assistant Prosecuting Attorneys, Appellate Division, for the people.

BUTZEL, J. Fred Freleigh, defendant, was convicted of a felony, and on supplemental information charging him with being a second offender, he was found guilty and sentenced to serve a term of not less than 2 years, 4 months, 3 days to 7½ years, the statutory maximum, with a recommendation of 1 year. Although the conviction was over 10 years ago, he has not fully served his sentence owing to the fact that he was released on parole for an interim period and later returned to custody for parole violation. He presented a petition for review on October 4, 1951, pursuant to CL 1948, § 769.14, as added by PA 1951, No 159 (Stat Ann 1951 Cum Supp § 28.1085[1]), which provides:

"Any person now incarcerated in any State prison, or on parole from a sentence thereto, who was sentenced under the terms of sections 10, 11, 12 or 13 of this chapter as in effect prior to the effective date of Act No 56 of the Public Acts of 1949, shall be entitled to a review of sentence upon application to the court in which he was sentenced. Upon such application any judge of such court may vacate the previous sentence and impose any lesser sentence which in his judgment might have been imposed under sections 10, 11, 12 or 13 of this chapter, as amended by Act No 56 of the Public Acts of 1949, had such sections as amended been in force at the date of the previous sentence imposed upon said prisoner: Provided, That any sentence so imposed shall be deemed to have begun as of the date of the previous sentence, and the rights of such prisoner

under the laws shall be governed by the lesser sentence as then imposed."

The Hon. George Murphy, judge of the recorder's court for the city of Detroit, doubting the validity of Act No 159 and basing his decision on an opinion of the attorney general of the State of Michigan, held the act to be unconstitutional and denied appellant's petition. We allowed an appeal.

Article 6, § 9, of the Constitution of 1908 provides:

"He [the governor] may grant reprieves, commutations and pardons after convictions for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence or grant a further reprieve. He shall communicate to the legislature at each session information of each case of reprieve, commutation or pardon granted and the reasons therefor."

Article 5, § 28, of the Constitution of 1908 provides:

"The legislature may provide by law for indeterminate sentences, so called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

This latter section was added to the Constitution after this Court, in the absence of such a provision, had held the indeterminate sentence law unconstitutional.*

* See *People* v. *Cummings* (1891), 88 Mich 249 (14 LRA 285); Const 1850, art 4, § 47, as amended in 1902.—REPORTER.

PA 1927, No 175, chap 9, §§ 10–13, being CL 1948, §§ 769.10–769.13 (Stat Ann §§ 28.1082–28.1085), provided for certain mandatory sentences to be imposed on criminals convicted of more than 1 felony. The statutes provided for sentencing on an indeterminate basis for second, third and fourth offenders.

PA 1949, No 56, amending CL 1948, §§ 769.10–769.13 (Stat Ann 1951 Cum Supp §§ 28.1082–28.1085) made new provisions for the sentencing of habitual criminals, giving the trial court in its discretion the power to impose less than the former mandatory sentence upon the offender.

Subsequently PA 1951, No 159, was passed by the legislature. Both parties concede that Act No 159, *supra,* is a legislative attempt to give PA 1949, No 56, retroactive effect upon sentences which were mandatory on the trial judge under the habitual criminal act prior to the effective date of Act No 56, *supra,* and under which prior act defendant was sentenced. Defendant, claiming Act No 159, *supra,* to be constitutional under article 5, § 28, *supra,* maintains that the legislature may provide for the release of persons imprisoned or detained on indeterminate sentence, Act No 159, *supra,* providing for such release. Defendant relies chiefly on *People* v. *Cook,* 147 Mich 127, and *In re Casella,* 313 Mich 393. The question in those cases was whether or not prisoners could be released on parole prior to the time they had served their maximum term. We only held that such release by parole was not a commutation of the sentence as such parolees remained under the surveillance of the prison authorities and upon violation of the parole would be returned to the prison to serve the balance of the sentences without any deduction of the time during which they had been released on parole. Defendant was so released until he violated the terms of his parole.

The power of pardon and commutation of sentence rests in the governor alone, article 6, § 9, *supra*. As stated in *Rich* v. *Chamberlain,* 104 Mich 436 (27 LRA 573), at 446, such "power is vested exclusively in the governor of the State, and any law which restricted this power would be unconstitutional and void."

In *People* v. *Fox,* 312 Mich 577 (168 ALR 703), we held at pp 581, 582:

"To hold with defendant under the circumstances of this case that the court has power to amend a sentence after the prisoner has served a part of it would infringe upon the exclusive power of the governor under the Constitution to commute sentence."

The Constitution by implication forbids the judiciary to commute a sentence. It does not enable the legislature to pass a law that will infringe upon the exclusive power of the governor to commute a sentence.

The trial judge was correct in denying defendant's petition and the order of denial is affirmed.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## CORPRON *v.* SKIPRICK.

1. AUTOMOBILES—PEDESTRIANS—LOCATION OF ACCIDENT—SPEED—QUESTIONS FOR JURY.

   Issues of fact as to how and where eastbound defendant motorist struck southbound plaintiff pedestrian and speed of defendant were properly left to jury, where claims of respective parties were supported by their own and corroborating testimony.

2. SAME—NEGLIGENCE—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—GREAT WEIGHT OF EVIDENCE.

   Finding of jury that plaintiff pedestrian had failed to sustain his burden of proof as to his own freedom from contributory negligence and as to defendant motorist's negligence *held,* not against great weight of evidence.

3. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—STATUTES.

   Claim of error respecting charge as to contributory negligence of plaintiff pedestrian in that trial judge unduly emphasized such issue *held,* without merit, the charge having fairly submitted such issue as well as issue of defendant's negligence because of alleged failure to observe pertinent statutory provisions as to operation of motor vehicles on public highways and due care on occasion in question (CL 1948, § 256.305[a]).

4. SAME—MOTORISTS NOT INSURERS AGAINST ACCIDENTS—PEDESTRIANS.

   A motorist is not an insurer against accidents with pedestrians.

5. SAME—PEDESTRIANS—CROSSING STREETS—TRAFFIC LIGHTS.

   Defendant motorist, eastbound on rainy evening late in March on street on which southbound plaintiff pedestrian was crossing east of traffic light, may not be said to have had the duty as a matter of law to avoid a collision with plaintiff regardless of circumstances.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–8] 5 Am Jur, Automobiles § 293.

[1–8] Right of way at street or highway intersections. 21 ALR 974; 37 ALR 493; 47 ALR 595.

6. SAME—INSTRUCTIONS—SPEED—NEGLIGENCE—EVIDENCE.
Conflicting proofs as to how and where accident happened when defendant's eastbound car struck southbound plaintiff pedestrian presented question for jury as to whether defendant was subject to the "assured clear distance" rule as to speed of his car, hence plaintiff was not entitled to instruction to jury that defendant was guilty of negligence as a matter of law because he was traveling faster than would permit him to stop within the assured clear distance ahead and because of his failure to see plaintiff when latter was part way across street at 7:30 in the evening on a rainy night late in March (CL 1948, § 256.305[a]).

7. TRIAL—EXAMINATION OF REQUESTS TO CHARGE.
A trial judge is entitled to a reasonable opportunity to examine requests to charge jury and to determine whether they are in proper form (CL 1948, § 691.432).

8. SAME—REQUESTS TO CHARGE—STATUTES.
A trial judge may comply with an oral request to charge if he thinks it proper to do so, but, if he declines, such refusal is not a proper basis for an assignment of error, since the statute relating to requests to charge provide for written requests but is silent as to any right to verbally ask for a specific instruction (CL 1948, § 691.432).

Appeal from Tuscola; DesJardins (George W.), J. Submitted June 5, 1952. (Docket No. 37, Calendar No. 45,422.) Decided September 3, 1952.

Case by Edward A. Corpron against Frank Skiprick for injuries suffered when struck by defendant's automobile. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

*Williams & Williams,* for plaintiff.

*Maurice C. Ransford,* for defendant.

CARR, J. Plaintiff brought this action in circuit court to recover damages for injuries suffered by him as the result of being struck by defendant's automobile. The accident occurred about 7:30 p.m. on

the 26th of March, 1949, in the village of Cass City. Main street in said village is 74 feet in width from curb to curb, running in an east and west direction. At the time in question plaintiff undertook to cross said street from the north to the south side at or near the crosswalk on the east side of the intersection of Main and Seager. Defendant approached the scene of the accident from the west, driving through the intersection and striking plaintiff with such force as to knock him to the pavement or to cause him to fall.

The case was tried before a jury, which returned a verdict in favor of the defendant. Judgment was entered on the verdict. Plaintiff moved for a new trial, alleging as one of the grounds therefor that the verdict was against the great weight of the evidence. The motion was denied and plaintiff has appealed.

On the trial of the case the testimony was conflicting as to where the accident happened and as to the circumstances involved. It was plaintiff's claim that he left the northeast corner of the intersection of Main and Seager streets, that as he did so he observed the traffic light in the center of the intersection, and that it was green for north and south traffic. As he proceeded on his course he looked to the west and saw the headlights of an automobile approaching Seager street. When approximately 20 feet from the north curb he noticed that said car, which was operated by defendant, was proceeding through the intersection. His testimony indicates that the automobile was coming directly toward him, that he was uncertain whether to retrace his steps to the north or to continue south, and in consequence he remained stationary until he was struck by the left front corner of defendant's car. His claim that the accident happened on the north side of the center line of Main street was corroborated by the testi-

mony of 2 witnesses who apparently did not see the occurrence but who stated that when they arrived on the scene plaintiff was lying a short distance from the north curb. One of the witnesses placed such distance at 9 feet, and the other at 14 or 15 feet. Plaintiff's claim with reference to where the accident happened and his conduct immediately preceding it is indicated by the following excerpt from his testimony:

"*Q.* Now how far down the street was that car when you first saw it?

"*A.* The car was possibly 75 feet west from the crosswalk going north and south on the west side of the intersection. He was headed and going east and was in the center of the road. There is no center line on Main street and I saw the car coming and I stopped and was about 20 feet from the north curb.

"*Q.* What did you do then?

"*A.* Well, I figured the man was going to stop on the corner for the red light which was east and west, understand me?

"*Q.* Yes.

"*A.* But consequently that car went through.

"*Q.* As I remember on your direct examination you made a remark like this, that you stopped to let the car pass by?

"*A.* Well, what else could I do. That is what I said, when the car was coming at me right close to me I couldn't step one way and couldn't jump back the other way. There I was. I figured he would go around me and miss me, that is what I figured he would do.

"*Q.* He was going against the red light, was he?

"*A.* He was. * * *

"*Q.* Then Mr. Skiprick continued right on crossing the intersection while you were standing there 20 feet out and he drove right towards you?

"*A.* Must have done it because he hit me there.

"*Q.* That is what I want to know.

"*A.* I would say that he did. I wouldn't say he run straight for me. I know the car was coming right direct at me, and I could not make a move. That I do know.

"*Q.* Then would you say you never moved from your spot 20 feet out from the time you saw Mr. Skiprick down here 75 feet west of the west crosswalk, that you never moved from that spot until the time he hit you?

"*A.* I didn't have a chance."

Defendant testified in substance that immediately prior to striking plaintiff he was driving in an easterly direction on Main street, also referred to in the record as M–81, at approximately 15 miles per hour, and that he was proceeding slowly because it was raining and the visibility was poor. Cars were parked along both sides of the street. Defendant claimed that he was at all times on the south side of the center line of Main street, that when he went through the intersection of that street with Seager he had the green light, and that he did not see plaintiff until the instant of the impact. He stated further that he stopped his car within a distance of 4 or 5 feet, and that it remained in that position for approximately one-half hour. It was his further claim that the accident did not happen on or near the crosswalk but, rather, approximately 70 feet to the east thereof, and that the plaintiff stepped in front of the automobile. His testimony fairly indicates the claim that plaintiff, immediately prior to the impact, was approaching from the north and that he did not see plaintiff because of the poor visibility and the fact the he was observing the highway to the east.

Defendant's testimony was corroborated by that of a witness who was riding with him at the time of the accident. Other witnesses claimed that the automobile, following the accident, was on the south

side of the center line of Main street. The village marshal arrived on the scene some 10 or 15 minutes after the accident occurred. He stated that at the time plaintiff was lying 3 to 4 feet north of the center line of the street, and that defendant's car was at least 3 feet to the south of the center line. This witness noticed skid marks on the pavement, approximately 3 feet in length, south of the center line. The testimony of the marshal further indicated that there was no evidence to the effect that defendant had crossed the center line. He testified also to measurements made by him 2 or 3 days after the accident, and corroborated the claim of the defendant that the point of impact was some distance east of the crosswalk.

In view of the testimony of the various witnesses in the case, including the parties, we think that the issues of fact involved were properly submitted to the jury for determination. Apparently the jury concluded that plaintiff had not sustained the burden of proof resting on him and was, in consequence, not entitled to recover damages. On the record before us it cannot be said that such finding was against the great weight of the evidence. *Black* v. *Ambs,* 307 Mich 644.

Appellant further argues that the trial judge in submitting the case to the jury unduly emphasized the issue of contributory negligence. Our examination of the charge as a whole brings us to the conclusion that the claim is not well founded. Whether defendant was negligent and whether plaintiff had established his freedom from contributory negligence were the principal issues in the case, and it is apparent that the judge in his charge sought to avoid the possibility of any confusion arising in the minds of the jurors with reference thereto. It cannot be said that more stress was placed on the duties resting on plaintiff for his own well-being than on

defendant's obligation to observe applicable provisions of the statute governing the operation of motor vehicles on public highways and to exercise due and proper care in the operation of his automobile on the occasion in question. As given, the charge fairly submitted plaintiff's claims and he was not, under the record in the case, entitled to a more favorable presentation of the issues. The claim of error is without merit.

At the conclusion of the proofs counsel for plaintiff orally requested the court to charge the jury that the defendant was guilty of negligence as a matter of law because he was driving at such a rate of speed that he was not able to stop his car within the assured clear distance ahead, and because of his failure to see the plaintiff prior to the impact. The first ground for the request apparently was based on the theory that under the evidence in the case defendant was guilty of a violation of CL 1948, § 256.305(a) (Stat Ann 1947 Cum Supp § 9.1565[a]), in force at the time of the accident, which read as follows:

"Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead."

The provision above quoted now appears in the present Michigan vehicle code, PA 1949, No 300, as section 627(a) thereof (Stat Ann 1952 Rev § 9.2327).

The second ground alleged in the request for the instruction was obviously predicated on the theory that it was the duty of the defendant to discover

plaintiff in time to stop before striking him, and that because he did not do so he was guilty of negligence as a matter of law. However, defendant was not an insurer against accidents. It may not be said that the duty rested on the defendant as a matter of law to avoid a collision with plaintiff regardless of circumstances. *Nickels* v. *Hallen*, 247 Mich 291, 295. The request seems to have rested on the claim of plaintiff, as made in his testimony on the trial, that he was standing on the highway immediately in front of defendant's automobile as the latter approached him and that he did not, for the reason given by him, undertake to move from his position. Such claim was not in accord with the testimony of the defendant and his witnesses. It was in effect defendant's claim that he was watching the highway in front of his vehicle and that plaintiff approached from the north side of the car and stepped in front of the left front fender.

In view of the conflict in the proofs as to how and where the accident happened, plaintiff was not entitled to the instruction requested by him. Under defendant's proofs plaintiff was not, prior to the impact, ahead of the automobile. Rather, he was at one side. If such was the situation, and the jury might well have concluded that it was, whether defendant was guilty of negligence because of his failure to observe plaintiff approaching from his left was, under all the circumstances of the case, an issue of fact. It may not be said that the statutory "assured clear distance ahead" rule was necessarily applicable in the case. *Fisher* v. *Grand Trunk Western R. Co.*, 306 Mich 95. In *Malone* v. *Vining*, 313 Mich 315, 320, it appears that the defendant driver saw the plaintiff standing on the north side of the pavement, and although her view was not obstructed she did not again observe him until the instant of the impact. Commenting on the situation, it was said:

"Her testimony, together with other evidence and the physical facts and circumstances surrounding the accident, clearly presented a question of fact for jury determination as to whether or not she was negligent."

At the time of the request the trial judge stated in effect that he would endeavor to take care of the matter in his general charge. He did so by specifically calling attention to the duties resting on defendant in the operation of his automobile, which duties plaintiff claimed had been violated, and charging that if defendant failed to operate his car accordingly he was guilty of negligence. Plaintiff was not entitled to a presentation more favorable to him. Without reference to the form in which the request for an instruction that defendant was guilty of negligence as a matter of law was made, the court was not in error in failing to so charge.

It may be noted in passing that the statute, relating to requests to charge at the conclusion of the proofs in a trial before a jury, provides for written requests but makes no mention of any right to verbally ask a specific instruction. CL 1948, § 691.-432 (Stat Ann § 27.1039). The trial judge is entitled to a reasonable opportunity to examine requests and determine whether they are in proper form. He may, of course, comply with an oral request if he thinks it proper to do so, but, if he declines, such refusal is not a proper basis for an assignment of error. As suggested by this Court in *Anthony* v. *Cass County Home Telephone Co.,* 165 Mich 388, 401, such practice "is not to be commended for many reasons that must be apparent to the profession." However, without reference to the form in which the request was made in the instant case, its denial was not erroneous.

We find no reversible error in the case, and the

judgment of the trial court is affirmed. Defendant may have costs.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

WATSON *v.* DAX.

1. FRAUD—PLEADING—DAMAGES.

Overruling of defendants' motion to dismiss declaration after it was filed and their motion for directed verdict at close of opening statement by counsel for the plaintiffs was proper, where declaration sufficiently averred facts supporting claims that standing timber on the farm was materially less than as represented, that acreage seeded to wheat and contracted to be seeded to oats was misrepresented and that condition of the dwelling house was also misrepresented, notwithstanding failure to set forth amount farm would have been worth if the representations with reference to the timber, grain and house were true.

2. SAME—TIMBER—GRAIN—EVIDENCE.

Evidence, presented by purchasers of farm, that defendants and their agent had misrepresented the amount of standing timber thereon and the amount of acreage of wheat that had been sown and the acreage contracted to be seeded to oats, *held*, sufficient to justify denial of motions for directed verdict and for judgment notwithstanding verdict.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur, Fraud and Deceit § 169; 55 Am Jur, Vendor and Purchaser §§ 76, 79.

[1] Fraud predicated upon vendor's misrepresentation of physical condition of real property. 174 ALR 1010.

[3] 24 Am Jur, Fraud and Deceit § 227.

[7, 8] Generally as to judgments notwithstanding verdicts, see 30 Am Jur, Judgments § 52 *et seq.*

[9, 10, 12] 3 Am Jur, Appeal and Error § 820.

3. SAME—MEASURE OF DAMAGES.

The measure of damages in an action for fraud based on alleged misrepresentations as to property purchased by plaintiffs is the difference between what it would have been worth had it been as represented and the value of the property as it was when conveyed to them, the amount paid not being in issue.

4. SAME—DAMAGES—EVIDENCE.

Verdict of $2,000 for plaintiffs in action against vendors of farm who had misrepresented value of timber and amount sown to wheat and contracted to be sown to oats *held,* supported by testimony before the jury.

5. SAME—RELIANCE ON DEFENDANTS' MISREPRESENTATIONS—QUESTION FOR JURY.

Whether or not plaintiff purchasers had relied on claimed misrepresentations made by defendant vendors *held,* a matter for the jury to determine from all the proofs in the case.

6. SAME—INSTRUCTIONS.

Charge to jury *held,* to have fairly and clearly presented claims of parties in action for damages because of claimed misrepresentations as to timber, grain and condition of house on farm plaintiffs purchased from defendants.

7. TRIAL—SWORN BILL OF PARTICULARS—MOTION FOR DIRECTED VERDICT—MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

Failure of plaintiffs to indicate in their motion for directed verdict that it was based on their sworn bill of particulars wherein they claimed damages in the sum of $10,000, or to bring the matter to the attention of the trial court prior to the determination of the case by the jury precludes use of such basis for decision in their favor on motion reserved under Empson act for judgment notwithstanding the verdict for $2,000 (CL 1948, § 691.691; Court Rule No 20, § 5 [1945]).

8. JUDGMENT—SUMMARY JUDGMENT—SWORN BILL OF PARTICULARS—DECISION BY TRIAL COURT.

Plaintiffs who filed a motion for judgment for $10,000 notwithstanding verdict in their favor of $2,000 were not entitled to have judgment in their favor in larger amount summarily entered, based on sworn bill of particulars, items of which had not been specifically denied by affidavit by defendants, where such basis does not appear to have been called to attention of trial court or to have been considered

by him or that he took any action with reference to it (CL 1948, § 691.691; Court Rule No 20, § 5 [1945]).

9. APPEAL AND ERROR—QUESTIONS REVIEWABLE—VERIFIED BILL OF PARTICULARS.

The failure of plaintiffs to call to the attention of the trial court to their verified bill of particulars in action based on fraudulent representations and obtaining a ruling from him as to the merits of their claim precludes consideration thereof on appeal (Court Rule No 20, § 5 [1945]).

10. SAME—QUESTIONS REVIEWABLE—DETERMINATION BY TRIAL COURT.

An issue not shown to have been presented to the trial court for determination is not before the Supreme Court for decision.

11. FRAUD—DEFECTIVE DWELLING—EVIDENCE.

Plaintiffs' claim for damages resulting from alleged misrepresentations concerning dwelling on farm plaintiffs purchased from defendants in midwinter was properly not submitted to jury, where evidence adduced shows they made a careful examination of it, its proximity to highway was obvious, it was not a new structure and had recently been remodeled, there were no proofs to support finding that defendants were aware of defects, made fraudulent representations with respect thereto or the amount of damages, if any, sustained by plaintiffs with reference thereto and the defects only appeared after repeated vibrations from use of highway by heavily-loaded gravel trucks during following spring and summer.

12. APPEAL AND ERROR—QUESTIONS REVIEWABLE—GREAT WEIGHT OF EVIDENCE—MOTION FOR NEW TRIAL.

Claim that verdict was against the great weight of the evidence is not considered by Supreme Court, where no such question was raised in the circuit court by motion for a new trial.

13. COSTS—FAILURE OF EITHER SIDE TO PREVAIL IN FULL.

No costs are allowed, where neither plaintiffs nor defendants have prevailed in their respective appeals upon affirmance of judgment.

Appeal from Menominee; Jackson (Glenn W.), J. Submitted June 10, 1952. (Docket No. 61, Calendar No. 45,324.) Decided September 3, 1952.

Action by Lewis Watson and wife against Joseph Dax and wife for damages caused by misrepresentation of real estate. Verdict and judgment for plaintiffs. Defendants appeal. Plaintiffs cross-appeal. Affirmed.

*Michael J. Amuta,* for plaintiffs.

*Doyle & Doyle,* for defendants.

CARR, J. In November, 1947, the defendants were the owners of a farm in Menominee county which they desired to sell. They caused to be inserted in a Milwaukee newspaper an advertisement purporting to describe the farm and specifying the purchase price. As a result plaintiffs became interested and entered into negotiations with defendants and with their agent, which culminated in the purchase of the property on January 17, 1948, for the sum of $15,000. The consideration was paid in full and plaintiffs went into possession on or about January 31st following the execution and delivery of the deed.

Claiming that the defendants by themselves and by their agent had made material misrepresentations of fact concerning the property, on which they relied, plaintiffs brought suit in September, 1948, to recover damages. The amended declaration filed alleged that statements in the advertisement were not true, particularly with reference to standing timber on the land. It was further alleged that when plaintiffs were shown the property, timber was pointed out to them as being on the farm. They discovered later that such timber was on adjoining land which defendants had previously conveyed to another party. Plaintiffs asserted that they did not at the time know the location of the boundaries of the property, and that they were told by defendants' agent that there was more than $5,000 worth of standing timber

thereon. The declaration further set forth that misrepresentations were made with reference to the acreage that had been seeded to wheat and also as to the acreage for which defendants had contracted to be seeded to oats in the spring of 1948; and that the defendants misrepresented the condition of the dwelling house on the property. It was charged that the statements made were false, that in fact the value of the standing timber on the farm as conveyed did not exceed $200, that the acreage seeded, and contracted to be seeded, was much less than as represented, and that the house contained serious defects which appeared after plaintiffs went into possession.

Defendants moved to dismiss the declaration on the ground that it failed to allege a cause of action. The motion was denied. A bill of particulars was requested, and was furnished, after which defendants filed an answer denying the material averments in the declaration and denying that plaintiffs were entitled to recover damages. On the trial of the case, following the opening statement of counsel for the plaintiffs, defendants moved for a directed verdict on the ground that even if plaintiffs proved all the facts claimed by their counsel they would not be entitled to a verdict in their favor. This motion was also denied.

On the completion of plaintiffs' proofs a motion for a directed verdict was made and decision thereon reserved by the court. After the introduction of testimony for defendants the motion was renewed, and decision again reserved. The jury returned a verdict of $2,000 in favor of the plaintiffs. Defendants then moved for judgment notwithstanding the verdict of the jury, which motion the trial judge denied for reasons set forth by him in a carefully considered opinion. Judgment was entered on the verdict and thereupon defendants moved to vacate the judgment and for the entry of judgment in their favor. This

motion also was denied. While defendants' motion for judgment notwithstanding the verdict was pending, plaintiffs filed a motion for the entry of a judgment in their favor in the sum of $10,000, based on the pleadings in the case, notwithstanding the verdict of the jury. It does not appear that the trial judge considered the motion, and the record before us contains no order with reference to it. From the judgment entered defendants have appealed and plaintiffs have cross-appealed.

The first question presented for consideration is whether the amended declaration filed by the plaintiffs, and the opening statement of their counsel on the trial, were each sufficient in substance to set forth a cause of action. As above indicated, plaintiffs' pleading averred the transaction into which they had entered with the defendants and alleged that they purchased the farm in reliance on the representations made to them which, as they claimed, they subsequently learned were false. It was not set forth in specific terms that the property was actually worth less than it would have been worth if the representations with reference to the standing timber, the grain seeded and to be seeded, and the condition of the house, had been true. The allegations of fact were not inconsistent with the theory on which the plaintiffs were required to rely. We do not understand that defendants claim that they were in any way misled because of the failure to make reference in the declaration to the rule of law as to the measure of damages applicable in the case. The trial judge concluded that sufficient facts were pleaded, and also stated by counsel in his remarks to the jury, to fairly set forth a cause of action. There was no error in overruling defendants' motions based on the amended declaration and the opening statement of counsel.

The motion for a directed verdict submitted by defendants at the conclusion of plaintiffs' proofs,

renewed after both parties had rested, and further raised by the motion for judgment notwithstanding the verdict, was based primarily on the claim that the proofs were insufficient to enable the jury to find a verdict in plaintiffs' favor. The testimony of the plaintiffs and their witnesses tended to substantiate their claims, as set forth in their pleading, with reference to the alleged misrepresentations relating to the quantity and value of the standing timber and the acreage of grain seeded and to be seeded under contract. From such testimony the jury might well have concluded that plaintiffs were not advised as to the boundary line of the farm and that they were in substance told that standing timber shown to them was located thereon although actually on adjoining land. The jury might also have concluded that the acreage of wheat that had been sown was materially overstated and that the contract with reference to the oats had been misrepresented. It is, we think, apparent that if the representations claimed to have been made to them by defendants in the particulars referred to had been in fact true the farm would have been worth appreciably more than its value in the condition that it was in at the time of the transaction between the parties.

In submitting the case to the jury the trial judge gave the following instruction:

"The general rule of damages in an occasion of this nature is the difference between what the property would have been worth if it had been as represented and the value of such property as it was when conveyed to the plaintiffs. The issue is not whether plaintiffs paid too much or too little for the property. Therefore whether or not plaintiffs received $15,000 worth of property is not material and is not the issue in this case. Plaintiffs were entitled to get what was represented to them that they should get. And so you will go over each of the claimed representations

and first determine whether or not plaintiffs are entitled to recover with respect to any one or more of them and then you will assess plaintiffs' damages, if any, based upon the difference between what the premises would have been worth if they had been as represented and what their value was when actually conveyed to the plaintiffs, and if you find for the plaintiffs you will render your verdict in such an amount."

It must be assumed that the jury followed the instructions of the court and returned their verdict accordingly, based on the determination of the disputed factual issues involved in the case. The correctness of the rule as stated is not challenged by either appellants or cross-appellants. See *Chapman* v. *Bible,* 171 Mich 663 (43 LRA NS 373); *Gloeser* v. *Moore,* 284 Mich 106. The testimony before the jury was sufficient to permit a specific finding in accordance with the rule embodied in the charge, and the amount of the verdict is well within the scope of the evidence. Whether the plaintiffs relied on the claimed representations in purchasing the farm was a matter for the jury to determine from all the proofs in the case. *Dinius* v. *Bolibrzuch,* 270 Mich 618. The factual issues in the case were properly submitted. The charge given fairly and clearly presented the claims of the parties. The trial court was not in error in denying the motion for judgment notwithstanding the verdict.

This brings us to a consideration of the cross appeal of the plaintiffs. It is their claim that the trial judge should have directed a verdict in their favor in the sum of $10,000, and that failure to do so was error. As before mentioned, defendants, following the filing of the amended declaration, demanded a bill of particulars. In response thereto plaintiffs filed a more specific statement of their claims than was set forth in the declaration, discussing all of the

paragraphs thereof, leaving some unchanged and explaining in some detail the allegations made in others. As in their amended declaration, they claimed damages in the sum of $10,000, together with costs. It was sworn to by both plaintiffs.

Defendants raised no question as to the form or sufficiency of the bill of particulars furnished, nor did they file a sworn denial of plaintiffs' claimed right to recover damages in accordance therewith. Court Rule No 20, § 5 (1945), provides that:

"Whenever a bill of particulars is verified by oath, the items thereof shall be deemed admitted except insofar as the opposite party shall file an affidavit within 15 days specifically denying the same."

Plaintiffs' motion, above referred to, made after the jury had returned its verdict, was based on the above-quoted rule and on the further claim that the verdict for $2,000 was contrary to the great weight of the evidence. Both claims are urged in this Court.

The record does not indicate that plaintiffs made a motion for a directed verdict on the basis of their sworn bill of particulars, or that the matter was in any other way called to the attention of the trial court, prior to the determination of the case by the jury. Not having made such motion on the trial, the plaintiffs were not in position to avail themselves of the provisions of the statute (CL 1948, § 691.691 [Stat Ann 1951 Cum Supp § 27.1461]) relating to the making and decision of a motion for judgment notwithstanding the verdict. Neither were they entitled to urge at the time of the filing of their said motion that the court should summarily enter a judgment for them on the basis of the bill of particulars. As before stated, it does not appear that the trial judge considered such motion or that he took any action with reference to it. The record does not show

affirmatively that it was called to his attention. If so, it is a matter of inference that he considered that plaintiffs were not then entitled to raise the question based on the court rule and that the motion did not require affirmative action.

The situation presented is somewhat unusual. In effect this Court is asked to pass on a matter not seasonably submitted to the trial judge and not passed on by him. In *Garbarino* v. *Lee C. Miller Company,* 330 Mich 688, it was said with reference to an analogous situation:

"It does not appear in the record on this appeal that the trial judge passed upon any of the controverted issues—*i.e.,* whether plaintiff's status was that of a stockholder in the corporation or a creditor of the corporation, whether plaintiff was entitled to an accounting for the value of his services as bookkeeper, or for his alleged loss incident to the motor vehicle transaction. Hence those issues are not before us for review."

See, also, *Dowagiac Manufacturing Co.* v. *Schneider,* 181 Mich 538; *Taskey* v. *Paquette,* 324 Mich 143; *Cabana* v. *City of Hart,* 327 Mich 287 (19 ALR2d 333). Counsel for plaintiffs cites and relies on *Cohen* v. *Peerless Soda Fountain Service Co.,* 257 Mich 679. In that case the plaintiff, having filed a sworn bill of particulars, moved for judgment on the pleadings, basing such motion on the failure of the defendant to file a verified answer denying the various items specified in plaintiff's claim. Defendant relied on its sworn answer to plaintiff's declaration. The trial court held that such answer was not a compliance with the rule, but granted defendant time to file an amended sworn answer. This the defendant neglected to do, and the trial court rendered judgment in plaintiff's favor, which this Court reversed. The case does not support plaintiffs' position in the in-

sant controversy. Without reference to the merits of the claim based on the verified bill of particulars, we conclude that because of the failure of the plaintiffs to seasonably call the matter to the attention of the trial court and obtain a ruling thereon they are precluded from raising the matter on appeal in this Court. See, *Baldwin* v. *Nall,* 323 Mich 25, 31.

It is further contended on behalf of plaintiffs that the trial court was in error in not submitting to the jury their claim for damages because of alleged misrepresentations concerning the condition of the house. The ruling of the trial judge on the matter and his reasons therefor are set forth in the following excerpt from his charge:

"Now as to any claim for damages arising out of fraud with respect to the representations in regard to the dwelling on the premises I cannot submit this to you. There was testimony that now there is ample evidence of defects and damage which can be seen at this time. The house had been remodeled at considerable expense before the negotiations. The difficulties with respect to the dwelling did not become manifest or observable until a considerable time after the negotiations took place and the plaintiffs had moved in. There is not sufficient evidence to submit this issue to the jury as to whether or not defendants were aware of these difficulties at the time of the negotiations or if aware of them to what extent they were aware of them at the time. The testimony upon any claimed issue of damages arising is too indefinite and uncertain. One of the plaintiffs' witnesses said he estimated the cost of repairs now to be a total of $3,600 or $3,700. Now it is quite clear from the evidence not all of the defects that now can be seen at the house were observable when the negotiations took place and even if you find that some of these defects existed and were known to defendants at that time when the parties met and made this transaction the evidence forms

no basis for apportioning any part or parts of this $3,600 or $3,700 to such part as might have been known to the defendants at that time. Now the matters of cost of rehabilitating and remodeling this house are matters peculiarly in the hands of plasterers, carpenters and other artisans and without testimony from experts of this type there is not sufficient evidence to submit these issues to the jury. For these and other reasons you will disregard all claim for damages with respect to the dwelling house."

The claims of plaintiffs with reference to the appearance of the alleged defects in the construction of the house, and the possible reasons therefor, are suggested in the following excerpts from the testimony of plaintiff Lewis Watson:

"We started to notice a disturbance in the house, in the walls, on account of the many county trucks traveling by our place on [highway] 577, somewhere in April, 1948. I was living there all the time. We noticed damage done around the summer of 1948 when the county began hauling large quantities of gravel and large trucks passed our house. The county, also in April, 1948, was hauling large quantities in heavy trucks on 577.

"*Q.* The point is, whenever it was that the county was hauling this gravel in the large trucks along 577, that is the time you connected up the damage to the walls of the house? That is right, is it not?

"*A.* I noticed cracks in the house along in the spring. The time they really became noticeable was at the time the county was hauling gravel in large trucks over 577 in front of our house. A lot of cracks did not appear because the walls were covered with paper and they broke through the wall paper.

"*Q.* Now, Mr. Watson, was it that damage to the house that became part of the claim on which you had your attorney write to the Menominee county road commission to look into a cost of $1,700 to repair

the house and see if the road commission or its insurers would pay that?

"*A.* Yes, I am talking about that damage. * * *

"*Q.* When the trucks went by on the highway, what effect did they have on the house?

"*A.* That is what I did not know and I tried to find out.

"*Q.* Was there any shaking or anything like that?

"*A.* I didn't realize it was the trucks until I was on the back porch; when the trucks went past I felt a great vibration.

"*Q.* There was some vibration?

"*A.* Yes. That was the only thing I noticed from the highway traffic, the shaking."

Mrs. Watson testified that defects in the house were first discovered about the 1st of July, 1948, when cracks in the plaster began to appear. The dwelling was in proximity to a county road designated in the record as Highway 577, over which there was during the spring and summer of 1948 rather extended operations by heavily-loaded trucks. It is a fair conclusion that the vibration resulting from such traffic affected the dwelling, contributing in part at least to the condition that plaintiffs contended necessitated the making of repairs.

As the trial judge pointed out in his statement to the jury, above quoted, the false representations claimed by plaintiffs with reference to the house related to the situation at the time the property was purchased by them. The testimony concerning defects in the structure in the main had reference to the condition developing later. The court was not in error in holding that there were no proofs before the jury on which to base a specific finding as to what fraudulent representations, if any, were made in the course of negotiations between the parties with reference to the then condition of the house, or as to the amount of damage, if any, sustained by plaintiffs

because of false statements with respect thereto. It further appears that plaintiffs knew at the time they made the purchase that the house was not a new structure, and that it had been recently remodeled. The testimony indicates that they made a careful examination of it. They were, of course, charged with notice of its proximity to the highway. On the basis of the record before us the trial court properly declined to submit to the jury plaintiffs' claim of damages to them resulting from misrepresentations concerning the dwelling.

Plaintiffs' claim that the verdict was against the great weight of the evidence does not require discussion. It does not appear that such claim was raised in the circuit court by motion for a new trial. *Boran* v. *New York Life Ins. Co.*, 274 Mich 638, 642; *Csircsu* v. *Muir*, 303 Mich 323.

We find no reversible error and the judgment entered in the trial court is affirmed. Inasmuch as neither plaintiffs nor defendants have prevailed on their respective appeals, no costs are allowed.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

MACIAS *v.* MACIAS.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.
   Determination of trial judge that 25-year-old plaintiff wife was not entitled to divorce from 49-year-old husband on ground of extreme cruelty is not disturbed under record presented, where it appears that plaintiff failed to sustain her burden of proof in that defendant's jealousy and accusations as to her conduct were not entirely without foundation and it was shown that plaintiff's dissatisfaction was due, in part, to difference in ages of the parties.

2. SAME—COSTS.
   No costs are allowed upon affirmance of decree dismissing plaintiff wife's bill for divorce.

Appeal from Oakland; Doty (Frank L.), J. Submitted June 12, 1952. (Docket No. 76, Calendar No. 45,383.) Decided September 3, 1952.

Bill by Eva L. Macias against Abigay Macias for divorce on ground of extreme cruelty. Decree for defendant. Plaintiff appeals. Affirmed.

*Verne C. Hampton*, for plaintiff.

*William John Beer* (*John B. Osgood*, of counsel), for defendant.

CARR, J. This suit was instituted by plaintiff in circuit court for the purpose of obtaining an absolute

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Divorce and Separation § 63 *et seq.*
[1] Accusation of improper relations as cruelty constituting ground for divorce or separation. 143 ALR 623.

divorce from the defendant. The parties were married on or about the 9th of February, 1943, and according to plaintiff's allegations in her bill of complaint they lived together as husband and wife until 2½ months prior to the filing of said bill on July 26, 1950. There were 2 children of the marriage, the older being 8 years of age at the time of the trial of the case in circuit court on April 6, 1951, and the younger 4 years of age at that time.

Plaintiff charged that defendant had been guilty of extreme and repeated cruelty toward her in that he had failed to furnish a proper home for her and the children, that he found fault with her concerning money matters, that he drank intoxicants to excess, that he falsely accused her of improper associations with other men, and that he had stated that he did not care for her and wanted a divorce. Defendant by answer denied that he had been guilty of extreme and repeated cruelty toward the plaintiff. He further asserted in his pleading that he wished to become reconciled, and that he still had affection for plaintiff notwithstanding conduct on her part subversive of the marital relation. He further alleged that plaintiff had failed to properly care for the children of the parties.

Following a hearing the trial court came to the conclusion that plaintiff had failed to establish her right to the relief sought and entered a decree dismissing the bill of complaint. Plaintiff has appealed, asserting that the holding of the trial judge was erroneous and not in accord with the evidence in the case. This Court is asked to enter a decree in plaintiff's favor on the basis of the record before us.

At the time of the trial plaintiff was 25 years of age, and defendant 49. At the time of the marriage she was 17. According to her testimony the parties lived together for approximately 8 months before

they were married. Defendant was born in Mexico, but it does not appear that the parties had trouble because of racial differences. He became a naturalized citizen of this country prior to the bringing of the divorce action. It does appear, however, that plaintiff's dissatisfaction with defendant arose in part from the fact that he was approximately 24 years older than she. The following testimony given by her on her cross-examination is significant:

"*Q.* Is the real reason you want a divorce because your husband is 25 years older than you?
"*A.* Not altogether.
"*Q.* Your major reason?
"*A.* Not altogether.
"*Q.* That is a reason?
"*A.* That is 1 of the reasons."

Plaintiff further stated that another reason for her seeking a divorce was her dissatisfaction with the home surroundings. At the time of the separation of the parties they were living in the home of plaintiff's grandmother, where they had been for approximately 18 months. The grandmother was a witness for defendant on the trial, testifying to the arrangement under which the parties to the case shared her home and stating further that she had never heard any quarrels or arguments between plaintiff and defendant until shortly before plaintiff left. The witness testified also to statements by plaintiff indicating her dissatisfaction because of defendant's age, and to the conduct of the parties in seeking recreation nights and Sundays.

The record fairly indicates that defendant worked whenever he could find employment. It was his claim that prior to 1949, when he was unemployed for several months, he customarily turned over his paychecks to the plaintiff and that she used the money for the expenses of the household and for her own

purposes. It was his claim further that at one time, after having been steadily employed for several years, he had approximately $1,800 in bonds, which he gave to plaintiff to keep. It was his desire to save a sufficient amount of money to enable the parties to purchase a home. He testified further that plaintiff, without his knowledge, cashed the greater portion of the bonds and used the money for such purposes as she desired.

The evidence in the case indicates clearly that the parties were not provident in their financial matters, that each indulged in the use of intoxicating liquors, and that they habitually attended places of amusement. Plaintiff complains of defendant's failure to establish a permanent home, although for about a 4-year period during the time that they lived together they occupied a house that they had rented. At other times they lived with relatives of the plaintiff, but it does not appear that such situation contributed materially to plaintiff's dissatisfaction. The conclusion is fully justified that the failure to establish a permanent home was not entirely defendant's fault. Neither may it be said that he was solely responsible for the quarrels in which the parties indulged from time to time. Plaintiff admitted in her testimony that, after the separation of the parties, she had associated to some extent with a man other than the defendant. Other testimony indicates that plaintiff visited a certain man who was at the time an inmate of the Oakland county jail. It appears that defendant's jealousy and the accusations of which she complained in her bill of complaint were not entirely without foundation.

On the trial of the case the claims of the parties were contradictory in many material respects. The determination of issues of fact involved in the controversy depended largely on the credibility of the witnesses, particularly the parties to the case. The

trial judge, after listening to the proofs and noting the demeanor of the witnesses in court, came to the conclusion that the plaintiff had not met the burden resting on her, and that in consequence she was not entitled to relief. Our examination of the record does not convince us that we would have reached a different conclusion had we been in the position of the trial judge. In consequence, his determination should not be set aside. *Chubb* v. *Chubb,* 297 Mich 501; *Wells* v. *Wells,* 330 Mich 448. Plaintiff's testimony, corroborated in some respects by her witnesses, might perhaps be deemed sufficient to establish a prima facie case in her favor, but on the entire record it must be said that she has failed to sustain by the requisite degree of proof the grounds for divorce alleged in her bill of complaint, or any of such grounds. *Bolthuis* v. *Bolthuis,* 233 Mich 584.

The decree of the trial court is affirmed, but without costs.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## *In re* KADER.

1. PARDON—PAROLE OF CRIMINAL SEXUAL PSYCHOPATHIC PERSON—CONDITIONS—STATUTES.

   Release by parole of person who had been committed as a criminal sexual psychopathic person must have been upon conditions attached thereto, at least by implication, where there was no hearing in court to determine whether or not he had recovered from such psychopathy, since an unconditional parole would amount to a complete discharge and would be contrary to statute; the word "parole" itself implying a conditional release (CL 1948, § 780.501 *et seq.*).

2. SAME—PAROLE OF CRIMINAL SEXUAL PSYCHOPATHIC PERSON—CONDITIONS.

   Conditions of the parole of one who has been committed as a criminal sexual psychopathic person should bear some relation to the main object of the statute under which he was committed, that is, to prevent sexual deviates from preying upon society (CL 1948, § 780.501 *et seq.*).

3. SAME—CRIMINAL SEXUAL PSYCHOPATHIC PERSONS—VIOLATION OF PAROLE.

   A person who exhibits abnormal sexual behavior while on parole from commitment as a criminal sexual psychopathic person breaches an implied condition of his parole (CL 1948, § 780.501 *et seq.*).

4. SAME—CRIMINAL SEXUAL PSYCHOPATHIC PERSONS—PAROLE—ABNORMAL SEXUAL BEHAVIOR.

   What constitutes abnormal sexual behavior of a parolee from commitment as a criminal sexual psychopathic person is primarily a matter for medical determination (CL 1948, § 780.501 *et seq.*).

5. SAME—CRIMINAL SEXUAL PSYCHOPATHIC PERSONS—VIOLATION OF PAROLE—EVIDENCE.

   Determination of director of department of mental health that parolee had violated terms of his parole from commitment as a criminal sexual psychopathic person was not an abuse of his discretion, where there is evidence that parolee was

convicted of simple larceny so committed as to disclose the characteristics of a planned sex crime rather than simple larceny (CL 1948, § 780.501 *et seq.*, as amended by PA 1950, No 25).

6. SAME—CRIMINAL SEXUAL PSYCHOPATHIC PERSONS—VIOLATION OF PAROLE—FURTHER TREATMENT.

Parolee from commitment as a criminal sexual psychopathic person, committed in the first instance until he should have fully and permanently recovered from his psychopathy, was properly ordered returned for further treatment, where there is evidence that he committed a crime having the characteristics of a planned sex crime (CL 1948, § 780.501 *et seq.*, as amended by PA 1950, No 25).

Habeas corpus by Dale Kader with accompanying certiorari to Lenawee circuit court to obtain his release from State Prison of Southern Michigan. Submitted June 10, 1952. (Calendar No. 45,304.) Writ denied September 3, 1952.

*James B. Stanley*, for petitioner.

*Frank G. Millard*, Attorney General, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara*, Assistant Attorney General, for the people.

BUSHNELL, J. Petitioner Dale Kader, in his application for writ of habeas corpus, claims that he is illegally imprisoned and restrained in the State prison of southern Michigan. We issued our writ to inquire into the matter and, in response to the ancillary writ of certiorari, we have the records pertaining to Kader's detention. He was arrested in December of 1941, on the charge of indecent liberties with a 6-year-old female child. Qualified psychiatrists made a personal examination, filed written reports and testimony was taken in open court. On May 15, 1942, the circuit judge of Lenawee county adjudged Kader to be a "criminal sex(ual) psychopathic person," in accordance with the provisions

of PA 1939, No 165 (see CL 1948, § 780.501 *et seq.* [Stat Ann 1949 Cum Supp § 28.967(1) *et seq.*]).*

Kader was committed to the State hospital commission (now department of mental health) "to be confined in an appropriate institution under the jurisdiction of either the State hospital commission or the department of corrections until the said Dale Kader shall have fully and permanently recovered from such psychopathy."

On May 18th, by order of the commission, Kader was confined in the Ionia State Hospital. About 2 years later, on order of the commission, he was admitted to parole in the custody of his father, on the verbal condition that he would conduct himself as a good citizen. He was returned to the hospital as a parole violator on November 30, 1944, after having been accused of committing indecent acts upon several small children. In February of 1946, Kader was transferred to the State prison because the hospital was unable to help him readjust his abnormal sexual behavior. In December of 1948 he was returned to the hospital, and he was again released on parole on February 11, 1949, for the reason that he had sufficiently improved. In December of that year he was convicted of using obscene language in a public place, he appealed to the circuit court, where his conviction was affirmed. In May of 1950 he was re-examined at the hospital, but his parole was not revoked.

In March of 1951, the prosecuting attorney of Washtenaw county advised the director of the mental health commission that Kader was convicted and given the maximum sentence of 90 days on a charge of simple larceny. The director's attention was called to the evidence, which disclosed that the offense appeared to have the characteristics of a

* The above statute was amended by PA 1950, No 25 and PA 1952, No 58.

planned sex crime rather than simple larceny. It was recommended that he be returned to institutional custody as a parole violator. On March 17, 1951, Kader was returned to the Ionia State Hospital on a warrant issued by the director of the department of mental health. In May of 1951 he was transferred to the State prison as a criminal sexual psychopathic visitor.

Kader claims that, because his last release was not preceded by a written agreement setting forth the terms of his parole or any definite understanding relating thereto, such release was outright and unconditional. He further claims that the order of the director of the department of mental health was not within the authority of the director and, therefore, void; and, if the order was based upon his conviction for larceny, it was unreasonable.

Section 6 of the criminal sexual psychopathic act (CL 1948, § 780.501 *et seq.*, as amended [Stat Ann 1949 Cum Supp § 28.967(1) *et seq.*]), provides:

"The State hospital commission shall have the right to release such person upon parole to such persons and under such conditions as his condition, in the judgment of the State hospital commission merits."

At the time of Kader's parole, section 7 of the act read:

"Such criminal sexual psychopathic person shall be discharged only after he shall have fully recovered from such psychopathy."

This section further provided that if it is claimed that a person has recovered, a petition may be filed in the court which committed him, and such court shall proceed to determine whether or not he has recovered from such psychopathy.

Kader's parole must have had some conditions attached to it, at least by implication. An uncon-

ditional parole would amount to complete discharge, which would be contrary to the statute; and, the word "parole" itself implies a conditional release. *In re Eddinger,* 236 Mich 668, 670. *People* v. *Pippin,* 316 Mich 191, cited by petitioner in support of his argument, is inapplicable to the parole of a criminal sexual psychopathic person.

We agree with petitioner's statement, "that conditions of parole under this particular public act should bear some relation to the main object of the act which is to prevent sexual deviates preying upon society." If a person exhibits abnormal sexual behavior while on parole, he has breached an implied condition of his parole. What constitutes such behavior is primarily a matter for medical determination.

If Kader had been merely convicted of simple larceny, this fact of itself might be an insufficient basis for rehospitalization. However, where the circumstances of the theft for which he was convicted, plus his previous conviction for indecency indicate abnormal sexual behavior and a medical decision follows, we cannot say that the director's determination was an abuse of his discretion.

Kader was committed in the first instance until he should have fully and permanently recovered from his psychopathy, and when the director decided that he should be returned for further treatment, he acted within his authority to confine Kader until he had recovered.

The petition for habeas corpus is denied, and the writ is dismissed.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## HENSINGER *v.* HENSINGER.

1. HUSBAND AND WIFE—SEPARATE MAINTENANCE—MODIFICATION OF DECREE.

   The circuit court has jurisdiction to modify a decree as to support allowed wife and child in suit for separate maintenance but there must be a change in the condition of the parties since the decree to justify the modification (CL 1948, § 552.28).

2. SAME—SEPARATE MAINTENANCE—MODIFICATION OF DECREE—REMARRIAGE OF HUSBAND—WIFE'S EARNING CAPACITY.

   Husband will not be relieved, even in part, of his obligation to support wife, as contained in decree for separate maintenance, where his salary is substantially the same now as when decree was entered, notwithstanding he has subsequently remarried after obtaining a decree of divorce in Nevada and incurred new family obligations and plaintiff wife is making an effort to earn some money.

3. APPEAL AND ERROR—NEVADA DIVORCE DECREE—SEPARATE MAINTENANCE—QUESTIONS REVIEWABLE.

   Effect of Nevada decree of divorce, granted to defendant husband after decree of separate maintenance had been granted to wife in this State is not considered, where no question has been raised with respect thereto.

Appeal from Jackson; Simpson (John), J. Submitted June 4, 1952. (Docket No. 20, Calendar No. 45,424.) Decided September 3, 1952. Rehearing denied October 15, 1952.

Separate maintenance proceedings between Mary Hensinger and Kenneth Hensinger. On petition of

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur, Divorce and Separation §§ 643, 703.

defendant for modification of decree relating to alimony. Petition denied. Defendant appeals. Affirmed.

*Kelly & Kelly,* for plaintiff.

*Haskell L. Nichols,* for defendant.

BUSHNELL, J. On January 5, 1948, we reversed a decree of the circuit court of Jackson county, and granted plaintiff Mary Hensinger a decree of separate maintenance. Defendant Kenneth Hensinger was ordered to pay $80 per month for the support of his wife and their minor child. See *Hensinger* v. *Hensinger,* 319 Mich 645. About a year later, Hensinger went to Nevada, secured a decree of divorce, and married another person the following February. Under the Nevada decree he was ordered to pay $40 per month for the support of his minor child. He now has another child by reason of his remarriage, and his present wife has 2 children by a former marriage.

On August 2, 1949, he filed a petition in the circuit court of Jackson county to modify the decree, which was entered here. This petition was denied and he has appealed. He claims in an amended petition that he has been suffering from low blood pressure and sugar diabetes, and has been unemployed for several periods. He is now earning about $70 per week. Since filing his petition he has only been paying the alimony ordered in the Nevada decree. He claims that Mary Hensinger, plaintiff herein, is employed, and she admits that she earns about $170 per month as a nurse.

The circuit court of Jackson county has jurisdiction to modify the decree. CL 1948, § 552.28 (Stat Ann § 25.106). However, there must be a change in the condition of the parties since the decree to jus-

tify the modification of the provision for alimony. *Foltz* v. *Foltz,* 281 Mich 179, and *Rowe* v. *Rowe,* 291 Mich 451.

Hensinger's income is approximately the same as it was when the decree was entered here, and his remarriage and new family obligations are not such a change in circumstances as to warrant a modification of the decree. *Christensen* v. *Christensen,* 295 Mich 203; and *Renn* v. *Renn,* 318 Mich 230, 235. Nor does his wife's effort to earn money relieve him from his obligation. *Christensen* v. *Christensen, supra,* and *Harter* v. *Harter,* 307 Mich 258.

No question has been raised as to the effect of the Nevada decree of divorce upon the decree of separate maintenance entered here. The order of the trial court denying Hensinger's petition for modification of the decree is affirmed. Costs to appellee.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

POSTMA *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 406.

1. LABOR—INJUNCTION—PICKETING—LABOR DISPUTE—LABOR OBJECTIVE.

   The propriety of a decree enjoining defendant union from picketing plaintiff's place of business must be tested by a determination of whether there was a lawful labor dispute and whether the union sought to achieve a lawful labor objective (CL 1948, § 423.17, as amended by PA 1949, No 230).

2. SAME—PICKETING—ECONOMIC INTERESTS OF OTHER EMPLOYEES IN SAME INDUSTRY.

   It is not necessary that a dispute exist between an employer and his employees in order to permit peaceful picketing, because if the economic interests of other employees engaged in the same industry are affected, they may through their representatives publicize their grievances by peaceful picketing.

3. SAME—MOTIVE FOR PICKETING—QUESTION OF FACT.

   The motive for picketing by a union is always a question of fact.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–7] 31 Am Jur, Labor §§ 223 *et seq.*, 335 *et seq.*

[1–7] Legality of, and injuction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions. 11 ALR2d 1338.

Practical termination, or inability to attain object of labor dispute, as affecting right to enjoin picketing. 122 ALR 1292.

Injunction against peaceable picketing by labor union, plant whose employees are represented by another union as statutory bargaining agent. 166 ALR 185.

Employer's right to injunction against picketing by labor union to enforce a demand compliance with which would constitute an unfair labor practice. 162 ALR 1438.

4. SAME—MOTIVE FOR PICKETING—EVIDENCE.

Evidence that was stricken in suit to enjoin picketing of plaintiff's place of business is considered on appeal, where it appears in the record and relates to purpose and motives for establishing picket line.

5. SAME—MOTIVE FOR PICKETING—EVIDENCE—FORCING PLAINTIFF'S EMPLOYEES TO JOIN UNION.

Publicizing of unfair wages and working conditions at plaintiff's place of business by defendant union *held*, not established as the primary purpose of picket line, where the unfair wages and working conditions were not established to any degree of certainty and the union's officer stated, in effect, that the purpose of the picketing was to force plaintiff's employees to join the union (CL 1948, § 423.17, as amended by PA 1949, No 230).

6. SAME—LABOR OBJECTIVE—FORCING EMPLOYEES TO JOIN UNION.

An attempt to force employees to become unionized either directly or indirectly through their employer is not a lawful labor objective (CL 1948, § 423.17, as amended by PA 1949, No 230).

7. INJUNCTION—PICKETING—CONSTITUTIONAL LAW—FORCING PLAINTIFF'S EMPLOYEES TO JOIN DEFENDANT UNION.

A permanent injunction against picketing place of business where plaintiff conducted sand and gravel business did not violate any of the constitutional rights of defendant union or its members, where there was no dispute between plaintiff and his employees, union does not represent his employees although it does represent employees of other companies in the same business in the area and purpose of picketing was to force plaintiff's employees to join defendant union (CL 1948, § 423.17, as amended by PA 1949, No 230).

Appeal from Kent; Brown (William B.), J. Submitted June 5, 1952. (Docket No. 29, Calendar No. 45,423.) Decided September 3, 1952. Application for certiorari filed in the Supreme Court of the United States November 13, 1952.

Bill by Harold F. Postma, doing business as Harold F. Postma Gravel Company, and another against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 406 and others to restrain picketing.

Clarence De Boer and others intervened as parties plaintiff. Decree for plaintiffs. Defendants appeal. Affirmed.

*Linsey, Shivel, Phelps & Vander Wal,* for plaintiffs.

*Schmidt, Smith & Howlett,* for intervening plaintiffs.

*David Previant, A. Robert Kleiner* and *George Fitzgerald,* for defendants.

BUSHNELL, J. Plaintiff Harold F. Postma, who is in the sand and gravel business in the Grand Rapids area, filed a bill of complaint in which he sought a permanent injunction restraining defendants from picketing his place of business. The intervening plaintiffs are the employees of Postma.

Defendant Union, Local No. 406, is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor. The individual defendants are Mackey, an officer, and Dertien and Switzer, members of the local. The Union does not represent any of the Postma employees, although it has attempted to persuade them to become its members. It does, however, represent employees of other sand and gravel companies in the area.

In February of 1950, the Union had difficulty in negotiating new agreements with the Grand Rapids Gravel Company and other competitors of Postma. According to testimony, which was returned on a separate record, the negotiating companies stated that their reason for failing to reach an agreement with the Union was that they were unable to increase or even continue their prevailing wages because Postma was paying lower wages. The Union

offered in corroboration of this statement a pay stub of 1 of Postma's employees showing wages of 82 cents per hour covering a period of 1 week in 1949, but without any indication of the nature of the employee's work. Intervening plaintiffs testified that they were paid wages by Postma ranging from $1.45 to $1.65 per hour, and 1 of them testified that he was never paid less than $1 per hour even when he was first employed. The Union stated in its answer that the general wage rate in the area for similar work was $1.31 per hour.

During negotiations with the Union the manager of the Grand Rapids Gravel Company called a meeting of all gravel producers in the area, which Postma attended. Kleiner, an attorney for the Union, was also present. Postma testified that Kleiner urged all the gravel companies to sign a blanket contract designating the Union as the bargaining agent for all employees. Postma admitted on cross-examination that Kleiner did not offer a contract to be signed at that time, and that the testimony regarding the contract was based upon a discussion which took place at the meeting after Kleiner had left the room.

During the progress of the negotiations the employees of certain competing gravel producers requested their Union officers to picket the Postma Company. Defendant Mackey, the secretary-treasurer of defendant Union, testified that the purpose of such a picket line was:

"To let the general public know that we had a dispute; Postma Gravel Company was unfair, paying a lesser wage in the gravel industry, hoping that we would encourage people that were favorable of the Union operators to place their orders to a fair operator that was paying the higher standards of wages and working conditions that exist in this area."

This testimony was stricken as immaterial. However, it was printed in full in the record, together with a lengthy colloquy between court and counsel.

A picket line was established on August 3, 1950, and continued until August 8th, when Postma obtained a temporary restraining order. This picket line consisted of 2 men who walked either abreast or single file on the shoulder of the highway in front of the Postma property. They carried placards reading: "This company unfair to organized labor." Mackey testified that the word "company" was intended to include the employees of Postma as well as the company, and not to mean that Postma was unfair to his own employees. The Union offered to change the wording of the sign if it was deemed inaccurate.

The trucks of Postma use the shoulder of the highway in going from one part of Postma's premises to another. It was claimed that the pickets hindered the ingress and egress of the trucks and required them to slow down. After the first day the pickets sat in automobiles on which were displayed like signs, near the entrance to the Postma yard.

Postma uses bulk cement delivered to him by truck and which is purchased from various companies located in other parts of the State. The cement truck drivers are not Postma's employees; most of them are Union members and will not cross a picket line. When the Postma picket line was established, Local No. 406 notified other teamsters locals with whom the cement haulers had agreements, so they might avoid the expense of returning undelivered bulk cement. Cement is delivered to Postma by 5 separate trucking concerns. Postma testified that failure to receive bulk cement would paralyze his business. In September several gravel producers in the Grand Rapids area agreed to a

wage increase, provided Postma and other competitors would pay the same rate.

Prior to the entry of a decree in which the defendants were permanently enjoined from picketing, the court said:

"Considering all the testimony in the case, the court is of the opinion that no labor dispute existed at the Postma plant; that there was no legitimate labor dispute objective in the establishing of the picket line at plaintiff's place of business; that the defendants were seeking to accomplish an improper and illegal labor objective in picketing plaintiff company's premises, and in cutting off its supply of cement. Plaintiffs are, therefore, entitled to the relief prayed in their bills of complaint."

Defendants on appeal argue that the decree is a violation of their rights under the Thirteenth and Fourteenth Amendments of the Constitution of the United States; that it imposes involuntary servitude upon them, deprives them of freedom of speech and of property without due process of law. The propriety of this decree must be tested by a determination of whether there was a lawful labor dispute and whether the Union sought to achieve a lawful labor objective.

It is conceded that no dispute exists between Postma and his employees, but, rather, the dispute is between the Union and Postma and the Union and Postma's employees.

It is not necessary that a dispute exist between an employer and his employees in order to permit peaceful picketing, because if the economic interests of other employees engaged in the same industry are affected, they may through their representatives publicize their grievances by peaceful picketing. *Silkworth* v. *Local No. 575 of the American Federation of Labor,* 309 Mich 746, 755; *Standard Grocer*

*Co.* v. *Local No. 406 of the American Federation of Labor,* 321 Mich 276, 285; and authorities cited therein.

What was the objective of the defendants? The motive for picketing is always a question of fact, and here an exceedingly close one. We have, therefore, considered that excluded evidence returned in the separate record, which we deem relevant in order to determine the purpose and motives of the defendant Union and its officers. The Union claims:

"The picket line was to be placed to show the general public and like that through our method of advertising to the general public that there was an unfair condition, an unfair condition with Postma Gravel Company because they were paying beneath the rates at that time; * * * they [the employees of Postma company] were holding us back."

This claim is supported by the testimony of defendant Mackey and the pay stub of one of Postma's employees, as well as the contracts finally negotiated between the Union and Postma's competitors.

"This objective, *viz.*, the bettering of the working conditions and wages of nonunion members in the industry, so as to remove the barrier to increased benefits to union members, we must deem to be a lawful labor objective, if not otherwise prohibited by law." *Standard Grocer Co.* v. *Local No. 406 of the American Federation of Labor, supra,* 289.

Postma contends, however, that defendants' claim is a mere sham and that they were attempting to force his employees to join the Union and force him to enter into a contract giving it sole bargaining rights.

There is little in the testimony to indicate that a publicizing of unfair wages and working conditions at Postma company was the primary purpose of defendants' picketing. The existence of such "un-

fair wages and working conditions" was not established to any degree of certainty. The only evidence regarding wages was Mackey's testimony and the pay-roll stub of 1 employee. The only testimony regarding working conditions was that Postma's employees had no guarantees as to the terms of their employment.

Even if such facts were proved, Mackey's answers to the following questions indicate a different objective. He was asked:

"Mr. Mackey, even if all of the employees at the Postma Sand and Gravel Company were getting at least or more than the uniform wage scale you have negotiated with the other 2 gravel companies, but if they still were not members of your Union would you consider your Union to be in dispute with those employees?"

He replied: "Yes, sir."

Mackey was asked on cross-examination:

"It is your contention that the only way that this dispute can ever be removed between your Union and Postma employees is for them to join your Union, is that right?"

He replied:

"I believe that they should join our Union; that they have been getting the benefits that we have negotiated, so why shouldn't they join our Union."

According to Mackey, it would make no difference whether Postma paid as much or more than the uniform wage scale, because he stated that the only way to settle the dispute would be for Postma's employees to join the Union. Defendants' objective, therefore, was to force Postma's employees to become members of the Union.

In *Harper* v. *Brennan,* 311 Mich 489, and *Standard Grocer Co.* v. *Local No. 406 of the American Fed-*

*eration of Labor, supra,* the Court held (the writer of this opinion dissenting) that, under the provisions of the statute (CL 1948, § 423.17, as amended by PA 1949, No 230 [Stat Ann 1950 Rev § 17.454 (18)]) an attempt to force employees to become unionized either directly or indirectly through their employer is not a lawful labor objective. Under the authorities cited, we are obliged to hold that the permanent injunction entered by the circuit court does not violate any of the constitutional rights of the defendants.

The decree is affirmed, with costs to appellees.

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

BOYLES, J., concurred in the result.

The late Chief Justice NORTH did not sit.

---

## EDWARDS *v.* MEINBERG.

1. JUDGMENT—COLLATERAL ATTACK—ABUSE OF PROCESS.
   An action for damages for abuse of process, based on fact that defendant herein had commenced an action against plaintiff in a municipal court in a city other than one in which both parties were resident, constitutes a collateral attack upon the judgment in the original action.

2. SAME—COLLATERAL ATTACK—JURISDICTION OF SUBJECT MATTER.
   A collateral attack upon a judgment is permissible only if the court in which the judgment was rendered never acquired jurisdiction over the persons or the subject matter.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 6–9] 31 Am Jur, Judgments §§ 576, 583, 597.
[3, 4, 9] 3 Am Jur, Appearances § 31.
[5] 14 Am Jur, Courts § 184.

3. SAME—JURISDICTION—PERSONAL SERVICE—GENERAL APPEARANCE.
A municipal court had jurisdiction to render judgment against defendant in action of assumpsit, where defendant, a nonresident, was personally served and entered a general appearance.

4. APPEARANCE — GENERAL APPEARANCE — WAIVER — JURISDICTIONAL DEFECTS.
A party, by a general appearance, may waive "jurisdictional" defects arising out of a failure to observe residential requirements (CL 1948, § 666.10, as amended by PA 1949, No 44).

5. COURTS—JURISDICTION—SUBJECT MATTER—AGREEMENT OF PARTIES.
Jurisdiction as to subject matter may not be conferred upon a court by agreement of the parties.

6. JUDGMENT—DEFECT IN VENUE—COLLATERAL ATTACK.
A defect in venue requirements, even where not waived by a general appearance, is not such a defect as may be attacked collaterally.

7. SAME—TRUE JURISDICTIONAL DEFECT—COLLATERAL ATTACK.
The judgment of a court which has acted without authority by reason of a true jurisdictional defect is a nullity and is always subject to collateral attack.

8. SAME—MISTAKE IN JURISDICTION—DIRECT ATTACK.
A mistake in the exercise of jurisdiction by a court is not void altogether but may be subject to direct attack on appeal, where question as to jurisdiction is seasonably raised.

9. SAME—COLLATERAL ATTACK—JURISDICTION OF THE SUBJECT MATTER AND PERSON OF DEFENDANT.
The judgment by a municipal court in an action of assumpsit may not be the subject of collateral attack, where it had jurisdiction of the subject matter and of the person of the defendant, a nonresident, by reason of personal service followed by general appearance.

Appeal from Wayne; Culehan (Miles N.), J. Submitted June 5, 1952. (Docket No. 38, Calendar No. 45,442.) Decided September 3, 1952.

Action by James J. Edwards against Walter W. Meinberg and City Finance Company, a Delaware corporation, for damages resulting from abuse of

process. Motion to dismiss granted. Plaintiff appeals. Affirmed.

*Dee Edwards,* for plaintiff.

*Walter W. Meinberg* (*Colin J. McRae,* of Counsel), for defendants.

BUSHNELL, J. Defendant City Finance Company, a Delaware corporation, which has a "small-loan" office in the city of Detroit, brought an action in assumpsit in the municipal court for the city of Highland Park against James J. Edwards, who resides in the city of Detroit. Edwards, who was personally served with process, appeared, answered the finance company's declaration, and demanded a jury trial. Edwards testified in his own behalf. After the trial judge directed a verdict in favor of the finance company, Edwards moved to dismiss on the ground that the court lacked jurisdiction, which motion was denied, as was another one to set aside the judgment. No appeal was taken to the circuit court.

When the finance company obtained a writ of garnishment against Edwards' wages to satisfy its judgment, he brought action in the circuit court to recover damages on the ground of abuse of process. The finance company appeared specially and, upon its motion, this circuit court cause was dismissed.

Edwards relies upon a statute designated in its "catch-line" as "Venue of actions; exception as to certain cities and counties." CL 1948, § 666.10, as amended by PA 1949, No 44 (Stat Ann 1951 Cum Supp § 27.3188), which reads in part as follows:

"Sec. 10. Every action commenced in such court shall be brought before some justice of the peace of the city or township where:

"1. The plaintiffs or any of them reside; or

"2. Where the defendants or any of them reside; or

"3. Before some justice of another township or city, in the same county, next adjoining the residence of the plaintiff or defendant or 1 of the plaintiffs or defendants: Provided, however, That justices of the peace in cities having a population of 10,000 or more shall have exclusive jurisdiction, concurrent jurisdiction of courts of record excepted, in causes or proceedings where all the parties to the same reside in said city at the time of the commencement of the proceedings or cause, and in case where the original cause of action existed in favor of a plaintiff and against a defendant, both residents of said city, and has been assigned to a nonresident of said city; or."

Edwards argues that the finance company at the time it commenced its action in the Highland Park municipal court knew that that court was without jurisdiction; that they concealed the residence of the City Finance Company from that court; that the summons would not have been issued had they made a full disclosure. He also claims that the judgment creditor was fully aware at the time it obtained the writ of garnishment that the judgment obtained in Highland Park was wholly invalid and void.

The argument thus presented amounts to a collateral attack upon the judgment in the original suit. *In re Ives,* 314 Mich 690. Such attack is permissible only if the court never acquired jurisdiction over the persons or the subject matter. *Adams* v. *Adams,* 304 Mich 290, 293, and *Life Insurance Company of Detroit* v. *Burton,* 306 Mich 81.

The municipal court had jurisdiction over both the parties and the subject matter, because Edwards was personally served and entered a general appearance; and the court had jurisdiction over an action in assumpsit on the promissory note. Edwards

argues, however, that the statute hereinbefore quoted imposes another jurisdictional requirement. The parties, by a general appearance, may waive any "jurisdictional" defects arising out of a failure to observe residential requirements. *Thompson* v. *Michigan Mutual Benefit Association,* 52 Mich 522; *Noble* v. *Grandin,* 125 Mich 383, 387–389; *Johnson* v. *Burke,* 167 Mich 349, 355; *Westgate* v. *Dunn,* 291 Mich 286.

A failure to meet the requirements of a "venue" statute does not constitute a true jurisdictional defect. Venue requirements may be waived, but the parties by agreement cannot confer jurisdiction as to subject matter upon the court. *Thompson* v. *Michigan Mutual Benefit Association, supra; Kirkwood* v. *Hoxie,* 95 Mich 62 (35 Am St Rep 549); and *Sloss* v. *Young,* 275 Mich 492. A defect in venue requirements, even where not waived by a general appearance, is not such a defect as may be attacked collaterally. *Miller* v. *Smith,* 115 Mich 427 (69 Am St Rep 583). If there is a true jurisdictional defect, the court has acted without authority, its judgment is a nullity and is always subject to collateral attack.

"There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal." *Jackson City Bank & Trust Co.* v. *Fredrick,* 271 Mich 538, 544.

The statute upon which plaintiff relies is not a true jurisdictional statute, but is one pertaining to venue. Its requirements may be waived by failure to seasonably raise the question in the original proceedings.

Since the Highland Park municipal court had jurisdiction to render a judgment in the assumpsit

action, plaintiff may not question that judgment in this collateral suit.

The order of dismissal is affirmed, with costs to appellees.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## ASSOCIATES DISCOUNT CORPORATION *v.* GEAR.

1. TRIAL—MOTION FOR DIRECTED VERDICT—BASIS OF DECISION.
   A party claiming to be entitled to judgment as a matter of law should, at the time of making such request, state the grounds upon which he relies, the decision of the trial court being limited to grounds fairly covered by such motion.

2. BILLS AND NOTES—HOLDER IN DUE COURSE—MOTION FOR DIRECTED VERDICT.
   Defendant in action on promissory note *held,* to have failed to indicate that his motion for directed verdict was based on claim that plaintiff was not a holder in due course.

3. APPEAL AND ERROR—SUPPLEMENTAL RECORD.
   A record on appeal in the Supreme Court may not be supplemented by an *ex parte* proceeding.

4. SAME—OMISSIONS IN RECORD—EX PARTE AFFIDAVITS.
   Omissions in a record on appeal in the Supreme Court may not be supplied by *ex parte* affidavits.

5. SAME—RECORD—EX PARTE AFFIDAVITS.
   Cases on appeal in the Supreme Court must be disposed of on the record as made and not upon *ex parte* affidavits.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 41 Am Jur, Pleading § 335 *et seq.*

6. SAME—SUPREME COURT—RECORD.

The Supreme Court does not consider matters dehors the record on appeal.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted June 10, 1952. (Docket No. 62, Calendar No. 45,421.) Decided September 3, 1952.

Action by Associates Discount Corporation against Harold W. Gear on a promissory note. Verdict for plaintiff. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Reversed and remanded for entry of judgment on verdict.

*James B. Stanley,* for plaintiff.

*Jackson, Fitzgerald & Dalm,* for defendant.

BUSHNELL, J. This is an action on a promissory note. Plaintiff Associates Discount Corporation, a foreign corporation, maintains a branch office at Kalamazoo, through which it loans money, secured by chattel mortgages and conditional sales contracts. One of its accounts was with Wallace R. Ewing, a used-car dealer in Kalamazoo, operating under the name of Kalamazoo Auto Mart. Edward J. Schludecker, the manager of Associates in Kalamazoo, testified:

"Our company has been dealing with Mr. Ewing long before June of 1948 which was when I came here. I have been servicing Mr. Ewing's accounts personally. * * * I would go to his place daily, sometimes twice a day. I would handle the financing of the paper in his office on his lot. There might have been an occasion when he brought a deal in but that was very rare. In servicing a dealer we furnish a complete line of financing and furnish them with forms for their business such as defendant's."

According to Schludecker, Associates had hundreds of transactions with Ewing, part of which was "floor-planning automobiles." He said:

"Floor-planning means loaning money to the dealer to finance his purchase of that automobile so that he may place that car on his floor or sale lot, for sale, and when he sells the car then the floor-plan is paid off and at that time we take a retail paper from the purchaser. When we floor-plan an automobile we take a chattel mortgage and a bill of sale from the dealer which is represented in this case by exhibit B. During the time that we have the car floor-planned, the evidence of title or ownership is in our office and it is our practice to keep that evidence of ownership until the car or the floor-plan is paid off. In this case we had a bill of sale in our office."

On May 4, 1949, Associates floor-planned a 1949 convertible Cadillac coupe for Ewing, taking a chattel mortgage for $2,800 and a bill of sale. Nothing was said at the time about the title or a title certificate. Schludecker said the Cadillac looked like a new car, and that Ewing said it was a new car. The name of the Werner Motor Company of Goshen, Indiana, was on the bill of sale. Schludecker thought that, since the car had never been sold at retail, no title had yet been issued. Ewing testified that he told Schludecker that the title was in Indianapolis being processed and that he would have it in a few days.

On May 6th defendant Harold W. Gear purchased a 1949 convertible Cadillac coupe from Ewing. In order to be sure about the interest rate, Ewing called Schludecker and asked him if he would handle a note bearing 4% interest, which was lower than the usual rate. Schludecker agreed, but stated on the witness stand that he did not know at that time what particular car Ewing was selling. Gear had signed a note and chattel mortgage in blank and left them in Ewing's hands. When Schludecker went to Ewing's

office that same day to discuss the details of the transaction, he (Schludecker) filled in these blank forms, taking the necessary information from the sales tax slip made out by Ewing. In the sales agreement the car was described as a 1949 new convertible Cadillac coupe. Schludecker gave Ewing Associates' check for $3,100, and Ewing gave Schludecker a check for $2,800, which Schludecker said "was to pay off the floor-plan." Ewing then had about 18 cars on the floor-plan with Associates, but only 1 Cadillac. On cross-examination, Schludecker admitted that when he got back to his office he knew that the Cadillac car floor-planned on May 4th was the one sold to Gear on May 6th.

The record is not too clear, but it seems undisputed that the Cadillac was taken from Gear by someone, because it was admitted by Associates that, as between Gear and Ewing, there was a total failure of consideration. After the close of the proofs, Associates' counsel stated in the presence of the jury that "the car involved in this case was a used car in the sense that there had been issued to the car or for the car a certificate of title which was in existence on and prior to May 4, 1949. * * * As a matter of fact that it was not a new car which had not yet acquired a certificate of title." However, counsel claimed that at the time of the transaction, Schludecker was not aware that it was a used car.

Motions for directed verdicts were denied and the case was submitted to the jury under the Empson act. PA 1915, No 217 (CL 1948, § 691.691 *et seq.* [Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*]). The jury's verdict in the sum of $3,348 in favor of plaintiff was set aside and a judgment in favor of Gear was entered notwithstanding the verdict. In a memorandum opinion the trial judge said in part:

"Plaintiff, through its agent, Schludecker, is charged with knowledge of the fact that Ewing was a used-car dealer and did not have a new-car dealer's license. These facts were known to witness, Schludecker, * * * when he purchased the note in question, he understood that the note covered the sale of a new car, and not a used car. * * *

"Under the law Ewing had no right as a used-car dealer to sell new cars, and the plaintiff is not a holder in due course."

Plaintiff argues on appeal that the circuit court may not consider or grant a motion for a directed verdict (or enter a judgment notwithstanding the verdict) where no grounds are stated in the motion.

The state of the record is this: At the close of plaintiff's proofs, counsel for defendant Gear said:

"At this time I would like to move the court for a directed verdict on the ground that the plaintiff has failed to make out a case, and the court should direct a verdict of no cause of action.

"*The Court:* I will reserve decision on the motion."

At the close of all the testimony plaintiff's counsel suggested that he had a motion to make, which he would like to discuss with the court not in the presence of the jury. After the jury had retired, counsel stated that the undisputed testimony indicated that plaintiff was a holder in due course, there was no question of fact in dispute, and, therefore, Associates was entitled to recover the full amount of the note. This motion was with the reservation that, in the event of its denial, Associates could still go to the jury.

Defendant's counsel then stated: "I would like to make a motion for a directed verdict, but I would like to have a ruling on the other first." After some colloquy, defendant's counsel stated: "At the time we were talking only about certificate of title under the

law, if I remember right. We were being confined to that."

Defendant claims that, as indicated in the court's memorandum opinion on his motion for a directed verdict, his motion was "based upon specific grounds known to the court and plaintiff before the case was submitted to the jury."

In *Turner* v. *Mutual Benefit Health & Accident Ass'n,* 316 Mich 6, 27, we stated:

"The party claiming to be entitled to judgment as a matter of law should, at the time of making the request, state the grounds upon which he relies."

We held that it is equally clear that the decision of the trial court on the motion is limited to those grounds "fairly covered by the motion for a directed verdict as presented prior to the submission of the case to the jury." In discussing the reason for the rule, we quoted with approval the following from *Smalley* v. *Railway Co.,* 34 Utah 423, 442 (98 P 311, 316):

" 'We think the reasons given by courts, requiring the grounds upon which a motion for nonsuit is based to be specified, in order that the court may know upon what question of law the case is asked to be taken from the jury, and the party against whom the motion is directed may be afforded opportunity to correct the defects, if they admit of correction, and can be obviated by additional evidence, apply with equal force to a motion for a direction of a verdict. If such opportunity should be afforded him on a motion of nonsuit, which, if granted, not being an adjudication on the merits, and not a bar to another action, for much stronger reasons should such opportunity be given him on a motion for a direction of a verdict, which, if granted, would be a bar to another action.' "

To this statement we now add the following from *Falvey* v. *Coats* (CCA), 47 F2d 856 (89 ALR 1):

"A motion for a directed verdict should specifically state the grounds upon which it is urged. * * * It was due to the lower court that its attention be specifically called to the grounds upon which the motion was based; it was due to opposing counsel so that they might have an opportunity, either intelligently to oppose the motion, or ask to reopen the case for the introduction of further testimony, or for leave to amend the pleadings, or to move for a nonsuit; it was due the appellate court so as to enable that court to see whether or not the grounds urged were the same as those presented to the trial court. Where a motion for a directed verdict, failing to state the grounds upon which it is based, is denied, it is unfair to the trial court and to the appellate court; but, where it is granted, it is unfair to the party against whom it is granted."

Defendant argues in his brief that the ground for his motion was that Associates was not a holder in due course, and that "the stated ground that plaintiff had not made out a case was broad enough to include all reasons why plaintiff could not be a holder in due course." He further argues that the conclusion reached by the trial judge was based upon the theory advanced by Associates that Schludecker thought a new car was involved. Neither argument serves the purpose of warning plaintiff of the defects of its case.

It is difficult on the record before us to conclude that defendant fairly indicated to plaintiff's counsel and the court the theory upon which he relied.

Defendant, by a motion subsequently filed here, has sought to supplement the record by adding thereto the statement of the trial judge which contains his understanding of the specific reasons given by defendant and on which his motion for a directed verdict was made. This statement indicates that the

argument was advanced, in the absence of the jury, that Associates could not be a holder in due course because its representative, Schlüdecker, knew that the car Ewing sold to Gear was a new one and that a licensed used-car dealer is not permitted to sell a new car. See CL 1948, § 256.114 (Stat Ann 1947 Cum Supp § 9.1482), and *Salway* v. *Secretary of State,* 321 Mich 211. It may be assumed that, if this statement of the trial judge is to be considered a part of the record, it then follows that plaintiff was aware of the specific grounds upon which defendant's motion for a directed verdict was based.

The more important question, however, is whether on appeal this *ex parte* certified statement of the trial judge should be considered a part of the record. We are concerned both with the question of practice and procedure, and the difficulty in this harsh case of permitting practice which would establish a bad precedent. Court Rule No 66 (1945) describes in detail the procedure necessary to settle a record. It provides for hearing on any controversy and an opportunity for objection. While no procedure is prescribed in the rule for supplementing a record, it is clear that it should not be an *ex parte* proceeding. Omissions in a record may not be supplied by *ex parte* affidavits. Cases in this Court must be disposed of on the record as made and not upon *ex parte* affidavits. Furthermore, we do not consider matters dehors the record. *O'Connor* v. *O'Connor,* 281 Mich 640.

The subsequent motion to supplement the record is denied. The record as made does not show that defendant adequately stated the grounds upon which he based his motion to dismiss.

The judgment *non obstante veredicto* is not supported by the settled record. It is vacated and the cause is remanded for the entry of a judgment in

accordance with the verdict of the jury. Costs to appellant.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

*In re* McKENNA'S ESTATE.

McKENNA *v.* McKENNA.

1. SALES—AUCTIONS—TAXICABS.

   Auction sale of 4 taxicabs which had been owned by defendant's decedent, a member of a nonprofit corporation, was not held in 2 parts where purchaser paid a lump sum for the vehicle and its accessories and the right to operate it, a right for which personal representative had to apply to mayor for transfer of city license (Detroit Compiled Ordinances 1945, ch 103, § 4).

2. EXECUTORS AND ADMINISTRATORS—FIDUCIARY'S DUTY TOWARD ESTATE PROPERTY.

   A personal representative of an estate is a fiduciary and owes a duty to the estate not to engage in transactions concerning the property of the deceased for his or her own personal profit as against the interests of the estate.

3. SAME—ACCOUNTING—SALES OF TAXICABS AND RIGHT OF OPERATION.

   The entire proceeds resulting from the sales of 4 taxicabs which had been owned by defendant's decedent, a member of a nonprofit corporation whose membership terminated upon his death, including the amount the purchasers paid to obtain the right to operate the taxicabs under the city license under which they had been operated, and not merely the

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 21 Am Jur, Executors and Administrators § 251.

value of the vehicles and their accessories, under the circumstances, belonged to the estate of the deceased, hence special administratrix must account for entire sum received.

4. Corporations—Nonprofit Corporation—Membership—Taxicabs—Right to Operate.

Entire sum paid by 4 members of nonprofit corporation for purchase of 4 taxicabs which had belonged to deceased member, together with transfer of license to operate them, was not for purchase of membership, where auction sale had been limited to members already owning 3 taxicabs and by-laws barred one person from having more than 1 membership.

Appeal from Wayne; Weideman (Carl M.), J. Submitted April 17, 1952. (Docket No. 33, Calendar No. 45,415.) Decided September 3, 1952. Rehearing denied October 15, 1952.

In the matter of the estate of William P. McKenna, deceased. Edna J. McKenna filed her account as special administratrix. Andrew M. McKenna, executor of the will of Emily McKenna, deceased, objected thereto. Account allowed both in probate court and circuit court on appeal. Andrew M. McKenna, executor, appeals. Reversed and remanded with instructions.

*Moll, Desenberg, Purdy & Glover,* for appellant executor.

*Edward N. Barnard,* for special administratrix.

Boyles, J. The question here for decision is whether $26,597 now held by Edna J. McKenna belongs to her, or to the estate of her deceased husband, William P. McKenna, wherein she is special administratrix.

William P. McKenna died intestate in 1946, leaving as his surviving heirs-at-law Edna J. McKenna,

his widow, and Emily McKenna, his mother. At the time of his death he owned 4 taxicabs, together with licenses to operate them in Detroit. His widow, Edna J. McKenna, as special administratrix of his estate, petitioned the probate court "that an order be entered authorizing her as special administratrix to sell the said taxicabs for the best price obtainable and not less than the market value thereof." The probate court entered an order accordingly.

At the time of his death, William P. McKenna was a member of the Checker Cab Company, a Michigan nonprofit corporation. Under its rules and bylaws, his membership rights were terminated by his death. His 4 taxicabs were licensed to operate as such, in Detroit, under an ordinance of said city, which provided in part as follows:

"No license shall be granted until the person applying for such license shall have secured from the mayor a certificate certifying that public convenience and necessity require the operation of the taxicab or motor vehicle for hire. * * * Licenses issued hereunder shall not be transferable excepting, however, in the case of death of any person owning a vehicle licensed hereunder, the mayor shall upon receipt of satisfactory evidence of such death, at the request of deceased's personal representative, approve transfer and validate by appropriate indorsement thereon such license in the hands of the person in whose name title to such taxicab shall become vested through the deceased's personal representative."

A so-called "bond plate" accompanied each taxicab. The city "license" referred to is the "bond plate." The secretary-treasurer of the Checker Cab Company testified:

"The license they are talking about * * * is the bond plate, we call it a bond plate, I presume a taxi license would be more correct."

Edna J. McKenna, as special administratrix and the personal representative of the deceased owner, proceeded to sell said taxicabs at an auction sale held at the office of the Checker Cab Company in Detroit. She asserts that they could be sold at best advantage and at an increase in price only if sold to members of Checker Cab Company. The secretary-treasurer testified to the circumstances and conditions under which the auction sale was held, as follows:

"I am a member of Checker Cab Company and was secretary-treasurer at the time of the death of William P. McKenna.

"On September 6, 1946, in my capacity as secretary-treasurer of Checker Cab Company, I had something to do with the sale of the 4 taxicabs that he owned at the time of his death.

"After his death, I contacted his widow and asked her if she wanted the directors of the cab company to manage the sale of the cabs, or did she want to shop around and sell them elsewhere. She informed me that since her husband had been a member for 20 or 25 years, she would prefer to have them sold in Checker Cab Company. We arranged for the sale, which took place on October 2, 1946. The eligible buyers were notified of the sale. A man who owned 4 cars could not purchase another car, but only members who only owned 3 cars. At that time no one owned less than 3. The only persons receiving notice of the sale were the so-called 'eligible' members, who owned 3 taxicabs. There was no public notice of the sale given to people outside the Checker Cab Company, by publication or otherwise. There were no outsiders present at the sale, which was held at the Checker Cab building.

"The prices arrived at for the bare motor vehicles were by figures from the so-called blue book, which is the National Automobile Dealers Association book, in which all used-car dealers and new-car dealers determine the value month by month of any kind

of car. The price in Mrs. McKenna's report is $1,034 for the bare vehicle and would be the blue book price. We arrived at the $250 for the special taxicab equipment in consultation with the widow as to what the meter, the partition, the Checker light, the spotlight and any other accessories that might be in the car would be worth. The cars were there at the sale and a prospective purchaser could see them, and at the sale he was told what we thought they were worth. The $50 bond plate fee was the city fee for the issuance of the plate."

The assembled eligible purchasers, company members who were already operating 3 licensed taxicabs, were the only bidders. They were willing to bid more than the mere used-car value of the taxicabs and equipment provided they also obtained the right to operate a taxicab in the city as evidenced by the bond plates issued to William P. McKenna by the city. The bond plates would be the purchasers' licenses to operate taxicabs in the city, and their transfers were controlled by the more important circumstance that under the taxicab ordinance the city would transfer the taxicab licenses of the deceased owner of the taxicabs, upon his death, only by the request of the personal representative of the deceased. It requires no particular foresight to see that Edna J. McKenna, in collaboration with the company, was in a position to decide whether a purchaser of the vehicle from the estate would get with it the privilege of using it as a taxicab in Detroit. It is apparent that what a prospective purchaser was bidding for was not merely a used taxicab and the equipment, including the "bond plate," but was actually bidding for the opportunity to have Edna J. McKenna, as special administratrix of the estate of the deceased owner, apply for the transfer of the city license and the right to operate a taxicab in Detroit.

The appellee claims that the auction sale of each taxicab was divided into 2 parts—1 for the sale of the vehicle, special equipment and "bond plate," and the other to enroll the purchased taxicab in the Checker Cab Company. The record fails to establish the fact. The only bidder who was sworn at the trial, who was 1 of the 4 successful bidders, testified:

"I didn't bid separately for the right to operate the cabs and for the cabs themselves, but I 'just bid.' My bid was $8,000."

Furthermore, a receipt given to this purchaser, to the same purport as those given each of the other 3 successful bidders, was:

"$8,000 Date 10–4–1946
"Received of J. Kern 8,000 dollars. Payment of 1946 Ply & right to oper 4th car Ob."

Each of the successful bids was for a lump sum, covering the vehicle and accessories, and the right to operate a taxicab, namely, an opportunity to obtain a transfer of the license (the "bond plate"), which was obtainable from the mayor of the city only through an application by Edna J. McKenna, the personal representative of the deceased owner, as special administratrix of his estate. Edna J. McKenna, as special administratrix, might have sold the decedent's 4 taxicabs without resort to the Checker Cab Company, and under the ordinance the licenses held by William P. McKenna at his death might have been transferred to any other purchasers of his taxicabs, depending solely on the application of the special administratrix to the mayor asking for such transfer. The record does not indicate that any effort was made by Edna J. McKenna, as special administratrix, to sell the 4 taxicabs to any-

one else, or to learn whether a greater advantage might result to the estate by such sales.

Under these circumstances, the 4 taxicabs of the deceased were sold at auction to 4 eligible members of the Checker Cab Company, for the following amounts respectively: $8,000—$7,875—$6,975 and $8,800, a total of $31,650. Each purchaser gave the money to the Checker Cab Company and each was given a receipt by the company in identical language except as to name of purchaser, make of car and amount of bid, each receipt concluding with "right to oper 4th car."

On the same date as the sale, Edna J. McKenna executed 4 separate letters addressed to the mayor of Detroit, identical except as to names of purchasers and numbers of taxi plate, as follows:

"Honorable Sir:

"This is to certify that I, Edna J. McKenna, am the personal representative of the late William P. McKenna, deceased, formerly a member of Checker Cab Company, and I have been duly appointed special administratrix of his estate. Further that by order of the probate court entered on the 16th day of September 1946, I was authorized and directed to sell the taxicab owned by the said deceased, and I have sold to [name of purchaser] the taxicab for which 1 set of city of Detroit taxi plates for the year 1946, bearing number * * * were issued to the said William P. McKenna, and I hereby respectfully request that the said set of taxicab plates No * * * be transferred to the said [purchaser] in accordance with Detroit Compiled Ordinances, 1945, ch 103, § 4.

"In witness whereof, I have hereunto set my hand and seal this 2d day of October, A.D., 1946.

"EDNA J. MCKENNA,
"Special administratrix."

It is rather significant that each of said 4 applications for such transfers was executed by her,

addressed to the mayor of the city, on October 2, 1946, the same day as the sales.

About 3 weeks later the Checker Cab Company gave 2 checks to Edna J. McKenna, payable to her own personal order, which were cashed by her personal indorsement. They were:

"Detroit, Mich., Oct. 23, 1946
"Pay to the order of Mrs. Edna McKenna ..... $26,597.00
The sum of .... 26,597 Dols 00 Cts ..... Dollars
For
"Checker Cab Company
"Dudley D. Grayson,
"Sec'y.-Treas."

"Detroit, Mich., Oct. 23, 1946
"Pay to the order of Mrs. Edna McKenna ..... $5,053.00
The sum of ..... 5,053 Dols 00 Cts ..... Dollars
for account Wm. McKenna (Deceased).
"Checker Cab Company
"Dudley D. Grayson,
"Sec'y.-Treas."

On April 26, 1949, Edna J. McKenna, as special administratrix, filed in the probate court a report of the sale of said taxicabs, to

"4 different members of the Checker Cab Company who had qualified and who were recognized by the board of directors of the Checker Cab Company as permitted to purchase said Checker taxicabs and to operate them as Checker taxicabs in addition to the cabs that they were then operating. That she sold the said taxicabs at the price which was determined upon by the directors and officials of the Checker Cab Company as the price at which they should be purchased as used taxicabs and as used automobiles equipped with the special equipment for use as Checker taxicabs, * * * That she received therefor the full sum of $5,053 for the sale of the said personal property."

The report further stated that this was the total of the sums received for "the bare motor vehicle, * * * $250 for the special taxicab equipment therein, and for the sum of $50 for the bond plates." On the same date that she filed the foregoing report of sale, she also filed her final account as special administratrix, showing that the said sum of $5,053 had been turned over by her as special administratrix to herself later appointed as general administratrix of the estate of the deceased. In the meantime, Emily McKenna, the mother of the deceased William P. McKenna and an heir-at-law interested in his estate, had died and the appellant herein, Andrew M. McKenna, had been appointed as executor of her estate. He filed objections to the allowance of the final account of Edna J. McKenna as special administratrix, claiming that she had failed to account for the $26,597 she had received from the sale of the 4 taxicabs owned by William P. McKenna in addition to the $5,053 accounted for. The probate judge who heard the matter disagreed with that claim and allowed the account as filed by the special administratrix. On appeal, the circuit judge likewise overruled and denied appellant's claim and affirmed the order of the probate court. Andrew M. McKenna, as executor of the estate of Emily McKenna, deceased, appeals.

Stripped of nonessentials, the simple question here is whether the $26,597 which Edna J. McKenna, special administratrix, received personally from the Checker Cab Company resulting from the sale of the 4 taxicabs owned by William P. McKenna, belongs to her individually, or must she account for it to the estate. The Checker Cab Company is not a party in the case, it has paid over the money to her, and apparently has no financial interest in the outcome of this particular case. The appellee, Edna J. McKenna, claims that said money was received

by the Checker Cab Company for the right to operate 4th taxicabs by 4 of its members, and only inferentially to obtain a transfer of the taxicab license from the city therefor; and that the Checker Cab Company made a present of said $26,597 to her. She was not a member of the Checker Cab Company and could not be. The only ground on which she seems to claim this money is that it was a gift to her from the Checker Cab Company. She had no individual interest in the taxicabs of William P. McKenna, or in his rights as a member of said company. She obtained the $26,597 as a result of the auction sale of the taxicabs owned by William P. McKenna, over and above the bare value of used taxicabs plus $250 in equipment, obviously on account of the opportunity allowed only to her by the ordinance to obtain a transfer of the decedent's 4 licenses to the purchasers, to operate 4 taxicabs in Detroit. Those transfers, according to the ordinance, could be obtained only by request of Edna J. McKenna as the personal representative of the deceased owner, and then only to the persons who became the purchasers of the titles of the taxicabs, when sold to them by her as such personal representative. Incidentally, Edna J. McKenna, as the personal representative of the estate of William P. McKenna, deceased, owed a duty to the estate not to engage in transactions concerning the property of the deceased for her own personal profit as against the interests of the estate. As special administratrix, she stood in the relationship of a fiduciary with the estate,* and as such was in a position of confidence and trust with respect to the estate and to Emily McKenna who was also an heir-at-law of the deceased.†

* CL 1948, § 704.1 (Stat Ann 1943 Rev § 27.3178[251]).
† CL 1948, § 704.2 (Stat Ann 1943 Rev § 27.3178[252]).

The right to operate a taxicab in Detroit under license is tied into the ownership of the vehicle itself by the provisions of the ordinance, which allows a transfer of the right to operate the taxicab upon the death of the owner only to one who purchases the taxicab from his estate, and then only on the application of the personal representative of the decedent. The licenses to operate the 4 taxicabs owned by William P. McKenna belonged to him. Appellee's brief concedes that:

"A license upon issuance by the city does not attach to a particular vehicle, but is issued to a licensee—a person."

Under the peculiar circumstances of this case, the entire proceeds resulting from the sale of the taxicabs, including the money paid by the purchasers in order to obtain the right to operate the taxicabs under city license, belong to his estate. Edna J. McKenna has no right to any part of the same. The contest in this case is not between the estate and the Checker Cab Company; it is between Edna J. McKenna, as special administratrix, and the estate of William P. McKenna, deceased. The decision here rests upon the respective rights of those parties.

Appellee claims that the Checker Cab Company was paid $26,597 for the privilege granted to the 4 purchasers each to operate a 4th taxicab. We do not so consider it. The purchasers paid that total sum in order to obtain the application of the special administratrix of the estate, the only person who could make such application to the mayor of the city, and thus to effectuate the transfer of the licenses from the estate to them. Nor was it paid to the Checker Cab Company by the purchasers for the privilege of becoming a member of the company under article 11 of its bylaws, as claimed by appellee.

The purchasers were not buying memberships—they were already members of the company. Under its bylaws, article 8(b), no person can be entitled to more than 1 membership.

As between Edna J. McKenna, special administratrix of the estate of William P. McKenna, deceased, and the estate she represented in the sale of these taxicabs, she is required to account to the estate for the full amount paid by the purchasers for the 4 taxicabs, including the sums paid by them to accomplish the transfers by her of the taxicab licenses held by the deceased. The case will be remanded to the circuit court for entry of an order to that effect and return to the probate court for entry of an order for allowance of the final account of the special administratrix in accordance therewith. Costs to appellant.

Dethmers, Butzel, Carr, Bushnell, Sharpe, and Reid, JJ., concurred.

The late Chief Justice North took no part in this decision.

*In re* STAHL'S ESTATE.

TUCKER *v.* DEPARTMENT OF REVENUE.

1. TAXATION—INHERITANCE TAXES—INTEREST IN LANDS BEYOND BORDERS OF STATE.

An interest in land situated beyond the borders of this State is not taxable for an inheritance tax in this State (CL 1948, § 205.201).

2. SAME—COURTS—VALIDITY OF TAX LAW.

The court before which a State tax is challenged must determine for itself the nature and incidence of the tax, where the validity of a State tax is challenged under the Federal Constitution.

3. SAME—ILLINOIS LANDS—INHERITANCE TAXES—LANDS HELD IN TRUST.

The interest of deceased in lands situated in Illinois held in trust by an Illinois trustee but subject to the directions of deceased who could direct a conveyance by the trustee and enjoyed all the qualities of ownership ordinarily enjoyed by an owner except the right to sign the ordinary instruments of conveyance possessed an interest in land that was not subject to the inheritance tax laws of this State (CL 1948, § 205.201).

4. COSTS—PUBLIC QUESTION—APPLICATION OF STATE INHERITANCE TAX LAWS.

No costs are allowed in proceeding for determination of an inheritance tax upon a resident decedent's interest in lands located in Illinois, a question of public interest being involved (CL 1948, § 205.201).

Appeal from Allegan; Smith (Raymond L.), J. Submitted April 10, 1952. (Docket No. 45, Calendar No. 45,274.) Decided September 3, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 28 Am Jur, Inheritance, Estate, and Gift Taxes §§ 87, 110.
[4] 14 Am Jur, Costs § 91.

In the matter of the estate of Gustave A. Stahl, deceased. Irving J. Tucker, administrator, petitioned for order determining that no Michigan inheritance tax was due. Judgment for plaintiff on appeal to circuit court. Defendant, Department of Revenue of the State of Michigan, appeals. Affirmed.

*Irving J. Tucker,* administrator *in pro. per.*

*Arthur W. Eckman, John R. Peterson, Abe R. Peterson, William U. Bardwell,* and *Elroy C. Sandquist, Jr.,* for First Church of Christ, Scientist, in Boston, Massachusetts.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for defendant.

BOYLES, J. This is an appeal by the State from a circuit court judgment denying the State's claim for inheritance tax in the estate of Gustave A. Stahl, deceased. The transfer on account of which the State claims an inheritance tax consists of proceeds from the sale of real estate located in Illinois.

Gustave A. Stahl, a resident of Allegan county in this State, died in 1947 and Irving J. Tucker, the appellee herein, was appointed administrator of his estate. The decedent had been and at the time of his death was a beneficiary in a trust set up in Illinois for certain Illinois real estate. Tucker, as administrator, petitioned the probate court for an order determining no inheritance tax was due, claiming that any transfer under said trust was not subject to the Michigan inheritance tax. The judge of probate held that the transfer of the decedent's beneficial interest in the Illinois real estate was subject to the Michigan inheritance tax.

Tucker, administrator, appealed to the circuit court from such order, and the circuit judge reversed the determination and held that there was no transfer subject to the tax. The Michigan department of revenue, by the attorney general, appeals from the order and judgment entered in the circuit court to that effect.

The essential facts are not in dispute. In 1922, one John G. Stahl entered into a trust agreement with the Chicago Title & Trust Company under which the trust company agreed to take title to certain real estate in Cook county, Illinois, and hold it for the use and benefit of John G. Stahl during his lifetime and, at his death, for the benefit of Frank A. Stahl. It provided that the interest of the beneficiary should consist solely of a power of direction to deal with the title to said property and the right to receive the proceeds from rentals or sales, that such right be deemed to be personal property, that in case of the death of any beneficiary his or her right and interest should pass to his or her executor or administrator, and not to his or her heirs-at-law; that no beneficiary should have any right, title or interest in said real estate as such, but only an interest in the proceeds, it being the intention to vest the full legal and equitable title to the premises in the trust company. The trust agreement further provided that while the trust company should be the sole owner of the real estate, it would deal with it only when authorized to do so in writing by the beneficiary, whereupon it might make deeds for, or otherwise deal with the title to, the real estate. The beneficiary was to have the management and control of the property, should handle the rents and the proceeds of any sales of said property, the trust company was not to be called upon to do anything in the management or control of said property except on the written direction of the beneficiary.

Reasonable compensation for the services of the trust company was provided for.

On October 25, 1930, Frank A. Stahl, after the death of John G. Stahl, designated Gustave A. Stahl as beneficiary, in accordance with the agreement.

On May 22, 1945, subsequent to the death of Frank A. Stahl, Gustave A. Stahl and the trust company executed an amendment to the trust agreement which in substance confirmed the agreement, that the trust company should hold title to the real estate for the use and benefit of Gustave A. Stahl; that, upon his death, all his rights and beneficial interest should pass to the board of directors of the Mother Church of Christ, Scientist, of Boston, Massachusetts. Gustave A. Stahl reserved the right to change said beneficiary; however, he never did so. The term of the agreement was extended, the compensation of the trust company was increased, and the other provisions of the original agreement were, without substantial change, confirmed.

The property subject to the trust agreement consisted solely of real estate within the State of Illinois. It was held and used exclusively within the State of Illinois. The locus and legal ownership of said real estate was at all times in Illinois. Any written direction by Gustave A. Stahl pursuant to the agreement with the trust company was effective only by delivery to the trust company in Illinois.

After the death of Gustave A. Stahl, the trustee sold the real estate and delivered the proceeds to the First [Mother] Church of Christ, Scientist, in Boston, Massachusetts. Under the foregoing circumstances, the circuit judge held that the State of Michigan was not entitled to levy an inheritance tax upon the interest of Gustave A. Stahl in said trust, essentially on the ground that it was a trust in Illinois real estate.

The State department of revenue in answering appellee's petition in the probate court admitted that the property subject to the trust agreement

"consisted solely of real estate within the State of Illinois and that the property (referring to the real estate) was held and used exclusively within the State of Illinois; * * *

"That the legal ownership, presence and control of the property (referring to the real estate) were at all times within the State of Illinois exclusively; * * *

"That any written direction by Gustave A. Stahl pursuant to the trust agreement with the title company was of no effect whatsoever until delivered to the title company within the State of Illinois. * * *

"That PA 1899, No 188, § 1, third, as amended* (Michigan inheritance tax act), taxes only transfers 'to persons or corporations not exempted by law in this State from taxation on real or personal property,' * * *

"But avers affirmatively that the State of Michigan has jurisdiction to levy a tax under PA 1899, No 188, as amended, on the transfer of Gustave A. Stahl's beneficial interest in the trust agreement."

We are in accord with the conclusion of the circuit judge that Gustave A. Stahl held an interest in Illinois lands, which interest is not taxable for an inheritance tax in this State. It was so held in *Senior* v. *Braden,* 295 US 422 (55 S Ct 800, 79 L ed 1520, 100 ALR 794). In that case the court held that a State was without power to subject to tax the beneficial interests represented by the certificates (intangible property) in rents or interests in land situate either within or beyond its borders, or, consistently with the due process clause of the Fourteenth Amendment, tax as intangible property of a

* See CL 1948, § 205.201 (Stat Ann 1947 Cum Supp § 7.561).—REPORTER.

resident of the State land trust certificates representing interests in various parcels of land either within or outside the State, the holder of which is entitled to a share of the net income and, upon a sale of the property, of the proceeds of sale.

In the Stahl trust, the beneficiary Gustave A. Stahl possessed all the attributes of an owner of the fee except the power to sign instruments of conveyance. As to that, he had the power to direct a conveyance by the trustee. His interest in the land in the instant case was at least as much, if not more, an interest in land than the facts disclosed in *Senior* v. *Braden, supra.* He could revoke the trust, change the beneficiary, had the active management of the real estate, paid the real estate taxes, collected the rents. In short, the trustee carried out only the directions of the beneficiary. His interest in land in various respects was greater than the facts disclosed in *Senior* v. *Braden,* where the court held that the interest was in lands and not taxable. It is apparent in this case from the trust agreement that the parties intended that the beneficiary should actively manage the property and that his relationship to the property should carry all the qualities of ownership ordinarily enjoyed by an owner of real property except the right to sign the ordinary instruments of conveyance.

Appellant's main contention is that the nature of Gustave A. Stahl's interest must be determined according to the law of Illinois and, hence, is to be considered as personal property. The answer is that the *Braden Case, supra,* deciding the question under the Fourteenth Amendment to the United States Constitution, has held contrariwise, under circumstances similar to the case at bar, as follows (syllabi):

"Where the validity of a State tax is challenged under the Federal Constitution, this court must determine for itself the nature and incidence of the tax. * * *

"The attempt of Ohio to subject the beneficial interests represented by the certificates to a tax imposed on 'investments' and other intangible property, measured by a percentage of the income yield—investments being so defined by the statute as to include equitable interests in land and rents divided into shares evidenced by transferable certificates—is unconstitutional both in respect of such interests in land outside of the State and of those in land within the State."

Incidentally, the question of double taxation referred to in the *Braden Case, supra,* has not been raised as one of the issues in the case at bar. Whether imposition of the inheritance tax by the State would result in double taxation need not be considered, in view of our conclusion herein. Here we have the single question whether, under the circumstances of this case, the interest of Gustave A. Stahl in the trust was taxable as a beneficiary's interest in land, under the Fourteenth Amendment to the United States Constitution.

The judgment of the circuit court is affirmed and the case remanded to the circuit court for return to the probate court with directions to enter an order in accordance therewith. No costs, a question of public interest being involved.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

The late Chief Justice NORTH took no part in this decision.

## NELSON *v.* McCORMICK.

1. ATTACHMENT—WRIT IS A SUMMONS.
   A writ of attachment is a summons as well as an attachment.

2. SAME—NATURE OF PROCEEDING—PROPERTY SUBJECT TO EXECUTION.
   An attachment proceeding is strictly a proceeding *in rem* and no property except that attached can be taken in execution, where the defendant is not personally served and does not appear in the suit.

3. SAME—GENERAL APPEARANCE—JURISDICTION IN PERSONAM.
   The entering of a general appearance by the defendant in an attachment proceeding gives the court jurisdiction *in personam* the same as if the suit had been commenced by a summons that was served (CL 1948, § 626.19).

4. APPEARANCE—GENERAL APPEARANCE—WAIVER OF QUESTIONS OF SERVICE.
   A general appearance waives all questions of the service of process, and is the equivalent to a personal service (CL 1948, § 626.19).

5. GARNISHMENT—DISMISSAL BEFORE FINAL ADJUDICATION OF PRINCIPAL CASE.
   Dismissal of garnishment proceeding before final conclusion of the principal case may not properly be done as the issues in the garnishment proceeding should come before the court having jurisdiction of the principal case only after that case has been decided.

6. ACTION—MOTION TO DISMISS—GARNISHMENT.
   Issues in a garnishment proceeding are not proper matters for decision on a motion to dismiss principal case wherein the court has jurisdiction *in personam* (CL 1948, § 628.11).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur, Attachment and Garnishment § 504.
[2] 4 Am Jur, Attachment § 9 *et seq.*
[3] 4 Am Jur, Attachment § 49.
[4] 3 Am Jur, Appearances § 35.

7. ATTACHMENT—FOREIGN DIVORCE DECREE—GARNISHMENT.

The effect of a change in a foreign decree of divorce is a matter for consideration when principal case in action on such decree in this State is heard and possibility of change in such decree, does not alone afford reason for dismissing attachment and garnishment proceedings, based on such decree and brought in this State, and in which principal defendant filed a general appearance (CL 1948, §§ 552.121–552.123, 626.19, 628.11).

Appeal from Wayne; Miller (Guy A.), J. Submitted June 5, 1952. (Docket No. 32, Calendar No. 45,412.) Decided September 3, 1952.

Action commenced by writs of attachment and garnishment by Margaret McCormick Nelson against Wayne Hawthorne McCormick, Sr., for money due under foreign divorce decree. Writs dismissed on motion. Plaintiff appeals. Reversed and remanded.

*Larry Middleton,* for plaintiff.

*James C. Moran,* for defendant.

BOYLES, J. Plaintiff sued the defendant, her former husband, in the circuit court for Wayne county to obtain a judgment for the amount awarded to her against the defendant in a decree for divorce in the State of Idaho. See CL 1948, § 552.121 (Stat Ann § 25.141). At the time of starting suit the plaintiff filed simultaneous affidavits for writs of attachment and garnishment, showing that the defendant was not, and had not been, a resident of Michigan for 3 months immediately prior. The writs were issued and the writ of attachment was returned not served. The writ of garnishment was served. The garnishee defendant filed a disclosure denying liability to the principal defendant. After the filing of a demand for personal examination of the garnishee defendant

he filed an amended disclosure alleging circumtances relied upon by him for claiming no liability to the principal defendant, and again denied liability.

The plaintiff filed a declaration and bill of particulars in the principal suit whereupon the principal defendant entered a general appearance by attorney, who gave notice of such appearance to the attorney for the plaintiff. Shortly afterward defendant's attorney filed a motion to dismiss the cause and gave notice of hearing thereon. The ground alleged for dismissal was that the funds in the possession of the garnishee defendant were exempt from and not subject to garnishment.

Circuit Judge Guy A. Miller heard and granted the motion, and entered an order dismissing the case. The plaintiff appeals.

The court erred in dismissing the case. The writ of attachment was a summons as well as an attachment.

"The writ [of attachment] is a summons as well as an attachment. When there is no personal service upon the defendant, and he does not appear in the suit, the proceeding is strictly *in rem,* and no property except that attached can be taken in execution. When the defendant has been personally served, or has appeared, the proceedings in the suit are to be the same in all respects as upon the return of a summons personally served in a suit commenced by summons." *Bower* v. *Town,* 12 Mich 229.

See, also, *John D. Gruber Co.* v. *Montcalm Circuit Judge,* 183 Mich 477.

The entering of a general appearance by the principal defendant gives the court jurisdiction *in personam.* Jurisdiction of the principal suit *in personam* was conferred on the court by the entering of a general appearance by the defendant. CL 1948, § 626.19 (Stat Ann § 27.1779).

"A general appearance waives all questions of the service of process, and is equivalent to a personal service." *Hempel* v. *Bay Circuit Judge* (syllabus), 222 Mich 553.

See, also, to the same effect, *National Coal Co.* v. *Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich 195; *Fisher* v. *Fisher*, 224 Mich 147; *Daines* v. *Tarabusi*, 246 Mich 419; *Republic Automobile Insurance Co.* v. *Maedel*, 253 Mich 663; *Ward* v. *Hunter Machinery Co.*, 263 Mich 445; *Fraser* v. *Collier Construction Co.*, 305 Mich 1.

The court also erred in dismissing the garnishment suit before the principal case came to final conclusion. The issues in the garnishment suit should come before the court having jurisdiction of the principal case only after that case was decided. The procedure for joining issue, and final judgment in the garnishment suit, is plainly set forth in the statute. Those issues are not proper matters for decision on a motion to dismiss the principal case wherein the court has jurisdiction *in personam*.

"The affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff against the garnishee as defendant; * * * And thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff. At any time after final judgment against the defendant in the principal cause, judgment may be rendered against such garnishee defendant, on plaintiff's motion to the court with such notice to the garnishee defendant as is provided by the rules of the court for the giving of notice of the hearing of motions: Provided, however, If such plaintiff or such garnishee defendant shall within 10 days after filing of such disclosure, answer, or statement, file with the clerk of such court a demand for trial of the cause, said cause shall stand for trial in the manner provided by this act. A jury may be

had on demand of either party." CL 1948, § 628.11 (Stat Ann 1951 Cum Supp § 27.1865).

See, also, *Hayes* v. *Ross,* 236 Mich 208.

In an opinion filed by him the circuit judge speculated on the effect which a change in the Idaho decree might have in the principal suit here involved, and referred to our recent decision in *Sonenfeld* v. *Sonenfeld,* 331 Mich 60, as his ground for considering such uncertainty. The effect of a change in the Idaho decree might be a matter to be considered when the principal suit is heard; and the answer to the trial court's confusion as to that matter may readily be found in the statute. See CL 1948, §§ 552.121–552.123 (Stat Ann §§ 25.141–25.143). The *Sonenfeld Case, supra,* which was a contempt proceeding for nonpayment of alimony, has no bearing on the question here for decision, namely, did the court err in dismissing this case.

The order dismissing the case is set aside and the case remanded for further appropriate proceedings in the principal suit; and, if judgment for plaintiff is entered therein, then for further proceedings or trial of the statutory issues involved in the garnishment suit.

Reversed and remanded. Costs to appellant.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

*In re* JONES' ESTATE.

APPEAL OF SCHOOL DISTRICT OF THE CITY OF BATTLE CREEK.

APPEAL OF OAK HILL CEMETERY COMPANY.

1. TRUSTS—WILLS—CONSTRUCTION—CHARITABLE TRUSTS.
   Two trusts created by will for cemetery and educational purposes are construed as testamentary trusts for charitable purposes.

2. SAME—TESTAMENTARY TRUSTS—CHARITABLE TRUSTS—PROBATE COURT—JURISDICTION.
   The probate court has jurisdiction over testamentary trusts and must require bonds of all trustees before issuing letters of trusteeship and no exception as to trusts for charitable purposes is made by statute conferring jurisdiction (CL 1948, §§ 701.19, 704.1, 704.3).

3. SAME—TESTAMENTARY TRUSTS—APPOINTMENT OF TRUSTEE—PROBATE COURT.
   The probate court is not authorized to appoint any other person than one named in will setting up testamentary trust, except in case of failure to qualify or for other good cause shown (CL 1948, §§ 701.19, 704.1, 704.3).

---

REFERENCES FOR POINTS IN HEADNOTES

[2] Generally as to qualifications of testamentary trustee, see 54 Am Jur, Trusts § 126.
Generally as to jurisdiction of probate courts, see 14 Am Jur, Courts §§ 8, 169.
[4] Generally as to bond or security given by trustee, see 54 Am Jur, Trusts § 541 *et seq.*
[6] 50 Am Jur, Statutes § 348.
[7–11] Generally as to jurisdiction of courts of equity over trusts, see 54 Am Jur, Trusts § 565.
[9–11] Generally as to appointment of trustee by court of equity to prevent failure of trust, see 54 Am Jur, Trusts §§ 121, 122.
[11] 54 Am Jur, Trusts § 565; 57 Am Jur, Wills §§ 1025, 1027.
[13] 14 Am Jur, Costs § 92.

4. SAME—TESTAMENTARY TRUSTEES—BONDS.

A testamentary trustee, appointed by the probate court, can accept the trust and perform the duties of trustee only after filing the required bond (CL 1948, §§ 701.19, 704.1, 704.3).

5. SAME—TESTAMENTARY TRUSTEES—LETTERS OF TRUSTEESHIP—COLLATERAL ATTACK.

An order of the probate court, granting letters of trusteeship to trustees named in a will, is necessarily a construction of the will and is not subject to collateral attack (CL 1948, §§ 701.19, 704.1, 704.3).

6. STATUTES—IN PARI MATERIA—CONSTRUCTION.

Statutes relating to the same subject, being *in pari materia*, should be construed together and effect given to all of them.

7. TRUSTS—STATUTES—CHARITABLE TRUSTS—CIRCUIT COURTS—TESTAMENTARY TRUSTS—PROBATE COURTS—JURISDICTION.

Statute conferring jurisdiction upon circuit courts in chancery over charitable trusts and probate code conferring jurisdiction upon probate courts over testamentary trusts can both be given effect without necessary conflict (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3).

8. SAME—STATUTES—JURISDICTION—COURTS—TESTAMENTARY TRUSTS FOR CHARITABLE PURPOSES.

Statute conferring jurisdiction upon circuit courts in chancery over charitable trusts does not give such court exclusive jurisdiction over a testamentary trust for a charitable purpose so as to nullify provisions of probate code conferring jurisdiction upon probate courts over testamentary trusts without exception (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3).

9. SAME—CHARITABLE TRUSTS—STATUTES.

The purpose of the act conferring jurisdiction upon circuit courts in chancery over charitable trusts is to prevent certain gifts, grants, bequests and devises, whether in trust or otherwise, to religious, educational, charitable or benevolent uses, or for the care of cemeteries, from being held invalid, by reason of indefiniteness or uncertainty of the object of the trust, of beneficiaries thereunder, or by reason of contravention of any statute or rule against perpetuities, or by reason of failure to name a trustee or provide for his successor (CL 1948, § 554.351 *et seq.*).

10. SAME—CHARITABLE TRUSTS—JURISDICTION—COURTS.

Charitable trusts, created by testamentary devise or bequest are included under the jurisdiction granted by statute to the probate court the same as other testamentary trusts except as such trusts are saved from invalidation by statute, conferring jurisdiction upon circuit courts in chancery over charitable trusts, by reason of indefiniteness or uncertainty of object, contravention of statute or rule against perpetuities or failure to name trustee or provide for successor (CL 1948, § 554.351 *et seq.*; §§ 701.19, 704.1, 704.3).

11. SAME — COURTS — JURISDICTION — TESTAMENTARY CHARITABLE TRUSTS.

The circuit court in chancery has jurisdiction to construe wills, incident to its general power over trusts, but such jurisdiction over testamentary charitable trusts is not exclusive nor does its existence deny jurisdiction of probate courts over such trusts, in the absence of any proceeding in chancery court whereby validity of the trust is challenged by reason of indefiniteness or uncertainty of object, contravention of statute or rule against perpetuities or failure to name trustee or provide for successor (CL 1948, § 554.351 *et seq.*; §§ 701.19, 704.1, 704.3).

12. SAME—CEMETERIES—SCHOOLS—QUALIFICATION OF TESTAMENTARY TRUSTEES.

Probate court properly declined to authorize executor to turn over testamentary trust funds to appellants until they had qualified and obtained authority as trustees to receive and administer funds left in trust for cemetery and educational purposes, since it had authority to order the trustees to give bonds, qualify and receive letters of trusteeship before receiving funds devised (CL 1948, §§ 701:19, 704.1, 704.3).

13. COSTS—BRIEFS.

No costs are allowed appellee upon affirmance of order of probate court as affirmed by circuit court, where he filed no brief in the Supreme Court.

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted June 6, 1952. (Docket No. 41, Calendar No. 46,266.) Decided September 3, 1952.

In the matter of the estate of Genevieve R. Jones, deceased. The executor petitioned probate court for

instructions relative to trustees qualifying. Both probate and circuit court on appeal held they should qualify in probate court. Oak Hill Cemetery Company and School District of the City of Battle Creek appeal. Affirmed.

*Horace M. Mechem* and *Ronald M. Ryan,* for appellants.

BOYLES, J. This case brings the question whether the probate court has jurisdiction over certain trusts created by the will of Genevieve R. Jones, deceased, duly admitted to probate in Calhoun county. The facts have been stipulated.

Said will sets up 2 trusts. In one of them the testatrix gives $5,000 to the Oak Hill Cemetery Company in trust for the following purposes:

"(A) To place said sum in a fund separate and apart from any of the other funds owned or administered by said company, and to invest and reinvest said sum, and any unused income accumulated thereon from time to time, in such income-producing securities and properties as shall be lawful trust investments under the laws of Michigan in effect from time to time.

"(B) To use and apply the income from said separate fund for the purpose of maintaining the A. O. Jones family cemetery lot in said Oak Hill Cemetery."

The second trust devises and bequeaths the residue of the estate (approximately $240,000) to the School District of the City of Battle Creek, in trust, with the following directions as to its use and purposes:

The school district is to divide said residue into 3 separate, equal funds, each to be administered apart from the others. One fund, to be known as the Community Civic and Social Center Fund,

"shall be used by said school district, when and as the board of education of said district deems best, in defraying a part or all of the cost of constructing a new building, or an addition to an existing building belonging to the said school district, to be used as a Community Civic and Social Center where groups may gather for civic and social activities."

The second fund, to be known as the Almon O. Jones Teachers' Fund, is to be held, invested and reinvested by the school district as trustee, and it is required to use the net income as follows:

"The net income * * * shall be granted from time to time * * * to employees of said school district for the purpose of aiding them in advanced study, in travel or in other activities calculated better to fit them for their service to the Battle Creek public schools. Preference in making such grants shall be given to employees actively engaged in the classroom instruction of students."

The will then directs that the net income from the third fund, to be known as the Almon O. Jones Student's Fund,

"shall be used in the unfettered discretion of the board of education of said school district, or its successor governing body, to remedy the lot of underprivileged children of public school age resident in the city of Battle Creek or attending its public schools."

The executor of the estate petitioned the probate court for instructions as to whether said 2 trustees need qualify in the probate court as testamentary trustees before the trust funds could be turned over to them. After due notice and a hearing thereon, the probate judge entered an order declaring that these were testamentary trusts, that the jurisdiction conferred on circuit courts over trusts for certain charitable purposes does not deprive the probate

court of jurisdiction of such trusts when created by a will; and directed that each trustee must file a bond in said court and receive letters of trusteeship before receiving the funds and entering upon its fiduciary duties.

The 2 trustees appealed to the circuit court, where Judge Hatch filed a well-considered opinion holding that these were testamentary trusts within the jurisdiction of the probate court over which the circuit court does not have exclusive jurisdiction, and entered judgment affirming the order of the probate court. Thereupon the trustees, on one record and on stipulated facts, have perfected a consolidated appeal to this Court.

The only question involved is whether the probate court has jurisdiction, under a will admitted to probate in that court, over testamentary trusts for charitable purposes—stated in another way: Does the circuit court in chancery have sole and exclusive jurisdiction over testamentary charitable trusts? No issue has been raised as to the validity of the trusts, or seeking a construction as to their provisions or purposes. For the purposes of this decision they will be considered as trusts both for charitable purposes as well as testamentary trusts.

Appellants claim that under PA 1915, No 280 (CL 1948, § 554.351 *et seq.* [Stat Ann § 26.1191 *et seq.*]), the circuit court in chancery has exclusive jurisdiction over the trusts involved in this case. They contend that under said act the jurisdiction of circuit courts in chancery is exclusive, and that the probate court does not have jurisdiction over testamentary trusts which are for charitable uses. Appellants concede that probate courts have general jurisdiction over testamentary trusts, but argue that their jurisdiction does not include testamentary trusts for charitable purposes.

The probate code provides:

"Each judge of probate shall have jurisdiction:
* * *

"2. Of trusts and trustees in the execution of wills and administration of estates of deceased persons." CL 1948, § 701.19 (Stat Ann 1943 Rev § 27.3178 [19]).

"The term 'fiduciary' as used in this act, unless the context shall require a different meaning, shall include all executors, administrators, general or special, administrators with the will annexed, administrators *de bonis non,* guardians, general or special, and trustees, appointed by or under the jurisdiction of the probate court, whether testamentary or otherwise: Provided, That the term 'fiduciary' shall not include guardians *ad litem.*

"The term 'testamentary trustee' as used in this act includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will or by any competent authority to execute a trust created by a will; and it includes such an executor or administrator where he is acting in the execution of a trust created by the will which is separable from his functions as executor or administrator." CL 1948, § 704.1 (Stat Ann 1943 Rev § 27.3178[251]).

"Every fiduciary before he enters upon the execution of his trust, and before letters of his authority shall be granted to him, and annually thereafter, shall give a bond, as provided in section 8 of this chapter, to the judge of probate in such reasonable amount as he may direct with such surety or sureties as he shall direct and approve." CL 1948, § 704.3 (Stat Ann 1943 Rev § 27.3178[253]).

It is apparent from the foregoing provisions of the probate code that probate courts are thereby given jurisdiction by statute over testamentary trusts, and are authorized and directed to require bonds of all

said trustees before issuing to them letters of trusteeship. The statute does not except testamentary trusts which are for charitable purposes.

In *Re Oliff's Estate,* 283 Mich 43, one Charles E. Taylor was nominated both as executor and trustee in the will of Thomas Oliff, deceased. He qualified as executor on December 4, 1926, but did not file a bond and receive letters of trusteeship from the probate court until July 14, 1933. In the interim, he assumed to act as trustee. This Court said:

"The statute, CL 1929, § 15865, is mandatory in requiring that:

" 'Every testamentary trustee before he enters upon his duties as trustee, shall give bond.'

"Mr. Taylor could not exercise, or have any power or authority to act as testamentary trustee until granted the letters of trusteeship on July 14, 1933."

When a trustee is named in a will, the probate court is not authorized to appoint any other person except in case of failure to qualify or other good cause shown. *Gibney* v. *Allen,* 156 Mich 301. A testamentary trustee can accept the trust and perform the duties of trustee only after filing the required bond. *Wessborg* v. *Merrill,* 195 Mich 556 (LRA1918E, 1074). An order of the probate court granting letters of trusteeship to trustees named in a will is necessarily a construction of the will, and is not subject to collateral attack. *Chapin* v. *Chapin,* 229 Mich 515.

We find nothing in PA 1915, No 280, *supra,* itself, relied on by appellants, to indicate that the circuit court in chancery should have exclusive jurisdiction over a testamentary trust for charitable purposes, which would thereby nullify the express provisions of the probate code giving the probate court jurisdiction over testamentary trusts without exception. It is difficult to reconcile the claim of appellants, that

the circuit court in chancery has exclusive jurisdiction over the trusts here involved, which admittedly are testamentary trusts, in view of appellants' concession in their brief as follows:

"Without entering upon a discussion of a sometimes difficult question when the chancery court will take jurisdiction of a matter pending in the probate court, it suffices for our purposes to say that the probate court and the chancery court have concurrent jurisdiction of testamentary trusts, that each court derives its jurisdiction from separate statutory enactments now in force, and that such was the case at all times which are significant with respect to the matters considered in this appeal."

As a general rule, statutes which can stand together, relating to the same subject, being *in pari materia,* should be construed together and effect should be given all of them. *Rathbun* v. *State of Michigan,* 284 Mich 521; *Michigan Good Roads Federation* v. *State Board of Canvassers,* 333 Mich 352. As construed by the circuit judge, the provisions of the probate code, *supra,* and those of PA 1915, No 280, can both be given effect without necessary conflict.

The precise question in this case has never been clearly decided by this Court. However, the Court has recognized the jurisdiction of the probate court over a testamentary charitable trust, and the right of that court to act where the question was raised. In *Gifford* v. *First National Bank of Menominee,* 285 Mich 58, a bill was filed in the circuit court in chancery to determine the validity of certain charitable trusts set up in the will of the testator. A will which set up a charitable trust had been admitted to probate and, when the trustees therein declined to serve, the probate court appointed a certain bank and 2 named individuals as trustees. The will provided for a charitable trust. The residue of the estate, in

excess of $210,000, was to be devoted to charitable uses, in part to further the practice of medicine, medical education, care of the sick, operation of hospitals, laboratories, and like medical institutions. In a bill in chancery the plaintiffs challenged the validity of the appointment of 2 of the trustees by the probate court, as well as their fitness to act. The circuit judge dismissed the bill of complaint, and on appeal this Court in effect affirmed the appointment of the 2 trustees by the probate court as follows:

"The first of these questions challenges the appointment by the probate court of Albert G. Cherney and Cecil J. Scanlan as trustees. It is appellants' contention that the charitable trust in the instant case is one of the class included in CL 1929, § 13512 (Stat Ann § 26.1191), since there is some 'indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same;' and that, therefore, as provided in the same section, in case a vacancy occurs in the trusteeship 'then the trust shall vest in a court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court.' See, also, CL 1929, § 13513. Appellants conclude that since the chancery court under the statute had jurisdiction of this trust, the appointment of the 2 trustees named by the probate court was void. For the purposes of this case it may be so conceded, but the record discloses that this case, including the trustees named, has already been before the circuit court of Menominee county in chancery and after full hearing a finding was made and a decree entered by the circuit judge which in effect ratifies the appointment of these trustees, including an approval of their qualifications to act, and directs them to proceed with the execution of the trust."

We are convinced by a consideration of the language of the title and sections of PA 1915, No 280, *su-*

*pra,* that it does not nullify the provisions of the probate code giving the probate court jurisdiction over the trusts here involved, as testamentary trusts. From a reading of said sections and particularly the title to said act, it is apparent that the legislature had in mind one objective, which was to prevent certain gifts, grants, bequests and devises, whether in trust or otherwise, to religious, educational, charitable or benevolent uses, or for the care and maintenance of cemeteries, from being held invalid, by reason of indefiniteness or uncertainty of the object of the trust, or of the persons designated as beneficiaries thereunder, or by reason of the contravening of any statute or rule against perpetuities; and also for the regulation of the same by providing that if no trustee is named to execute the same, then the legal title to the lands or property devised or bequeathed shall vest in the court of chancery, with power to appoint a trustee where none is appointed or where a vacancy occurs. There can be little doubt but that said act was passed for the purpose of accomplishing the one result, namely, to save the charitable trusts mentioned therein from being invalidated for the reasons stated in section 1 of said act. By section 2 of the act the legislature, to carry out the provisions of section 1, has placed the jurisdiction in the court of chancery as being the proper court to handle such gifts, devises and bequests to religious, educational, charitable and benevolent uses, or for the care or maintenance of cemeteries, when their validity was questioned for any of the reasons stated in section 1 of said act. Charitable trusts, created by testamentary devise or bequest, are included under the jurisdiction granted by statute to the probate court, and the same as other testamentary trusts, except in so far as PA 1915, No 280, *supra,* prevents the failure of certain charitable trusts for reasons therein stated, and then confers jurisdiction upon chancery

courts to administer such trusts. It is important to note that the jurisdiction of the chancery court has not been invoked in the present situation, under any claim of circumstances or conditions referred to in said PA 1915, No 280. Had that been done, the circuit court in chancery might have jurisdiction over these trusts, assuming that issues were raised to bring them within the purview of said act. This Court has decided many issues first raised in the circuit court in chancery by bills in chancery under testamentary trusts set up in wills, to adjudicate questions concerning charitable trusts, to obtain a construction of such trust provisions, or to test their validity. The questions thus raised were within the purview of said PA 1915, No 280. For example, see *In re Brown's Estate,* 198 Mich 544; *Scudder* v. *Security Trust Co.,* 238 Mich 318; *Greenman* v. *Phillips,* 241 Mich 464; *Wanstead* v. *Fisher,* 278 Mich 68.

While the circuit court in chancery has jurisdiction to construe wills, incidental to its general power over trusts, *MacKenzie* v. *Union Guardian Trust Co.,* 262 Mich 563, the jurisdiction of circuit courts in chancery over testamentary charitable trusts is not exclusive, nor does it deny jurisdiction of probate courts over such testamentary trusts. The testamentary trusts here under consideration are testamentary trusts as well as for charitable uses. If the jurisdiction of the chancery court had been invoked by a bill of complaint which would bring the case within the purview of PA 1915, No 280, the chancery court would have jurisdiction of a charitable trust under that act.

But the complete answer to appellants' claim that the chancery court has *exclusive* jurisdiction is indicated by the *Oliff Case, supra,* where the chancery jurisdiction had not been invoked until about 7 years later, and not until after the one nominated as a trustee had received the trust fund and assumed his

powers and duties, without bond or letters of trusteeship. The Court held that his acts were not those of a trustee of the fund during that time. In the 2 trusts now before us, in the absence of any proper proceeding in the chancery court, where its jurisdiction had been invoked by a proper party, obviously the only jurisdiction and control over the trusts must be in the probate court. Absent the giving of bond, and the receiving of letters of trusteeship from that court, and until the jurisdiction of the chancery court had been properly invoked, the trusts might be carried on indefinitely, without proper authority from a court having jurisdiction of such testamentary trusts.

The probate court properly declined to authorize the executor to turn over the trust funds to the appellants until they had qualified and had obtained authority as trustees to receive and administer the trust funds. The probate court had the authority to order the trustees of said trusts to give bonds, qualify, and receive letters of trusteeship before they could receive the trust funds mentioned in said will.

Affirmed, but without costs, appellee not having filed a brief in this Court.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## LORREN *v.* BARODA MANUFACTURING COMPANY, INC.

1. APPEAL AND ERROR—FINDINGS OF TRIAL COURT—EVIDENCE—CORPORATIONS.

   Findings of trial judge that payments made to plaintiff for use of his car and truck and alleged excessive salary were made without objection until plaintiff sued on corporate note after he and his wife had sold out their interest in corporate defendant to costockholder are not disturbed, where the evidence does not preponderate in the opposite direction.

2. CORPORATIONS—USE OF GENERAL MANAGER'S TRUCK AND CAR.

   Amounts paid plaintiff, formerly general manager of corporate defendant, for use of his car, trailer and truck *held,* not excessive or improper, especially where evidence shows the corporation continued the same use of plaintiff's truck for some time after plaintiff and wife had sold out their interest to the president, a costockholder.

3. SAME—RATIFICATION OF PAYMENTS TO DIRECTOR AND GENERAL MANAGER—EVIDENCE.

   Trial court's findings that defendant corporation's president and director had authorized, approved or ratified expenditures to plaintiff for car and truck hire and for salary, were fair and not to the disadvantage of the corporation or detrimental to it *held,* justified under record presented on defendant corporation's appeal from disallowance of such amounts now sought to be set off against plaintiff's undisputed note.

---

REFERENCES FOR POINTS IN HEADNOTES

[4] 13 Am Jur, Corporations §§ 1110, 1112.
[5] 13 Am Jur, Corporations § 1005.
[6, 8] 13 Am Jur, Corporations §§ 890, 915, 916, 924, 925, 1106.
[6, 8] Acceptance and retention of benefits, as ratification by corporation of unauthorized contract entered into by officer. 7 ALR 1446.
[7] 13 Am Jur, Corporations §§ 948, 949.
[7] Officers' right to assert invalidity of action taken at informal meeting of directors. 64 ALR 713.

4. SAME—PRESIDENT—KNOWLEDGE OF PAYMENTS TO GENERAL MANAGER—BOOKS OF ACCOUNT.

The president and director of a corporation will be charged with knowledge as to payments shown on corporate books to have been made to plaintiff, where books of account were kept by a certified public accountant and plaintiff was given a free hand in management of the furniture upholstering business as its general manager.

5. SAME—DIRECTOR—BURDEN OF SHOWING FAIRNESS OF DEALINGS WITH CORPORATION.

The director of a corporation has a right to deal with the corporation provided he does so fairly and where the director sustains his burden of establishing the fairness of his dealings they are valid (CL 1948, § 450.13[5], as amended by PA 1949, No 229).

6. SAME—GENERAL MANAGER—CONTRACTS.

A corporation which has been managed by a director and general manager who was permitted by the officers and other directors to assume full control of its affairs and which receives the benefit of the manager's acts and services is as much bound as though it had itself formally contracted for the services.

7. SAME—DIRECTOR'S MEETINGS—USE OF GENERAL MANAGER'S CAR AND TRUCK.

A formal meeting of the 3 directors of a corporation engaged in the furniture upholstering business was not necessary in order to authorize plaintiff, who was also its general manager, to use his automobile and truck for the corporation.

8. SAME—POWERS OF GENERAL MANAGER.

The general manager of a corporation, who is also a director of the corporation, has prima facie power to do any act which the directors could authorize or ratify unless special limitations or restrictions are put upon such power of which the party dealing with him has notice or unless power to do the particular act is expressly given to another officer or agent.

Appeal from Berrien; Westin (Edward A.), J. Submitted June 10, 1952. (Docket No. 56, Calendar No. 45,382.) Decided September 3, 1952.

Action by R. E. Lorren against Baroda Manufacturing Company, Inc., on a note. Recoupment by defendant against plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

*Robinson, Robinson & Robinson,* for plaintiff.

*Harvey & Fisher,* for defendant.

BOYLES, J. Plaintiff sued the defendant corporation on a promissory note for $10,000 executed August 4, 1946, for a loan of money by plaintiff to the corporation. The note was not disputed. The defendant claims set-off and recoupment amounting to $9,504.50. The circuit judge hearing the case without a jury disallowed the claim of set-off and recoupment and entered judgment for the plaintiff. Defendant appeals.

The sole controversy is whether the claims of set-off and recoupment should have been allowed. The defendant corporation was organized March 8, 1946. Its incorporators, stockholders and directors were the plaintiff, his wife, and Joseph C. Higgins. This continued unchanged from its inception until December 8, 1947, when Higgins purchased all of plaintiff's stock. Higgins was its president and the plaintiff was its secretary-treasurer and general manager. He was in complete control of its affairs until he sold out to Higgins. The books were kept by a certified public accountant. The corporation was in the business of upholstering furniture. Mr. Higgins was connected with Sears-Roebuck Company, was in need of the furniture, and plaintiff was to have a free hand in the management of the defendant corporation in providing it. No regular directors' meetings were held. Plaintiff furnished the money and put up a building for the corporation. The corporation needed a truck for its operations and the plaintiff

himself purchased one. Before it was delivered plaintiff used his own automobile and a 4-wheel trailer for company business, under an understanding that he was to be paid for its use. His mileage and expense was entered on the books of the company and plaintiff was paid and received $982.50 for that use. The defendant claims this was unauthorized and seeks to set it off against plaintiff's note and thus recoup it. The truck also belonged to the plaintiff. The company was short of money to pay for a truck and had been hiring trucks. Plaintiff testified that it was understood and agreed by Higgins at all times that plaintiff should provide the truck, use it for the company and be paid for its use, so much for a trip, and $12 a day for local use. From the books of the defendant, plaintiff was paid $7,347 for truck use. The defendant claims this use was unauthorized and asks that the payment be used as an offset against plaintiff's note. The defendant also claims that the plaintiff drew $25 a week as salary in excess of the amount Mr. Higgins had agreed to, and seeks to offset or recoup $1,175 on that account. Mr. Higgins testified that at no time did he agree to a charge by plaintiff for use of his car or truck.

The circuit judge heard the case without a jury and in his opinion stated that he was not impressed with Mr. Higgins' testimony. While there were no formal directors' meetings held, the court concluded that Higgins, as a director and stockholder, was fully aware of the payments shown on the corporate books as being paid to plaintiff and made no objection until after plaintiff had sued the defendant corporation to collect the $10,000 note, after Higgins became its sole owner. We fully agree with the findings of the trial court. The testimony does not preponderate in the opposite direction.

While the corporation is the nominal defendant, Higgins, who now owns the defendant corporation, is interested in opposing the plaintiff's suit to obtain judgment on the note. The defendant's main claim is that there were no directors' meetings, and that, absent any directors' authority, the plaintiff had no legal right to receive the payments shown on the books which the defendant seeks to offset against plaintiff's note. The record does not support defendant's claim that plaintiff was paid excessive, unreasonable or improper amounts for use of his car, trailer and truck. . The corporation continued the same use of the plaintiff's truck for some time after plaintiff sold out to Higgins. The record fully justifies the trial court's finding that Higgins, the corporation's president and director, authorized, approved, or ratified the expenditures the defendant seeks to recoup, that such expenditures were fair, and were not to the disadvantage of the corporation or detrimental to it. Under the circumstances of the case, the knowledge which Higgins denies as to the payments shown on the corporate books to have been made to the plaintiff may be imputed to him. *Carnahan* v. *M. J. & B. M. Buck Co.*, 250 Mich 198. Plaintiff had a right to deal with the corporation of which he was a director and has fairly established the fairness of his dealings with the corporation. See CL 1948, § 450.13(5), as amended by PA 1949, No 229 (Stat Ann 1951 Cum Supp § 21.13[5]).

"The directors, who comprised the entire body of stockholders of the corporation, having permitted the president, treasurer and general manager to exercise all of their functions and to assume the entire control and management of the corporate affairs, and having received the benefit of his acts and of plaintiff's services, the legal entity is as much bound as though it had itself formally contracted for the serv-

ices." *Ruttle* v. *What Cheer Coal Mining Co.,* 153 Mich 300.

Under the circumstances of this case a formal meeting of the 3 directors, the plaintiff, his wife, and Higgins, was not necessary to authorize plaintiff's use of his automobile and truck for the corporation.

*Zachary* v. *Milin,* 294 Mich 622, mainly relied on by appellant, wherein this Court had under consideration quo warranto to test the right of the defendants to hold office as director of a corporation, has no particular bearing on the issues of the instant case.

In *Faust* v. *Kent-Moore Organization, Inc.,* 324 Mich 45, at page 51, this Court said:

"We quote with approval in *Cope-Swift Co.* v. *John Schlaff Creamery Co.,* 223 Mich 543, at page 547, as follows:

" 'Where the president is given power as general manager of the business with full direction and charge thereof, he has the power to do any act or make any contract that the president and general managing agent of such a corporation could do or make in the ordinary transaction of the corporate business, and prima facie has power to do any act which the directors could authorize or ratify, unless special limitations or restrictions are put upon such power, of which the party dealing with him has notice, or unless power to do the particular act is expressly given to another officer or agent.' 14A CJ, p 358."

The claims of set-off and recoupment were properly disallowed and the judgment is affirmed, with costs to appellee.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## EMPLOYMENT SECURITY COMMISSION *v.* CRANE.

1. PARTNERSHIP—DISTINCT LEGAL ENTITY.

   A partnership is a distinct legal entity separate from the individuals composing it and its essential elements are their contribution to it of whatsoever nature, whether capital, skill or labor.

2. UNEMPLOYMENT COMPENSATION—CONTRIBUTION RATE OF SUCCESSOR—PARTNERSHIP—STATUTES.

   The question of whether 2 partnerships owned by the same 2 individuals constituted but 1 employing unit is to be determined by the provisions of the employment security act in proceeding for determination of contribution rate of successor of one of the partnerships (CL 1948, § 421.1 *et seq.*).

3. SAME—PARTNERSHIP—EMPLOYING UNIT.

   The employment security act does not require that 2 separate and distinct copartnerships must be construed as a single employing unit, where they conducted separate businesses in physically separated premises, for which separate and distinct books of account were kept for each, separate bank accounts maintained and operated under separate franchises from different manufacturers and distributors, separate personnel employed, separate letterheads and separate billings used and separate Federal income tax returns filed, since there is no unity of enterprise (CL 1948, §§ 421.40, 421.41).

4. SAME—COMBINATION OF EXPERIENCE RECORDS OF EMPLOYERS.

   The experience records of 2 or more employers may be combined, where a change in the legal entity or form of an employer has been effected by a change of ownership or in the composition of a partnership (CL 1948, § 421.22).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur, Partnership § 18.

[2–6] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds §§ 25–27.

[2–6] Validity, construction, and application of provisions of unemployment compensation acts as to employment units which are affiliated or under a common control. 142 ALR 918; 158 ALR 1237.

5. SAME—LEGAL ENTITIES OF EMPLOYERS—CONTRIBUTIONS.

The employment security act recognizes that legal entities of employers are not to be disregarded unless it appears that there is no sound business reason for separation other than merely to avoid contributions under the act (CL 1948, § 421.-41).

6. SAME—SUCCESSOR EMPLOYERS—COMBINED EXPERIENCE RECORD—SEPARATE PARTNERSHIPS BY SAME BROTHERS.

Partnership of 2 brothers conducting automobile sales agency under franchise from one manufacturer in physically separate premises with separate books of account and bank accounts from that of another partnership, conducted under another name, operating under franchise from another manufacturer for sale of tractors and implements and which prohibited its dealers from engaging in any other business constituted 2 separate and distinct employing units, hence, successor of automobile sales agency was entitled to more favorable contribution rate resulting from combined experience record with partnership succeeded (CL 1948, § 421.-40).

Appeal from Ingham; Salmon (Marvin J.), J. Submitted June 11, 1952. (Docket No. 64, Calendar No. 45,483.) Decided September 3, 1952.

Certiorari by Employment Security Commission to review order of the appeal board of the Employment Security Commission holding that Clyde C. Crane, Jr., doing business as Crane Motor Sales, succeeded to experience record to Ford Sales & Service. Judgment for defendant. Plaintiff appeals. Affirmed.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Francis W. Edwards,* Assistant Attorney General, for plaintiff.

*Warner, Norcross & Judd* (*Harold S. Sawyer,* of counsel), for defendant.

BOYLES, J. The question presented here is whether 2 certain separate and distinct partnerships, although consisting of the same 2 individuals as copartners, are 1 and the same employing unit, and whether they should be combined and held to be a single employing unit for the purpose of determining their experience record and contribution rate under the Michigan employment security act.*

On January 2, 1946, Sam T. and Rex Johnson became partners in a Ford sales and service agency in Reed City, which they operated under a franchise from the Ford Motor Company until July 15, 1949. In their certificate of copartnership filed with the county clerk, the partnership name was designated as Sam T. and Rex Johnson.

On May 1, 1948, these same 2 individuals became partners in a tractor and implement sales and service business under a certificate of copartnership in which the partnership name was designated as Johnson Tractor & Implement Sales. They operated this business until August 1, 1949, under a franchise from the Great Lakes Tractor & Equipment Company which prohibited its dealers from engaging in any other business.

The business of each of these 2 partnerships was directed and controlled by these same 2 individuals. However, each business was operated in physically separated premises, separate and distinct books of account were kept for each, they maintained separate bank accounts, operated under separate franchises from different manufacturers and distributors, employed separate personnel, used separate letterheads, separate billings, and filed separate Federal income tax returns.

* PA 1936 (Ex Sess), No 1, as amended (CL 1948, § 421.1 *et seq.*, as amended by PA 1951, No 251 [Stat Ann 1950 Rev and Stat Ann 1951 Cum Supp § 17.501 *et seq.*]).

The Ford agency became subject to the payment of contributions under the Michigan employment security act on January 1, 1946. At all times during its operation it employed a sufficient number of workers to remain subject thereto. Its account with the commission was carried under the name of Sam T. and Rex Johnson, a copartnership. The other copartnership, the tractor agency, at no time employed a sufficient number of workers to be separately subject to the contribution provisions of the act.

On October 18, 1948, the partners notified the commission that as of May 1, 1948, the date of its inception, the tractor and implement business became separate from Sam T. and Rex Johnson, under the name of Johnson Tractor & Implement Sales, asked for 2 blanks to make reports, and stated that they would include Johnson Tractor & Implement Sales contribution with Sam T. and Rex Johnson. They were advised by the commission that inasmuch as Sam T. and Rex Johnson were the owners of both business establishments, the employment of Johnson Tractor & Implement Sales should be included with the rest of their employment, and 1 combined quarterly contribution report submitted. The Johnsons accordingly thereafter submitted a single report for each of the calendar quarters in which they paid wages to the employees of both enterprises. Each report was filed under the name of Sam T. and Rex Johnson, a copartnership, and included the combined wages paid by both partnerships.

On July 15, 1949, Sam T. and Rex Johnson enjoyed a favorable contribution rate of 1% based upon their experience in respect to providing employment to those who rendered services for both enterprises. On that date the defendant and appellee herein, Clyde C. Crane, Jr., purchased the entire assets of the Ford agency, secured a new franchise from the Ford Motor Company and continued to operate that

agency under the name of Crane Motor Sales. He continued to employ all of the personnel formerly employed by the Johnsons in the operation of the Ford agency. The business and assets of the Ford agency constituted about 65% of the combined assets of the tractor and Ford agencies.

The Johnsons continued to operate the tractor agency as copartners until August 1, 1949. On that date all of the assets of the tractor agency were transferred to Rex Johnson, who thereafter operated the agency as an individual proprietor. Rex Johnson continued to employ all of the same individuals who had been employed by the Johnsons in the operation of this agency. He acquired the entire organization, trade and business of the tractor agency, including all of its assets.

After these transactions were completed, the commission issued 2 administrative determinations respecting the status of Clyde C. Crane, Jr., doing business as Crane Motor Sales, and that of Rex Johnson. The first determination held that Clyde C. Crane, Jr., became an "employer" on July 15, 1949, under the successorship provisions of the act.* The other held that Rex Johnson became an employer on August 1, 1949, under the provisions of the same section of the act. No appeal was taken from either determination.

On March 16, 1950, the commission issued a determination establishing the contribution rate of Crane Motor Sales for the years 1949 and 1950 at 3% effective July 15, 1949. Crane Motor Sales protested this determination and appealed to the referee, who reversed it. The appeal board affirmed the referee, and the Michigan employment security commission thereupon filed a petition for a writ of certiorari in the Ingham circuit court. The circuit judge entered

* CL 1948, § 421.41(2) (Stat Ann 1950 Rev § 17.543[2]). Not amended by PA 1951, No 251.

an order dismissing the writ and affirming the appeal board. The result was that Crane Motor Sales has a contribution rate of 1%, favorable to it as against the commission's determination of 3%. The commission appeals.

The gist of the appellant commission's claim is that the 2 partnerships, although separate and distinct in every respect except one, are only 1 employing unit under the employment security act. The 1 element in the circumstances of the present case on which appellant relies is that both partnerships have the same 2 individuals as copartners.

The weakness in appellant's position might appear from the question involved as stated by appellant:

"Where the *same individuals* employ workers in each of 2 businesses which they operate as separate enterprises under separate partnership agreements, is each business organization a separate and distinct employing unit under CL 1948, § 421.40 (Stat Ann 1950 Rev § 17.542)?" (Italics supplied.)

The obvious query is whether it is true that the *same individuals* employ the workers in both partnerships, one operating the Ford agency, and the other operating the Johnson Tractor & Implement Sales. Its franchise prohibited it from engaging in any other business—*e.g.*, selling Ford automobiles.

In this State a partnership is a distinct legal entity separate from the individuals composing it.

"Partnership is a legal entity separate from the individuals composing it, and its essential elements are their contribution to it of whatsoever nature, whether capital, consisting of money, merchandise, et cetera, or credit, skill or labor." *Thurston* v. *Detroit Asphalt & Paving Co.*, 226 Mich 505.

See, also, *Chisholm* v. *Chisholm Construction Co.*, 298 Mich 25; *Lobato* v. *Paulino*, 304 Mich 668.

(In the *Chisholm Case, supra,* the Court came to the conclusion that "in order to prevent an injustice or fraud, we do not hesitate to disregard the fictional entity of the partnership and regard the members as individuals." The rationale of the *Chisholm Case* is that an inactive copartner in the defendant construction company "cannot take advantage of his own wrong or neglect to create a waiver or estoppel in his own favor." No such claim is made in the instant case.)

The statutory definition of an employing unit in the employment security act is:

" 'Employing unit' means any individual or type of organization, including any partnership, * * * which has or * * * had in its employ 1 or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains 2 or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this act." CL 1948, § 421.40 (Stat Ann 1950 Rev § 17.542).*

From the above, appellant argues that the 2 partnerships here involved are, in legal effect, only 1 partnership, because both are composed of the same individuals; hence only 1 employing unit. Appellant claims:

"Thus, when 2 or more copartnerships are composed of the same identical individuals, there is, in fact, and in law, but 1 copartnership, *which includes the entire business in which the 2 individuals have co-ownership and concerning which they are associated.*"

We agree with appellant that the question whether there is only 1 employing unit in this case is to be determined by the provisions of the employment

* Not amended by PA 1951, No 251.

security act. *Acme Messenger Service Co.* v. *Michigan Unemployment Compensation Commission,* 306 Mich 704; *O'Brian* v. *Michigan Unemployment Compensation Commission,* 309 Mich 18; *Graystone Ballroom, Inc.,* v. *Baggott,* 319 Mich 87; *Nordman* v. *Calhoun,* 332 Mich 460. However, we do not find in the employment security act itself any requirement that 2 separate and distinct copartnerships operating as in the case at bar must be construed as a single employing unit. Appellant's only basis for claiming such a conclusion must be found solely in the unity of the partners in both copartnerships. There is no such "unity of enterprise" here as to bring the instant case under *American Screw Products Co.* v. *Michigan Unemployment Compensation Commission,* 311 Mich 440 (159 ALR 1195). Here, the enterprises operated by the 2 partnerships were fully separate and apart, and conducted as such. Furthermore, the "unity of enterprise" basis announced in the *American Screw Products Case, supra,* would not afford any relief to the appellant here. The appellee would not suffer hardship under the unity of enterprise premise, any more than under the legal entity theory of partnerships.

The Michigan employment security act expressly recognizes that a partnership is an "employing unit" within the meaning of the act, without the exception claimed by appellant that separate and distinct partnerships, operating separate enterprises, should be considered as 1 employing unit when they are owned and conducted by the same individual partners. Section 40 of the act (CL 1948, § 421.40 [Stat Ann 1950 Rev § 17.542])* declares that an employing unit includes a partnership. Section 41(2) (CL 1948, § 421.41[2] [Stat Ann 1950 Rev § 17.543(2)])* declares that "employer" means any individual *legal*

* Not amended by PA 1951, No 251.

*entity, et cetera.* Section 22(2) (CL 1948, § 421.22 [2] [Stat Ann 1950 Rev § 17.524(2)])* declares that the experience records of 2 or more employers may be combined where a change in the *legal entity* or form of an employer has been effected by a change of ownership or in the composition of *a partnership.* It might be argued that section 41(3) (CL 1948, § 421.41[3] [Stat Ann 1950 Rev § 17.543(3)])* of the act should be applied to the circumstances of this case to support appellant's conclusion that here there is only 1 "employer," hence only 1 employing unit. This section provides that:

" 'Employer' means: * * *

"(3) Any employing unit * * * which, together with 1 or more other employing units engaged in the same or an associated line of business, is owned or controlled (by a legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls 1 or more other employing units engaged in the same or an associated line of business, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this section: Provided, That this subsection shall not apply in cases where it can be shown that there is a sound business reason, other than avoidance of contributions, for the separation of such employing units."

In the instant case, the two Johnsons had a sound business reason for the complete separation of the Johnson Tractor & Implement Sales partnership from the operation of the Ford agency partnership. The Johnson Tractor & Implement Sales agency operated under a franchise from its supplier prohibiting it from engaging in any other business. Section 41, *supra,* recognizes that legal entities are

* Not amended by PA 1951, No 251.

not to be disregarded unless it appears that there is no sound business reason for separation other than merely to avoid contributions under the act. The reason for the separation here has not been challenged.

Appellant relies on *Canada Dry Bottling Co. of Utah* v. *Utah Board of Review*, — Utah — (223 P2d 586, 22 ALR2d 664). But in that case the Utah supreme court had under consideration only 1 partnership. The Utah supreme court construed this question in a situation where *the same partnership* operated simultaneously as separate enterprises 3 bowling alleys and a bottling works. It answered in the negative the contention that each business enterprise of this copartnership was a single employing unit separate and apart from the other. The situation before us is different. Here, we have 2 separate and distinct partnerships, not a single partnership operating separate enterprises.

We are not in accord with appellant's claim that under the circumstances of this case the 2 partnerships constitute a single employing unit under the employment security act. Each was a separate and distinct employing unit. Other incidental questions raised but not discussed in appellant's brief need not be referred to.

Affirmed. Costs to appellee.

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

The late Chief Justice NORTH did not sit.

## BILANDZIJA *v.* SHILTS.

1. VENDOR AND PURCHASER — LAND CONTRACTS — FORFEITURES — EQUITY.
   Equitable relief against forfeiture of land contract may be obtained by defendant in an action of ejectment by bill in chancery.

2. SAME—PAYMENT—LOCATION.
   Holder of purchaser's interest under land contract, who first tried to locate vendor, then attempted to make annual payment at banks in town near which property was located and at office of vendor's attorney, made reasonable effort to comply with requirements for payment of such instalment where no place of payment was established nor exact date on which to make annual payment provided.

3. SAME—TENDER OF PAYMENT—REFUSAL TO ACCEPT CHECK.
   Vendor's refusal to receive check of holder of purchaser's interest on sole ground it was too late obviated need for making a more formal and legal tender of cash.

4. SAME—LAND CONTRACTS—FORFEITURE NOT FAVORED.
   Forfeitures of land contracts are not favored in the law.

5. SAME—LAND CONTRACT—FORFEITURE.
   Forfeiture of a land contract may be provided for but provisions relied upon for forfeiture must be clear and unequivocal.

6. SAME—FORFEITURE—PERFORMANCE WITHIN REASONABLE TIME.
   Equity will not enforce forfeiture of land contract, where purchasers have offered to perform within a reasonable time and were refused.

7. CONTRACTS—TIME OF ESSENCE—EQUITY.
   Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 6, 7] 55 Am Jur, Vendor and Purchaser §§ 625, 642.
[3] 55 Am Jur, Vendor and Purchaser § 344.
[5] 55 Am Jur, Vendor and Purchaser § 621.

Appeal from Eaton; McDonald (Archie D.), J. Submitted June 19, 1952. (Docket No. 51, Calendar No. 45,498.) Decided September 3, 1952.

Bill by Rose Bilandzija against Shirley E. Shilts to set aside forfeiture of land contract and restrain action of ejectment. Decree for defendant. Plaintiff appeals. Reversed and decree entered for plaintiff.

*Howard W. Cavanagh* (*Wendell L. Schoder,* of counsel), for plaintiff.

*George W. Watson* (*George W. Watson, Jr.,* of counsel), for defendant.

DETHMERS, J. June 7, 1946, the defendant entered into a land contract to sell a certain 10-acre farm in Eaton county to Orval and Elsie Ganger. By proper assignment the plaintiff herein has succeeded to all their rights, as vendee. On June 15, 1950, plaintiff received from the defendant a notice of forfeiture for nonpayment of an instalment of principal and interest, and demand for possession. The defendant later refused to accept payment of the arrears and commenced an action in ejectment. Thereupon plaintiff filed the instant bill of complaint in chancery to set aside the forfeiture, and to enjoin the ejectment suit. She paid into court $202, the 1950 arrears of principal and interest then due, and later paid into court the instalment of principal and interest required for 1951.

Issue was joined, the court heard the proofs and entered a decree dismissing the bill of complaint. Plaintiff appeals.

The land contract was for the principal sum of $2,500, of which $500 was paid down, the balance to be paid $100 or more annually on the principal, plus

annual interest at 6%. From its inception, June 7, 1946, the payments were made by the original vendees, Mr. and Mrs. Ganger, according to contract until early in 1949 when Mr. Ganger died. The defendant (vendor) agreed with Mrs. Ganger to wait 90 days for the annual instalment due June 7, 1949, and at the end of that time, she being still in default, he started summary proceedings before a circuit court commissioner in Eaton county to terminate the contract. Mrs. Ganger was unable to pay, and the plaintiff paid up the $208 principal and interest then due, which redeemed from the summary proceedings, paid Mrs. Ganger $600 and paid up some other matters that Mrs. Ganger owed. On November 3, 1949, Mrs. Ganger assigned her interest as vendee to the plaintiff.

On June 1, 1950, 6 days before the next instalment and interest of $202 would be due (if due June 7th), plaintiff, who lived in Battle Creek, went to the bank in Olivet, in Eaton county, near the 10-acre farm, and then to the 2 banks in nearby Charlotte, to make the annual payment. She did not find the contract in one of them, as she expected, was unsuccessful in trying to locate Mr. Shilts, the vendor, did not remember where his farm was. She went to Charlotte again on June 3d, attempted to make payment to the defendant's attorney who had indorsed her payment of the 1949 instalment for Mrs. Ganger, was unsuccessful, went back to the Olivet bank and on June 14th asked Mr. Tyson, the vice-president, to accept the $202 in cash and give it to Mr. Shilts. The banker preferred that she leave her check instead of cash and she did that. Then Mr. Shilts refused to receive the check, not on the ground that it was no good, or not a proper tender, but he told the bank officer that "the time had gone by" and he would not accept it. The next day plaintiff received from the defendant a notice of forfeiture and demand for possession.

She claims that under the circumstances equity should intervene to relieve her from the attempted forfeiture of her rights in the land contract and her investment therein. When she took the contract from Mrs. Ganger she made the first payment for her in 1949, $208, to defendant or his attorney in his office in Charlotte. At that time she told them she did not want to make payments to Mr. Shilts, she wanted to make payments in a bank. Mr. Shilts nodded assent. From June 1st to June 14th she made "about 10 trips" to Charlotte and Olivet, trying to make the payments. The contract itself did not indicate the address or place of residence of the vendor, nor did it indicate where the payments were to be made. While the contract declared that time should be deemed of the essence of the contract, it did not specify any exact date on which the annual payments should be made. It merely required that the balance be payable "at the rate of $100 or more annually upon the principal," and interest "payable annually" at 6% per annum. Assuming, as the trial court held, that the payments were due each June 7th, plaintiff on June 1st began efforts to make the 1950 payment, $202, and continued every reasonable effort to do so throughout, until she finally left her payment by check at the Olivet bank, to be given to Mr. Shilts. He refused it, on June 14th, 7 days after the first possible due date which this plaintiff could be supposed to meet. A week later Mr. Shilts started the ejectment proceedings. Had he started summary proceedings, as he had earlier started against Mrs. Ganger, redemption could follow and the arrears might be paid up. From ejectment, plaintiff's remedy must be in chancery, to invoke equitable relief against forfeiture.

In the absence of a due date plainly fixed in the contract, and in the absence of a place of payment established therein, plaintiff made reasonable effort

to comply with the requirements for payment of the 1950 instalment. The defendant makes no showing of harm or loss resulting from the short delay in making the instalment payment. His refusal to receive the check from the bank on the sole ground that it was too late obviated the need for making a more formal and legal tender of cash. The entire balance due the defendant on the contract was approximately $1,700. Plaintiff has paid the arrears into court, and also the 1951 requirement. She testified that she had sold the contract to a Mr. Bishop for $5,000, and that he had entered into possession, but had to be removed because she could not make good for his possession. While the contract declared that unless the vendees should comply with its requirements "at the respective times, and in the manner above limited and specified," or forfeit all rights, no time or place of paying the annual instalment was therein "limited and specified."

"Forfeitures are not favored in the law, and, while they may be contracted for, the provisions of contracts relied upon to establish them must be clear and unequivocal." *John* v. *McNeal,* 167 Mich 148.

Appellee relies on some statements found in *Elbom* v. *Pavsner,* 225 Mich 213. However, the conclusion reached in that case fits into the circumstances of the case now before us:

"Under the circumstances shown here, where plaintiffs have offered within reasonable time to perform on their part and were refused, equity will not enforce a forfeiture against them."

In *Hubbell* v. *Ohler,* 213 Mich 664, the vendee was in default in making a payment of interest and taxes in a land contract requiring payment of $100 and interest each year. When it was assigned to the plaintiff there was due $220. Plaintiff, to obtain the as-

signment, paid vendee approximately $1,000. Under circumstances quite comparable to the instant case, this Court in its decree relieved the plaintiff from the forfeiture.

"We have repeatedly held that equity will not render aid in enforcing forfeitures, but will interpose to relieve from them," citing many cases. *Hodges* v. *Buell,* 134 Mich 162.

"Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, as in stipulated damages, if the stipulation is not reasonable, courts will not regard it." *Richmond* v. *Robinson,* 12 Mich 193.

A decree may be entered in this Court setting aside the forfeiture, permanently enjoining the prosecution of the ejectment proceeding, and allowing the plaintiff 60 days to continue or complete performance of the requirements of the land contract as vendee in accordance with its terms. Costs to appellant.

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

The late Chief Justice NORTH did not sit.

## WIELAND *v.* DOW CHEMICAL COMPANY.

1. WORKMEN'S COMPENSATION—TEST OF EARNING CAPACITY.
   The test of an injured employee's right to compensation is his inability by reason of the accident to work and earn wages in the employment at which he was engaged when injured.

2. SAME—EARNING CAPACITY—ORDINARY PERMANENCY.
   An employee who accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency thereby establishes a present earning capacity equal to such wages, whatever may be his physical condition.

3. SAME—EARNING CAPACITY—RESUMPTION OF WORK.
   Plaintiff, an unskilled lathe operator, whose left hand was injured and who received compensation for upwards of a month until he resumed employment, who thereafter continued to work at the same and heavier work at increased pay, established an earning capacity which was not shown to have diminished at the time of or during 7-month period of layoff for lack of work beginning nearly 9 months after resumption of work after injury, hence he was not entitled to workmen's compensation during such layoff.

Appeal from Workmen's Compensation Commission. Submitted June 4, 1952. (Docket No. 25, Calendar No. 45,178.) Decided September 3, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 58 Am Jur, Workmen's Compensation §§ 282, 284, 285.

[1–3] Right to compensation as affected by fact that injured employee earns, or is offered, as much as, or more than, before the injury. 149 ALR 413.

"Incapacity for work" or the like, as including inability to obtain work following an injury. 33 ALR 115.

Benjamin A. Wieland presented his claim for further compensation against Dow Chemical Company, employer, and Zurich General Accident & Liability Insurance Company, Ltd., insurer, for injuries sustained while in its employ. Award to plaintiff. Defendants appeal. Reversed.

*Bernard S. Frasik* (*James Scott Wood,* of counsel), for plaintiff.

*Stanton, Montgomery, MacKenzie & Cartwright* (*Harvey D. Walker,* of counsel), for defendants.

DETHMERS, J. Defendants appeal from an award of the workmen's compensation commission allowing plaintiff compensation for total disability for the period from February 12, 1950, to September 12, 1950.

On April 11, 1949, bones in plaintiff's left hand were fractured in an accidental injury arising out of and in the course of his employment with defendant Dow. As a result, he was off work until May 19, 1949, and received compensation for that period. He then returned, at the same pay, to his regular work as an unskilled lathe operator. Due to pain in his hand, he was permitted for a time to run somewhat lighter stock through his same machine and on that same account lost a few additional days' time. Plaintiff testified that his left hand hurt him on the job and that he used his foot rather than his left hand on a wrench to tighten the parts he was machining into position on the lathe. This was also the practice of many other men. Plaintiff received complaints about the amount of material scrapped due to his failure to adequately tighten the chuck into the machine. Later he requested that his classification be raised to first class operator. His request was refused at first on the grounds of lack of experience and production on his part, but ultimately it was granted with

a corresponding increase of pay. He testified that in his new classification it was necessary that he do the best, if not the most, work and that he had done first-class work. He admitted that on his new job he operated just as heavy a machine and lifted and worked on heavier parts than was the case at the time of his injury. The proofs show that he did this work in a proper and satisfactory manner.

On February 12, 1950, plaintiff was laid off for lack of work, along with other men doing the same kind of work. He was called back to his job as a first-class lathe operator on September 12, 1950, and continued at it steadily and satisfactorily, at full pay, until the date of hearing on October 3, 1950. During the layoff he received unemployment compensation for 20 weeks. During that period he was offered a job as lathe operator by another concern, discussed and went through the job for an hour with his prospective employer and told him that he could not do the job because it necessitated opening and closing the chuck with his left hand. He also attempted to conduct an awning business but testified that he could not physically do what was required in that work because of his injured hand and, further, that he had tried 2 other ventures with scant success, failing, however, to establish the injured hand to have been a factor. Plaintiff also adduced medical testimony to establish some loss of grip, soreness and tenderness in an area the size of a dime in the palm of the left hand, and overlapping of fingers and lack of complete closure of the hand.

Was plaintiff entitled to compensation for the 7-month period of his layoff? Plaintiff relies on such cases as *Smith* v. *Pontiac Motor Car Co.*, 277 Mich 652; *Cundiff* v. *Chrysler Corp.*, 293 Mich 404; *Shaw* v. *General Motors Corp.*, 320 Mich 338. They are not in point. Although plaintiff was at first, after his injury, permitted to machine lighter parts on the same

old lathe, there is no showing that this practice continued. On the contrary, prior to his being laid off for lack of work, he had been promoted to a better position and worked at as heavy a lathe on heavier stock than that on which he had worked at the time of injury. This is not, as in the cited cases, a case of a plaintiff being returned and kept, after injury, at light work or temporary, makeshift, odd lot or nondescript employment, nor was he unable at the time of the layoff to do the work he was employed to do at the time of the accident. Despite medical testimony showing some disablement of the hand and proof of discomfort and pain in operating a lathe or putting up awnings, it was established that plaintiff was able to and actually did do his old work for a time and thereafter, upon promotion, even heavier work than before, in a satisfactory manner, establishing an earning capacity thereat which was not shown to have diminished at the time of or during his layoff. Applicable is the following:

"The test of an injured employee's right to compensation is his inability by reason of the accident to work and earn wages in the employment at which he was engaged when injured." *Levanen* v. *Seneca Copper Corp.*, 227 Mich 592, 601.

"Admittedly plaintiff suffers some disability in that he is unable to flex completely the injured thumb but there was no showing that the disability had in any way lessened his earning capacity. * * * He was laid off due to regulations of the union to which he belonged and not because of inability to perform his work. The record is devoid of a showing that during this period his injury would have prevented him from performing his old job at the pasteurizer. To entitle him to a resumption of payments the burden was upon him to prove that because of the accident he was suffering a disability that lessened his earning capacity. Proof of a physical condition which in no sense impairs the employee's wage-earn-

ing ability is not sufficient." *Kalonsky* v. *Goebel Brewing Co.*, 282 Mich 638, 640.

"When an employee accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency, as here, there is no room for argument that he has not thereby established a present earning capacity equal to such wages, whatever may be his physical condition." *Markey* v. *S.S. Peter & Paul's Parish*, 281 Mich 292, 299.

There is no competent testimony in the record to support the commission's finding that, during the period in question, plaintiff was disabled from doing the unskilled labor at which he was engaged at the time of his injury.

Reversed, with costs to defendants.

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

BUTZEL, J., and the late Chief Justice NORTH did not sit.

## TRISCH *v.* FAIRMAN.

1. APPEAL AND ERROR—ORAL AGREEMENT TO LEAVE FARM—EVIDENCE—FINDING OF COURT.

   Trial court's finding that plaintiffs had established by a preponderance of the evidence an oral agreement by one defendant to leave them her farm in return for their agreement to live on the premises, put cattle on it, take care of her and give her 1/3 of the crops during her lifetime is not disturbed under record presented on appeal in suit for money decree and imposition of lien on farm which contracting defendant conveyed to other defendants who ousted plaintiffs after they had occupied the farm 10 years.

2. FRAUDS, STATUTE OF—PLEADING.

   The defense that oral agreement sued on was unenforceable because it was subject to the statute of frauds must be affirmatively pleaded (CL 1948, § 566.106; Court Rule No 23, § 3 [1945]).

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—STATUTE OF FRAUDS—PLEADING.

   The defense of the statute of frauds may not be urged on appeal, where such defense was not affirmatively pleaded, notwithstanding fact that defendants' objections to parol evidence of an oral agreement were overruled and plaintiffs failed to object in the trial court to defendants' failure to plead the statute (CL 1948, § 566.106; Court Rule No 23, § 3 [1945]).

4. FRAUDS, STATUTE OF—PERFORMANCE OF ORAL AGREEMENT.

   Performance by plaintiffs of an oral contract whereby they were to move onto farm and live thereon, put cattle on it,

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 49 Am Jur, Statute of Frauds § 556 *et seq.;* 49 Am Jur, Specific Performance § 175.

Generally as to recovery for improvements, see 27 Am Jur, Improvements § 5 *et seq.*

[2, 3] 49 Am Jur, Statute of Frauds §§ 601–604.

[4] 49 Am Jur, Statute of Frauds § 419 *et seq.*

take care of defendant owner and give her 1/3 of the crops during her lifetime in return for her agreement to leave the property to them takes the case out of the statute of frauds and permits plaintiffs to sue for a money decree and impose lien upon such farm to secure payment thereof (CL 1948, §§ 566.106, 566.110).

5. IMPROVEMENTS—MEASURE OF RECOVERY.

Party who is in possession of land under a contract providing for his ultimate acquisition of title from the owner and proceeds, in reliance thereon, to make reasonable improvements suitable to the premises in question and at a definite cost to himself should be permitted to recover the expense of the improvement unless shown to be unreasonable or utterly unadapted to the premises, where the owner breaches the contract, not the difference between the value of the land before and after the improvement was made and due to its having been made.

6. EQUITY—MONEY DECREE—LIENS—OFFSET—EVIDENCE—DAMAGES.

No allowance of any specific amount for alleged deterioration of farm during 10 years of occupancy by plaintiffs as an offset against them in their suit for money decree for improvements and imposition of a lien is made, where there is no actual proof of the amount of such damage and trial court allowed plaintiffs only $800 on item of $3,150 for bulldozing some of the land.

Appeal from Wayne; DesJardins (George W.), J., presiding. Submitted June 5, 1952. (Docket No. 35, Calendar No. 45,416.) Decided September 3, 1952.

Bill by Leland Trisch and wife against Libby Fairman and others for money decree secured by lien on farm. Decree for plaintiffs. Defendants appeal. Affirmed.

*Roland O. Kern,* for plaintiffs.

*Timothy C. Quinn,* for defendants.

DETHMERS, J. This is a suit in chancery for money decree and, to secure payment thereof, for a lien on a farm which plaintiffs allege defendant Fairman orally agreed to leave them at her death on condition that they live on the premises, put cattle on it, take care of her, and give her 1/3 of the crops during her lifetime. Claiming performance on their part, plaintiffs brought this action after defendant Fairman conveyed the premises to the defendants Robinson and the latter had ousted plaintiffs. From decree for plaintiffs the defendants appeal.

Defendants contend that the oral agreement was not established by a preponderance of the evidence. Plaintiffs testified to the existence of the agreement and defendant Fairman testified to the contrary. Defendants pointed to claimed facts which they urge are consistent with a landlord and tenant relationship rather than with a contractual relationship of the character claimed by plaintiffs. Such alleged facts are that plaintiffs permitted the premises to deteriorate; that they testified that defendant Fairman had agreed to furnish materials for repairs, clover seed, and money for payment of taxes; that the farm was operated on shares; that plaintiffs failed to care for defendant Fairman adequately; that plaintiff wife, on the witness stand, referred to the arrangement with defendant Fairman as renting. On the other hand, plaintiffs stress the fact, as did the trial court in its opinion, that their actions during 10 years of occupancy of the farm are inconsistent with mere tenancy for a term and strongly persuasive of the existence of the claimed oral agreement. Plaintiffs' actions, referred to, consist of their making many improvements to the farm, such as laying a cement floor in the basement of the house they occupied, installing a furnace and stoker, pouring cement footings for and building large timbers into a barn, buying and erecting 200 rods of woven

wire fence, planting fruit trees, replacing and installing windows, et cetera, all at a cost to plaintiffs of some $1,161.50 independent of their labor in connection therewith. Furthermore, plaintiffs bulldozed and leveled a number of acres to make them tillable. They testified they spent $3,150 on that account. Under the circumstances, we cannot say that plaintiffs failed, as defendants put it, to establish the oral agreement by a preponderance of the evidence or, to apply the rule in equity cases, that had we been in the position of the trial court we would have found otherwise than that the oral agreement had been entered into as claimed by plaintiffs.

Defendants claim error in admission of parol evidence to establish an oral agreement in violation of the statute of frauds.[1] Defendants' objections to the testimony were overruled on trial. The defense of the statute must be, but was not, affirmatively pleaded.[2] There is no validity in defendants' claim that under our holding in *Burlage* v. *Radio Cab Co.*, 321 Mich 319, they may urge the defense of the statute of frauds on appeal, though not affirmatively pleaded below, on the ground that plaintiffs failed to object below to defendants' failure to plead the statute. Furthermore, performance on plaintiffs' part takes the case out of the statute,[3] and this is true as well in a case such as this as in suits for specific performance. See *Van Camp* v. *Van Camp,* 291 Mich 688. No question has been raised concerning the propriety of bringing this suit in equity.

Defendants urge that the court erred in allowing plaintiffs damages measured by their expenditures for improvements (except as relates to the bulldozing) rather than the increased value of the premises occasioned thereby, citing *Kimmel* v. *Peach,* 240 Mich

[1] See CL 1948, § 566.106 (Stat Ann § 26.906).—REPORTER.
[2] See Court Rule No 23, § 3 (1945).—REPORTER.
[3] See CL 1948, § 566.110 (Stat Ann § 26.910).—REPORTER.

697. The rule of that case applies when persons making the improvements are guilty of conduct warranting rescission, by the opposite party, of the contract under which the former are in possession, and perhaps as well in the case of improvements made by an innocent trespasser or one in possession under mistaken claim of title. The application of that rule would be inequitable indeed in cases, as here, in which a party, in possession under a contract providing for his ultimate acquisition of title from the owner, proceeds, in reliance thereon, to make reasonable improvements, suitable to the premises in question, at a definite cost to himself, only to find himself thereafter the innocent victim of the owner's breach of the contract and refusal to convey as agreed. In such cases the expense of the improvement should be recovered unless shown to be unreasonable or utterly unadapted to the premises.

Finally, defendants complain that the court should have balanced the equities by offsetting against the improvements an amount for damages resulting from plaintiffs' neglect and misuse of the premises. The court did allow plaintiffs only $800 on the $3,150 bulldozing item which the court considered unreasonable and in excess of any benefits to the extent that "it shocks one's sensibilities." Defendants showed that the premises had deteriorated during 10 years of possession by plaintiffs, but the latter testified that this was in a large part due to defendant Fairman's failure to furnish materials for repairs as agreed. There was no testimony which rose to the dignity of actual proof of the amount of such damages in dollars and cents, merely a guess hazarded by one of the witnesses without any pretense

of itemizing, delineating or particularizing the same.

Affirmed, with costs to plaintiffs.

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

The late Chief Justice NORTH did not sit.

---

## LABOUR *v.* BERGIN.

1. FRAUDULENT CONVEYANCES—PAYMENTS ON MORTGAGES ON ENTIRETIES PROPERTY DURING INSOLVENCY.

   Payments by insolvent judgment debtor from his individual earnings upon mortgages on entireties property while judgment was outstanding constituted a "fraudulent conveyance" entitling trustee in bankruptcy to lien on the property notwithstanding the mortgages were executed subsequent to the date of insolvency (CL 1948, § 566.11 *et seq.*).

2. SAME—LIEN ON ENTIRETIES REALTY—PAYMENT—MORTGAGE LIEN—EXEMPTIONS—FORECLOSURE.

   Lien of trustee in bankruptcy of judgment debtor upon entireties realty upon which such debtor and his wife had executed mortgages after his insolvency is limited to amount of payments made by judgment debtor from his individual earnings and subject to balance due on mortgages and debtor's exemption under the law, such lien being foreclosable if not paid within 4 months (CL 1948, § 566.11 *et seq.*; § 623.73 *et seq.*).

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 10, 1952. (Docket No. 59, Calendar No. 45,514.) Decided September 3, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 6 Am Jur (Revised), Bankruptcy §§ 906, 1103 *et seq.*, 1180.

Bill by George F. LaBour, trustee of the estate of John Raymond Bergin, bankrupt, against John Raymond Bergin and wife to establish a lien on real property held as tenants by entireties. Decree granting lien on automobile purchased with proceeds of mortgage loan on the real estate. Plaintiff appeals. Reversed and decree entered for plaintiff.

*Gillard & Gillard,* for plaintiff.

*McMahon & Cook* and *Walter B. Freihofer,* for defendants.

BUTZEL, J. Plaintiff, as trustee of the estate of John Raymond Bergin, bankrupt, sought to establish a lien on the joint property of defendants Bergin and his wife, Frances, in the amount of $2,300, representing payments of $500 and $1,800 made by Bergin from his individual earnings on 2 mortgages respectively $500 and $2,000 theretofore placed on the joint property by Bergin and wife. At the time of the payments there was outstanding against Bergin a 1935 judgment, duly renewed in 1945, which with interest exceeded the amounts paid on the mortgages. An unsuccessful effort had been made to collect the judgment. Bergin was insolvent at the time of his payments on the mortgages. The value of the Bergin interest in the joint property at the times the mortgages were executed was thereby decreased, and when payments were made by Bergin on the mortgages from his individual earnings the value was correspondingly increased. It was equivalent to Bergin taking his money and instead of paying his outstanding debts, placing it into jointly held property, and thus attempting to place it beyond the reach of his creditors. The value of the jointly held property exceeds the aggregate amount of defendants' exemptions, the balance due on the mortgage and the

amount of the lien claimed. The proceeds from the $2,000 mortgage had been used by Bergin and wife to purchase an automobile which was held in their joint names, and which Bergin also claims as exempt on the ground that he uses it in the furtherance of his business.

The trial judge held that the plaintiff was entitled only to a lien on the automobile, subject to whatever exemptions Bergin might be entitled. The court in its opinion cited the cases of *McCaslin* v. *Schouten,* 294 Mich 180, and *Dunn* v. *Minnema,* 323 Mich 687 (7 ALR2d 1099), to the effect that when an insolvent debtor uses assets or makes payment on what constitutes an investment in property in joint names so that it becomes beyond the reach of creditors, he has worked a constructive fraud against which relief should be granted.

In the *McCaslin Case,* defendant used his individual funds to reduce the mortgage debt on his home, which was entireties property, thereby increasing the equity in entireties property and preventing his creditors from reaching his individual funds. In the *Dunn Case,* the defendant bankrupt used his funds to continue payments on a jointly-held land contract upon which he had begun payments before he became insolvent. We allowed a lien to be imposed on that part of the value of the property, over and above the value of the homestead exemption, which had been augmented by payments made subsequent to insolvency. We believe that these 2 cited cases firmly establish plaintiff's right to impose a lien on the home of the parties. As frequently happens, there may be some slight difference in facts, but there is but little in the rule established which entitles plaintiff to a lien in the instant case. Also, see *Newlove* v. *Callaghan,* 86 Mich 297, and *Caswell* v. *Pilkinton,* 138 Mich 138.

The defendants, while conceding the correctness of the principle of the 2 cases cited by the trial judge, contend they should not apply here because the mortgage liabilities were incurred after the date the bankrupt became insolvent. The uniform fraudulent conveyance act (CL 1948, § 566.11 *et seq.* [Stat Ann § 26.881 *et seq.*]) covers conveyances made during insolvency with the effect of diminishing the debtor's assets to the damage of his creditors. The creditor here was just as much damaged as he would have been had the encumbrance existed at the time the bankrupt became insolvent. We find no merit in defendants' claim that the rule of the 2 cases was limited to the creation and building up of a tenancy by the entireties during insolvency, not the mortgaging of an existing entireties estate subsequent to the date of insolvency.

The decree of the lower court is reversed and one will be entered as prayed, giving plaintiff a lien on the jointly-owned realty in the amount of defendant Bergin's payments from his undivided funds on the mortgage debts, plus costs of both courts, but subject to the small balance, if any, due on the mortgage and defendants' exemption under the law.* The decree shall provide for the payment of the lien within 4 months and remanding the case to the trial court for the enforcement of the lien and for foreclosure in case of nonpayment.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

* See CL 1948, § 623.73 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1572 *et seq.*).—REPORTER.

BLUMROSEN *v.* SILVER FLAME INDUSTRIES, INC.

SILVER FLAME INDUSTRIES, INC., *v.* BLUMROSEN.

1. SALES—DIVISIBLE CONTRACT TO SELL.
   A divisible contract to sell is one in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation (CL 1948, § 440.76).

2. CONTRACTS—RESCISSION IN TOTO.
   The right to rescind an indivisible contract must be exercised *in toto*.

3. SAME — RESCISSION — RECOVERY — PAYMENTS — DAMAGES FOR BREACH.
   Purchaser of 4 heating units for a block of 4 stores who did not make a complete rescission of contract of purchase which was not shown to have been divisible was not entitled to recover payments made thereunder or damages for breach thereof.

Appeals from Wayne; Ferguson (Frank B.), J. Submitted June 3, 1952. (Docket Nos. 12, 13, Calendar Nos. 45,319, 45,320.) Decided September 3, 1952.

Action in common pleas court of the City of Detroit by Sol Blumrosen against Silver Flame Industries, Inc., a Michigan corporation, for money due after rescission of instalment contract. Directed verdict and judgment for defendant.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur, Sales §§ 140, 141.
[2] 12 Am Jur, Contracts § 444.
[3] Generally as to recovery of payments by purchaser, see 46 Am Jur, Sales §§ 666 *et seq.*, 758.

Action in common pleas court of the City of Detroit by Silver Flame Industries, Inc., against Sol Blumrosen for instalments due on instalment contract. Directed verdict and judgment for plaintiff.

Both cases appealed to circuit court by Sol Blumrosen where judgments were affirmed. Sol Blumrosen appeals. Affirmed.

*Sol Blumrosen, in pro. per.*

*Silverston & Kabatsky,* for Silver Flame Industries, Inc.

REID, J. Plaintiff Sol Blumrosen in the first above entitled case (hereinafter referred to as appellant) appeals from a judgment for the appellee Silver Flame Industries, Inc., with costs to appellee, rendered in the circuit court on an appeal to that from the common pleas court of the city of Detroit where verdict for appellee had been directed and judgment entered thereon; and said Blumrosen also appeals from a judgment in favor of appellee Silver Flame Industries, Inc., in the second above entitled case and against Blumrosen (defendant in said second case) in the sum of $625 with costs to Silver Flame Industries, Inc., likewise rendered in circuit court on appeal from the common pleas court of the city of Detroit where verdict had been directed for appellee and judgment entered thereon.

On May 22, 1950, Silver Flame Industries, Inc. (hereinafter referred to as appellee), began suit (the second suit above entitled) in the common pleas court of the city of Detroit to recover for payments past due and unpaid under an agreement in writing with appellant Blumrosen (a practicing attorney since 1913), under which appellee agreed to sell to appellant 4 ceiling suspended furnaces and 4 oil storage tanks, and install said heaters and tanks in

a block of 4 stores owned by appellant at 9141 Dexter, 3701 Joy road, 3703 Joy road and 3705 Joy road, Detroit, for a gross sum of $1,988.93 payable in specified instalments with interest. The agreement was without acceleration clause for defaulted payments, and contained no express warranties or express guaranties.

When appellee began its said suit, appellant had paid a total of $1,096.26 and had defaulted on 5 monthly payments amounting to $625 and still owed a balance of $1,000 on said agreement. The contract was an agreement to sell with the vendor retaining the title until payment of the full amount.

In his answer filed June 19, 1950, to the declaration in the suit against him, appellant admitted the delivery of the 4 furnaces and tanks, denied his default in payment and claimed that appellee made representations, guaranties and warranties to appellant before appellant signed the agreement, which representations, guaranties and warranties were breached by appellee, and asserted that he, appellant, had notified appellee that he, appellant Blumrosen, had rescinded the agreement and that the agreement was null and void; and in his said answer, appellant further stated that there was an implied warranty of fitness and suitability of the equipment, which warranty was breached by appellee and that therefore, he, appellant Blumrosen, had rescinded the agreement, that the heating units were worthless to him. Included with his said answer is appellant's claim of set-off and recoupment for $1,100, the amount paid by him on the agreement, also for $400, the approximate cost of painting the stores damaged by leak of the equipment and for $200, the approximate cost of removing the equipment.

On May 23, 1950 (the next day after he was sued by appellee), appellant Blumrosen started suit (the first suit above entitled) against appellee. In his

amended declaration are 3 counts. In count 1, appellant alleged breach by appellee of certain representations, guaranties, warranties and promises (claimed by appellant to be false) made to appellant before he signed the agreement in question and that therefore appellant has rescinded the agreement and that appellee became indebted to him for about $1,500, the moneys paid by him on the agreement. Count 2 alleged breach of implied warranty, and that for such breach appellant rescinded the contract, and that appellee became indebted to appellant for approximately $1,500 paid by him on the agreement. Count 3 of appellant's declaration alleges that because of the failure of the heating units "to heat * * * cleanly," appellant will be obliged to repaint the stores at an approximate cost of $400; and further that because of the failure of the heating units "to heat * * * comfortably and cleanly, and at a cost no greater than gas heating units," appellant will be obliged to remove the units at a cost of approximately $200; and further that by reason of those facts, appellee has become indebted to appellant for $1,500, wherefore appellant asks judgment.

The 2 suits were tried together before the common pleas court with a jury, though not technically consolidated for trial.

It will be noted that appellant, consistently in his pleadings in both suits, claimed that he had made rescission and claimed damages consequent upon and consistent only with rescission by him.

After the jury had been sworn, an opening statement was being made by appellant, and it became apparent he was claiming damages which could be awarded only on the theory that the agreement was still valid and binding as an existing contract. Appellant made no offer to amend his pleadings to state that he claimed alternative remedies or awards consistent only with alternative theories. The court

required an election. As a conclusion of his opening statement to the jury, appellant said:

"We will show you that sometime in the spring of 1950 I served this Silver Flame Industry with a notice of rescission, that I had rescinded this contract and demanded my money, and asked for the return of my money. I will show you that thereafter I was forced to expend money in painting and redecorating and removing dirt, and I feel and I maintain, members of the jury, that if I establish these facts to your satisfaction, that I ask for a verdict for the return of the money that I have paid this Silver Flame Industry."

The trial court in effect ruled that appellant stood upon his claimed rescission, and was asking for a return of the money that he had paid appellee.

Appellant introduced testimony tending to show damages as for a breach of the contract, among other things. There was undisputed testimony that appellant had removed 3 heating units from his stores, but that 1 of the heating units was retained by the appellant and was still in use as a heating unit in the drugstore. The agreement contained only a lump sum as the consideration for the 4 heating units and tanks with no criterion expressed in the contract for the separate values of the units.

The trial court ruled that the contract was indivisible and that under his pleadings and opening statement, appellant Blumrosen could not recover for damages occasioned by breach of the contract.

" 'Divisible contract to sell or sale' means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation." CL 1948, § 440.76 (Stat Ann § 19.316).

"As a general rule the right to rescind must be exercised *in toto*. The contract must stand in all

its provisions or fall altogether. Accordingly a party cannot repudiate a contract or compromise so far as its terms are unfavorable to him and claim the benefit of the residue. A partial rescission, however, may be allowed where the contract is a divisible one." 12 Am Jur, p 1027, § 444.

"A contract to 'manufacture, transport, deliver, and set up ready for use' chairs for equipment of a theater for a stated price per chair payable on completion of the contract, *held* entire and not divisible." *A. H. Andrews Co.* v. *Colonial Theatre Co.*, 283 Fed 471 (per syllabus 2).

There is nothing contained in the contract in question nor in the testimony, to show what proportionate share of the whole cost of furnishing and installing the equipment in question, would be attributable to the heating unit retained in the drugstore as compared with the value and cost attributable to the 3 units which appellant Blumrosen removed from 3 stores and held ready for appellee's call.

The trial court correctly ruled that the contract in question is indivisible. It being indivisible, appellant's attempt at rescission must fail, for he did not make a complete rescission. His rescission having failed, appellant Blumrosen's case must fail, for he based his whole case upon rescission, in each case.

The judgment in each case is affirmed. Costs of both courts in each case to appellee Silver Flame Industries, Inc.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

The late Chief Justice NORTH did not sit.

## MARROBIE *v.* MARROBIE.

1. DIVORCE—CREDIBILITY OF PARTIES.
   Decree of divorce, based upon findings of fact by the trial judge who listened to the parties and their witnesses give different versions of various events is not disturbed, where based largely upon an evaluation of the credibility of the parties.

2. SAME—AWARD OF PROPERTY.
   Decree of divorce awarding substantially all of the property to the wife is not disturbed, where it appears the couple are childless, that the wife has been employed outside of the home all of the time during marriage lasting 18 years and that the husband had gambled away or hypothecated much of the earnings of the parties.

3. SAME—HOME—HOUSEHOLD FURNITURE.
   Decree of divorce awarding home of the parties to the wife is modified to award to her the household furniture and furnishings, where she has been employed outside the home during entire marriage of 18 years and been the sole support of herself and husband during a part of the time.

4. SAME—DIVISION OF PROPERTY—VACANT LOT.
   Vacant lot, valued at $400, is awarded to husband in suit for divorce, where decree of trial court is silent on the matter and most of the rest of the property was awarded the wife.

5. SAME—ALIMONY.
   A court cannot make an allowance of alimony after granting a decree of absolute divorce, where no alimony was awarded nor reservation of the question of alimony made.

6. SAME—EXTREME CRUELTY—EVIDENCE.
   Plaintiff wife's conduct *held,* not such as to support husband's claim of extreme cruelty on her part nor to defeat her cause for divorce.

7. SAME—EXTREME CRUELTY—EVIDENCE.
   Nonsupport, constituting extreme cruelty on the part of husband, *held,* to have justified decree of divorce to wife (CL 1948, § 552.8).

---

REFERENCES FOR POINTS IN HEADNOTES

[2–4] 17 Am Jur, Divorce and Separation § 445.
[5] 17 Am Jur, Divorce and Separation §§ 514, 626 *et seq.*
[7] 17 Am Jur, Divorce and Separation § 155.

8. SAME—COSTS.

No costs are allowed on husband's appeal in suit for divorce, where decree was modified on appeal and neither party prevailed in full.

Appeal from Wayne; Miller (Guy A.), J. Submitted June 4, 1952. (Docket No. 24, Calendar No. 45,226.) Decided September 3, 1952.

Bill by Ann Marrobie against Abe Marrobie for divorce on ground of extreme cruelty. Decree for plaintiff. Defendant appeals. Modified and affirmed.

*E. O. Kugel,* for plaintiff.

*Arthur Mitchell,* for defendant.

REID, J. Defendant Abe Marrobie appeals from a decree of divorce granted to the plaintiff, which decree dismissed defendant's cross bill, and defendant appeals, also, from the award of property to plaintiff.

The parties were married July 12, 1930, at Toledo, Ohio, by a justice of the peace. They have no children. The parties live in the city of Detroit, and have lived in Detroit for more than 2 years last past. They separated about July 10, 1948. During part of the early years after the marriage, defendant was ill and unable to work. Plaintiff had to work at housework for other people and also in a restaurant until defendant was able to work. She went to work for Bundy Tubing November 11, 1936, because she had no money, though defendant was then able to work. Plaintiff testified that from her earnings she maintained the home, bought groceries and took care of the bills, and what was left of her earnings, she put in the "kitty," *i.e.,* a safe for their joint savings.

She worked steadily at Bundy Tubing and is still employed there.

Plaintiff testified that the defendant used vile and cursing language toward her, and also that he falsely accused her of associating with other men. She claims that she drove some of her fellow employees in her car from their employment for their return to their residences, but denies improprieties. She claims that her working and earning of wages was made necessary by the insistence of defendant, during about 14 years of their married life.

Defendant admits that he lost $2,000 to $2,500 in gambling; plaintiff claims that he lost more than $2,500. Defendant admits that he rented safety deposit boxes in Toledo, Ohio, and Bowling Green, Ohio, to keep money to be used for gambling purposes, and names or describes several gambling places in Ohio and Michigan with which he is familiar. Plaintiff testified that while the parties each had a key to their safe where $8,400 was at one time kept, she found the safe locked and key gone when she filed the bill of complaint in this case and that she secured the services of a locksmith to open the safe and that no money was found in the safe.

Defendant testified that his wife had a loving disposition toward him until the last year before she filed the suit for divorce. He further testified that on Sunday he would wake her up to get his breakfast and she called him an opprobrious name and said, "Make your own breakfast," after he had cooked for himself all the week. He further testified:

"She got into an argument with me all the time. She used obscene language towards me. She broke my bed, and the kitchen chairs. This took place about a year ago, when she moved back into my home, after the divorce proceedings. She did not prepare meals for me for pretty nearly since we have been married. When I married her, she couldn't cook,

and I learned her to cook. I am the cook in my house. I still do the cooking. She kept house with the help of myself. I did the sweeping and cooking, dusting, and repair work. She used to get home at a quarter to 12, and I would see her in the house. One night 3 fellows met her in front of my home, and I made a report to the Fort and Green station. After she was working, and bowling, she used to get home about 2:30, and about a year before the divorce procedure was started, she used to come home at 4 o'clock in the morning. She would tell me it was none of my damned business where she had been. I have seen her in the company of other men. A year ago last summer, right across from the school. I was sitting in the park. That was before the divorce procedure. My wife was staying home with me. When we were separated, I didn't interfere with her. I had seen her in the company of other men before I separated from her on one occasion. One block from my home, right by Western high school. About 3 years ago. She told me it was absolutely none of my business."

While plaintiff was not recalled as a witness after defendant had given the above testimony, still much of the above testimony by defendant was inconsistent with testimony already given by plaintiff in her main case. She had testified that she had to break into the house because she found it locked and impliedly that was a contrary version as to the occasion on which he says she broke the furniture. Her failure to prepare meals was excusable by the fact that she had to work to support the household. Her being with other men in a car near their home, was explained at least inferentially by her testimony that she drove other employees from their employment. She testified that only women bowled at her bowling alleys and that she never gave any man a ride from the bowling alleys; and that defendant knew where she went; that she was treasurer of the bowling league, and bowled once a week. Defendant claims

he took her to the show once a month but does not show that he gave her any other opportunity for diversion.

Plaintiff further testified:

"I never told him I would rather go out alone. I tried to make this marriage a success. I went 100% of the way to make a success of it. * * * There was $8,440 in the safe, and $300 in a canary bird-seed can, up until 1948, and that money was gone. That was money that came from earnings of both of us. All my married life I had to account for my own money, and I never got any money from him to spend. I was told what to do, and how to do it, and when to breathe, with all the humiliation and embarrassment that went with it."

Defendant claimed that the largest amount ever in the safety box in the house was around $4,600.

The trial court in weighing the testimony of the parties, said:

"If it were a simple contradiction between her and him, I would believe her and discredit him. His appearance is distinctly unimpressive. His testimony was given in a shifty, evasive manner which words can not describe. The transcript of the testimony does not truly convey the impression of dishonesty which his words, plus his mannerisms, plus his personality, vividly portray. Add to this unfavorable impression the corroborative testimony of the brother [as to the amount of money counted that was in the safe and seed can], and the result, to my mind, is inevitable."

The trial court found that defendant had taken the $8,400 "in the kitty" as claimed by plaintiff, at about the time of the inception of the divorce proceedings.

We cannot say that we would have come to a different conclusion than that arrived at by the trial court, as to the credibility of the parties.

Defendant complains because the decree awarded practically all the property to plaintiff wife.

The reference in the testimony as to the property of the parties and its value, is casual and the testimony in that particular is in an inconclusive condition. The court seems to have had available, for the purposes of making the decree, information not shown in the record and presumably furnished by the parties for the purposes of entry of decree.

The report of the friend of the court says the agreed valuation of the residence at 4080 Page street, Detroit, jointly owned, is $5,200 or $6,000. The decree assigns this property to the wife, plaintiff, and also, United States savings bonds of the face value of $1,975, are assigned to the wife.

The report of the friend of the court further states other property as follows: A 1939 Plymouth automobile, in the wife's name and possession, but always considered as joint property; also household furniture and furnishings valued by the wife at $1,000 and by the husband at $500; also a vacant lot in Dearborn, Michigan, agreed value $400.

We assume that the trial court intended to assign to the wife the household furniture and furnishings and the decree shall be modified to assign the same to the wife. The vacant lot in Dearborn is not disposed of by the decree and the decree may be amended to assign whatever interest the parties have in the same to the husband. The record does not show how the title to the vacant lot in Dearborn stands.

The decree is silent on the subject of future support of wife. Where there is an absolute decree of divorce with no allowance of alimony nor reservation of the question of alimony, the court cannot make such allowance thereafter. See, *Moross* v. *Moross,* 129 Mich 27; *Kutchai* v. *Kutchai,* 233 Mich

569; *Harner* v. *Harner,* 255 Mich 515; *Mack* v. *Mack,* 283 Mich 365.

It is of considerable value to the husband to be freed from the wife's future support. He had gambled away and hypothecated much of the earnings of the parties.

The conduct of plaintiff was not such as to support defendant's claim of extreme cruelty on her part nor to defeat her cause for divorce. See *Stuart* v. *Stuart,* 311 Mich 30; *Trombley* v. *Trombley,* 313 Mich 80.

The wife is entitled to the decree of divorce on the ground of nonsupport (CL 1948, § 552.8 [Stat Ann § 25.88]) which is certainly to be considered as extreme cruelty on the part of defendant under all the circumstances of this case.

The decree may be modified in accordance with this opinion and as thus modified, is affirmed. No costs, neither party having prevailed in full.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

The late Chief Justice North did not sit.

ROWERDINK *v.* CAROTHERS.

1. DEEDS—SURVIVORSHIP OF GRANTEE—CONTINGENT REMAINDERS.
A deed of land to 2 grantees or survivor conveys a moiety to each for life, with remainder to the survivor in fee, and neither of them, by conveyance during his lifetime, can create a tenancy in common so as to cut off the contingent remainder.

2. COURTS—RULE OF REAL PROPERTY LAW—OVERRULING.
Cases establishing a rule of law as to real property will not be overruled in the absence of necessity.

3. DEEDS—CONSTRUCTION—EXTRINSIC FACTS.
Extrinsic facts shown *held,* without effect in construing deed to 2 grantees or survivor.

4. SAME—CONSTRUCTION—"OR"—"AND."
Word "or" in deed conveying to grantees "or survivor" does not require a different construction than if word "and" had been used.

5. SAME—CONSTRUCTION—CONVEYANCE BY SURVIVOR.
Quitclaim deed to plaintiff by survivor of 2 grantees in conveyance to them "or survivor," executed after other grantee had died, conveyed title to plaintiff.

Appeal from Grand Traverse; Brown (Charles L.), J. Submitted June 12, 1952. (Docket No. 52, Calendar No. 45,509.) Decided September 3, 1952.

Bill by Doris Rowerdink against Flossie Carothers to quiet title to real estate. Decree for plaintiff. Defendant appeals. Affirmed.

*Searl, White & Block,* for plaintiff.

*Charles H. Menmuir,* for defendant.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 14 Am Jur, Cotenancy § 6 *et seq.*

REID, J. This is in effect a bill of complaint filed for construction of a deed in which the grantees are "Alfred Carothers and Delarma Hackett, or the survivor of them." The decree of the trial court determined that plaintiff, the grantee of Hackett who survived Carothers, is the owner of the property. Defendant who claimed through Carothers, appealed.

The receiver of the Citizens State Bank of Fife Lake on November 13, 1937, petitioned the circuit court for authority to sell the west half of the southeast one-quarter and the southeast one-quarter of the southeast one-quarter of sec 36, T 26 N, R 9 W, Union township, Grand Traverse county, Michigan, "to Alfred Carothers and Delarma Hackett, or survivor," on executory land contract for the sum of $550, to be paid $150 down and with the balance of $400 to be paid thereafter in monthly instalments of $40 per month beginning January 1, 1938. Alfred Carothers was a brother of the plaintiff, Doris Rowerdink, and Delarma Hackett was a nephew of the plaintiff. The property had formerly been owned by the parents of Alfred Carothers and Doris Rowerdink, and had been taken over by the bank on a mortgage foreclosure. Defendant is the widow of Alfred Carothers.

To effect the sale, a receiver's deed was to be executed at once and placed in escrow with the receiver until the purchase money was fully paid. Authority was granted by the court to make the sale, November 18, 1937 "to Alfred Carothers and Delarma Hackett, or the survivor of them." The deed, exhibit No 4, was dated November 22, 1937, 4 days after the order. The pertinent parts of the deed read as follows:

"THIS INDENTURE, made this 22d day of November, A. D. 1937, between L. G. HAMMOND as the duly appointed and acting receiver of the Citizens State

Bank of Fife Lake, a banking corporation in receivership, as party of the first part and ALFRED CAROTHERS and DELARMA HACKETT, or the survivor of them, of Fife Lake, Michigan, as parties of the second part * * * WHEREAS, the said L. G. Hammond, as receiver * * * has sold the right, title and interest of said bank in the premises hereinafter described, at private sale, to the said parties of the second part, the said Alfred Carothers and Delarma Hackett, for the sum of $550 * * * in consideration of the sum of $550 to him paid by said parties of the second part, Alfred Carothers and Delarma Hackett, the receipt whereof is hereby acknowledged, the said parties of the second part [*sic*, party of the first part], as such receiver, does hereby grant, bargain, sell and convey unto the said Alfred Carothers and Delarma Hackett, or survivor, their heirs, executors and administrators as parties of the second part * * * TO HAVE AND TO HOLD the same with all the privileges and appurtenances thereunto belonging to the said parties of the second part, their heirs, executors and administrators FOREVER."

This deed was not acknowledged until September 30, 1938, on which day it was signed. On that same day, September 30, 1938, Delarma Hackett, not wanting to invest more in the land, and having said he wasn't interested in it and that he wouldn't put any more money in it, deeded "all his undivided one-half interest" in the land to Doris Rowerdink, the plaintiff, "and to her heirs and assigns forever." The receiver's deed was recorded by Alfred Carothers November 5, 1938, and the Hackett deed was recorded the same day, November 5, 1938, and at the same hour, 10:30 a.m.

The plaintiff, Doris Rowerdink, after the death of her brother, Alfred Carothers, in 1948, secured a second quitclaim deed to the property in question from Delarma Hackett on April 9, 1949. Hackett

outlived Alfred Carothers and is still alive. Plaintiff also secured a quitclaim deed on October 20, 1949, from Georgia Carothers, her mother, after Alfred's death.

Alfred Carothers and his wife, defendant Flossie Carothers, had no children; and as widow, defendant claims one-fourth interest in the land under the laws of descent and distribution, the said Alfred Carothers having left but 2 heirs-at-law: His mother, Georgia Carothers, and his widow, Flossie Carothers.

As to the original conveyance granted to "Alfred Carothers and Delarma Hackett, or survivor, their heirs, executors and administrators," defendant claims that:

"Under such a conveyance each are presumed to have an equal one-half interest. Hackett by conveying all his undivided one-half interest showed what his interest was. Mrs. Rowerdink, plaintiff, by accepting his deed confirmed and established what her interest was. Carothers by recording and keeping both deeds during his lifetime assented to the Hackett conveyance of a one-half interest and accepted the plaintiff as his cotenant. For 10 years nothing was done to change the cotenancy into a survivorship arrangement."

Defendant further claims that if there was a joint tenancy, the deed of Delarma Hackett to plaintiff of September 30, 1938, during the lifetime of Alfred Carothers, destroyed the joint tenancy with the result that defendant inherited from her deceased husband Alfred Carothers an undivided fourth interest in the real estate described in the deed.

Plaintiff claims that the deed to the 2 grantees "or the survivor of them" created a tenancy for life in the named grantees and a remainder in fee to the survivor, and cites 4 Michigan cases in support of her theory.

In *Schulz* v. *Brohl,* 116 Mich 603, the grantees are "Peter Brohl and Christine Schulz * * * to them and the survivor of them." We construed the deed, page 605, "to convey a moiety to each of these parties for life, with remainder to the survivor in fee."

In *Finch* v. *Haynes,* 144 Mich 352 (115 Am St Rep 447), we held (per syllabus):

"A deed which conveys land to 2 grantees, 'and the survivor of them, and to their heirs and assigns forever,' conveys a moiety to each for life, with remainder to the survivor in fee, and neither of them, by conveyance during his lifetime, can create a tenancy in common, so as to cut off the contingent remainder."

In *Jones* v. *Snyder,* 218 Mich 446, we held (per syllabus):

"Under a deed conveying land to 4 persons, 'as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivor of them, forever,' a joint tenancy for life in the grantees was created, with a contingent remainder in fee simple to the survivor, and, therefore, one of the grantees could not alienate his joint interest so as to cut off the contingent remainder."

In *Ames* v. *Cheyne,* 290 Mich 215, we held, page 218:

"Where property stands in the name of joint tenants with the right of survivorship, neither party may transfer the title to the premises and deprive the other of such right of survivorship," citing *Schulz* v. *Brohl, supra,* and *Finch* v. *Haynes, supra.*

Defendant accentuates the background of authorities cited in the *Schulz Case* and authorities cited in the *Finch Case,* and argues that the rule in those 2 cases inadvertently and erroneously crept into Michigan jurisprudence from jurisdictions having dif-

ferent statutes and problems relative to estates and in effect requests us to overrule those 2 cases as an improvement in the rules of conveyancing.

There is no necessity for overruling the 4 cases cited, by which a law of real property as to the right of survivorship has been established. We expressly reaffirm the rule as laid down in the 4 cases cited, as to the right of survivorship.

Defendant cites *Taylor* v. *Taylor,* 310 Mich 541 (157 ALR 559), as affording a rule of construction in accordance with which defendant claims that the trial court in the instant case should have construed the deed under consideration, to have been intended to have a different effect than the trial court gave to the deed in the instant case. Defendant claims that the first deed made to plaintiff by Delarma Hackett was contemporaneous with the execution of the deed under consideration to Carothers and Hackett.

Defendant argues that Hackett's deed of "all his undivided one-half interest" dated September 30, 1938, the same day as the acknowledgment of the deed in question, indicates his then understanding (as of September 30, 1938) of the meaning and intent in the transaction by which he became one of the grantees under the deed sought to be construed in this case. We think the reasoning of defendant erroneous. The intent with which Delarma Hackett entered into the transaction, could be gathered from the receiver's petition filed for the purpose of giving Hackett and Carothers an opportunity to buy the property from the bank's receiver, presumably filed with the knowledge and consent of Hackett and of Carothers; at least, Hackett and Carothers availed themselves of the benefit obtained by the petition, *i.e.*, they bought the land from the receiver under the court's order made in pursuance to the petition and dated November 18, 1937.

The circumstances relied on by defendant are without effect in construing the deed in controversy.

Defendant argues that the word "or" in the deed in question requires a different construction than would be required if the word "and" had been used instead of "or." Indicating the incorrectness of defendant's contention are *In re Blodgett's Estate,* 197 Mich 455; *In re Peterson's Estate,* 239 Mich 452; *Forler* v. *Williams,* 242 Mich 639; *Block* v. *Schmidt,* 296 Mich 610; *Lilly* v. *Schmock,* 297 Mich 513.

After the death of Carothers, Hackett again conveyed to plaintiff, which later deed gave plaintiff title to the lands described in the deed in question.

We affirm the decree appealed from. Costs to plaintiff.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

The late Chief Justice NORTH did not sit.

## *In re* KANERA'S ESTATE.

## TEN CATE *v.* KANERA.

1. WILLS—PRESUMPTION OF REVOCATION BY DESTRUCTION.
   A presumption arises that will was destroyed by the testator in his lifetime with the intention of revoking it, where a will which is known to have existed during the testator's lifetime, and in his custody, cannot be found at his death.

2. SAME—PRESUMPTIONS—BURDEN OF PROOF.
   Proponents of a will which is presumed to have been destroyed have the burden of producing evidence to overcome or rebut the presumption.

3. SAME—DESTRUCTION—EVIDENCE—QUESTION FOR JURY.
   Trial court was not in error in failing to direct a verdict for contestants on ground that deceased had destroyed his will with intention of revoking it, in view of conflicting evidence presented on such issue.

4. EVIDENCE—REBUTTABLE PRESUMPTION.
   A rebuttable or prima facie presumption has no weight as evidence but merely serves to establish a prima facie case.

5. SAME — REBUTTABLE PRESUMPTION — SUPPORTING EVIDENCE — WEIGHT OF EVIDENCE.
   When a rebuttable presumption is challenged by rebutting evidence and supporting evidence is presented, the question is

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 57 Am Jur, Wills §§ 549, 551.
[1–3] Establishment of will lost before testator's death. 34 ALR 1310.
[2] 57 Am Jur, Wills § 973.
[4–6] 20 Am Jur, Evidence § 166.
[4–6] Presumption as evidence. 95 ALR 878.
[6] 20 Am Jur, Evidence § 160.
[7] 53 Am Jur, Trial § 187.
[9–11] Generally as to sufficiency of evidence to rebut presumption of revocation of lost will, see 57 Am Jur, Wills § 568.
[9–11] Proof of nonrevocation in proceeding to establish lost will. 3 ALR2d 949.

then raised as to the weight of the actual evidence introduced without giving any evidential force to the presumption itself.

6. SAME—PRESUMPTIONS NOT PROBATIVE MATTER.
A presumption is a legal rule or a legal conclusion serving merely to establish a prima facie case until the other party has gone forward with his evidence; it is not probative matter which may be a basis of inference and weighed and compared with other matter of a probative nature.

7. SAME—PRESUMPTION—REBUTTAL—QUESTION FOR JURY.
Whether or not a presumption is rebutted or shown to be inapplicable presents a jury question.

8. WILLS—PRESUMPTION OF DESTRUCTION—EVIDENCE.
Circuit court was not in error in instructing jury that it must not weigh presumption that will was destroyed, where there was testimony on the subject but that it must make its determination from the evidence introduced.

9. SAME—REVOCATION BY DESTRUCTION—GREAT WEIGHT OF EVIDENCE.
Verdict for proponents in will contest was not contrary to the great weight of the evidence in respect to issue as to whether childless deceased had destroyed his will during his lifetime, where proposed will left nothing to his brother and sisters, gave a life estate to his housekeeper and remainder to a home for veterans' widows and orphans and there was evidence testator did not want contestant relatives to share in his estate and that they had an opportunity to destroy the will.

10. SAME—VERDICT—EVIDENCE.
The Supreme Court will not invade the province of the jury by weighing evidence in will contest, where it cannot be said that jury's verdict upholding will was not based upon substantial evidence.

11. SAME—REVOCATION—EVIDENCE—INTEREST IN LEGATEE.
Admission of testimony concerning testator's interest in home for veterans' widows and orphans was not prejudicial in will contest, where it showed testator's continued interest in such home and, in the absence of any testimony concerning the change in his attitude could properly be considered on issue of a likelihood of revocation of will providing substantially for such home.

12. APPEAL AND ERROR—QUESTIONS REVIEWABLE—OBJECTION—MOTION TO STRIKE.

An objection that testimony received in will contest was not competent was too general and where no motion to strike was made the matter will not be considered on appeal.

Appeal from Allegan; Smith (Raymond L.), J. Submitted June 4, 1952. (Docket No. 21, Calendar No. 45,395.) Decided September 4, 1952.

In the matter of the estate of James J. Kanera, deceased. Vernon Ten Cate and others presented the last will of deceased for probate. John Kanera and others objected thereto. Contest certified to circuit court. Verdict and judgment for proponents. Contestants appeal. Affirmed.

*Miles & Miles,* for proponents.

*Leo W. Hoffman,* for defendants.

SHARPE, J. This is a proceeding to establish and have admitted to probate the last or destroyed will of James Kanera deceased. The deceased, whose wife died in the early part of 1945, lived in the village of Saugatuck, where he owned 3 cottages. He was childless, but was survived by a younger brother, John Kanera, and 3 sisters, Mary Penshorn, who lives in Chicago, Antoinette Day, who lives in Detroit, and Anna Kanera, who lives in Detroit in the winter and in Allegan county in the summer.

In August, 1945, Rose Sitzler became acquainted with deceased, and at his request she became his housekeeper.

On April 25, 1949, Vernon Ten Cate, an attorney of Holland, Michigan, drafted a will for deceased, and retained an unsigned copy of it. This will was executed in Mr. Ten Cate's office. Deceased took the executed will with him when he left Ten Cate's office.

In the fall of 1949, deceased made arrangements with the Veterans Administration for a physical examination in Detroit. He came to Detroit in November, and stayed 2 days with his sister.

About the middle of November, 1949, Anna Kanera and her nephew drove deceased back to Saugatuck, where they left him in front of his cottage. When deceased left for Detroit, Rose Sitzler left to visit her daughter. When deceased returned to Saugatuck he was taken to Douglas, and later to a hospital in Grand Rapids, where he died December 4, 1949.

On February 16, 1950, proponent, Vernon Ten Cate, executor named in the will, filed a petition in the probate court of Allegan county, alleging possession of a copy of the will, and petitioned to have proofs taken and the instrument admitted to probate as the will of deceased. The will in question reads as follows:

"LAST WILL AND TESTAMENT

"I, JAMES KANERA, of the village of Saugatuck, in the county of Allegan, State of Michigan, being of sound mind and memory, do make, publish and declare this to be my last will and testament, hereby revoking all former wills and codicils by me at any time heretofore made.

"FIRST: I direct the payment of all of my just debts and funeral expenses as soon as possible after my death.

"SECOND: All the rest, residue and remainder of my property, of which I may die seized or possessed, or to which I may in any manner be entitled at the time of my death, I give, devise and bequeath to Vernon D. Ten Cate, of Holland, Michigan, as trustee, for and on behalf of Rose Sitzler, she to have the life use and income from my said estate, and in the fulfillment of the trust powers I hereby grant unto my said trustee the following powers:

"To demand, receive, compromise or adjust any right of action and any right or title hereby con-

veyed or hereafter acquired by my trustee; to bring or dismiss any action, suit or proceedings and employ counsel; to convert and reconvert, invest and reinvest, sell, exchange, lease, pledge or mortgage the whole or any portion of the property or funds held in trust; to alter, repair, rebuild or improve the buildings on the land now owned by me or hereafter acquired by my trustee; to pay taxes, assessments, insurance premiums and other expenses incident to the execution of the trust, including the compensation of the trustee; to make, sign, sell and deliver such instruments and to perform such other acts as may be required for the fulfillment of this trust, and to exercise any further or other powers necessary or convenient to enable him to perform his duties as such trustee, and such other powers as shall be given him by the laws of the State of Michigan; and I do order and direct that the said trust shall be dissolved upon the death of the said Rose Sitzler and the remainder of said trust fund be paid to the Veterans of Foreign Wars of the United States National Home.

:.....(L.S.)

at Eaton Rapids, Michigan.

"THIRD: I hereby nominate and appoint Vernon D. Ten Cate, of Holland, Michigan, executor of this last will and testament, and I confer upon my said executor power and authority to sell, lease or mortgage any and all real and personal estate for such price and on such terms as he may deem best for my estate, and in the execution of the trust hereinabove provided for.

"FOURTH: I will and direct that any Federal or State taxes, either income, inheritance, or estate taxes of any kind or nature, either now imposed or which may after the date hereof be imposed or shall come due, shall be paid from my estate the same as administration expenses.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal and declared this to be my Last Will and Testament this 25th day of April, 1949.

.....(L.S.)"

On March 8, 1950, John Kanera filed objections to the granting of the petition as follows:

"That he objects to the granting or allowance of probate to that certain instrument propounded by Vernon D. Ten Cate by petition of Vernon D. Ten Cate dated the 16th day of February, 1950, filed herein, for the following reasons and upon the following grounds:

"a. That said purported will was not executed as required by law.

"b. That at the time said instrument was purportedly executed by deceased, deceased lacked mental competency or capacity to make a valid will.

"c. That said instrument does not represent the will or desire of the said deceased, but was induced by fraud and undue influence practiced upon said deceased.

"d. That said purported will was intentionally destroyed and revoked by the deceased, and thereby is not a legal will of the deceased."

Mary Penshorn, Antoinette Day, and Anna Kanera filed similar objections. Upon application of contestants the will was certified to the circuit court of Allegan county, where the case was tried before a jury, resulting in a verdict by the jury upholding the instrument offered for probate as the last will and testament of deceased.

It appears that at the close of plaintiffs' proofs, defendants' counsel made a motion for a directed verdict, alleging that proponents have not established that there was a last will. Decision on the motion was reserved under the Empson act.* There-

* CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.1461 *et seq.*).—REPORTER.

after contestants moved for judgment notwithstanding the verdict. This motion was denied. Contestants moved for a new trial, giving the following reasons:

"Because the verdict of the jury therein is contrary to the great weight of the evidence.

"Because the court erred in charging the jury in substance that there was no presumption in the case to be considered by the jury that the will had been destroyed or revoked by the testator.

"Because the court erred in charging the jury, as follows:

" 'You are instructed, if you find in this case that James Kanera was not on friendly terms with his sisters during the year 1949, after he had executed his will, and up until his death, then you may consider that fact as bearing upon the probability of his revoking his will, which gave them, that is his sisters, nothing and thereby leaving them three-fourths of his property.'

"Because the court erred in charging the jury, as follows:

" 'Now members of the jury, you are instructed that there is no presumption in this case to be considered by you with reference to the destruction of the will in question. Where there is testimony in the case on the subject for and against any presumption that might otherwise exist disappears, a presumption may not be weighed against evidence. You are to consider the evidence offered on both sides and determine from such evidence whether James Kanera did or did not destroy his will made on the 25th day of April, 1949; that is destroyed with the intention of revoking it.'

"Because the court erred in charging the jury, as follows:

" 'You are instructed that if you find that the contestants, or some of them, had opportunity to destroy the will in question either before or after the death of James Kanera, then you may consider their in-

terest in having the will destroyed, and while opportunity alone is not sufficient to prove that contestants did not destroy it, you may weigh such fact with the other proven facts in the case in determining whether or not they did in fact so destroy it.' * * *

"Because the court erred in permitting the witness, Charles F. Adams, to testify, over the objection of counsel, as follows:

"'*Q.* And will you tell us that nature of that home, what it is? * * *

"*A.* It is a home for widows and orphans of members of the Veterans of Foreign Wars.

"*Q.* Of which war?

"*A.* That is all wars as long as they are a member of the Veterans of Foreign Wars organization.

"*Q.* How long has that home been in existence?

"*A.* 25 years. * * *

"*Q.* What does the home—what do they do for orphans and widows there? * * *

"*A.* They take children, regardless of age, and keep them until they are self supporting.'"

The trial court denied the motion for a new trial and entered judgment upon the verdict.

Contestants appeal. In the case at bar it is established that James Kanera executed a will on April 25, 1949. The rule is well established that where a will which is known to have existed during the testator's lifetime, and in his custody, cannot be found at his death, a presumption arises that such a will was destroyed by the testator in his lifetime with the intention of revoking it, and in such cases the proponents have the burden of producing evidence to overcome or rebut such presumption; see *In re Keene's Estate,* 189 Mich 97 (Ann Cas 1918E, 367), *In re Estate of Taylor,* 271 Mich 404, *In re Estate of Bernard Thomas,* 274 Mich 10.

To rebut this presumption, proponents relied primarily upon declarations made by the deceased. Rose Sitzler testified that deceased had declared

many times, both before and after the execution of the will, and as late as November, 1949:

"*Q.* What, if any, conversation have you ever had with James Kanera concerning the disposition of his property?

"*A.* Well, he always told me that he would see that the orphans got something and he says, 'You little orphan, I will see that you got something too. I will see that you got a roof over your head the rest of your life.'

"*Q.* You say he often talked about that?

"*A.* He did, very often.

"*Q.* He talked about that before April 25, 1949?

"*A.* Yes, he did.

"*Q.* He talked about that after April 25, 1949?

"*A.* Yes, he did. * * *

"*Q.* What, if any remarks did he ever make to you about your remuneration?

"*A.* He always says, 'Rose, you don't have to worry, I will always see you have a roof over your head.' * * *

"*Q.* Did he make the remark during the year 1949?

"*A.* Oh, yes.

"*Q.* Can you fix the time in 1949?

"*A.* Well, when I asked him to come and make his home with my sister and myself then—

"*Q.* When was that now?

"*A.* That was during the time that my brother-in-law passed away. That was between October 26th and November 2d or so.

"*Q.* Of 1949?

"*A.* That's right.

"*Q.* All right. What did he say about that in November, 1949, or the latter part of October?

"*A.* Well, he says, 'I don't see why you can't stay here and I will see that you have a roof over your head.' He says, 'I don't want you to leave.'"

John Janis, a neighbor of deceased, testified that in September or October, 1949, the deceased stated:

"Some time during the late fall I saw and talked with James Kanera. I talked to him several times a week. He was a neighbor of ours. He lived just across the parking lot from the hotel where he had his cottages. I was working on the hotel some time; after the season was over we generally do some repair work, and I was working. I did see Jim over there some time. As to about when that would be, I got to see him several times each week, whenever he was out and I continued to see him up until the time that I did leave Saugatuck. I had some conversation with him sometime on one of those occasions about his health and his property.

"*Q.* And when was that, about?

"*A.* That was either the latter part of September or first part of October.

"*Q.* And will you give us that conversation that you had with him, as near as you can?

"*A.* Well, we were talking about it and he was not feeling well. He was telling me that his heart was bad and that he was quite a sick man and that he would have to take things easy as almost anything that would aggravate him or so, would be the end. And he did tell me—we were talking about his health and I says—I says, 'Well, you are lucky you have somebody to take care of you.' And he says 'Yes'. And Rose was taking care of him at the time and he says he appreciated Rose being with him and that he said also that Rose would be taken care of."

Mrs. Pearl Palermo, a daughter of Rose Sitzler, testified:

"Regarding what, if anything he said about my mother and about her care for him, he always said that he would see that she had a roof over her head and he couldn't pay her wages, but that she could always file a claim and get paid that way.

"*Q.* You hear him say that, the last time you ever heard him discussing that, when was that?

"*A.* Well, the last time I saw Mr. Kanera was in '49, the summer of '49, and we were quite busy with the cottages.

"He had rented the cottage we were living in also to some girls. He had rented a sleeping room rather, and we were busy straightening up and cleaning up after the girls. They made quite a mess. And I says, 'Gosh darn, I would be darned if I would do this for nothing.' And Jim says, 'Well, I haven't any money.' You know I mentioned about money, and I said, 'I wouldn't work this hard for nothing.' I said, 'Mum, you are a fool working for nothing.' I said 'housekeepers are getting good money in the city.' And Jim says, well, he didn't like that. I guess, you know, it hurt his feelings. And Jim says, 'You know I can't pay your mother, pay Mum, but I need her here.' I like Jim too, he was a nice friend. And he says, 'The only thing I can do for your mother is to see she has a roof over her head and that she files a claim for wages after I go.'"

John Kanera was called by proponents for cross-examination. He testified that deceased told him he destroyed the will, and later testified that he saw deceased throw the will in the stove.

Proponents also produced evidence to show that contestants had an opportunity to destroy the will after the death of deceased, if it was then in existence, as 2 of deceased's sisters lived in the cottage the deceased had occupied as a home prior to his going to the hospital, and that after the funeral John Kanera opened the bag where deceased had placed the will.

Evidence was also introduced by proponents that deceased did not like his brother and sisters. Rose Sitzler testified:

"Jim did say, 'I wish those girls would leave me alone.' And they were interfering with his business too much, telling him how to live, trying to live his life for him. This is conversation of Jim. As to what Jim told me about his sisters, he says he wished

they would leave him alone. He says, 'I am getting along all right. I wish they would stay out of my life.' He says, 'Whatever I have got I have earned by myself and I don't owe them anything.' James hasn't said anything much about John. But he was peeved when John was going to move because he would always move out for the fall and then the place would be empty all winter so he said, well, he was really through with him when he moved with him the last time. He says, 'I am through with him now.' Regarding what ill feeling existed between James Kanera and me prior to and at the time of my departure from his household on November 14, 1949, we parted friends. There was no ill feeling whatsoever. I never received any remuneration whatsoever from James Kanera for the time that I served at that place."

Contestants offered evidence to the effect that deceased told them that he had burned the will. Considering all the circumstances of this case, we are of the opinion that there was evidence for a jury's consideration that deceased had not destroyed the will. The court was not in error in failing to grant contestant's motion for a directed verdict.

Contestants urge that the court was in error in giving the following instruction:

"Now members of the jury, you are instructed that there is no presumption in this case to be considered by you with reference to the destruction of the will in question. Where there is testimony in the case on the subject for and against any presumption that might otherwise exist disappears, a presumption may not be weighed against evidence. You are to consider the evidence offered on both sides and determine from such evidence whether James Kanera did or did not destroy his will made on the 25th day of April, 1949; that is destroyed with the intention of revoking it."

In *Gillett* v. *Michigan United Traction Co.*, 205 Mich 410, we said:

"It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself. In 1 Elliott on Evidence, § 91, p 114, it is said:

" 'It (the presumption) may be directly rebutted by such evidence, or it may be shown thereby that it was never applicable to the particular facts, for it will be found that presumptions are usually very general in their nature, and lose their force and application when the specific facts of the case are shown;'

—and further (section 93, p 116):

" 'A presumption operates to relieve the party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a prima facie case until the other party has gone forward with his evidence, but in itself, it is not evidence, and involves no rule as to the weight of evidence necessary to meet it. * * * It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothings tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence. * * * It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature.' "

And whether or not a presumption is rebutted presents a jury question; see *In re Taylor's Estate*, 271 Mich 404.

In our opinion there was testimony introduced by proponents that overcame the presumption. The

court was not in error in giving the above-quoted instruction.

Contestants also urge that they are entitled to a new trial, as the verdict was against the great weight of the evidence. In the case at bar there was evidence presented to the jury that testator did not want his brother and sisters to receive his property, that he had made provisions for Rose Sitzler, and that contestants had an opportunity to destroy the will. In *Saginaw Milling Co.* v. *Mower,* 154 Mich 620, we said:

"3. The determination of the essential question of fact * * * depended upon the conclusion the jury should reach as to their credibility * * * and although we must disagree with their conclusion, we cannot say that it is not based upon substantial testimony, nor invade their province of weighing conflicting testimony by determining that plaintiff's testimony was so contrary to the weight of the evidence as to justify us in reversing the ruling of the trial judge."

We conclude that the verdict of the jury was not against the great weight of the evidence. The court was not in error in denying a new trial.

Contestants also urge that the testimony of Charles F. Adams, regarding the Veterans Home, was improper and prejudicial.

It appears that during the trial Attorney Ten Cate testified as to deceased's interest in the Veterans Home:

"He told me about the Veterans of Foreign Wars home at Eaton Rapids. I remember that he mentioned that it was a very fine home and that it was for the widows and orphans of veterans and that he had heard about it and he went on at some length to tell me what a fine place it was, and that was where he wanted his property to go after Mrs. Sitzler was through with it."

The trial court in denying contestant's motion for a new trial stated as follows:

"14. Testimony concerning the activities of the Veterans Home at Eaton Rapids was material to the issues in this case for the reason that decedent's interest in the Home as a veteran himself, and the inference of his continued interest in the Home, in the absence of any testimony concerning the change in his attitude, could properly be considered upon the issue of a likelihood of revocation of a will that provided substantially for the Veterans' Home."

Under the circumstances of this case, it was not prejudicial error to permit the jury to consider the testimony concerning the Veterans' Home.

Contestants also urge that it was error to admit evidence of an attempt by John Kanera to settle the case with Rose Sitzler. It appears that John Kanera was called as a witness by proponents for cross-examination. He testified:

"When I went over to Rose's place there, and her sister's place at Nunica, Rose's sister was there. And I wanted to talk privately with Rose. If I was just going to ask her about her dishes, the reason I was going to talk privately at Rose's was after I knew that there was going to be a court trial, I thought maybe she would have some suggestion to make that could avoid that. I knew she had an attorney at that time. I don't know whether I knew who her attorney was at that time or not. I didn't make any effort to find out; I never asked her."

Counsel for contestants objected to receiving this evidence for the reason that it was prejudicial and improper. We note that no reason was given as to why the testimony was prejudicial and improper, nor was any request made to strike it from the record. In *Hynes* v. *Hickey,* 109 Mich 188, we held that an objection to a question as "incompetent" was too

general for consideration on appeal. In *Mulliken* v. *City of Corunna,* 110 Mich 212, we held that an objection to testimony that was not responsive to the questions asked cannot be raised on appeal where no motion was made to strike it out. In *Weiser* v. *Welch,* 112 Mich 134, we held that an objection that an incompetent answer was received to a proper question will not be considered on appeal in the absence of a motion to strike out the answer. See, also, *Renders* v. *Grand Trunk R. Co.,* 144 Mich 387, and *In re Paquin's Estate,* 328 Mich 293.

We find no reversible error and the judgment is affirmed, with costs to proponents.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## KOKALIS *v.* WHITEHURST.

1. LANDLORD AND TENANT—LEASE FOR YEARS—HOLDING OVER—IMPLIED RENEWAL.

   Generally, the law implies a contract to renew the tenancy on the same terms for another year, where a tenant under a valid lease for years holds over.

2. SAME—HOLDING OVER—ACCEPTANCE OF RENT—RENEWAL PRESUMED.

   A presumption that the parties intend to renew the tenancy arises from the holding over by the tenant and acceptance of rent by the landlord.

3. SAME—HOLDING OVER—TENANT AS TRESPASSER.

   A landlord may treat a tenant who holds over after the expiration of a lease as a trespasser or may acquiesce in the continued possession.

4. SAME—RECEIPT OF RENT AFTER END OF TERM—SPECIFIC PROVISION OF LEASE.

   A notice to quit need not be made by the landlord upon a tenant who holds over after the termination of a valid lease because of acceptance of rent, where lease specifically provided that after termination of term of the lease the receipt of money by the landlord should not reinstate, continue or extend the term.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 32 Am Jur, Landlord and Tenant § 948.
[1] Term implied by holding over after expiration of lease for a fixed term. 108 ALR 1464.
[2, 4] 32 Am Jur, Landlord and Tenant § 944.
[2, 4] What constitutes assent by landlord to renewal by holding over. 64 ALR 309.
Landlord's consent to holding over by tenant as essential to tenancy from year to year. 55 ALR 286.
[3] 32 Am Jur, Landlord and Tenant § 919.
[4] Generally as to notice to quit, see 32 Am Jur, Landlord and Tenant § 993.
[4] Necessity of giving notice to quit to tenant holding over after expiration of definite term. 19 ALR 1405; 156 ALR 1310.

Appeal from Wayne; Maher (Thomas F.), J. Submitted June 5, 1952. (Docket No. 31, Calendar No. 45,341.) Decided September 4, 1952.

Summary proceedings by James Kokalis and wife against R. B. Whitehurst to recover possession of land. Judgment of restitution given in circuit court on appeal. Defendant appeals. Affirmed.

*Alexander P. Perry* (*Moe F. Wolfgang* and *Ralph L. Seltzer,* of counsel), for plaintiffs.

*Reymont Paul,* for defendant.

SHARPE, J. This is an action originally commenced before a circuit court commissioner of Wayne county to recover possession of certain premises in the city of Dearborn. It appears that plaintiffs executed a lease of business property to the defendant for a term of 5 years, expiring on December 31, 1950. The lease contained the following:

"(3) For the term of 5 years from and after the first day of January, 1946, fully to be completed and ended, the tenant yielding and paying during the continuance of this lease unto the landlord for rent of said premises for said term, the sum of $30,000 in lawful money of the United States, payable in monthly instalments in advance, upon the 1st day of each and every month as follows: — Beginning January 1, 1946, and continuing regularly each month thereafter to December 31, 1951 [1950?] — $500 per month. * * *

"(23) The tenant will pay as liquidated damages, double rent for all the time tenant shall retain possession of said premises or any part thereof after the termination of the term hereby demised, whether by lapse of time or by election of the landlord and will pay all expenses of the landlord incurred in enforcing any of the provisions thereof. No receipt of

money by the landlord from the tenant after the termination of said term in any way shall reinstate, continue or extend the term above demised, nor affect any notice given by the landlord to the tenant prior to such receipt of money. All rights and remedies of the landlord in this lease shall be cumulative and none shall be exclusive of any other rights and remedies allowed by law."

In the early part of December, 1950, plaintiffs' representative called defendant and informed him that the lease terminated at the end of the year 1950, and possession was demanded as of that date.

Subsequent to the expiration of the lease, the defendant continued to pay and the plaintiff to receive rent at the monthly rental of $500 per month for each of the calendar months: January, February, and March, 1951.

On March 27, 1951, a complaint to recover possession was filed by plaintiffs against defendant in the office of a circuit court commissioner, and a summons issued by virtue of said complaint. Upon trial a verdict for eviction was rendered. Upon appeal to the circuit court of Wayne county, plaintiffs were granted a judgment for possession of the property.

Defendant appeals and urges that the negotiations for a new lease in December, 1950, and plaintiffs' acceptance of rent for the months of January, February, and March, 1951, resulted in the creation of a tenancy from month to month, requiring plaintiffs to give defendant 1 month's notice of termination of lease prior to instituting an action for eviction, and that rent was paid to a date 4 days subsequent to the institution of the present action before the circuit court commissioner.

The trial court in an opinion stated:

"The court in arriving at its opinion has in mind that the plaintiffs at no time solicted the rent for the 3 months of January, February and March, nor that they signified, other than by cashing the checks, that they were accepting them as rent. The court is of the opinion that the contractual relationship between the parties is set out in the lease and that the lease should govern as between the parties, it being their express agreement, unless altered or changed subsequently, and the court does not find that there has been any such alteration or change in the provisions of the lease. * * *

"It is the position of the defendant that by the acceptance of this rent for January, February, and March that he was in legal possession of the property for those months and that the suit started as of March 27, 1951, is premature and the cause should be dismissed. However, the court is of the opinion that rent can only exist where the relationship of landlord and tenant exists, and the court believes that both parties were bound by the provisions of the lease, and that the mere payment of the money under the circumstances as related in this case did not create a tenancy relationship between the parties. Therefore, the plaintiffs acted within their rights when they instituted the suit as of March 27, 1951."

It is a general rule that where a tenant under a valid lease for years holds over, the law implies a contract to renew the tenancy on the same terms for another year.

It is also the rule that a presumption arises from the holding over by the tenant and acceptance of rent by the landlord that the parties intend to renew the tenancy. See *Faraci* v. *Fassulo*, 212 Mich 216.

In *Rice* v. *Atkinson, Deacon, Elliott Co.*, 215 Mich 371 (19 ALR 1399), we announced the following rule relative to the rights of landlords:

"Where there is no express agreement for a renewal of an annual lease and the tenant remains in possession after the term has expired, the landlord may treat him as a trespasser or may acquiesce in his continuing in possession, and in the latter event the law presumes that the tenant holds for another year subject to the terms of the previous lease."

Under such circumstances notice to quit was not necessary. See *Teft* v. *Hinchman,* 76 Mich 672, and *Smith* v. *Smith,* 144 Mich 139.

In the case at bar the parties, by written agreement, have defined the relationship after the lease by providing that no receipt for money by the landlord from the tenant after the termination of said term "in any way shall reinstate, continue, or extend the term above demised." In the case at bar, at the expiration of the 5-year lease, the parties had negotiations for a new lease, but no agreement was arrived at. Meanwhile defendant continued to pay what he termed rent for the premises, and plaintiffs accepted it without acknowledging that it was received as rent.

A similar situation existed in *Detroit Free Press* v. *Miller,* 217 Mich 118. We there said:

"It was the claim of the defendant in the court below and it is his claim here that, because he occupied the offices after the 3-year lease expired and paid to the plaintiff the monthly rent, he thereby became a tenant from year to year, which tenancy could not be terminated without a year's notice, citing CL 1915, § 11812, and the case of *Faraci* v. *Fassulo,* 212 Mich 216."

In the case at bar no facts are presented that in any way modify the agreement of the parties. Under the lease the payment and acceptance of so-called

rent did not constitute the relationship of landlord and tenant. The judgment is affirmed, with costs to plaintiff.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## JACOX *v.* STATE HIGHWAY COMMISSIONER.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—DETERMINATION OF NECESSITY—REVIEW BY CERTIORARI.

   The right to review by certiorari is an adequate review of a determination of necessity in condemnation proceedings for the taking of private property for public highway purposes (CL 1948, § 213.197).

2. SAME—REVIEW OF DETERMINATION OF NECESSITY—CERTIORARI EXCLUSIVE REMEDY.

   Right to review by certiorari the determination of necessity for the taking of private property for public highway purposes is the exclusive remedy provided by statute (CL 1948, § 213.197).

3. SAME—DETERMINATION OF NECESSITY A JUDGMENT.

   The highway commissioner's determination of necessity for taking lands described for limited access highway purposes is a judgment of necessity of taking for such purposes (CL 1948, § 213.174).

4. SAME—JUDGMENT OF NECESSITY—RES JUDICATA—NOTICE—INJUNCTION.

   Judgment of necessity for the taking of described land in fee for limited access highway purposes and an easement in

---

REFERENCES FOR POINTS IN HEADNOTES

[3–5] 18 Am Jur, Eminent Domain § 367.

certain other described land for highway easement for construction of a service road in condemnation proceedings held pursuant to clear notice of such intended taking precluded the adjudication of matter of notice in a subsequent injunction suit, since the issue as to adequacy of notice and scope of proceedings could have been adjudicated in the condemnation case (CL 1948, § 213.174).

5. SAME—JUDGMENT—SCOPE—DEFENSES.

All defenses to a proposed taking of private property for public highway purposes must be made in the condemnation proceedings by way of which the property is sought to be taken (CL 1948, § 213.171 *et seq.*).

Appeal from Wayne; Miller (Guy A.), J. Submitted June 12, 1952. (Docket No. 33, Calendar No. 45,414.) Decided September 4, 1952.

Bill by Earl F. Jacox and wife and Jacox Realty Corporation against Charles M. Ziegler, State Highway Commissioner of the State of Michigan, to restrain defendant from limiting or prohibiting access over certain land. Bill dismissed on motion. Plaintiffs appeal. Affirmed.

*Ross & Ross* (*Tinkham & Snyder,* of counsel), for plaintiffs.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *A. Floyd Blakeslee* and *Eugene F. Townsend,* Assistants Attorney General, for defendant.

SHARPE, J. Plaintiffs, Earl F. Jacox, Ruth C. Jacox, and Jacox Realty Corporation, began the instant chancery suit in the circuit court of Wayne county, to enjoin Charles M. Ziegler, State highway commissioner, from limiting or prohibiting plaintiffs from access over, from or to the northerly 33-foot strip of property as described in their bill

of complaint, and from exercising any easement of right-of-way over the south 50 feet of the northerly 83 feet of plaintiffs' property as a service road, until such time as defendant has acquired the title in fee simple of all service roads, and until such time as defendant has separated the grades of all intersecting county and State roads.

The following facts are agreed upon:

"SETTLED CASE AND RECORD

"1. Plaintiffs are the owners in fee of approximately 40 acres of land in the township of Van Buren, Wayne county, Michigan, situated about one-half mile from the city of Belleville and located at the southeast corner of the intersection of State trunk line highway M-112 abutting on the north and Belleville road, a county road, abutting on the west of the property.

"State trunk line highway M-112 is a 2-lane highway, formerly called Chase road, a section line road, the center of which is the north boundary of plaintiffs' property.

"2. That defendant is the duly elected and qualified highway commissioner of the State of Michigan.

"3. On or about May 25, 1950, defendant, under his designated project No. 82–93, pursuant to the provisions of PA 1925, No 352, § 4, as amended, executed a "Notice of hearing on necessity," wherein it was proposed to improve Chase road, named as state trunk line highway M-112, by constructing a service road between Belleville road at the west to Hannan road at the east over and across certain lands, including plaintiffs' lands, designating therein 1 parcel of land 33 feet in width across the northerly end of plaintiffs' property, to which title in fee simple was to be taken, said strip being part of Chase road, or M-112, and a second parcel 50 feet in width lying south of said 33-foot parcel and across plaintiffs' property to which a highway easement was to be taken. Project No. 82–93 includes

M-112 from Belleville road on the west to Hannan road on the east, a distance of 2 miles.

"4. On June 19, 1950, defendant made his determination of necessity and damages for taking such property, and thereafter, on June 28, 1950, duly recorded the same in the county of Wayne.

"5. On July 25, 1950, defendant filed his petition requesting the appointment of court commissioners with the probate court of Wayne county.

"6. Testimony affecting the parcels belonging to plaintiffs was commenced on February 5, 1951, at which time an employee and engineer of defendant, C. H. Brown, testified that in the proceedings then in question, it was the intention of defendant to establish a limited access highway of the 33-foot strip, title to which was being taken in fee simple, across the north end of plaintiffs' property, over, from and to which plaintiffs were to be immediately limited and prohibited from having any access on account of their remaining property abutting on said highway, such limitation to be effected by a ditch, posts, or posts and cables; and that the 50-foot strip abutting and to the south of said 33-foot strip across plaintiffs' property, to which a highway easement was to be taken, was to be a service road, a gravel road to be used to serve the abutting property owners, because access to the cement portion of the highway was to be limited to certain points, presently designated by defendant as Belleville road and Morton Taylor road. Such testimony further disclosed that the said 33-foot strip across the north end of plaintiffs' property was then and still is approximately the south half of Chase road or the Expressway, so-called, and designated as Michigan State highway M-112, upon which is the eastbound paved lane of said highway.

"7. Such testimony further disclosed that said Belleville road running along the west side of plaintiffs' property, and also Morton Taylor road, 1 mile to the east of Belleville road, now intersect Michigan State highway M-112 at grade, and that it is not

the intention of defendant in the present project No. 82–93 to separate the grades of Belleville road, and Morton Taylor road from the limited access highway, nor will the same be done for some extended period.

"8. Such testimony also disclosed that Belleville road and Morton Taylor road are county roads and not a part or portion of the proposed limited access highway system.

"9. Immediately upon the disclosure of such testimony, plaintiffs moved the probate court to dismiss the proceedings, but upon reference to the statute (CL 1948, § 213.189 [Stat Ann 1951 Cum Supp § 8.190]) under which such condemnation proceedings were brought, it was disclosed that no such authority rested in the probate court, and said motion was denied without objection. Whereupon the bill of complaint in this case to enjoin defendant from limiting plaintiffs' access to Michigan State highway M-112, and particularly that part thereof being the north 33 feet of plaintiffs' property, from the rest of plaintiffs' property abutting thereon, and from exercising any easement of right of way over the 50-foot strip to the south of said 33-foot strip, until defendant had separated the grades from said proposed limited access highway of Belleville road and Morton Taylor road, and had acquired title in fee simple to service roads and other roads being a part of said limited access highway system, was filed by plaintiffs.

"10. The proceedings in the Wayne county probate court before the court commissioners have been adjourned pending the outcome of these proceedings.

"11. On the northwest corner of plaintiffs' property, the same being the southeast corner of the intersection of Michigan State highway M-112 and Belleville road, plaintiffs in 1946 constructed a large service station, which is the last gasoline station between Belleville road and Wyoming avenue in Detroit along Michigan State highway M-112. Included in the service station are a restaurant and

bus and truck stop. Access to the station off M-112 is made at Belleville road from the eastbound lane of M-112. Access to the eastbound lane of M-112 from the station is at a point some hundreds of feet to the east of Belleville road. There are red and green stop and go traffic lights at the Belleville road intersection above the east and west traffic lanes of M-112. With limited access established, eastbound traffic would enter said station from M-112 by way of Belleville road and could not return to M-112 at a point some hundreds of feet east of the station as at present. It was stipulated at the hearing before the circuit court in this proceeding that there was injury and damage in sufficient amount to confer jurisdiction in the court so far as the amount of injury and damages are concerned, and further stipulated that Belleville road and Morton Taylor road, and Hannan road are county roads and not part of the proposed limited access highway system, and that they are not going to be separated as to grades in the immediately foreseeable future."

Defendant filed an answer to plaintiffs' bill of complaint, which contained a motion to dismiss the bill of complaint. The reasons stated in the motion to dismiss are as follows:

"1. The bill of complaint fails to state a cause of action.

"2. The determination of compensation for damages to plaintiffs' property rests with the probate court of Wayne county under the provisions of PA 1925, No 352, as amended.*

"3. No review of the determination of necessity by certiorari has been sought under the provisions of the aforesaid act, said determination having been made by defendant June 19, 1950.

"4. No objection to the petition for the appointment of court commissioners to fix compensation for

* CL 1948, § 213.171 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 8.171 *et seq.*).—REPORTER.

damages was made by plaintiffs in said probate court.

"5. Plaintiffs by their aforesaid conduct have waived any and all objections sought to be raised by said bill of complaint.

"6. The provisions of said PA 1925, No 352, as amended, control the rights of the parties herein and a court of equity will not intervene where a specific and appropriate remedy is provided and available."

On August 7, 1951, the trial court entered a decree dismissing plaintiffs' bill of complaint. Plaintiffs appeal and urge that they are entitled to an injunction against use of the 33 feet for limited access highway purposes until the grades of intersecting roads are separated, and an injunction against the use of the 50 feet until the fee is acquired.

Plaintiffs admit that a taking for limited access purpose is lawful and raise no question concerning the regularity of the procedure adopted to effectuate a taking by determination of necessity pursuant to sections 4, 5 and 6 of PA 1925, No 352, as amended (CL 1948, §§ 213.174, 213.175 and 213.176 [Stat Ann 1951 Cum Supp §§ 8.174, 8.176, 8.177]).

It is the position of defendant that the determination of necessity pursuant to PA 1925, No 352, § 4, as amended (CL 1948, § 213.174), coupled with the right of review by certiorari pursuant to PA 1925, No 352, § 27, as amended (CL 1948, § 213.197 [Stat Ann 1951 Cum Supp § 8.198]), is a prior judgment.

The right to review by certiorari is an adequate review of a determination of necessity; see *Ziegel* v. *Genesee Board of County Road Commissioners,* 241 Mich 161. Such right is the exclusive remedy under the statute, see *Allen* v. *Rogers,* 246 Mich 501. It follows that the determination of necessity of taking the lands described for limited access highway purposes is a judgment of the necessity of taking for such purposes. In the case at bar the notice

of hearing in the condemnation case apprised plaintiffs that "it is proposed to improve State trunkline highway M-112 by constructing a service road between Belleville and Hannan roads." The property was designated as "the title in fee simple for limited access highway purposes, in, over and upon, all of the north 33 feet of the parcel of land" and including, "for a highway easement in, over, and upon all of the south 50 feet of the north 83 feet" of the same land as that from which the north 33 feet was to be required.

From the above it clearly appears that plaintiffs were notified of the fact that the State highway commissioner proposed to take certain lands for limited access highway purposes and to take an easement for the construction of a service road.

It also appears that plaintiffs in their suit in equity seek to adjudicate matters which were subject to adjudication in the condemnation case. The claim made by plaintiffs that they had no notice that "access to property" was to be taken, is without merit. In *Sandusky Grain Co.* v. *Sanilac Circuit Judge,* 184 Mich 126, we held that *all defenses* to the proposed taking must be made in the condemnation proceedings. Plaintiffs should have raised this issue in the condemnation proceedings. It now comes too late. See *Farmers Fire Insurance Co.* v. *Johnston,* 113 Mich 426.

The decree of the trial court is affirmed, with costs to defendant.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## EGGEBEEN *v.* RED TOP CAB COMPANY OF GRAND RAPIDS.

1. AUTOMOBILES—EMERGENCY VEHICLES—DUE CARE.

   The driver of an emergency vehicle, such as an ambulance, is not relieved of the duty to drive with due regard for the safety of others (PA 1949, No 300, §§ 632, 653).

2. TRIAL—NONJURY CASES—WEIGHT OF EVIDENCE.

   A trial judge who tries an action at law without a jury is the trier of the facts and may give such weight to the testimony as it is entitled to have in his opinion.

3. APPEAL AND ERROR—FINDING OF COURT—PREPONDERANCE OF EVIDENCE.

   A finding of the trial judge who tried case without a jury will not be reversed unless the evidence clearly preponderates in the opposite direction.

4. SAME—EXAMINATION OF EVIDENCE IN NONJURY CASE.

   Record of evidence from which findings of fact were made in a nonjury action at law is examined by Supreme Court in order to determine whether or not it preponderates in the opposite direction.

5. AUTOMOBILES — AMBULANCES — CONTRIBUTORY NEGLIGENCE — EVIDENCE—INTERSECTIONS.

   Plaintiff's ambulance driver was not guilty of contributory negligence as a matter of law, where there is evidence that at a speed of 10 to 15 miles an hour and with siren sounding while on an emergency run, he entered a clear intersection in the right-hand lane from the south after observa-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 5, 6] 5 Am Jur, Automobiles §§ 40, 89, 294, 298; 25 Am Jur, Highways §§ 217, 219.

[1, 5, 6] Right-of-way of fire apparatus, et cetera, at street or highway intersections. 21 ALR 978; 37 ALR 500; 47 ALR 601.

Applicability of motor vehicle regulations to public officials or employees: 19 ALR 459; 23 ALR 418.

Right-of-way of vehicle carrying policeman. 65 ALR 140.

[2] 53 Am Jur, Trial § 1123.

[3, 4] 3 Am Jur, Appeal and Error § 896 *et seq.*

tion made at a point 10 feet or so south of the south curb line of street on which defendant's eastbound taxicab had stopped and waited for traffic light to turn in his favor and that the collision occurred in the northeast portion of the intersection in midafternoon on a wet, slushy midwinter day (PA 1949, No 300, §§ 632, 653).

6. SAME — AMBULANCES — TAXICABS — INTERSECTIONS — NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE.

Evidence as to eastbound defendant taxicab driver's negligence *held,* sufficient to permit trial court finding him guilty of negligence proximately causing collision with northbound ambulance in midafternoon of midwinter day in northeast portion of intersection, notwithstanding cab driver started up when traffic light turned in his favor, that radio in taxicab was operating and most of its windows closed, where there is evidence that red dome light of ambulance was visible for several blocks, that its siren was sounding and it was traveling at speed of 10 to 15 miles an hour (PA 1949, No 300, §§ 632, 653).

Appeal from Kent; Brown (William B.), J. Submitted June 5, 1952. (Docket No. 39, Calendar No. 45,461.) Decided September 4, 1952.

Case by Anton Eggebeen, Jr., and others against Red Top Cab Company, a Michigan corporation, for damages resulting from automobile accident. Judgment for plaintiffs. Defendant appeals. Affirmed.

*Mitts & Smith,* for plaintiffs.

*Uhl, Bryant, Slawson & Wheeler,* for defendant.

SHARPE, J. This case came to us as a result of a collision between a taxicab owned by defendant company and an ambulance owned by plaintiffs. The collision occurred in the intersection of Division and Fulton streets in the city of Grand Rapids, on January 27, 1951, at or about the hour of 3 p.m. The

ambulance was proceeding in a northerly direction on Division street. Its driver was taking a patient to the hospital, and as it approached Fulton street its siren was sounding in an oscillating manner. The taxicab was proceeding in an easterly direction on Fulton street, had stopped before entering the intersection. The intersection is controlled by traffic lights. When the traffic light changed to green for Fulton street traffic, the taxicab entered the intersection with the green light in its favor. The collision between the 2 vehicles occurred in the northeast corner of the intersection.

The damage to the ambulance was $675.01, of which plaintiff insurance company paid $575.01, and has taken an assignment in such amount from plaintiffs, and as such is a party plaintiff.

The cause came on for trial, and at the conclusion of plaintiff's proofs the defendant made a motion for "judgment of no cause of action" for the reason that plaintiffs were guilty of contributory negligence because its driver entered the intersection against the red light. The motion was denied. At the close of all proofs the trial court granted plaintiffs, Anton Eggebeen, Jr., and Jean Eggebeen, a judgment in the amount of $100 and plaintiff insurance company a judgment in the amount of $575.01.

The trial court, at the close of all proofs, gave an opinion, a part of which reads as follows:

"So, without attempting to go into a detailed review of what each witness testified to, I will say the testimony in this case shows clearly and competently and preponderantly that the driver of this ambulance was exercising a high degree of care, and I would say commensurate with the responsibility that he has in operating this ambulance; and it seems to me the driver of this taxi must have heard it. I think he must have heard this siren. As the ambulance was approaching with its siren sounding

30 or 40 feet south of this intersection, when the man in the taxi saw it or heard it first he certainly could have stopped before he got into the middle of South Division street. Certainly he could have stopped and given the ambulance right-of-way. * * * I would say that the driver of this taxi was careless, which is commonly called negligent, in the way in which he started up his taxi to be sure to get to that fellow he was going to take for a ride."

Defendants appeal and urge that plaintiff's driver was guilty of contributory negligence in entering the intersection against the red light. Plaintiffs rely on the following statutory provisions:

"(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least 1 lighted lamp exhibiting red light visible under normal atmospheric condition from a distance of 500 feet to the front of such vehicle and when the driver is giving audible signal by siren, exhaust whistle, or bell:

"1. The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer. * * *

"(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway." PA 1949, No 300, § 653 (CL 1948, § 257.653 [Stat Ann 1949 Cum Supp § 9.2353]).

"The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such viola-

tion, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall not however protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others." PA 1949, No 300, § 632 (CL 1948, § 257.632 [Stat Ann 1952 Rev § 9.2332]).

In *City of Kalamazoo* v. *Priest,* 331 Mich 43, we had occasion to consider a similar statute. We there held that the driver of an emergency vehicle is not relieved of the duty to drive with due regard for the safety of others. The trial court found as a fact that the driver of the ambulance was exercising a high degree of care commensurate with his responsibility in operating an ambulance. In *Vannett* v. *Michigan Public Service Co.,* 289 Mich 212, we said:

"We have repeatedly said in cases tried without a jury that the trial judge is the trier of the facts and may give such weight to the testimony as in his opinion it is entitled to. In such cases we do not reverse unless the evidence clearly preponderates in the opposite direction."

See, also, *Lather, for use and benefit of Employers Mutual Casualty Company, Inc.,* v. *Michigan Public Service Co.,* 332 Mich 683.

In determining whether the evidence clearly preponderates against the finding of fact of the trial court, we find it necessary to examine the testimony from which such findings were made.

It is undisputed that the driver of the ambulance was engaged in an emergency run; that in addition to the siren, the ambulance was equipped with a red dome light visible for 4 blocks over intervening traffic; that Division street is approximately 54 feet wide and has 4 lanes of traffic, 2 for northbound traffic and 2 for southbound traffic; that some snow

had fallen and the streets were sloppy and wet; that Fulton street has a width of 45 feet from curb to curb, and that the collision occurred in the northeast part of the intersection. There is testimony from which the court could find that, as the ambulance entered the intersection, all traffic on all 4 sides of the intersection stopped for the ambulance, with the exception of the taxicab. Ned Shaw, the driver of the ambulance, testified:

"I entered Division avenue on Franklin street and drove on Division to Fulton where the accident happened. The siren was going all of the time, oscillating to bring it to a high pitch, coast down a little and bring it up again so traffic can hear it. It never stopped completely during that run.

"I was driving 25 to 30 miles an hour during the trip from Franklin to Fulton. Traffic for a distance of 3 blocks from Fulton street was heavy enough to necessitate maneuvering in and out from the right to the left and then as we got toward the intersection of Fulton street it was heavy there. The oncoming traffic had pulled over into the lanes, and the traffic traveling in my direction was heavy enough that I maneuvered back and forth on my right side of the street. The weather was clear. The pavement was wet and slippery, probably covered with thin ice or thin film.

"As I was pulling up to the intersection the signal was changing from the green to amber and at that I slowed up my speed and traffic itself was stopped, for traffic coming from the west, going west, that had stopped, and also traffic on the east; northbound traffic was at a stand-still, and I proceeded into the intersection. I was on the crosswalk when the light changed to red for Division. I was still looking around. I looked to my right and left. I saw vehicles stopped on both sides. There were lines of traffic on both sides that were stopped. As I entered the intersection I was going about 10 miles an hour, 10 to 15. I at that time after making obser-

vation formed a judgment that it was safe to go on through. As I came into the intersection when it was clear why just out of no where, the taxicab; I tried to pull to the right after I saw him; I tried to pull right with him but it was too late then. The taxi appeared from my left. He came from the west going east. I don't know whether he was north or south of traffic that was stopped there. I do know there were other cars waiting as he came through, because I never saw him until I saw him sliding into the intersection itself. Then the 2 vehicles collided. He hit me on the left front fender. I was still headed north at that time. He was headed east. When the impact occurred the ambulance was midway, little past the midsection of the intersection. After the impact it went towards the curb, that would be on the northeast corner. I was still facing north when I came to a stop. I was right over at the east curb. * * *

"I was at the south curb line on Fulton street when my eyes got around north of the 2 cars that were waiting there. I would say I was about 10 feet from the curb line when my vision was clear for the whole intersection. I was about 10 feet or so south of the curb line when my eyes passed those 2 cars. At that time I looked west and I looked east. I also looked north, in other words my head was just in that motion. I looked to the east first. Then I looked to the west. I saw traffic was stopped, that the westbound traffic was stopped and waiting; that the eastbound traffic was stopped and waiting. Then I proceeded north into the intersection. * * *

"There are buildings along the west side of Division avenue, south of Fulton street and on the south side of Fulton street west of Division avenue. These buildings are built right up to the sidewalk and are continuous. They interfere with the view of traffic going north on Division and traffic going east on Fulton."

Richard Twelvetrees, a witness for plaintiff, testified as follows:

"I was a witness to the accident on January 27th at Division and Fulton streets. I was in my automobile first in line headed west on Fulton street at Division. I heard the siren of the ambulance several seconds before the ambulance came into view. The ambulance came into sight a few feet from the corner. The streets were kind of sloppy. It was wet. It was not raining or snowing that I recall. I had stopped for the red light originally. The light then changed to green for Fulton street traffic. When the light changed from red to green for Fulton street traffic the ambulance was just a little ways from the corner, not quite to the corner, and I estimated its speed at 10 to 15 miles an hour. As the light changed from red to green for Fulton street traffic I remained standing there to let the ambulance pass."

Mrs. Viola White, a witness for plaintiff, testified:

"I was in the front seat of the ambulance by the side of the driver. My son's wife was a patient in the rear of the ambulance. * * *

"The ambulance driver appeared to slow down when approaching the intersection and take things in view generally. The vehicle slowed down. The taxicab was on Fulton street, facing east, and the Greyhound bus on the east side of Fulton, going west, both waiting for the traffic light to change. The light turned red as we entered the intersection. I observed the taxicab start up, he had the green light and he started into the intersection. When the taxicab drove into the intersection we were well into the intersection; the front part was beyond the center."

We have carefully examined the evidence produced on the part of the defendant, and conclude that there is evidence from which the trial court could find that plaintiff's driver was driving with due regard to the

safety of others. It follows that he was not guilty of contributory negligence as a matter of law. The trial court found that the driver of the taxicab was careless and negligent. There is evidence to sustain this finding of fact. The ambulance was equipped with and was operating its siren and red light; all cars were stopped. Under such conditions the driver of the taxicab should have heeded the warning given by the ambulance. The trial court was correct in refusing to grant defendant's motion for a directed verdict, as there was evidence from which the court could have found that the negligence of the driver of the taxicab was the proximate cause of the accident.

When this motion was renewed at the close of all proofs, the court had the benefit of the testimony of Lewis Rounds, the driver of the taxicab, who testified that the radio in his cab was on, that all windows were up except the window on the left of the driver's seat, which had an opening of about an inch for ventilation; that when he first saw the ambulance it was 30 to 40 feet south of the intersection; that he was in low gear, traveling at a speed of 7 or 8 miles per hour and could stop his cab within a distance of approximately 15 feet. In our opinion the evidence produced by plaintiffs is such that the trial court could find that the negligence of the driver of the taxicab was the proximate cause of the collision. Other questions have been raised by defendants, but none of them are determinative of any material issues.

The judgment of the trial court is affirmed, with costs to plaintiffs.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## KELLEY *v.* DODGE.

1. SPECIFIC PERFORMANCE—ORAL CONTRACTS TO CONVEY LAND.
   Equity courts have jurisdiction to decree the specific performance of verbal agreements to devise land, where the verbal agreement is satisfactorily established.

2. CONTRACTS—AGREEMENT TO LEAVE PROPERTY BY WILL.
   It is competent for a person to make a valid agreement to make a particular disposition of his property by last will and testament.

3. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW.
   The Supreme Court, hearing a chancery case *de novo*, does not reverse a decree unless persuaded it is not in accordance with the just rights of the parties.

4. SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY LAND—EVIDENCE.
   Evidence supported trial court's finding in suit for specific performance that deceased father and daughter had orally agreed with plaintiffs that if latter would make improvements and repairs upon dilapidated cottage and pay $150 per year for duration of lives of decedents that decedents would pay taxes and insurance and leave the property to plaintiffs, notwithstanding the daughter, as survivor of her father had not devised the property to plaintiffs.

5. SAME—PAYMENTS—REPAIRS—IMPROVEMENTS—INTEREST—EVIDENCE.
   Trial court's findings in suit for specific performance of an oral contract to convey land that plaintiff purchasers owed $335

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 49 Am Jur, Statute of Frauds §§ 5, 403, 506, 539; 57 Am Jur, Wills § 192 *et seq.*

[1, 4, 5] Decedent's agreement to devise, bequeath, or leave property as compensation for services. 69 ALR 14; 106 ALR 742.

[2] 57 Am Jur, Wills § 166 *et seq.*

in payments of so-called rent, $403.23 for repairs and improvements and $111.77 for interest and incidentals are not disturbed, being supported by evidence.

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted June 18, 1952. (Docket No. 44, Calendar No. 45,476.) Decided September 4, 1952.

Bill by D. L. Kelley and wife against Elise Dodge, individually and as executrix of the estate of Marion Gleason, deceased, and others to specifically enforce oral contract to devise real property. Decree for plaintiffs. Defendants appeal. Affirmed.

*J. Donald Murphy*, for plaintiffs.

*Reber & Reber*, for defendants.

SHARPE, J. Plaintiffs, D. L. Kelley and Hazel Kelley, filed a bill of complaint for specific performance of an oral contract claimed to have been made by A. Wilder Gleason and Marion Gleason, to devise certain real estate located at Hess lake, Newaygo county, Michigan. In 1938, the title to the real estate involved became vested in A. Wilder Gleason and Marion Gleason. The terms of the alleged agreement, as set forth in plaintiff's bill of complaint, read as follows:

"That during the spring of 1942, the aforementioned A. Wilder Gleason, who was one of the joint owners of the property described above, made a verbal agreement with the plaintiffs, whereby said A. Wilder Gleason agreed that, commencing as of the year 1942, the plaintiffs would pay to him and his daughter, Marion Gleason, the decedent, the sum of $150 per year, during the lifetime of the aforementioned A. Wilder Gleason and during the lifetime of Marion Gleason, the above named decedent, for the purchase by the plaintiffs of the premises described above; that it was agreed between the plaintiffs and A. Wilder Gleason and Marion Glea-

son, the decedent, that they, the Gleasons, would pay the taxes and insurance on the property during the lifetime of the aforementioned A. Wilder Gleason and Marion Gleason; that it was agreed between the plaintiffs and the Gleasons that if the plaintiffs would pay to them the aforementioned sum of $150 per year that they, the Gleasons, would leave said property to the plaintiffs upon the death of the survivor of A. Wilder Gleason and Marion Gleason, the decedent; that the aforementioned Gleasons agreed to give the plaintiffs immediate possession of the property.

"The aforementioned A. Wilder Gleason died July 23, 1946, and, subsequent thereto, Marion Gleason, the above named decedent, again confirmed to the plaintiffs the terms of the agreement, as set forth above, and specifically reagreed with the plaintiffs that if the plaintiffs would pay to her, Marion Gleason, the sum of $150 per year during the period of her lifetime that she, Marion Gleason, would leave the real estate above described to the plaintiffs upon her death; that the aforementioned Marion Gleason agreed to pay the taxes and insurance on the premises during her lifetime, to all of which the plaintiffs agreed, and, in pursuance of said agreement, the plaintiffs continued to pay the sum of $150 per year to Marion Gleason, the above named decedent, subsequent to A. Wilder Gleason's death on July 23, 1946, said payments having been made for each year from 1942 to 1950, inclusive, the said payment being due in September of each and every year."

The record shows that A. Wilder Gleason died July 23, 1946, and Marion Gleason died February 26, 1951, leaving a will dated May 24, 1949, devising the above property to J. A. Gleason, Esther Parks, Roma Duff and Erma Dodge.

The will also provided "and D. L. Kelley shall have first option to purchase same." The cottage property involved in these proceedings had been owned by the Gleason family and used by them as a summer

home for nearly 40 years prior to 1942. About the year of 1937 the Gleasons purchased a summer cottage on another lake. The condition of the cottage in 1942, when plaintiffs first occupied it in 1942 was dilapidated and untenantable. Plaintiffs have occupied the cottage since 1942. Plaintiffs claim that, relying upon the aforesaid agreement, they made extensive and costly improvements consisting of

"(1) Drilling a new water well and installing an electric pump thereon.
"(2) Installing a new sink in the kitchen of the cottage.
"(3) Rewiring of the cottage for electricity.
"(4) Installing electric fixtures in the cottage.
"(5) Painting the cottage inside and out.
"(6) Sealing the cottage with plywood on the inside, both upstairs and downstairs.
"(7) Installing new screens on the cottage on 2 occasions.
"(8) Repairing the roof.
"(9) Repairing the stairs leading from the cottage to the lake.
"(10) Building a new dock at the lake.
"(11) Installing cement steps at the back of the cottage.
"(12) Installing new linoleum in the kitchen and porch.
"(13) Installing a trap door at the top of the stairs.
"(14) Laying a cement floor in the garage.
"(15) Screening in the back and front porch.
"(16) Repairing the mantel and fireplace.
"The bill of complaint alleges the cost of these improvements to be $2,000."

The value of the property in 1942 was approximately $900.

The cause came on for trial, and at its conclusion the trial court found as a fact that the evidence offered by plaintiffs established the oral agreement as

claimed by plaintiffs. In an opinion the court made the following finding of facts:

"The proofs are undisputed that the plaintiffs went into possession of the property in the spring of 1942 after the making of the verbal contract which they rely upon and have since been and are still in possession of the property. They have made many improvements and repairs which the bill alleges amount to $2,000 or thereabouts. The proofs are somewhat uncertain as to the exact amount of the expenditures which have been made by way of permanent repairs or improvements upon the property. These improvements under the undisputed proofs, include the installation of a new well and pump, a new sink, rewiring of the cottage for electricity, electric lights, painting the cottage both inside and out and also a garage, new screens, the construction of new cement steps and a cement floor in the garage, a new dock and a new mantel, porch blinds and sealing up of the cottage on the inside, both upstairs and down.

"I am satisfied after a careful examination of all the evidence in this case that there was a contract entered into verbally, as claimed by the plaintiffs. The most clear explanation of that contract is found in the deposition of the witness, Donna Whitehead King. Under the contract as testified to by her there was an obligation on the part of the plaintiffs to keep the property in repair and in addition thereto to pay the sum of $150 per year. The proofs are undisputed that the Kelleys were never asked to vacate the premises at any time prior to the death of either Mr. Gleason or his daughter, Marion Gleason. In other words, the contract remained in effect at the time of the death of Marion Gleason without having been rescinded or terminated by any affirmative action on the part of either Mr. Gleason or his daughter Marion.

"This leads us to the question as to whether there was anything left undone by way of performance

on the part of the plaintiffs which they were required to do but had failed to perform at the time of the death of Marion Gleason to entitle them to the relief prayed for in the bill of complaint. The burden of proof rests upon the plaintiffs to show a performance of their part of the contract. Under the contract as interpreted by this court it was the Kelley's duty to make both the temporary and permanent repairs and to relieve the Gleasons of the necessity of any expenditures whatsoever on the property. I am inclined to allow the claim made by the defendants of a total of $403.23 for such repairs and improvements. It was also the duty of the Kelleys to keep up the payments in full of the $150 per year. It is a bit difficult to determine with mathematical accuracy just where the parties stand with relation to these payments. The defendants claim there is an unpaid balance in this connection of $335 and they rely upon income tax reports and some rather poorly kept records by Marion Gleason. The plaintiffs, it is true, are handicapped because they are unable to testify and supply their own records. I am forced under the circumstances in view of the fact that the burden of proof is upon the plaintiff to give credence to and allow the amount of $335 as being unpaid upon these annual payments. This makes a total of $738.23. Obviously, some time has elapsed since these accounts became due and payable and some allowance for interest should be made thereon. It is difficult and almost impossible to make an accurate computation of the same. It is, however, the final finding of this court as the nearest approach which I am able to make, that in addition to the sum of $738.23, the plaintiffs should also pay an additional amount to cover any incidentals, including interest that may have accrued, to make a total of $850."

Defendants appeal and urge that the evidence failed to establish the existence of a fair and equitable contract with sufficient certainty to be capable of specific performance.

It is an established principle that equity courts have jurisdiction to decree the specific performance of verbal agreements to devise land where the verbal agreement is satisfactorily established. It is competent for a person to make a valid agreement to make a particular disposition of his property by last will and testament; see *Carmichael* v. *Carmichael,* 72 Mich 76 (1 LRA 596, 16 Am St Rep 528).

In *Moore* v. *Moore,* 231 Mich 209, we said:

"We hear chancery cases *de novo;* but we do not, and should not, reverse decrees unless we are persuaded they are not in accordance with the just rights of the parties."

Donna Whitehead King, an ex-school teacher, and a witness produced in behalf of plaintiffs, testified to a conversation she had with A. Wilder Gleason:

"*A.* He told me he and Marion had an agreement with Hazel and Dave Kelley wherein they paid a certain amount of money, a certain amount a year, and that in return the Kelleys were to keep up improvements and repairs and he and Marion were to pay taxes and insurance, because it was such a small amount; and when he and Marion were finished with the cottage, it would belong to Hazel and David.

"*Q.* That is what Wilder Gleason said the agreement was, to you?

"*A.* And Marion was there, yes, sir."

She also testified to a conversation she had with Marion Gleason subsequent to the death of A. Wilder Gleason:

"*Q.* Will you state what Marion Gleason told you on that occasion concerning the arrangement that

she had made with D. L. Kelley and Hazel Kelley concerning this cottage?

"*A.* Yes. She said to me, 'I don't know why I don't sign over the cottage to Dave and Hazel now, I think I just keep it for sentimental reasons;' but she said, 'We have an agreement that they pay me so much a year and they make improvements and repairs and I have agreed it will be theirs when I pass on.' "

Other testimony of like import was given by W. J. Brown, a close friend of Marion Gleason; Ed Henning, township supervisor, Mr. and Mrs. Lee Robey, merchants in Newaygo since 1927, Mary Jerome, who with her husband owned and operated a drugstore, Dulcie Hammond, an employee of the telephone company, Fannie Johnson, a close friend of Marion Gleason for 25 years, and Mrs. William Faust, a neighbor of Marion Gleason.

We have examined the record and analyzed the testimony of all witnesses, and conclude that the testimony produced in behalf of plaintiffs sustains the finding of the trial judge that A. Wilder Gleason and Marion Gleason did enter into an oral contract with plaintiffs as alleged in their bill of complaint. Defendants also urge that the undisputed acts of the deceased, Marion Gleason, were so inconsistent with the alleged contract as to constitute convincing proof that the oral contract was never entered into. The only act of Marion Gleason that was inconsistent with the oral contract was the making of her will, wherein she failed to devise the property to plaintiffs. Her reasons for so doing are unexplained in the record, but there is convincing proof that after the death of her father she made the oral agreement as alleged by plaintiffs.

The trial court found as a fact that upon the death of Marion Gleason the plaintiffs owed her estate the sum of $335, so-called rent, and the further sum of $403.23 for repairs and improvements made by de-

ceased upon the property, and the further sum of $111.77 for interest and incidental repairs.

The record justifies these facts, but they do not detract from the fact that plaintiffs and Marion Gleason did enter into an oral agreement concerning the property. The record satisfies us that the agreement was made, and that it was equitable. This case involves issues of fact. In such cases the conclusion of the trial judge will not be disturbed when fairly supported by evidence. We so find. The decree is affirmed, with costs to plaintiffs.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## LEVENBURG *v.* MERRILL, LYNCH, PIERCE, FENNER & BEANE.

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

   The Supreme Court does not reverse the decision of a trial court in a nonjury action at law upon a finding of fact unless the evidence clearly preponderates in the opposite direction.

2. CONTRACTS—BROKERS—CONDITIONAL OFFER TO PURCHASE.

   Evidence justified trial court in nonjury case in finding that plaintiff seller of stock had sufficient information from defendant broker concerning offer from prospective purchaser, which had attached several conditions, to understand it and to act accordingly.

3. SAME—OFFER AND ACCEPTANCE—CANCELLATION OF ACCEPTANCE—EVIDENCE.

   Finding of trial court that at time when plaintiffs attempted to cancel sale of their stock that purchaser's offer to purchase such stock had been accepted, was irrevocable, and that attempted cancellation of acceptance came too late *held,* sustained by competent evidence.

Appeal from Wayne; DesJardins (George W.), J., presiding. Submitted June 10, 1952. (Docket No. 55, Calendar No. 45,043.) Decided September 4, 1952.

Action by Annette J. Levenburg and her husband against Merrill, Lynch, Pierce, Fenner & Beane, a

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 3 Am Jur, Appeal and Error § 896 *et seq.*
[3] 46 Am Jur, Sales § 45.

limited partnership, for damages for claimed unlawful sale of stock. Judgment for defendant. Plaintiffs appeal. Affirmed.

*Maxwell M. Lowe* (*Richard G. Eubank,* of counsel), for plaintiffs.

*Dickinson, Wright, Davis, McKean & Cudlip* (*Daniel J. Tindall, Jr.*, and *Richard C. Van Dusen,* of counsel), for defendant.

SHARPE, J. This is an action for damages for the claimed unlawful sale of 300 shares of Atlantic Gulf & West Indies Steamship Lines. Plaintiffs, Charles C. Levenburg and Annette J. Levenburg, in November, 1948, were the owners of 300 shares of the above stock. From 1944 to December, 1948, plaintiffs had about 50 transactions with defendant company, which included the buying and selling of stock. The majority of these transactions were margin accounts, and the agent in charge for defendant company was Nathan Plotkin.

On or about November 15, 1948, Plotkin informed Mrs. Levenburg that he could get 47½ for her Atlantic Gulf & West Indies stock. On December 2, 1948, she authorized defendant company to sell at that price. It appears that on November 20, 1948, the Manufacturers Trust Company offered to buy shares of common stock of Atlantic Gulf & West Indies at 47½ per share, with a dividend of $1 per share, payable December 15, 1948, to be retained by the seller. The offer of the Manufacturers Trust Company was subject to the following terms:

"If between 60,000 and 75,000 shares are deposited in acceptance of the offer by 3 p.m. on December 10, 1948, all deposited stock will be purchased. If more than 75,000 shares are so deposited, the purchasers reserve the right either to accept all shares deposit-

ed or to purchase not less than 75,000 shares on a pro rata basis. Should less than 60,000 shares be deposited, the purchasers reserve the right to accept and pay for such number of shares deposited, and also reserve the right to extend the final deposit date by not more than 14 days. Our customers represent that this offer to purchase is for investment and no other representations are made."

Following the conversation with Mrs. Levenburg on December 2, 1948, at which time the market price of the stock was 45¼, Mr. Plotkin made out an order directing the defendant's New York office to tender plaintiff's 300 shares to the Manufacturers Trust Company. This order was received in defendant's New York office on December 2, 1948, at 2:29 p.m. On December 3, 1948, defendant's New York office delivered the stock to the Manufacturers Trust Company.

On December 10, 1948, plaintiff, Annette J. Levenburg, instructed defendant company to cancel the sale of the stock. On December 13, 1948, plaintiffs came to defendant's office in Detroit and talked with Mr. Plotkin. As a result of this conversation defendants wired their New York office "Client would like to bust exchange if possible and sell at market." On this date the market price of the stock was 55¼. Upon receipt of the telegram the New York office contacted the Manufacturers Trust Company, and was advised by its officer in charge that there was no right to withdraw the offer to sell the 300 shares of Atlantic Gulf & West Indies Steamship Lines.

On December 16, 1948, defendant company received a letter from plaintiffs demanding a reinstatement of the stock. On December 23, 1948, the stock was selling at 64½.

The cause came on for trial before the court without the aid of a jury. On March 23, 1950, the court entered judgment in favor of defendant company.

In an opinion filed the court made the following finding of facts:

"The court is satisfied from the record in this case, first, that plaintiff, Annette J. Levenburg, was given sufficient information with reference to the proposed transaction by Mr. Plotkin to enable her to reasonably understand the nature of the same, and that if she desired more definite or detailed information from her agent or broker, it was her duty to inquire. Otherwise, he had every reason to believe that she was satisfied with the information in her possession.

"The record discloses absolutely, nothing that was withheld. The record does disclose that this matter was handled in a business-like manner, in accordance with practices, and that there was no bad faith on the part of Mr. Plotkin or overreaching on the part of his employer.

"It further appears definitely that the defendant in this case in no manner profited by the transaction except as it attempted to build the goodwill of a customer.

"There remains but one question. Was there an order for cancellation which could have been carried out on December 10th at 11:30 a.m. and was that given?

"I am not going to question for one minute that witness Annette J. Levenburg said something about 'Have you sold it?' That would be, as her counsel stated, a natural remark. The serious question, whether Mr. Plotkin said 'No'. I wouldn't be surprised if he might have said 'I will see what I can do,' because that is what he did later when they came to the office. He has no recollection of the conversation so we will accept Mrs. Levenburg's version of it. You will note that she does not ask that the offer be withdrawn, if we are going to be technical. She directs a sale of a stock that has been offered and tendered 8 days before and there is no way of determining whether it could have been withdrawn, even at that time. Definitely it could not be sold unless it

could be withdrawn and that is a very short time for a principal to give an agent to act.

"The court is of the opinion now, and I think I want you to brief this, that that sale had become absolute, upon this record, because there is no evidence whatever that 60,000 shares had not been deposited. They may have been deposited that day, they may have been deposited a week before, and the minute they were deposited, the contract, in my opinion, became absolute."

Plaintiffs appeal and urge that defendant company did not give plaintiffs sufficient information relative to the offer of Manufacturers Trust Company to purchase the stock.

The trial court found as a fact that plaintiff did have such information. We have repeatedly held that in law cases tried before the court, we do not reverse unless the evidence clearly preponderates in the opposite direction. In the case at bar defendant's agent, Mr. Plotkin, testified that in the latter part of November, 1948, he discussed the terms of the Manufacturers Trust Company's offer with plaintiff, Annette J. Levenburg, and acquainted her with the details of the offer, including the Trust Company's offer to purchase a certain number of shares at a price of $47.50 per share for an undisclosed principal, and that the expiration date of the offer was December 10, 1948.

We conclude from the above evidence that the trial court was correct in finding that Mrs. Levenburg had sufficient information concerning the offer to understand it and act accordingly.

Plaintiffs urge that they ordered defendant company to sell the 300 shares of stock, and it was its duty to cancel the order on December 10, 1948, when so ordered by plaintiffs. The difficulty with this theory is that the Manufacturers Trust Company made the offer and plaintiffs accepted the offer. It

appears that the stock was delivered to the Manufacturers Trust Company on December 3, 1948, a week previous to Mrs. Levenburg's order to "cancel the sale." There is testimony that on December 10th or 13th, 1948, the order to cancel the sale or tender was irrevocable.

Mr. K. B. Atkinson, a witness for defendant, and an employee in defendant's New York office, testified:

"It is my recollection that we were requested by Detroit to withdraw the item but were not successful. We received that request on December 13th by wire from the Detroit office. It is my recollection that I called the agent, and that they stated that under the terms of the offer, the item could not be withdrawn. It is my recollection that they said it could not have been withdrawn at any time after having been deposited."

There is competent evidence to sustain the finding of the trial court that on December 10, 1948, the sale had been made and was irrevocable.

The record clearly shows that plaintiffs accepted the offer of Manufacturers Trust Company, and their attempt to cancel the acceptance came too late. The judgment of the trial court is affirmed, with costs to defendants.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## ATTORNEY GENERAL, *ex rel.* REUTER, *v.* CITY OF BAY CITY.

1. ELECTIONS—PRIMARIES.

A primary election is not a regular election in any sense of the term but is merely the selection of candidates for office by the members of a political party in a manner having the form of an election.

2. MUNICIPAL CORPORATIONS—HOME-RULE CITIES—CHARTER AMENDMENTS—ELECTIONS.

The purpose of the amendment to the home-rule act relative to the submission of charter amendments to the electorate was to eliminate their submission at primary and special elections and require submission at a regular city or State or county election (CL 1948, § 117.21).

3. QUO WARRANTO—VALIDITY OF ELECTIONS.

A writ in the nature of quo warranto is the proper writ to test the validity of an election (CL 1948, §§ 638.26–638.29).

4. SAME—CIRCUIT COURT—TIME FOR FILING PETITION.

A petition for a writ in the nature of quo warranto to test the validity of an election must be filed within 30 days after the election when filed in the circuit court (CL 1948, § 638.29).

5. SAME—SUPREME COURT—CONSTITUTIONAL LAW—STATUTES.

The power to issue writs of quo warranto at any time, conferred upon the Supreme Court by the Constitution, cannot be limited by statute (Const 1908, art 7, § 4; CL 1948, § 638.29).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 18 Am Jur, Elections § 148.
[2, 9] 28 Am Jur, Initiative, Referendum, and Recall § 31.
[3] 44 Am Jur, Quo Warranto §§ 16, 22, 27.
[4, 6] 44 Am Jur, Quo Warranto §§ 62, 63.
[5] 44 Am Jur, Quo Warranto §§ 4, 5.
[7, 8] 44 Am Jur, Quo Warranto §§ 73, 74, 76, 78.
[10] 14 Am Jur, Costs §§ 23, 91.

6. SAME—SUPREME COURT—TIME FOR FILING PETITION.
   Challenge to the validity of election did not come too late, where petition for writ in nature of quo warranto which might have been filed in the circuit court was filed in the Supreme Court after lapse of more than 30 days following the election (Const 1908, art 7, § 4; CL 1948, § 638.29).

7. SAME—PARTIES—ATTORNEY GENERAL.
   Fact that terms of office of members of home-rule city board of health had expired before the attorney general filed petition for writ in nature of quo warranto on their relation against city was immaterial, as statute authorized the attorney general to file an information in the nature of quo warranto either on the relation of a private party without leave or on his own relation, where it is alleged an office is being held illegally (CL 1948, § 638.1).

8. SAME—PARTIES—ATTORNEY GENERAL.
   Information in nature of quo warranto to test validity of adoption of amendment to charter of home-rule city was filed by a proper party, where filed by the attorney general on the relation of private parties (CL 1948, § 638.1).

9. MUNICIPAL CORPORATIONS—AMENDMENTS TO HOME-RULE CITY CHARTER—PRIMARY—BOARD OF HEALTH.
   Submission of proposed amendments to home-rule city charter relative to organization of city board of health at primary election was null and void, hence former provisions relating to the board remained in full force and effect (CL 1948, §§ 638.26–638.29).

10. COSTS—PUBLIC QUESTION—VALIDITY OF CHARTER AMENDMENT ELECTION.
    No costs are allowed in quo warranto proceedings to test validity of election on question of adopting amendments to home-rule city charter at primary election, a public question being involved (CL 1948, §§ 638.1, 638.26–638.29).

Quo Warranto by Frank G. Millard, Attorney General, on the relation of Clarence W. Reuter and others, against City of Bay City, a municipal corporation, and others to test the validity of an amendment to the charter relative to the organization of the city board of health. Submitted June 12, 1952. (Docket

No. 66, Calendar No. 45,433.) Writ granted September 5, 1952.

*Smith & Brooker,* for plaintiff.

*Bernard S. Frasik,* for defendants.

BUTZEL, J. The city of Bay City is chartered and operates under the provisions of the home-rule act (CL 1948, § 117.1 *et seq.* [Stat Ann 1949 Rev § 5.2071 *et seq.*]). Its charter, prior to the purported election hereinafter referred to, provided for a board of health composed of 5 members, 3 of whom were to be duly licensed physicians, with the power in the city commission to make such appointments.

A charter amendment providing that the board should be composed of 5 members, 1 of whom was to be a licensed physician, 1 a licensed dentist, and 1 a licensed osteopath was proposed by initiatory petition and was submitted to the electorate at a primary election on Monday, February 19, 1951, it being assumed that the amendment could be legally submitted to the electorate at such an election. Plaintiff asserts and defendants do not deny that such submission was improper for the applicable statute (PA 1947, No 87, § 21 [CL 1948, § 117.21 (Stat Ann 1949 Rev § 5.2100)]) provides for the amendment of an existing city charter originally submitted by initiatory petition to the voters *only* at a regular municipal or State election. The 1947 amendment does not so provide. A primary election is not a regular election in any sense of the term. In *Line* v. *Board of Election Canvassers of Menominee County,* 154 Mich 329 (18 LRA NS 412, 16 Ann Cas 248), we held that a primary election is merely the selection of candidates for office by the members of a political party in a manner having the form of an election. Analyzing the effect of section 21 after its 1939

amendment, in *Oakland County Drain Commissioner* v. *City of Royal Oak,* 306 Mich 124, we stated (at p 151):

"It is apparent that the amendment was intended to eliminate the submission of charter amendments at primary and special elections and to require submission at a regular city or State and county election."

Plaintiff brings quo warranto by original proceedings in this Court on the relation of 3 individual former members of the board of health of Bay City, 2 of whom are citizens of Bay City. Both parties agree that a writ in the nature of a quo warranto is the proper writ to test the validity of an election. Defendants, however, contend that the challenge to the validity of the election comes too late and was not made by the proper parties. They cite the following statutory provisions:

"An information in the nature of a quo warranto may be filed in the several circuit courts of this State, as well as in the Supreme Court, and all of the provisions of this chapter shall be applicable to such proceedings in such circuit courts, and all powers conferred upon the several judges of the Supreme Court by this chapter are hereby conferred upon the judges of the several circuit courts respectively: *Provided,* That no such information shall be filed and allowed by any such circuit court against any judge of the Supreme Court or any State officer." CL 1948, § 638.26 (Stat Ann § 27.2340).

"Informations under this chapter may be filed by the prosecuting attorney of the proper county, on his own relation, or that of any citizen of the county, without leave of the court, or, by any citizen of the county by special leave of the court or a judge thereof." CL 1948, § 638.27 (Stat Ann § 27.2341).

"A petition may be filed in the circuit court of any county of this State whenever it shall be made to

appear that material fraud or error has been committed at any election in such county at which there shall have been submitted any constitutional amendment, question, or proposition to the electors of the State or any county, township, or municipality thereof." CL 1948, § 638.28 (Stat Ann § 27.2342).

"Such petition shall be filed within 30 days after such election by the attorney general or the prosecuting attorney of the proper county on his own relation, or on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. Such petition shall be filed against the municipality wherein such fraud or error is alleged to have been committed." CL 1948, § 638.29 (Stat Ann § 27.2343).

Had the instant petition been brought in the circuit court CL 1948, § 638.29, *supra,* would bar redress, as it was not brought therein within the 30 days provided in this section. See *Youells* v. *Morrish,* 218 Mich 194; *Anderson* v. *Levin,* 218 Mich 225; *Voorhies, ex rel. Bradburn,* v. *Nier,* 222 Mich 374; *Heidelmeyer* v. *Village of Oakwood,* 222 Mich 331; *Fulton Township School District, Gratiot County,* v. *School District No. 4 Fractional, Essex Township, Clinton County,* 302 Mich 566; *Lake* v. *Township of North Branch,* 314 Mich 140; and *Finlayson* v. *Township of West Bloomfield,* 320 Mich 350.

Plaintiff, however, chose an original proceeding in this Court and contends that the Supreme Court has the power to issue original writs at any time by reason of article 7, § 4, of the Michigan Constitution which reads:

"The Supreme Court shall have a general superintending control over all inferior courts; and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs, and to hear and deter-

mine the same. In all other cases it shall have appellate jurisdiction only."

This power cannot be limited by statute. See *Attorney General, ex rel. Trahair,* v. *Landel Metropolitan District,* 318 Mich 376, an original proceeding in this Court, in which it was sought to challenge the election by which the defendant district was created. It was contended that the challenge came too late by reason of the 30-day proviso. We, however, stated at pp 382, 383:

"The cases on which defendants rely refer to proceedings started in circuit court. * * * None relates to original jurisdiction in this Court in quo warranto proceedings. * * *

"The necessity for an early decision in the instant matter is urged by the parties, to settle questions that may relate to taxation and bond issues. Under the circumstances this Court will entertain jurisdiction of the proceedings. In *People, ex rel. Bennett,* v. *Benfield,* 80 Mich 265, an original proceeding by quo warranto in this Court, it was said (p 267):

" 'We consider the question raised (right to office) of sufficient public importance to be entertained and passed upon.' "

Defendants attempt to distinguish the cited case by stating that plenary power is exercised only in cases when a remedy was not initially available and where substantial rights are affected as taxation, insurance of bonds, et cetera. However, an examination of the *Landel Case* reveals that the challenge there could have been properly brought in the circuit court within 30 days, even as in the instant case, and also that the Court, although speaking of taxation and bond issues, did not state that these were the *only* instances in which a question might be of sufficient public importance to warrant the Supreme Court hearing the case and intimated by the citation of *People, ex rel. Bennett,* v. *Benfield, supra,* that the

question of right to a public office might be one of those instances. It is certainly a question of very greatest importance involving the public health of the city of Bay City to have a legally constituted board of health. We find that the challenge to the validity of the election did not come too late.

Defendants, citing CL 1948, § 638.27 (Stat Ann § 27.2341), also contend that this proceeding is not brought by the proper parties in interest; that the relators, Clarence Reuter, Edwin Miller and M. J. Dardas, have no interest in the medical board, their terms thereon having expired prior to the commencement of this action. However, the attorney general, unlike the prosecuting attorney, is by CL 1948, § 638.1 (Stat Ann § 27.2315) given authority to file an information in the nature of a quo warranto on the relation of any private party without leave or on his own relation where it is alleged that an office is being held illegally, as it is here alleged. The attorney general having so acted in the instant case, the propriety of the relation is beyond question.

The case being properly before us, we hold that the submission of the proposed charter amendment to the voters at the primary election was null and void. The former charter provisions relating to the board of health of the city of Bay City, prior to the attempted amendment, herein declared void, are still in full force and effect.

Judgment will be entered accordingly; no costs, a public question being involved.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## EATON v. BAKER.

1. CERTIORARI—QUESTIONS REVIEWABLE—RECALL PETITION SIGNATURES.

   Whether or not 600 signatures on petitions for recall of trustees of school district in which there were cast not to exceed 899 votes for governor in the last preceding election is not determined on appeal in nature of certiorari from order granting writ of mandamus to hold recall election, where claim that there was an insufficient number of signatures appears to have been abandoned (CL 1948, § 201.101 *et seq.*).

2. OFFICERS—RECALL—PETITION.

   A petition for the recall of a public officer differs from a proceeding for removal and exacts neither the technical, detailed statement of charges nor proof or procedure of a petition for removal (CL 1948, § 201.101 *et seq.*).

3. SAME—RECALL—PETITION—ALLEGATIONS—INFORMATION TO ELECTORS.

   A petition for recall of a public officer must be such as will furnish information to the electors on which they may form a judgment when called upon to vote and reason or reasons assigned must be based on some act or failure to act which, in the absence of a sufficient justification, would warrant the recall (CL 1948, § 201.101 *et seq.*).

4. SAME—RECALL—PETITION—ALLEGATIONS—PREPARATION OF OFFICER'S JUSTIFICATION.

   A petition for recall of a public officer must contain such specific allegations of facts and charges of misconduct in office as to enable the officer to identify the incident and prepare his justification but is not insufficient because it does not allege the time, person and occasion involved as it

---

REFERENCES FOR POINTS IN HEADNOTES

[1–7] 28 Am Jur, Initiative, Referendum, and Recall § 48 *et seq.*

[2–7] Constitutional or statutory requirement as to short title, ballot title, or explanation of nature of proposal in recall petition. 106 ALR 555.

[8] 14 Am Jur, Costs § 91.

must be presumed to refer to the current term of office (CL 1948, § 201.101 *et seq.*).

5. SAME—RECALL—PETITIONS—STATEMENT OF CHARGES.
A meticulous detailed statement of the charges of misconduct in office is not required in a petition for recall of a public officer (CL 1948, § 201.101 *et seq.*).

6. SAME—RECALL—PETITIONS—SURPLUSAGE.
A petition for recall of a public officer which contains sufficient valid reasons, properly stated, that may be classified as charges of misfeasance, malfeasance or nonfeasance to warrant a recall entitling the electors to vote thereon would not be invalid because it also contained some reasons which were insufficient or unimportant (CL 1948, § 201.101 *et seq.*).

7. SCHOOLS AND SCHOOL DISTRICTS—RECALL OF TRUSTEE—PETITIONS—AVERMENTS AS TO MISFEASANCE OR MALFEASANCE.
A petition for the recall of a school district trustee which contained averments that he had received money in the form of wages from the school board and district in violation of law and that he has been using property of the district for his own use, pleasure and business, to the neglect of its proper use, particularly the station wagon, constituted a sufficiently specific averment of misfeasance or malfeasance in office, since it was such a misappropriation of assets as would warrant a recall and gave the officer involved sufficient notice so as to be able to prepare his justification of his conduct in office (CL 1948, § 201.103).

8. COSTS—PUBLIC QUESTION—RECALL OF SCHOOL DISTRICT TRUSTEE.
No costs are allowed in mandamus proceeding to determine validity of proceeding for recall of a school district trustee, a public question being involved.

Appeal from Oakland; Hartrick (George B.), J. Submitted August 21, 1952. (Calendar No. 45,513.) Decided October 6, 1952.

Petition by Otis C. Eaton and others for writ of mandamus against Loretta Baker and others, trustees of School District No 1 of Royal Oak township to compel the calling and holding of a recall election. Writ granted. Defendants appeal in nature of certiorari. Affirmed.

*Russell E. Knister* and *Youngjohn, Worley, Brown & Flynn,* for plaintiffs.

*George H. Cholack* and *Hugh K. Davidson,* for defendants.

BUTZEL, J. Plaintiffs, electors and voters in School District No 1 of Royal Oak township in the county of Oakland and State of Michigan, filed a petition in the Oakland circuit court for a writ of mandamus to order defendants, trustees and Loretta Baker, acting clerk of such school district, to call and take all other necessary steps for a recall election as asked for in similar petitions for the recall of defendants Lonnie C. Cash, Chester Carter and Sidney Thomas, as trustees.

Although we are only considering the petition for the recall of defendant Lonnie C. Cash, counsel have stipulated that our determination herein shall also be binding upon defendants Chester Carter and Sidney Thomas. According to the recall petitions, School District No 1, *supra,* embraces the entire voting precinct No 4 and a portion of voting precinct No 6 of Royal Oak township, that the vote for all candidates for governor for the State of Michigan in the last preceding election did not exceed 899 votes and the total number of voting electors who signed the recall petitions was in excess of 600. Following the filing of the petitions, demand was made upon Loretta Baker as acting clerk of the school district and upon other defendants, comprising all its board of trustees, that petitions for the recall of Cash be given full effect, that a recall election be called as asked for in the recall petitions, and that they do all the necessary things to proceed with a recall election in accordance with the law, CL 1948, § 201.101 *et seq.* (Stat Ann § 6.771 *et seq.*). Defendants first claimed that there was an insufficient number of

signatures to the petitions but they evidently have abandoned such claim. In reply to the petitions for mandamus they do not deny any of the reasons given for such recall but challenge the sufficiency of the petitions, claiming that they do not comply with the recall statutes, *supra,* in that they do not state clearly "the reason or reasons for said demand" for recall. The trial judge held the petitions sufficient and issued a writ of mandamus. Defendant filed an appeal to this Court in the nature of certiorari.

The petition against defendant Cash sets forth the following reasons why he should be recalled from the office of trustee of said school board:

"1. That the said Lonnie C. Cash has violated the clear provisions of the laws of the State of Michigan pertaining to the administration of education in said school district;

"2. That he has received money in the form of wages from said school board and district, in violation of law;

"3. That he has received expense moneys improperly from said board and district, in violation of law;

"4. That he has been using property of the school district for his own use, pleasure and business, to the neglect of its proper use, particularly the station wagon;

"5. That he has failed as a board member to ask for and obtain proper competitive bids on contracts with the said board as required by law;

"6. That he has intimidated employees to obtain forced resignations and has not issued proper legal contracts of hire to teachers employed by said board;

"7. That his actions have caused turmoil, loss of public confidence and irreparably injuring confidence in public education;

"8. That he has taken action with others on said board to interfere with free discussion of school problems by employees under threat of dismissal;

"9. That he has participated in concert with others on said board to violate the school laws of the State of Michigan as hereinbefore set forth.

"10. That he has assumed duties with other members of the board which should be performed by the superintendent of the district and which he has prevented the superintendent from performing."

We have repeatedly called attention to the fact that a recall petition differs from a proceeding for removal, and exacts neither the technical proof nor procedure of a petition for removal.

We have considered what constitutes a sufficiently clear statement of reasons to comply with the statute in 3 previous cases, namely, *Newberg* v. *Donnelly,* 235 Mich 531; *People, ex rel. Elliott,* v. *O'Hara,* 246 Mich 312; *Amberg* v. *Welsh,* 325 Mich 285. In *Newberg* v. *Donnelly, supra,* cited by defendants, allegations that a member of the school board refused to hire a certain teacher and stated that he would run the school district to suit himself while intimidating the other members of the school board were held to be insufficient. We said:

"This statement must be such as will furnish information to the electors on which they may form a judgment when called upon to vote. The reason or reasons assigned must be based on some act or failure to act which, in the absence of a sufficient justification, would warrant the recall."

In *People, ex rel. Elliott,* v. *O'Hara, supra,* we held that allegation that a school board officer had held back $60 from salary due an employee for his own use to be sufficient. We stated that an allegation was sufficient when it was "a specific allegation of facts, and charges misconduct in office. It is not insufficient because it does not allege the time, person, and occasion involved. It must be presumed to refer to the ensuing term of office. It clearly states

the charge so the officer may identify the incident and prepare his justification, and it informs the electors of the specific character and instance of official misconduct relied on for recall."

We further held that:

"In view of the general application of the statute to even the smallest municipalities, where such petitions would often be drafted by laymen, it would impose too great a burden on recall proceedings to require meticulous and technical detailed statement of the charges."

This becomes particularly true in the instant case where evidently over 600 voters out of 899 entitled to vote filed the recall petitions. CL 1948, § 201.101.

In *Amberg* v. *Welsh, supra,* we held that even if some of the reasons for recall were unimportant or insufficient, there were sufficient valid reasons, properly stated, in the petition that may be classified as charges of misfeasance, malfeasance, or nonfeasance to raise a question as to whether the acts of the officer complained of warrant a recall and entitled the electors to vote thereon.

It will serve no purpose to compare all these cases in more detail. No 2 recall petitions will allege the same facts or circumstances. We do find, however, that at least reasons 2 and 4 of the petition before us meet the tests set forth in those cases. They present a more definite statement of reasons than appeared in the case of *Newberg* v. *Donnelly, supra.* If they are true and defendant can show no justification, then they are charges of misfeasance or malfeasance in office, since they involve the illegal use of school district properties and money. The misappropriation of such assets would warrant a recall. As is obvious upon examination of the entire petition, the receiving of a salary and the use of the district station wagon were carried on as a continuous

course of conduct and it would have been impossible for the petitioners to refer to a particular time and occasion. As in the case of *People, ex rel. Elliott,* v. *O'Hara, supra,* it must be presumed that this course of conduct took place in a current term of office. Defendant Cash has sufficient notice so as to be able to prepare the justification of his conduct in office. CL 1948, § 201.103. Similarly the electors will know of the specific character of the misconduct relied upon as a basis for recall.

We find that reasons 2 or 4 satisfy the statute in that each, or either one, constitutes a clear statement of a reason for recall. In so holding, we find it unnecessary to consider the other portions of the recall petition.

The order of the trial court ordering the issuance of a writ of mandamus is affirmed, and the case remanded to the trial court for further proceedings, if such order is not complied with forthwith. No costs, a public question being involved.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## STEPHENSON *v.* STEPHENSON.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONSPIRACY.

No discussion of facts is made on appeal in regard to parcel of property as to which plaintiff does not appear to claim any wrongdoing or conspiracy on her appeal in suit for divorce against her former husband in which she joined his father and husband's paramour on charge of conspiracy to deprive plaintiff of her rights in certain properties.

2. CONSPIRACY—EVIDENCE.

Conspiracy to deprive plaintiff wife in suit for divorce of her interest in property which the parties had occupied for a time as their home *held,* not shown, where evidence shows that defendant father-in-law had paid defendant son's debts and sent the son and plaintiff the balance of the purchase price, that such proceeds were used to pay the son's debts and plaintiff's hospital bills and they signed a quitclaim deed to the father in consideration for his assumption of the obligations of the parties.

3. SAME—EVIDENCE.

Proof of conspiracy to defraud plaintiff of her interest in property which her husband and his brother had inherited upon the death of their mother *held,* lacking, where defendant father-in-law had paid debts for defendant son and then paid him $2,000 for his interest, a very low price, and had occupied the premises for many years before and after obtaining deed signed by plaintiff and her husband.

4. SAME—EVIDENCE.

Evidence that sale of heavily-mortgaged real estate by defendant father-in-law of plaintiff, while he had acted as

---

REFERENCES FOR POINTS IN HEADNOTES

[2–7] 11 Am Jur, Conspiracy § 51.

[2–7] Civil liability for conspiring to aid debtor to evade payment of his pecuniary obligations. 2 ALR 287.

[3] 17Am Jur, Divorce and Separation § 582.

guardian of her husband had been unnecessary and that such money as had been received went to pay defendant husband's debts and not to support plaintiff wife *held*, insufficient to prove conspiracy to defraud her of property rightfully hers.

5. SAME—EVIDENCE—FIDUCIARY TRANSACTIONS.

Finding of trial judge that plaintiff in suit for divorce had failed to prove her charge of conspiracy between defendant husband and father-in-law to put the son's property beyond her reach and thus prevent her from obtaining a property settlement as well as alimony is not disturbed, where no claimed error was shown and fraud which may have been committed upon the defendant husband by his father, if any, in the latter's handling of fiduciary transactions was too indirect to entitle plaintiff to recover and the husband failed to question any of such transactions.

6. DIVORCE—CONSPIRACY—EVIDENCE—FRAUD—ACCOUNTANT'S REPORT AS TO PROBATE COURT FILES.

Exclusion of expert accountant's report as to files of the probate court as evidence of fraud in plaintiff wife's suit for divorce and for conspiracy to place husband's property beyond her reach for purposes of property settlement and alimony in which her father-in-law had been joined as a defendant was proper, where conspiracy was not proved and probate court had allowed the father-in-law's accounts.

7. SAME—CONSPIRACY—INFERENCES.

Inference that plaintiff wife had an interest in property arose from testimony that attorney for defendant father-in-law and corporation which he controlled had unsuccessfully sought to obtain from her a quitclaim deed and an assignment of land contract thereon and neither such defendant nor defendant husband in suit for divorce and for conspiracy to defraud her of her interest in the property produced the land contract by which she and her husband had contracted to purchase the property, notwithstanding claim of a third codefendant, the husband's paramour, of an interest in the property.

8. SAME—LIEN FOR COSTS AND ATTORNEY FEE.

A lien upon property of which plaintiff wife is found to have an interest is ordered imposed unless both trial and appellate costs of suit for divorce and attorney fee, as increased from $150 to $750, are paid within 30 days after entry of

decree in Supreme Court, where defendant husband has at times made it difficult to collect $25 a week awarded for support of the 2 minor children.

9. SAME—ALIMONY—EXCUSE FOR NONPAYMENT—PARAMOUR.

A married man who lives with his paramour and their son is not, by reason of incurring additional expenses for such purpose, excused from paying alimony.

10. SAME—SUPPORT OF CHILDREN.

Award of $25 per week for support of 2 minor children is not increased, even though inadequate, but continued at that amount during minority of younger child, where the older child is married and will be 21 years of age shortly.

11. SAME—ALIMONY.

Alimony in the amount of $50 a month is awarded plaintiff wife in suit for divorce for such period as she remains unmarried, such amount being subject to modification by being increased or decreased as circumstances may develop, where her conduct has been without suspicion of impropriety and she has worked hard to support herself and the 2 minor children of the parties.

12. SAME—COSTS—CONSPIRACY.

Costs of both trial court and Supreme Court are awarded plaintiff wife who appealed from decree granting divorce but denying her property and alimony but no costs are awarded against or in favor of defendant father-in-law and another defendant, paramour of defendant husband, who had been joined in claimed conspiracy to defraud plaintiff by placing husband's property out of reach of plaintiff for purposes of property settlement or alimony.

Appeal from Wayne; Maher (Thomas F.), J. Submitted June 4, 1952. (Docket No. 17, Calendar No. 45,032.) Decided October 6, 1952.

Bill by Virginia Charlotta Stephenson against William Burnette Stephenson for divorce and other relief. Burnette F. Stephenson and Shirley Miles added as parties defendant and charged with the other defendant of a conspiracy to defraud plaintiff. Decree granting divorce entered and dismissing bill

as to Burnette F. Stephenson and Shirley Miles. Plaintiff appeals. Modified.

*Davidow & Davidow,* for plaintiff.

*Verne C. Amberson,* for defendants William Burnette Stephenson and Shirley Miles.

*John N. Anhut,* for defendant Burnette F. Stephenson.

BUTZEL, J. Virginia Charlotta Stephenson, plaintiff herein, on September 20, 1945, filed a bill for divorce against William Burnette Stephenson. Later she joined as codefendants Burnette F. Stephenson, father of William Burnette Stephenson, and herein referred to as defendant's father, and also Shirley Miles, a woman with whom defendant was living at the time of the hearing, each of whom she alleged had conspired with defendant to deprive plaintiff of her rights in certain properties. Plaintiff charged defendant with extreme and repeated cruelty, excessive use of intoxicants, indecent language, frequent association with other women and absences from home. At the hearing in January, 1950, defendant made no effort to deny plaintiff's charges nor did he make any counter charges, or attempt to excuse his conduct. The judge granted plaintiff a divorce and custody of the minor children of the parties, subject to certain rights of visitation by defendant. The decree provided for the payment of medical and dental expenses for the children only after approval of expenditures by the court, and also for the payment by defendant of $25 a week for the support of the 2 minor children. It also provided for payment by defendant of an attorney fee of $150. Plaintiff was not awarded any alimony. The judge made no property settlement as he had held that defendant had

no property or rights which plaintiff alleged were being withheld or concealed through a conspiracy. Plaintiff, however, claims on appeal that the conspiracy through which defendant's property rights are being withheld and concealed was proved, that she is entitled to a property settlement, a far larger attorney fee, more ample provision for the support of the minor children and alimony for herself.

Plaintiff and defendant were married on May 14, 1931, when he was 18 and she 17 years of age. They lived together, with the exception of short intervals, until September 15, 1944. They are the parents of 2 children, a daughter now 20 years of age and a son about 16 years of age. Several previous divorce proceedings, begun by plaintiff, had been discontinued following temporary reconciliation. Were it not of importance, considering the charges of conspiracy against the respective codefendants, we would refrain from further discussion of defendant's reprehensible conduct. Besides the other charges against him, his philandering would indicate that he was unmoral in his conduct towards women. Otherwise he can be described by the statement of defendant's father who, when asked about his son's affairs with women, testified that he was too busy writing checks for payment of his son's gambling debts, or things like that and that while plaintiff had consulted him about defendant's gambling and drinking he had no recollection of talking to her, or of her ever complaining about his son's philandering; that when he learned that his son was living with another woman and had a son by her, he was shocked but that he did not reproach him in any way because a suit was pending. Testimony positively proves that defendant was still married to plaintiff while he was living under the same roof with codefendant Shirley Miles and had a son by her. Defendant's father stated that

he met Miss Miles while she was working at a cherry orchard at Lexington, Michigan, owned or controlled by his company, and that "she had driven her husband over to work, I mean William Burnette Stephenson." When his attention was called to the use of the word "husband" he asked to withdraw his answer and correct it. It is seldom that a court is called upon to review such brazen conduct as that of defendant and Miss Miles with whom defendant was living while plaintiff was trying to make a living for herself and children and had to be assisted by the help and charity of others. The intimate association of defendant with Miss Miles enters largely into the discussion of what is heretofore referred to as the Lexington property.

In the charges of conspiracy in the amended bill of complaint, plaintiff claims that defendant's father conspired with defendant to dispose of or to divest plaintiff of title in a piece of property outside of Detroit, Michigan, which we shall refer to as the home in Berkley, Michigan; the Ten Mile road property in Oakland county, Michigan; property at Woodward and Richton avenues (Highland Park, Michigan); and interest in a house on Longfellow avenue in Detroit, Michigan. Plaintiff also charges that defendant conspired with Shirley Miles so as to deprive plaintiff of an interest in a cottage along the lake shore at Lexington, Michigan, which plaintiff claims belonged to plaintiff and defendant. Inasmuch as on appeal plaintiff does not appear to claim any direct wrongdoing or conspiracy as to the Ten Mile road property, we need not discuss any facts in regard to it.

Shortly after their marriage, plaintiff and defendant purchased a home on Edgewood boulevard in Berkley, Michigan, and resided there until the summer of 1940. At that time they separated as a result of defendant's infatuation with another woman.

Defendant left for Chicago and was later joined by plaintiff after a reconciliation. Plaintiff had joined in mortgaging the Berkley home about 1937. In 1940, when they contemplated leaving Berkley, there was an outstanding sheriff's deed on foreclosure of the mortgage, as well as some $1,800 in bills unpaid by defendant. These obligations were taken care of by defendant's father who sold the property, sending to plaintiff in Chicago the balance of the purchase price that was left after payment of the mortgage and debts. Plaintiff and her husband signed a quitclaim deed to his father as a consideration for his assuming the obligations. Plaintiff contends that she received nothing personally from the transactions and that the money she received she used to pay her husband's debts. She admits, however, that part of it went to pay hospital bills incurred by her during the time the parties were separated. We find that no conspiracy of any kind was proven as to the Berkley property.

Upon the death of Monica Stephenson, the first wife of codefendant Burnette F. Stephenson, certain assets came into his hands as defendant's guardian. Defendant and his brother inherited a fine residence at 131 Longfellow avenue, Detroit, Michigan, from their mother Monica Stephenson. Defendant's father had lived there for the past 20 years and upwards and was living there in 1931 before plaintiff and defendant married and moved to their own home. According to the testimony of defendant's father, the Longfellow avenue house is a 3-story structure with 10 rooms, a kitchen and 3 baths. The property was originally encumbered with a $14,000 mortgage which the father paid over the years. In 1939, defendant and plaintiff signed a deed for defendant's one-half interest in the property for a consideration of $2,000. The deed was made to the brother instead of to the father because the latter was having trouble

in regard to his income tax and feared that a government lien would be placed against the property if title were taken by him. The brother subsequently deeded the property to defendant's father. There seems to be little question but that plaintiff and defendant were at least to a degree subject to the direction of the father, who was frequently putting up money, some for the support of defendant but principally to pay defendant's debts. Defendant's father at one time owned the Stephenson Land Company and still seems to be in full control of it. As a rule defendant's withdrawals came from the Stephenson Land Company but the father was the real party from whom eventually the moneys came. Plaintiff claims that defendant's father promised her, when she signed the deed for the Longfellow property, that he, defendant's father, would see to it that neither she nor his grandchildren by her would come to want. Defendant's father denies this. It would seem quite natural that he might have made some such statement and unquestionably large sums of money were paid to defendant and smaller amounts to plaintiff but this is far from proof of a conspiracy. The record would indicate that $2,000 was a very low price for defendant's interest in the equity in the Longfellow home; further, that defendant's father had been living in the house these many years, both before and after the deed, without paying any rent. Nevertheless, plaintiff and defendant signed the deed and proof of conspiracy is lacking.

In 1937 an interest in certain property at Woodward and Richton avenues in Highland Park, Michigan, was the only asset of value left in the guardianship estate. This property was heavily mortgaged and evidently did not bring in a sufficient return to take care of the carrying charges. It has frequently been brought to our attention that in the 1930's prop-

erty values were still depreciated and similar property was frequently referred to as distressed real estate. Although plaintiff with her limited experience may not have been familiar with estate affairs, she joined in the deed of conveyance of the Highland Park property at the request of her father-in-law and thereby alienated her interest. She now contends there was no necessity to sell the property and that the money received from the sale went to pay her husband's debts and she received none of it personally. This is far from proof of any conspiracy to deprive her of property rightfully hers.

Defendant, in addition to being an heir to one-half of the estate of Monica Stephenson, was also an heir to one-sixth of the estate of James W. Flynn. The latter's estate was a sizable one, a large part of it consisting of stocks, some of which became worthless. As guardian of defendant, the latter's father for years failed to file an annual account. When he finally did so it showed that defendant's interest in the estate had been entirely used up. The final account was approved by the probate court and defendant's father was discharged as guardian.

As we have noted, the real estate involved herein, with the exception of the Lexington and Berkley properties, was under the direct control of defendant's father as administrator of the estate of James W. Flynn, the estate of Monica Stephenson, and the guardianship estate of his 2 sons. Plaintiff's attorney sought to inquire into alleged irregularities in the handling of the funds of defendant in such estates by the father, also in the books and records of the Stephenson Land Company, from which defendant evidently was able to draw moneys but had no stock interest so far as the record shows. It is quite apparent that defendant's father controlled the Stephenson Land Company, of which he was the sole owner for a long period and subsequently held

a majority interest. The net worth of the Stephenson Land Company is not shown. It had 3,000 shares of stock.

We realize the difficulty that plaintiff's attorney had in his attempt to show fraud and conspiracy. Grave grounds of suspicion were shown with innuendo but no actual proof of a conspiracy. The charges are rather vague. Plaintiff claims that the conspiracy began as early as 1940. The property at Woodward and Richton avenues in Highland Park was transferred in 1937. As a matter of fact, however, plaintiff had full knowledge of the documents she was signing or opportunity to learn about them. At times she received checks payable to her and she used the proceeds to pay not only her husband's debts but for the family support. Defendant is not questioning any of the transactions. If any fraud was committed by the fiduciary it was against the defendant, and plaintiff's loss therefrom would at the most be too indirect to entitle her to recovery. Although it is charged that there was a conspiracy between father and son to put the son's property beyond the reach of plaintiff and thus prevent her from obtaining a property settlement as well as alimony, we find lack of sufficient proof to warrant a decree in this respect in plaintiff's favor. The trial judge held that there was not sufficient proof and we cannot disturb his judgment in that respect as no claimed error was shown.

We do find a distracted father trying to help his son who was constantly in trouble. The record does not, however, indicate that the father suffered any financial loss thereby. His occupation of the home on Longfellow avenue in Detroit without paying rent and then purchasing his son's equity therein for only $2,000, as well as the many other facts that were developed in the case, would indicate that the father was protecting himself financially and not plaintiff

or her 2 children to whom he stood in such a close relationship.

Plaintiff had an expert accountant make a limited examination of the account of defendant as reflected on the books of the Stephenson Land Company and the files of the probate court for Wayne county in the matter of the estate of Monica V. Stephenson and in the father's guardianship of defendant and his brother. The court refused to permit any testimony in regard to the guardianship matters as reflected by the files of the probate court.

It will serve no useful purpose to go into the many details of the guardianship account as the charges of fraud, which we do not believe were proven, are not being made by defendant. It is indicated that defendant's father charged large sums expended for the defendant to the guardianship account and thus exhausted its assets. There is no doubt that the entire account was handled carelessly but defendant himself makes no claim to that effect, nor does there appear sufficient proof of any conspiracy so as to warrant relief to plaintiff on that ground.

We believe the court was correct in its ruling as to the expert accountant's report inasmuch as no conspiracy to defraud was established and the final account in the probate court was allowed and the guardian discharged. We have examined the report of the expert accountant and we find that it discloses no fraud. It is true that the reports of defendant's father were very general in their terms but they disclose no fraud and the probate court saw fit to allow them. Without proof of conspiracy we do not believe that plaintiff is now entitled to attack them, and the trial court was correct in excluding the expert accountant's reports regarding the probate court files.

The trial judge held that defendant had no interest in the cottage or home at Lexington, Michigan,

formerly occupied by the parties. In the summer of 1944 defendant, after having had numerous jobs which he eventually lost, was again employed by the Stephenson Land Company and sent to Lexington, Michigan, to supervise a cherry orchard which it owned. He was soon joined there by plaintiff and their children who remained a large part of the summer. It was difficult to find a house to live in but an unfurnished cottage was found. An agreement was entered into with Fred Wood, the owner, now deceased, to waive a down payment for the purchase of the property if it were immediately improved. $100 was paid to Mr. Wood for a binder by the Stephenson Land Company, to whom a receipt was issued. According to defendant, he was to pay $325 on December 26, 1944, to obtain a land contract. He asserts that the property was to be bought in his name alone although he admits that at the outset of the dealings with Mr. Wood, plaintiff appears to have participated. Although defendant claims that there were no other written documents, there is a very strong indication to the contrary. It appears that Wood addressed both plaintiff and defendant when he wrote in reference to their contract. Plaintiff's sister testified that she was shown such a land contract in the summer of 1944. Improvements specified in the oral contract were made, the Stephenson Land Company advancing $1,058 for that purpose. Although defendant testified to the contrary, plaintiff and her sister both insisted that plaintiff performed manual labor while helping with the improvements on the inside of the house.

Plaintiff later returned to Chicago but defendant refused to follow her and remained in Lexington after the summer ended. Illinois divorce proceedings were begun by plaintiff but discontinued. In November of 1944 the Stephenson Land Company wrote to plaintiff asking her to execute a quitclaim deed and

also an assignment of the land contract for the Lexington property to the Stephenson Land Company in order to protect it for the $1,058 which it advanced for the improvement of the property. Plaintiff would not sign these documents despite the fact that defendant's father refused to send money for her support if she did not do so. Defendant claims that both he and plaintiff were later served with papers through the mail canceling their interest in the property, for the protection of the company, but plaintiff denies this.

Plaintiff returned to Michigan at the end of the year. While plaintiff was in Chicago, defendant met codefendant Shirley Miles and they planned to get married after plaintiff secured a divorce. Miss Miles was a waitress in the hotel at Lexington, Michigan, when defendant met her. She must have known that defendant was a married man when she became so intimately acquainted with him. She testified that when she learned that defendant would be unable to assume the land contract on the Lexington property she used funds of her own and obtained a contract for the property but did not produce it as she was unable to find it.

The original papers for the purchase of the property from Mr. Wood were not produced, the claim being that when Mr. Wood died these papers also were lost. Miss Miles testified that so far as she knew there had been no previous contract. She claims that she did not know of any interest that either plaintiff or defendant still had in the property when she made the alleged new contract with Wood. Plaintiff also was unable to produce the contract entered into by defendant, with or without her, while defendant claims there was none. If there were, it would probably have been in defendant's possession. The attorney who had acted for defendant's father and the Stephenson Land Company did draft

the aforementioned quitclaim deed and assignment of land contract for the Lexington property to be signed by plaintiff. When attorney for plaintiff undertook to cross-examine this attorney, an objection on the ground that there was a confidential client-attorney relationship was sustained by the trial judge. While plaintiff's attorney objected to the ruling, it becomes unimportant for there is a legitimate inference to be drawn from the facts which were disclosed, that plaintiff must have had an interest in the property as otherwise she would not have been asked to sign a quitclaim deed and an assignment of land contract.

Miss Miles testified that on February 28, 1945, she paid down $963.03, borrowing $650 from her brother to make the payments and assuming its obligations of $40 a month. The total purchase price of the property was $4,436.36, plus $800 borrowed from Mr. Wood for improvements. With the exception of such work as plaintiff did in improving the property in 1944, all of the other work in making substantial improvements was done by defendant who also paid for all work and material furnished by others. He also had made all the payments on the contract for the house for 1946 and thereafter. Miss Miles has not worked since 1945 with the exception of earning $75 for some typewriting work for the Stephenson Land Company.

There is no indication in the record as to the present value of the Lexington property. There appears to be a substantial equity in the property over and above the amount still due the title owners. If Miss Miles has ever put any money into this property she has received back an equivalent value in the years during which she has occupied the property rent free. The costs in the case, with an increased attorney fee, will be very substantial. The printed record alone contains 589 pages. Inasmuch as defendant has

made it difficult at times to collect the $25 a week awarded for the support of the 2 minor children, it may also be correspondingly difficult to collect the costs, including an increased attorney fee. We, therefore, order that unless such costs and attorney fees are paid within 30 days after the date that the decree is entered in this Court and the court costs taxed, the case will be remanded to the trial court so as to ascertain the amount still due the vendors of the property and to perfect and enforce a lien against the equity in the Lexington property. The payment of such costs, including attorney fee and costs in the trial court, shall be paid in such instalments as the trial court shall determine. The final order of the trial court shall provide for the immediate foreclosure of the lien in case of the nonpayment of any instalment. The lien shall be in addition to any other legal method of enforcing the payment of the costs and attorney fee.

Defendant is gainfully employed by the Stephenson Land Company, the owner of the cherry orchard. At the time of the hearing his latest known annual earnings was $4,550 for 1948. We have frequently held that the remarriage and additional expense thus incurred by a divorced husband in no way excuses him from paying alimony. Obviously this is true when a married man lives with another woman and their son. The court allowed only $25 a week for the support of the 2 minor children. The sum seems wholly inadequate but in view of the fact that one of the children is married and will be 21 years of age shortly, we are not increasing the amount but order that the payment of the entire $25 a week shall be continued for the support of the other child during his minority.

The record shows that plaintiff has worked hard to support herself and the 2 minor children but that her earnings have been inadequate and she has been

dependent upon help from her family and the charity of others. There has not been a breath of suspicion cast upon her conduct during her married life.

We hold that she shall be entitled to $50 a month alimony during such time as she remains unmarried, such amount being subject to modification by being either increased or decreased, as circumstances may develop. Plaintiff shall be entitled to costs of both courts and attorney fees of $750 to be paid by defendant. No costs are awarded against or in favor of either codefendant. The decree as modified in accordance with this opinion will be entered.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## ETHERINGTON v. BAILIFF.

1. REFORMATION OF INSTRUMENTS—VERDICTS AND FINDINGS—EVIDENCE.

   Finding of trial court that parties had intended to purchase tract as specified in reformed deed, *held*, supported by evidence.

2. SAME—EVIDENCE—BOUNDARIES.

   A conveyance of real estate may be reformed, where, through

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 45 Am Jur, Reformation of Instruments § 38.
[3] 45 Am Jur, Reformation of Instruments § 93.
[7] 19 Am Jur, Equity § 483.
[9, 10] 27 Am Jur, Improvements § 8 *et seq.*
[9, 10] Action to recover for improvements made on land by one who mistakenly believed himself the owner. 104 ALR 577.

error, it fails to express the result of the meeting of the minds of the parties as to boundaries, particularly when it is clear that the description fails to embody the clear, undisputed visual standard of the parties.

3. SAME—PARTIES—BOUNDARIES OF OTHER PARCELS.

Reformation of deeds as to parcels of land plaintiffs had sold to others than defendants and prior to the sale to defendants is not made even though descriptions in other deeds relate to same erroneously located corner, where such grantees are not parties to instant suit, although boundaries between plaintiffs' and defendants' property and such other properties are inevitably affected.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE.

The Supreme Court cannot adjudicate questions relating to boundaries that are not before it for consideration.

5. SAME—VERDICTS AND FINDINGS—CHANCERY CASES—RECORD.

Great weight is accorded findings of the trial court in a suit for reformation of instruments, where it is impossible to determine from the record what the true facts are, since he had the opportunity to see and hear the witnesses first-hand.

6. BOUNDARIES—ESTOPPEL—REFORMATION OF INSTRUMENTS—FINDINGS OF TRIAL COURT.

Finding of trial court that plaintiffs were not estopped from contending that standard which should be used in measuring the holdings of the respective parties was the visual one set out by them previous to delivery of the deed of which they now seek reformation, where it appears that defendants had moved their buildings onto disputed land in reliance upon a survey which they had had made rather than upon any act, representation or admission of plaintiffs.

7. EQUITY—MAXIMS.

A loss must be borne by the party whose conduct has rendered the injury possible, where 1 of 2 innocent persons must suffer loss.

8. REFORMATION OF INSTRUMENTS—DAMAGES—EXCAVATION—MOVING BUILDINGS ONTO DISPUTED LAND.

Defendants are required to stand loss due to excavation and cost of moving small buildings from area disputed in suit for reformation of deed and awarded to plaintiffs, where they had dug basements and moved such buildings onto the

area without permission from plaintiffs and not in reliance upon any act, representation or admission of plaintiffs.

9. IMPROVEMENTS—RECOVERY OF VALUE FROM OWNER.
One who places improvements on the land of another is not entitled to recover the value thereof unless he did so while in possession under color of title, had possession adverse to the title of the true owner and acted in good faith.

10. SAME—BONA FIDE POSSESSION.
One who makes improvements on the land of another is not a bona fide possessor of such land, where he knows his title thereto is contested by some other person claiming a better right to it.

11. REFORMATION OF INSTRUMENTS—IMPROVEMENTS—VALUE.
Defendants in suit for reformation of deed who excavated a basement and moved small buildings onto disputed piece of land when they knew plaintiffs contested the title thereto were not entitled either to have an award for the value of the improvements as determined by the court or to have the value of the land determined and be permitted to pay plaintiffs such value and take possession.

Appeal from Arenac; Shaffer (John C.), J. Submitted July 2, 1952. (Docket No. 19, Calendar No. 45,312.) Decided October 6, 1952.

Bill by Henry Etherington and wife against Royal Bailiff and wife to reform a deed. Decree for plaintiffs. Defendants appeal. Affirmed.

*Dennis J. O'Keefe* and *Harry E. Converse,* for plaintiffs.

*Herbert Hertzler,* for defendants.

BUTZEL, J. Plaintiffs, Henry and Mary Etherington, in 1934 acquired 40 acres of land in the township of Au Gres, county of Arenac, State of Michigan, to-wit:

"Southwest quarter of the northwest fractional quarter of section 18, town 19 north, range 6 east."

At the time of purchase, plaintiffs and their grantors inspected the property with the aid of a Mr. Baikie, who was not a surveyor but supposedly familiar with such matters, being county drain commissioner. The 40-acre parcel is bounded on the west by State Highway M–65 and on the south by US Highway No 23, and it is conceded that the true west quarter post of the section is found at the intersection of the 2 highways. Locating such post, Mr. Baikie measured east from it along US–23 for a distance of 1,484.34 feet to what he believed to be the southeast corner of the parcel. The parties there placed a stake 75 feet north from the center of the pavement. We shall refer to this hereinafter as the Baikie stake.

On July 3, 1940, plaintiffs, desiring to sell 100 feet of frontage on US–23 at the southeast corner of the forty to Faye E. Castonguay, again went on the property, and measuring from the Baikie stake, chained along the highway to a point 100 feet west thereof where they placed another stake denoting the southwest corner of the Castonguay property. We shall refer to this as the Castonguay stake. The right-of-way of the Detroit & Mackinac Railroad runs through plaintiffs' land some 1,100 feet north and parallel to US–23, and it was understood that such right-of-way would constitute the northern boundary of the Castonguay property. The deed to the Castonguay parcel read as follows:

"Commencing at the SE corner of the SW 1/4 of NW 1/4 of section 18, town 19 north, range 6 east, thence 1,100 feet north, thence 100 feet west, thence 1,100 feet south, thence east 100 feet to beginning."

It will be noted that the Castonguay deed was given with reference to the southeast corner of the forty, not with reference to the established southwest quarter post or to the Baikie stake. The Castonguays

took without further survey and so far as can be ascertained from the record they have considered their property lines to be properly set out in relation to such stake.

Members of the family of Royal and Lottie Bailiff, defendants herein, having purchased land from plaintiffs in the southwest part of the forty, defendants were desirous of buying 200 feet of frontage adjacent to the Castonguay property. Early in March of 1942, both of plaintiffs, defendant Royal Bailiff and his father, Clarence Bailiff, went to the property for the purpose of marking out such plot. Just what happened at this time is disputed. Plaintiffs testified that the parties measured 100 feet from the Baikie stake as a means of locating the Castonguay stake, then chained 200 feet west from the Castonguay stake and placed a similar stake and a root at that point; that it was understood that the property would run as far north as the Castonguay property, that is, to the railroad right-of-way. Royal Bailiff, on the other hand, testified that he saw no actual measurements being made (although Clarence Bailiff and plaintiffs may have made some); that he observed no stakes; that his intention was to rely upon the description in the deed given him. A later statement made by the same witness indicates that he was actually aware of the existence of stakes, but he consistently stated his property was bought subject to a correct survey. Plaintiffs had stated that if a survey was to be had, defendants would have to pay for it. Clarence Bailiff also testified that the parties were unable to find the Baikie stake; that they measured instead from the southwest corner of plaintiffs' forty, bordering on State Highway M–65 to the southeast corner and then back to the property in question; that although some measurements were taken, the land being cheap (the 200 foot frontage sold for $50) the parties did not pay much attention

to the measurements, just understood that the southwest corner of defendants' property would be 300 feet from the southeast corner of the forty, and determined with reference to it. The parties having examined the property, the deed thereto was executed on March 16, 1942, and read as follows:

"A piece of land commencing at a point 100 feet west from the southeast corner of the SW 1/4 of NW 1/4, section 18, T 19 N, R 6 E, thence 1,100 feet north, thence 200 feet west, thence 1,100 feet south, thence 200 feet east to point of beginning."

It will be noted that the property was again described with reference to the southeast corner. At the time of the deed, there were no structures on the Castonguay property to indicate the location of the Castonguay west line, other than the aforementioned stake. No effort was made at that time to locate the northeast and northwest corners of defendants' parcel.

Between 1942 and 1948, defendants' parcel and the Castonguay parcel were improved and ditches and fences were established in accordance with the stakes set out by the plaintiffs. At no time was the location of the parcel questioned. However, in 1948, defendants contemplated the building of an onion storage warehouse and before undertaking such project had their property surveyed. The surveyor, Mr. Cooke, found by his calculations that the true southeast corner of the property was 146 feet west of where Mr. Baikie had supposed it to be in relation to the west quarter post. The result of the survey, if followed, would be to move all previously established property lines which had been set up in relation to the southeast corner 146 feet west of where they had been supposed to be, and defendants would thus be entitled to 146 feet of the frontage plaintiffs had supposed to be theirs.

On being informed of the results of the survey, Mrs. Castonguay stated that she would take no action. Evidently the State of Michigan, which owns the forty adjoining the Castonguay piece has likewise taken no action. Defendants, however, have consistently sought to establish the survey as the true one.

On April 18, 1948, defendant Royal Bailiff took the results of the survey to plaintiffs and expressed to them his intention of relying thereon and having his house moved on the disputed strip. What was said during the rest of the conversation is in dispute. Royal Bailiff states that plaintiff Henry Etherington said that the survey was all right if Cooke did it, as he was one of the best surveyors around, that he would hurry to move his cabins off the disputed strip, and made no objection or statement that he would contest the survey. Etherington, however, testified that he said that something must be wrong; that he would look into the property situation and have it surveyed; that he did not agree to the moving of defendants' buildings; that he stated he would hurry and move the cabins only if he found out the survey was right. He also introduced impartial testimony that he had contemplated moving the cabins as early as 1946 and hired a contractor to move them in March, 1948, before the Cooke survey, so that his subsequent removal of them was not as a result of the survey.

Soon thereafter, Etherington went to Cooke and asked about a survey to be made of the whole property, but for some reason proceeded no further with one. He then had Mrs. Castonguay, an employee of the State conservation department, try to obtain information in regard to the true property line. He delayed for some time waiting for word through her, then, evidently feeling there was no way to avoid the larger expense of a survey, arranged to have the

property surveyed in September of 1949.

In the meantime, defendants had moved quickly to take possession of the disputed strip. Plaintiffs' cabins were moved sometime between April 28 and April 29, 1948, and about the same time basements were dug for both defendants and plaintiffs. Plaintiffs contend that they knew nothing of the basement defendants proposed to build on the disputed area. Defendant Royal Bailiff testified that soon after the discussion of the survey, they discussed the 2 basements; but plaintiff Henry Etherington testified that on April 28th he went to see the progress of his basement at which time no basement had been dug for defendants.

Just which basement was dug first would seem to bear on the question of notice. The excavator was paid by plaintiffs for their job immediately before it was fully completed (April 28, 1948), and by defendants after their job was done (April 30, 1948). However, he was unable to testify as to which basement was dug first. Mr. Swartzentruber, who moved the cabins at this same time, positively testified that plaintiffs' was dug first.

Plaintiffs testified that, for a number of reasons, they did not pass defendants' property again until the 11th of July, inasmuch as they were living some distance away at the time. On their return from Canada at this time, they also noticed that defendants had moved their house and outbuildings during June and begun construction of the onion storage warehouse. Defendants claim that plaintiffs made no objection to the buildings on their return; plaintiff Henry Etherington attributes this to his reluctance to argue. A postcard sent from Canada to defendants was introduced in evidence and would indicate that plaintiffs still believed in early June that a solution of the boundary difficulties could be reached to their satisfaction, and adds credence to

the claim that they did not know of defendants' actions. Plaintiffs themselves commenced their home in August and finished building it that year. No building has been done after 1948 to the present on or near the disputed property.

The Holmes survey, which was completed for plaintiffs on May 1, 1950, indicated that there was only 24.33 feet of overlap from the true southeast corner. Soon thereafter, on May 22, 1950, the parties tried to reach an amicable settlement of their disputes but failed. There is testimony that at a conference, although defendants admitted the existence of the stakes, they claimed they took the land pending a survey and not in relation to any stakes.

On September 2, 1950, plaintiffs filed their bill of complaint asking for reformation of the 1942 deed to conform with what they believed the intention of the parties to be at the time of sale. They did not introduce the Holmes survey and at no time on trial or appeal have attempted to rely on it. Defendants introduced the Cooke survey and in addition argued that plaintiffs are now barred by equitable principles from asserting title to the disputed strip. On May 26, 1951, the court decreed reformation of the deed so that it should read in accordance with the original measurements from the west quarter post, as follows:

"A piece of land commencing at a point 1,184.34 feet east of the west quarter-post of section 18, T 19 N, R 6 E, thence north 1,100 feet, thence east 200 feet, thence south 1,100 feet, thence west 200 feet to point of beginning, excepting therefrom" (right-of-way, et cetera).

It also decreed that defendants be given 60 days in which to remove their buildings from all other properties.

Defendant admits that his property was "pointed out" to him and that he surrounded his property with ditches and fences generally in accordance therewith. That there were stakes of some kind is also indicated by the testimony. It was also understood as to the total area to be sold, and that it was to be adjoining the Castonguay piece of property. The trial court seemed to feel that there was sufficient evidence that the parties intended to purchase the tract now specified in the reformed deed. We believe this is the most logical conclusion from all of the testimony.

Although defendant claimed he had no idea of his side boundaries, it is difficult to believe he built fences and ditches without such an idea. It is true that no side boundaries were indicated but it would appear that they could be determined easily from the deed, knowing the railroad right-of-way to be the northern boundary, and the highway to be the southern boundary, and determining the southwest and southeast corners of the parcel and measuring due north to the right-of-way. We fail to see how failure to specify a northeast or northwest corner in view of the other provisions of the deed could be an obstacle.

There is abundant authority for reforming a deed or mortgage which, through error, fails to express the result of the meeting of the minds of the parties, particularly when it is clear that the description fails to embody the clear, undisputed visual standard of the parties. *In re Moore's Estate,* 292 Mich 198 (7 NCCA NS 332); *Farabaugh* v. *Rhode,* 305 Mich 234. The trial court found there to be a visual standard, incorporating the use of the Baikie measurements. Although there is conflicting evidence, we find that the trial judge was reasonable in his conclusion, and in the absence of a clear showing of error we will not disturb his findings. Under these circumstances, a

consideration of the correctness of the Cooke survey or any other survey is irrelevant.

Defendants point out that the Castonguay parcel by survey overlaps defendants' parcel and that the Castonguay deed, therefore, should be reformed at the same time defendants' rights are determined. It is unquestionably difficult to attempt to determine proper boundary lines as between only 2 land owners when, inevitably, other property holders in the forty will be affected. However, the boundary between Castonguays and Bailiffs is a matter in which plaintiffs have no concern. It is within defendants' power to initiate the proper proceedings to determine such a boundary. In the instant case, we are empowered only to decide the matter before us: That is, the reformation of the deed given to defendants.

For the same reason, the trial court was correct in excluding evidence that plaintiffs claimed the Holmes survey to be correct to their advantage with respect to a boundary with the owner adjoining them on the west. That owner is not joined as a party here. Although the dispute between all of these parties will be resolved by a solution of the same problems (the intent of parties, or the correct location of the southeast corner) they are not properly before us and we cannot adjudicate questions that are not before us.

Defendants contend that they were led by plaintiffs to believe that plaintiffs would accept the Cooke survey as the correct one, and that the building on the disputed strip was done in pursuance of such belief. The testimony as to whether or not there was reliance is contradicted in almost every respect: As to the conversation that took place in plaintiffs' house on April 18th; plaintiffs' knowledge of the subsequent activities of the defendants, particularly the digging of the basement and the moving of the buildings; and why plaintiffs waited so long to chal-

lenge the survey. It is useless to review this testimony here. In a situation of this nature, where it is impossible to determine from the record what the true facts are, we give great weight to the findings of the trial court who had the opportunity to see and hear the witnesses firsthand. He stated:

"The only situation under the facts in this case where an estoppel could possibly have arisen was at the time of and actions subsequent to the conversation in April, 1948 when defendants told plaintiff that by reason of a survey defendants had procured, the latter owned land west of the line that had been accepted by the parties for 6 years as defendants' west line, and were going to move on, and that their survey would stand law. Thereupon plaintiff said something must be wrong and he would look into it. In quick succession, defendants proceeded to have a basement dug on the disputed strip and their house moved thereon. In my opinion the defendants unquestionably relied upon their survey in so doing, and certainly not upon any act, representation or admission of plaintiff, nor upon his silence, for none of these elements was present."

We are bound to accept the findings of the trial court as correct in the absence of a clear showing of error. None has been made here. Plaintiffs are not estopped to contend that the standard which should be used in measuring the holdings of the respective parties was the visual one set out by them previous to the delivery of the deed.

Although in proper cases a court of equity will consider hardship as a factor in its determination, this is not the case for the application of such a doctrine, despite the fact that defendants will suffer losses if forced to move their property. This situation calls for the application of the equitable doctrine that where 1 of 2 innocent persons must suffer loss, it must be borne by that one of them who by his conduct

has rendered the injury possible. The trial court found that defendants moved their buildings on the disputed strip without permission of plaintiffs and, as stated above, we accept that finding as correct. Having done so, they must take the consequences of their actions, which are the cost of moving the small buildings from the strip and any loss on account of the excavation.

Defendants contend that even assuming they do not have the legal title to the 146-foot disputed strip, the court erred in giving them only the right to remove the improvements therefrom within 60 days; that, instead they should be able to salvage the full value of the improvements, either by having the value of the improvements determined and the owner of the land required to pay the other the amount so determined, or, at their option, having the value of the land determined and defendants pay plaintiffs this value and taking possession of the land.

Defendants cite *Whitehead* v. *Barker,* 288 Mich 19, in which it was held that one who places improvements on another's land is entitled to such relief if there are 3 concurrent essentials:

"1. He must have held possession under color of title.

"2. His possession must have been adverse to the title of the true owner.

"3. He must have acted in good faith. 16 Am & Eng Encyc of Law (2d ed), 79–83."

In the *Whitehead Case,* we also quoted the United States supreme court as having defined a bona fide possessor as one not only who supposes himself to be the true proprietor of the land but who is ignorant that his title is contested by some other person claiming a better right to it.

It can hardly be said that defendants were ignorant that their title was contested by plaintiffs and

that they thus acted in good faith. We therefore find that the order of the trial court was equitable and in accord with the facts as found.

The decree of the trial court will be affirmed, with costs to plaintiffs.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

BUCHTHAL *v.* NEW YORK CENTRAL RAILROAD COMPANY.

1. RAILROADS—SPEED OF TRAINS IN OPEN COUNTRY.
   The speed of railroad trains is not limited while they are traveling through open country.

2. EVIDENCE—JUDICIAL NOTICE—SPEED OF RAILROAD TRAINS.
   It is generally known that in the past 50 years the speed of railroad trains has been increased.

3. RAILROADS—NEGLIGENCE—SPEED.
   Negligence of railroad company may not be inferred from mere fact that it permitted a speed of 80 miles per hour on passenger trains being operated in open country where the track is straight for several miles and that train involved in accident with plaintiff was operated at that speed.

4. SAME—GRADE CROSSINGS—APPROACHING AUTOMOBILES.
   It is not incumbent upon operators of a railroad train to

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 44 Am Jur, Railroads §§ 456, 511.
[1–3] Speed of train, locomotive, or railway car at highway crossing, as negligence. 154 ALR 212.
[5] 44 Am Jur, Railroads § 510.
[6, 7] 44 Am Jur, Railroads § 622.
[8, 9] 39 Am Jur, New Trial § 160.

stop it or slow it down merely because automobiles are approaching a grade crossing unless danger is apparent.

5. SAME—OBSERVATION OF GRADE CROSSING—APPROACHING AUTOMOBILES.

Omission of crew on northeastbound train, proceeding at 80 miles per hour, to make actual observation of country grade crossing where plaintiff, as a passenger, was in an eastbound automobile moving across double track at speed of 2 or 3 miles an hour did not constitute negligence, since realization by crew from an observation that the driver intended to continue would obviously be too late to prevent the accident.

6. SAME—TRAIN WARNING SIGNALS—STATUTES—EVIDENCE OF COMPLIANCE.

Positive testimony of members of train crew that bell was ringing and train whistle was blown as required by statute will be accepted as determinative as to whether statute was being complied with, where plaintiff's negative testimony that the bell and whistle were not sounded related to time when train was so far from crossing that statute did not apply and when sounds were required to be made the windows in her car were closed and she was not in a position to hear the signals if given (CL 1948, § 466.13).

7. SAME—TRAIN WARNING SIGNALS—NEGATIVE TESTIMONY—QUESTION FOR JURY.

Negative testimony that train bell was not rung and whistle not sounded will not present an issue of fact for consideration of jury unless person giving the negative testimony was in a position to hear the signals, if given, and was paying attention when the signals were claimed to have been given.

8. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DISCRETION OF COURT—SHOWING AS TO DILIGENCE.

Denial of new trial because of alleged newly-discovered evidence that there was no sound of train whistle before train reached crossing at which collision occurred was not an abuse of discretion, where there was no showing that plaintiff could not, with reasonable diligence have discovered the evidence and produced it at the trial.

9. SAME—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

It is not error to deny a motion for a new trial on the ground of newly-discovered evidence in the absence of a showing that such evidence could not have been discovered timely by exercise of reasonable diligence.

10. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—PASSENGERS.
Passenger in an automobile with which defendant's train collided at a grade crossing, *held*, guilty of contributory negligence, where she assumed duty of looking out for approaching train and failed to see it.

Appeal from Cass; Mosier (Carl D.), J. Submitted June 11, 1952. (Docket No. 71, Calendar No. 45,525.) Decided October 6, 1952.

Case by Ethel Buchthal against New York Central Railroad Company for damages for injuries sustained at a railroad crossing accident. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

*Mitts & Smith* and *James & Hoff*, for plaintiff.

*Harvey & Fisher* and *George H. Wyatt* (*Patrick E. Hackett*, of counsel), for defendant.

BUTZEL, J. On April 2, 1949, plaintiff Ethel Buchthal was seated next to her husband on the front seat of an automobile driven by him on a bright clear day. It was proceeding east along a road in Cass county, popularly known as Peavine road or Swank road. They reached an intersection of the double track right-of-way of defendant New York Central Railroad Company, known as Swank's crossing, located between Niles and Dowagiac, Michigan, and about 2 miles west of Dowagiac. Peavine road is a narrow gravel or dirt highway, not a trunk line and was used for the convenience of the residents of the rural district. The right-of-way of the railroad was partly obscured by numerous trees to the right of the road but the approach to the railroad crossing was indicated by 2 warning signs placed along the road. Plaintiff and her husband had lived in that vicinity at one time and were familiar with the crossing. She

does not claim that she did not know of its existence.

Plaintiff's husband stopped the car at a point some 12 or 15 feet from the closest rail to look and listen for a possible train. At this point the car had passed out of the wooded area and beyond the fenced-in boundary of the right-of-way. The visibility was very good, notwithstanding the fact that the sun was shining from the southwest. Plaintiff testified that she could see beyond the semaphore signal posts which were 2,546 feet distant from the intersection. The testimony showed that the railroad track west of the crossing proceeded in a straight line for several miles and there was a very slight upgrade starting 3,700 feet from the crossing. Also, there was a slight upgrade of approximately 5% on Swank road at the crossing. Several witnesses testified as to ordinary conditions of visibility at the crossing but all conceded that the semaphore signal was ordinarily visible from a point some 10 or 15 feet beyond the right-of-way, notwithstanding alleged bushes and shrubbery which are not shown in exhibits verified by plaintiff.

When the driver stopped the car both he and plaintiff lowered their respective windows on each side and made observations by looking up the track and listening for warning bells or whistles. After seeing and hearing nothing, according to her testimony, they raised the windows and proceeded across the tracks without further observations and drove in first gear at approximately 2 miles per hour, possibly at 3 miles per hour, the distance between the outside rails of the double tracks being 21-1/2 feet. The car was almost entirely across the further south side rail when its right rear corner was struck by the Wolverine, a regularly scheduled fast passenger train run by defendant. Plaintiff testified that she heard nothing until she felt the impact of the train as it struck the car. Plaintiff's husband was killed.

The sole question is plaintiff's right to recover for damages to herself.

The engineer testified that he was proceeding at a speed of 80 miles an hour as he approached the crossing. That is the speed permitted by the company rules for the particular crossing, which was the last crossing west of Dowagiac. Plaintiff, however, contends that the speed was greater. The engineer testified that he blew the whistle the prescribed number of times as he reached the whistle post, which is located 1,327 feet before the crossing. The fireman and the road foreman corroborated this testimony. They also testified that the bell was sounding continuously as they approached the crossing and that the headlight was burning. The engineer and fireman testified that they were observing the tracks for possible obstructions and although visibility was excellent, the sun being behind them, they did not see the car until after the impact. Plaintiff emphasizes that the engineer and the fireman were engaged in conversation but the record indicates that the conversation took place after the impact and not before.

Plaintiff testified that she was 55 years of age at the time of the accident, had had extensive driving experience, had good vision and good hearing; that she was in the habit of making observations for danger and warning her husband when necessary. From her own testimony, she was alert, watching and listening for oncoming trains at the time. The case presents a peculiar situation. Plaintiff must have known from her experience that very fast passenger trains use the right-of-way and on a bright clear day the car was driven at from 2 to 3 miles per hour over the railroad right-of-way when the oncoming train could have been seen by her at least 2,546 feet from the intersection.

Attorneys for plaintiff urge that the question of whether the train was going at such an excessive rate

of speed so as to constitute negligence should have gone to the jury. They conceded that the testimony of the engineer is binding insofar as it is not contradicted. His testimony was positive that he was proceeding at 80 miles an hour as shown by the speedometer. Plaintiff testified she did not see the approaching train, and that when she last looked up the track she could see as far as the semaphore, 2,546 feet distant, and saw no train. She states that the automobile had come to a full stop when she last looked, it was then put into first speed and it proceeded at 2 miles, possibly 3 miles, an hour across the tracks until hit. She now tries to prove that by mathematical calculation at 80 miles an hour, the train could go only 2,115 feet in 18 seconds (the time elapsing between her last observation and seeing no train at or past the semaphore and the time of the collision), that, therefore, the train must have speeded at 90 or 100 miles an hour to also cross the 431 feet of additional distance.

The rules of the railroad, not a statute, limited the speed of the train to 80 miles an hour at that particular crossing. As a rule it would not be negligence for a train to speed at a rapid rate through open rural country. Plaintiff partly relies on *Hudson* v. *Grand Trunk Western R. Co.*, 227 Mich 1 (23 NCCA 682); *Morgan* v. *Detroit, Jackson & Chicago Railroad*, 234 Mich 497. Neither of these cases is in point as the accidents complained of took place at village crossings. In *Mulvaney* v. *New York Central R. Co.*, 233 Mich 350, we held that it was proper to take the issue from the jury and that as a matter of law no negligence existed when a person 20 feet from the track could see up the track for some 1/4 to 1/2 mile and where the train was running through sparsely settled country, the crossing being 2 and 9 miles respectively from the nearest towns. The highway in the *Mulvaney Case*, like that here, was not part of

a trunk line system. The train in that case was running at 55 miles per hour. We held that the general rule is that when running through open country the speed of trains is not limited. We cited *Robinson* v. *Flint & P. M. R. Co.*, 79 Mich 323 (19 Am St Rep 174), an early case, where we held that a speed of 60 miles an hour was not evidence of negligence. In *Shufelt* v. *Flint, P. M. R. Co.* (1893), 96 Mich 327, at 329, we said:

"Trains are not limited in the rate of speed they may run in the country, and across the public highways, where travel is limited."

See, also, *Robins* v. *Pitcairn*, 124 F2d 734. It is generally known that in the years which have elapsed since the *Shufelt* and *Robins* decisions, the speed of trains has greatly increased. It must be borne in mind that the Wolverine was proceeding through a rural section in broad daylight. Inasmuch as there is no law that prohibits a train from going at high speed in sparsely settled open country, we hold that there was no negligence shown because of speed.

Plaintiff contends that under the admitted conditions of good visibility the train crew, particularly the fireman and the engineer, charged with the duty of observing persons lawfully crossing the tracks and of maintaining a reasonable lookout, should have stopped the train when the car became visible. There was no duty upon the train crew to slow down the train or stop, even if they had seen the car. In *Piskorowski* v. *Detroit, G. H. & M. R. Co.*, 121 Mich 498 (80 Am St Rep 518), we held that a hand-car crew was not negligent as to a pedestrian unless they realized that the traveler would not stop and the crew have a right to assume that he will stop. We have held that at a country crossing there is no reason to slacken speed unless danger is apparent. See *Tucker* v. *Chicago & Grand Trunk R. Co.*, 122 Mich 149;

*Knickerbocker* v. *Detroit, G. H. & M. R. Co.*, 167 Mich 596; *Rushford-Surine* v. *Grand Trunk R. Co.*, 239 Mich 19; *Tomes* v. *Detroit, T. & I. R. Co.*, 240 Mich 133. It is obvious that, under plaintiff's own testimony, had the train crew realized that the motorist intended to continue across the tracks it would have been too late to prevent the accident. Whether they made an actual observation becomes immaterial.

Under CL 1948, § 466.13 (Stat Ann § 22.272), the railroad must give at least 2 whistle signals at least 40 rods before a crossing is reached, together with a continuous ringing of the bell from that point to the crossing. Plaintiff's own testimony is as follows:

"My best estimate is we were possibly about 12 or 15 feet from the rail closest to us at that time. As near as I can judge we proceeded on the track at about 2 miles an hour. After we once started up it was clear in my mind no train was coming. We went across, that's all. No use looking any further.

"I lowered the window in the first place to listen and look so I could hear, that was the purpose in lowering the window. *You can't hear through it;* I don't suppose after I raised the window I was able to hear so well. No doubt when I took my last look I could see well over 40 rods, and I didn't see a train within 40 rods." (Italics ours.)

The road foreman, fireman, and the engineer testified that the bell and the whistle were sounded in accordance with the statute but plaintiff testified that she did not hear anything until the impact. No other witness testified. Plaintiff contends that her testimony raised an issue for the jury as to whether the bell and whistle had been properly sounded. Plaintiff, however, admitted with the window closed she could not hear, or, at least as well, the signals after the car got under way and while it traversed not only the 12 or 15 feet but also most of the 21-1/2 feet over the 2 sets of tracks. If her observation as to distance

was correct, she looked before the train had reached the whistling post, at which time there was no duty to sound the whistle. Thereafter she had closed the car window and was not in a position to hear the signals, or at least hear them as well. The testimony that a witness did not hear signals cannot be considered unless it is shown affirmatively that the witness was in a position to hear signals if given and that she was paying attention when it is claimed the signals were being given. See, to that effect, *Shufelt* v. *Flint & P. M. R. Co.*, 96 Mich 327; *Lambert* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 209 Mich 107; *Mulvaney* v. *New York Central R. Co., supra.* In *Burt* v. *Detroit, G. H. & M. R. Co.*, 262 Mich 204, it was held that in an action brought by a boy who was struck by a train while crossing the tracks, his purely negative testimony that he heard no bell ring as against positive testimony that it was ringing, raised no issue of fact. Similarly here, plaintiff's testimony constitutes negative testimony only and the positive testimony of employees of defendant will be accepted as determinative.

Plaintiff claims error because a motion for new trial for newly-discovered evidence was denied. In an affidavit accompanying the motion, one Junior Coyle testified that while on a farm about a half mile away from the crossing, he heard the noise of the impact but no sound of a whistle preceding it; that he was listening for a whistle and would have heard it if it had been blown. Plaintiff filed an affidavit that she had not been aware of such testimony until after the trial. We do not believe that the court abused its discretion in denying motion for a new trial. There was no showing that plaintiff could not, with reasonable diligence, have discovered such evidence and produced it at the trial. Without such showing, it was not error to deny a new trial. See

*Grossman* v. *Langer,* 269 Mich 506; *Davidson* v. *City of Detroit,* 307 Mich 420.

We find that no negligence on the part of the defendant was shown. In the case of *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697), we held that ordinarily the contributory negligence of the traveler is not imputed to the passenger. In the instant case it was claimed that plaintiff was contributorily negligent inasmuch as she was also, according to her own testimony, accustomed to watch and warn her husband while he was driving and she did assume such duty to look out for any approaching train. Under the facts of this case, plaintiff was unquestionably guilty of contributory negligence. However, we need not enlarge on this point as there was no negligence on the part of the defendant.

Judgment for defendant affirmed, with costs.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

*In re* FULLER.

1. HABEAS CORPUS—COMMITMENT—STATUTES—AMENDMENTS.
   Commitment proceedings in 1945 are governed by statutory provisions in effect at time they are held, subsequent amendments not being material in later habeas corpus proceeding (CL 1929, § 6888, as amended by PA 1943, No 250, and PA 1949, No 313).

2. SAME—FILING OF PETITION—CONSTRUCTION OF STATUTES.
   The statute providing for the filing of a petition for habeas corpus by "some person" other than the one whose alleged unlawful restraint is in issue is to be liberally construed (CL 1948, § 637.9).

3. SAME—SPOUSES—JURISDICTION.
   Any person, including a spouse, may sue out a writ of habeas corpus and confer jurisdiction to inquire into the matter of an alleged illegal restraint of another person (CL 1948, § 637.9).

4. SAME—PETITION—INSANE PERSONS—VALIDITY OF COMMITMENT.
   Petition for habeas corpus by husband of person, claimed to have been committed to a hospital as a mentally incompetent person by the probate court after hearing at which the wife was not present and whose absence was not made to appear to the court as improper and unsafe, *held*, sufficient to confer jurisdiction upon Supreme Court to determine questions raised as to validity of wife's commitment (CL 1929, § 6888, as amended by PA 1943, No 250).

5. INSANE PERSONS—APPEARANCE AT HEARING—JUSTIFICATION FOR DENIAL.
   The determination as to whether or not it would be improper and unsafe to permit a person whose sanity is the subject of inquiry to appear at the hearing or to render removal

---

REFERENCES FOR POINTS IN HEADNOTES

[3] 25 Am Jur, Habeas Corpus § 122.
[4] 25 Am Jur, Habeas Corpus § 84.
[6] 28 Am Jur, Insane and Other Incompetent Persons §§ 12, 14, 16, 32, 33.
[6] Necessity and sufficiency of notice to alleged incompetent of application for appointment of guardian or committee. 23 ALR 594.
[8] 28 Am Jur, Insane and Other Incompetent Persons § 12.

from place of commitment improper or unsafe is a matter for determination by the court and not a hospital superintendent or physicians (CL 1929, § 6888, as amended by PA 1943, No 250).

6. SAME—SANITY PROCEEDING—PRESENCE OF ALLEGED INSANE PERSON.

A person must be present at the hearing in which his sanity is in issue unless such appearance is made to appear to the court holding the hearing to be improper and unsafe (CL 1929, § 6888, as amended by PA 1943, No 250).

7. SAME—SANITY PROCEEDING—JUSTIFICATION FOR DENIAL OF PRESENCE AT HEARING OF ALLEGED INSANE PERSON—EVIDENCE.

Letter from hospital superintendent to probate judge that person whose sanity was in issue in proceeding brought for testing same was temporarily a patient in his institution and that it was improper and unsafe for her to appear in the court at the time of the hearing without setting forth supporting facts was insufficient to justify a denial to such person of her right to be present in court and take such part in the proceeding as she might desire, hence her commitment was null and void, there being no other justifying evidence (CL 1929, § 6888, as amended by PA 1943, No 250).

8. SAME—SANITY PROCEEDING—STATUTES.

A probate court is without jurisdiction to commit a person as insane, where provisions of the statute relative to sanity proceeding are not complied with, since such provisions are mandatory (CL 1929, § 6888, as amended by PA 1943, No 250).

9. SAME—SANITY PROCEEDING—STRICT COMPLIANCE WITH STATUTE.

Proceedings taken for an adjudication of insanity against an individual should require the strictest compliance with all the pertinent statutory provisions, as such determination affects the rights of the individual to the enjoyment of life, liberty and property (CL 1929, § 6888, as amended by PA 1943, No 250).

10. SAME—JURISDICTION OF PROBATE COURT—STATUTES.

The probate court derives its jurisdiction in sanity proceedings from the statute and the provisions of the statute must be strictly pursued (CL 1929, § 6888, as amended by PA 1943, No 250).

11. SAME—PRESUMPTION OF SANITY.

A person whose sanity is being adjudicated is presumed sane

until the contrary fact is made to appear (CL 1929, § 6888, as amended by PA 1943, No 250).

12. SAME—PRESUMPTION OF SANITY—EVIDENCE.
Hearsay testimony that petitioner's wife had attempted to commit suicide and had indulged in fits of crying but not "to a great extent" and that the attempted suicide resulted from a misunderstanding of the parties *held*, insufficient to overcome presumption of sanity, hence commitment was void (CL 1929, § 6888, as amended by PA 1943, No 250).

13. SAME—CERTIFICATES OF EXAMINING PHYSICIANS.
An adjudication of insanity may not be based solely on the certificates of physicians appointed by the probate court to examine the alleged insane person (CL 1929, § 6888, as amended by PA 1943, No 250).

14. SAME—SANITY PROCEEDING—REVIEW BY SUPREME COURT.
The Supreme Court does not weigh the testimony taken at a sanity proceeding but does determine whether the requirements of the statute were complied with and whether there was sufficient testimony taken on the hearing to overcome the presumption of sanity and to justify an affirmative finding that the person was at the time insane (CL 1929, § 6888, as amended by PA 1943, No 250).

15. APPEAL AND ERROR — QUESTIONS REVIEWABLE — CONSTITUTIONALITY OF STATUTES—SUFFICIENCY OF PHYSICIANS' AFFIDAVITS.
Questions as to constitutionality of statute relative to conduct of sanity proceedings and whether affidavits of examining physicians were in compliance with statutory requirements are not determined, where commitment was void because of failure to comply with statute as to presence of person whose sanity was in issue at hearing and of insufficiency of evidence upon which to base a finding of insanity (CL 1929, § 6888, as amended by PA 1943, No 250).

Habeas corpus with accompanying certiorari by J. Douglas Fuller to obtain release of his wife from Wayne County General Hospital. Submitted June 10, 1952. (Calendar No. 45,303.) Writ granted October 6, 1952.

*Black, Bush & Bradt,* for petitioner.

*Francis T. McGann, guardian ad litem.*

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for the people.

CARR, J. On the 10th of May, 1945, the probate court of Wayne county entered an order adjudging Helen Fuller to be an insane person and ordering her committed to the Ypsilanti State Hospital or to the Eloise Hospital. She was confined to the latter institution, now known as the Wayne County General Hospital, and is an inmate thereof at the present time. The instant proceeding was brought by her husband for the purpose of obtaining her release. The petition filed alleges that the order of commitment was unauthorized and illegal in that provisions of the State and Federal Constitutions with reference to due process of law were violated, and also that certain mandatory provisions of the statute under which the proceeding was had were not followed.

On October 12, 1951, a writ of habeas corpus was issued by this Court, directed to the superintendent of the hospital, with ancillary writ of certiorari to the probate court. Returns to both writs have been duly filed. It appears therefrom that the basis for Mrs. Fuller's detention is the order above mentioned. The proceedings taken prior to the commitment, insofar as material, are set forth in the return to the writ of certiorari.

The petition seeking an adjudication as to Mrs. Fuller's sanity was filed by her husband on April 12, 1945. It was stated therein as the principal bases for the allegation of insanity that she was depressed and that she had attempted to commit suicide. She was examined by 2 physicians on whose certificates a temporary order for her restraint in Eloise Hospi-

tal, pending the hearing on the application, was made.

The statutory provisions governing the procedure at the time of the commitment were set forth in CL 1929, § 6888 (Stat Ann § 14.811), as last amended by PA 1943, No 250. Subsequent amendments to the section are not material in the present controversy.* Pursuant to the statute the probate court, following the filing of the petition, fixed a date for hearing and appointed 2 physicians to examine Mrs. Fuller. The examination was duly held and the physicians filed their respective reports indicating their conclusions as to her mental condition.

In accordance with the statutory mandate, notice of hearing was given to the husband and sister of Mrs. Fuller, and was also served on her. However, she was under detention in the hospital at the time of the hearing and was not permitted to attend. Neither was she represented unless it can be said that her husband, who filed the petition on which the proceeding was had, was charged with the obligation of protecting her rights. The reasons for Mrs. Fuller's absence will be discussed more fully hereafter. On the hearing, the only testimony requiring specific consideration was that of Mr. Fuller who was sworn and examined by the probate judge. The order of commitment followed.

It is claimed in the instant proceeding that the requirements of the statute were not observed in the probate court, and that in consequence Mrs. Fuller's commitment was unauthorized and void. It is urged that the averments of the petition on which the hearing was held were insufficient to give the court jurisdiction, and that the affidavits of the examining physicians were deficient in that they did not set forth material facts in support of the conclusions

* See CL 1948, § 330.21, as amended by PA 1949, No 313 (Stat Ann 1951 Cum Supp § 14.811).

stated therein. It is also urged that precluding her from attending the hearing constituted an invasion of her rights under the statute, and that the testimony taken did not support the conclusion of the probate judge on which his order of commitment was based. It is also argued that the probate proceeding, as actually conducted, failed to satisfy constitutional guaranties as to due process of law.

On behalf of the superintendent of the Wayne County General Hospital it is claimed that the petition of Mr. Fuller for writs of habeas corpus and certiorari should be dismissed on the ground that he was without right or authority to present it to this Court. On the basis of certain affidavits that have been filed in the matter it is argued that Mrs. Fuller is opposed to the proceeding. An attempt has been made to show that she is antagonistic to her husband because of his action in filing the petition in probate court, and perhaps for other reasons, and that it is against her wishes that he undertake at this time to do anything in her behalf. The claim that the husband should not be permitted to maintain the instant proceeding seems to be predicated on the theory that her wishes should be regarded as controlling, and that her mental condition is such that she should be deemed competent to determine what action, if any, should be brought in her behalf and who should represent her.

The statute relating to habeas corpus proceedings specifically provides for the filing of the petition by "some person" other than the one whose alleged unlawful restraint is in issue. CL 1948, § 637.9 (Stat Ann § 27.2252). For obvious reasons such provision has been liberally construed. In the case of *In re Joseph Nowack,* 274 Mich 544, 549, in which the petition was filed by an attorney, it was said:

"It is claimed that the attorneys had no right to sue out the petition for *habeas corpus*. It was proper that an attorney knowing that a former client was unlawfully restrained of his liberty and had been temporarily divested of his property by the appointment of a guardian, all without lawful proceedings, should file a petition for *habeas corpus* and an ancillary writ of certiorari. Any person may sue out a writ of *habeas corpus*. *In re Mould,* 162 Mich 1."

In the case of *In re Mould,* cited by the Court in the *Nowack Case, supra,* the right of an aunt of the child whose custody was in question to institute the proceeding was recognized. A petition filed by a parent, a spouse, a close relative, an attorney, or a friend, has been recognized by this Court as sufficient to confer jurisdiction to inquire into the matter of an alleged illegal restraint. The cases herein cited with reference to other matters involved in the controversy fairly indicate the situation in this regard. In the case at bar, notwithstanding the claimed aversion on the part of Mrs. Fuller to any action being taken in her behalf by her husband, we think that his petition was sufficient to charge this Court with the duty of determining the questions raised. It may be noted in passing that the issuance of the writs of habeas corpus and certiorari following the filing of the petition was not opposed on the ground that Mr. Fuller was not entitled to file it.

As before noted, Mrs. Fuller was given notice of the hearing of May 10, 1945, but was not permitted to be present. The statutory provision as set forth in the section above cited, relating to the procedure to be observed in a matter of this character, is as follows:

"Such alleged mentally diseased person shall have the right to be present at such hearing, unless it shall be made to appear to the court, either by the certificate of the medical superintendent in charge of

such hospital, home or retreat to which he may have been temporarily admitted, or by the certificate of 2 reputable physicians, that his condition is such as to render his removal for that purpose, or his appearing at such hearing improper and unsafe."

The language quoted clearly implies that the court must, on the basis of the showing made by the certificate of the superintendent of the hospital or by the certificates of 2 physicians, determine whether it would be improper and unsafe to permit the one whose sanity is the subject of the inquiry to appear at the hearing, or to render his removal from the institution improper and unsafe. The statute may not be read as intending to delegate to the hospital superintendent or to physicians the final authority to determine that issue. Such a construction would raise a serious question as to the validity of the provision quoted. *Dation* v. *Ford Motor Co.,* 314 Mich 152 (19 NCCA NS 158). Under the specific language of the statute the presence at the hearing of the alleged insane person is required unless it is "made to appear to the court" that such appearance would be improper and unsafe.

The return to the writ of certiorari contains a photostatic copy of a letter addressed to the probate court of Wayne county, under date of April 17, 1945, by the superintendent of the Eloise Hospital. Said letter was apparently filed on May 10, 1945, the date of the hearing. It referred to the fact that Mrs. Fuller was at the time a patient in the hospital under a temporary order issued by the court, and to the provisions of the statute with reference to her right to be present at the hearing. Following such references it was stated:

"I hereby certify that it is improper and unsafe for the above mentioned patient to appear in your court at the time of the hearing regarding the alleged mental disease."

No facts were set forth in the letter as the basis for the certification. Apparently the probate judge accepted it as a sufficient showing justifying a denial to Mrs. Fuller of the right to be present in court and to take such part in the proceeding as she might desire. It is argued on behalf of petitioner that such certificate, which merely indicated the opinion of the superintendent without any reference to facts on which he based it, was wholly insufficient to justify the action taken, and that in legal effect such attempted certification was a mere nullity.

In the case of *In re Harold H. Roberts,* 310 Mich 560, a petition for a writ of habeas corpus was filed by the mother of an inmate of the Kalamazoo State Hospital. There, as in the case at bar, the alleged insane person was confined in the hospital under an emergency commitment at the time of the hearing in probate court, and was not present at such hearing. There was no showing that his condition was such as to render his appearance improper and unsafe. After quoting the provisions of the statute above set forth, it was said:

"Under the above statute Roberts was entitled to be present at the hearing unless it was shown to the court that his condition was such as to render his removal from the hospital for that purpose improper and unsafe. The provisions of the statute are mandatory, and as they were not complied with, the probate court was without jurisdiction to commit him as an insane person. In the case of *In re Phillips,* 158 Mich 155, 159, we said:

"'Proceedings taken for an adjudication of insanity against an individual should require the strictest compliance with all the statutory requirements provided. The determination affects the rights of the individual to the enjoyment of life, liberty, and property. Courts will ever protect the rights of the individual who is so unfortunate as to

be called upon to make a showing to maintain his or her mental integrity.'

" 'The probate court derives its jurisdiction from the statute. To obtain jurisdiction in this case, therefore, the provisions of the statute should have been strictly pursued.' *In re Greenman,* 212 Mich 687.

" 'The commitment of a person to an insane asylum is too serious to permit any slipshod methods or failure to strictly comply with the provisions of the law. Without such strict compliance, proceedings like those in the instant case are a nullity.' *In re Joseph Nowack,* 274 Mich 544, 548.

"See, also, *In re Maffett,* 304 Mich 173; *In re Petition of Martin,* 248 Mich 512."

There being no basis for a determination by the probate judge, on any showing of facts made to him, that it would be unsafe and improper, or detrimental to the welfare of Mrs. Fuller, to permit her presence at the hearing, the conclusion necessarily follows that the requirement of the statute was not observed. She was entitled to the right granted to her by the law under which the proceeding was conducted. The failure to observe the statute in this respect rendered her commitment null and void.

Another question of a serious nature is raised by petitioner's claim that at the hearing in the probate court on May 10, 1945, there was no competent testimony tending to prove that Mrs. Fuller was at that time an insane person. The statute, above cited, in force at the time required that:

"The court shall also institute an inquest, and take proofs, as to the alleged insanity, feeble-mindedness, or epilepsy of such person, and fully investigate the facts before making such order, and, if no jury is required, the probate court shall determine the question of such alleged mental disease of such person."

The proofs taken on the hearing in question consisted of a statement made by a deputy sheriff and brief testimony given by the husband of Mrs. Fuller. The deputy stated that Mrs. Fuller was 38 years of age, married, that she was brought to Eloise on an emergency order after a suicide attempt, and that the petition in the case was signed by the husband. The testimony of Mr. Fuller, which is relied on as tending to support the claim of insanity, was as follows, the examination being conducted by the probate judge:

"*Q.* You are the husband of Helen Fuller?

"*A.* Yes, sir, I am.

"*Q.* She is about 38 years of age?

"*A.* Yes, sir.

"*Q.* On the 12th of April, you signed this petition and you said that she was—that people were talking about her and were against her; is that right?

"*A.* Yes, sir, to a degree.

"*Q.* Was she depressed and cries for long periods of time for no apparent reason?

"*A.* I wouldn't say that.

"*Q.* That is in the petition.

"*A.* Well, I didn't understand that part of it.

"*Q.* Did she indulge in fits of crying? You can understand that in plain English.

"*A.* Yes, sir, but not to a great extent.

"*Q.* Did she attempt suicide by jumping into a pond at Plymouth?

"*A.* That is what I understand; I heard about it.

"*Q.* Did you think she was in need of hospital care at that time?

"*A.* Yes, sir.

"*Q.* What is her condition now?

"*A.* I would like to have it postponed. I was responsible for her making that attempt, that night. It was a misunderstanding between us and I would like —it was—I want to do what is right but I sometimes wonder after seeing her since, I would like to have it postponed, if possible and try to do what is right.

"*Q.* If she is mentally sick, I think the public institutions are about as good as you can find anywhere.

"*A.* I appreciate that.

"*Q.* It takes a lot of money in a private institution.

"*A.* Yes, sir.

"*Q.* Under the circumstances you would like to have it adjourned to see whether or not—according to Mr. Smith—

"*Mr. Smith:* If it is adjourned, they can't commence the treatment.

"*Q.* It is a mistake to have it adjourned. They couldn't cut out a scientific course of treatment for her condition as long as she is there temporarily; they will have to leave her status quo. They can't treat her. When anyone has a sudden attack or condition of this kind, the earlier that treatment can be obtained, the recovery will be earlier. You are not doing anything in her interest by postponing it. They couldn't treat her if you postpone it. You are holding it up for 2 weeks. The quicker she is committed, the better. If she recovers, she can be returned so there is nothing gained by looking at it in a washy-washy fashion. People must take things as they are, not as they would like them to be. She needs hospital care, it is serious and she needs it now, not 2 weeks from now.

"*A.* Could I speak to my sister-in-law for a few minutes? We will be right back in.

"*Q.* Certainly you may; go right ahead."

Subsequently Mr. Fuller re-entered the courtroom, and said:

"I guess the best thing to do is what is best for her."

The testimony has been quoted in full in order that the situation may clearly appear. Apparently the questions propounded by the judge of probate to Mr. Fuller were based on the statements contained in the petition, and his answers tend to indicate that

at the time of the hearing he was unwilling to characterize his wife's conduct in the terms that had been set forth in the petition. He declined to say that she was depressed and cried for long periods of time without apparent reason. While admitting that she did indulge in fits of crying, he modified it by saying such conduct was not indulged in "to a great extent." Reference was made to her alleged attempt to commit suicide. The answer of the witness indicated that his knowledge of the occurrence referred to was based on hearsay. His further testimony suggests that Mrs. Fuller's conduct, if she did attempt suicide, resulted from a misunderstanding between the parties. He was not questioned for the purpose of bringing out the details of the occurrence. Bearing in mind that Mrs. Fuller was presumed to be sane until the contrary fact was made to appear, we do not think the testimony was sufficient to overcome that presumption. Whether the attempt to commit suicide, if there was such, indicated insanity at that time depended on the facts and circumstances involved, concerning which no inquiry was made. It may not be said that the hearing as conducted was a sufficient compliance with the mandate of the statute to the probate judge to "fully investigate the facts before making such order."

The situation here is analogous to that involved in *Re Haines,* 315 Mich 657. There, this Court after considering all of the testimony offered on a sanity hearing in probate court came to the conclusion that the testimony "did not in any reasonable sense tend to prove insanity." The commitment was accordingly held illegal. Attention in the case at bar has been directed to the statements in the affidavits of the examining physicians. A similar issue was involved in the *Haines Case,* and with reference thereto it was said:

"In reaching the above conclusion we are mindful that at the hearing the probate judge had before him the certificates of the 2 duly appointed physicians, each of whom certified that Harold H. Haines was an insane person; and doubtless the probate judge in so determining relied mainly, if not wholly, on such certificates. But it is settled law that in the absence of other competent proof an adjudication of insanity may not be based on the certificates of physicians appointed by the court to examine the alleged insane person. *In re Clifford,* 303 Mich 84; *In re Buck,* 308 Mich 634."

The language quoted is applicable in the case at bar. While we do not weigh the testimony taken in a proceeding of this kind, it is our duty to determine whether the requirements of the statute were complied with and whether there was sufficient testimony taken on the hearing to overcome the presumption of sanity and to justify an affirmative finding that Mrs. Fuller was at the time insane. Under the holding in the *Haines Case, supra,* and in other prior decisions of this Court, it must be held that the finding and the commitment based thereon were not supported by competent proofs. *In re Myrtle Davis,* 277 Mich 88; *In re Ryan,* 291 Mich 673; *In re Gordon,* 301 Mich 224; *In re Aslanian,* 318 Mich 55; *In re Fidrych,* 331 Mich 485; *In re Floyd Brooks,* 331 Mich 628.

In the respects above discussed, it is our conclusion that the statute was not followed, that in consequence the commitment of Mrs. Fuller was illegal, and that she is now entitled to her release. It is unnecessary to discuss the constitutional questions raised by petitioner, to pass specifically on the sufficiency of the petition initiating the sanity proceeding, or to determine whether the affidavits of the examining physicians were in compliance with the statutory requirements.

An order will enter in accordance with the foregoing opinion.

DETHMERS, BUSHNELL, and REID, JJ., concurred with CARR, J.

SHARPE, J., concurred in the result.

BOYLES, J. (*concurring in part*). I agree with Justice CARR that there was an absence of any competent testimony at the hearing in probate court to prove insanity. For that reason the patient must be released. I do not find it necessary to concur in some of the other reasons given.

The testimony has been quoted in full. It does not tend to prove insanity.

"Among other questions presented is petitioner's contention that at the hearing in the probate court no competent testimony was produced tending to prove petitioner's alleged insanity, and therefore his commitment by the probate court was absolutely void and his present detention is illegal.

"On review by certiorari of the proceedings in the probate court we do not pass upon the weight of testimony. Instead the limit of such review is to determine whether any competent testimony was produced from which it could reasonably be found that petitioner was an insane person. * * *

"We are unable to reach any other conclusion than that the testimony taken did not in any reasonable sense tend to prove insanity, and in the absence of any proof of insanity the commitment of petitioner was and is illegal. * * *

"It is not within the province of this Court in this proceeding to determine whether petitioner was insane at the time of his commitment or whether he is now insane. But on the record before us we must and do hold that the proceedings in the probate court were fatally defective and that Harold H. Haines is

entitled to be discharged." *In re Haines,* 315 Mich 657.

To the same effect, see *In re Gordon,* 301 Mich 224; *In re Aslanian,* 318 Mich 55, 58.

I do not agree that there was no showing made that the condition of the patient was such as to render her removal from Eloise hospital improper and unsafe for the purpose of appearing at the hearing. Such a showing was made, in accordance with the statute, where it provides that:

"Such alleged mentally diseased person shall have the right to be present at such hearing, unless it shall be made to appear to the court, either by the certificate of the medical superintendent in charge of such hospital, home or retreat to which he may have been temporarily admitted, or by the certificate of 2 reputable physicians, that his condition is such as to render his removal for that purpose, or his appearing at such hearing improper and unsafe." CL 1929, § 6888, as last amended by PA 1943, No 250 (Stat Ann 1943 Cum Supp § 14.811).*

The patient had been committed to Eloise hospital by order of the court and was confined there at the time of the hearing. The medical superintendent of the hospital certified to the court as follows:

"I hereby certify that it is improper and unsafe for the above mentioned patient to appear in your court at the time of the hearing regarding the alleged mental disease."

Justice CARR relies on *In re Harold H. Roberts,* 310 Mich 560, where there was a complete absence of any such showing, either by the medical superintendent or by any physicians, or otherwise. In that case the attorney general filed a memorandum with the court confessing error in the proceedings because

* Subsequent amendments have no bearing.

of lack of such compliance with the statute, and on that ground alone this Court ordered release of the patient.

See, also, *In re Aslanian, supra,* pp 58, 59.

It is not necessary to discuss additional questions raised as to why the patient should or should not be entitled to release. Either they have been considered by us in previous opinions or are not likely to arise again if another proceeding should be instituted to determine whether the patient is now insane.

There being an absence here of any competent testimony to prove insanity, the statute has not been complied with in that regard. For that reason I concur in the entry of an order discharging the patient from custody.

BUTZEL, J., concurred with BOYLES, J.

The late Chief Justice NORTH did not sit.

## FLOOD *v.* WELSH.

1. JOINT ADVENTURES—DEBTOR AND CREDITOR—SUBSEQUENT DEALINGS.

   Evidence *held,* to show that by execution of a so-called security agreement at a time when defendant was insolvent, joint adventure relationship between him and plaintiff widow was changed to debtor and creditor, especially in view of the dealings subsequently had between the parties.

2. FRAUD—EVIDENCE—COMPROMISE AND SETTLEMENT.

   Plaintiff's claim that she was fraudulently induced to accept by way of settlement a note for an amount less than what was actually due her as creditor of defendant must be determined on the basis of the evidence introduced on the trial.

3. SAME—BURDEN OF PROOF—EVIDENCE.

   Party asserting fraud as the basis for relief has the burden of establishing claim of fraud by clear and satisfactory proof.

4. SAME—BURDEN OF PROOF—EVIDENCE—ACCOUNTING.

   Burden of proving fraud in execution of note for an amount alleged to be much less than plaintiff claims was then due her from defendant *held,* not sustained by plaintiff in her accounting suit against defendant with whom she had first engaged in joint adventures and after accounting thereof was had relation thereafter was that of debtor and creditor.

5. ACCOUNTING—PAYMENT—RECORD.

   Payments shown to have been made to plaintiff in suit for accounting *held,* to have been such that Supreme Court is

---

REFERENCES FOR POINTS IN HEADNOTES

[2, 4] Generally as to fraud inducing compromise and settlement, see 11 Am Jur, Compromise and Settlement § 29.
[3, 4] 24 Am Jur, Fraud and Deceit § 255.
[6] 9 Am Jur, Cancellation of Instruments § 4.
[7] 9 Am Jur, Cancellation of Instruments §§ 60, 61, 63; 24 Am Jur, Fraud and Deceit § 278.

unable to say they did not fully discharge defendant's obligation to her.

6. CANCELLATION OF INSTRUMENTS—EXECUTED CONTRACTS.
Canceling an executed contract is an exertion of the most extraordinary power of a court of equity.

7. SAME—FRAUD—EVIDENCE.
Cancellation of an executed contract ought not to be done on the ground of fraud unless the fraud be made clearly to appear.

8. ACCOUNTING—FRAUD—DAMAGES—EVIDENCE.
Evidence in suit for accounting failed to show plaintiff had been damaged as the result of misrepresentation or fraud on part of defendant, if there was such.

9. APPEAL AND ERROR—ACCOUNTING—EVIDENCE—CREDIBILITY—WITNESSES—EQUITY.
The Supreme Court does not reverse decree in suit for accounting, where trial judge saw and heard witnesses in the case, was in a position to pass upon the credibility of their testimony and record does not show decree for defendant was not in accordance with the just rights of the parties.

Appeal from Oceana; Smith (Raymond L.), J., presiding. Submitted June 3, 1952. (Docket No. 8, Calendar No. 45,376.) Decided October 6, 1952.

Bill by Nina N. Flood against Clarence A. Welsh for an accounting and other relief. Bill dismissed. Plaintiff appeals. Affirmed.

*Alexis J. Rogoski* and *Robert Bunker Rogoski*, for plaintiff.

*Stewart J. Roche* and *Warner, Norcross & Judd* (*George S. Norcross* and *Harold S. Sawyer*, of counsel), for defendant.

CARR, J. Plaintiff brought suit in circuit court for an accounting and to obtain further incidental equitable relief based on the claim that defendant

had been guilty of fraudulent misrepresentations to her prejudice. The case resulted from business transactions between the parties which began early in the year 1927, or perhaps prior thereto, and continued for several years. Plaintiff was at the time a widow, and was the owner of real estate and of personal property which she had received from the estate of her husband.

Shortly prior to the associations referred to, defendant counseled plaintiff with reference to an investment from which she realized a profit of approximately $31,000. It is her claim that as a result of this transaction she acquired confidence in defendant's business ability and in his honesty and integrity. In any event, the parties entered into a series of joint ventures toward which plaintiff contributed money from time to time, such transactions being handled by defendant. It is plaintiff's claim that they agreed to share equally in the profits resulting from their operations.

Neither party kept a complete and accurate record of the different ventures that were undertaken. On the trial of the case a ledger was introduced in evidence, in which, as the testimony relating thereto indicates, each party made entries during a period of several months beginning March 11, 1927. Many of such entries, however, are not in satisfactory form, and it may well be doubted if the exhibit can be regarded as an accurate account of the dealings of the parties even during the limited period of time covered by it.

While some of the investments made by defendant apparently proved profitable, it is conceded that in 1929 heavy losses were sustained because of expenditures made and indebtedness incurred in the drilling of oil wells. The ventures in this field were unfortunate, and as a result defendant became insolvent. Apparently motivated by a desire to protect

plaintiff as far as possible, defendant and his wife, on April 29, 1929, executed a written instrument reciting that defendant had borrowed from and was indebted to the plaintiff for large sums of money, and that it was the desire of the parties to secure the repayment thereof. Reference was made to an assignment attached to the agreement which the parties executed, by the terms of which defendant and his wife undertook to convey to plaintiff defendant's interest in all oil and gas leases, wells, products, drilling equipment, and all personal property used in connection with his oil and gas drilling operations within the State, which he then owned. The assignment was accepted by the plaintiff presumably for the purpose for which it was executed, that is, to protect her in the repayment of the money that she had advanced to defendant.

On August 1, 1929, defendant gave plaintiff his note, payable on demand, in the sum of $15,000, and on October 15th following 2 notes, in like form, for $10,000 each were executed and delivered. The parties are not in accord as to the aggregate of the amounts advanced by plaintiff to defendant, the former claiming that during their business associations she gave to defendant approximately $65,000, while defendant insists that at the time of the agreement made on April 29, 1929, the aggregate of advances was $35,000, the total of the 3 notes mentioned. In March, 1932, defendant executed and delivered to plaintiff 2 notes in the sums of $2,000 and $1,138.42 respectively. The precise nature of this transaction is not explained in the record. The same situation obtains with reference to other dealings between the parties of which, apparently, no record was kept and with reference to which their memories have failed.

During the period beginning August 5, 1929, and ending April 1, 1938, plaintiff received a total of

$8,886.37 from the Hart Petroleum Company, in which defendant was financially interested. It was his claim on the trial of the case in circuit court that such payments were in fact made on his obligation to her to enable her to meet her expenses and those of her son. No other satisfactory explanation is suggested in the proofs. In 1942, defendant paid plaintiff the further sum of $2,000, the receipt of which is admitted. Subsequent to 1932 defendant's financial situation improved as a result of certain transactions into which he entered, including investments in oil fields that turned out profitably and a contract with the Michigan highway department.

On the 7th of April, 1944, following negotiations between the parties, defendant executed and delivered to plaintiff the following obligation:

"Hart, Michigan. April 7, 1944.

"After date I promise to pay to the order of Nina N. Flood $40,000 payable at the rate of $3,000 or more per year at the rate of no percent interest.

"This note is in full payment of any and all moneys due Nina N. Flood by myself and is to supersede any and all other notes & agreements previously executed.

"The shares of stock now held by Nina N. Flood in Hart Petroleum Company and Oceana Oil Producers, Inc. to be held as collateral security until payment of this note, and upon payment of this note said shares are to be returned and issued to myself, my heirs or assigns without consideration by Nina N. Flood, her heirs or assigns.

"(s) C. A. WELSH
C. A. Welsh

"Approved and accepted: April 7, 1944.
(s) NINA N. FLOOD
Nina N. Flood"

Payments on the foregoing obligation were made from time to time by defendant, in the total sum of

$35,000. The final checks were delivered on December 15, 1949, the record indicating that 3 of them were postdated. However, they were cashed by plaintiff, the last payment being received by her shortly before the present suit was instituted. It is the claim of the defendant that the balance of the obligation was paid by his acquiring from the Hart Petroleum Company an obligation owing to it by plaintiff, in the aggregate amount of $6,034.13, which he applied against the debt owing by him to plaintiff. He claims, in consequence, and the trial court so found, that he had actually paid to her, or for her use and benefit, sums of money in excess of the obligation of April 7, 1944.

After listening to the proofs of the parties, the trial judge concluded that as a result of the execution and delivery of the security assignment and the 3 notes totalling $35,000 the relationship between the parties thenceforth became that of debtor and creditor, that the aggregate of the amounts turned over to defendant by plaintiff up to that time did not exceed the amount of the notes, that under the proofs the note given on April 7, 1944, for $40,000 was not less than the amount owing to plaintiff by defendant at that time, that plaintiff was bound by her acceptance of such undertaking, and that defendant's obligation thereunder had been fully paid and satisfied. In accordance with such findings a decree was entered denying to plaintiff the relief that she sought and dismissing the bill of complaint. From such decree plaintiff has appealed, claiming in substance that the evidence in the case does not justify the factual conclusions of the trial judge.

While the record with reference to the original agreement of the parties is not entirely clear, it is a fair inference that they contemplated a series of joint ventures which would continue as long as the arrangement proved mutually satisfactory. How-

ever, certain of the transactions into which defendant entered on behalf of himself and plaintiff proved ill-advised from the financial standpoint, as a result of which defendant, as before noted, was insolvent, or practically so, at the time of the execution of the security agreement on April 29, 1929. It is a fair conclusion from all the circumstances of the case, including what was actually done by the parties, that it was then intended to change the status of the plaintiff to that of a creditor. Because of the relationship that had existed between them defendant concluded, as he claimed on the trial, that he should protect her as fully as possible. It is obvious that had there been an accounting and final settlement at that time the money that plaintiff had invested in the various joint ventures undertaken would have been largely, if not entirely, lost to her.

The execution of the notes suggests also that the intention of the parties was to give to plaintiff the status of a creditor, and the total of the obligations was presumptively considered at that time as covering the total of plaintiff's advances. If, as plaintiff claims, such advances exceeded $35,000, it is reasonable to assume that notes would have been executed for the full amount. It does not appear that there was any difference of opinion between the parties at that time. We are in accord with the conclusion of the trial judge that after the 1929 transactions plaintiff's status was that of a creditor of the defendant. Dealings between the parties thereafter tend to support such finding.

As before noted, defendant in March, 1932, executed and delivered to plaintiff further notes in the aggregate amount of $3,138.42. He also caused to be paid to her through the Hart Petroleum Company, over a period of approximately 9 years, the sum of $8,886.37. It is significant that plaintiff did not during this period insist that defendant account

to her for any portion of the profits from the various operations in which, to her knowledge, he engaged. Plaintiff's claim, as set forth in her bill of complaint, that such transactions were in fact joint ventures in the profits of which she was entitled to participate is not tenable. Furthermore, the provisions of the note of April 7, 1944, and the acceptance thereof by plaintiff indicate that the parties considered that the relationship existing between them was that of debtor and creditor.

It is further urged on behalf of appellant that she was induced to accept the note for $40,000 in settlement of defendant's obligations to her because of fraudulent misrepresentations made to her by defendant at that time. In substance, she claims, 1st, that the property now possessed by defendant was all acquired as the result of joint ventures in the profits of which she was entitled to share, and that in consequence she now is, as alleged in her bill of complaint, "lawfully entitled to a half interest therein," and, 2d, that if the relationship admittedly existing between the parties prior to 1929 had been changed to that of debtor and creditor, the amount advanced by her to defendant and remaining unpaid on the 7th of April, 1944, greatly exceeded the amount of the note executed and delivered on that date. She contends that defendant, in order to induce her to settle for less than what was actually owing to her, falsely represented that he was financially unable to pay more than $40,000, and that she accepted the note because of such representation. Defendant denies any fraud or misrepresentations whatever on his part, and asserts that the amount of the advances made by plaintiff totalled approximately $35,000 rather than the $65,000 claimed by her. Based on the testimony in the case, the trial court sustained the claim of the defendant as to the amount of his indebtedness to plaintiff.

The argument of plaintiff that she was entitled to share in the proceeds of transactions in which defendant engaged subsequent to 1929 does not require further consideration. Her claim that she was fraudulently induced to accept by way of settlement a note for an amount less than what was actually due to her as a creditor of the defendant must be determined on the basis of the evidence introduced on the trial. Having asserted fraud the burden rested on her of supporting such claim by clear and satisfactory proof. As said in *Zimmerman* v. *Feldman*, 217 Mich 390, 399:

"When one bases his claim for relief upon the ground of fraud it becomes his duty to establish the fraud by evidence that is convincing that the fraud was perpetrated."

See, also, *Achenbach* v. *Mears*, 272 Mich 74; *Groth* v. *Singerman*, 328 Mich 615. It must be said in the instant case that plaintiff has failed to sustain the burden of proof resting on her with reference to the issue of fraud. Furthermore, if, as claimed by defendant and found by the trial court, she has received the full amount due and owing to her, she has not, in any event, been damaged. She has, it appears, received from defendant payments approximating $52,000. On the basis of the record that is before us we cannot say that such payments did not fully discharge defendant's obligation to her.

In effect plaintiff asks that she be decreed not bound by the note of April 7, 1944, that for the reason urged by her such obligation, even though fully paid, be disregarded, and that defendant be found indebted to her in accordance with her claim. In *Atlantic Delaine Company* v. *James*, 94 US 207, 214 (24 L ed 112), it was said:

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity.

The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

The foregoing statement was quoted with approval by this Court in *Oliver* v. *Baldwin,* 201 Mich 336, 362.

In the case at bar plaintiff has failed to prove that she has been damaged as the result of misrepresentations or fraud on the part of defendant, if there was such. The trial judge saw and heard the witnesses in the case, including the parties to the suit, and was in consequence in position to pass on the credibility of their testimony. We should not reverse the decree unless satisfied that it is not in accordance with the just rights of the parties. *In re George L. Nadell & Co., Inc.,* 294 Mich 150; *Barar* v. *Phillips,* 328 Mich 267. The record in the case does not require or justify a conclusion that plaintiff has established her right to the equitable relief sought.

The decree is affirmed. Defendant may have costs.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## VAN ANTWERP v. STATE.

1. APPEAL AND ERROR—ORDER GRANTING MOTION TO DISMISS—WELL-PLEADED ALLEGATIONS OF FACT ACCEPTED AS TRUE.

   Well-pleaded allegations of fact in petition setting forth alleged cause of action against State for commitment to State hospitals under void commitment proceedings must be accepted as true on appeal from order granting State's motion to dismiss.

2. JUDGMENT—INJUNCTION—ACTION AGAINST STATE—STATUTES.

   A decree enjoining the State commissioner of revenue from instituting any proceeding against plaintiff to recover because of expenditures by the State in caring for him in State institutions because commitments thereto were void cannot be regarded as creating any new right of action in plaintiff or as imposing on the State any liability in addition to that, if any, created through legislative enactment.

3. STATUTES—INTERPRETATION—INTENT.

   The primary purpose of rules governing the interpretation of statutes is to ascertain and give effect to the intention of the legislature.

4. SAME—UNAMBIGUOUS LANGUAGE RENDERS INTERPRETATION UNNECESSARY.

   A bare reading of a statute suffices and no interpretation is

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error §§ 944, 945.
[2] 28 Am Jur, Insane and Other Incompetent Persons §§ 41, 43.
[3] 50 Am Jur, Statutes § 223.
[4] 50 Am Jur, Statutes § 225.
[5] 50 Am Jur, Statutes §§ 357, 363.
[6] As to strict or liberal construction, see 50 Am Jur, Statutes § 384.
[8–11] 49 Am Jur, States, Territories, and Dependencies § 78.
[12–14, 16] 49 Am Jur, States, Territories, and Dependencies §§ 76, 77.
[15] 50 Am Jur, Statutes §§ 442–445.
[16] 49 Am Jur, States, Territories, and Dependencies §§ 91, 97.

necessary, if the language employed therein is plain, certain and unambiguous.

5. SAME—CONSTRUCTION OF ACT AS A WHOLE.

Effect must be given, if possible, to every word, sentence and section when construing a statute and 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.

6. STATES—COURT OF CLAIMS ACT—CONSTRUCTION OF STATUTES.

The question of intent of the court of claims act, whereby a means was afforded of presenting claims against the State, was not left to be determined by general rules of construction by reason of the specific statement that the act was not to be construed as enlarging the present liabilities of the State and any of its agencies which provision functioned as a guide for observance by the courts in the interpretation of such act (PA 1939, No 135, § 24).

7. SAME—COURT OF CLAIMS ACT—SOVEREIGN IMMUNITY—WAIVER.

The court of claims act did not waive or abrogate the right of the State to rely on its sovereign immunity (PA 1939, No 135).

8. SAME—WAIVER OF IMMUNITY FROM ACTION.

A State does nothing more than waive its immunity from action by consenting to be sued and does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist.

9. SAME—LIABILITY FOR TORTS—STATUTORY CONSENT TO BE SUED.

Liability of the State for tort cannot be predicated upon the fact that the State has entered its general statutory consent to be sued and directing the manner in which suits may be brought by those having claims against the State (PA 1939, No 135).

10. SAME—CLAIMS AGAINST STATE—STATUTES.

A special statute permitting suits against the State on particular claims does not concede the justice of such claims.

11. SAME—CONSENT TO BE SUED—JURISDICTION—INTERPOSITION OF DEFENSES.

Statutory consent to sue the State merely gives a remedy to enforce a liability and submits the State to the jurisdiction

of the court, subject to its right to interpose any lawful defense.

12. SAME—LIABILITY FOR TORTS—CONSENT.

The State is liable for the torts of its officers, agents or servants only upon its clear and definite consent.

13. SAME — TORTS — WAIVER OF LIABILITY — STATUTES — VESTED RIGHTS.

Plaintiff who failed to make it appear that any cause of action arose or became vested in his behalf for void commitments during period when court of claims act was amended so as to waive immunity from liability for the torts of its officers and employees with certain exceptions not here applicable, may not rely upon the statute as so amended, where it has since been repealed (PA 1939, No 135, § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87).

14. SAME—COURT OF CLAIMS ACT—LIABILITY FOR TORTS—VOID COMMITMENT—CONSTRUCTION OF STATUTES.

Fact that section of court of claims act declaring that it was not to be construed as enlarging present liabilities of the State or its agencies was repealed did not subject the act to an interpretation so as to include liability for void commitments in State institutions, where the repealing act itself set forth a specific class of torts upon which immunity from liability was waived and such class did not include liability for void commitments to State institutions (PA 1939, No 135, § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87).

15. STATUTES—AMENDMENTS—JUDICIAL CONSTRUCTION.

Amendments to statutes which include language previously used and which have been subjected to judicial construction are presumed to have been adopted in the light of the prior construction placed on such provision.

16. STATES—TORTS—INTENT.

Liability on the part of the State in actions *ex delicto* may result only from affirmative legislation clearly manifesting such intent.

17. SAME—CONSTRUCTION OF STATUTES—AMENDMENTS.

Statute amending section of court of claims act relating to jurisdiction of the court to hear claims *ex contractu* and *ex delicto* against the State and another statute expressly waiving immunity from liability as to torts committed with State-owned motor vehicles and which latter statute ex-

pressly repealed a provision of the court of claims act relating to waiver of immunity from liability must be construed together, where they became effective simultaneously and relate to the same subject matter (PA 1939, No 135, § 8, as amended by PA 1941, No 137 and PA 1945, No 199; § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87).

18. SAME—COURT OF CLAIMS ACT—WAIVER OF IMMUNITY FROM LIABILITY FOR TORTS—VOID COMMITMENT.

Section of court of claims act vesting the court with jurisdiction to hear actions *ex contractu* and *ex delicto* against the State is not construed as waiving State's immunity from liability for tort of committing plaintiff to State institutions under void commitments (PA 1939, No 135, § 8, as amended by PA 1931, No 137 and PA 1945, No 199).

Appeal from Court of Claims; Spier (James E.), J., presiding. Submitted June 6, 1952. (Docket No. 47, Calendar No. 44,828.) Decided October 6, 1952.

Action by Lyle S. Van Antwerp against the State of Michigan and another for damages for alleged void commitment to State hospitals. Motion to dismiss granted. Plaintiff appeals. Affirmed.

*Lyle S. Van Antwerp, in pro. per.*, and *Conlin, Conlin & Parker*, for plaintiff.

*Frank G. Millard*, Attorney General, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara* and *Meredith H. Doyle*, Assistants Attorney General, for defendant.

CARR, J. Under date of December 16, 1948, the plaintiff instituted an action in the court of claims to recover a judgment for damages against the State of Michigan. From the petition filed by him it appears that his alleged cause of action was based on certain proceedings in the probate court of Kent county which resulted in his commitment to the State

psychopathic hospital at Ann Arbor for a period of 35 days, and subsequently to an adjudication that he was an insane person, followed by his commitment to the Kalamazoo State hospital. Plaintiff asserted in his pleading that as a result of such actions he sustained damages, that the proceedings against him were null and void because of the failure of the court to observe provisions of the statute relating thereto, and that, in consequence, the State of Michigan is liable for the various elements of damage sustained by him, as set forth in his bill of particulars.

Defendant moved to dismiss the case on the general ground that the facts stated were not sufficient "to constitute a valid cause of action against said defendant." The motion was granted, the trial judge concluding that under pertinent statutory provisions relating to the court of claims defendant was not precluded from raising the defense of governmental immunity, that the acts of the probate judge of Kent county of which the plaintiff complained were judicial acts for which the State cannot be held liable, and that the proceeding in the court of claims was not seasonably instituted. Plaintiff has appealed from the order of dismissal.

The case having been disposed of in the trial court on the issues raised by the motion, the well-pleaded allegations of fact in plaintiff's petition must be accepted as true. It appears therefrom that on the 10th of June, 1927, plaintiff's father filed in the probate court of the county of Kent a petition seeking plaintiff's commitment to the State psychopathic hospital at the University of Michigan. Such order of commitment was made for a period not exceeding 35 days. Subsequently and under date of April 6, 1928, plaintiff's father filed a second petition in the probate court alleging that plaintiff was insane and seeking his admission to the Kal-

amazoo State hospital for treatment. As a result of the proceedings taken, plaintiff was so committed as a public patient. The petition further alleges that the proceedings and orders of the Kent county probate court were null and void, and in violation of plaintiff's constitutional rights because the petition by which the proceedings were instituted was insufficient, no hearing to determine the matter of insanity was held, and plaintiff was denied the right to be present at a proper hearing held pursuant to the statute. Reference is made to PA 1923, No 151, § 11, which, as amended by PA 1925, No 283, was in force and effect at the time of the commitment.* The petition alleges that by reason of the void proceedings plaintiff was injured in his reputation, was wrongfully deprived of his liberty, and has sustained financial losses.

Attached to the petition is a decree rendered by the circuit court for the county of Washtenaw on the 13th day of June, 1947. The record indicates that plaintiff herein brought suit against the commissioner of revenue of the State for injunctive relief. The case was not contested, defendant's default being taken. The decree entered declared the orders and commitments of the probate court for the county of Kent, referred to by plaintiff in his petition, to be null and void, and recited that plaintiff had been deprived of his constitutional rights to his damage. In terms he was authorized to assert in any court of the State "any cause of action which may inure to him" because of the void commitments; and the defendant, the commissioner of revenue, was enjoined from instituting any proceeding against plaintiff to recover because of the expenditures by the State in caring for him in the State institutions.

* See CL 1948, § 330.21, as amended by PA 1949, No 313 (Stat Ann 1951 Cum Supp § 14.811). Amendments made since plaintiff's commitment in 1927 are not involved in the controversy.

Approximately 6 months after the entering of the default decree a motion to set it aside was denied. Plaintiff apparently relies to some extent on the recitals in such decree. Obviously, however, the statements referred to cannot be regarded as creating any new right of action in his behalf, or as imposing on the State any liability in addition to that, if any, created through legislative enactment.

The primary question at issue is whether the State of Michigan has by statute waived the right to assert governmental immunity in cases of the character here involved, and has subjected itself to liability therein. The court of claims was created, and its jurisdiction defined, by PA 1939, No 135, which, as subsequently amended, appears as CL 1948, § 691.101 *et seq.*, as amended by PA 1948 (1st Ex Sess), No 47, and PA 1949, No 253 (Stat Ann 1951 Cum Supp § 27.3548[1] *et seq.*). In section 8 of the act as originally passed in 1939 the court was given power:

"To hear and determine all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto*, against the State and any of its departments, commissions, boards, institutions, arms or agencies."

Said section 8 (CL 1948, § 691.108 [Stat Ann 1951 Cum Supp § 27.3548(8)]) was amended in certain respects not material in the instant case by PA 1941, No 137, and PA 1945, No 199. The clause, above quoted, was not changed in any way. Plaintiff relies thereon, asserting that under its terms the State is liable to him for the damages alleged in his petition, and that the State has thereby waived its right to raise against him the defense of governmental immunity.

The question at issue is in effect one of statutory interpretation. 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."

See, also, *Gardner-White Co.* v. *State Board of Tax Administration,* 296 Mich 225; *In re Chamberlain's Estate,* 298 Mich 278; *In re Petition of Bryant,* 323 Mich 424.

On the specific point in issue here the legislature, in the enactment of PA 1939, No 135, did not leave the question of intent to be determined by the application of general rules of construction. In section 24 of said act it was specifically provided:

"This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies." (CLS 1940, § 13862–24, Stat Ann 1942 Cum Supp § 27.3548[24]).

It will be noted that the quoted section was not in the form of a limitation on, or an exception to, any other specific provision or provisions of the act, but, rather, was a general statement with reference to the legislative purpose in the adoption of the act, and a guide for observance by the courts in its interpretation. It was accordingly held in *Manion* v. *State Highway Commissioner,* 303 Mich 1,

and in *Mead* v. *Michigan Public Service Commission,* 303 Mich 168, that the legislature, by the court of claims act, had not waived or abrogated the right to rely on its sovereign immunity. See, also, *McNair* v. *State Highway Department,* 305 Mich 181.

It is a fair inference that the legislature in declaring that it was not its intention to enlarge the then existing liability of the State and its agencies had in mind the commonly accepted rule with reference to sovereign immunity. In 49 Am Jur, pp 315, 316, it is said:

"It is well established that by consenting to be sued the State does nothing more than waive its immunity from action. It does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist. Thus, liability of the State for tort cannot be predicated upon the fact that the State has entered its general statutory consent to be sued, directing the manner in which suits may be brought by those having claims against the State. Neither does a special statute permitting suits on particular claims concede the justice of the claims. Statutory consent to be sued merely gives a remedy to enforce a liability and submits the State to the jurisdiction of the court, subject to its right to interpose any lawful defense."

In an annotation appearing in 169 ALR, p 105 *et seq.* many decisions relating to the question at issue are cited and discussed. The holdings are summarized in the following statement there made:

"The decisions discussed herein add further support to the uncontroverted proposition noted in the earlier annotation that a general statute authorizing suits against the State does not permit a recovery in actions in tort, upon the principle that the State is not liable for the torts of its officers, agents, or

servants, and it will only be so liable upon its clear and definite consent."

The general principle recognized is in accord with the decisions of this Court. *Board of Supervisors of Sanilac County* v. *Auditor General,* 68 Mich 659, 665; *McDowell* v. *Warden of Michigan Reformatory at Ionia,* 169 Mich 332, 337. See, also, *United States* v. *Sherwood,* 312 US 584 (61 S Ct 767, 85 L ed 1058).

Plaintiff concedes in his brief that under the act of 1939 as originally passed the State could avail itself of the defense of governmental immunity in tort actions brought against it in the court of claims. It is claimed, however, that the act in its present form should not be so construed because section 24, above quoted, was amended by PA 1943, No 237, and was repealed by PA 1945, No 87. As so amended, it read as follows:

"Upon the happening of any event subsequent to November 1, 1943, which gives rise to a cause of action, the State hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the circuit court against an individual or a corporation, and the State hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the State to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the State while acting as such officer or employee. Such claim must be submitted pursuant to procedural provisions of the court of claims act. The provisions of this act shall not apply to (a) any claim for injury to or death of a prisoner, or for services rendered while an inmate of a penal institution; (b) any claim arising out of the injury to or death of an inmate of

any State institution in connection with the rendition of medical or surgical treatment; (c) any claim for property damage or personal injury caused by the Michigan State troops and/or the national guard when called into the service of the State." (CLS 1945, § 13862–24; Stat Ann 1944 Cum Supp § 27.3548 [24]).

In *Benson* v. *State Hospital Commission,* 316 Mich 66, the constitutionality of said section, as amended, was sustained against the objection that it was not within the scope of the title of the act and, hence, violated article 5, § 21, of the State Constitution. There the cause of action arose while the amendment enlarging the liability of the State was in effect. It also appears that the action was brought in the court of claims and an appeal taken to this Court prior to the repeal of the section by the act of 1945, above cited. Since plaintiff seems to rely on this decision, it may be further noted that under the averments of his petition it does not appear that any cause of action in his behalf against the State, under the above-quoted amendment, arose during the period that it was in effect. He raises no question based on the theory that he became vested with rights of which he may not be deprived by virtue of any provision of the statute that has since been repealed.

As above stated, section 24 of the court of claims act, as amended by PA 1943, No 237, was expressly repealed by PA 1945, No 87. Apparently by way of substitution for such repealed section, the following provision was enacted:

"In all actions brought in the court of claims against the State of Michigan to recover damages resulting from the negligent operation by an officer, agent or employee of the State of Michigan of a motor vehicle of which the State of Michigan is owner as defined by Act No 302 of the Public Acts

of 1915, as amended, the fact that the State of Michigan was in the ownership or operation of such motor vehicle, engaged in a governmental function, shall not be a defense to such action: Provided, however, That this act shall not be construed to impose upon the State of Michigan a liability other or greater than the liability imposed upon other owners of motor vehicles by the provisions of Act No 302 of the Public Acts of 1915, as amended." (CL 1948, § 691.141 [Stat Ann 1951 Cum Supp § 27.-3548(41)].)

In substance, it is appellant's claim that with section 24 eliminated from the original act the provision of section 8, above quoted, becomes subject to a broader interpretation than was previously given it, and that it must now be construed as imposing liability on the State in all actions, *ex contractu* and *ex delicto,* and as abrogating the doctrine of governmental immunity in all such cases. Such claim is not justified by a fair interpretation of the language of the provision, nor is it in accord with the intent evidenced by legislative action. As before pointed out, section 24, as originally enacted, was not in the nature of a limitation on the provision of section 8 in question here, but was a legislative declaration of intention. The statute, including section 8, was construed accordingly. When the provision on which appellant relies was reenacted in PA 1941, No 137, and again in PA 1945, No 199, it must be presumed that the action was taken in the light of the prior construction placed on such provision and with the intent in mind, since there was no change in language, to adopt such construction, which was, obviously, in accord with the legislative intent existing at the time of the creation of the court of claims. *McEvoy* v. *City of Sault Ste. Marie,* 136 Mich 172; *In re Chamberlain's Estate, supra*; *Knapp* v. *Palmer,* 324 Mich 694.

If, as appellant argues, the quoted provision of section 8 became subject to a new interpretation on the amendment of section 24, as adopted at the session of 1943, it is apparent that the object sought by such amendment might have been attained by a simple repeal. Apparently such was not the legislative theory. Acting on the principle that liability on the part of the State in actions *ex delicto* may result only from affirmative legislation clearly manifesting such intent, the amendment was adopted in the form hereinbefore quoted.

The conclusion would seem to follow, under plaintiff's theory, that the attempt of the legislature by the enactment of PA 1945, No 87, § 1, to limit the liability of the State to cases of the character specified therein was ineffective to accomplish such purpose. If by virtue of the provision in section 8 the State is liable in all actions *ex delicto* for the tortious conduct of its officers, agents, and employees, liability because of the negligent operation of State-owned and operated motor vehicles obviously would be included. In this connection it may be noted that said Act No 87 became operative on September 6, 1945, and that Act No 199 of the same year, which reenacted the provisions of section 8 of the court of claims act, on which appellant relies, went into effect the same day. Relating to the same subject matter they must be construed together for the purpose of determining the legislative intent. *Reed* v. *Secretary of State,* 327 Mich 108; *Michigan Good Roads Federation* v. *State Board of Canvassers,* 333 Mich 352. The conclusion follows that the provision of section 8 in question here may not be given the effect claimed by plaintiff.

The theory on which appellant relies is at variance with settled rules of statutory construction, and with the clearly expressed intention of the legislature with reference to the matter at issue. The claim that the

State of Michigan has by statute waived the right to rely on its sovereign immunity in the instant case is not tenable. The provision of section 8 of the court of claims act, above quoted, may not be construed as claimed by appellant. Such conclusion renders it unnecessary to consider the other questions in the case.

The order of the trial court dismissing plaintiff's petition is affirmed.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

VANDEN BOGERT *v.* MAY.

1. EXECUTION—USE OF FORCE—OUTER DOOR—INNER DOORS.

An officer, seeking a judgment debtor's property for purpose of making a levy, has no right to force an entrance through the outer door of the debtor's home, but if he is lawfully admitted to the home, he is entitled to insist that inner doors be opened to enable him to make the levy as commanded by the writ and to use reasonable force if necessary to accomplish that result.

2. SAME—LOSS OF PRIVILEGE.

A householder waives his right to close the outer door against an officer serving process, by allowing him to enter; and if

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur, Executions §§ 131, 132.
[1, 2] Right of officer to break into building to levy under execution. 57 ALR 210.
[3] 21 Am Jur, Executions § 134.
[4, 5] 3 Am Jur, Appeal and Error §§ 815, 885, 895, 912.

the officer once gains entrance through the outer door without force or fraud the privilege is gone, and he can force any other door open if necessary to make complete service of his process.

3. SAME—FORCIBLE ENTRY.

Generally, an officer may force an entry into any enclosure except the dwelling house of the judgment debtor in order to levy a *fieri facias* on the debtor's goods.

4. APPEAL AND ERROR—DE NOVO REVIEW—CREDIBILITY OF WITNESSES.

The Supreme Court hears equity cases *de novo,* hence must use its own judgment in passing on the evidence, but recognizes the better position of a trial judge to pass upon the credibility of witnesses and evaluating their testimony as they give it.

5. SAME—FINDINGS OF FACT—CHANCERY CASES.

The findings of fact of the trial court in a chancery case will be upheld by the Supreme Court in the absence of a definite showing that a contrary result should have been reached.

6. EXECUTION—USE OF FORCE—EXEMPTION—EVIDENCE.

Determination by trial judge that deputy sheriff had not used force in gaining entrance into plaintiffs' home when seeking goods upon which to make a levy and that the deputy undertook to perform his duty to the best of his ability and that articles having a value substantially greater than the amount of the exemption to which plaintiff, as judgment debtor, was entitled, were not taken *held,* justified under record presented.

7. SAME—RESIDENCE OF APPRAISERS—EXEMPTIONS—INJUNCTION.

Fact that 1 of the 2 appraisers who accompanied defendant deputy sheriff in making a levy upon plaintiffs' property to satisfy a judgment was not a resident of the city in which plaintiffs resided, as required by statute *held,* not to justify relief to plaintiffs by way of injunction against sale of property taken in the levy, there being no showing that plaintiffs were deprived of any right to claim their exemptions and property having a greater value than the judgment debtor's exemption was excluded from the levy, and no showing made that the appraisal made was not fairly and honestly made nor motion to set aside the levy made in the court in which the judgment was entered (CL 1948, § 623.46).

Appeal from Kent; Brown (William B.), J. Submitted June 11, 1952. (Docket No. 73, Calendar No. 45,517.) Decided October 6, 1952.

Bill by John Vanden Bogert and wife against George E. May and others to restrain sheriff's sale and for return of personal property. Decree for defendants. Plaintiffs appeal. Affirmed.

*John M. Dunham,* for plaintiffs.

*Dilley & Dilley,* for defendants.

CARR, J. Plaintiffs brought suit in circuit court to obtain an injunction against the sale of certain personal property taken from their possession by defendant May under a writ of execution. In March, 1939, a judgment was entered in the justice court of Grand Rapids in favor of defendant West-Dempster Company and against plaintiff John Vanden Bogert. The judgment was not paid, and later a transcript thereof was filed in the circuit court of Kent county. Subsequently the judgment was renewed, the amount then being $247.23, together with costs in the sum of $42.10. To enforce such judgment the writ of execution involved in the instant controversy was issued under date of April 16, 1951, and was delivered to defendant May, a deputy sheriff, for service. At the time defendant Blacklock was sheriff of the county.

A levy was made on personal property in the office of Mr. Vanden Bogert but was abandoned because the appraised value of the articles on which such levy was made did not exceed the judgment debtor's exemptions. Subsequently defendant May, accompanied by an attorney for the West-Dempster Company, went to the home of plaintiffs for the purpose of making a levy there. The testimony is in

dispute as to what occurred at the time. However, a levy was made on certain items of property found by the officer in the home, and such items were removed from the premises.

Plaintiffs then instituted the present suit, claiming in their bill of complaint that the deputy sheriff had forced his way into the home, that what was done by defendants constituted an abuse of process, and that the levy was void. Injunctive relief against the sale of the property was asked, together with an award of damages to which plaintiffs claimed they were entitled on the theory that defendants were guilty of trespass. On the filing of the bill of complaint a temporary injunction was granted, restraining the sale until further order of the court. Defendants by answer denied the material allegations of fact set forth in plaintiffs' pleading. After listening to the testimony and the arguments submitted on the trial, the trial judge determined the facts substantially in accord with the claims of the defendants and entered a decree setting aside the temporary injunction, denying to plaintiffs the relief sought by them, and dismissing the bill of complaint. Plaintiffs have appealed.

On the trial of the case it was the claim of the plaintiffs, as set forth in their bill of complaint, that defendant May had forced his way into their home in spite of the fact that his attempt to enter was resisted. They claimed also that after entrance through the front door of the building had been effected further physical force was resorted to by defendant May, aided and abetted by police officers whom he had caused to be summoned, to compel plaintiffs to open inner doors. It is conceded by defendants that there was difficulty within the home, involving the use of physical force on the part of the deputy sheriff as well as by plaintiffs, the pur-

pose of the latter being to prevent the making of a levy on their property.

Defendant May and the attorney who accompanied him to plaintiffs' home testified positively that no force was used to effect an entrance into the building. They claimed in substance that Mr. Vanden Bogert, after they had knocked 3 or 4 times, opened the outer door, and that they entered peaceably and without the use of any force whatever on their part. This conflicting testimony presented an issue of fact for the determination of the trial judge, who obviously came to the conclusion that plaintiffs had not sustained the burden of proof resting on them. He, therefore, found that the entering of the home was not illegal, that defendants were attempting in good faith and by legal means to enforce payment of the judgment, and that there was no abuse of process.

The crucial question in the case is whether the proofs can be said to establish that defendant May forced entrance to the home of the plaintiffs through the outer door. It is conceded that under the law of the State he had no right to do so. If the officer was lawfully admitted to the home he was entitled to insist that inner doors be opened to enable him to make the levy as commanded by the writ and to use reasonable force if necessary to accomplish that result. In *Stearns* v. *Vincent,* 50 Mich 209, 219, 220 (45 Am Rep 37), it was said:

"The protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take it by closing the door against the officer, or to waive it by allowing him to enter. If the officer once gains entrance through the outer door without force or fraud, the privilege is gone, and he may force open any other door if necessary to make complete service of his process."

The above statement is in accord with the general rule set forth in 33 CJS, p 242, as follows:

"As a general rule an officer may force an entry into any enclosure except the dwelling house of the judgment debtor in order to levy a *fieri facias* on the debtor's goods; and even in the case of the debtor's home, when the officer is once inside, he may break open inner doors or trunks to come at the goods."

The legal proposition involved is discussed at some length in an annotation in LRA 1916D, p 281 *et seq.* It is there said, in part:

"The common law, both in England and America, jealous of intrusion upon domestic peace and security, regards every man's house as his castle and fortress as well for his defense against injury and violence as for his repose. It is this ancient and well-known principle that underlies the whole law of the right to break and enter a dwelling house to serve a civil writ or process. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcibly entered in the execution of a civil writ or process, either against the person or property of the householder, except, perhaps, at the suit of the King. Of course, if the door or other protection is open, and the officer can enter peaceably without force and violence, he may do so; and being lawfully in the house, he is justified in using such force as is necessary to overcome any resistance he may meet with in the service of the process, being responsible only for the excess beyond what is necessary to enable him to accomplish his purpose."

In the making of the levy Mr. Vanden Bogert refused to assist in any way, and declined to assert his exemption rights. It is the claim of the defendants,

however, that the other plaintiff claimed certain articles of furniture as her property, and that in each such instance no levy thereon was made. It is further claimed that she cooperated, to some extent at least, in determining what property should be regarded as exempt. The proofs offered on behalf of defendants indicated that articles having a value appreciably greater than the amount of the exemption to which the judgment debtor was entitled were not taken under the writ. Under the circumstances we think that the conclusion of the trial judge that the deputy sheriff undertook to perform his duty to the best of his ability was fully supported by the record made on the trial.

While we hear equity cases *de novo* on the record made in the trial court, and in consequence must use our own judgment in passing on the evidence, we recognize that the trial judge had an opportunity to observe the witnesses as they gave their testimony in court and was therefore in a better position than we are to pass on the credibility of such witnesses and to evaluate the testimony of each. In *Gindorff* v. *Gindorff*, 295 Mich 469, 471, it was said:

"When the testimony is conflicting, the findings of the trial court will be upheld in the absence of a definite showing that a contrary result should have been reached. *Donaldson* v. *Donaldson*, 134 Mich 289."

Among numerous cases of like import are: *Lau* v. *Lau*, 304 Mich 218; *Eicholtz* v. *Grunewald*, 313 Mich 666; *Steketee* v. *Steketee*, 317 Mich 100. On the record before us we cannot say that the determination of the facts by the trial judge was not in accordance with the just rights of the parties. Such being the situation, we would not be justified in reversing the decree entered. *Barar* v. *Phillips*, 328 Mich 267.

Appellants claim further that one of the appraisers who valued the different items of property at the time of the levy was not a resident of the city of Grand Rapids. The answer of the defendants conceded that such was the fact. On the trial of the case counsel for plaintiffs cross-examined the other appraiser, who was called as a witness by defendants, with reference to the matter. The testimony given was not conclusive, the witness indicating that the alleged nonresident appraiser lived outside of the city at times and inside the city at other times. Assuming on the basis of the pleadings that said appraiser was not a resident of the city, as specified in CL 1948, § 623.46 (Stat Ann § 27.1546), the facts in the instant case do not justify or require the granting of equitable relief to plaintiffs on that ground. No claim is made that Mr. Vanden Bogert was deprived of any right to claim his exemptions. Under testimony that the trial judge found to be credible, the deputy sheriff, assisted by Mrs. Vanden Bogert, excluded from the levy property having a greater value than the amount of the judgment debtor's exemption. There is no showing that the appraisal was not fairly and honestly made, or that plaintiffs were in any way prejudiced. Neither does it appear that any motion to set aside the levy was made in the court in which the judgment was rendered. See *Rhode* v. *Hassler,* 113 Mich 56.

The decree of the trial court is affirmed. Defendants may have costs.

DETHMERS, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

JAUP *v.* OLMSTEAD.

1. EQUITY—JURISDICTION.
   Equity will entertain jurisdiction, where the remedy at law is not plain, adequate and complete but is difficult or doubtful.

2. SPECIFIC PERFORMANCE—CONTRACT TO SELL PERSONAL PROPERTY.
   Generally specific performance is not decreed of a contract relating to sale of personal property.

3. SAME—CONTRACT TO SELL PERSONAL PROPERTY—MARKET—DAMAGES.
   Equity may take jurisdiction to compel specific performance of a contract to sell personal property, where the specific property is not obtainable on the market and damages will not provide adequate compensation.

4. SAME—RESTORATION OF GAS HEATING UNITS—LAND CONTRACTS.
   Bill by purchaser under contract for sale of stores, wherein it was agreed that gas heating units were to remain on the property, and to compel vendor who removed them to return them and to compel gas company to furnish heating service, stated a cause for equitable relief, where loss of such heating units resulted in loss of gas heating service because possession of such units was necessary to obtain such service and a court of law could not require the gas company to furnish the service.

5. EQUITY—COSTS—REMOVAL OF GAS HEATING EQUIPMENT.
   Costs against vendor of premises heated by gas heating equipment are allowed upon reversal of decree in his favor after

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Equity § 100 *et seq.*
[2] 49 Am Jur, Specific Performance § 125.
[2–4] Specific performance, or injunction against breach, of contract for sale of tangible personal property. 152 ALR 4.
[3, 4] 49 Am Jur, Specific Performance §§ 126, 127.

. . he had removed the equipment, where codefendant gas company is complying with preliminary order of trial court as to restoration of service and appeal was not taken as to it.

Appeal from Wayne; Murphy (George B.), J. Submitted June 3, 1952. (Docket No. 9, Calendar No. 45,380.) Decided October 6, 1952.

Bill by Sadik Jaup and wife against Charles M. Olmstead and Michigan Consolidated Gas Company, a Michigan corporation, for specific performance of contract as it relates to certain personal property. Bill dismissed on motion. Plaintiffs appeal. Reversed and remanded.

*Schulman & Schulman* (*Meyer R. Rubin,* of counsel), for plaintiffs.

*O'Brien & Nertney* and *Isaac M. Smullin,* for defendant Olmstead.

*Dyer, Angell, Meek & Batten,* for Michigan Consolidated Gas Company.

BUSHNELL, J. Plaintiffs Sadik Jaup and Clara Jaup entered into an agreement with defendant Charles M. Olmstead in September of 1949, to purchase 2 stores in the city of Detroit. This agreement stated in part:

"It is understood that the partitions and 2 gas heating plants (are considered as part of the purchase price and shall remain on this property)."

In October, Olmstead conveyed the property to plaintiffs. He remained in possession as a tenant of plaintiffs until September of 1950, when he vacated the premises. Plaintiffs charge that when he did so he "took with him portions of the heating unit

plants, without right or lawful authority, and then fraudulently had this gas unit and services transferred to his new place of occupancy and the gas heat then was removed from the premises that was purchased by the plaintiffs from the defendant."

Plaintiffs further charge:

"That as a consequence of this unlawful conversion and as a consequence of the breach of the contract and fraud on the part of the defendant, Charles M. Olmstead, the Michigan Consolidated Gas Company has refused and will not furnish any gas heat until these units removed by the defendant are restored to the plaintiffs' premises, as well as a direction by the defendant that the unit and the gas service belong to the plaintiffs rather than to the defendant covering the above described premises."

Michigan Consolidated Gas Company was joined as a defendant for the reason that it had, under order of the Michigan Public Service Commission, discontinued selling gas and servicing gas heaters for any new customers. Since the gas company had a monopoly in the area, plaintiffs were unable to obtain gas after the removal of the heating plant.

Plaintiffs sought a preliminary order to show cause and a final order directing Olmstead to return the heating units and directing the gas company to restore the service. They also asked for the damages resulting from the breach of Olmstead's agreement.

The judge who heard the order to show cause denied Olmstead's motion to dismiss, ordered the return of the heating units, and issued a temporary injunction against the gas company. This order recited that if plaintiffs were obliged to purchase new heating units, the gas company should service them.

The pretrial statement indicates that plaintiffs thereafter purchased new equipment which, apparently under the first order, is being serviced by the

gas company. The trial judge, however, entered a final order dismissing plaintiffs' action on the ground that their bill lacked equity and their rights, if any, were enforceable on the law side of the court.

The controlling question presented on appeal is whether plaintiffs' bill of complaint presents a case for equitable relief.

Under the circumstances recited in the bill and answer, plaintiffs did not have an adequate and complete remedy at law. An action in replevin might have resulted in their regaining possession of the heating units, but neither that action nor one for damages for breach of contract would secure the relief essential to the operations of the stores, *viz.*, the right to obtain heating gas. The court of law could not require the gas company to furnish service.

"Where the remedy at law is not plain, adequate and complete, but is difficult or doubtful, equity will entertain jurisdiction." *Multiplex Concrete Machinery Co.* v. *Saxer,* 310 Mich 243, 258, and authorities there cited.

See, also, *Steggles* v. *National Discount Corporation,* 326 Mich 44, 49 (15 ALR2d 208).

Plaintiffs' bill is in the nature of an action for specific performance of a contract to sell personal property. Generally, specific performance is not decreed where the subject matter of the contract is personalty. However, if the specific property is not obtainable on the market and damages will not provide adequate compensation, equity may take jurisdiction. *Cole* v. *Cole Realty Co.,* 169 Mich 347, 351; *Gallagher* v. *Studebaker Corporation,* 236 Mich 195. Here the right to possession of the heating units determined the right to the gas service, which was otherwise unobtainable. Plaintiffs' bill of complaint, therefore, presented a case for equitable relief.

The order is vacated and the cause is remanded for further proceedings not inconsistent with this opinion. Costs to appellants, but only against defendant Olmstead.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## KLUG *v.* BERKLEY HOMES, INC.

1. JUDGMENT—SUMMARY JUDGMENT.
   A court may enter a summary judgment for the defendant only where there are no issues of fact which, if resolved in favor of plaintiff, would entitle him to a judgment (Court Rule No 30 [1945]).

2. SAME—SUMMARY JUDGMENT—EXISTENCE OF ISSUES OF FACT—PLEADING—AFFIDAVITS.
   On motion for summary judgment the existence of an issue of fact is determined by a consideration of the pleadings and the affidavits (Court Rule No 30 [1945]).

3. SAME—SUMMARY JUDGMENT—SUFFICIENCY OF AFFIDAVIT.
   Affidavit in support of defendants' motion for summary judgment in action for alleged breach of warranty of building construction contract was insufficient, where it neither denied nor mentioned the pleaded promise to repair the house and replace the defective materials (Court Rule No 30 [1945]).

---

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 41 Am Jur, Pleading §§ 340–342.
[4] 20 Am Jur, Evidence § 1099.

4. EVIDENCE—PAROL EVIDENCE—AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.
   Reliance upon parol evidence rule to exclude testimony plaintiffs might present in action for breach of warranty in building construction contract was not warranted, where defendants' affidavit in support of motion for summary judgment failed to state that the written contract embodied the entire agreement between the parties.

5. JUDGMENT—SUMMARY JUDGMENT—PLEADING—ISSUES OF FACT.
   Granting defendants' motion for summary judgment was error, where there were factual issues raised in the declaration which, if supported by competent proof, could result in a judgment against defendants.

Appeal from Oakland; Holland (H. Russel), J. Submitted June 11, 1952. (Docket No. 75, Calendar No. 45,251.) Decided October 6, 1952. Rehearing denied December 9, 1952.

Action by Robert Klug and wife against Berkley Homes, Inc., a Michigan corporation, and another for damages for breach of contract. Summary judgment for defendants. Plaintiffs appeal. Reversed and remanded.

*Kasoff & Young* (*Norman W. Stern,* of counsel), for plaintiffs.

*Armstrong, Essery, Helm & Marshall* (*Donald W. Grant,* of counsel), for defendants.

BUSHNELL, J. Plaintiffs Robert Klug and Rose Mary Klug, his wife, sought to recover damages against defendants Berkley Homes, Inc., and Harry Green, its president. Plaintiffs claim that the materials used in the house they purchased from the defendant corporation were defective, and that the construction of the house was not performed in a good and workmanlike manner.

Plaintiffs alleged in part:

"That at the time of the said purchase of said premises, the said defendants, and each of them, warranted to the plaintiffs that the said home was in a good condition and built in accordance with the building conditions of the city of Oak Park and the requirements of the Veterans Administration.

"That upon completing said purchase from the said defendants, the said plaintiffs for the first time then discovered that the said home had numerous defects, of which the said defendants failed to advise the plaintiffs, but on the contrary, informed the said plaintiffs that the home was free from any structural or material defects. * * *

"That upon discovering that the aforesaid premises were constructed with defective materials and that the labor performed in erecting said home was not good and proper and in accordance with services ordinarily rendered in the construction of like homes, the said plaintiffs immediately notified the said defendants of all of the structural defects evident to them at that time and requested that the said defendants make the necessary repairs and defective materials replaced, all of which the said defendants promised to do, but to date of the filing of this declaration, have refused and neglected to make."

Defendants filed an answer and a motion for a summary judgment. The motion was supported by an affidavit by Green to the effect that he had not for himself or on behalf of the corporation made any promise or warranty to plaintiffs that the home erected upon the property was constructed in a workmanlike manner and free from defective materials. He stated that, if sworn as a witness, he could testify as to these facts. A copy of the accepted agreement to purchase was attached to the motion. It was the theory of the defendants that, in the absence of written warranties and promises, plaintiffs could not prove their case because of the parol

evidence rule. When defendants' motion for a summary judgment was heard, plaintiffs did not appear and the court entered a judgment against them.

Plaintiffs moved to set aside this judgment. Their motion was supported by the affidavit of their attorney, who claimed that a settlement had been reached and that it was understood between the parties that the motion for the summary judgment would be held in abeyance pending the drafting of the settlement agreement. Plaintiffs also filed an affidavit of a contractor who described the various structural defects. Plaintiffs' motion to set aside the summary judgment was denied.

A court may enter a summary judgment for the defendant only where there are no issues of fact which, if resolved in favor of plaintiff, would entitle him to a judgment. See Court Rule No 30 (1945); *Whittenberg* v. *Carnegie,* 328 Mich 125.

The existence of an issue of fact is determined by a consideration of the pleadings and the affidavits. *Baxter* v. *Szucs,* 248 Mich 672, 675; *Bed* v. *Fallon,* 307 Mich 466, 472; and *Robertson* v. *New York Life Insurance Co.,* 312 Mich 92, 98.

The affidavit in support of defendants' motion for a summary judgment does not deny or even mention the pleaded promise to repair the house and replace the defective materials. It is, therefore, insufficient.

It does not state that the written contract embodies the entire agreement between the parties and, therefore, defendants' reliance upon the parol evidence rule is unwarranted. *Clare County Savings Bank* v. *Featherly,* 173 Mich 292, 301.

There are factual issues raised in the declaration which, if supported by competent proof, could result in a judgment against defendants. The court, therefore, erred in granting defendants' motion for a summary judgment.

The judgment is vacated and the cause is remanded

for further proceedings not inconsistent with this opinion. Costs to appellants.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## LAUDE *v.* COSSINS.

1. COURTS—PROBATE COURT—JURISDICTION—TITLE.
   The probate court is without jurisdiction to determine questions of title of real estate.

2. SAME—TITLE—CIRCUIT COURT.
   The proper forum in which to determine questions of title to real estate is the circuit court.

3. SAME—JURISDICTION—EQUITY—FRAUD—TITLE.
   Claim of plaintiff that purchase of realty was from his funds and that it was his and not an asset of the estate of his wife is a claim that is equitable in nature and his request that court impose a constructive trust upon the property of which he was defrauded by reason of her failure to place the title to the property in their joint names was based upon fraud, subject matter of which the circuit court has jurisdiction.

4. JUDGMENT—RES JUDICATA—FORM OF ACTION—JURISDICTION.
   Judgment upon a demurrer going to form of the action, defect of pleading or to jurisdiction of the court will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] Generally as to the jurisdiction of probate courts, see 14 Am Jur, Courts § 8.

[4, 5] 1 Am Jur, Abatement §§ 2–4; 30 Am Jur, Judgments §§ 208–212, 286.

5. SAME—RES JUDICATA—"WITH PREJUDICE."
   Inclusion of the words "with prejudice" in a judgment does not add conclusiveness to a judgment insofar as a second but different action is concerned.

6. APPEAL AND ERROR—STATEMENT OF REASONS AND GROUNDS OF APPEAL—COURT RULES.
   Appellant's statement of reasons and grounds of appeal sufficiently complies with requirements of court rule, where it reasonably informs the court and appellees as to errors relied upon (Court Rule No 66 [1945]).

7. COURTS—JURISDICTION—CONSTRUCTIVE TRUST.
   Circuit court order granting defendants' motion to dismiss plaintiff's bill to impose a constructive trust upon property of which he claims his deceased wife defrauded him, because court claimed it had no jurisdiction, deprived him of his day in court, since circuit court, rather than probate court, was the proper forum.

Appeal from Oakland; Holland (H. Russel) and Doty (Frank L.), JJ. Submitted June 16, 1952. (Docket No. 77, Calendar No. 45,481.) Decided October 6, 1952.

Bill by Charles Laude against Lolo Cossins, executrix of the estate of Violet Laude, deceased, and others to impose a constructive trust on real estate. Bill dismissed on motion. Plaintiff appeals. Reversed and remanded.

*John C. Bossenberger* (*Louis Andrzejewski,* of counsel), for plaintiff.

*Ira F. Morgan*, for defendants.

BUSHNELL, J. Violet Laude, a resident of Avon township, Oakland county, Michigan, died August 25, 1948, leaving as survivors her daughters, Lolo, Grace and Edna, her sons, George and John, and her husband, Charles Laude, plaintiff herein. Her estate

consisted of household furnishings and fixtures, a house and several lots in Avon township.

In her last will and testament, which was admitted to probate on November 12, 1948, she directed that her estate be equally divided between her 3 daughters and her husband. Defendant Lolo Cossins, a daughter, was appointed executrix. No claims were presented against the estate.

Laude, on August 9, 1951, sought a decree assigning all of the property to him, on the theory that it was accumulated out of his earnings and with the understanding and promise that title thereto would be held jointly. He charged that he relied on Violet's promises, expended about $9,000, and was thus defrauded because Violet took title in her name only. He asked that the court restrain Lolo from selling or assigning the property and closing the estate. A motion to dismiss his action, on the ground that the circuit court was without jurisdiction, was granted September 26, 1951, in an order which stated that plaintiff's bill was "dismissed with prejudice."

On September 20, 1951, Laude began a second action in equity, alleging that in 1937 he and Violet had agreed to purchase property as tenants by the entireties, and that he provided all the funds. In his second bill of complaint Laude asked that the court impose a constructive trust upon the property of which he was defrauded by Violet's failure to place the title thereto in their joint names. He sought a decree declaring him to be the true and equitable owner of the assets of Violet's estate.

Two motions to dismiss Laude's second bill of complaint were filed; one by Lolo in her capacity as administratrix, and the other by Lolo, Grace and Edna, individually as devisees and legatees under the will. The court stated that it had no jurisdic-

tion. An order was entered dismissing Laude's bill of complaint "with prejudice."

Defendants argue that a court of chancery is without power to set aside the provisions of a will which has been admitted to probate. Laude, however, is not attacking the validity of the will or questioning the order of the probate court. He claims the right to equitable relief on the ground that the assets of Violet's estate are his property and not that of testatrix. The question, therefore, is whether the trial court has jurisdiction to determine Laude's adverse claim of ownership of property included in the assets of Violet's estate.

The probate court is without jurisdiction to determine questions of title. *Mitchell* v. *Bay Probate Judge,* 155 Mich 550, 554; *Rudolphi* v. *Gilbert,* 209 Mich 141; and *In re Estate of Fraser,* 288 Mich 392. The proper forum in which to determine questions of title is the circuit court. Plaintiff's claim is equitable in nature and is based upon allegations of fraud. See, in this connection, *Fred Macey Co.* v. *Macey,* 143 Mich 138 (5 LRA NS 1036), and *Lewis J. Selznick Enterprises* v. *Harry I. Garson Productions,* 202 Mich 111.

The order dismissing plaintiff's second bill was not based upon any *res judicata* theory, but rather upon a determination of lack of jurisdiction with the added suggestion that the procurement of process and injunction in the second action was a gross abuse of process. The first bill did not clearly state grounds for equitable relief. The second bill of complaint seeks to impose a constructive trust on the property because of the fraudulent acts of and breach of promise by the testatrix.

"Judgment upon a demurrer going to form of the action, defect of pleading or to jurisdiction of the court will not preclude future litigation on the merits

of the controversy in a court of competent jurisdiction upon proper pleadings." *Palchi* v. *Robbins* (syllabus), 272 Mich 411.

The words "with prejudice" added nothing to the conclusiveness of the first judgment. That judgment is not a bar to a different action.

Defendants also claim that plaintiff has not set up proper reasons for his appeal. Plaintiff's statement of reasons and grounds of appeal reasonably informed the court and defendants as to the errors relied upon. It sufficiently complied with the requirements of Court Rule No 66 (1945).

Plaintiff has been denied his day in court and is entitled thereto.

The order dismissing his bill of complaint is vacated and the cause is remanded for further proceedings not inconsistent with this opinion. Costs to appellant.

DETHMERS, BUTZEL, CARR, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

*In re* JOSLIN.

1. COURTS—SPECIAL TERMS—NONJURY CASES—CRIMINAL LAW.
   Statute providing for special terms of court to be held in counties of same circuit as county in which nonjury cases may be pending covers arraignments, acceptance of pleas and sentences upon pleas of guilty (CL 1948, § 691.231).

2. CRIMINAL LAW—SPECIAL TERM OF COURT—JURISDICTION—NONJURY CASE.
   Trial court, sitting in Chippewa county in a special session of the circuit court of Schoolcraft county, which 2 counties were part of a 4-county judicial circuit, had jurisdiction to arraign a 16-year-old boy, accused of robbery armed in Schoolcraft county, accept his plea of guilty and impose sentence, where it appears accused requested the special session of court and he was advised of his rights to appointment of counsel and jury trial, in view of statute authorizing holding of special terms of court for transaction of judicial business arising in another county of the same circuit but not involving determination by a jury (CL 1948, § 691.231).

3. HABEAS CORPUS—QUESTIONS REVIEWABLE—LEAVE TO FILE DELAYED MOTION TO VACATE PLEA OF GUILTY.
   The review of the denial of a motion for leave to file a delayed motion to vacate plea of guilty is not reviewable by habeas corpus, as such writ does not function as a writ of error.

Habeas corpus with ancillary certiorari to Schoolcraft Circuit Judge by Benjamin J. Joslin to obtain release from State Prison of Southern Michigan. Submitted June 27, 1952. (Calendar No. 45,290.) Writ denied October 6, 1952.

---

REFERENCES FOR POINTS IN HEADNOTES

[3] 25 Am Jur, Habeas Corpus § 28.

*George E. Wood,* for petitioner.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for the people.

SHARPE, J. Petitioner, Benjamin J. Joslin, seeks a writ of habeas corpus and ancillary certiorari to review his conviction on April 1, 1946, in the circuit court for the county of Schoolcraft, upon plea of guilty to an information charging robbery while armed. Penal code, § 529 (CL 1948, § 750.529 [Stat Ann § 28.797]).

It appears that on March 27, 1946, at about 10:30 p.m., petitioner was arrested in the city of Manistique, Schoolcraft county, on the charge of robbery armed. The following day a formal complaint was made by a member of the State Police. Petitioner was arraigned before the examining magistrate, waived examination, and was bound over for trial in the circuit court of Schoolcraft county, to be held in the city of Manistique, Schoolcraft county, on April 8, 1946.

On the same day the prosecuting attorney of Schoolcraft county filed a petition with the judge of probate of said county, and an order was entered upon said petition, by which the probate court waived jurisdiction in the cause. The petitioner was not present in the probate court at the time of the hearing on the petition of the prosecuting attorney. On April 1, 1946, petitioner was arraigned in the circuit court for the county of Chippewa, at the city of Sault Ste. Marie, on the information filed against him. Upon being arraigned petitioner pleaded guilty to the charge of robbery armed, and was sentenced to imprisonment. At the time petitioner pleaded guilty he was of the age of 16 years, and was not represented by counsel.

In August, 1950, petitioner filed a petition in the Supreme Court for a writ of habeas corpus and ancillary writ of certiorari.

The petition alleges that at the time of his conviction he was 16 years of age, was not represented by an attorney; that the trial court was without jurisdiction to proceed to a determination of the issues involved; that the circuit judge was prohibited from holding an arraignment in Chippewa county for a crime that may have been committed in Schoolcraft county; that petitioner was not afforded an opportunity for a preliminary examination before the examining magistrate in Schoolcraft county; that he was denied the right to have counsel, and that he was afforded "quick justice" in violation of the rule announced in *DeMeerleer* v. *Michigan,* 329 US 663 (67 S Ct 596, 91 L ed 584).

The journal entry of arraignment and sentence shows that the proceedings were held "at a special term of the circuit court in the city of Sault Ste. Marie, Chippewa county, Michigan," which, together with the counties of Alger, Luce, Schoolcraft and Chippewa, form the 11th judicial circuit of the State of Michigan.

CL 1948, § 691.231 (Stat Ann § 27.561), providing "for the holding of special terms of circuit courts in judicial circuits consisting of 3 or more counties," reads as follows:

"Special terms of circuit court; business and proceedings; records, filing.

"Sec. 1. Every term in any county is a special term for every other county in the same circuit. At any term in any county which is by law a special term for any other county or counties, all business may be done arising in such other county or counties which might be done at a term in the county where the business arose, except the trial of issues of fact by a jury in cases other than those arising in actions

of quo warranto and mandamus, and excepting also the trial of issues of fact in actions made local by law and arising in some county other than the one in which such special term is held. All orders, judgments, findings, proofs, testimony and other proceedings had or made at any such special term, being authenticated by the clerk of such court, shall be filed and entered of record in the office of the clerk of the circuit court in the county where the action or proceeding shall be pending; and no entries need be made in the office of the clerk of the circuit court of any other county."

The act in question is not a part of the judicature act, nor does it form a portion of the code of criminal procedure. Its provisions apply to both civil and criminal matters within its scope. In criminal matters it covers arraignments, acceptance of pleas, and sentence upon pleas of guilty, all of which could have occurred in Schoolcraft county. To that extent we hold the act constitutional. There is no question of venue in the case at bar, as the warrant was issued by a magistrate having jurisdiction within the county of Schoolcraft, preliminary examination was waived, and petitioner was bound over for trial. We also note that in his return to the ancillary writ of certiorari the circuit judge certified:

"The respondent in this case was arraigned at a special session of the circuit court for the county of Schoolcraft held at the city of Sault Ste. Marie, Michigan. This special session of court was held at the request of the defendant. Court was duly opened as a special term of circuit court for the county of Schoolcraft and all journal entries were made and signed as in a regular term of court. The defendant was advised as to all of his rights, declined the appointment of an attorney and a jury trial, freely admitted his guilt after both private and public questioning by me. His rights were safeguarded in every way. Before his plea of guilty was accepted, he was

advised of the nature and consequences of his plea, examination convinced me that his plea was made freely, voluntarily and understandingly without any undue influence, compulsion or duress and without promise of leniency."

Under such circumstances we hold that the trial court had jurisdiction to arraign petitioner, accept his plea, and impose sentence.

It also appears that petitioner filed a motion for leave to file a delayed motion to vacate his plea of guilty. An answer was filed by the prosecuting attorney of Schoolcraft county denying the allegations contained in said petition. It does not appear that a hearing was had on this petition. The motion was denied. The office of habeas corpus does not function as a writ of error. See *In re Offill,* 293 Mich 416; and *In re Kovacivich,* 323 Mich 310.

Petitioner has mistaken his remedy. He should have filed an application for leave to appeal from the trial court's denial of his motion to vacate sentence and a new trial. The granting of habeas corpus and ancillary certiorari in the case at bar is dependent upon the lack of jurisdiction of the trial court to arraign, accept a plea of guilty, and impose sentence upon petitioner. We hold adversely to petitioner on this issue, and the writ is dismissed.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## PETTENGILL *v.* MONTEITH LAND COMPANY.

1. CORPORATIONS—JUDICIAL INTERFERENCE WITH INTERNAL AFFAIRS.
   Finding of trial court that land company, which owned lots in large tract of land which it sold to persons who automatically became members of an association whose board of directors was dominated by the land company, was more responsible for the difficulties between the 2 corporations than the association, which justified gradual and complete relinquishment of any control of the association *held*, supported by competent evidence.

2. SAME—EQUITY—INTERFERENCE WITH INTERNAL AFFAIRS—FRAUD—BREACH OF TRUST.
   A court of equity has power to interfere in the internal affairs of a corporation, when there is fraud or breach of trust.

Appeal from Montmorency; Dehnke (Herman), J., presiding. Submitted June 3, 1952. (Docket No. 10, Calendar No. 45,091.) Decided October 6, 1952.

Petition by Monteith Land Company, a Michigan corporation, for amendment of decree to relieve it of burden of selling lots. Cross petition by Canada Creek Ranch Association, a Michigan nonprofit corporation, for amendment requiring removal of its directors appointed by Monteith Land Company. Decree amended in accordance with prayer of Canada Creek Ranch Association petition. Affirmed.

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 13 Am Jur, Corporations §§ 1014, 1147; 19 Am Jur, Equity § 182.

*Edward A. Jacob* (*Paul F. Mabley,* of counsel), for Monteith Land Company.

*Russell E. Knister* (*Stern, Milmet & Rossier,* of counsel), for appellees.

SHARPE, J. This is an appeal from a decree entered May 5, 1944, as amended February 9, 1950. The facts giving rise to the mentioned decree are as follows:

In 1934, A. C. Monteith conceived the idea of purchasing a large area of land in Montmorency county, suitable for hunting and fishing purposes, and subdividing a portion of the area into lots for subsequent purchasers.

Pursuant to this plan Monteith purchased approximately 10,000 acres of land, and of this land he subdivided a part of the acreage into 3,500 lots. He was instrumental in organizing a corporation known as the Monteith Land Company, having for its purpose the promotion of sales of the subdivided lots, and at the same time providing a membership for the club. He then organized a corporation known as Canada Creek Ranch Association, which was to be the club to which every purchaser of a lot would automatically become a member.

In 1934, the 2 corporations entered into a contract whereby the members were given a one-half interest in the mineral rights in the land, excepting those rights reserved by the State of Michigan, and ownership certificates for lots purchased.

In 1939, the contract was changed, whereby Monteith Land Company retained all mineral rights, and lot purchasers were given membership certificates.

Up to the fall of 1939, there had been no membership meeting, but shortly thereafter a meeting of the membership was called, bylaws adopted providing for the election of 9 directors, 5 of such directors

to be selected by Monteith Land Company, and the membership selecting the other 4 directors. It appears that through the formation of the 2 corporations Monteith intended to keep control over the project until such time as the subdivided lots were sold.

Only one set of books was kept for the 2 corporations, and it did not reflect the true financial picture of the individual corporation's operations.

In 1942, the stockholders of the Monteith Land Company sold their stock to Thomas Herzog, who has since continued to own and control the Monteith Land Company.

In 1943, the members of the Canada Creek Ranch Association filed a bill in chancery against the Monteith Land Company for an accounting and relief from unreasonable interference and domination by the Land Company.

The trial court, after hearing evidence, entered a decree on May 5, 1944, which provided that each corporation was to operate separate and apart from each other, except as to such rights and obligations as would be necessarily incident to the mutual interests of each in the successful operation of the recreation acreage; that the 1939 and 1940 contract between the 2 corporations are null and void because of breach of trust on the part of the directors of the 2 corporations; adjustment of the financial accounts between the 2 corporations; making a determination of the names and terms of office of each director of Canada Creek Ranch Association, and reducing the right of Monteith Land Company to select directors for Canada Creek Ranch Association from 5 directors to 3 directors.

For a time following the entry of the decree the situation seemed to improve, but personal animosities subsequently generated an uncooperative spirit between the members of the Canada Creek Ranch

Association and the Monteith Land Company in the person of Thomas Herzog. In June, 1948, the Monteith Land Company filed a petition to modify the 1944 decree, claiming that Canada Creek Ranch Association has followed a course of deliberately refusing to assist the Monteith Land Company in selling the lots, contrary to paragraph 19 of the decree:

"IT IS FURTHER DETERMINED, ORDERED, ADJUDGED AND DECREED, that Canada Creek is entitled to all income from the Ranch House and the entire property described in exhibits "A" and "B" (excepting the building sites therein reserved for sale) together with all dues collected or owing out of membership in the aforesaid Canada Creek and all income of every kind and nature whatsoever, excepting only the return from the sale of lots in the before described property. It is further determined that all lot purchasers, as a condition to the purchase of lots as aforesaid, shall, upon making purchase thereof, become liable for dues regularly payable by members of Canada Creek as a condition to the use of the aforesaid club property generally, the recreational privileges and the club house and facilities. Canada Creek shall be entitled, at all times, to impose reasonable rules and regulations upon its members governing its operation, the collection of dues and the use of the premises and club facilities, but shall not unreasonably interfere with the proper sale of lots by Monteith; and said Canada Creek, its officers, directors and agents are specifically directed to cooperate with said Monteith, but without expense, to make available to Monteith, the facilities of the club, club house and real estate herein involved for the purpose of allowing inspection by prospective purchasers and for the serving of such meals and the use of such rooms at the Ranch House, at the expense of Monteith, as do not unreasonably interfere with the use of said facilities by the members of Canada Creek.

"Canada Creek is required to pay all expense of said Ranch House facilities and the property described in exhibits 'A' and 'B', including real estate taxes thereon and including taxes on unsold lots, and specifically excepting the cost of constructing roads to the building sites; but all members of Canada Creek shall have the right to use said property, including the unsold lots, at all times for proper purposes. Monteith shall make reasonable efforts to dispose of the lots not as yet deeded by it to prospective members and in the event of the failure of Monteith to dispose of all remaining unsold lots within a reasonable time, taking into consideration economic conditions, the demand for similar properties and all conditions properly affecting such sales, this court reserves jurisdiction to require Monteith to pay taxes upon undeeded lots and to enter such further order by way of amendment to this decree as shall reasonably require Monteith to carry out its undertaking by this court found, to promptly sell and dispose of the remainder of the now undeeded lots."

It was also claimed that officers and agents of Canada Creek Ranch Association have slandered defendant Herzog with prospective customers, and have made resales of lots at a discount, thereby making it impossible for Monteith Land Company to make its planned sales.

The officers of Canada Creek Ranch Association filed an answer to the above petition, denying the claims made in the petition, and also filed a petition for amendment to the decree, in which it is alleged:

"(b) That your petitioner is informed and believes and upon information and belief charges the fact to be, that respondent, at various times and on days and dates best known to respondent, has substantially increased the proposed sale price of lots intended for sale by Monteith Land Company and ordered sold pursuant to the terms of the aforesaid decree.

"(c) That according to the information and belief of petitioner, economic conditions of the public generally and of prospective purchasers for the unsold lots have, since the entry of said decree, been conducive to the sale of like or similar lots and that like or similar lots have been sold in increasing numbers throughout the State of Michigan but more particularly in the general area of the lots here in question to or through the year 1947.

"(d) That according to the information and belief of your petitioner and upon information and belief petitioner charges the fact to be that respondent has refrained from making a reasonable effort to sell or dispose of the maximum number of lots at a fair price and has failed to fairly attempt to sell the aforesaid lots to the public generally but has, on the contrary, attempted by various means, contrary to the terms of the aforesaid decree, to interfere in the management and operation of petitioner corporation and to cause petitioner to purchase from respondent or cause to be purchased from respondent the remaining lots unsold by respondent.

"(e) That the cost and expense of petitioner for the payment of taxes upon the lots owned by Monteith Land Company has at all times been substantial but has materially increased in the various years succeeding the entry of the decree herein.

"(f) That according to your petitioner's information and belief, respondent has failed to construct various roads to various unsold lots, contrary to the obligation of respondent to so construct said roads and said lots have remained less readily salable than they would have been had respondent complied with its duties under the decree of this court and the contract thereby affirmed.

"That according to the information and belief of your petitioner, respondent has, by the dissemination of untrue and misleading statements at a stockholders' meeting held on March 31, 1948, and at various other days and dates best known to respondent, attempted to cause dissension within the mem-

bership of petitioner and has improperly and contrary to the terms of the decree attempted to interfere with the management of petitioner's club and has, accordingly, to some extent, made it more difficult for respondent itself to sell lots to members or others. That such activity on the part of respondent corporation is contrary to the terms of the decree and the determination of this court, according to the information and belief of your petitioner."

The court heard the petitions and permitted the taking of testimony, and on February 9, 1950, filed an amended decree, the pertinent parts of which read as follows:

"1. IT IS HEREBY ORDERED AND DECREED that Monteith Land Company shall, effective upon the election of directors of Canada Creek Ranch Association to be held in the spring of 1950, pursuant to the existent bylaws of Canada Creek Ranch Association, be entitled to name not more than 2 directors of Canada Creek Ranch Association and the members of Canada Creek Ranch Association shall, effective at said election, be entitled to name the remainder of the directors. That effective with the election of directors to be held in the spring of 1951, pursuant to the existent bylaws of Canada Creek Ranch Association, Monteith Land Company shall be entitled to name not more than 1 director of Canada Creek Ranch Association and the members of Canada Creek Ranch Association shall, effective at said election, be entitled to name the remainder of the directors.

"2. IT IS FURTHER ORDERED AND DECREED that effective with the election of directors of Canada Creek Ranch Association in the spring of 1952, Monteith Land Company will not be entitled to elect any members to the board of directors of Canada Creek Ranch Association.

"3. IT IS FURTHER ORDERED AND DECREED, that the newly-elected member of the board of directors of Canada Creek Ranch Association in the instance of each of the 3 replacements indicated in the preceding

paragraphs hereof shall be elected for a term of 3 years.

"4. IT IS FURTHER ORDERED AND DECREED, that such directors as at any time act as the appointees of Monteith Land Company shall in all manner and in all respects devote their efforts and their responsibilities solely to the protection of Monteith Land Company in the sale by Monteith Land Company of its remaining unsold lots and shall not, in any manner, interfere with such activities of Canada Creek Ranch Association as do not materially affect Monteith Land Company in the sale of its unsold lots and Monteith Land Company shall, in no manner, either directly or indirectly, interfere with nor take part in the conduct of the affairs of Canada Creek Ranch Association except to the extent that any action or inaction of Canada Creek Ranch Association affects Monteith Land Company in the sale of Monteith Land Company unsold lots and Monteith Land Company, its officers, directors, agents and representatives are hereby restrained and enjoined from such interference.

"5. Pursuant to stipulation of the parties in open court, IT IS FURTHER ORDERED AND DECREED that Thomas F. Herzog is to be replaced upon the board of directors by his appointee from time to time and the aforesaid Thomas F. Herzog is enjoined from at any time acting as director of Canada Creek Ranch Association as an appointee of Monteith Land Company.

"6. IT IS FURTHER ORDERED AND DECREED that effective with taxes payable covering the calendar year 1949, said taxes shall be payable by Monteith Land Company upon all such lots as are by it owned and taxes during the year 1949 and Canada Creek Ranch Association is relieved from the responsibility for the payment of such taxes and is relieved from the payment of any taxes upon lots owned by Monteith Land Company in subsequent years. Provided, however, that in the event Canada Creek Ranch Association pays or caused said taxes to be paid for said

year or for any subsequent year prior to the disposition by Monteith Land Company of the last of its unsold lots, then and in that event Canada Creek Ranch Association shall be entitled to reimbursement therefor upon demand from Canada Creek Ranch Association to Monteith Land Company and in the event of failure to pay such demand may have judgment and execution therefor upon application for such purpose made to this court."

Defendant Land Company appeals and urges that the court was in error in dismissing its petition, as the evidence shows the Canada Creek Ranch Association interfered with the Land Company's sale of lots. From our examination of the record we conclude that neither party has been completely without fault, but the Monteith Land Company, in the person of Thomas Herzog, has been more responsible for the difficulties than were the members of the Canada Creek Ranch Association. We are also of the opinion that the trial court has worked out a reasonable solution of the problems. There is competent evidence to support the finding of facts made by the court. A court of equity has power to interfere in the internal affairs of a corporation when there is fraud or breach of trust. See *Dodge* v. *Ford Motor Co.*, 204 Mich 459 (3 ALR 413).

In *Turner* v. *Calumet & Hecla Mining Co.*, 187 Mich 238, we upheld a decree granting an injunction restraining the principal corporation from voting for directors in the subsidiary corporation.

In the case at bar Canada Creek Ranch Association was treated by Monteith Land Company as a subsidiary corporation.

In our opinion the trial court was within his powers in regulating the election of directors of the Canada Creek Ranch Association. We have examined the record and conclude that the trial court arrived at

the correct solution of the internal problems of the 2 corporations.

The decree is affirmed, with costs to plaintiffs.

DETHMERS, BUTZEL, CARR, BUSHNELL, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## KRUER v. KRUER.

1. DIVORCE—MODIFICATION OF DECREE—CUSTODY OF CHILDREN—FITNESS OF MOTHER.

   Order denying husband's petition to modify decree of divorce so as to award him the custody of 10-year-old girl and 9- and 7-year-old boys because the children were embarrassed by being required to live with a fourth child, conceived out of wedlock but born in wedlock, is affirmed, where mother's remarriage has been followed by consistent and proper home life, testimony indicates her excellent care of the children and the severance from their mother now would be a very grave disturbance of their happy home life.

2. SAME—CUSTODY OF CHILDREN—PREJUDICE.

   Denial of husband's petition to modify decree of divorce as to custody of the parties' children, 10, 9 and 7 years of age, because of their embarrassment by being required to live with their mother's fourth child who was conceived out of wedlock although born after her remarriage, is made without prejudice to his right to renew the petition in the event that future facts and conditions warrant his so doing.

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] Generally as to modification of decree as to custody of children, see 17 Am Jur, Divorce and Separation § 684.

3. SAME—COSTS—MODIFICATION OF DECREE.

No costs are awarded on affirmance of order denying husband's petition to modify decree of divorce as to custody of the children of the parties, where no costs are asked.

Appeal from Oceana; Pugsley (Earl C.), J. Submitted June 11, 1952. (Docket No. 65, Calendar No. 45,519.) Decided October 6, 1952.

Divorce proceedings between Dorothy J. Kruer and George Kruer. Petition of defendant for modification of decree as to custody of children. Petition dismissed. Defendant appeals. Affirmed.

*Stewart J. Roche* and *Warner, Norcross & Judd* (*George S. Norcross* and *Harold S. Sawyer,* of counsel), for plaintiff.

*Arnold R. Levandoski* and *J. Donald Murphy,* for defendant.

REID, J. Defendant filed May 11, 1950, in circuit court, in chancery, a petition to modify a decree of divorce granted plaintiff April 24, 1948, and defendant prayed for an award of the custody of 3 young children of the parties to defendant husband instead of the award in the decree of divorce to the plaintiff wife. From an order denying him the custody, and dismissing his petition for such modification of the divorce decree, defendant appeals.

The 3 children of the parties are Nancy Ellen, born in 1942, George Thomas, born in 1943, and Patrick, born in 1945.

On the hearing of the petition, June 2, 1950, it developed that the real ground of the petition was a charge that plaintiff wife had been guilty of personal misconduct demonstrating her unfitness to be custodian of her children. She married, March 18, 1950,

Charles Beckholt, the father of her fourth child, Stephen, born March 20, 1950. The implied misconduct and plaintiff's relations with Beckholt, her present husband, prior to their marriage and beginning 2 months before a divorce granted Beckholt's first wife, constitute the entire ground for defendant's petition to deprive plaintiff of the custody of the children of the parties to this case. Defendant claims that the 3 children are embarrassed by their consciousness of the fact of the fourth child's having been begotten out of wedlock (though born in wedlock), he being constantly associated with them in the same household, and consciousness of a disgrace and reproach to their family in the community, resulting from the fact of Stephen's birth and circumstances preceding his birth.

Upon being examined by the court, plaintiff wife testified as follows:

"The home I am now living in with Mr. Beckholt, is the home where I lived prior to my divorce from Mr. Kruer, the same home. I have plans to continue to live in that home as husband and wife. As to my expectations to remain in Hart permanently, I would have to go wherever my husband's job would take him. So far as the present is concerned, I have no plans except to stay where I am now living, I don't know of any place else right now. Yes, I have stated that Mr. Beckholt is agreeable to having my 3 children remain there with me in my home. As to my own personal feeling about the mistake I have made, I am very sorry about it, and I certainly don't want to lose my children. I love them. I realize that the question that is before the court is whether I am a fit and proper person to continue to have the custody of those children. I understand that is the question, and that question has been asked by virtue of the fact that I had had improper relations with the man to whom I am now married before I was married to him. Yes, I understand that. Yes, I realize that

was a mistake. That was contrary to and in conflict with all the good moral teachings and religious teachings I had had in my own home, that is right. There is nothing about my environment as a child or during the time I have lived in Hart that would encourage me in that sort of thing. I can't help the past now.

"*The Court:* The future is entirely in your hands. Is there any danger, if these children are permitted to stay with you, of any repetition of such immoral acts on your part?

"*A.* There certainly won't be because I want to keep my children.

"*Q.* Or any other conduct unbecoming a Christian mother?

"*A.* No, sir; I would do anything to keep my children.

"*Q.* Do you assure me, if these children are allowed to remain with you, that you will do everything within your power to bring them up properly?

"*A.* I can assure you I hope they grow up to be a credit to the whole community and that I can be proud of them."

The testimony showed that aside from the matters with Mr. Beckholt prior to her marriage to him, plaintiff has been an excellent mother, and has cared for her children; they receive consistent Christian training and make good educational progress. Plaintiff is shown to be a good housekeeper and gives her children good physical and moral attention. She assured the court of the propriety of her future conduct and of her proper bringing up of her children and of her love for them.

Witnesses of excellent standing as good citizens of the city of Hart, where plaintiff and her family live, gave testimony that would show that plaintiff, notwithstanding her error, is well regarded in the community, and to the excellence of her care for her children.

The court continued the hearing until June 2, 1951, at which time the hearing was resumed, and testimony was given as to the happy home the children have with plaintiff, the good care that she gives them, and repeating in general, the good showing on plaintiff's behalf.

During the year's interval, defendant remarried and his present wife was a witness on behalf of defendant. She testified to the good and devoted care that she would give the children if their custody was given to defendant. The trial court indicated that if the children had been without a good and suitable home, it would be natural and logical to give the children to defendant.

The children have been with their mother from birth, and to take them from her now would be a very grave disturbance of their happy home life.

For a recent case involving a mother who has committed indiscretions, see *Cooley* v. *Cooley,* 329 Mich 91. When the case of *Smilgus* v. *Smilgus* was first before this Court, we reversed the order of the trial court giving a mother the custody of her daughter and gave the custody to a worthy father, where the mother had committed misconduct with one Losey: See *Smilgus* v. *Smilgus,* 323 Mich 149; but later the mother satisfied the trial court of her reformation and suitability for the custody, and we affirmed the later award by the trial court of the custody of the daughter to the mother: See *Smilgus* v. *Smilgus,* 328 Mich 19.

Plaintiff's remarriage and consistent and proper home life following the remarriage, point to the propriety of the court's order leaving the custody of the children with her, in view of the entire testimony of the excellent care she gives them and her promise of proper future conduct.

The order appealed from denied defendant's petition to award the custody of the children to him,

but without prejudice to his right to renew the petition in the event that future facts and conditions warrant his so doing, which order we affirm. No costs are asked for and none are awarded.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## CLARK *v.* CITY OF GRAND RAPIDS.

1. DEEDS—CONDITIONS SUBSEQUENT—REVERTER.
   Ordinarily the use of the word "condition" in a deed does not indicate the existence of a condition subsequent without the presence of words of reverter.

2. SAME—CONDITIONS SUBSEQUENT STRICTLY CONSTRUED.
   Conditions subsequent, contained in a deed, are not favored in law and are strictly construed.

3. SAME—CONDITIONS SUBSEQUENT—CONSTRUCTION—COVENANT.
   A provision in a deed as to use will be construed as a covenant rather than a condition subsequent, if possible, and in doubtful cases, held to be a covenant.

4. SAME—CONDITION SUBSEQUENT—EVIDENCE.
   The intention of the grantor in a deed to create a condition subsequent must be clearly and definitely shown.

---

REFERENCES FOR POINTS IN HEADNOTES

[1–6] 14 Am Jur, Covenants, Conditions, and Restrictions § 3.
[7–9] 1 Am Jur, Abandonment § 17.
[9, 10, 14, 15, 17] 39 Am Jur, Parks, Squares, and Playgrounds § 33.
[10, 14, 15, 17] 1 Am Jur, Abandonment §§ 13–15; 16 Am Jur, Dedication § 65.
[11, 12] 16 Am Jur, Dedication §§ 2, 8, 31.
[16] 39 Am Jur, Parks, Squares, and Playgrounds § 2.
[18] 3 Am Jur, Appeal and Error § 821.
[19] 18 Am Jur, Ejectment § 20.

5. SAME—REVERTER—CONSTRUCTION OF DEED—CONDITIONS.
Clause of deed wherein it was stated that if property conveyed for park and recreation purposes was not accepted by city that it should revert to grantor pertained to clause of deed reciting purpose of conveyance and not other so-called conditions, some of which were reservations.

6. SAME—CONSTRUCTION—CONDITIONS SUBSEQUENT.
Defendant city, grantee in deed of land conveyed to its grantor for park and recreation purposes *held*, not to have estopped itself from insisting there was but 1 condition subsequent merely by references to 8 enumerated clauses as "conditions" in pleading.

7. SAME—REMEDY FOR BREACH OF COVENANT.
Remedy of plaintiffs in ejectment action was in chancery for any breach of covenant, where condition of sole condition subsequent had been met by defendant city's acceptance of property for park and recreation purposes.

8. DEDICATION—ABANDONMENT—BURDEN OF PROOF.
Burden of proof of abandonment of property conveyed to, and accepted by, defendant city for park and recreation purposes was upon plaintiffs, heirs of grantor, claiming such abandonment.

9. SAME—ABANDONMENT—EVIDENCE.
Burden of proof that property conveyed to, and accepted by, defendant city for park and recreation purposes had been abandoned was not sustained, where it was not shown that such use had wholly failed.

10. SAME—ABANDONMENT—MISUSE—NONUSE.
Neither misuse nor nonuse of property is sufficient to constitute an abandonment of land dedicated to public use so as to work a reverter to the dedicators.

11. SAME—ACCEPTANCE OF TRACT FOR PARK AND RECREATION PURPOSES.
A deed to a nonprofit corporation on the express condition it was to be turned over to city for park and recreation purposes and which was accepted by the city for such purposes constituted a completed dedication to the public for all practical purposes.

12. SAME—DEFINITION.
A dedication is merely an appropriation of land to some public use, accepted for such use by or in behalf of the public.

13. SAME—STATUTES—COMMON LAW—ABANDONMENT—CERTAINTY OF TITLE.

No distinction between a statutory dedication and common-law dedication is made for the purposes of the law of abandonment as the need for certainty of title exists equally in both instances.

14. SAME—ABANDONMENT—EVIDENCE.

Neglect of 264-acre property, dedicated for park and recreation purposes, by failure to provide a caretaker or make improvements or repairs did not effect an abandonment of property and cause it to revert to the dedicator's heirs, where the beautiful natural woodland remained and was a source of great delight to students of natural history who sought untouched conditions of plant life.

15. SAME—ABANDONMENT—TRANSFER BY CITY TO STATE—PARKS.

Transfer of 264-acre tract from city to the State conservation commission and retransfer to city did not effect an abandonment of the use of the tract for park and recreational purposes by reason of the State's use of it for a woodland preserve, as a park may be a woodland preserve as well as a landscaped playground.

16. WORDS AND PHRASES—PARKS.

A park is a pleasure ground for the recreation of the public to promote its health and enjoyment, a place open to everyone for purposes of pleasure, exercise, amusement or ornament or to which the public may resort for recreation, air and light.

17. DEDICATION—ABANDONMENT—RELINQUISHMENT OF ADJACENT RIGHT-OF-WAY TO PARK.

A city's relinquishment of right-of-way adjoining 264-acre tract of land in another county which had been dedicated and accepted for park and recreation purposes did not constitute an abandonment of the right to use the entire park in any manner, where such relinquishment was at least partly motivated by a desire to preserve a portion of the park in a natural state.

18. APPEAL AND ERROR—QUESTIONS REVIEWABLE—STATEMENT OF QUESTIONS INVOLVED—REASONS AND GROUNDS FOR APPEAL.

Whether or not State conservation commission's reconveyance of property to city of property outside the city limits but dedicated to and accepted by the city for park and recreation purposes was not properly before the Supreme Court,

where it was not raised in the statement of questions involved or the reasons and grounds for appeal.

19. EJECTMENT—DEFECTIVE TITLE OF DEFENDANT—PARK—PARTIES. Any possible question of the power of the State conservation commission to reconvey property theretofore conveyed to it by a city which had acquired it from grantee of plaintiffs' ancestor and which had been dedicated for park and recreation purposes may only be raised by the State and not by plaintiffs in their action of ejectment against city as the plaintiffs may recover only on the strength of their own title and not because of any alleged weakness in the title of the defendant city.

Appeal from Ottawa; Smith (Raymond L.), J. Submitted June 4, 1952. (Docket No. 27, Calendar No. 45,431.) Decided October 6, 1952.

Ejectment by Minnie R. Aman Clark and others against City of Grand Rapids to gain possession of real estate. Judgment for defendant. Plaintiffs appeal. Affirmed.

*L. H. Grettenberger,* for plaintiffs.

*Fred N. Searl,* City Attorney, and *George R. Cook,* Assistant City Attorney, for defendant.

BUTZEL, J. Jacob Aman, a widower, in 1926 quitclaimed a 264-acre tract in Ottawa county about 5 miles west of Grand Rapids, Michigan, to the Grand Rapids Park and Boulevard Association, a private nonprofit corporation. The provisions of such deed material here are as follows:

"This deed is given upon the following conditions:

"1. This conveyance is made with the understanding that the above described property shall be turned over to the city of Grand Rapids, Michigan, for park and recreation purposes subject to the below conditions within 1 year from the date of this instrument or as soon thereafter as is practicable. 2. The

grantor reserves a life estate in the following described portion of said land and premises, to-wit: The house, barn and outbuildings and the land surrounding the same, comprising about 10 acres and being 35 rods east and west and 45 rods north and south, lying in the southwest corner of said premises. 3. The grantor reserves the right to cultivate and plant any of the above described premises not theretofore improved or used by the second party for park and recreation purposes; and further reserves the right to cut and use such matured wood and timber as he may need for his own domestic use. 4. The grantee is to spend $2,000 in developing and improving the property within 2 years from the date hereof, said moneys to be spent under the supervision and in accordance with the wishes of the grantor. 5. The name to be given the premises conveyed shall be Aman Valley or some other name to be selected or approved by the grantor if he so desires. 6. The property hereby conveyed shall forever be used for park and boulevard purposes only, subject to the above conditions, and the trees and timber thereon shall be preserved and handled in accordance with the best forestry practices. 7. The grantor reserved the right to be buried upon the premises at a spot now designated by a stake, said spot to be dedicated as the grantor's final burial place and to be preserved, protected and maintained in a fitting and proper way by the party of the second part forever. 8. If said proposition is not accepted by the city of Grand Rapids, Michigan, as specified, said property shall revert back to said first party.

"Together with all and singular * * * TO HAVE AND TO HOLD the said premises to the said party of the second part and its successors and assigns to the sole and only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever."

By deed of September 7, 1926, the corporation conveyed the property to the city of Grand Rapids,

which by official proceedings accepted the land for park purposes. In a previous case involving different parties, land and facts, but involving a similar question, we held that the Grand Rapids Park and Boulevard Association had authority to convey premises to the city of Grand Rapids for park and boulevard purposes and that the city had the authority to accept the conveyance. *Schneider* v. *City of Grand Rapids,* 211 Mich 399.

The testimony as to the use and care the park received through the years is voluminous. It appears from a careful examination thereof that during the first years the city of Grand Rapids maintained the park, it was greatly improved and well policed and supervised. At first Jacob Aman himself supervised the property. Later, under city supervision, numerous picnic, camping and playground facilities were installed and the park was landscaped, all at considerable expense to the city. When it failed to dedicate Jacob Aman's grave in accordance with the terms of his deed, his heirs protested, and on September 18, 1930, the property was formally dedicated as "Aman Park," with appropriate ceremonies. It was maintained and supervised during the 1930's, but for some 8 years prior to the time of the trial of the instant case, no caretaker had been in charge of the park and no further improvements or repairs were made on the property.

Jacob Aman in 1911 had obtained a right-of-way through adjoining property as a convenient means of access to part of Aman Park. The right-of-way was not expressly assigned to the city. The city failed to maintain such way and on February 29, 1940, relinquished the same on the advice that that portion of the park would look more unspoiled and natural if all artificial improvements were discontinued. Soon thereafter, the man-made improvements in all the park fell into disrepair although the

beautiful natural woodland remained and was a source of great delight to students of natural history who sought untouched conditions of plant life. After the removal of the caretaker, the park became often the scene of wild carousals, drinking, midnight campfires, auto races, et cetera. Policing authorities were confused as to the jurisdiction over property belonging to, but outside of, the city, so no arrests were made. After a protest from the citizens adjoining the park, and upon being urged by plaintiffs' attorney, the city of Grand Rapids erected a barricade to keep out cars and to allow only people on foot to enter the park. Plaintiffs later sought to completely close the park to the public.

In 1949, the city of Grand Rapids began negotiations with the State conservation commission in an attempt to exchange Aman Park for some State land within the city limits of Grand Rapids. On July 14th, the State conservation commission accepted the city's offer to deed the park to the State. In the memorandum filed with the conservation commission which was the basis for its action taken July 14, 1949, it was stated:

"The city of Grand Rapids has offered the above described property to the State of Michigan for such conservation uses, *within the stipulations of the title,* as the department may deem feasible. * * * The city no longer desires to maintain this property as part of its city park system even though some development and improvement work has been done in the form of road and trail construction and reforestation. * * *

"According to the stipulations in the chain of title the donors require that this land shall be used for park purposes. * * * It appears among other things that this property would adapt itself as a demonstration area for the practice of forest management of southern Michigan woods in connection

with the forestry division's program with the owners of woodlots in southern Michigan." (Italics ours.)

After the conveyance to the State, the 4 children and only heirs of Jacob Aman, plaintiffs herein, proceeded to give notices of forfeiture and began the instant ejectment proceeding on April 1, 1950. The conservation commission, evidently uncertain as to the exact requirements of the deed, reconveyed to the city of Grand Rapids on September 1, 1950. The case was discontinued as to the defendant conservation commission but was continued as to the city of Grand Rapids, which had been a defendant on its own motion. It thus became the sole defendant.

Two questions are decisive here: Has there been a breach of a condition subsequent in the deed? Has there been an abandonment of the property by the public such as to work a reverter to the dedicators?

Plaintiffs contend that the 8 "conditions" set forth in the deed of Jacob Aman (quoted *supra*) are conditions subsequent, the nonfulfillment of any of which will work a reverter to the heirs. We do not find that such a construction is permissible under the laws of Michigan. An examination of the terms of the deed itself show how unlikely it is that such could have been meant. It is at once obvious that "conditions" 2, 3 and part of 7, *supra,* are reservations and not conditions at all. It is also noteworthy that "condition" 8, *supra,* is the only "condition" embodying a reverter clause. The absence of a reverter clause is ordinarily controlling against construction of a provision as a condition. See *Adams* v. *First Baptist Church of St. Charles,* 148 Mich 140 (11 LRA NS 509, 12 Ann Cas 224). The fact that 1 "condition" prescribes forfeiture is more significant when we consider that the other "conditions" do not contain a forfeiture or re-entry clause. See *Rhines* v. *Consumers' Power Co.,* 259 Mich 236. Ordinarily the

use of the word "condition" in a deed does not indicate the existence of a condition subsequent without the presence of words of reverter.

It is well settled that conditions subsequent are not favored in law and are strictly construed. See *Barrie* v. *Smith,* 47 Mich 130; *Adams* v. *First Baptist Church of St. Charles, supra; County of Oakland* v. *Mack,* 243 Mich 279; and *Central Land Co.* v. *City of Grand Rapids,* 302 Mich 105 (144 ALR 478). The latter case is a striking example of the rule. There, land was given to the city of Grand Rapids with the express requirement that it be used for park purposes or it would revert to the grantor. We held that a lease by a city to drill for oil on that property did not constitute a breach where the use did not interfere with the main purpose of the park. For this reason, a provision in a deed as to use will be construed as a covenant rather than a condition subsequent, if possible. In doubtful cases, the writing will be held to be a covenant. See *Smith* v. *Barrie,* 56 Mich 314 (56 Am Rep 391); *Blanchard* v. *Detroit, L. & L. M. R. Co.,* 31 Mich 43 (18 Am Rep 142); and *Detroit Union Railroad Depot & Station Co.* v. *Fort Street Union Depot Co.,* 128 Mich 184. This is particularly true if there is no provision for forfeiture in case of failure to continue the use, as is the case here.

Plaintiff cites *Epworth Assembly* v. *Ludington & Northern Railway,* 236 Mich 565, which may be quickly distinguished as there was an express reverter clause contingent on the cessation of the use. Such a situation does not exist here. Similarly, *Blanchard* v. *Detroit L. & L. M. R. Co., supra; Jones* v. *Van Bochove,* 103 Mich 98, and *Puffer* v. *Clark,* 202 Mich 169, are valuable statements of the general rules governing conditions subsequent but not controlling here.

It appears then that the intention of the grantor to create a condition subsequent must be clearly and definitely shown. It has not been shown here. Plaintiff argues that the reverter clause in "condition" 8 applies as well to all of the "conditions." However, an examination of "condition" 8 reveals that the words:

"If said proposition is not accepted by the city of Grand Rapids, Michigan, as specified, said property shall revert back to said first party,"

refer only to "condition" 1:

"This conveyance is made with the understanding that the above described property shall be turned over to the city of Grand Rapids."

It does not mean that once the property was accepted by the city of Grand Rapids that a failure to observe any of the other "conditions" would work a reverter.

Plaintiff has pointed out that a number of times the conservation commission and the city of Grand Rapids in their pleadings referred to the 8 provisions in the deed as "conditions." That, however, is not an admission that they were conditions subsequent, the breach of which would work a reverter. Defendant made no admissions in its pleadings that estop it from insisting there was only 1 condition subsequent in the deed.

It is our conclusion that the trial court was correct when it held that "condition" No 8, the only condition subsequent in the deed, had been met in 1926 when the city of Grand Rapids accepted the property. Having reached this conclusion, it is unnecessary to discuss whether or not the other covenants in the deed have been carried out. For any breach of the other covenants, plaintiffs' remedy is not an action in ejection, but in a court of chancery.

Even though there may have been no breach of express conditions subsequent, plaintiffs argue that the facts in the instant case indicate an abandonment of the property by the city of Grand Rapids so as to work a reverter to the heirs of the grantor, Jacob Aman. In *Kirchen* v. *Remenga,* 291 Mich 94, there was a dedication of a tract within a subdivision for park purposes, a dedication which had not been accepted by the county, but was so regarded by surrounding landowners. It was held that the burden of proof that the use as a park had been abandoned was on the party asserting it and was not sustained even when a hotel, grocery store, boat livery, powerhouse, and other buildings were built thereon when it was not shown that the use for which the property was dedicated *had wholly failed.* In *Ford* v. *City of Detroit,* 273 Mich 449, we held that neither misuse nor nonuse will be sufficient to constitute an abandonment of land dedicated to public use so as to work a reverter to the dedicators. The city of Detroit had converted part of property dedicated for a parkway into a roadway. The acts of the city in removal of trees and shrubbery, excavation and condemnation proceedings were held a misuser but not an abandonment entitling holders of the right of reverter to maintain ejectment. This was in the face of a provision in a deed to the parkway that should the use of the parkway cease, it should revert to the dedicators.

We agree with the trial court that *Ford* v. *City of Detroit, supra,* is controlling here. Plaintiffs argue that the *Ford Case* does not apply as the Aman deed was to a private corporation in trust for a municipality, not to the public. For all practical purposes, however, the Aman deed was a dedication to the public for it contained the express condition that the property be turned over to the city of Grand Rapids. A dedication is merely an appropriation of land to

some public use, accepted for such use by or in behalf of the public. *Hayes* v. *Livingston,* 34 Mich 384 (22 Am Rep 533); *Alton* v. *Meeuwenberg,* 108 Mich 629. The acceptance of the property by the city of Grand Rapids in 1926 completed the dedication. Plaintiffs here argue that the cases are not analogous as the *Ford Case* involved a statutory dedication and if the Aman transaction is a dedication it is by virtue of the common law. We see no reason to distinguish between the 2 types of dedication for the purposes of the law of abandonment. It is clear that the need for certainty of title exists equally in both instances. There is even less basis for finding a reverter here than in the *Ford Case,* in which there was an express reverter clause. The neglect of the property was not sufficient to constitute an abandonment.

Plaintiffs allege that the transfer to the State constituted an abandonment of the property by the city of Grand Rapids. It is true that in certain cases a sale may constitute an abandonment. In *Kent County Board of Supervisors* v. *City of Grand Rapids,* 61 Mich 144, land was dedicated for county seat purposes. The county seat was removed from the land and the county sold the courthouse to the owner of the fee. It was held that the county had abandoned all control of the site. *Patrick* v. *Young Men's Christian Association of Kalamazoo,* 120 Mich 185, involved a similar situation. A church society had erected a building on a lot dedicated to the use of certain churches. It then conveyed the lot to a YMCA which demolished the church building and erected a building adapted to its own wants. It was held that the sale constituted an abandonment of the use for which the lot was dedicated. No such abandonment exists in the instant case. The transfer to the State was made for uses *within the stipulation of title* and the State, when it felt it might not be able

to conform thereto, deeded the property back to the city which undertook the defense of the use of the property for park and boulevard purposes. In none of these transfers was there an abandonment of the use for which the property was dedicated, as took place in *Kent County Board of Supervisors* v. *City of Grand Rapids, supra,* and *Patrick* v. *Young Men's Christian Association, supra.* A park may be a woodland preserve as well as a landscaped playground. To quote a few of the definitions of "park" from Black's Law Dictionary (3d ed), at p 1325:

"A pleasure ground for the recreation of the public to promote its health and enjoyment. * * * A piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament. * * * A place for the resort of the public for recreation, air and light; a place open for everyone."

These definitions are inclusive of any of the purposes for which the Aman tract has been used or was intended to be used throughout the years.

The relinquishment of any claim the city might have had to the adjoining right-of-way was at least partly motivated by a desire to preserve the west side of the park in a natural state and can hardly be construed, by itself, to constitute an abandonment of the right to use the entire park in any manner.

We conclude then that the uses for which the property has been dedicated have not wholly failed, and there has been no abandonment.

Plaintiffs also argue that the conservation commission had no power to grant the property in question back to the city of Grand Rapids. We seriously doubt the propriety of this discussion as it is not raised in the statement of questions involved or the reasons and grounds for appeal. But even so we must agree with defendant that if there is any possible question as to the power of the conservation com-

mission to reconvey, it can only be raised by the State, not by the plaintiffs who must stand or fall on the strength of their own title and who may not recover because of any alleged weakness in the title of the defendant.

If the city government has failed to perfectly perform the obligations assumed in the acceptance of this gift, a court of equity has the power to compel such performance.

The judgment of the trial court is affirmed. Costs to defendant.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

---

## HAYWARD v. MARKER.

1. ADVERSE POSSESSION—BOUNDARIES—EVIDENCE—EJECTMENT.
   Mere recognition of and acquiescence in the wrong line for 15 years by defendant in ejectment action is insufficient to establish title by adverse possession of disputed strip, where there is no such showing as relates to plaintiff and predecessor record title holders.

2. SAME—EVIDENCE.
   Inclusion of disputed strip of rough, undeveloped and tree- and brush-covered lake shore land within area staked out as defendant's plat, coupled with acts of planting trees and flowers, trimming and cutting dead branches, holding pic-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 1 Am Jur, Adverse Possession § 126 *et seq.*
[3] 3 Am Jur, Appeal and Error § 770.

nics, shoring up of lake bank at places, building of road to a building site, payment of taxes for more than 15 years *held*, sufficient evidence upon which to base finding that defendant had acquired title thereto by adverse possession, since it was visible, open, notorious and distinct and presumably hostile.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—EJECTMENT—TAX TITLE—BRIEFS.

Effect of State's acquisition on a tax sale on record title to property involved in action of ejectment is not discussed, where no point is made of it in the briefs.

Appeal from Antrim; Brown (Charles L.), J. Submitted June 12, 1952. (Docket No. 60, Calendar No. 45,472.) Decided October 6, 1952. Rehearing denied December 9, 1952.

Ejectment by Charles L. Hayward and wife against Helen Marker to try title to land. Judgment for defendant. Plaintiffs appeal. Affirmed.

*Harry T. Cook* (*Charles H. Menmuir* and *Jones & Glabach*, of counsel), for plaintiffs.

*James R. Zerafa*, for defendant.

DETHMERS, J. This is a suit in ejectment testing title to a disputed strip of land approximately 89.7 feet in width located within and immediately south of the north line of government lot 3, section 7, T 30 N, R 8 W, in Antrim county, on the west shore of Torch lake.

In 1917 defendant purchased and in 1920 received a deed to government lot 2, situated immediately adjacent to and north of the disputed strip. In 1923 she platted the east portion of lot 2 on the basis of a survey made by the county surveyor. Through error the surveyor staked out the plat as commencing on the north at a line 70 or more feet south of the north line of government lot 2 and extending

south to a line 89.7 feet south of the dividing line between government lots 2 and 3, with the result that the plat encroached by that number of feet on government lot 3. In 1941 plaintiffs purchased and in 1945 received a deed to government lot 3. In 1942 defendant showed plaintiffs the erroneously placed iron stakes which she said marked the south line of her property. Plaintiffs made no objection, having had no previous knowledge of the true location of the line. In 1949 and again in 1950, after defendant had built and occupied a house on the now disputed strip, plaintiffs had surveys made, discovered the error and thereupon brought this suit. From judgment for defendant plaintiffs appeal.

Relying on *Dubois* v. *Karazin,* 315 Mich 598, and cases cited therein, defendant urges that an old, established line, long recognized, acquiesced in, and treated as the true line for a period of more than 15 years ought not to be disturbed on the basis of a new survey. The difficulty with defendant's contention in this regard is that the recognition of and acquiescence in the wrong line for 15 years is only shown to have been on the part of defendant with no such showing as relates to plaintiffs and their predecessors.

The trial court held that defendant had acquired title to the disputed strip by adverse possession for more than the statutory period. The area had been, in the main, rough, undeveloped, and covered with trees and underbrush. Plaintiffs contend that the inclusion of the disputed strip within the area staked out as defendant's plat, coupled with her infrequent acts of planting trees and flowers, cutting dead branches, holding picnics, and shoring up the lake bank at places throughout her plat, without actually dwelling upon the disputed strip until 1947, and defendant's occupation and use of portions of her plat located outside the disputed strip did not con-

stitute open, notorious, continued, hostile and adverse possession of the strip sufficient to ripen into title.

The trial court viewed the premises and described all the witnesses in the case as truthful. On that basis it found that, despite the fact that defendant had not actually dwelt upon the disputed strip for the requisite period, nonetheless, she had, for more than such a period, worked on the strip and planted flowers and trees on it, including a row of red and white pines planted, in 1924 and 1925, near and parallel with the lake shore and running north from defendant's present house; that she had recurrently trimmed and removed dead branches from trees thereon, built a road on the strip leading to the building site, cleared out underbrush, brushed out the creek thereon, cleared a line along the south boundary thereof, shored up the banks of the lake in front of the strip with rocks and boulders, used the property for picnics, et cetera, and paid taxes on the entire plat; that her son had spent several summer vacations on the disputed strip, and that, for more than the statutory period, defendant had not only done all these things on it but had treated it in every respect as a part of her plat. The court determined that defendant's use of the strip had been such as was consistent with the character of the property and that she had devoted it to the use to which it was adapted, all under claim of title; that her possession had been visible, open, notorious and distinct, presumed to be hostile, and sufficient to cause title to ripen in her by adverse possession. The court relied in this connection on *Greene* v. *Anglemire*, 77 Mich 168; *Dubois* v. *Karazin, supra,* and cases cited therein. Applicable also is *Monroe* v. *Rawlings,* 331 Mich 49, and authorities therein cited. We believe the trial court was correct.

Because no point is made of it in the briefs, we need not pass on the effect of the State's having acquired title to lot 3 on tax sale in 1939, a subject considered in *McCreary* v. *Shields,* 333 Mich 290.

Affirmed, with costs to defendant.

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

The late Chief Justice NORTH did not sit.

---

## PEOPLE *v.* GARDINEER.

1. INDICTMENT AND INFORMATION—ESCAPE OF PRISONER CHARGED WITH FELONY.

   Allegation that defendant conveyed hacksaw blades to a prisoner, confined in a county jail on a charge of malicious destruction of property exceeding $50 in value, charged an offense known to the law (CL 1948, § 750.183).

2. SAME—AMENDMENT.

   It is proper for a trial court to allow an amendment to an information, designed to more fully describe the felony with which the prisoner stood charged.

3. SAME—INTENT.

   Intent to aid the escape of a prisoner, confined on a charge of having committed a felony, *held,* to have been alleged sufficiently so that accused might prepare his defense with full and precise knowledge of what he was accused of having done and intended (CL 1948, § 750.183).

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur, Escape, Prison Breaking, and Rescue §§ 2, 5.
[1] Escape or prison breach as affected by means employed to effect it. 10 ALR 148; 50 ALR 989.

4. SAME—AIDING ESCAPE OF PRISONER CHARGED WITH MALICIOUS DESTRUCTION.

Failure of information to indicate whether the prisoner, whom accused had been charged with having attempted to aid in escaping, had been charged with malicious destruction of personal or real property did not render information insufficient, since the prisoner was lawfully detained on a criminal charge regardless of whether he was accused of destroying real or personal property (CL 1948, §§ 750.183, 750.377a, 750.380).

5. ESCAPE—DEGREE OF CHARGE AGAINST PRISONER AIDED.

The crime of aiding the escape of one lawfully detained on a felony charge constitutes a felony, while aiding escape of one lawfully detained on charge not punishable by imprisonment in the State prison is a circuit court misdemeanor (CL 1948, § 750.183).

6. SAME—DEGREE OF CHARGE AGAINST PRISONER AIDED.

Accused who was charged with aiding the escape of a prisoner, confined on charge of having maliciously destroyed various enumerated pieces of property whose value exceeded the sum of $115, charged prisoner was detained on a felony charge, even though it was not specified whether the personal or real property destroyed was greater than $50 in value, since obviously one or the other was in excess of such amount (CL 1948, §§ 750.183, 750.377a, 750.380).

7. SAME—INFORMATION AGAINST PRISONER—AMENDMENT—CONVICTION.

Fact that after defendant had attempted to aid in the escape of a prisoner, charged with a felony, the information against latter was amended to charge him with the malicious destruction of personalty and later he was convicted of a misdemeanor, rather than a felony *held,* immaterial, since at the time defendant sought to effect an escape, the prisoner was charged with having committed a felony (CL 1948, §§ 750.183, 750.377a, 750.380).

8. MALICIOUS MISCHIEF—"PROPERTY OF ANOTHER."

"Property of another," as the term is used in statute making it an offense to maliciously injure the property of another, includes the property of bodies politic and corporate as well as individuals (CL 1948, § 750.377a).

Appeal from Kalamazoo; Sweet (Lucien F.), J. Submitted June 12, 1952. (Docket No. 68, Calendar No. 45,360.) Decided October 6, 1952.

John A. Gardineer was convicted of conveying hacksaw blades to prisoner with intent to facilitate his escape. Affirmed.

*Bucknell, Birkhold, Fayling & Luna,* for appellant.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *John M. Pikkaart,* Prosecuting Attorney, for the people.

DETHMERS, J. Defendant appeals from conviction on a charge, as alleged in the amended information, that he "did convey into the Kalamazoo county jail certain hacksaw blades, adapted and useful to aid * * * a prisoner lawfully committed and detained in said Kalamazoo county jail" awaiting trial on a charge of "wilfully and maliciously injuring and destroying by breaking a bed, bed springs, table, windows, window frame, chair, ventilator and door in the juvenile home for Kalamazoo county, property of Kalamazoo county, said damage resulting from said injury and destruction exceeding the sum of $50, to wit $115, that being a felony punishable in the State prison, in making his escape therefrom, with intent to facilitate the escape." The complaint, warrant and original information did not contain, as above set forth in the amended information, the description of the felony with which the prisoner stood charged at the time defendant allegedly undertook to aid his escape, but stated merely that he was detained on a felony charge.

Defendant contends that the complaint, warrant and original information were defective for failure to allege a crime known to the law because they did

not set forth what felony it was with which the prisoner stood charged, and that, in consequence, it was error to permit amendment of the information for the purpose of causing it to adequately charge a crime, citing *People* v. *Donovan,* 228 Mich 149. We do not agree. The allegation that defendant committed the mentioned overt act with intent to aid the escape of a prisoner lawfully detained in the county jail on a felony charge punishable in the State prison charged an offense known to the law, namely, violation of CL 1948, § 750.183 (Stat Ann § 28.380). The trial court properly allowed the amendment designed to more fully describe the felony with which the prisoner stood charged.

Neither the original nor the amended informations suffered from the infirmity considered in *People* v. *Westerberg,* 274 Mich 647, cited by defendant, in which the charge of breaking and entering in the nighttime with intent to commit a felony was held defective for failure to specify the intended felony. The substance of the holding there was that because a particular intent had been made by the statute an essential element of the offense, it needed to be alleged in the information so that the defendant might prepare his defense thereto with full and precise knowledge of what it was that he was accused of having done and intended. In the instant case that purpose was satisfactorily served by the allegations of the informations.

Defendant's next contention seems to boil down to the claim that the amended information is insufficient for the reason that its allegations describing the offense with which the prisoner stood charged failed to disclose that he was lawfully detained on a charge of having committed a felony punishable by imprisonment in State prison. See *People* v. *Hamaker,* 92 Mich 11. This contention appears to be predicated on the fact that the property which

the prisoner was charged with injuring consisted in part of personal and in part of real property. CL 1948, § 750.377a (Stat Ann 1951 Cum Supp § 28.609[1]) provides, as relates to personal property, and CL 1948, § 750.380 (Stat Ann § 28.612), as relates to certain real property, that malicious injury thereto shall constitute a felony if the resultant damage exceeds the amount of $50, or a misdemeanor if $50 or less. Accordingly, the difficulty in the *Hamaker Case* is not presented by the instant record because here the prisoner was lawfully detained on a criminal charge regardless of whether he was accused of destroying real or personal property.

In this connection defendant also states that it could not be determined from the language of the charge filed against the prisoner whether he was accused of a felony or misdemeanor. This is of significance only as relates to the penalty to which defendant was subject for aiding the prisoner's escape. Under the statute the crime of aiding the escape of one lawfully detained on a felony charge constitutes a felony, while aiding the escape of one lawfully detained on a charge not punishable by imprisonment in State prison constitutes a circuit court misdemeanor. In either event, the circuit court had jurisdiction over defendant and the subject matter of the offense with which he stood charged. Furthermore, a reading of the charge against the prisoner makes it manifest that he was accused of a felony, inasmuch as the amount of damage to real and personal property charged to have been done by the prisoner was of the amount of, to wit, $115. Whatever may have been the proportionate amount of that injury done to real and personal property, respectively, under the mentioned charge the damage done to one or the other, of

necessity, exceeded the statutory dividing line of $50.

The fact that the information in the prisoner's case was subsequently amended to charge him with malicious injury to personal property only and that he was subsequently convicted of a misdemeanor rather than a felony is of no consequence to defendant's case, inasmuch as the prisoner was lawfully detained on a felony charge at the time defendant undertook to aid his escape.

We have no hesitancy in holding that the legislature, in enacting the statute making it an offense to maliciously injure the "property of another," intended to include within the meaning of the quoted term the property of bodies politic and corporate as well as of individuals. See *People* v. *Ferguson,* 119 Mich 373.

Conviction and sentence affirmed.

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

The late Chief Justice NORTH did not sit.

## ROMAN v. DELTA BROADCASTING COMPANY.

1. WORKMEN'S COMPENSATION—EMPLOYEES OF SUBCONTRACTOR.
Workmen's compensation may not be recovered from a principal contractor by a subcontractor's injured employee or his dependents unless the subcontractor was not subject to the workmen's compensation act (CL 1948, § 411.10).

2. SAME—RAZING BROADCASTING TOWER—INDEPENDENT CONTRACTOR.
Defendant broadcasting company, not engaged in the business of razing radio towers, may not be subjected to payment of workmen's compensation for fatal injuries sustained by an employee of independent contractor engaged for job of razing such a tower for defendant, since it was not a part of the business of the defendant or work undertaken by it (CL 1948, § 411.10).

Appeal from Workmen's Compensation Commission. Submitted June 24, 1952. (Docket No. 78, Calender No. 45,478.) Decided October 6, 1952.

Valeda Roman and Gladys Shea, guardian of James Roman, a minor, presented their claim for compensation, arising from death of William Ro-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation § 361.

Right of one, other than employer or his insurer, liable under compensation act, to indemnity or contribution from the employer or his insurer. 66 ALR 1433.

Right as between employer primarily responsible under workmen's compensation act and employer secondarily liable under that act (or their insurers) where injury was due to latter's negligence. 117 ALR 571.

Workmen's Compensation: Remedy as between subcontractor and principal contractor (or independent contractor and contractee) in respect of compensated injury to employee of one due to negligence of other, where injured employee had no remedy apart from the act. 166 ALR 1221.

man, against Delta Broadcasting Company and Employers Mutual Liability Insurance Company. Award to defendants. Plaintiffs appeal. Affirmed.

*Ray Derham* and *L. J. Archambeau,* for plaintiffs.

*Burney C. Veum,* for defendants.

DETHMERS, J. Plaintiffs appeal from an award of the workmen's compensation commission denying compensation.

While there is support in the record for defendants' claim that plaintiffs' decedent and his brother, John, were partners engaged as independent contractors in doing for defendant broadcasting company, hereinafter called defendant, the job on which decedent was accidently injured and killed, nevertheless, after excluding matters equally within the knowledge of the deceased,* the commission made a finding of fact, supported by some competent evidence, that John entered into a contract with defendant to take down its radio tower for $200 and that he hired decedent to assist him in the work. The commission found that defendant had no right to and had exercised no control over decedent. Accordingly, it held: (1) That decedent was not the employee of defendant, but of his brother, John; (2) that John was an independent contractor rather than defendant's subcontractor; and, therefore, (3) that defendant was not liable for compensation.

Plaintiffs claim they are entitled to an award of compensation against defendant under the provisions of CL 1948, § 411.10 (Stat Ann 1950 Rev § 17.150). Although the commission did find that John was an independent contractor doing a job under contract for defendant, and that he hired dece-

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

dent to assist him in the work, it did not find, nor is there any admission or showing in the record, that John was, at the time in question, not subject to the workmen's compensation act. This is a prerequisite to liability on defendant's part under the mentioned statutory provisions. Assuming, however, that John was not subject to the act, defendant's liability as principal under the mentioned act would depend on its having contracted with John, the contractor, "for the execution by or under the contractor of the whole or any part of *any work undertaken by the principal.*" Defendant was engaged in the broadcasting business. It was not in the business of and did not undertake the work of razing a radio tower. In that respect this case might be viewed as distinguishable from 2 cited by plaintiffs, namely *Nowacki* v. *Escanaba Manfg.* Co., 229 Mich 675; and *Aukstales* v. *Klotz,* 280 Mich 355, in which the work contracted to be done by the contractor might be considered to be part of the business of the principal and, hence, in the language of the statute, a part of the work undertaken by it. That distinction between (1) work which is part of the business of the principal and (2) work, contracted to be done for it, which is not part of its business and therefore not work undertaken by it, was clearly recognized in *Burt* v. *Munising Woodenware Co.,* 222 Mich 699; and *Rinebold* v. *Bray,* 248 Mich 321. The case of *Harris* v. *Fry & Kain,* 306 Mich 1, cited by plaintiffs, presents greater difficulty. There the work in which plaintiff was injured and which his employer had contracted to do for the principal was clearly not a part of the business of the principal nor work undertaken by it. Nevertheless, we permitted recovery against the principal under the statute here under consideration. It is to be noted, however, that the contentions raised in that case, as also in the *Nowacki* and *Aukstales Cases,* related to other subjects, with the result that

the mentioned distinction recognized in the *Burt* and *Rinebold Cases* was neither discussed nor considered. To the extent, therefore, that the *Harris Case,* or, for that matter, the *Nowacki* and *Aukstales Cases,* decided, without discussing or directly considering, that there is liability under the section of the statute in question on the part of a principal for injuries sustained in work contracted to be done for it but which is not part of its business and, hence, not work undertaken by it, we decline to follow them.

Affirmed, with costs to defendants.

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

The late Chief Justice NORTH did not sit.

## TOWNSHIP OF DEARBORN *v.* DEARBORN TOWNSHIP CLERK.

1. JUSTICES OF THE PEACE—JUDICIAL POWER.
   Judicial power is vested in justices of the peace as well as in the higher courts (Const 1908, art 7).

2. STATUTES—CONSTRUCTION.
   A statute must be construed with the deference due to a deliberate action of a co-ordinate branch of the State government and if it does not violate any of the provisions of the Constitution, the Supreme Court may not inquire into the wisdom of the legislation or substitute its judgment for that of the legislature.

3. SAME—CONSTITUTIONAL LAW.
   The conflict between a statute and a provision of the Constitution must be clear and inevitable before the statute may be declared unconstitutional.

4. SAME—SUBSEQUENT REVISION OF CONSTITUTION.
   A statute which is repugnant to the Constitution would not remain in force merely because enacted prior to the adoption of a revised Constitution (Const 1850, sched § 1; Const 1908, sched § 1).

5. SAME—CONSTITUTIONAL LAW—MEMBERSHIP IN TOWNSHIP BOARD—OFFICERS.
   Provision in schedule of Constitution continuing officers in

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 14] 31 Am Jur, Justices of the Peace § 2.
[2] 50 Am Jur, Statutes §§ 223, 228, 378, 380.
[3] 11 Am Jur, Constitutional Law §§ 91, 92, 128.
[6] 11 Am Jur, Constitutional Law § 88; 50 Am Jur, Statutes §§ 442, 443.
[6–8, 17] 11 Am Jur, Constitutional Law §§ 81–83.
[10] 11 Am Jur, Constitutional Law § 180.
[12] 52 Am Jur, Towns and Townships § 24.
[20] 31 Am Jur, Justices of the Peace §§ 33, 34.
[20, 21] 52 Am Jur, Towns and Townships § 22.
[25] 14 Am Jur, Costs § 91.

their respective offices until superseded under laws in force at time of adoption of Constitution or under the Constitution is inapplicable so as to continue membership in township board as provided by statute enacted before Constitution was adopted (Const 1908, sched § 5).

6. SAME—AMBIGUITY—LONG ACQUIESCENCE.

Long acquiescence in a certain interpretation may be binding in the case of a statute containing an ambiguity but cannot prevail over the plain language of the Constitution.

7. CONSTITUTIONAL LAW—USURPATION OF POWER.

Repetition of error does not correct it and acquiescence for a very long time cannot legalize a clear usurpation of power.

8. JUSTICES OF THE PEACE—TOWNSHIP BOARDS.

The fact that justices of the peace have acted as *de facto* members of township boards over a century does not make them members *de jure* (Const 1908, art 4; CL 1948, § 41.70, as amended by PA 1949, No 9).

9. SAME—STATUTES—CONSTITUTIONAL LAW—TOWNSHIP BOARDS.

Statute constituting justices of the peace, who are vested with judicial power by the Constitution, as members of township boards, vested by the Constitution with legislative and administrative powers, contravenes provision of the Constitution prohibiting a person belonging to one department of government from exercising powers properly belonging to another (Const 1908, art 4, § 2; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9).

10. CONSTITUTIONAL LAW—DIVISION OF POWERS OF GOVERNMENT.

The apportionment of power to one department of government is understood to be a prohibition of its exercise by either of the others, the keeping of the 3 great branches of government strictly separate and distinct from each other being essential to the maintenance of a republican form of government (US Const, art 4, § 4; Mich Const 1908, art 4).

11. TOWNSHIPS—TOWNSHIP BOARD—CONSTITUTIONAL LAW—STATUTES.

The existence of a township board implies it will be given powers by other statutes, hence, it is proper for Supreme Court to consider the constitutionality of statute establishing the board possessing certain powers of a township as authorized by the Constitution (Const 1908, art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9).

12. SAME—TOWNSHIP BOARD—LEGISLATIVE POWER.
A township board has special and limited jurisdiction as conferred by the legislature pursuant to permission contained in the Constitution and insofar as the legislature has conferred upon it legislative powers, it is a legislative body (Const 1908, art 8, § 17).

13. SAME—TOWNSHIP BOARD—CHARACTER OF DUTIES—JUSTICES OF THE PEACE.
The township board possesses no judicial duties, all of its duties being legislative or administrative in character, duties which the justices of the peace, being judicial officers, may not exercise (Const 1908, art 7; art 8, § 17).

14. JUSTICES OF THE PEACE—JUDICIAL POWER—CRIMINAL CASES.
A justice of the peace is vested with part of the judicial power of the State and in exercising such powers in criminal cases represents the State rather than the township.

15. SAME—JUDICIAL POWER—CONSERVATOR OF THE PEACE.
The judicial power conferred upon justices of the peace is in no manner reduced or modified by virtue of their constitutional appointment as conservators of the peace (Const 1908, art 7, §§ 1, 18).

16. SAME—CONSTITUTIONAL LAW—EJUSDEM GENERIS.
Provision of Constitution setting forth certain judicial duties of the justices of the peace and authorizing the imposition of "such duties as shall be prescribed by law" requires the application of the rule *ejusdem generis*, since by the specific mention of judicial duties, other types of duties not mentioned are excluded (Const 1908, art 7, § 16).

17. CONSTITUTIONAL LAW—CONSTRUCTION—CUSTOMS AND USAGES.
The plain provisions of the Constitution are paramount, notwithstanding there may be a long standing and previously existing custom which violates such provisions.

18. STATUTES—AMBIGUITY—OFFICERS—SEPARATION OF POWERS.
The doubt existing in an ambiguous statute creating duties for public officers is resolved in favor of the traditional separation of powers (Const 1908, art 4).

19. CONSTITUTIONAL LAW—SEPARATION OF POWERS—LOCAL GOVERNMENT.
The doctrine of absolute separation of the 3 great powers of government is adhered to in this State so far as local government is concerned, except as provided by Constitution

or in the charter of the political unit in question (Const 1908, art 4).

20. TOWNSHIPS—JUSTICES OF THE PEACE—LEGISLATURE—CONSTITUTIONAL LAW.

The organization of the township and that of the office of justice of the peace are directly under the purview of the legislature and the Constitution of the State and are subject to the provisions of the latter.

21. SAME—CONSTITUTIONAL LAW.

Individual townships are given no power over the structure of their own government but may exercise only such legislative power as is delegated to them subject to the provisions of the State Constitution.

22. SAME—TOWNSHIP BOARD—JUSTICES OF THE PEACE—CONSTITUTIONAL LAW.

There is no affirmative requirement of the Constitution that justices of the peace act on the township board, hence, since they are judicial officers they may not participate in the exercise of the legislative or administrative functions of that board (Const 1908, art 4; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9).

23. SAME—TOWNSHIP BOARD—JUSTICES OF THE PEACE—SEPARATION OF POWERS.

Statute, insofar as it makes justices of the peace members of the township board, is unconstitutional, there being no basis for the application of the "modified" or "limited" doctrine of separation of powers so far as township government is concerned (Const 1908, art 4; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9).

24. SAME—TOWNSHIP BOARD—MEMBERSHIP.

The only legal members of the township board are the supervisor, the township clerk and the township treasurer (Const 1908, art 4; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9).

25. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTE.

No costs are allowed in suit for declaration of rights involving validity of a long standing statute, where a public question is presented (CL 1948, § 41.70, as amended by PA 1949, No 9).

Appeal from Wayne; Culehan (Miles N.), J. Submitted June 5, 1952. (Docket No. 36, Calendar No. 45,485.) Decided October 6, 1952.

Bill by Township of Dearborn against Glenn E. Dail, township clerk of Dearborn township, for declaratory decree that township board is composed of 7 members. Decree that it is comprised of township supervisor, clerk, and treasurer. Plaintiff appeals. Defendant cross-appeals. Affirmed.

*Jesse W. Bollinger,* for plaintiff.

*Marx & Fewlass,* for defendant.

*Amici Curiae:*

*Gerald K. O'Brien,* Prosecuting Attorney, *Hobart Taylor, Jr., Philip A. McHugh* and *Aloysius J. Suchy,* Assistant Prosecuting Attorneys.

Township of Nankin, by *John J. Nellis,* Township Attorney.

Township of Taylor, by *Russel J. Comer,* Township Attorney.

Townships of Sumpter and Brownstown, by *Fred B. Hill,* Township Attorney.

*Elton R. Nellis,* of counsel.

BUTZEL, J. Revised Statutes of 1846, ch 16, § 70, provided that the supervisor, 2 justices of the peace and the township clerk of each organized Michigan township should constitute its township board, 3 of its 4 members constituting a quorum. PA 1935, No 19, and PA 1937, No 81, amended section 70

of chapter 16 of the Revised Statutes of 1846, so as to provide that in townships of under 5,000 population there was to be a 5-member board, consisting of the supervisor, the 2 justices of the peace whose terms of office "will soonest expire," the township treasurer and the township clerk, 3 of whom should constitute a quorum; and that in townships having a population of 5,000 or over according to the last Federal census there was to be a 7-man board, consisting of the supervisor, the township treasurer, the township clerk and 4 justices of the peace, any 4 of whom should constitute a quorum. The provisions for a 7-man board were conditioned, however, upon the electors of the township adopting the provisions of section 70, *supra,* by a majority vote at any annual town meeting. Section 70, *supra,* as amended, is set forth in CL 1948, § 41.70 (Stat Ann 1951 Cum Supp § 5.62). There were further amendments to clarify the population provisions of the act but they are not material here. PA 1945, No 23; PA 1949, No 9. For brevity, we refer to the amended act as section 70, *supra.* For over 100 years justices of the peace have been members of the township board. Statutes relating to the powers and duties of township boards in regard to procuring standards of weights and measures, prohibiting sales of liquor to certain persons, granting licenses to tavern keepers, licensing public exhibitions, et cetera, are listed in the index of the Revised Statutes of 1846. The township board since 1846 has been expressly given certain legislative and administrative powers.

Prior to 1947 Dearborn township, plaintiff herein, had been organized with a 5-man board but at an annual meeting of the electors held on April 7, 1947, the township was brought under the provisions of the amendment applicable to townships having 5,000 population or over, the Federal census of 1940

having indicated a population far in excess of 5,000. The township operated under a 7-man board until the annual meeting of the electors on April 2, 1951, at which time the electors purported to rescind their action taken in 1947 and to reestablish a 5-man board. The reason given at the time was that the 7-man board gave the majority control to the 4 justices of the peace. Defendant township clerk thereafter recognized only the votes of the 2 justices of the peace "whose term would soonest expire." Plaintiff, claiming that the resolution restoring the 5-man board was ineffective for various reasons, brought a bill for declaratory judgment, asking that defendant be required to record all 4 votes of the justices. On motion for entry of a judgment on pleadings the trial court held for defendant, on the ground that the Constitution forbade the legislature from giving legislative power to judicial officers, namely, justices of the peace, and thus neither 2 nor 4 justices of the peace could be members of a township board. Other questions were raised but we believe the over-all question is the constitutionality of section 70, *supra,* in constituting justices of the peace members of the township board, a legislative body.

More specifically stated, defendant contends that section 70, *supra,* providing that justices of the peace be members of either a 5-man or a 7-man board, violates article 4, §§ 1 and 2, of the Michigan Constitution, which divides the State government into 3 departments: The legislative, the executive and the judicial, and forbids any person belonging to one department from exercising powers properly belonging to any other except in cases expressly provided for in the Constitution. The judicial power, by article 7 of the Constitution, is vested in justices of the peace as well as in the higher courts. If defendant is correct in his contention that section 70, *supra,* is unconstitutional insofar as it makes

justices of the peace members of township boards, we need not discuss other questions raised.

In coming to our conclusions, we are mindful of the restrictions upon the power of this Court to declare a challenged statute in conflict with our Constitution. It is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a co-ordinate branch of our State government. If the legislature enacted a statute which does not violate the provisions of the Constitution, this Court may not inquire into the wisdom of the legislation or substitute its judgment for that of the legislature. The conflict between the statute and constitutional provisions must be clear and inevitable before we strike down a statute as unconstitutional.

Plaintiff, in attempting to uphold the constitutionality of section 70, *supra,* relies on section 1 under the schedule appended to the Constitution of 1908, which provides as follows:

"The common law and the statute laws now in force, not *repugnant* to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed." (Italics ours.)

He also cites a similar provision appended to the Constitution of 1850,* and contends that by reason of such provisions the constitutionality of section 70, *supra,* in effect at the time of the constitutional revisions, was affirmed. An examination of the quoted language of section 1, however, shows that a statute which was indeed "repugnant" to the provisions of the Constitution would not be embraced in this section. We find that the reenactment of such statute has no determinative effect here other than as further proof of the long period in which it has been in effect without challenge. Section 5

* See Const 1850, sched § 1.—REPORTER.

of the schedule appended to the Constitution refers to "officers" and not to "offices" and is not relevant here.

Our reluctance to overturn an action of the legislature increases when we are confronted by an enactment of such ancient vintage. For over 100 years justices of the peace have sat upon township boards within the State of Michigan without any question being raised as to their eligibility. If we were confronted with a matter of construction of a statute containing some claimed ambiguity or with a mere technical objection, long acquiescence in a certain interpretation of such statute might be binding on us. But neither contemporaneous construction nor long acquiescence can prevail over the plain language of the Constitution when the constitutional question is presented to us for the first time. Repetition of error does not correct it nor can acquiescence for a very long time legalize a clear usurpation of power. The fact that justices of the peace have acted as *de facto* members of township boards over the years does not make them members *de jure.*

Additional constitutional provisions which may be pertinent in considering the instant problem are as follows:

Article 8 of the Michigan Constitution of 1908, entitled "Townships, Local Legislation," states:

"Sec. 17. The legislature may by general law confer upon organized townships such powers of a local, legislative and administrative character, not inconsistent with the provisions of this Constitution, as it may deem proper."

The Constitution makes no provision for any other agency to be vested with the powers mentioned in section 17, *supra,* but they are vested by various statutes in the township board.

It is apparent that section 70, *supra,* attempts to vest justices of the peace, officers possessing judicial power by virtue of article 7, § 1, with legislative and administrative power given to the township governing bodies thereof under article 8, § 17. On its face, therefore, section 70, *supra,* to the extent that it constitutes justices of the peace members of the township board is a violation of article 4, § 2, which provides that no person belonging to one department shall exercise the powers properly belonging to another.

In many decisions this Court has upheld and jealously guarded the right to keep distinctly separate one department from another. The doctrine of strict separation was early set forth by Mr. Justice COOLEY in *People, ex rel. Sutherland,* v. *Governor,* 29 Mich 320 (18 Am Rep 89). In holding that the apportionment of powers to one of the 3 co-ordinate branches is a prohibition of its exercise by either of the other departments, he said:

> "Our government is one whose powers have been carefully apportioned between 3 distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."

In other decisions we have reaffirmed that doctrine and applied it to a variety of situations. We have struck down attempts by the legislature to give

nonjudicial power to courts (*Houseman* v. *Kent Circuit Judge*, 58 Mich 364; *Nichols* v. *Judge of Superior Court of Grand Rapids*, 130 Mich 187; *Anway* v. *Grand Rapids Railway Co.*, 211 Mich 592 [12 ALR 26]). We forbade any attempt by the legislature to restrict judicial powers or qualifications (*People* v. *McMurchy*, 249 Mich 147; *Attorney General, ex rel. Cook*, v. *O'Neill*, 280 Mich 649). In *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich 659, we reaffirmed the doctrine that the courts cannot legislate under the guise of the examination of the validity of a law. In *Wood* v. *State Administrative Board*, 255 Mich 220; and *Civil Service Commission* v. *Auditor General*, 302 Mich 673, we emphasized that the legislative and the executive could not encroach upon each other's powers. For other statements of the general rule see *Cooke* v. *Holland Furnace Co.*, 200 Mich 192 (LRA1918E, 552), and *Local 321, State, County & Municipal Workers of America* v. *City of Dearborn*, 311 Mich 674.

That the rule favoring strict separation of powers prevails throughout the United States need merely be mentioned in passing. From the time of the Federalist papers, the United States supreme court and other United States jurisdictions have reaffirmed that keeping the 3 great branches of government separate and distinct from each other is essential to the maintenance of a republican form of government.* This principle has become axiomatic.

Plaintiff, admitting that the doctrine of strict separation of powers will be applied in Michigan, contends that the instant case is not a proper one for the application of such a doctrine, for several reasons: *First*, that the township board is not a legislative body and is not given legislative powers by the statute in question; *Second*, that the justice

* See US Const, art 4, § 4.—REPORTER.

of the peace is not only a judicial officer but is permitted under a proper interpretation of the Michigan Constitution to exercise extrajudicial functions; and, *Third,* that the modified or limited doctrine of separation of powers should instead be applied here in the consideration of a problem of local government.

Plaintiff contends that the statute in question merely creates the township board but gives it no powers and it cannot therefore be said to be a legislative body to which powers were illegally delegated, and that its constitutionality must be determined solely from the particular statutory provisions sought to be held unconstitutional. Plaintiff's argument, although ingenious, does not reach the root of the problem. Under his reasoning every statute enacted conferring power on township boards would have to be individually declared unconstitutional on the ground that the board itself was an illegally constituted body; whereas in reality unconstitutionality finds its roots in the very composition of the board. It is true that only by additional or supplemental statutes are the powers vested in the township board, which the Constitution (article 8, § 17) authorizes the legislature to vest in the township. The very existence of the township board, however, implies that it will be given powers by other statutes. We cannot presume that the legislature would do a useless thing. We find that the legislature contemplated the establishment of a body possessing certain powers of a township authorized under article 8, § 17, when it set forth the composition of the township board and that it is proper for us to consider the constitutionality of section 70 in that light.

Plaintiff further contends that the township board is not a basic legislative body and as such does not constitute a legislative body whose power would be

illegally delegated to a constitutional judicial officer, as it has no real basic legislative power to delegate but is more a special, semiministerial body.

It is true that the township board was held, in *People, ex rel. Le Roy,* v. *Hurlbut,* 24 Mich 44 (9 Am Rep 103), and *Hanslovsky* v. *Township of Leland,* 281 Mich 652, to be a board of special and limited jurisdiction. It has no power or authority by constitutional mandate; it derives its sole authority from the legislature, which is authorized to delegate certain powers to the township by the Constitution. *People, ex rel. Le Roy,* v. *Hurlbut, supra,* however, did not hold that a township board is not a legislative body but that the legislature may delegate any or none of its legislative power to a township board; that only as to such powers as are delegated can the township board exercise legislative power. The township board, possessing certain powers originally given to the legislature by the Constitution and properly delegated to the township board, is a legislative body to that extent.

In considering PA 1933 (Ex Sess), No 8,* relating to the liquor control commission, and particularly the provision therein to the effect that applications for the sale of intoxicants should be approved by the local legislative body, we held that the township board was the local legislative body of the township. *Scott* v. *Arcadia Township Board,* 268 Mich 170. Also, see *McCarthy* v. *Thomas Township Board,* 324 Mich 293. Further evidence as to the fact that the township board possesses legislative powers appears when we examine the statutes prescribing its powers and duties. Among others, CL 1948, § 41.201 (Stat Ann § 5.191), provides that a township board may employ a traffic officer and fix his compensation. CL 1948, § 41.444 (Stat Ann § 5.274),

* See CL 1948, § 436.1 *et seq.* (Stat Ann and Stat Ann 1949 Cum Supp § 18.971 *et seq.*).—REPORTER.

provides that the township board shall pass on the budget of the township park commission. CL 1948, § 125.281 (Stat Ann 1949 Rev § 5.2963 [11]), provides that the township board shall vote on the adoption of a zoning ordinance to be submitted to the electors and provide a penalty for violation. It may also (CL 1948, § 125.351 [Stat Ann 1949 Rev § 5.2973 (1)]) provide by ordinance for the uniform construction of buildings and fix the penalty for violation. The township board possesses no judicial duties; all of its duties are legislative or administrative in character.

We agree with defendant that the township board can in no sense be held to have any connection with the judicial department of the government and that it is vested with legislative, as well as certain administrative, powers which justices of the peace as judicial officers by the constitutional provisions hereinbefore referred to, may not exercise.

Article 7 of the Michigan Constitution provides in section 1 that the judicial powers of the State shall vest in the Supreme Court, circuit courts, probate courts, justices of the peace, and such other courts as the legislature may establish. Section 15 provides for the election in each organized township of 4 justices of the peace to serve for 4 years. Section 16 defines their jurisdiction, and section 18 provides that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions. In interpreting these provisions, we have held that the justice of the peace is vested with part of the judicial power of the State (*Holland* v. *Adams,* 269 Mich 371; *In re Sanderson,* 289 Mich 165) and in exercising his judicial powers in criminal cases he represents the State rather than the township (*People, ex rel. Royce,* v. *Goodwin,* 22 Mich 496; *Faulks* v. *People,* 39 Mich 200 (33 Am Rep 374); *People* v.

*De Meaux*, 194 Mich 18). We have also held that the judicial power conferred upon justices of the peace was in no manner reduced or modified by virtue of their constitutional appointment as conservators of the peace (*In re Sanderson, supra; In re Slattery*, 310 Mich 458). Unquestionably justices of the peace belong to the judicial department of the government.

Plaintiff contends, however, that in addition to their judicial duties, justices of the peace in Michigan may exercise other functions, among which are the duties vested in them by reason of their membership on township boards. He relies on section 16 which, after providing for the civil jurisdiction of justices, states:

"They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by law."

What was meant by "such duties?"

Defendant contends that the wording of section 16 extends only to additional judicial duties. That such duties exist is indicated by *O'Connell* v. *Menominee Bay Shore Lumber Co.*, 113 Mich 124, in which it was held permissible to give justices additional jurisdiction in certain trespass and conversion cases under the authority of section 16; and by *Village of Paw Paw* v. *Flook*, 214 Mich 486, in which it was held permissible to give justices the responsibility of summoning a jury in condemnation proceedings. There being other judicial duties not enumerated in section 16, it appears that the rule of *ejusdem generis* applies inasmuch as judicial duties are specifically mentioned and such inclusion by specific mention thereof excludes other types of duties not mentioned. See *Michigan Wolverine Student Co-Operative, Inc.*, v. *Wm. Goodyear & Co.*, 314 Mich 590. This is not a case where the

specific words which precede a general term embrace all objects of their class and the rule of *ejusdem generis* is held not to apply in order that the general term may be given a meaning differing from specific words, as was true in *Utica State Savings Bank* v. *Village of Oak Park,* 279 Mich 568.

Notwithstanding the written provisions of the Constitution and statutes, plaintiff contends that the history of the office of justice of the peace in Michigan and the other States of the United States shows that they have traditionally had other than merely judicial powers. He cites the laws of the Northwest Territory which gave the justices of the peace numerous nonjudicial powers, among which were the participation in township organization, and *People, ex rel. Le Roy,* v. *Hurlbut, supra,* in which it was stated:

"The Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which it is assumed."

However, the plain provisions of the Constitution are paramount, notwithstanding a custom which violates such provisions.

We are asked to look into the history of the Northwest Territory and other governments preceding or coexisting with our own. We do not believe such consideration can be controlling in the face of our own Constitution which limits the justices of the peace to judicial duties. That justices of the peace are also made conservators of the peace by article 7, § 18 of the Constitution, does not constitute the granting of nonjudicial authority to justices, but merely imposes upon them a function possessed by all judicial officers of the State of Michigan and is

limited to the constitutional power thus expressly given.

In *Robertson* v. *Baxter,* 57 Mich 127, we held:

"It has always been understood that in providing, as it does, for the organization and incorporation of townships, the Constitution dealt with them as recognized and ancient municipal bodies, the substantial character of which was intended to be perpetuated."

It is worthy of note, however, that the holding of the *Robertson Case* was concerned with an attempt of a township to extend its authority over drains without its jurisdiction and this Court held that the township jurisdiction had been limited traditionally to within its territorial limits. This Court did not concern itself with the question of separation of powers upon which there had been a clear constitutional mandate.

Plaintiff relies heavily on *State, ex rel. Patterson,* v. *Bates,* 96 Minn 110 (104 NW 709, 113 Am St Rep 612). Minnesota has adopted the theory that when duties of an ambiguous character are imposed upon a judicial officer any doubt will be resolved in favor of the validity of the statute creating such duties. However, the rule in Michigan is stated in *Civil Service Commission* v. *Auditor General,* 302 Mich 673, as follows:

"If there is any ambiguity the doubt should be resolved in favor of the traditional separation of governmental powers."

An examination of the history of Michigan Constitutional Debates is a clear indication that in Michigan the justices of the peace were intended to have judicial powers only. The 1835 Constitution did not clearly define the powers of justices, but in 1850 a proposal that the justices be made a part of the

township government was rejected by the Constitutional Convention. The proposed section had provided:

"There shall be elected annually on the first Monday of April, in each organized township, one supervisor, one township clerk, who shall be ex officio school inspector, one commissioner of highways, one township treasurer, one school inspector, not exceeding 4 constables and 1 overseer of highways for each highway district, in whom together with the justices of the peace shall be vested the township government to be defined and limited by the legislature."

The final provision, which was substantially carried over into the 1908 Constitution (article 8, § 18), omitted all references to the justices. That, in the face of such rejection, section 70, *supra,* was allowed to remain on the statute books in its present form, we can only attribute to inadvertence and possibly to the fact that up to the present time it did not become a subject of serious controversy. The question is squarely presented to us in the instant case.

We have held that the township board exercised legislative as well as ministerial and local functions. However, if we had held that the township board exercises only ministerial or administrative functions, we would conclude that it would not be permissible for a justice of the peace to serve thereon, as under Michigan law a justice of the peace is solely a judicial officer, with the same status as other constitutional judicial officers. *Local 170, Transport Workers Union of America,* v. *Genesee Circuit Judge,* 322 Mich 332.

The theory of the "modified" or "limited" doctrine of the separation of the powers of government was stated in Story's Constitutional Law (4th ed), p 380 *et seq.,* and quoted in *Local 321, State, County & Municipal Workers of America* v. *City of Dearborn, supra,* as follows (at p 677):

"When we speak of a separation of the 3 great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a *limited sense.* It is not meant to affirm that they must be kept wholly and entirely separate and distinct."

Plaintiff cites authority holding that the "modified" or "limited" view will find particular application to the local level of government, but we note that plaintiff has cited no Michigan cases to such effect. Indeed, as we have noted, this Court has rigidly stated the doctrine of absolute separation of powers on numerous occasions.

It is claimed that *Local 321, State, County & Municipal Workers of America* v. *City of Dearborn, supra,* is an exception but an examination of the facts of that case distinguishes it. The Court first reaffirmed the very important principle that the departments of the government must be kept separate but added, however, that when it is expressly provided in the Michigan Constitution or in the charter of the political unit in question that the 2 departments act together in a certain matter under certain conditions, then this is not a violation of that principle. A well-known example is that of the veto power of the executive. In the *Dearborn Case,* the city council gave to municipal workers a cost-of-living increase in pay without the consent or action of the city civil service board, with whom by charter (Dearborn's charter having been promulgated under the provisions of the home rule act) it was required to act. We properly held that the city council could not act alone.

Even assuming that a local government may be given authority to set up a governmental structure which in some respect may not strictly conform to the doctrine of separation, and that indeed this is done in the case of many local governments, the

instant case is not such a one. The organization of the township and that of the office of justice of the peace are directly under the purview of the legislature and the Constitution of the State and are subject to the provisions of the latter. The individual townships are given no power over the structure of their own governments; we are, instead, dealing with the exercise of legislative power delegated to them and which is subject to the provisions of the State Constitution.

It was held in the case of *Myers* v. *United States,* 272 US 52 (47 S Ct 21; 71 L ed 160) that while it is not possible wholly to avoid conflicts between the several departments of government, the Constitution should be expounded to blend the departments of government no more than it affirmatively requires. To a similar effect, see 11 Am Jur, § 182, p 880. We have not been shown any affirmative requirement that the justices of the peace so act on township boards; indeed the very existence of this controversy is an indication to the contrary. It is possible for the township justices to perform all of their judicial duties without any encroachment upon any department of the township government. As a minority on the township board, the justices would be exercising part of the legislative power on the board and thus are sitting unconstitutionally, but as a majority they might usurp all of the legislative power of the board.

We hold, therefore, that we do not have presented to us a case for the application of the "modified" or "limited" doctrine of separation of powers and that, in accordance with the main current of Michigan authority, the instant statute, insofar as it provides that justices of the peace be made members of township boards, is unconstitutional.

The trial judge held that section 70, *supra,* is unconstitutional for the reasons we have heretofore

given and he entered a decree to that effect. The decree is affirmed. The trial judge further found that there was no merit in other claims made by defendant. In view of our holding in favor of defendant on the main issue in the case, it is unnecessary to discuss claims made on cross appeal from the decree of the court disallowing additional claims made by defendant.

The decree may be entered herein affirming the trial judge in holding that section 70, *supra,* insofar as it provides for justices of the peace sitting as members of township boards, is in violation of and repugnant to the provisions of the Michigan Constitution and that the only legal members of the township board of Dearborn township are the supervisor, the township clerk, the township treasurer. No costs, a public question being presented.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

## ATTORNEY GENERAL *v.* GUY.

1. MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTER—CONSTITUTIONALITY—SUPREME COURT—ELECTION.

   The Supreme Court may determine the constitutionality of an amendment to a home-rule city charter but its propriety is a question for the voters of such city.

2. SAME — CHARTER AMENDMENT — EFFECTIVE DATE — MUNICIPAL JUDGES.

   Charter amendment substituting office of associate municipal judge for that of a municipal judge theretofore appointed was designed to take immediate effect upon adoption, where it provides that such associate municipal judge should hold office until the next municipal spring election rather than deferring its effective date until such election (Dearborn Charter, § 10.2, as amended in 1951).

3. SAME—MUNICIPAL JUDGES—CREATION AND ABOLITION OF OFFICE.

   The office of municipal judge is not a constitutional one but is created by amendment of the home-rule city charter pursuant to legislative authority provided by statute, can be legally abolished in the same manner and need not be abolished by constitutional amendment.

4. OFFICERS—ABOLITION OF OFFICE.

   Public offices may be abolished and no office holder has a contractual right thereto.

5. SAME—ABOLITION OF OFFICE—CONSTRUCTION OF CHARTER.

   It is unnecessary to use actual words of abolition or their equiv-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 37 Am Jur, Municipal Corporations § 103.
[2, 3, 11, 15] 30 Am Jur, Judges § 5.
[4, 5] 42 Am Jur, Public Officers §§ 11, 33.
[4, 5] Power to abolish or discontinue office. 4 ALR 205; 172 ALR 1366.
[7] 37 Am Jur, Municipal Corporations § 53.
[8] 30 Am Jur, Judges § 34.
[9] 30 Am Jur, Judges § 8.
[10] 14 Am Jur, Courts § 17.
[12] 37 Am Jur, Municipal Corporations § 231.
[16] 14 Am Jur, Costs § 91; 44 Am Jur, Quo Warranto § 122.

alent to eliminate or abolish a public office, when the only proper reading of the legislation, a charter amendment, as a whole, shows such purpose.

6. MUNICIPAL CORPORATIONS—CHARTER AMENDMENTS—ELECTIONS.

Voters on a lengthy charter amendment must be held to have been familiar with the terms thereof when they voted in strict accordance with the usual procedure for charter amendments of home-rule cities and abolished office of one municipal judge and substituted therefor an entirely different office pursuant to a different statute than that providing for other municipal judge whose office was continued without change except with some additional duties (CL 1948, §§ 117.28–117.33; § 730.101 *et seq.;* § 730.321 *et seq.;* Dearborn Charter, §§ 10.2, 10.10, 10.17, as amended in 1951).

7. CONSTITUTIONAL LAW—MUNICIPAL JUDGES—RECOMMENDATION TO COUNCIL—DELEGATION OF POWER.

Conferral by charter upon municipal judge of power to recommend to city council that associate municipal judge be engaged to sit an additional number of days to minimum prescribed by the charter did not constitute an illegal delegation of power since the right of recommendation is a normal part of the task of supervising the work of the court, the legislative authority involved being exercised solely by the city council (Dearborn Charter, § 10.10, as amended in 1951).

8. MUNICIPAL CORPORATIONS—CONSTRUCTION OF CHARTER—STATUTES—ASSOCIATE JUDGES.

Provision of home-rule city charter amendment, adopted pursuant to associate judges act, whereby the associate judge was to hold court "on direction of the municipal judge" was not contrary to the statute under which the amendment was adopted by permitting the full-time municipal judge to dictate to the part-time associate judge but merely a recognition of the administrative responsibility of the municipal judge in directing the details of the docket of the municipal court (CL 1948, § 730.321 *et seq.;* Dearborn Charter, § 10.10, as amended in 1951).

9. SAME—MUNICIPAL COURT—NUMBER OF JUDGES.

Neither the municipal court act nor the associate judges act requires that there be more than 1 municipal judge functioning full time, nor prevents an increase or decrease in the number of municipal judges in a municipality (CL 1948, § 730.101 *et seq.;* § 730.321 *et seq.*).

10. SAME—MUNICIPAL COURT—CHARTER AMENDMENT.
Changes in the structure of a municipal court for a home-rule city may be made by way of charter amendment, where the establishment of such a court is effected by way of charter amendment (CL 1948, § 730.101 *et seq.*).

11. SAME—JUDGES—ASSOCIATE JUDGES.
The number of full-time municipal judges may be reduced by charter amendment concurrently with the establishment of the new office of associate judge (CL 1948, § 730.101 *et seq.*; § 730.321 *et seq.*).

12. SAME—LEGISLATIVE BODY—APPOINTMENT OF OFFICERS.
Voters themselves may constitute the legislative body for purposes of appointment of city officials.

13. SAME—AMENDMENT OF CHARTER—APPOINTMENT OF OFFICERS.
The sovereign power of the people in a home-rule city to alter the charter implies power to provide for the effective functioning of the new government under the proposed alteration, by providing who should hold an office in event the charter amendment creating it is adopted (Dearborn Charter, § 10.2, as amended in 1951).

14. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ELECTION—CHARTER AMENDMENT—APPOINTMENT OF INCUMBENT TO INTERIM POSITION BY VOTERS.
The selection of an appointed, incumbent municipal judge by the voters of a home-rule city as an interim appointee to the office of associate judge at election at which charter was amended to abolish such office of 1 municipal judge and creating the office of associate judge was not an election within the meaning of the general election laws, hence, it is unnecessary to consider contention that passage of the charter amendment was in violation of State election laws when it attempted to name such incumbent to the interim position (Dearborn Charter, § 10.2, as amended in 1951).

15. QUO WARRANTO—MUNICIPAL JUDGE—ABOLISHED OFFICE.
Defendant in quo warranto proceedings, brought by the attorney general, who had been municipal judge in a home-rule city, occupying an office lawfully abolished by charter amendment, *held*, without right to office of municipal judge.

16. COSTS—QUO WARRANTO—PUBLIC QUESTION—MUNICIPAL JUDGE.
No costs are allowed in quo warranto proceedings to try right of defendant to office of municipal judge, a public question being involved.

Quo Warranto by Frank G. Millard, Attorney General, to test the right of Ralph B. Guy to the office of municipal judge of the City of Dearborn. Submitted June 6, 1952. (Docket No. 45, Calendar No. 45,413.) Judgment for plaintiff October 6, 1952.

*Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General (*Glenn M. Coulter,* of counsel), for plaintiff.

*Dale H. Fillmore,* Corporation Counsel, *Duane Dunick,* Deputy Corporation Counsel, and *Frank C. McCann* and *Frederick G. Weideman,* Assistants Corporation Counsel (*Robert E. Childs,* of counsel), for defendants.

BUTZEL, J. Frank G. Millard, attorney general of the State of Michigan, plaintiff, brings original quo warranto proceedings in this Court to determine the right of Ralph B. Guy, defendant, to the occupation of the office of municipal judge in the city of Dearborn, Wayne county. The following facts are conceded. The city of Dearborn has been organized under the home-rule act (PA 1909, No 279, as amended [CL 1948, § 117.1 *et seq.* (Stat Ann 1949 Rev § 5.2071 *et seq.*)]) since January 9, 1929. A new charter was adopted for the city in 1942. Chapter 10 thereof created the judicial department of the city of Dearborn and provided that there should be 2 justices of the peace having certain powers and administrative responsibilities in accordance with sections 28 through 33 of the home-rule act (CL 1948, §§ 117.28–117.33 [Stat Ann 1949 Rev §§ 5.2107–5.2113]).

In 1945 by charter amendment the judicial department was brought under the municipal court act (PA 1933, No 269 [CL 1948, § 730.101 *et seq.* (Stat Ann and Stat Ann 1951 Cum Supp § 27.3831 *et seq.*)]). In accordance therewith, there were created 2 mu-

nicipal judges in place of the previous justices of the peace and thereafter 2 judges have acted as municipal court judges of the municipal court of Dearborn.

An initiatory petition setting forth the newly proposed amendments to sections 10.2, 10.10 and 10.17 of chapter 10 of the charter, as amended in 1945, was circulated in July, 1951, and after securing the opinion of the attorney general of the State of Michigan that the amendments were proper they were placed on the ballot. The amendment was approved by the electorate. For purposes of clarity we set out such sections in full. As first amended at the 1945 election, they read as follows:

"Sec. 10.2. At the regular municipal election in the year 1945 and every 4 years thereafter, there shall be elected 2 municipal judges whose terms of office shall begin on the 4th day of July following their election, and who shall hold office for 4 years; provided, however, that the justices of the peace heretofore elected or appointed, and now holding office, shall be the municipal judges of said court and shall hold office for the remainder of the terms for which they were respectively elected or appointed. * * *

"Sec. 10.10. Until otherwise changed by a charter amendment the municipal judges shall each receive a salary of $6,500 per annum, and shall be required to devote their entire time during office hours to the duties of their offices. The salaries herein provided for the municipal judges shall be in lieu of all fees, costs and charges to which said judges would be entitled but for the provisions of this section, except fees for the performance of marriage ceremonies, and for administering oaths in matters not connected with suits or proceedings in the municipal court in said city. * * *

"Sec. 10.17. The words, 'justice of the peace,' and 'justices of the peace,' wherever the same may appear in other chapters of this charter shall be con-

strued to mean 'municipal judge,' or 'municipal judges,' as the case may be."

The amendments enacted in 1951 amended these sections so as to provide as follows:

"Sec. 10.2. At the regular municipal election in the year 1955 and every 6 years thereafter, there shall be elected 1 municipal judge and 1 associate municipal judge whose terms of office shall begin on the fourth day of July following their election, and who shall hold office for 6 years; provided, however, that the municipal judge heretofore elected and now holding office shall be the municipal judge and shall hold office for the remainder of the term for which he was elected; and provided moreover that the municipal judge heretofore appointed and now holding office shall be the associate municipal judge and shall hold office as such until an associate municipal judge is elected in the spring election held in the city of Dearborn in the year 1953. The associate municipal judge so elected in the said spring election in 1953 shall immediately assume office following his election, and shall hold office until the fourth of July, 1956.

"Sec. 10.10. Until otherwise changed by a charter amendment, the municipal judge shall receive a salary of $6,500 per annum, and shall be required to devote his entire time during office hours to the duties of his office. The associate municipal judge shall receive $1,000 per annum and such additional compensation as the council may by ordinance provide and shall be required to devote not less than 50 full days or 100 half days per year to the duties of his office. If the work of the court shall require, upon recommendation of the municipal judge, the council shall provide that the associate municipal judge shall sit any number of additional days, or half days, for which he shall receive such compensation as the council may by ordinance or resolution provide. The associate municipal judge shall hear all cases in which the municipal judge is disqualified and shall

hold court in the absence, disability or on direction of the municipal judge.

"The compensation provided for the municipal judge and the associate municipal judge shall be in lieu of all fees, costs, and charges to which said judges would otherwise be entitled, except fees for the performance of marriage ceremonies, and for administering oaths in matters not connected with suits or proceedings in said city.

"Sec. 10.17. Whenever in this chapter the term 'municipal judges' is used, it shall include both the municipal judge and the associate municipal judge. In all his official acts and in all court proceedings, the associate municipal judge shall be designated as 'municipal judge,' the word 'associate' being herein used to distinguish between the municipal judge required to devote full time and the one required to devote partial time to the duties of his office.

"Whenever the words 'justice of the peace' and 'justices of the peace' may appear in other chapters of this charter, they shall be construed to mean 'municipal judge' or 'municipal judges' as the case may be."

Messrs. George A. Belding and George T. Martin were elected for 6-year terms as municipal judges of Dearborn, such terms to begin July 4, 1950, and to expire July 4, 1956. On May 15, 1951, with 5 years left of his term, Judge Belding resigned. On May 18, 1951, defendant Ralph B. Guy was appointed by the city council to fill the vacancy. This appointment was made pursuant to the municipal court act, *supra,* section 2, being CL 1948, § 730.102 (Stat Ann 1951 Cum Supp § 27.3832), under which his appointment was to run until July 4, 1953, at which time the next regular spring election's successful candidate took office. The person who won that spring election would then serve until July 4, 1956, at which time the election of a judge and associate judge would be held in the usual manner. The reference in the amend-

ment to the "municipal judge heretofore elected and now holding office" is thus a reference to Judge Martin; and the reference to the "municipal judge heretofore appointed" is a reference to defendant. The effect of the amendment thus would be to constitute defendant the new associate judge, with the duties and salary as set forth in the amendment of 1951.

It is agreed that defendant, upon the advice of the corporation counsel of the city of Dearborn and although the amendment distinctly states it was an "economy" measure, has refused to surrender his position, title, prerogatives and duties as a municipal judge and has likewise failed to assume the office of associate judge in accordance with the provisions of the amended charter.

Counsel for defendant dispute the motives and the wisdom of the amendment in question. Suffice it for us to say that our determination must go only to its constitutionality; its propriety is a question for the voters of Dearborn.

Defendant contends that he is properly entitled to the office of municipal judge as the questioned charter amendments are either invalid insofar as they purport to take effect before July 1, 1953, or fatally defective because of other alleged defects therein. He contends that the amendment, if construed to take effect immediately, has the effect of reducing the salary and term of a municipal judge contrary to the Michigan Constitution and the home-rule cities act; that the amendments represent an illegal delegation of power to the remaining municipal judge; that the associate judges act (PA 1947, No 109 [CL 1948, § 730.321 *et seq.* (Stat Ann 1951 Cum Supp § 27.4071 *et seq.*)]) under the authority of which the amendment was framed does not permit a reduction in the number of full-time municipal judges; that the selection by the voters of a specified individual for an interim position was improper as

the only means provided by statute was appointment; and that the method of selection of the associate judge was improper being contrary in several respects to the general election laws.

Defendant contends that the questioned amendment has the effect of changing the salary and term of a public officer contrary to the Constitution of Michigan and to the home-rule act, under which Dearborn is organized, if it be held to take effect immediately upon passage of the amendment and before the spring election at which his term would have expired.

Article 16, § 3, Constitution of 1908, reads as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employee or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

The home-rule act, section 5 (CL 1948, § 117.5 [Stat Ann 1949 Rev § 5.2084]), also provides:

"No city shall have power * * *

"(d) To change the salary or emoluments of any public official after his election or appointment or during his term of office; nor shall the term of any public official be shortened or extended beyond the period for which he was elected or appointed, unless he resign or be removed for cause, where such office is held for a fixed term."

We believe that an intent that the charter amendment is to take immediate effect may be gleaned from that portion of the amendment which provides:

"The municipal judge *heretofore* appointed and *now* holding office shall be the associate municipal judge and shall hold office as such until an associate

municipal judge is elected in the spring election held in the city of Dearborn in the year 1953." (Italics ours.)

If the amendment took immediate effect, therefore, and did not abolish the office of municipal judge substituting therefor a new office, that of associate judge, defendant claims the Constitution and statute have been violated.

The office of municipal judge is not a constitutional one. It was created by charter amendment pursuant to provisions of the statutes of Michigan, under legislative authority, and can be legally abolished in the same manner. It need not be abolished by a constitutional amendment. This seems not to be disputed by defendant. Counsel also agree that public offices may be abolished and that no office holder has a contractual right thereto. *Sprister* v. *City of Sturgis*, 242 Mich 68. It is not necessary to use actual words of abolition or their equivalent to eliminate or abolish a public office when the only proper reading of the amendment as a whole shows such purpose. The prime issue thus is whether the office of municipal judge held by defendant was abolished by such amendment or whether it constituted merely a reduction in the salary, term, duties and authority of defendant's office.

The offices of municipal judge and associate municipal judge, even though it may be claimed carry the same jurisdiction and title for purposes of court procedure, are not the same. The associate judge works only part time and is permitted to practice law on the side; the municipal judge is required to devote his full time to the office and may not practice law. The associate judge is subject to the authority of the municipal judge, who has full-time responsibility for the conduct of the municipal court. The office of associate municipal judge is established un-

der the associate judges act; the office of municipal judge under the municipal court act. Defendant contends that the intent of the amendment is not clear and claims that the proposition submitted to the voters on the ballot was somewhat ambiguous. However, all voters must be held to have been familiar with the terms of the somewhat lengthy charter amendments when they voted in strict accordance with the usual procedure for charter amendments. The amendments themselves make it clear and not ambiguous that an entirely different office was contemplated for defendant and that Judge Martin was to continue in his office without change, except with some additional authority.

We find that the amendment provided for a bona fide abolition of the office of one municipal judge to take effect immediately upon the passage thereof.

The amended section 10.10 provides partly as follows:

"If the work of the court shall require, upon the recommendation of the municipal judge, the council shall provide that the associate municipal judge shall sit any number of additional days, or half days, for which he shall receive such compensation as the council may by ordinance or resolution provide. The associate municipal judge shall hear all cases in which the municipal judge is disqualified, and shall hold court in the absence, disability or on direction of the municipal judge."

Defendant contends that the foregoing provision concerning the recommendations of the municipal judge makes them a condition precedent to legislative action and is, therefore, invalid as it represents a delegation of power of the city budget to a person not the legislative body provided for under the home-rule act. However, we do not find that there is any illegal delegation of power. As a presiding judge,

the municipal judge would normally be given the right of recommendation as an additional means of supervising the work of the court. The council of the city of Dearborn is given the sole power to provide compensation for extra work and is thus vested with the legislative authority and has the power to act upon the recommendation as it sees fit.

Defendant also contends that the words "on direction" make it possible for the municipal judge to dictate to his colleague and as such are contrary to section 6 of the associate judges act (CL 1948, § 730.326 [Stat Ann 1951 Cum Supp § 27.4076]) which reads:

"The compensation of associate judges, the time and manner of payment of same, the funds from which same shall be paid and the time or times they shall be required to devote to the duties of the office, may be determined either by charter or ordinance."

The administrative responsibility of the municipal judge is such as to properly permit him to direct the details of the docket of the municipal court. The charter sets out the compensation and duties of the associate judge extensively but the exact handling and assignment of cases is an administrative responsibility which by its nature must be delegated. It would be a most unnatural relationship if the associate judge should take no instructions or directions from the full-time municipal judge who has the duty and responsibility of supervising the work of the court.

Defendant contends that the associate judges act does not permit a reduction in the number of full-time municipal judges, only an addition thereto. However, an examination of the statute reveals no requirement that there be more than one municipal judge functioning full time, for section 1 thereof (CL 1948, § 730.321 [Stat Ann 1951 Cum Supp § 27.4071]) provides:

"Any city having a justice or municipal court, or any court in which the justice or judge, or justices or judges, as the case may be * * * may by charter or by ordinance provide for the election of 1 or more associate justices or associate judges of such court."

Neither is there embodied in the associate judges act any prohibition against the abolishment of the office of one or more full-time municipal judges. It in no way limits the right of the city under the home-rule act, section 21 thereof, to amend its charter by initiatory petition of the electors and approved by a majority adoption thereof. In the municipal court act it is provided that a municipality may establish a municipal court by charter amendment, and it follows that changes in the structure of the municipal court are also made by charter amendment. Nothing in the municipal court act prevents an increase or decrease in the number of municipal judges in a municipality although its provisions may first be brought to bear only in a municipality with 2 justices.

We conclude, therefore, that neither the associate judges act nor the municipal court act can be construed to limit the right of the city to reduce the number of its full-time judges, whether or not this is done concurrently with the establishment of the new office of associate judge.

Defendant contends that the election of an individual (in this case, himself) to an interim position was improper as the municipal court act and associate justices act provide for the appointment of an individual to an interim position by the city council and by no other. The associate judges act provides:

"Sec. 5. In any city having 1 judge, or having more than 1 judge all of whom are elected at the same time, the associates shall be elected at the same time as the judge or judges." (CL 1948, § 730.325 [Stat Ann 1951 Cum Supp § 27.4075])

"Sec. 7. The legislative body of any city whose charter is amended to provide for the election of 1 or more associate judges as provided for in this act or which shall by ordinance provide therefor shall appoint an associate judge or judges to serve until such are elected." (CL 1948, § 730.327 [Stat Ann 1951 Cum Supp § 27.4077])

The municipal court act provides:

"Sec. 2. * * * Whenever a vacancy shall occur in the office of any judge of any such court by death, resignation, removal from office or from any other cause, such vacancy shall be filled by appointment by the legislative body of such city. Each judge so appointed shall assume office immediately following his appointment, and shall hold the same until his successor has been elected and has qualified. Successors to any judge or judges so appointed shall be nominated and elected at the next spring election held in such city following such appointment, and such successor or successors shall hold office until the expiration of the term to which such judge or judges removed from office by death, resignation, or otherwise, was elected." (CL 1948, § 730.102 [Stat Ann 1951 Cum Supp § 27.3832])

"Sec. 3. The qualifications, term of office, time and manner of election * * * shall be governed by the provisions of existing laws relating to justices of the peace in such cities." (CL 1948, § 730.103 [Stat Ann 1951 Cum Supp § 27.3833])

The term of Judge Martin, the remaining municipal judge, expires July 4, 1956. Applying the provisions of the municipal court act to the associate judges act it appears that it was contemplated that first, the associate judge be appointed; that at the next spring election an associate judge should be elected for the remainder of the term; and that in 1956 an associate judge should be elected to a full term contemporaneously with the new term of the

full-term municipal judge. Was this procedure followed by this charter amendment? Defendant argues that the "legislative body of such city" can only mean the city council, and that the choice by the electors was therefore invalid.

In certain instances the voters themselves may constitute the legislative body for purposes of appointment of city officials. In *People, ex rel. Brown,* v. *Parsons,* 200 Mich 39, we referred to the electorate of the city of Lansing as the "legislative body" in a construction of the charter thereof. In *Lewicki* v. *Matulewicz,* 321 Mich 388, appointment by the voters through the medium of a system of civil service was authorized instead of appointment under provisions nonapplicable to a home-rule city. In *Streat* v. *Vermilya,* 268 Mich 1, we considered an attempt to enjoin the election of city officers of Flint under a proposed charter at a special election. The intent was to create city officers under the proposed charter and at the same time to provide who should fill such city offices. We held (at page 7):

"In the absence of constitutional prohibition or legislative limitation it was the right and the duty of the electors of the city to provide for the election of officers under the proposed charter to take office in case of its adoption. Recourse is had to the electors of the city.

"'According to the theory of our government, the sovereign power is in the people.' *In re Spangler,* 11 Mich 298, 308. * * *

"As a necessary incident to the broad powers expressly granted by the Constitution and the home-rule act for cities to the electors of a city, the electors of the city of Flint have the implied power to provide for the effective functioning of the new government under the proposed charter, if adopted, because the greater power necessarily includes the lesser."

We believe that it was within the powers of the voters to make the appointment directly instead of doing so through their representatives, the city council, in this particular instance. In creating the new office of associate municipal judge, the electorate of Dearborn, like that of Flint in the *Streat Case* had the right to exercise their sovereign power by providing for the person who should hold the office in the event the charter amendment should be adopted.

The selection of Judge Guy as an interim appointee to the office of associate judge by the voters of Dearborn was not an election within the meaning of the general election laws. Consequently, we need not consider defendant's contention that the passage of the charter amendment was in violation of State election laws when it attempted to name Judge Guy to the interim position.

We hold that defendant has no right to the office of municipal judge and that a judgment will be entered accordingly. No costs, a public question being involved.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

*In re* ENDERS.

1. CRIMINAL LAW—SPECIAL TERM OF COURT—JURISDICTION—NONJURY CASE.

   Trial court, sitting in Grand Traverse county in a special session of the circuit court of Antrim county, which 2 counties were part of a judicial circuit containing more than 3 counties, had jurisdiction to arraign a man accused of breaking and entering in the nighttime and of being a second offender in Antrim county, accept his pleas of guilty and impose sentence, in view of statute authorizing holding of special terms of court for transaction of judicial business arising in another county of the same circuit but not involving determination by a jury (CL 1948, §§ 691.231, 750.110, 769.10 *et seq.*).

2. HABEAS CORPUS—QUESTIONS REVIEWABLE—REVIEW OF DENIAL OF MOTION TO VACATE SENTENCE AND FOR NEW TRIAL.

   The review of the denial of a motion to vacate sentence and for new trial is not by way of habeas corpus, as such writ does not function as a writ of error.

3. SAME—RECORD.

   Alleged grounds for release, claimed by petitioner for habeas corpus, *held,* not supported by record in habeas corpus and ancillary writ of certiorari, the charges that prior to trial he had been held incommunicado, threatened with being charged with being a fourth offender, promised leniency, not informed of his rights, denied counsel, and not informed of right to jury trial having been refuted by officers familiar with entire circumstances surrounding petitioner's arrest, detention, confession, and pleas of guilty in open court and showing in detail what was said and what occurred.

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Criminal Law § 234.
[2] 25 Am Jur, Habeas Corpus § 28.
[3] 25 Am Jur, Habeas Corpus § 49.

Habeas corpus by Charles W. Enders with accompanying certiorari to Antrim circuit court to obtain his release from State prison of southern Michigan. Submitted June 27, 1952. (Calendar No. 45,291.) Writ dismissed October 6, 1952.

*Charles W. Enders, in pro. per.*

*Frank G. Millard,* Attorney General, and *Harry F. Cook,* Prosecuting Attorney, for the people.

BOYLES, J. This petitioner, now confined in the State prison for southern Michigan in Jackson county, seeks habeas corpus and ancillary certiorari to obtain his release from such prison. He was arrested on a warrant charging breaking and entering in the nighttime [1] at Elk Rapids, in Antrim county, on September 16, 1946, and had an examination before a magistrate in that county resulting in being bound over to the circuit court for said county for trial. The prosecuting attorney filed an information in the Antrim county circuit court charging said offense, and also filed an information charging petitioner as a second offender under the habitual criminal act,[2] alleging a prior conviction in Kent county for robbery armed. One Lundberg signed a written confession that he and this petitioner together had broken into and entered 8 buildings in northern Michigan and above the Straits while on an alleged fishing trip which started September 13th and ended September 15th or 16th by their breaking into and entering a garage in Elk Rapids, Antrim county, with intent to commit larceny as alleged in the information filed. Petitioner signed an appended written statement in the presence of a captain of the State police and 2 of

[1] See CL 1948, § 750.110 (Stat Ann § 28.305).—REPORTER.

[2] See CL 1948, § 769.10 *et seq.* (Stat Ann § 28.1082 *et seq.*).—REPORTER.

petitioner's relatives, agreeing to the truthfulness of Lundberg's confession, after having read it; adding that he had carried a loaded gun into the jail where he was then confined and concealed it under his pillow. On September 26, 1946, he was arraigned on said charge of breaking and entering, at a special session of the circuit court in Grand Traverse county, in the same judicial circuit with Antrim county. The record returned to us in response to our writ of certiorari to the circuit court contains a full transcript of what occurred at said arraignment. It shows that he stated that he understood the charge, that there was nothing in connection with it that he desired to have explained to him by counsel or anyone else before he entered a plea, that there was no one he wished to talk to concerning his rights before pleading, that he fully understood the charge and its seriousness, and that thereafter he pleaded guilty. He admitted in open court that he and Lundberg were together when the crime was committed and, in answer to questions by the court, detailed the circumstances of the breaking and entering, admitted that they stole 6 tires from the garage, and also gave, in detail, the circumstances of his arrest immediately afterward by officers who (he said) were "a bit too hot" on his trail. He said that he was 26 years old, that there was nothing he cared to discuss privately with the court, admitted he was on parole from Kent county at the time, said in open court that no promises, inducements or threats had been made to him, and admitted his previous conviction and sentence for robbery armed and his unexpired parole. The court thereupon accepted his plea of guilty to the charge of breaking and entering in Antrim county and then he was arraigned on the supplemental information under the habitual criminal act. It was read in open court by the prosecutor and, in answer to questions, petitioner said he understood the law

applying to the supplemental information, admitted his previous arrest, conviction and sentence for the felony therein described, that he was the same person therein described, admitted his conviction in Kent county for robbery armed, was advised by the court that he was entitled to the advice of counsel or anyone else he desired to talk to, and he said he did not desire it, or to talk to anyone. The court explained he was entitled to have a trial before a jury, petitioner said that he understood that, and did not desire it, and thereupon he pleaded guilty to the supplemental information. He admitted he understood that it was the court's duty to sentence him under the habitual criminal law as a second offender, that the penalty would be greater than for a first offense, that no promises or inducements had been made to him by any police officer or anyone else to influence his action, again affirmed his previous statements as to the truth of the written confession made by Lundberg, said that all the statements therein were true, whereupon the court accepted his plea of guilty under the supplemental information. Later in the same day, after again admitting in open court the truth of the statements that he had previously made, including affirming the truth of the confession by Lundberg, he was sentenced to be confined in the southern Michigan prison for not less than 15 nor more than 22 1/2 years. These proceedings took place at a special session in open court in Grand Traverse county as hereinbefore noted.

The return to our writ of certiorari shows that on September 26, 1946, the circuit judge for said judicial district presided over said special session of the circuit court at Traverse City, in Grand Traverse county, which was in the same judicial circuit with Antrim county, that the proceedings hereinbefore detailed were had before the circuit judge of said judicial circuit in Grand Traverse county and that

said circuit judge there accepted petitioner's pleas of guilty and imposed the sentence. The transcript also shows that on January 5, 1950, the sentencing judge had denied his petition filed in the circuit court for Antrim county for habeas corpus and also for leave to file a motion for a new trial.

Petitioner now seeks release on the ground that said proceedings were had before the circuit judge of said judicial circuit in Grand Traverse county, instead of in Antrim county where the offense was committed. The court had statutory jurisdiction to hold such proceedings in Grand Traverse county to hold the arraignment and accept the pleas of guilty and impose sentence there, acting in a special session of the court in Grand Traverse county, said judicial circuit then consisting of more than 3 counties. CL 1948, § 691.231 (Stat Ann § 27.561); *In re Joslin, ante,* 627.

The other grounds on which petitioner seeks release on habeas corpus are that following his arrest he was held incommunicado, threatened with being charged with being a fourth offender, promised leniency, not informed of his rights, denied counsel or having been informed that he was entitled to a jury trial. The only proof presented by petitioner to support these claims rests in his own allegations, supported only by his ambiguous affidavit in which he states that he had "checked and examined the records and files of this cause, * * * upon the showings of said examination that he believes the foregoing petition, by him submitted, to be good and meritorious," and "that the notarization of this, his affidavit in support of his petition for writ of habeas corpus, shall also stand for and cover, his affidavit of proof of filing praecipe, affidavit of *ad subjiciendum,* affidavit of proof of service, statement of facts and all the documents of this cause." His barren unsupported assertions are refuted by the affidavits

of a captain and a sergeant of the State police who were present, personally familiar with the entire circumstances surrounding petitioner's arrest, detention, confession, and pleas of guilty in open court, which show in detail what was said and what occurred, and fully refute petitioner's charges; which affidavits appear in the record as a part of the answer filed here to this petition for habeas corpus. In addition, the record certified here in response to certiorari contains a transcript of the entire proceedings in open court. It shows that petitioner was not held incommunicado but, on the contrary, was allowed visitation by 2 of his relatives, who were present at the time he freely admitted the truth of Lundberg's confession and made his own additions thereto.

We might well rely solely on the well-established law that habeas corpus will not be allowed to function as a writ of error, and that petitioner's remedy would be to file here an application for leave to appeal from the denial of his motion filed in the trial court to vacate his sentence and for a new trial. See *In re Joslin, supra.* However, we have carefully examined the entire record submitted here and find no support in fact or law for petitioner's alleged grounds on which he bases his petition here for release.

The petition is denied and the writ dismissed.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, and REID, JJ., concurred.

The late Chief Justice NORTH did not sit.

# INDEX.


ABANDONMENT—See CERTIORARI; DEDICATION (1–3, 6–9).

ABNORMAL SEXUAL BEHAVIOR—See PARDON (3, 4).

ABOLITION OF OFFICE—See MUNICIPAL CORPORATIONS (11, 12); OFFICERS (8, 9); QUO WARRANTO (7).

ABSENCE—See HABEAS CORPUS (5).

ABSTRACT OF TITLE—See VENDOR AND PURCHASER (1).

ABUSE OF DISCRETION—See OFFICERS (1, 2); RECEIVERS (8).

ABUSE OF PROCESS—See JUDGMENT (2).

ACCEPTANCE—See DEDICATION (4); DEEDS (11); LANDLORD AND TENANT (5); VENDOR AND PURCHASER (1).

ACCIDENT—See AUTOMOBILES (5, 8, 11, 13); RAILROADS (6); WORKMEN'S COMPENSATION (5).

ACCOUNTANT—See DIVORCE (22).

ACCOUNTING.

1. Decree entered by trial court in suit for accounting between partners *held*, not unfair to appellant plaintiff nor inequitable on the basis of facts established by competent proofs, where books of account and other data were unsatisfactory for purposes of audit. *Kelso* v. *Coburn*, 44.
2. Payments shown to have been made to plaintiff in suit for accounting *held*, to have been such that Supreme Court is unable to say they did not fully discharge defendant's obligation to her. *Flood* v. *Welsh*, 583.
3. Evidence in suit for accounting failed to show plaintiff had been damaged as the result of misrepresentation or fraud on part of defendant, if there was such. *Id.* 584.

See APPEAL AND ERROR (5, 17, 38); CORPORATIONS (10); COSTS (4); EXECUTORS AND ADMINISTRATORS (3); FRAUD (10); PARTNERSHIP (1, 4); RECEIVERS (2, 6); UNEMPLOYMENT COMPENSATION (6, 9); WITNESSES.

ACQUIESCENCE—See ADVERSE POSSESSION (1); CONSTITUTIONAL LAW (3); LANDLORD AND TENANT (6); STATUTES (10).

ACTION.

1. Whether or not national banks can assert Federal immunity from State sales and excise taxes, regardless of whether or

ACTION—Continued.

not the legal incidence of the tax falls upon such a bank is a justiciable question determinable under the declaratory judgment act, since there is an actual controversy as to whether there is or is not immunity from the economic burden of the tax (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 691.501 *et seq.*). *National Bank of Detroit* v. *Department of Revenue*, 133.

2. Issues in a garnishment proceeding are not proper matters for decision on a motion to dismiss principal case wherein the court has jurisdiction *in personam* (CL 1948, § 628.11). *Nelson* v. *McCormick*, 387.

See APPEAL AND ERROR (39); JUDGMENT (9); STATES (1, 3, 4).

ACTUAL CONTROVERSY—See ACTION (1).

ADEQUACY OF REMEDY AT LAW—See EQUITY (3); SPECIFIC PERFORMANCE (5).

ADJUSTMENT OF CLAIMS—See COMMERCE (2).

ADMISSIONS—See BOUNDARIES; REFORMATION OF INSTRUMENTS (4).

ADVERSE POSSESSION.

1. Mere recognition of and acquiescence in the wrong line for 15 years by defendant in ejectment action is insufficient to establish title by adverse possession of disputed strip, where there is no such showing as relates to plaintiff and predecessor record title holders. *Hayward* v. *Marker*, 659.
2. Inclusion of disputed strip of rough, undeveloped and tree- and brush-covered lake-shore land within area staked out as defendant's plat, coupled with acts of planting trees and flowers, trimming and cutting dead branches, holding picnics, shoring up of lake bank at places, building of road to a building site, payment of taxes for more than 15 years *held*, sufficient evidence upon which to base finding that defendant had acquired title thereto by adverse possession, since it was visible, open, notorious and distinct and presumably hostile. *Id.*

AFFIDAVITS—See APPEAL AND ERROR (23, 24, 37); EVIDENCE (14); JUDGES (4); JUDGMENT (1, 11, 12).

AFFIRMATIVE DEFENSES—See APPEAL AND ERROR (28); FRAUDS, STATUTE OF (1).

AGE—See DIVORCE (12).

AGREEMENT TO LEAVE PROPERTY—See CONTRACTS (6).

AIDING AND ABETTING—See CRIMINAL LAW (8).

AIRPLANE PARTS—See CORPORATIONS (3, 4).

ALIMONY—See CONSPIRACY (4); DIVORCE (1, 9, 11, 18, 22, 25, 27, 28); RECEIVERS (7, 8).

AMBIGUITY—See MUNICIPAL CORPORATIONS (1); STATUTES (10, 11); TORTS (4).

AMBULANCES—See AUTOMOBILES (15, 16).

AMENDMENTS—See APPEAL AND ERROR (45); COSTS (8, 14); CRIMINAL LAW (17); ESCAPE (3); INDICTMENT AND INFORMATION (2); JUDGES (5); MUNICIPAL CORPORATIONS (6–13, 15, 16, 18); OFFICERS (9); QUO WARRANTO (6, 7); STATES (8, 11); STATUTES (5).

AMPUTATION—See WORKMEN'S COMPENSATION (4).

AND—See DEEDS (3).

ANIMALS—See APPEAL AND ERROR (25); FRAUDS, STATUTE OF (2).

ANNEXATION—See COSTS (5); SCHOOLS AND SCHOOL DISTRICTS (1, 3).

ANTRIM COUNTY—See CRIMINAL LAW (20).

APPARENT DANGER—See RAILROADS (5).

APPEAL AND ERROR.

1. The evidence must be construed in the light most favorable to plaintiff on defendant's appeal from denial of its motions for directed verdict and for judgment notwithstanding the verdict. *Reynolds* v. *Great American Insurance Company of New York*, 1.
2. Question raised by motion to dismiss appeal from order dismissing writ of garnishment because of plaintiff's failure to file a bond is not moot, where subsequent to such order the principal defendant proceeded to judgment against the garnishee defendant but latter has an appeal pending from judgment against him, hence evidently still has possession of the money (CL 1948, § 650.21). *Beyerlein* v. *Ashburn*, 13.
3. The testimony and legitimate inferences therefrom must be construed as favorably to plaintiff as is reasonably possible, where plaintiff appeals from directed verdict for defendant. *Knoor* v. *Borr*, 30.
4. Inconsistencies or contradictory statements in the testimony of party against whom verdict was directed do not prevent application as to rule requiring interpretation of testimony most favorably toward such party. *Id.*
5. Failure of officer to comply with statute as to posting of notices of sale of real property in 3 public places in township where premises were situated, pursuant to order of court to receiver in suit for accounting between partners, will not be assumed to have come to knowledge of purchaser at the sale and where such purchaser is not shown to have had notice of such omission and plaintiff fails to show in what way he has been prejudiced, such sale is not disturbed (CL 1948, §§ 623.85, 623.90). *Kelso* v. *Coburn*, 45.
6. Whether or not trial court was in error in excluding testimony of a defendant as incompetent because equally within knowledge of deceased partner of plaintiff-appellant is not passed upon by Supreme Court on appeal, where such matter

APPEAL AND ERROR—Continued.

is not referred to in appellant's statement of reasons and grounds for appeal (CL 1948, § 617.65). *Id.*

7. The Supreme Court does not reverse judgment in a nonjury case, based on findings of fact by the trial court, unless the evidence clearly preponderates in the opposite direction. *Stewart* v. *Napuche*, 76.

8. The Supreme Court does not reverse in a nonjury case wherein the controlling issue is one of fact, unless the evidence clearly preponderates in the opposite direction. *Allen* v. *Grand Trunk Western Railroad Company*, 105.

9. Contention that since plaintiff national bank is a Federal instrumentality the imposition of a State sales tax upon purchases and sales of tangible personal property made by it is in conflict with its Federal statutory and constitutional immunity is not discussed, where not presented on appeal (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272). *National Bank of Detroit* v. *Department of Revenue*, 132.

10. Material allegations in a bill of complaint must be taken as true on appeal from dismissal of bill on motion. *Chapel* v. *School District No. 8, Fractional, Parma Township, Jackson County*, 176.

11. Reference by witness in trial of personal injury case that person in room of her injured son, the plaintiff, was "from an insurance" *held*, prejudicial but not reversible error, where remarks of court in presence of jury clearly indicate such remark was improper but court made no finding of bad faith on the part of counsel, and it does not appear that the matter of insurance was referred to in the instructions or that a request to instruct the jury was made; hence denial of motion for mistrial, instantly made, and later motion for new trial because of such occurrence, was proper. *Watroba* v. *City of Detroit*, 183.

12. Claim that defendant corporate lessee of plaintiffs had violated lease which plaintiffs sought not to renew in accordance with provisions therefor, made for the first time on appeal, is not considered by the Supreme Court as a case will not be reviewed in the Supreme Court on a theory different from that on which it was tried in the trial court. *Dwelley* v. *Tom McDonnell, Inc.*, 229.

13. Whether or not an alleged taxpayer and voter is a proper party in suit to enjoin purchase of voting machines by city election officials is not determined, where allegations in bill are insufficient upon which to base injunction against contemplated action. *Moran* v. *Detroit Board of Election Commissioners*, 235.

14. Claim that defendant owners who refused offer presented by plaintiff broker was precluded at the trial from justifying refusal of offer on ground other than that stated at time offer was refused came too late when presented for first time on appeal, where the trial court has not had an opportunity to pass upon such question. *Sterk & Vogel, Inc.*, v. *Kuzee*, 249.

APPEAL AND ERROR—Continued.

15. Well-pleaded allegations of bill of complaint are accepted as true only for purposes of considering motion to dismiss plaintiffs' bill, on appeal from order denying such motion before introduction of proofs. *Holt* v. *Stofflet,* 272.

16. Receiver's claim that defendant husband was estopped from questioning validity of receiver's appointment because of failure to challenge it for over a year and because of agreement as to amount of fee, raised for first time on appeal in the Supreme Court, is not discussed. *Zielinski* v. *Zielinski,* 277.

17. Consideration of claim in suit for accounting as to payment of excessive salaries only to president of defendant corporation is made, where there is no proof as to payment of any specific amount to any of the other officers involved or the number of persons to whom a total amount was paid. *Garwin* v. *Anderson,* 288.

18. The failure of plaintiffs to call to the attention of the trial court to their verified bill of particulars in action based on fraudulent representations and obtaining a ruling from him as to the merits of their claim precludes consideration thereof on appeal (Court Rule No 20, § 5 [1945]). *Watson* v. *Dax,* 322.

19. An issue not shown to have been presented to the trial court for determination is not before the Supreme Court for decision. *Id.*

20. Claim that verdict was against the great weight of the evidence is not considered by Supreme Court, where no such question was raised in the circuit court by motion for a new trial. *Id.*

21. Effect of Nevada decree of divorce, granted to defendant husband after decree of separate maintenance had been granted to wife in this State, is not considered, where no question has been raised with respect thereto. *Hensinger* v. *Hensinger,* 344.

22. A record on appeal in the Supreme Court may not be supplemented by an *ex parte* proceeding. *Associates Discount Corporation* v. *Gear,* 360.

23. Omissions in a record on appeal in the Supreme Court may not be supplied by *ex parte* affidavits. *Id.*

24. Cases on appeal in the Supreme Court must be disposed of on the record as made and not upon *ex parte* affidavits. *Id.*

25. The Supreme Court does not consider matters dehors the record on appeal. *Id.* 361.

26. Findings of trial judge that payments made to plaintiff for use of his car and truck and alleged excessive salary were made without objection until plaintiff sued on corporate note after he and his wife had sold out their interest in corporate defendant to costockholder are not disturbed, where the evidence does not preponderate in the opposite direction. *Lorren* v. *Baroda Manufacturing Company, Inc.,* 405.

27. Trial court's finding that plaintiffs had established by a preponderance of the evidence an oral agreement by one defendant to leave them her farm in return for their agreement to

APPEAL AND ERROR—Continued.

live on the premises, put cattle on it, take care of her and give her 1/3 of the crops during her lifetime is not disturbed under record presented on appeal in suit for money decree and imposition of lien on farm which contracting defendant conveyed to other defendants who ousted plaintiffs after they had occupied the farm 10 years. *Trisch* v. *Fairman*, 432.

28. The defense of the statute of frauds may not be urged on appeal, where such defense was not affirmatively pleaded, notwithstanding fact that defendants' objections to parol evidence of an oral agreement were overruled and plaintiffs failed to object in the trial court to defendants' failure to plead the statute (CL 1948, § 566.106; Court Rule No 23, § 3 [1945]). *Id.*

29. An objection that testimony received in will contest was not competent was too general and where no motion to strike was made the matter will not be considered on appeal. *In re Kanera's Estate (Ten Cate* v. *Kanera)*, 463.

30. A finding of the trial judge who tried case without a jury will not be reversed unless the evidence clearly preponderates in the opposite direction. *Eggebeen* v. *Red Top Cab Company of Grand Rapids*, 490.

31. Record of evidence from which findings of fact were made in a nonjury action at law is examined by Supreme Court in order to determine whether or not it preponderates in the opposite direction. *Id.*

32. The Supreme Court, hearing a chancery case *de novo*, does not reverse a decree unless persuaded it is not in accordance with the just rights of the parties. *Kelley* v. *Dodge*, 499.

33. The Supreme Court does not reverse the decision of a trial court in a nonjury action at law upon a finding of fact unless the evidence clearly preponderates in the opposite direction. *Levenburg* v. *Merrill, Lynch, Pierce, Fenner & Beane*, 508.

34. No discussion of facts is made on appeal in regard to parcel of property as to which plaintiff does not appear to claim any wrongdoing or conspiracy on her appeal in suit for divorce against her former husband in which she joined his father and husband's paramour on charge of conspiracy to deprive plaintiff of her rights in certain properties. *Stephenson* v. *Stephenson*, 528.

35. The Supreme Court cannot adjudicate questions relating to boundaries that are not before it for consideration. *Etherington* v. *Bailiff*, 544.

36. Great weight is accorded findings of the trial court in a suit for reformation of instruments, where it is impossible to determine from the record what the true facts are, since he had the opportunity to see and hear the witnesses firsthand. *Id.*

37. Questions as to constitutionality of statute relative to conduct of sanity proceedings and whether affidavits of examining physicians were in compliance with statutory requirements are not determined, where commitment was void because of failure to comply with statute as to presence of

APPEAL AND ERROR—Continued.

person whose sanity was in issue at hearing and of insufficiency of evidence upon which to base a finding of insanity (CL 1929, § 6888, as amended by PA 1943, No 250). *In re Fuller*, 568.

38. The Supreme Court does not reverse decree in suit for accounting, where trial judge saw and heard witnesses in the case, was in a position to pass upon the credibility of their testimony and record does not show decree for defendant was not in accordance with the just rights of the parties. *Flood* v. *Welsh*, 584.

39. Well-pleaded allegations of fact in petition setting forth alleged cause of action against State for commitment to State hospitals under void commitment proceedings must be accepted as true on appeal from order granting State's motion to dismiss. *Van Antwerp* v. *State*, 593.

40. The Supreme Court hears equity cases *de novo*, hence must use its own judgment in passing on the evidence, but recognizes the better position of a trial judge to pass upon the credibility of witnesses and evaluating their testimony as they give it. *Vanden Bogert* v. *May*, 607.

41. The findings of fact of the trial court in a chancery case will be upheld by the Supreme Court in the absence of a definite showing that a contrary result should have been reached. *Id.*

42. Appellant's statement of reasons and grounds of appeal sufficiently complies with requirements of court rule, where it reasonably informs the court and appellees as to errors relied upon (Court Rule No 66 [1945]). *Laude* v. *Cossins*, 623.

43. Whether or not State conservation commission's reconveyance of property to city of property outside the city limits but dedicated to and accepted by the city for park and recreation purposes was not properly before the Supreme Court, where it was not raised in the statement of questions involved or the reasons and grounds for appeal. *Clark* v. *City of Grand Rapids*, 648.

44. Effect of State's acquisition on a tax sale on record title to property involved in action of ejectment is not discussed, where no point is made of it in the briefs. *Hayward* v. *Marker*, 660.

45. The selection of an appointed, incumbent municipal judge by the voters of a home-rule city as an interim appointee to the office of associate judge at election at which charter was amended to abolish such office of 1 municipal judge and creating the office of associate judge was not an election within the meaning of the general election laws, hence, it is unnecessary to consider contention that passage of the charter amendment was in violation of State election laws when it attempted to name such incumbent to the interim position (Dearborn Charter, § 10.2, as amended in 1951). *Attorney General* v. *Guy*, 696.

See CERTIORARI; COSTS (1, 4, 11); DIVORCE (6, 10, 21, 28); EQUITY (4); GARNISHMENT (1); HABEAS CORPUS (6); JUDGMENT (7); TRIAL (6).

APPEARANCE.

1. A party, by a general appearance, may waive "jurisdictional" defects arising out of a failure to observe residential requirements (CL 1948, § 666.10, as amended by PA 1949, No 44). *Edwards* v. *Meinberg*, 356.
2. A general appearance waives all questions of the service of process, and is the equivalent to a personal service (CL 1948, § 626.19). *Nelson* v. *McCormick*, 387.

See ATTACHMENT (2–4); DEPOSITIONS; EXECUTORS AND ADMINISTRATORS (1); INSANE PERSONS (1, 2); JUDGMENT (4, 5, 8).

APPOINTMENT—See APPEAL AND ERROR (16, 45); DIVORCE (11); MUNICIPAL CORPORATIONS (17, 18); RECEIVERS (2, 3, 7, 8); TRUSTS (3).

APPORTIONMENT OF EXPENSES—See CONTRACTS (2).

APPRAISERS—See EXECUTION (6).

AREA—See MONOPOLIES (2–4).

ARGUMENT OF COUNSEL—See TRIAL (3).

ARRAIGNMENT—See CRIMINAL LAW (19, 20).

ARRANGEMENT OF NAMES OF CANDIDATES ON BALLOTS—See ELECTIONS (1, 3).

ARREST—See HABEAS CORPUS (8).

ASSAULT—See INTOXICATING LIQUORS.

ASSIGNMENT—See CORPORATIONS (3); DIVORCE (23).

ASSOCIATE JUDGES—See APPEAL AND ERROR (45); CONSTITUTIONAL LAW (7); MUNICIPAL CORPORATIONS (10, 13, 16).

ASSUMPSIT—See JUDGMENT (8).

ASSURED CLEAR DISTANCE—See AUTOMOBILES (13).

ATMOSPHERIC CONDITIONS—See AUTOMOBILES (12, 13, 15, 16).

ATTACHMENT.

1. A writ of attachment is a summons as well as an attachment. *Nelson* v. *McCormick*, 387.
2. An attachment proceeding is strictly a proceeding *in rem* and no property except that attached can be taken in execution, where the defendant is not personally served and does not appear in the suit. *Id.*
3. The entering of a general appearance by the defendant in an attachment proceeding gives the court jurisdiction *in personam* the same as if the suit had been commenced by a summons that was served (CL 1948, § 626.19). *Id.*
4. The effect of a change in a foreign decree of divorce is a matter for consideration when principal case in action on such decree in this State is heard and possibility of change in such decree, does not alone afford reason for dismissing

ATTACHMENT—Continued.

attachment and garnishment proceedings, based on such decree and brought in this State, and in which principal defendant filed a general appearance (CL 1948, §§ 552.121–552.123, 626.19, 628.11). *Id.* 388.

ATTORNEY AND CLIENT—See CRIMINAL LAW (1, 19); DIVORCE (23); HABEAS CORPUS (8); TRIAL (4); VENDOR AND PURCHASER (4).

ATTORNEY FEE—See DIVORCE (24).

ATTORNEY GENERAL—See QUO WARRANTO (5–7).

AUCTIONS—See CORPORATIONS (9); DIVORCE (2); SALES (1).

AUDIT—See ACCOUNTING (1).

AUTHORITY—See MASTER AND SERVANT (3).

AUTOMOBILES.

1. Showing made that due to bright headlights of westbound defendants, as they started to overtake and pass westbound truck and trailer while progressing uphill on a 20-foot 2-lane pavement in the rain at night an eastbound defendant motorist, driving at 50 or more miles per hour, lost control of his car and first hit the truck and later westbound plaintiff whose car followed behind westbound defendant's car that had finally returned to westbound lane, between plaintiff and the truck, presented an issue of fact as to negligence of westbound defendant driver who was himself driving some 50 to 60 miles an hour. *Knoor* v. *Borr,* 30.
2. Defendant wife, as co-owner of car operated by her husband was subject to liability for injuries inflicted due to his negligence in the absence of any testimony tending to rebut statutory presumption as to her knowledge and consent that it be used by him on the occasion in question (CL 1948, § 256.29). *Id.* 31.
3. Contributory negligence of plaintiff southbound pedestrian who collided with southwesterly bound taxicab near west side of street after latter had turned oblique corner from north *held,* for jury. *Hodgdon* v. *Barr,* 60.
4. It was error for trial court to charge jury that defendant taxicab driver was guilty of negligence as a matter of law in failing to keep behind preceding panel truck in making right turn with traffic light around oblique corner, where there is evidence from which a jury might find that, due to protrusion of defendants' taxicab behind the truck into street from which turn was being made, it was impracticable to keep in right-hand lane and collision with plaintiff pedestrian at left of the truck occurred a few feet west of 11-foot-wide crosswalk which perpendicularly crossed street into which taxicab had entered and about 25 or 30 feet from nearer curb line of street from which turn had been made (CL 1948, § 256.318). *Id.* 61.

AUTOMOBILES—Continued.

5. Contributory negligence of plaintiff, a 12-year-old boy who had just alighted from northbound streetcar, had let it pass and then proceeded westerly part way across tracks in center of 28-foot street on west side of which parking was not permitted *held*, question for jury, where evidence is in conflict as to just how the accident happened and as to where plaintiff was when he came into contact with defendant's southbound car. *Watroba* v. *City of Detroit*, 182.
6. Issue of negligence of defendant's southbound driver in street paved 28 feet between curbs and in the center of which was a single set of streetcar tracks was properly left to jury, where there is testimony that defendant's car was driven partially on such tracks and injured plaintiff, a 12-year-old boy, who had shortly theretofore alighted from a northbound streetcar and was proceeding westerly after it had passed on when hit by defendant's car being driven at speed variously estimated at from 25 to 40 miles an hour, since plaintiff was not bound to anticipate defendant's car would follow a course partly over the tracks or that it would approach at an excessive speed without keeping a reasonable and proper outlook. *Id.*
7. Verdict for 12-year-old boy against city for injuries he sustained when he came into contact with defendant's automobile *held*, not against the great weight of the evidence, hence denial of motion for new trial based in part on such claim was proper. *Id.* 183.
8. Issues of fact as to how and where eastbound defendant motorist struck southbound plaintiff pedestrian and speed of defendant were properly left to jury, where claims of respective parties were supported by their own and corroborating testimony. *Corpron* v. *Skiprick*, 311.
9. Finding of jury that plaintiff pedestrian had failed to sustain his burden of proof as to his own freedom from contributory negligence and as to defendant motorist's negligence *held*, not against great weight of evidence. *Id.*
10. Claim of error respecting charge as to contributory negligence of plaintiff pedestrian in that trial judge unduly emphasized such issue *held*, without merit, the charge having fairly submitted such issue as well as issue of defendant's negligence because of alleged failure to observe pertinent statutory provisions as to operation of motor vehicles on public highways and due care on occasion in question (CL 1948, § 256.305[a]). *Id.*
11. A motorist is not an insurer against accidents with pedestrians. *Id.*
12. Defendant motorist, eastbound on rainy evening late in March on street on which southbound plaintiff pedestrian was crossing east of traffic light, may not be said to have had the duty as a matter of law to avoid a collision with plaintiff regardless of circumstances. *Id.*
13. Conflicting proofs as to how and where accident happened when defendant's eastbound car struck southbound plaintiff pedestrian presented question for jury as to whether defendant was subject to the "assured clear distance" rule as to speed of

AUTOMOBILES—Continued.

his car, hence plaintiff was not entitled to instruction to jury that defendant was guilty of negligence as a matter of law because he was traveling faster than would permit him to stop within the assured clear distance ahead and because of his failure to see plaintiff when latter was part way across street at 7:30 in the evening on a rainy night late in March (CL 1948, § 256.305[a]). *Id.* 312.

14. The driver of an emergency vehicle, such as an ambulance, is not relieved of the duty to drive with due regard for the safety of others (PA 1949, No 300, §§ 632, 653). *Eggebeen* v. *Red Top Cab Company of Grand Rapids*, 490.

15. Plaintiff's ambulance driver was not guilty of contributory negligence as a matter of law, where there is evidence that at a speed of 10 to 15 miles an hour and with siren sounding while on an emergency run, he entered a clear intersection in the right-hand lane from the south after observation made at a point 10 feet or so south of the south curb line of street on which defendant's eastbound taxicab had stopped and waited for traffic light to turn in his favor and that the collision occurred in the northeast portion of the intersection in midafternoon on a wet, slushy midwinter day (PA 1949, No 300, §§ 632, 653). *Id.*

16. Evidence as to eastbound defendant taxicab driver's negligence *held,* sufficient to permit trial court finding him guilty of negligence proximately causing collision with northbound ambulance in midafternoon of midwinter day in northeast portion of intersection, notwithstanding cab driver started up when traffic light turned in his favor, that radio in taxicab was operating and most of its windows closed, where there is evidence that red dome light of ambulance was visible for several blocks, that its siren was sounding and it was traveling at speed of 10 to 15 miles an hour (PA 1949, No 300, §§ 632, 653). *Id.* 491.

17. Passenger in an automobile with which defendant's train collided at a grade crossing, *held,* guilty of contributory negligence, where she assumed duty of looking out for approaching train and failed to see it. *Buchthal* v. *New York Central Railroad Company*, 558.

See APPEAL AND ERROR (11, 26); CORPORATIONS (10, 11, 15); CRIMINAL LAW (13); RAILROADS (5–7); SCHOOLS AND SCHOOL DISTRICTS (4); STATES (11); UNEMPLOYMENT COMPENSATION (9).

AUTOMOBILE SALES AGENCY—See UNEMPLOYMENT COMPENSATION (4).

BAD FAITH—See APPEAL AND ERROR (11); OFFICERS (1).

BALLOTS—See COSTS (9); ELECTIONS (1, 2); JUDGES (1, 3, 9); MUNICIPAL CORPORATIONS (6).

BANKRUPTCY—See FRAUDULENT CONVEYANCES (1, 2).

BANKS AND BANKING—See ACTION (1); APPEAL AND ERROR (9); COSTS (3); UNEMPLOYMENT COMPENSATION (6, 9); VENDOR AND PURCHASER (4).

BARTENDER—See INTOXICATING LIQUORS.

BASEMENTS—See REFORMATION OF INSTRUMENTS (4, 5).

BELIEF IN IMPENDING DEATH—See EVIDENCE (1, 4, 5, 7, 8).

BELLS—See RAILROADS (7).

BILL OF PARTICULARS—See APPEAL AND ERROR (18); JUDGMENT (1); TRIAL (7).

BILLS AND NOTES.

Defendant in action on promissory note *held*, to have failed to indicate that his motion for directed verdict was based on claim that plaintiff was not a holder in due course. *Associates Discount Corporation* v. *Gear*, 360.

See APPEAL AND ERROR (26); CORPORATIONS (11); FRAUD (8, 10).

BONDS—See APPEAL AND ERROR (2); CRIMINAL LAW (1); GARNISHMENT (1); TRUSTS (4, 11).

BOOKS AND RECORDS—See UNEMPLOYMENT COMPENSATION (6, 9).

BOOKS OF ACCOUNT—See CORPORATIONS (12).

BOUNDARIES.

*Finding* of trial court that plaintiffs were not estopped from contending that standard which should be used in measuring the holdings of the respective parties was the visual one set out by them previous to delivery of the deed of which they now seek reformation, where it appears that defendants had moved their buildings onto disputed land in reliance upon a survey which they had had made rather than upon any act, representation or admission of plaintiffs. *Etherington* v. *Bailiff*, 544.

See ADVERSE POSSESSION (1); APPEAL AND ERROR (35); REFORMATION OF INSTRUMENTS (2, 3).

BREACH OF CONTRACT—See CONTRACTS (5).

BREACH OF COVENANT—See DEEDS (11).

BREACH OF TRUST—See CORPORATIONS (18).

BREACH OF WARRANTY—See EVIDENCE (14); JUDGMENT (12).

BREAKING AND ENTERING IN NIGHTTIME—See CRIMINAL LAW (20).

BRIEFS—See APPEAL AND ERROR (44); COSTS (1, 10, 13).

BROADCASTING—See WORKMEN'S COMPENSATION (9).

BROKERS.

1. Verdict was properly directed for owners of property listed by plaintiff broker, suing for commission, where offer received by broker and proposed to owner was not substantially identical to offer contained in listing agreement *Sterk & Vogel, Inc.*, v. *Kuzee*, 249.
2. A broker has the duty to show compliance with the terms of listing agreement in order to be entitled to commission. *Id.*
3. An owner of property in this State who has listed it for sale with a real estate broker is not limited to grounds of refusal stated at time he refuses to accept an offer presented by the broker. *Id.*

See CONTRACTS (7).

BROTHERS—See UNEMPLOYMENT COMPENSATION (9); WILLS (14).

BUILDINGS—See BOUNDARIES; REFORMATION OF INSTRUMENTS (4, 5).

BULLDOZING—See EQUITY (1).

BURDEN OF PROOF—See AUTOMOBILES (9); CORPORATIONS (6–8, 13); DEDICATION (1, 2); DIVORCE (12); FRAUD (9, 10); WILLS (9, 11); WORKMEN'S COMPENSATION (1).

CANCELLATION OF ACCEPTANCE—See CONTRACTS (8).

CANCELLATION OF INSTRUMENTS.

1. Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. *Flood* v. *Welsh*, 584.
2. Cancellation of an executed contract ought not to be done on the ground of fraud unless the fraud be made clearly to appear. *Id.*

CAPIAS—See CRIMINAL LAW (1).

CAPITAL—See PARTNERSHIP (5).

CARE AND KEEP—See APPEAL AND ERROR (27); JUDGMENT (9).

CARETAKERS—See DEDICATION (7).

CATTLE—See APPEAL AND ERROR (27); FRAUDS, STATUTE OF (2).

CEMETERIES—See TRUSTS (1, 11).

CERTIFICATES—See INSANE PERSONS (9); JUDGES (4).

CERTIFIED PUBLIC ACCOUNTANT—See CORPORATIONS (12).

CERTIORARI.

Whether or not 600 signatures on petitions for recall of trustees of school district in which there were cast not to exceed 899 votes for governor in the last preceding election is not determined on appeal in nature of certiorari from order granting writ of mandamus to hold recall election, where claim that there was an insufficient number of signatures

CERTIORARI—Continued.

appears to have been abandoned (CL 1948, § 201.101 *et seq.*). *Eaton* v. *Baker*, 521.

See EMINENT DOMAIN (1, 2); HABEAS CORPUS (8).

CHANCERY CASES—See APPEAL AND ERROR (32, 36, 41).

CHANGE OF ATTITUDE—See WILLS (16).

CHANGE OF CIRCUMSTANCES—See HUSBAND AND WIFE (2).

CHARITABLE TRUSTS—See TRUSTS (1, 2, 6–10).

CHARTERS—See APPEAL AND ERROR (45); CONSTITUTIONAL LAW (6, 7); COSTS (8, 14); INJUNCTION (1); MUNICIPAL CORPORATIONS (4, 6–13, 15, 16, 18); OFFICERS (9); QUO WARRANTO (6, 7).

CHECKS—See VENDOR AND PURCHASER (5).

CHIPPEWA COUNTY—See CRIMINAL LAW (19).

CIRCUIT COURT—See COSTS (13); COURTS (6, 8); QUO WARRANTO (2, 4); TRUSTS (6–10).

CIRCUIT COURT MISDEMEANOR—See ESCAPE (1).

CITY COUNCIL—See CONSTITUTIONAL LAW (7).

CLAIMS AGAINST STATE—See STATES (4, 5).

COLLATERAL ATTACK—See JUDGMENT (2, 3, 5, 6, 8); TRUSTS (5).

COLOR OF TITLE—See IMPROVEMENTS (2).

COMMERCE.

1. The solicitation of traffic by railroads, in States remote from their lines, is a recognized part of the business of interstate transportation. *Hershel Radio Company* v. *Pennsylvania Railroad Company*, 148.
2. The adjustment of claims against a railroad for damage to freight, involving the appearance of employees in courts away from their customary occupation, impairs efficiency in operation and constitutes a burden on interstate commerce to which the railroad may not be subjected without its consent in a State where it merely solicits business but conducts no other operations. *Id.*

COMMISSIONER OF REVENUE—See JUDGMENT (9).

COMMISSIONS—See BROKERS (1, 2); CORPORATIONS (8).

COMMITMENT—See APPEAL AND ERROR (37, 39); HABEAS CORPUS (2, 5); INSANE PERSONS (1, 3, 8); JUDGMENT (9); STATES (8, 9, 12).

COMMON LAW—See DEDICATION (6).

COMMUTATION OF SENTENCE—See CRIMINAL LAW (16–18).

COMPENSATION—See CORPORATIONS (6).

COMPROMISE AND SETTLEMENT—See CORPORATIONS (5, 8); FRAUD (8).

COMPTROLLER—See CORPORATIONS (8).

CONCLUSIONS—See PLEADING.

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN (1, 4, 5).

CONDITIONAL OFFER—See CONTRACTS (7).

CONDITIONS—See CONTRACTS (7); DEEDS (9); PARDON (1, 2).

CONDITIONS SUBSEQUENT—See DEEDS (5–8, 10, 11).

CONFESSION—See HABEAS CORPUS (8).

CONJECTURE—See TRIAL (1).

CONSENT—See AUTOMOBILES (2); COMMERCE (2); CORPORATIONS (1); STATES (3, 4, 6, 7); TORTS (1).

CONSERVATION COMMISSION—See APPEAL AND ERROR (43); DEDICATION (8); EJECTMENT.

CONSERVATOR OF THE PEACE—See JUSTICES OF THE PEACE (5).

CONSIDERATION—See CONSPIRACY (1).

CONSPIRACY.

1. Conspiracy to deprive plaintiff wife in suit for divorce of her interest in property which the parties had occupied for a time as their home *held*, not shown, where evidence shows that defendant father-in-law had paid defendant son's debts and sent the son and plaintiff the balance of the purchase price, that such proceeds were used to pay the son's debts and plaintiff's hospital bills and they signed a quitclaim deed to the father in consideration for his assumption of the obligations of the parties. *Stephenson* v. *Stephenson*, 528.
2. Proof of conspiracy to defraud plaintiff of her interest in property which her husband and his brother had inherited upon the death of their mother *held*, lacking, where defendant father-in-law had paid debts for defendant son and then paid him $2,000 for his interest, a very low price, and had occupied the premises for many years before and after obtaining deed signed by plaintiff and her husband. *Id.*
3. Evidence that sale of heavily-mortgaged real estate by defendant father-in-law of plaintiff, while he had acted as guardian of her husband had been unnecessary and that such money as had been received went to pay defendant husband's debts and not to support plaintiff wife *held*, insufficient to prove conspiracy to defraud her of property rightfully hers. *Id.*

CONSPIRACY—Continued.

4. Finding of trial judge that plaintiff in suit for divorce had failed to prove her charge of conspiracy between defendant husband and father-in-law to put the son's property beyond her reach and thus prevent her from obtaining a property settlement as well as alimony is not disturbed, where no claimed error was shown and fraud which may have been committed upon the defendant husband by his father, if any, in the latter's handling of fiduciary transactions was too indirect to entitle plaintiff to recover and the husband failed to question any of such transactions. *Id.* 529.

See APPEAL AND ERROR (33); CRIMINAL LAW (13, 15); DIVORCE (22, 23, 28); HOMICIDE (1).

CONSTITUTIONAL LAW.

1. Whether price-fixing arrangement is vertical or horizontal, important as bearing on question of whether a monopoly, trust or restraint of trade exists, is of no consequence in determining whether fair-trade statute bears any reasonable relation to public health, safety, morals or the general welfare (CL 1948, § 445.151 *et seq.*). *Shakespeare Company* v. *Lippman's Tool Shop Sporting Goods Company*, 109.
2. It is not the province of the Supreme Court to legislate limitations into existing statutes. *Chapel* v. *School District No. 8, Fractional, Parma Township, Jackson County*, 176.
3. Repetition of error does not correct it and acquiescence for a very long time cannot legalize a clear usurpation of power. *Township of Dearborn* v. *Dearborn Township Clerk*, 674.
4. The apportionment of power to one department of government is understood to be a prohibition of its exercise by either of the others, the keeping of the 3 great branches of government strictly separate and distinct from each other being essential to the maintenance of a republican form of government (US Const, art 4, § 4; Mich Const 1908, art 4). *Id.*
5. The plain provisions of the Constitution are paramount, notwithstanding there may be a long standing and previously existing custom which violates such provisions. *Id.* 675.
6. The doctrine of absolute separation of the 3 great powers of government is adhered to in this State so far as local government is concerned, except as provided by Constitution or in the charter of the political unit in question (Const 1908, art 4). *Id.*
7. Conferral by charter upon municipal judge of power to recommend to city council that associate municipal judge be engaged to sit an additional number of days to minimum prescribed by the charter did not constitute an illegal delegation of power since the right of recommendation is a normal part of the task of supervising the work of the court, the legislative authority involved being exercised solely by the city council (Dearborn Charter, § 10.10, as amended in 1951). *Attorney General* v. *Guy*, 695.

See APPEAL AND ERROR (37); COURTS (2); CRIMINAL LAW (10–12, 16–18); INJUNCTION (3); JUDGES; JUSTICES OF THE PEACE (1–3, 5, 6); MUNICIPAL CORPORATIONS (9, 11); QUO WAR-

CONSTITUTIONAL LAW—Continued.

RANTO (3, 4); STATUTES (6–11); TOWNSHIPS; TRADE-MARKS AND TRADE NAMES (1).

CONSTRUCTION OF CHARTER—See MUNICIPAL CORPORATIONS (13); OFFICERS (9).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (5).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (1).

CONSTRUCTION OF DEEDS—See DEEDS (2–7, 9, 10).

CONSTRUCTION OF OPTION—See LANDLORD AND TENANT (1, 2).

CONSTRUCTION OF STATUTES—See COSTS (16); COURTS (1); HABEAS CORPUS (3); MUNICIPAL CORPORATIONS (1); STATES (1, 9, 11); STATUTES (1–5).

CONSTRUCTION OF TRUSTS—See TRUSTS (1).

CONSTRUCTION OF WILLS—See WILLS (3).

CONSTRUCTIVE TRUST—See COURTS (7, 8).

CONSUMERS—See TAXATION (1, 6).

CONTINGENT REMAINDERS—See DEEDS (1).

CONTINUANCE—See CRIMINAL LAW (1, 2).

CONTINUANCE OF RECEIVERSHIP—See RECEIVERS (4, 5).

CONTRACTS.

1. Contracts must be construed as a whole and harmonious effect given, if possible, to each word and phrase. *Singer* v. *Goff*, 164.
2. Agreement relative to drilling oil well is construed as providing that holders of interests would not be obliged to pay more than they had originally contributed toward cost of drilling in the event the well proved to be a dry hole and driller would be liable for additional expenses but that in the event a commercially-producing well resulted costs were to be deducted from proceeds of sale of oil. *Id.*
3. Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it. *Bilandzija* v. *Shilts*, 421.
4. The right to rescind an indivisible contract must be exercised *in toto*. *Blumrosen* v. *Silver Flame Industries, Inc. (Silver Flame Industries, Inc.,* v. *Blumrosen)*, 441.
5. Purchaser of 4 heating units for a block of 4 stores who did not make a complete rescission of contract of purchase which was not shown to have been divisible was not entitled to recover payments made thereunder or damages for breach thereof. *Id.*

CONTRACTS—Continued.

6. It is competent for a person to make a valid agreement to make a particular disposition of his property by last will and testament. *Kelley* v. *Dodge,* 499.

7. Evidence justified trial court in nonjury case in finding that plaintiff seller of stock had sufficient information from defendant broker concerning offer from prospective purchaser, which had attached several conditions, to understand it and to act accordingly. *Levenburg* v. *Merrill, Lynch, Pierce, Fenner & Beane,* 508.

8. Finding of trial court that at time when plaintiffs attempted to cancel sale of their stock that purchaser's offer to purchase such stock had been accepted, was irrevocable, and that attempted cancellation of acceptance came too late *held,* sustained by competent evidence. *Id.*

See CANCELLATION OF INSTRUMENTS (1); CORPORATIONS (1–3, 12); EVIDENCE (14); IMPROVEMENTS (1); OFFICERS (8); SALES (2); SPECIFIC PERFORMANCE (4–6); UNEMPLOYMENT COMPENSATION (4).

CONTRIBUTIONS—See UNEMPLOYMENT COMPENSATION (5, 8).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (3, 5, 9, 10, 15, 17); TRIAL (3).

CONTROL—See CORPORATIONS (17).

CONVEYANCES—See DEEDS; TAXATION (9).

CONVICTION—See ESCAPE (3).

CO-OWNERS—See AUTOMOBILES (2).

CORNERS—See REFORMATION OF INSTRUMENTS (3).

CORPORATIONS.

1. Mere solicitation of interstate transportation business by a railroad company in a State in which it has no tracks and runs no trains is not doing business within such State so as to make it amenable to process therein. *Hershel Radio Company* v. *Pennsylvania Railroad Company,* 148.

2. The plea of *ultra vires* is not available to landlord of defendant corporate lessee, where it is not shown plaintiffs were directors or officers of defendant or knew of the *ultra vires* character of the act of defendant in entering into lease involved (CL 1948, § 450.11). *Dwelley* v. *Tom McDonnell, Inc.,* 229.

3. Directors' and officers' consent to assignment of contract for sale of stock of defendant corporation, engaged in manufacturing airplane parts for the Federal government, from underwriter corporation to underwriter partnership constituted no betrayal of interests of defendant corporation, where default under underwriting agreement as altered prior to assignment was not shown so as to give defendant corporation right to cancel its agreement and sell its stock at then substantially

CORPORATIONS—Continued.

higher price as disclosed by record of stock exchange transactions. *Garwin* v. *Anderson*, 287.

4. Consent by defendant directors and officers of defendant corporation to pledge of its stock for loan to underwriter did not constitute a breach of their fiduciary duty, where corporation was engaged in manufacturing airplane parts for the Federal government, had been required to eliminate certain persons as stockholders as a condition precedent to further contracts which were essential to the corporation's survival, and made an agreement with an underwriter for disposal of such stock, and as a result of the pledge the corporation received payment for the stock in amount corporation paid for it with safeguards for keeping the stock from falling into hands objectionable to the Federal government. *Id.*

5. Action of directors and officers of defendant corporation in compromising and settling claims of president and manager of parachute division for salaries based in part on percentage of net profits did not constitute an actionable breach of fiduciary duty, where there was a genuine dispute as to whether net profits should be computed before or after renegotiation of contracts with the Federal government and the legal rights of the parties were in serious doubt. *Id.*

6. The burden of proof is on directors of a corporation who have fixed their own compensation for services to the corporation to establish the reasonableness of the sum paid, when such matter is called into question in a stockholders' derivative suit, unless the majority of those voting on the question are disinterested. *Id.* 288.

7. Action of board of directors in setting salary of defendant president, not a director, not shown to have been accomplished by defendant or upon the vote of any individual benefited is assumed to be valid until person attacking it has sustained his burden of establishing unreasonableness of compensation. *Id.*

8. Stockholder who complained of action of defendant officers and directors of defendant corporation whereby they had settled a creditor's claim for compensation for alleged commissions *held,* not to have sustained burden of proving that defendants had acted recklessly or breached their fiduciary duty in effecting the compromise and settlement of a claim, where conclusion of corporation's comptroller that there was an amount due somewhat less than amount paid and that creditor claimed an amount considerably in excess of sum paid was not shown to have been inaccurate. *Id.*

9. Entire sum paid by 4 members of nonprofit corporation for purchase of 4 taxicabs which had belonged to deceased member, together with transfer of license to operate them, was not for purchase of membership, where auction sale had been limited to members already owning 3 taxicabs and bylaws barred one person from having more than 1 membership. *In re McKenna's Estate (McKenna* v. *McKenna),* 369.

10. Amounts paid plaintiff, formerly general manager of corporate defendant, for use of his car, trailer and truck *held,* not

CORPORATIONS—Continued.

excessive or improper, especially where evidence shows the corporation continued the same use of plaintiff's truck for some time after plaintiff and wife had sold out their interest to the president, a costockholder. *Lorren* v. *Baroda Manufacturing Company, Inc.*, 405.

11. Trial court's findings that defendant corporation's president and director had authorized, approved or ratified expenditures to plaintiff for car and truck hire and for salary, were fair and not to the disadvantage of the corporation or detrimental to it *held*, justified under record presented on defendant corporation's appeal from disallowance of such amounts now sought to be set off against plaintiff's undisputed note. *Id.*

12. The president and director of a corporation will be charged with knowledge as to payments shown on corporate books to have been made to plaintiff, where books of account were kept by a certified public accountant and plaintiff was given a free hand in management of the furniture upholstering business as its general manager. *Id.* 406.

13. The director of a corporation has a right to deal with the corporation provided he does so fairly and where the director sustains his burden of establishing the fairness of his dealings they are valid (CL 1948, § 450.13[5], as amended by PA 1949, No 229). *Id.*

14. A corporation which has been managed by a director and general manager who was permitted by the officers and other directors to assume full control of its affairs and which receives the benefit of the manager's acts and services is as much bound as though it had itself formally contracted for the services. *Id.*

15. A formal meeting of the 3 directors of a corporation engaged in the furniture upholstering business was not necessary in order to authorize plaintiff, who was also its general manager, to use his automobile and truck for the corporation. *Id.*

16. The general manager of a corporation, who is also a director of the corporation, has prima facie power to do any act which the directors could authorize or ratify unless special limitations or restrictions are put upon such power of which the party dealing with him has notice or unless power to do the particular act is expressly given to another officer or agent. *Id.*

17. Finding of trial court that land company, which owned lots in large tract of land which it sold to persons who automatically became members of an association whose board of directors was dominated by the land company, was more responsible for the difficulties between the 2 corporations than the association, which justified gradual and complete relinquishment of any control of the association *held*, supported by competent evidence. *Pettengill* v. *Monteith Land Company*, 632.

18. A court of equity has power to interfere in the internal affairs of a corporation, when there is fraud or breach of trust. *Id.*

See APPEAL AND ERROR (12, 17, 26); DIVORCE (22); EXECUTORS AND ADMINISTRATORS (3); MALICIOUS MISCHIEF; MONOPOLIES (2); SALES (1); UNEMPLOYMENT COMPENSATION (2, 4).

CORROBORATION—See HOMICIDE (2).

COSMETICS—See TORTS (5).

COSTS.

1. Costs are allowed only such appellees as have filed briefs on appeal, where decree is affirmed. *Kelso* v. *Coburn*, 45.
2. No costs are allowed in proceeding involving determination as to whether successor employer was entitled to the transfer of predecessor employer's experience record under unemployment compensation act under circumstances presented, a public question being involved (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246). *Russ Dawson, Inc.*, v. *Unemployment Compensation Commission*, 83.
3. No costs are allowed in suit under declaratory judgment act to determine whether or not a national bank was immune from payment of State sales tax on purchases and sales made by it of tangible personal property, a public question being involved (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 691.501 *et seq.*). *National Bank of Detroit* v. *Department of Revenue*, 133.
4. No costs are allowed on appeal in suit for accounting, where neither side has prevailed in full. *Singer* v. *Goff*, 164.
5. No costs are allowed in suit to determine validity of election relative to annexation of primary school district to a second or third class school district, a public question being involved (CL 1948, § 353.23, as amended by PA 1951, No 174). *Chapel* v. *School District No. 8, Fractional, Parma Township, Jackson County*, 177.
6. No costs are allowed in mandamus proceeding to compel defendant municipal officers to place plaintiffs' names on pension roll, a question of public importance being involved. *O'Connell* v. *Dearborn Police and Fire Pension Board (Rabideau* v. *Same)*, 209.
7. No costs are allowed in suit to enjoin purchase of certain voting machines by defendant city, a public question being involved. *Moran* v. *Detroit Board of Election Commissioners*, 235.
8. No costs are allowed in suit to enjoin collection of an income tax by city under charter amendment claimed to be invalid because of failure to comply with statute requiring separate statement of propositions to be voted upon by electors, a public question being involved (CL 1948, § 117.21). *House* v. *City of Saginaw*, 241.
9. No costs are allowed in mandamus proceeding by incumbent probate judge to compel defendant county clerk to accept nominating petitions for his office and to compel the county election commission to cause his name to be printed on the ballot following certification, a matter of public concern being involved. *Soutar* v. *St. Clair County Election Commission*, 260.
10. No costs in Supreme Court are allowed appellee on affirmance of order for defendant, where he filed no brief on appeal. *Chapman* v. *Chapman*, 298.

COSTS—Continued.

11. No costs are allowed, where neither plaintiffs nor defendants have prevailed in their respective appeals upon affirmance of judgment. *Watson* v. *Dax*, 322.
12. No costs are allowed in proceeding for determination of an inheritance tax upon a resident decedent's interest in lands located in Illinois, a question of public interest being involved (CL 1948, § 205.201). *In re Stahl's Estate (Tucker* v. *Department of Revenue)*, 380.
13. No costs are allowed appellee upon affirmance of order of probate court as affirmed by circuit court, where he filed no brief in the Supreme Court. *In re Jones' Estate*, 394.
14. No costs are allowed in quo warranto proceedings to test validity of election on question of adopting amendments to home-rule city charter at primary election, a public question being involved (CL 1948, §§ 638.1, 638.26–638.29). *Attorney General, ex rel. Reuter*, v. *City of Bay City*, 515.
15. No costs are allowed in proceeding to determine validity of proceeding for recall of a school district trustee, a public question being involved. *Eaton* v. *Baker*, 522.
16. No costs are allowed in suit for declaration of rights involving validity of a long standing statute, where a public question is presented (CL 1948, § 41.70, as amended by PA 1949, No 9). *Township of Dearborn* v. *Dearborn Township Clerk*, 676.
17. No costs are allowed in quo warranto proceedings to try right of defendant to office of municipal judge, a public question being involved. *Attorney General* v. *Guy*, 696.

See DEPOSITIONS; DIVORCE (6, 10, 13, 21, 24, 28, 31); EQUITY (4); EXECUTORS AND ADMINISTRATORS (1); GARNISHMENT (2).

COTTAGES—See SPECIFIC PERFORMANCE (2).

COUNTIES—See CRIMINAL LAW (9–15); HOMICIDE (1).

COUNTY CLERK—See COSTS (9); JUDGES (8, 9); MANDAMUS (2).

COUNTY ELECTION COMMISSION—See COSTS (9); JUDGES (4, 9).

COURT OF CLAIMS—See STATES (1, 2, 8, 9, 11, 12).

COURT RULES—See APPEAL AND ERROR (18, 28, 42); DEPOSITIONS; EXECUTORS AND ADMINISTRATORS (1); FRAUDS, STATUTE OF (1); JUDGMENT (1, 10–12); TRIAL (7).

COURTS.

1. The determination of a State supreme court as to the incidence of a tax imposed by the State has great weight with the supreme court of the United States when it follows logically the language of the act. *National Bank of Detroit* v. *Department of Revenue*, 133.
2. In a case presenting assertion of rights secured by the Federal Constitution, the State courts are bound by the decisions of the supreme court of the United States. *Hershel Radio Company* v. *Pennsylvania Railroad Company*, 148.

COURTS—Continued.

3. Jurisdiction as to subject matter may not be conferred upon a court by agreement of the parties. *Edwards* v. *Meinberg*, 356.
4. Cases establishing a rule of law as to real property will not be overruled in the absence of necessity. *Bowerdink* v. *Carothers*, 454.
5. The probate court is without jurisdiction to determine questions of title of real estate. *Laude* v. *Cossins*, 622.
6. The proper forum in which to determine questions of title to real estate is the circuit court. *Id.*
7. Claim of plaintiff that purchase of realty was from his funds and that it was his and not an asset of the estate of his wife is a claim that is equitable in nature and his request that court impose a constructive trust upon the property of which he was defrauded by reason of her failure to place the title to the property in their joint names was based upon fraud, subject matter of which the circuit court has jurisdiction. *Id.*
8. Circuit court order granting defendants' motion to dismiss plaintiff's bill to impose a constructive trust upon property of which he claims his deceased wife defrauded him, because court claimed it had no jurisdiction deprived him of his day in court, since circuit court, rather than probate court, was the proper forum. *Id.* 623.
9. Statute providing for special terms of court to be held in counties of same circuit as county in which nonjury cases may be pending covers arraignments, acceptance of pleas and sentences upon pleas of guilty (CL 1948, § 691.231). *In re Joslin*, 627.

See CRIMINAL LAW (3, 18); ELECTIONS (4); JUDGMENT (2, 4, 8); MANDAMUS (1); MUNICIPAL CORPORATIONS (13–15); OFFICERS (1, 2); TAXATION (8); TRUSTS (2–11).

COVENANT NOT TO COMPETE—See MONOPOLIES (1, 2, 4).

COVENANTS—See DEEDS (7).

CREDIBILITY—See APPEAL AND ERROR (38, 40); DIVORCE (3, 5, 7, 14).

CREDITOR'S CLAIM—See CORPORATIONS (8).

CRIMINAL LAW.

1. Denial of motion for continuance of prosecution for drunk driving was not an abuse of discretion, which motion had been made by defendant's attorney but was supported by unsworn statement of defendant's employer that it was necessary that defendant be elsewhere on the date set for trial, hence forfeiture of bond and issuance of capias were proper. *People* v. *Smith*, 10.
2. Validity of claim on defendant's presence elsewhere than in court on date set for trial of charge of drunk driving was a matter for determination by the trial judge rather than de-

CRIMINAL LAW—Continued.

fendant's employer, hence, denial of continuance was not an abuse of discretion. *Id.*

3. Sentences for crime by State and Federal courts do not run concurrently. *In re Huber,* 100.

4. The essential part of a sentence of imprisonment for crime is not the time when it begins to run, but the serving of the sentence as required by law. *Id.*

5. Delay in taking a prisoner into custody after conviction and sentence, occasioned by his service of sentence imposed by a Federal court, does not release him from serving the full term of his sentence imposed by a State court. *Id.*

6. The guilt of one charged with crime must be established beyond a reasonable doubt. *People* v. *Johnson,* 170.

7. Admission in evidence in prosecution for murder of hearsay statements of victim of stabbing, made the next day to an assistant prosecuting attorney in the presence of a stenographer, *held,* prejudicial error, where it does not clearly appear that the victim was, at time statements were made, either *in extremis* or under a sense of impending death, and while there is no doubt that the accused did stab the victim, there is some doubt as to whether the stabbing constituted murder or manslaughter or was done in self-defense. *Id.* 171.

8. One who aids and abets in the commission of an offense in this State may be prosecuted and, on conviction, punished as if he had directly committed the offense (CL 1948, § 767.39). *People* v. *Lee (Same* v. *Bannerman),* 217.

9. A felony which consists of or is the culmination of 2 or more acts done in its perpetration may be prosecuted in any county in which any one of the acts was committed (CL 1948, § 762.8). *Id.*

10. The legislature may fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed, since the elimination of the provision in the Constitution restricting the trial to the vicinage (Const 1835, art 1, §§ 9, 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19). *Id.*

11. The trial of a criminal prosecution should be by a jury of the county or city where an offense was committed except as the legislature has otherwise provided (Const 1908, art 2, § 19). *Id.*

12. A statute providing for venue of prosecution for crime in any county in which one of two or more acts culminating in a felony was committed is not unconstitutional as depriving the accused of a right to trial by jury (Const 1908, art 2, § 19; CL 1948, § 762.8). *Id.* 218.

13. Statute conferring jurisdiction to prosecute crime in any county in which any one of two or more acts culminating in felony took place conferred jurisdiction upon recorder's court of the city of Detroit to try prosecution for murder, where victim was inveigled into automobile within city limits by 2 of 5 defendants, pursuant to a prearranged plan, and

CRIMINAL LAW—Continued.

transported to another county where appellants participated in killing him (CL 1948, §§ 750.316, 762.8). *Id.*

14. A want of due process was not shown by appellants because of their prosecution for murder in which they had participated, where they were prosecuted in city of their residence and in which victim was inveigled into car and they failed to show they were put to disadvantage in procuring witnesses or attending trial there as compared with trial in county in which the killing took place (CL 1948, §§ 750.316, 762.8). *Id.*

15. Appellants were properly found guilty of murder in recorder's court of the city of Detroit, where there was evidence showing that they and other conspirators had participated in the formation of a conspiracy before the commission in Detroit of the act of inveigling the victim into an automobile by other members of the conspiracy and taking him to another county where appellants participated in shooting him (CL 1948, §§ 750.316, 762.8). *Id.*

16. The power of pardon and commutation of sentence rests in the governor alone and any law which restricts such power is unconstitutional (Const 1908, art 6, § 9). *People* v. *Freleigh*, 306.

17. To permit a trial court to amend a valid sentence after the prisoner has served a part of it would infringe upon the exclusive power of the governor under the Constitution to commute a sentence (Const 1908, art 6, § 9). *Id.*

18. The Constitution by implication forbids the judiciary to commute a sentence and does not enable the legislature to pass a law that will infringe upon the exclusive power of the governor to commute a sentence (Const 1908, art 6, § 9). *Id.*

19. Trial court, sitting in Chippewa county in a special session of the circuit court of Schoolcraft county, which 2 counties were part of a 4-county judicial circuit, had jurisdiction to arraign a 16-year-old boy, accused of robbery armed in Schoolcraft county, accept his plea of guilty and impose sentence, where it appears accused requested the special session of court and he was advised of his rights to appointment of counsel and jury trial, in view of statute authorizing holding of special terms of court for transaction of judicial business arising in another county of the same circuit but not involving determination by a jury (CL 1948, § 691.231). *In re Joslin*, 627.

20. Trial court, sitting in Grand Traverse county in a special session of the circuit court of Antrim county, which 2 counties were part of a judicial circuit containing more than 3 counties, had jurisdiction to arraign a man accused of breaking and entering in the nighttime and of being a second offender in Antrim county, accept his pleas of guilty and impose sentence, in view of statute authorizing holding of special terms of court for transaction of judicial business arising in another county of the same circuit but not involving determination by a jury (CL 1948, §§ 691.231, 750.110, 769.10 *et seq.*). *In re Enders*, 710.

CRIMINAL LAW—Continued.

See COURTS (9); ESCAPE; EVIDENCE (7); HOMICIDE; INDICTMENT AND INFORMATION; JUSTICES OF THE PEACE (4); MALICIOUS MISCHIEF.

CRIMINAL SEXUAL PSYCHOPATHIC PERSONS—See PARDON (1–6).

CROPS—See APPEAL AND ERROR (27); FRAUD (1, 2, 4, 6); FRAUDS, STATUTE OF (2).

CROSS-EXAMINATION—See EVIDENCE (6).

CROSSING—See AUTOMOBILES (4, 12, 17); NEW TRIAL (1); RAILROADS (1, 2, 5, 6).

CUSTODY OF CHILDREN—See DIVORCE (29–31).

CUSTOMS AND USAGES—See CONSTITUTIONAL LAW (5).

CUT-RATE SALES—See TRADE-MARKS AND TRADE NAMES (3, 6).

DAMAGES—See ACCOUNTING (3); CONTRACTS (5); EQUITY (1); FRAUD (1, 3, 4, 7); IMPROVEMENTS (1); JUDGMENT (2); REFORMATION OF INSTRUMENTS (4); SPECIFIC PERFORMANCE (5); TORTS (1, 4); TRIAL (7).

DEARBORN—See APPEAL AND ERROR (45); CONSTITUTIONAL LAW (7); MUNICIPAL CORPORATIONS (4, 10, 12, 13, 18).

DEATH—See CRIMINAL LAW (7); DIVORCE (1, 9); EVIDENCE (1, 4, 5, 7, 8); EXECUTORS AND ADMINISTRATORS (3); PARTNERSHIP (2, 4); WILLS (10); WITNESSES; WORKMEN'S COMPENSATION (9).

DEBTOR AND CREDITOR—See ACCOUNTING (2); FRAUD (8, 10); JOINT ADVENTURES.

DECISIONS OF FEDERAL SUPREME COURT—See COURTS (2).

DECLARATION—See FRAUD (1); JUDGMENT (13).

DECLARATION OF RIGHTS—See ACTION (1); COSTS (16).

DEDICATION.

1. Burden of proof of abandonment of property conveyed to, and accepted by, defendant city for park and recreation purposes was upon plaintiffs, heirs of grantor, claiming such abandonment. *Clark* v. *City of Grand Rapids*, 647.
2. Burden of proof that property conveyed to, and accepted by, defendant city for park and recreation purposes had been abandoned was not sustained, where it was not shown that such use had wholly failed. *Id.*
3. Neither misuse nor nonuse of property is sufficient to constitute an abandonment of land dedicated to public use so as to work a reverter to the dedicators. *Id.*
4. A deed to a nonprofit corporation on the express condition it was to be turned over to city for park and recreation purposes and which was accepted by the city for such purposes

DEDICATION—Continued.

constituted a completed dedication to the public for all practical purposes. *Id.*

5. A dedication is merely an appropriation of land to some public use, accepted for such use by or in behalf of the public. *Id.*
6. No distinction between a statutory dedication and common-law dedication is made for the purposes of the law of abandonment as the need for certainty of title exists equally in both instances. *Id.* 648.
7. Neglect of 264-acre property, dedicated for park and recreation purposes, by failure to provide a caretaker or make improvements or repairs did not effect an abandonment of property and cause it to revert to the dedicator's heirs, where the beautiful natural woodland remained and was a source of great delight to students of natural history who sought untouched conditions of plant life. *Id.*
8. Transfer of 264-acre tract from city to the State conservation commission and retransfer to city did not effect an abandonment of the use of the tract for park and recreational purposes by reason of the State's use of it for a woodland preserve, as a park may be a woodland preserve as well as a landscaped playground. *Id.*
9. A city's relinquishment of right-of-way adjoining 264-acre tract of land in another county which had been dedicated and accepted for park and recreation purposes did not constitute an abandonment of the right to use the entire park in any manner, where such relinquishment was at least partly motivated by a desire to preserve a portion of the park in a natural state. *Id.*

See APPEAL AND ERROR (43).

DEDUCTIONS—See TAXATION (3, 6).

DEEDS.

1. A deed of land to 2 grantees or survivor conveys a moiety to each for life, with remainder to the survivor in fee, and neither of them, by conveyance during his lifetime, can create a tenancy in common so as to cut off the contingent remainder. *Rowerdink* v. *Carothers,* 454.
2. Extrinsic facts shown *held,* without effect in construing deed to 2 grantees or survivor. *Id.*
3. Word "or" in deed conveying to 2 grantees "or survivor" does not require a different construction than if word "and" had been used. *Id.*
4. Quitclaim deed to plaintiff by survivor of 2 grantees in conveyance to them "or survivor," executed after other grantee had died, conveyed title to plaintiff. *Id.*
5. Ordinarily the use of the word "condition" in a deed does not indicate the existence of a condition subsequent without the presence of words of reverter. *Clark* v. *City of Grand Rapids,* 646.
6. Conditions subsequent, contained in a deed, are not favored in law and are strictly construed. *Id.*

DEEDS—Continued.

7. A provision in a deed as to use will be construed as a covenant rather than a condition subsequent, if possible, and in doubtful cases, held to be a covenant. *Id.*
8. The intention of the grantor in a deed to create a condition subsequent must be clearly and definitely shown. *Id.*
9. Clause of deed wherein it was stated that if property conveyed for park and recreation purposes was not accepted by city that it should revert to grantor pertained to clause of deed reciting purpose of conveyance and not other so-called conditions, some of which were reservations. *Id.* 647.
10. Defendant city, grantee in deed of land conveyed to its grantor for park and recreation purposes *held*, not to have estopped itself from insisting there was but 1 condition subsequent merely by references to 8 enumerated clauses as "conditions" in pleading. *Id.*
11. Remedy of plaintiffs in ejectment action was in chancery for any breach of covenant, where condition of sole condition subsequent had been met by defendant city's acceptance of property for park and recreation purposes. *Id.*

See BOUNDARIES; CONSPIRACY (1, 2); DIVORCE (23); RECEIVERS (8); VENDOR AND PURCHASER (1).

DEFAULTS—See CORPORATIONS (3).

DEFENSES—See EMINENT DOMAIN (5); STATES (6).

DELAY—See CRIMINAL LAW (5).

DELAYED MOTION—See HABEAS CORPUS (6).

DELEGATION OF POWER—See CONSTITUTIONAL LAW (7).

DELIVERY—See BOUNDARIES.

DE NOVO REVIEW—See APPEAL AND ERROR (32, 40); DIVORCE (5, 7).

DEPENDENTS—See WORKMEN'S COMPENSATION (8).

DEPOSITIONS.

The appearance called for by court rule authorizing party receiving a notice of taking a deposition to tax reasonable expenses actually incurred against moving party when latter fails to appear calls for the appearance by the moving party and his witness (Court Rule No 31, § 2 [1945]). *Chapman* v. *Chapman*, 297.

See EXECUTORS AND ADMINISTRATORS (1).

DERIVATIVE SUIT—See CORPORATIONS (6).

DESCRIPTION—See REFORMATION OF INSTRUMENTS (3).

DESERTION—See HUSBAND AND WIFE (1).

DESTRUCTION—See WILLS (10–14).

DETERIORATION—See EQUITY (1).

DETERMINATION OF NECESSITY—See EMINENT DOMAIN (1–4).

DETROIT—See NEGLIGENCE; SALES (1).

DILIGENCE—See NEW TRIAL.

DIRECTED VERDICT—See APPEAL AND ERROR (1, 3, 4); BILLS AND NOTES; FRAUD (1, 2); TORTS (1); TRIAL (7, 8); WILLS (12).

DIRECTORS—See CORPORATIONS (2–8, 11, 13–16).

DISCHARGE—See ACCOUNTING (2).

DISCREDITED WITNESS—See HOMICIDE (2).

DISCRETION OF COURT—See CRIMINAL LAW (1, 2); NEW TRIAL (1); RECEIVERS (4, 8).

DISCRETION OF OFFICERS—See MANDAMUS (1); MUNICIPAL CORPORATIONS (3, 4); OFFICERS (1, 2); PARDON (5).

DISMISSAL—See GARNISHMENT (1).

DISTRIBUTORS—See UNEMPLOYMENT COMPENSATION (6).

DIVISIBLE CONTRACT—See SALES (2).

DIVISION OF POWERS OF GOVERNMENT—See CONSTITUTIONAL LAW (4).

DIVISION OF PROPERTY—See DIVORCE (2, 4, 15, 17).

DIVORCE.

1. The right to enforce payment of arrears in alimony provided in decree of divorce for support of wife does not abate upon death of the wife, although courts may ease the burden upon the husband, under appropriate circumstances. *Beyerlein* v. *Ashburn,* 13.
2. Decree of divorce providing for sale of the home of the parties at public auction and equal division of the proceeds between the parties is not disturbed on appeal, where it appears to be in accord with the just rights of the parties and division made recognized husband's claim that while the value of the home in the wife's name at the time of the marriage was $3,500 and the present value of their equity was $11,000, the husband had made payments on the mortgage and expended labor exceeding 1/2 the present net value of the property. *Smith* v. *Smith,* 56.
3. The trial judge in a suit for divorce is in a better position than is the Supreme Court to pass upon the credibility of witnesses. *Id.*
4. The division of property in a divorce case must be determined on the basis of the facts established by the proofs and is not governed by any mathematical formula or by fixed rules. *Id.*
5. The Supreme Court on *de novo* review of a suit for divorce is not restricted by the findings of the trial court but gives especial consideration to such findings that are largely based upon the credibility of the witnesses and will not

DIVORCE—Continued.

reverse findings made unless convinced it must have reached a different conclusion had it occupied the position of the lower court, under like circumstances. *Id.* 57.

6. No costs are allowed upon affirmance of decree of divorce, where wife appealed. *Id.*

7. The finding of trial judge in a suit for divorce, who has the opportunity to observe the parties and listen to their claims, will not be reversed by the Supreme Court, even though it is not restricted by such findings on its *de novo* review, where the findings are based upon the credibility of witnesses who have presented conflicting testimony, unless convinced that it must have reached a different conclusion had it occupied the position of the lower court under like circumstances. *Tackabury* v. *Tackabury,* 157.

8. Conduct of wife who sought separate maintenance by husband, who filed cross bill for absolute divorce, *held,* to have justified decree for defendant on ground of extreme cruelty, where it appears she was emotionally unstable, 2 of the children left the home and she persistently embarrassed defendant by complaints to his employers. *Id.* 158.

9. Award to cross-defendant wife of $20 per week permanent alimony until death, remarriage or further order of the court is not disturbed on her appeal from decree of divorce on claim of insufficiency, where it appears she is not incapacitated from working although she claims not to be in good health. *Id.*

10. No costs are allowed wife on her appeal from decree for divorce, where decree is affirmed. *Id.*

11. Statute authorizing appointment of receiver for property of husband in suit for divorce to obtain payment of alimony or allowance for the support and education of minor children did not contemplate the appointment of a receiver before decree of divorce, especially where plaintiff had obtained an order for temporary alimony shortly theretofore and was in possession of property of defendant affording her an income greatly in excess of temporary alimony awarded (CL 1948, § 552.27). *Zielinski* v. *Zielinski,* 276.

12. Determination of trial judge that 25-year-old plaintiff wife was not entitled to divorce from 49-year-old husband on ground of extreme cruelty is not disturbed under record presented, where it appears that plaintiff failed to sustain her burden of proof in that defendant's jealousy and accusations as to her conduct were not entirely without foundation and it was shown that plaintiff's dissatisfaction was due, in part, to difference in ages of the parties. *Macias* v. *Macias,* 334.

13. No costs are allowed upon affirmance of decree dismissing plaintiff wife's bill for divorce. *Id.*

14. Decree of divorce, based upon findings of fact by the trial judge who listened to the parties and their witnesses give different versions of various events is not disturbed, where based largely upon an evaluation of the credibility of the parties. *Marrobie* v. *Marrobie,* 447.

DIVORCE—Continued.

15. Decree of divorce awarding substantially all of the property to the wife is not disturbed, where it appears the couple are childless, that the wife has been employed outside of the home all of the time during marriage lasting 18 years and that the husband had gambled away or hypothecated much of the earnings of the parties. *Id.*
16. Decree of divorce awarding home of the parties to the wife is modified to award to her the household furniture and furnishings, where she has been employed outside the home during entire marriage of 18 years and been the sole support of herself and husband during a part of the time. *Id.*
17. Vacant lot, valued at $400, is awarded to husband in suit for divorce, where decree of trial court is silent on the matter and most of the rest of the property was awarded the wife. *Id.*
18. A court cannot make an allowance of alimony after granting a decree of absolute divorce, where no alimony was awarded nor reservation of the question of alimony made. *Id.*
19. Plaintiff wife's conduct held, not such as to support husband's claim of extreme cruelty on her part nor to defeat her cause for divorce. *Id.*
20. Nonsupport, constituting extreme cruelty on the part of husband, *held,* to have justified decree of divorce to wife (CL 1948, § 552.8). *Id.*
21. No costs are allowed on husband's appeal in suit for divorce, where decree was modified on appeal and neither party prevailed in full. *Id.* 448.
22. Exclusion of expert accountant's report as to files of the probate court as evidence of fraud in plaintiff wife's suit for divorce and for conspiracy to place husband's property beyond her reach for purposes of property settlement and alimony in which her father-in-law had been joined as a defendant was proper, where conspiracy was not proved and probate court had allowed the father-in-law's accounts. *Stephenson* v. *Stephenson,* 529.
23. Inference that plaintiff wife had an interest in property arose from testimony that attorney for defendant father-in-law and corporation which he controlled had unsuccessfully sought to obtain from her a quitclaim deed and an assignment of land contract thereon and neither such defendant nor defendant husband in suit for divorce and for conspiracy to defraud her of her interest in the property produced the land contract by which she and her husband had contracted to purchase the property, notwithstanding claim of a third codefendant, the husband's paramour, of an interest in the property. *Id.*
24. A lien upon property of which plaintiff wife is found to have an interest is ordered imposed unless both trial and appellate costs of suit for divorce and attorney fee, as increased from $150 to $750, are paid within 30 days after entry of decree in Supreme Court, where defendant husband has at times made it difficult to collect $25 a week awarded for support of the 2 minor children. *Id.*

DIVORCE—Continued.

25. A married man who lives with his paramour and their son is not, by reason of incurring additional expenses for such purpose, excused from paying alimony. *Id.* 530.
26. Award of $25 per week for support of 2 minor children is not increased, even though inadequate, but continued at that amount during minority of younger child, where the older child is married and will be 21 years of age shortly. *Id.*
27. Alimony in the amount of $50 a month is awarded plaintiff wife in suit for divorce for such period as she remains unmarried, such amount being subject to modification by being increased or decreased as circumstances may develop, where her conduct has been without suspicion of impropriety and she has worked hard to support herself and the 2 minor children of the parties. *Id.*
28. Costs of both trial court and Supreme Court are awarded plaintiff wife who appealed from decree granting divorce but denying her property and alimony but no costs are awarded against or in favor of defendant father-in-law and another defendant, paramour of defendant husband, who had been joined in claimed conspiracy to defraud plaintiff by placing husband's property out of reach of plaintiff for purposes of property settlement or alimony. *Id.*
29. Order denying husband's petition to modify decree of divorce so as to award him the custody of 10-year-old girl and 9- and 7-year-old boys because the children were embarrassed by being required to live with a fourth child, conceived out of wedlock but born in wedlock, is affirmed where mother's remarriage has been followed by consistent and proper home life, testimony indicates her excellent care of the children and the severance from their mother now would be a very grave disturbance of their happy home life. *Kruer* v. *Kruer*, 641.
30. Denial of husband's petition to modify decree of divorce as to custody of the parties' children, 10, 9 and 7 years of age because of their embarrassment by being required to live with their mother's fourth child who was conceived out of wedlock although born after her remarriage, is made without prejudice to his right to renew the petition in the event that future facts and conditions warrant his so doing. *Id.*
31. No costs are awarded on affirmance of order denying husband's petition to modify decree of divorce as to custody of the children of the parties, where no costs are asked. *Id.* 642.

See APPEAL AND ERROR (21); HUSBAND AND WIFE (3); RECEIVERS (7, 8).

DOCKET—See MUNICIPAL CORPORATIONS (13).

DRUNK DRIVING—See CRIMINAL LAW (1, 2).

DUE PROCESS—See CRIMINAL LAW (12, 14); TRADE-MARKS AND TRADE NAMES (1).

DWELLING—See FRAUD (7).

DYING DECLARATIONS—See CRIMINAL LAW (7); EVIDENCE (1–8).

EARNING CAPACITY—See DIVORCE (9); HUSBAND AND WIFE (3); WORKMEN'S COMPENSATION (5–7).

EASEMENT—See EMINENT DOMAIN (4).

ECONOMIC BURDEN—See ACTION (1); TAXATION (1, 2).

ECONOMIC INTERESTS OF OTHER EMPLOYEES IN SAME INDUSTRY—See LABOR (2).

EFFECTIVE DATE—See MUNICIPAL CORPORATIONS (10).

EJECTMENT.

Any possible question of the power of the State conservation commission to reconvey property theretofore conveyed to it by a city which had acquired it from grantee of plaintiffs' ancestor and which had been dedicated for park and recreation purposes may only be raised by the State and not by plaintiffs in their action of ejectment against city as the plaintiffs may recover only on the strength of their own title and not because of any alleged weakness in the title of the defendant city. *Clark* v. *City of Grand Rapids,* 649.

See ADVERSE POSSESSION (1); APPEAL AND ERROR (44); VENDOR AND PURCHASER (3).

EJUSDEM GENERIS—See JUSTICES OF THE PEACE (6).

ELECTIONS.

1. That names of candidates for nomination to any political office by a political party are to be placed upon the party *row* of such party on a voting machine is a different requirement than placement in a separate *column* on a ballot (CL 1948, §§ 177.16, 191.6). *Moran* v. *Detroit Board of Election Commissioners,* 234.
2. Paper ballots may be used when election commissioners are confronted with an election at which all of the names of candidates cannot be accommodated on the voting machines (CL 1948, § 191.6). *Id.*
3. The rotating of names of candidates by precincts using voting machines is a sufficient rotation to comply with statutory requirements and obviates the presumed advantage of placement in the top row (CL 1948, § 165.3). *Id.*
4. Whether or not voting machines tend to confuse the voter or are not suitable for use by the aged or infirm voters are matters for consideration by the legislature and not grounds for judicial interference with election officers. *Id.*
5. A primary election is not a regular election in any sense of the term but is merely the selection of candidates for office by the members of a political party in a manner having the form of an election. *Attorney General, ex rel. Reuter,* v. *City of Bay City,* 514.

See APPEAL AND ERROR (45); COSTS (8, 9, 14); JUDGES (1–7); MUNICIPAL CORPORATIONS (6, 7, 9, 10, 12); OFFICERS (4, 6); QUO WARRANTO (1); SCHOOLS AND SCHOOL DISTRICTS (1, 3).

EMERGENCY VEHICLES—See AUTOMOBILES (14, 15).

EMINENT DOMAIN.

1. The right to review by certiorari is an adequate review of a determination of necessity in condemnation proceedings for the taking of private property for public highway purposes (CL 1948, § 213.197). *Jacox* v. *State Highway Commissioner*, 482.
2. Right to review by certiorari the determination of necessity for the taking of private property for public highway purposes is the exclusive remedy provided by statute (CL 1948, § 213.197). *Id.*
3. The highway commissioner's determination of necessity for taking lands described for limited access highway purposes is a judgment of necessity of taking for such purposes (CL 1948, § 213.174). *Id.*
4. Judgment of necessity for the taking of described land in fee for limited access highway purposes and an easement in certain other described land for highway easement for construction of a service road in condemnation proceedings held pursuant to clear notice of such intended taking precluded the adjudication of matter of notice in a subsequent injunction suit, since the issue as to adequacy of notice and scope of proceedings could have been adjudicated in the condemnation case (CL 1948, § 213.174). *Id.*
5. All defenses to a proposed taking of private property for public highway purposes must be made in the condemnation proceedings by way of which the property is sought to be taken (CL 1948, § 213.171 *et seq.*). *Id.* 483.

EMPLOYING UNIT—See UNEMPLOYMENT COMPENSATION (5, 6, 8).

EMPSON ACT—See TRIAL (7).

ENTIRETIES ESTATE—See FRAUDULENT CONVEYANCES (1, 2).

EQUITY.

1. No allowance of any specific amount for alleged deterioration of farm during 10 years of occupancy by plaintiffs as an offset against them in their suit for money decree for improvements and imposition of a lien is made, where there is no actual proof of the amount of such damage and trial court allowed plaintiffs only $800 on item of $3,150 for bulldozing some of the land. *Trisch* v. *Fairman*, 433.
2. A loss must be borne by the party whose conduct has rendered the injury possible, where 1 of 2 innocent persons must suffer loss. *Etherington* v. *Bailiff*, 544.
3. Equity will entertain jurisdiction, where the remedy at law is not plain, adequate and complete but is difficult or doubtful. *Jaup* v. *Olmstead*, 614.
4. Costs against vendor of premises heated by gas heating equipment are allowed upon reversal of decree in his favor after he had removed the equipment, where codefendant gas company is complying with preliminary order of trial court as to restoration of service and appeal was not taken as to it. *Id.*

See ACCOUNTING (1); APPEAL AND ERROR (32, 38); CANCELLATION OF INSTRUMENTS (1); CONTRACTS (3); CORPORATIONS

EQUITY—Continued.

(18); COURTS (7); DEEDS (10); DIVORCE (2); RECEIVERS (3); SPECIFIC PERFORMANCE (6); VENDOR AND PURCHASER (3).

ESCAPE.

1. The crime of aiding the escape of one lawfully detained on a felony charge constitutes a felony, while aiding escape of one lawfully detained on charge not punishable by imprisonment in the State prison is a circuit court misdemeanor (CL 1948, § 750.183). *People* v. *Gardineer,* 664.
2. Accused who was charged with aiding the escape of a prisoner, confined on charge of having maliciously destroyed various enumerated pieces of property whose value exceeded the sum of $115, charged prisoner was detained on a felony charge, even though it was not specified whether the personal or real property destroyed was greater than $50 in value, since obviously one or the other was in excess of such amount (CL 1948, §§ 750.183, 750.377a, 750.380). *Id.*
3. Fact that after defendant had attempted to aid in the escape of a prisoner, charged with a felony, the information against latter was amended to charge him with the malicious destruction of personalty and later he was convicted of a misdemeanor, rather than a felony *held,* immaterial, since at the time defendant sought to effect an escape, the prisoner was charged with having committed a felony (CL 1948, §§ 750.183, 750.377a, 750.380). *Id.*

See INDICTMENT AND INFORMATION (1, 3, 4).

ESTATES.

1. The law favors the earliest possible vesting of estates. *Durgee* v. *Simons,* 4.
2. The devise of a life estate to a spouse does not necessarily disclose an intent to bar the latter from sharing in the remainder. *Id.*
3. The fact that a life tenant can never come into the remainder does not change the time when title to the remainder vests. *Id.*

ESTATES BY ENTIRETIES—See COURTS (7).

ESTOPPEL—See APPEAL AND ERROR (13, 16); BOUNDARIES; DEEDS (10).

EVICTION—See INTOXICATING LIQUORS; MASTER AND SERVANT (2).

EVIDENCE.

1. A "dying declaration" is inadmissible in evidence unless made under a solemn belief of impending death. *People* v. *Johnson,* 169.
2. The fact that person who made a "dying declaration" lived for several days after making the statement is not controlling as to its admissibility as such a declaration. *Id.*
3. It is unnecessary to take a so-called "dying declaration" immediately after the declarer has been injured or to give no-

EVIDENCE—Continued.

tice to person accused of inflicting the injury of an intention to take the statement. *Id.*

4. The trial court must make a preliminary investigation in order to determine whether the person who made an alleged "dying declaration" was in fact *in extremis* at the time of making it and believed that his death was impending before admitting such hearsay testimony in evidence. *Id.* 170.

5. Whether or not person who made a so-called "dying declaration" was *in extremis* and believed that his death was impending may be proved like any other facts in the case and in the light of the existing and surrounding circumstances. *Id.*

6. Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, hence the necessity for extreme caution in admitting them in evidence. *Id.*

7. It must be clearly established that person making a dying declaration was *in extremis* at the time of making it and that he had a belief in his impending death before such hearsay testimony may be admitted in evidence in prosecution for crime. *Id.*

8. It was not established that person who made so-called dying declaration was either *in extremis* or had a belief in his impending death by testimony that he had been stabbed in the abdomen, had just been operated on and it is not shown he had any fear that his death was impending and answered "yes" to 3 leading questions as to whether he realized he was a pretty sick man, whether he made the statement in fear of impending death and whether he would make the same statement if he thought he was going to get well, and that he died from pneumonia 3 days later. *Id.*

9. A rebuttable or prima facie presumption has no weight as evidence but merely serves to establish a prima facie case. *In re Kanera's Estate (Ten Cate* v. *Kanera),* 461.

10. When a rebuttable presumption is challenged by rebutting evidence and supporting evidence is presented, the question is then raised as to the weight of the actual evidence introduced without giving any evidential force to the presumption itself. *Id.*

11. A presumption is a legal rule or a legal conclusion serving merely to establish a prima facie case until the other party has gone forward with his evidence; it is not probative matter which may be a basis of inference and weighed and compared with other matter of a probative nature. *Id.* 462.

12. Whether or not a presumption is rebutted or shown to be inapplicable presents a jury question. *Id.*

13. It is generally known that in the past 50 years the speed of railroad trains has been increased. *Buchthal* v. *New York Central Railroad Company,* 556.

14. Reliance upon parol evidence rule to exclude testimony plaintiffs might present in action for breach of warranty in building construction contract was not warranted, where defendants' affidavit in support of motion for summary judgment

EVIDENCE—Continued.

failed to state that the written contract embodied the entire agreement between the parties. *Klug* v. *Berkley Homes, Inc.*, 619.

See ACCOUNTING (1, 3); ADVERSE POSSESSION; APPEAL AND ERROR (1, 3, 4, 6–8, 15, 16, 20, 26–31, 33, 37, 38); AUTOMOBILES (1, 2, 4, 7, 9, 13, 15, 16); CANCELLATION OF INSTRUMENTS (2); CONSPIRACY; CONTRACTS (8); CORPORATIONS (10, 11, 17); CRIMINAL LAW (6, 15); DEDICATION (2, 7); DEEDS (8); DIVORCE (4, 7, 8, 12, 22, 23, 29); EQUITY (1); EXECUTION (5); FRAUD (2, 4, 5, 7–10); HOMICIDE (2); HUSBAND AND WIFE (1); INSANE PERSONS (3, 7, 8, 10); INSURANCE; JOINT ADVENTURES; LABOR (4, 5); MONOPOLIES (4); NEGLIGENCE; NEW TRIAL; OFFICERS (3); PARDON (5, 6); PARTNERSHIP (3, 4); RAILROADS (7); RECEIVERS (7); REFORMATION OF INSTRUMENTS (1, 2); SPECIFIC PERFORMANCE (1–3); TRIAL (1, 9); UNEMPLOYMENT COMPENSATION (4); WILLS (5–9, 11–16); WORKMEN'S COMPENSATION (2, 4).

EXCAVATION—See REFORMATION OF INSTRUMENTS (4, 5).

EXCESSIVE FORCE—See MASTER AND SERVANT (2).

EXCUSE—See DIVORCE (25).

EXECUTION.

1. The omission by an officer to give notice of execution sale required does not affect validity of such sale, if made to a purchaser in good faith and without notice of the omission (CL 1948, §§ 623.85, 623.90). *Kelso* v. *Coburn*, 44.
2. An officer, seeking a judgment debtor's property for purpose of making a levy, has no right to force an entrance through the outer door of the debtor's home, but if he is lawfully admitted to the home, he is entitled to insist that inner doors be opened to enable him to make the levy as commanded by the writ and to use reasonable force if necessary to accomplish that result. *Vanden Bogert* v. *May*, 606.
3. A householder waives his right to close the outer door against an officer serving process, by allowing him to enter; and if the officer once gains entrance through the outer door without force or fraud the privilege is gone, and he can force any other door open if necessary to make complete service of his process. *Id.*
4. Generally, an officer may force an entry into any enclosure except the dwelling house of the judgment debtor in order to levy a *fieri facias* on the debtor's goods. *Id.* 607.
5. Determination by trial judge that deputy sheriff had not used force in gaining entrance into plaintiffs' home when seeking goods upon which to make a levy and that the deputy undertook to perform his duty to the best of his ability and that articles having a value substantially greater than the amount of the exemption to which plaintiff, as judgment debtor, was entitled, were not taken *held*, justified under record presented. *Id.*

EXECUTION—Continued.

6. Fact that 1 of the 2 appraisers who accompanied defendant deputy sheriff in making a levy upon plaintiffs' property to satisfy a judgment was not a resident of the city in which plaintiffs resided, as required by statute *held*, not to justify relief to plaintiffs by way of injunction against sale of property taken in the levy, there being no showing that plaintiffs were deprived of any right to claim their exemptions and property having a greater value than the judgment debtor's exemption was excluded from the levy, and no showing made that the appraisal made was not fairly and honestly made nor motion to set aside the levy made in the court in which the judgment was entered (CL 1948, § 623.46). *Id.*

See ATTACHMENT (2).

EXECUTIVE CONSTRUCTION—See JUDGES (5).

EXECUTORS AND ADMINISTRATORS.

1. Whether or not plaintiff, who appears as an administrator, can be held personally liable for costs incident to notice he had given for the taking of an out-of-State deposition is not before the Supreme Court on his appeal from order granting defendant's motion for taxation of such costs when plaintiff's witness failed to appear (Court Rule No 31, § 2 [1945]). *Chapman* v. *Chapman*, 297.

2. A personal representative of an estate is a fiduciary and owes a duty to the estate not to engage in transactions concerning the property of the deceased for his or her own personal profit as against the interests of the estate. *In re McKenna's Estate (McKenna* v. *McKenna)*, 368.

3. The entire proceeds resulting from the sales of 4 taxicabs which had been owned by defendant's decedent, a member of a nonprofit corporation whose membership terminated upon his death, including the amount the purchasers paid to obtain the right to operate the taxicabs under the city license under which they had been operated, and not merely the value of the vehicles and their accessories, under the circumstances, belonged to the estate of the deceased, hence special administratrix must account for entire sum received. *Id.*

See SALES (1); TRUSTS (11).

EXEMPTIONS—See EXECUTION (5, 6); FRAUDULENT CONVEYANCES (2).

EX PARTE PROCEEDINGS—See APPEAL AND ERROR (22–24).

EXPERIENCE RECORD—See COSTS (2); UNEMPLOYMENT COMPENSATION (1–4, 7, 9).

EXPLOSION—See INSURANCE.

EXTENSION OF TERM—See LANDLORD AND TENANT (7).

EXTREME CRUELTY—See DIVORCE (8, 12, 19, 20).

EXTRINSIC FACTS—See DEEDS (2).

FAIR-TRADE AGREEMENTS—See CONSTITUTIONAL LAW (1); TRADE-MARKS AND TRADE NAMES (1, 3).

FARMS—See APPEAL AND ERROR (27); EQUITY (1); FRAUD (1, 2, 4, 6, 7); FRAUDS, STATUTE OF (2).

FATHER-IN-LAW—See APPEAL AND ERROR (34); CONSPIRACY; DIVORCE (22, 23, 28).

FEES—See APPEAL AND ERROR (16); JUDGES (1, 2).

FELONY—See CRIMINAL LAW (9, 11, 12); ESCAPE; INDICTMENT AND INFORMATION (1–3).

FIDUCIARIES—See CONSPIRACY (4); CORPORATIONS (3–5, 8); EXECUTORS AND ADMINISTRATORS (2, 3); SALES (1).

FILING—See FRAUD (1); HABEAS CORPUS (3); JUDGES (1, 2, 4–7); MANDAMUS (2); QUO WARRANTO (2, 4).

FIREMEN—See MUNICIPAL CORPORATIONS (4).

FIRST-DEGREE MURDER—See HOMICIDE (1, 2).

FISHING TACKLE—See TRADE-MARKS AND TRADE NAMES (4).

FITNESS OF MOTHER—See DIVORCE (29).

FITS OF CRYING—See INSANE PERSONS (8).

FORCIBLE ENTRY—See EXECUTION (2, 4, 5).

FORCING EMPLOYEES TO JOIN UNION—See INJUNCTION (3); LABOR (5, 6).

FORECLOSURE—See FRAUDULENT CONVEYANCES (2).

FOREIGN DIVORCE—See ATTACHMENT (4).

FORFEITURE—See VENDOR AND PURCHASER (3, 6–8).

FORM OF ACTION—See JUDGMENT (14).

FRANCHISES—See UNEMPLOYMENT COMPENSATION (6, 9).

FRAUD.

1. Overruling of defendants' motion to dismiss declaration after it was filed and their motion for directed verdict at close of opening statement by counsel for the plaintiffs was proper, where declaration sufficiently averred facts supporting claims that standing timber on the farm was materially less than as represented, that acreage seeded to wheat and contracted to be seeded to oats was misrepresented and that condition of the dwelling house was also misrepresented, notwithstanding failure to set forth amount farm would have been worth if the representations with reference to the timber, grain and house were true. *Watson* v. *Dax,* 320.
2. Evidence, presented by purchasers of farm, that defendants and their agent had misrepresented the amount of standing timber thereon and the amount of acreage of wheat that had been sown and the acreage contracted to be seeded to oats,

FRAUD—Continued.

*held,* sufficient to justify denial of motions for directed verdict and for judgment notwithstanding verdict. *Id.*

3. The measure of damages in an action for fraud based on alleged misrepresentations as to property purchased by plaintiffs is the difference between what it would have been worth had it been as represented and the value of the property as it was when conveyed to them, the amount paid not being in issue. *Id.* 321.

4. Verdict of $2,000 for plaintiffs in action against vendors of farm who had misrepresented value of timber and amount sown to wheat and contracted to be sown to oats *held,* supported by testimony before the jury. *Id.*

5. Whether or not plaintiff purchasers had relied on claimed misrepresentations made by defendant vendors *held,* a matter for the jury to determine from all the proofs in the case. *Id.*

6. Charge to jury *held,* to have fairly and clearly presented claims of parties in action for damages because of claimed misrepresentations as to timber, grain and condition of house on farm plaintiffs purchased from defendants. *Id.*

7. Plaintiffs' claim for damages resulting from alleged misrepresentations concerning dwelling on farm plaintiffs purchased from defendants in midwinter was properly not submitted to jury, where evidence adduced shows they made a careful examination of it, its proximity to highway was obvious, it was not a new structure and had recently been remodeled, there were no proofs to support finding that defendants were aware of defects, made fraudulent representations with respect thereto or the amount of damages, if any, sustained by plaintiffs with reference thereto and the defects only appeared after repeated vibrations from use of highway by heavily-loaded gravel trucks during following spring and summer. *Id.* 322.

8. Plaintiff's claim that she was fraudulently induced to accept by way of settlement a note for an amount less than what was actually due her as creditor of defendant must be determined on the basis of the evidence introduced on the trial. *Flood* v. *Welsh,* 583.

9. Party asserting fraud as the basis for relief has the burden of establishing claim of fraud by clear and satisfactory proof. *Id.*

10. Burden of proving fraud in execution of note for an amount alleged to be much less than plaintiff claims was then due her from defendant *held,* not sustained by plaintiff in her accounting suit against defendant with whom she had first engaged in joint adventures and after accounting thereof was had relation thereafter was that of debtor and creditor. *Id.*

See ACCOUNTING (3); APPEAL AND ERROR (18); CANCELLATION OF INSTRUMENTS (2); CONSPIRACY (2–4); CORPORATIONS (18); COURTS (7, 8); DIVORCE (22, 23, 28); EXECUTION (3); OFFICERS (1, 2).

FRAUDS, STATUTE OF.

1. The defense that oral agreement sued on was unenforceable

FRAUDS, STATUTE OF—Continued.

because it was subject to the statute of frauds must be affirmatively pleaded (CL 1948, § 566.106; Court Rule No 23, § 3 [1945]). *Trisch* v. *Fairman,* 432.

2. Performance by plaintiffs of an oral contract whereby they were to move onto farm and live thereon, put cattle on it, take care of defendant owner and give her 1/3 of the crops during her lifetime in return for her agreement to leave the property to them takes the case out of the statute of frauds and permits plaintiffs to sue for a money decree and impose lien upon such farm to secure payment thereof (CL 1948, §§ 566.106, 566.110). *Id.*

See APPEAL AND ERROR (28).

FRAUDULENT CONVEYANCES.

1. Payments by insolvent judgment debtor from his individual earnings upon mortgages on entireties property while judgment was outstanding constituted a "fraudulent conveyance" entitling trustee in bankruptcy to lien on the property notwithstanding the mortgages were executed subsequent to the date of insolvency (CL 1948, § 566.11 *et seq.*). *LaBour* v. *Bergin,* 437.
2. Lien of trustee in bankruptcy of judgment debtor upon entireties realty upon which such debtor and his wife had executed mortgages after his insolvency is limited to amount of payments made by judgment debtor from his individual earnings and subject to balance due on mortgages and debtor's exemption under the law, such lien being foreclosable if not paid within 4 months (CL 1948, § 566.11 *et seq.;* § 623.73 *et seq.*). *Id.*

FURTHERANCE OF VENDEE'S BUSINESS—See MONOPOLIES (1).

FURTHER TREATMENT—See PARDON (6).

GAMING—See DIVORCE (15).

GARNISHMENT.

1. The filing of a supersedeas bond is a prerequisite to stay of proceedings of an order dismissing a writ of garnishment but not to the consideration by the Supreme Court of the correctness of the trial court's order dismissing garnishment (CL 1948, § 650.21). *Beyerlein* v. *Ashburn,* 13.
2. Garnishment is a proper remedy for recovery of costs taxed under decree of the Supreme Court (CL 1948, § 628.1a). *Id.* 14.
3. Dismissal of garnishment proceeding before final conclusion of the principal case may not properly be done as the issues in the garnishment proceeding should come before the court having jurisdiction of the principal case only after that case has been decided. *Nelson* v. *McCormick,* 387.

See ACTION (2); APPEAL AND ERROR (2); ATTACHMENT (4).

GAS—See EQUITY (5); SPECIFIC PERFORMANCE (6).

GENERAL APPEARANCE—See APPEARANCE (1, 2); ATTACHMENT (3, 4); JUDGMENT (4, 5, 8).

GENERAL MANAGER—See CORPORATIONS (10–12, 14–16).

GENERAL VERDICT—See TRIAL (2, 3).

GENERAL WELFARE—See CONSTITUTIONAL LAW (1).

GIFTS—See TRUSTS (8).

GONDOLA CAR—See RAILROADS (2).

GOOD FAITH—See APPEAL AND ERROR (11); EXECUTION (1); IMPROVEMENTS (2, 3).

GOOD WILL—See TRADE-MARKS AND TRADE NAMES (2, 4).

GOVERNOR—See CRIMINAL LAW (16–18).

GRADE CROSSINGS—See AUTOMOBILES (17); RAILROADS (5, 6).

GRAIN—See FRAUD (2, 4, 6).

GRAND TRAVERSE COUNTY—See CRIMINAL LAW (20).

GRAVEL TRUCKS—See FRAUD (7).

GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (20); AUTOMOBILES (7, 9); WILLS (14).

GROCERY—See WORKMEN'S COMPENSATION (4).

GROSS PROCEEDS—See TAXATION (3).

GUARDIAN AND WARD—See CONSPIRACY (3).

HABEAS CORPUS.

1. The office of the writ of habeas corpus is to inquire into the cause of the imprisonment or restraint of the petitioner (CL 1948, § 637.7). *In re Huber*, 100.
2. Commitment proceedings in 1945 are governed by statutory provisions in effect at time they are held, subsequent amendments not being material in later habeas corpus proceeding (CL 1929, § 6888, as amended by PA 1943, No 250, and PA 1949, No 313). *In re Fuller*, 566.
3. The statute providing for the filing of a petition for habeas corpus by "some person" other than the one whose alleged unlawful restraint is in issue is to be liberally construed (CL 1948, § 637.9). *Id.*
4. Any person, including a spouse, may sue out a writ of habeas corpus and confer jurisdiction to inquire into the matter of an alleged illegal restraint of another person (CL 1948, § 637.9). *Id.*
5. Petition for habeas corpus by husband of person, claimed to have been committed to a hospital as a mentally incompetent person by the probate court after hearing at which the wife was not present and whose absence was not made to appear to the court as improper and unsafe, *held*, sufficient to confer jurisdiction upon Supreme Court to determine questions raised as

HABEAS CORPUS—Continued.

to validity of wife's commitment (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*

6. The review of the denial of a motion for leave to file a delayed motion to vacate plea of guilty is not reviewable by habeas corpus, as such writ does not function as a writ of error. *In re Joslin*, 627.

7. The review of the denial of a motion to vacate sentence and for new trial is not by way of habeas corpus, as such writ does not function as a writ of error. *In re Enders*, 710.

8. Alleged grounds for release, claimed by petitioner for habeas corpus, *held*, not supported by record in habeas corpus and ancillary writ of certiorari, the charges that prior to trial he had been held incommunicado, threatened with being charged with being a fourth offender, promised leniency, not informed of his rights, denied counsel, and not informed of right to jury trial having been refuted by officers familiar with entire circumstances surrounding petitioner's arrest, detention, confession, and pleas of guilty in open court and showing in detail what was said and what occurred. *Id.*

HABITUAL CRIMINALS—See CRIMINAL LAW (20); HABEAS CORPUS (8).

HACKSAW BLADES—See INDICTMENT AND INFORMATION (1).

HEALTH—See DIVORCE (9).

HEALTH BOARD—See MUNICIPAL CORPORATIONS (8); QUO WARRANTO (5).

HEARING—See HABEAS CORPUS (5); INSANE PERSONS (1–3, 10); MONOPOLIES (4); RAILROADS (8).

HEARSAY—See CRIMINAL LAW (7); EVIDENCE (1–4, 6, 7); INSANE PERSONS (8).

HEATING EQUIPMENT—See CONTRACTS (5); EQUITY (4); SPECIFIC PERFORMANCE (6).

HIGHWAY COMMISSIONER—See EMINENT DOMAIN (3).

HIGHWAYS AND STREETS—ADVERSE POSSESSION (2); AUTOMOBILES (5, 6, 10, 15, 16); EMINENT DOMAIN; RAILROADS (1, 2).

HILLS—See AUTOMOBILES (1).

HOLDER IN DUE COURSE—See BILLS AND NOTES.

HOLDING OVER—See LANDLORD AND TENANT (4–7).

HOME—See CONSPIRACY (1); DIVORCE (2, 16); EXECUTION (2, 5).

HOME-RULE CITIES—See COSTS (14); MUNICIPAL CORPORATIONS (7, 8, 11–13, 15, 18); QUO WARRANTO (5–7).

HOMICIDE.

1. Charge to jury that their verdict must be either murder in the first degree or not guilty was not error, because jury was

HOMICIDE—Continued.

not allowed to find defendants guilty of any lesser included offense, where theory of prosecution was based on carrying out of a conspiracy to murder in county other than that of prosecution and in which conspiracy had been formed and at least 1 act culminating in murder performed (CL 1948, §§ 750.316, 762.8). *People* v. *Lee (Same* v. *Bannerman),* 218.

2. Evidence was sufficient to permit jury to find appellants guilty of murder in the first degree, where there was corroboration of a discredited witness' testimony and some of his testimony gave details difficult to fabricate (CL 1948, § 750.316). *Id.* 219.

See CRIMINAL LAW (13–15).

HOSPITAL BILLS—See CONSPIRACY (1).

HOSPITALS—See INSANE PERSONS (1, 3).

HOT WATER PIPE—See INSURANCE.

HOUR OF DAY—See JUDGES (7).

HOUSE—See FRAUD (1, 6).

HOUSEHOLD FURNITURE—See DIVORCE (16).

HOUSEKEEPER—See WILLS (14).

HUSBAND AND WIFE.

1. Evidence failed to sustain claim of plaintiff wife that she was entitled to decree of separate maintenance on grounds of desertion and nonsupport. *Tackabury* v. *Tackabury,* 158.
2. The circuit court has jurisdiction to modify a decree as to support allowed wife and child in suit for separate maintenance but there must be a change in the condition of the parties since the decree to justify the modification (CL 1948, § 552.28). *Hensinger* v. *Hensinger,* 344.
3. Husband will not be relieved, even in part, of his obligation to support wife, as contained in decree for separate maintenance, where his salary is substantially the same now as when decree was entered, notwithstanding he has subsequently remarried after obtaining a decree of divorce in Nevada and incurred new family obligations and plaintiff wife is making an effort to earn some money. *Id.*

See APPEAL AND ERROR (21, 26); AUTOMOBILES (2); COURTS (7, 8); ESTATES (2); HABEAS CORPUS (4, 5); WILLS (4).

IDENTIFICATION—See JUDGES (3, 4).

ILLINOIS—See COSTS (12); TAXATION (9).

IMMUNITY—See ACTION (1); COSTS (3); STATES (2, 3, 11, 12).

IMPLEMENTS—See UNEMPLOYMENT COMPENSATION (9).

IMPROPER MANIPULATION—See INJUNCTION (1).

IMPROVEMENTS.

1. Party who is in possession of land under a contract providing for his ultimate acquisition of title from the owner and proceeds, in reliance thereon, to make reasonable improvements suitable to the premises in question and at a definite cost to himself should be permitted to recover the expense of the improvement unless shown to be unreasonable or utterly unadapted to the premises, where the owner breaches the contract, not the difference between the value of the land before and after the improvement was made and due to its having been made. *Trisch* v. *Fairman*, 433.
2. One who places improvements on the land of another is not entitled to recover the value thereof unless he did so while in possession under color of title, had possession adverse to the title of the true owner and acted in good faith. *Etherington* v. *Bailiff*, 545.
3. One who makes improvements on the land of another is not a bona fide possessor of such land, where he knows his title thereto is contested by some other person claiming a better right to it. *Id.*

See DEDICATION (7); EQUITY (1); REFORMATION OF INSTRUMENTS (5); SPECIFIC PERFORMANCE (2, 3).

INCLUDED OFFENSES—See HOMICIDE (1).

INCOME—See DIVORCE (11); RECEIVERS (7); UNEMPLOYMENT COMPENSATION (6); WILLS (4).

INCOME TAX—See COSTS (8); MUNICIPAL CORPORATIONS (6).

INCOMMUNICADO—See HABEAS CORPUS (8).

INDEPENDENT CONTRACTOR—See WORKMEN'S COMPENSATION (9).

INDICTMENT AND INFORMATION.

1. Allegation that defendant conveyed hacksaw blades to a prisoner, confined in a county jail on a charge of malicious destruction of property exceeding $50 in value, charged an offense known to the law (CL 1948, § 750.183). *People* v. *Gardineer*, 663.
2. It is proper for a trial court to allow an amendment to an information, designed to more fully describe the felony with which the prisoner stood charged. *Id.*
3. Intent to aid the escape of a prisoner, confined on a charge of having committed a felony, *held*, to have been alleged sufficiently so that accused might prepare his defense with full and precise knowledge of what he was accused of having done and intended (CL 1948, § 750.183). *Id.*
4. Failure of information to indicate whether the prisoner, whom accused had been charged with having attempted to aid in escaping, had been charged with malicious destruction of personal or real property did not render information insufficient, since the prisoner was lawfully detained on a criminal charge regardless of whether he was accused of destroying real or

INDICTMENT AND INFORMATION—Continued.

personal property (CL 1948, §§ 750.183, 750.377a, 750.380). *Id.* 664.

See ESCAPE (3).

IN EXTREMIS—See EVIDENCE (4, 5, 7, 8).

INFANTS—See AUTOMOBILES (5, 6).

INFERENCES—See APPEAL AND ERROR (3); DIVORCE (23); WORKMEN'S COMPENSATION (2, 3).

INHERITANCE TAXES—See COSTS (12); TAXATION (7, 9).

INJUNCTION.

1. Purchase and use of voting machines *held*, not subject to restraint by injunction, where allegations as to capacity for improper manipulation and malfunctioning are insufficient to show the machines fail to meet statutory and charter standards and requirements (CL 1948, §§ 191.2, 191.6). *Moran* v. *Detroit Board of Election Commissioners*, 235.
2. Decision on a motion for a temporary injunction is not *res judicata* as to action which may be taken on a final decree. *Hopkins* v. *Crantz*, 300.
3. A permanent injunction against picketing place of business where plaintiff conducted sand and gravel business did not violate any of the constitutional rights of defendant union or its members, where there was no dispute between plaintiff and his employees, union does not represent his employees although it does represent employees of other companies in the same business in the area and purpose of picketing was to force plaintiff's employees to join defendant union (CL 1948, § 423.17, as amended by PA 1949, No 230). *Posima* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 406*, 348.

See APPEAL AND ERROR (12); COSTS (7, 8); EMINENT DOMAIN (4); EXECUTION (6); JUDGMENT (9); LABOR (1, 4).

INNER DOORS—See EXECUTION (2, 3).

IN PARI MATERIA—See STATUTES (1).

IN REM—See ATTACHMENT (2).

INSANE DELUSIONS—See WILLS (6–9).

INSANE PERSONS.

1. The determination as to whether or not it would be improper and unsafe to permit a person whose sanity is the subject of inquiry to appear at the hearing or to render removal from place of commitment improper or unsafe is a matter for determination by the court and not a hospital superintendent or physicians (CL 1929, § 6888, as amended by PA 1943, No 250). *In re Fuller*, 566.
2. A person must be present at the hearing in which his sanity is in issue unless such appearance is made to appear to the

INSANE PERSONS—Continued.

court holding the hearing to be improper and unsafe (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.* 567.

3. Letter from hospital superintendent to probate judge that person whose sanity was in issue in proceeding brought for testing same was temporarily a patient in his institution and that it was improper and unsafe for her to appear in the court at the time of the hearing without setting forth supporting facts was insufficient to justify a denial to such person of her right to be present in court and take such part in the proceeding as she might desire, hence her commitment was null and void, there being no other justifying evidence (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
4. A probate court is without jurisdiction to commit a person as insane, where provisions of the statute relative to sanity proceedings are not complied with, since such provisions are mandatory (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
5. Proceedings taken for an adjudication of insanity against an individual should require the strictest compliance with all the pertinent statutory provisions, as such determination affects the rights of the individual to the enjoyment of life, liberty and property (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
6. The probate court derives its jurisdiction in sanity proceedings from the statute and the provisions of the statute must be strictly pursued (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
7. A person whose sanity is being adjudicated is presumed sane until the contrary fact is made to appear (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
8. Hearsay testimony that petitioner's wife had attempted to commit suicide and had indulged in fits of crying but not "to a great extent" and that the attempted suicide resulted from a misunderstanding of the parties *held*, insufficient to overcome presumption of sanity, hence commitment was void (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.* 568.
9. An adjudication of insanity may not be based solely on the certificates of physicians appointed by the probate court to examine the alleged insane person (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*
10. The Supreme Court does not weigh the testimony taken at a sanity proceeding but does determine whether the requirements of the statute were complied with and whether there was sufficient testimony taken on the hearing to overcome the presumption of sanity and to justify an affirmative finding that the person was at the time insane (CL 1929, § 6888, as amended by PA 1943, No 250). *Id.*

See HABEAS CORPUS (5).

INSOLVENCY—See FRAUDULENT CONVEYANCES; JOINT ADVENTURES.

INSTRUCTIONS—See APPEAL AND ERROR (11); AUTOMOBILES (4, 10, 13); FRAUD (6); TORTS (1, 4); TRIAL (2, 3, 6).

INSURANCE.

Evidence presented in insured's action under insurance policy to recover for loss alleged to be due to explosion *held*, not to have shown that improperly made slip joint on hot water pipe at washbowl in the bathroom had become separated due to explosion. *Reynolds* v. *Great American Insurance Company of New York*, 1.

See APPEAL AND ERROR (11); SPECIFIC PERFORMANCE (2).

INTENT—See DEEDS (8); ESTATES (2); EVIDENCE (3); INDICTMENT AND INFORMATION (3); RAILROADS (6); STATES (1, 10); STATUTES (2); VENDOR AND PURCHASER (2); WILLS (3, 10, 12).

INTEREST—See SPECIFIC PERFORMANCE (3).

INTEREST IN LAND—See COSTS (12); TAXATION (7, 9).

INTEREST IN LEGATEE—See WILLS (16).

INTERFERENCE WITH INTERNAL AFFAIRS—See CORPORATIONS (15, 16).

INTERIM POSITION—See APPEAL AND ERROR (45).

INTERNAL REVENUE ACT—See TAXATION (6).

INTERSECTIONS—See AUTOMOBILES (15, 16).

INTERSTATE COMMERCE—See COMMERCE; TRADE-MARKS AND TRADE NAMES (5, 6).

INTOXICATING LIQUORS.

Act of bartender in defendant's tavern in making unprovoked assault upon plaintiff patron who had been refused further drinks because of his intoxicated condition was properly found by trial court to have been made in furtherance of defendant master's business and fact that the bartender used more force than necessary to evict plaintiff does not relieve defendant from liability. *Stewart* v. *Napuche*, 77.

INVASION OF PRIVACY—See TORTS.

JAILS—See INDICTMENT AND INFORMATION (1).

JEALOUSY—See DIVORCE (12).

JOINT ADVENTURES.

Evidence *held*, to show that by execution of a so-called security agreement at a time when defendant was insolvent, joint adventure relationship between him and plaintiff widow was changed to debtor and creditor, especially in view of the dealings subsequently had between the parties. *Flood* v. *Welsh*, 583.

See FRAUD (10).

JOINT TENANCY—See COURTS (7).

JUDGES.

1. Printing of name of a candidate for the office of probate

JUDGES—Continued.

judge on a ballot may not be obtained without filing petitions therefor with the required number of signatures and in the form, as specified, prescribed by the secretary of State, no provision being made for payment of a fee in lieu of filing the required nomination petitions for such office (Const 1908, art 7, § 23, as amended in 1947). *Soutar* v. *St. Clair County Election Commission,* 258.

2. The statutory provision permitting a candidate of a political party to pay a fee in lieu of filing nomination petitions is not available for use with respect to the nonpartisan office of probate judge (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.3). *Id.*

3. The Constitution, insofar as it sets forth the steps required to obtain the printing on ballot of the name of a candidate for nomination for a judicial office, is self-executing and other obligations may not be imposed; hence a candidate for such an office need not file an affidavit of identification (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.22). *Id.*

4. The right of an unopposed candidate for judicial office to have his name certified to the board of election commissioners arises immediately following expiration of the time set for filing nominating petitions and is not conditioned or contingent on the filing of the statutory affidavit of identification in ensuing 3-day period (Const 1908, art 7, § 23; CL 1948, § 157.22). *Id.*

5. Executive construction of statutes relating to time for filing nominating petitions in effect at time amendment to Constitution was adopted relating to nomination and election of judges must be given due consideration (Const 1908, art 7, § 23). *Id.*

6. Nominating petitions for office of probate judge, filed on July 1, 1952, were timely filed, where primary election was set for August 5, 1952, the filing having taken place on the 35th day preceding the primary (Const 1908, art 7, § 23, as amended in 1947). *Id.* 259.

7. Statutory provision restricting officers who are authorized to receive nominating petitions from accepting petitions after 4 o'clock on the last day of acceptance does not concern the holding or conducting of an election, hence does not apply to petitions for office of probate judge (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.14, as amended by PA 1952, No 171). *Id.*

8. Defendant county clerk should have received plaintiff's nominating petitions for filing, subsequent examination and checking, that were presented at 4:55 p. m. on 35th day preceding date set for primary election, where, although office door was locked, tendered petitions were rejected because of mistaken application of an inapplicable statute and office was subsequently opened that day for transaction of other business (Const 1908, art 7, § 23, as amended in 1947; CL 1948, § 157.14, as amended by PA 1952, No 171). *Id.*

JUDGES—Continued.

9. Nominating petitions for office of probate judge, timely presented by plaintiff to defendant county clerk, are ordered received for examination and checking and, if found sufficient and in proper form, his name is ordered printed on the ballot, following certification by the defendant county clerk to defendant county election commission (Const 1908, art 7, § 23, as amended in 1947). *Id.*

See APPEAL AND ERROR (45); CONSTITUTIONAL LAW (7); COSTS (17); MUNICIPAL CORPORATIONS (10–14, 16); QUO WARRANTO (7).

JUDGMENT.

1. Plaintiffs who filed a motion for judgment for $10,000 notwithstanding verdict in their favor of $2,000 were not entitled to have judgment in their favor in larger amount summarily entered, based on sworn bill of particulars, items of which had not been specifically denied by affidavit by defendants, where such basis does not appear to have been called to attention of trial court or to have been considered by him or that he took any action with reference to it (CL 1948, § 691.691; Court Rule No 20, § 5 [1945]). *Watson* v. *Dax,* 321.
2. An action for damages for abuse of process, based on fact that defendant herein had commenced an action against plaintiff in a municipal court in a city other than one in which both parties were resident, constitutes a collateral attack upon the judgment in the original action. *Edwards* v. *Meinberg,* 355.
3. A collateral attack upon a judgment is permissible only if the court in which the judgment was rendered never acquired jurisdiction over the persons or the subject matter. *Id.*
4. A municipal court had jurisdiction to render judgment against defendant in action of assumpsit, where defendant, a nonresident, was personally served and entered a general appearance. *Id.* 356.
5. A defect in venue requirements, even where not waived by a general appearance, is not such a defect as may be attacked collaterally. *Id.*
6. The judgment of a court which has acted without authority by reason of a true jurisdictional defect, is a nullity and is always subject to collateral attack. *Id.*
7. A mistake in the exercise of jurisdiction by a court is not void altogether but may be subject to direct attack on appeal, where question as to jurisdiction is seasonably raised. *Id.*
8. The judgment by a municipal court in an action of assumpsit may not be the subject of collateral attack, where it had jurisdiction of the subject matter and of the person of the defendant, a nonresident, by reason of personal service followed by general appearance. *Id.*
9. A decree enjoining the State commissioner of revenue from instituting any proceeding against plaintiff to recover because of expenditures by the State in caring for him in State in-

JUDGMENT—Continued.

stitutions because commitments thereto were void cannot be regarded as creating any new right of action in plaintiff or as imposing on the State any liability in addition to that, if any, created through legislative enactment. *Van Antwerp* v. *State*, 593.

10. A court may enter a summary judgment for the defendant only where there are no issues of fact which, if resolved in favor of plaintiff, would entitle him to a judgment (Court Rule No 30 [1945]). *Klug* v. *Berkley Homes, Inc.*, 618.
11. On motion for summary judgment the existence of an issue of fact is determined by a consideration of the pleadings and the affidavits (Court Rule No 30 [1945]). *Id.*
12. Affidavit in support of defendants' motion for summary judgment in action for alleged breach of warranty of building construction contract was insufficient, where it neither denied nor mentioned the pleaded promise to repair the house and replace the defective materials (Court Rule No 30 [1945]). *Id.*
13. Granting defendants' motion for summary judgment was error, where there were factual issues raised in the declaration which, if supported by competent proof, could result in a judgment against defendants. *Id.* 619.
14. Judgment upon a demurrer going to form of the action, defect of pleading or to jurisdiction of the court will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. *Laude* v. *Cossins*, 622.
15. Inclusion of the words "with prejudice" in a judgment does not add conclusiveness to a judgment insofar as a second but different action is concerned. *Id.* 623.

See EMINENT DOMAIN (3–5); EVIDENCE (14); FRAUD (2); FRAUDULENT CONVEYANCES (1); TRUSTS (5).

JUDGMENT NOTWITHSTANDING VERDICT—See APPEAL AND ERROR (1); JUDGMENT (1); TRIAL (7).

JUDICIAL NOTICE—See EVIDENCE (13).

JUDICIAL POWER—See JUSTICES OF THE PEACE (1, 3–6); TOWNSHIPS (6).

JURISDICTION—See ACTION (2); APPEARANCE (1); ATTACHMENT (3); COURTS (3, 5, 7, 8); CRIMINAL LAW (9, 13, 15, 19, 20); EQUITY (3); HABEAS CORPUS (4, 5); HUSBAND AND WIFE (2); INSANE PERSONS (4, 6); JUDGMENT (2–4, 6–8, 14); OFFICERS (1); RECEIVERS (2); SPECIFIC PERFORMANCE (5); STATES (6); TRUSTS (2, 6–10).

JURY—See CRIMINAL LAW (19); HABEAS CORPUS (7).

JUSTICES OF THE PEACE.

1. Judicial power is vested in justices of the peace as well as in the higher courts (Const 1908, art 7). *Township of Dearborn* v. *Dearborn Township Clerk*, 673.

JUSTICES OF THE PEACE—Continued.

2. The fact that justices of the peace have acted as *de facto* members of township boards over a century does not make them members *de jure* (Const 1908, art 4; CL 1948, § 41.70, as amended by PA 1949, No 9). *Id.* 674.

3. Statute constituting justices of the peace, who are vested with judicial power by the Constitution, as members of township boards, vested by the Constitution with legislative and administrative powers, contravenes provision of the Constitution prohibiting a person belonging to one department of government from exercising powers properly belonging to another (Const 1908, art 4, § 2; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9). *Id.*

4. A justice of the peace is vested with part of the judicial power of the State and in exercising such powers in criminal cases represents the State rather than the township. *Id.* 675.

5. The judicial power conferred upon justices of the peace is in no manner reduced or modified by virtue of their constitutional appointment as conservators of the peace (Const 1908, art 7, §§ 1, 18). *Id.*

6. Provision of Constitution setting forth certain judicial duties of the justices of the peace and authorizing the imposition of "such duties as shall be prescribed by law" requires the application of the rule *ejusdem generis*, since by the specific mention of judicial duties, other types of duties not mentioned are excluded (Const 1908, art 7, § 16). *Id.*

See TOWNSHIPS (3, 4, 6, 7).

JUSTIFICATION—See OFFICERS (4, 5); SCHOOLS AND SCHOOL DISTRICTS (4).

LABOR.

1. The propriety of a decree enjoining defendant union from picketing plaintiff's place of business must be tested by a determination of whether there was a lawful labor dispute and whether the union sought to achieve a lawful labor objective (CL 1948, § 423.17, as amended by PA 1949, No 230). *Postma* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 406*, 347.

2. It is not necessary that a dispute exists between an employer and his employees in order to permit peaceful picketing, because if the economic interests of other employees engaged in the same industry are affected, they may through their representatives publicize their grievances by peaceful picketing. *Id.*

3. The motive for picketing by a union is always a question of fact. *Id.*

4. Evidence that was stricken in suit to enjoin picketing of plaintiff's place of business is considered on appeal, where it appears in the record and relates to purpose and motives for establishing picket line. *Id.* 348.

LABOR—Continued.

5. Publicizing of unfair wages and working conditions at plaintiff's place of business by defendant union *held*, not established as the primary purpose of picket line, where the unfair wages and working conditions were not established to any degree of certainty and the union's officer stated, in effect, that the purpose of the picketing was to force plaintiff's employees to join the union (CL 1948, § 423.17, as amended by PA 1949, No 230). *Id.*
6. An attempt to force employees to become unionized either directly or indirectly through their employer is not a lawful labor objective (CL 1948, § 423.17, as amended by PA 1949, No 230). *Id.*

See INJUNCTION (3); PARTNERSHIP (5).

LAKES—See ADVERSE POSSESSION (2).

LAND CONTRACTS—See DIVORCE (23); PARTNERSHIP (3, 4); SPECIFIC PERFORMANCE (6); VENDOR AND PURCHASER (3, 4, 6–8).

LANDLORD AND TENANT.

1. Option to purchase, contained in lease, and reading "at any time within 1 month of the expiration of the said lease term" is construed as one which could be exercised at any time prior to 1 month before the expiration of the lease. *Holt* v. *Stofflet*, 272.
2. An option to purchase, being inserted in the lease for the benefit of the tenant, must be construed with that purpose in view. *Id.*
3. The relation of landlord and tenant ceased when the option to purchase contained in the lease was properly exercised, hence, there was no obligation to pay rent for the month starting after the option was exercised. *Id.*
4. Generally, the law implies a contract to renew the tenancy on the same terms for another year, where a tenant under a valid lease for years holds over. *Kokalis* v. *Whitehurst*, 477.
5. A presumption that the parties intend to renew the tenancy arises from the holding over by the tenant and acceptance of rent by the landlord. *Id.*
6. A landlord may treat a tenant who holds over after the expiration of a lease as a trespasser or may acquiesce in the continued possession. *Id.*
7. A notice to quit need not be made by the landlord upon a tenant who holds over after the termination of a valid lease because of acceptance of rent, where lease specifically provided that after termination of term of the lease the receipt of money by the landlord should not reinstate, continue or extend the term. *Id.*

See APPEAL AND ERROR (12); CORPORATIONS (2); VENDOR AND PURCHASER (1, 2).

LARCENY—See PARDON (5).

LATHE OPERATOR—See WORKMEN'S COMPENSATION (7).

LAYOFF—See WORKMEN'S COMPENSATION (7).

LEADING QUESTIONS—See EVIDENCE (8).

LEASE FOR YEARS—See LANDLORD AND TENANT (4).

LEASES—See APPEAL AND ERROR (11); CORPORATIONS (2); LANDLORD AND TENANT (1-4, 7); VENDOR AND PURCHASER (1).

LEGAL ENTITIES—See PARTNERSHIP (5); UNEMPLOYMENT COMPENSATION (8).

LEG INJURY—See WORKMEN'S COMPENSATION (4).

LEGISLATIVE BODY—See MUNICIPAL CORPORATIONS (17).

LEGISLATIVE POWER—See TOWNSHIPS (2, 5, 6).

LEGISLATURE—See CRIMINAL LAW (18); ELECTIONS (4); STATUTES (6); TOWNSHIPS (4).

LENIENCY—See HABEAS CORPUS (8).

LETTERS—See VENDOR AND PURCHASER (2).

LETTERS OF TRUSTEESHIP—See TRUSTS (5, 11).

LICENSES—See CORPORATIONS (9); EXECUTORS AND ADMINISTRATORS (3); SALES (1).

LIENS—See APPEAL AND ERROR (27); DIVORCE (24); EQUITY (1); FRAUDS, STATUTE OF (2); FRAUDULENT CONVEYANCES (2).

LIFE ESTATE—See ESTATES (2, 3); WILLS (2, 4, 14).

LIGHTS—See AUTOMOBILES (1, 12, 16).

LIMITATION ON AREA—See MONOPOLIES (2, 3).

LIMITED ACCESS HIGHWAYS—See EMINENT DOMAIN (3, 4).

LISTING AGREEMENT—See BROKERS (1, 2).

LOCAL GOVERNMENT—See CONSTITUTIONAL LAW (6).

LUMP SUM—See SALES (1).

MAJORITY VOTE—See SCHOOLS AND SCHOOL DISTRICTS (3).

MALFEASANCE—See OFFICERS (7); SCHOOLS AND SCHOOL DISTRICTS (4).

MALFUNCTIONING—See INJUNCTION (1).

MALICIOUS MISCHIEF.

"Property of another," as the term is used in statute making it an offense to maliciously injure the property of another, includes the property of bodies politic and corporate as well as individuals (CL 1948, § 750.377a). *People* v. *Gardincer*, 664.

See ESCAPE (2, 3); INDICTMENT AND INFORMATION (1, 4).

MANAGERS—See CORPORATIONS (5).

MANDAMUS.

1. A court has no right to substitute its judgment or discretion by way of a writ of mandamus for that exercised by an administrative board or commission. *O'Connell* v. *Dearborn Police and Fire Pension Board (Rabideau* v. *Same),* 208.
2. Mandamus may not be granted to compel a county clerk to accept nominating petitions for the office of probate judge unless it was the clear legal duty of the clerk to receive the petitions. *Soutar* v. *St. Clair County Election Commission,* 259.

See CERTIORARI; COSTS (6, 9); MUNICIPAL CORPORATIONS (4).

MANSLAUGHTER—See CRIMINAL LAW (7).

MANUFACTURERS—See CORPORATIONS (3, 4); UNEMPLOYMENT COMPENSATION (6, 9).

MARKET—See SPECIFIC PERFORMANCE (5).

MASTER AND SERVANT.

1. Generally, a master is liable for the acts of a servant while the servant is acting within the scope of his employment. *Stewart* v. *Napuche,* 76.
2. The master is liable for acts of servant if latter uses more force than he was authorized to use in evicting a party from his master's premises. *Id.* 77.
3. The master who puts his servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another; doubt as to whether the servant exceeded his authority being resolved against the master. *Id.*

See CRIMINAL LAW (1, 2); INTOXICATING LIQUORS.

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See APPEAL AND ERROR (6); WITNESSES.

MAXIMS—See EQUITY (2).

MAYORS—See SALES (1).

MEETING OF THE MINDS—See REFORMATION OF INSTRUMENTS (2).

MEETINGS—See CORPORATIONS (15).

MEMBERSHIP—See CORPORATIONS (9).

MENTAL COMPETENCY—See WILLS (5).

MENTAL HEALTH, DIRECTOR OF DEPARTMENT OF—See PARDON (5).

MINES AND MINERALS—See CONTRACTS (2); RECEIVERS (6).

MINORS—See AUTOMOBILES (5, 6).

MISAPPROPRIATION OF ASSETS—See SCHOOLS AND SCHOOL DISTRICTS (4).

MISFEASANCE—See OFFICERS (7); SCHOOLS AND SCHOOL DISTRICTS (4).

MISREPRESENTATIONS—See FRAUD (1, 5, 6).

MISTAKE—See JUDGMENT (7); WILLS (7, 8).

MISTRIAL—See APPEAL AND ERROR (11).

MISUSE—See DEDICATION (3).

MODELS—See TORTS (1, 3).

MODIFICATION OF DECREE—See DIVORCE (27, 29, 31); HUSBAND AND WIFE (2, 3); MONOPOLIES (4).

MONEY DECREE—See APPEAL AND ERROR (27); EQUITY (1); FRAUDS, STATUTE OF (2).

MONOPOLIES.

1. A covenant not to compete is permitted when its object is to protect a vendee in the furtherance of his business (CL 1948, § 445.766). *Hopkins* v. *Crantz*, 300.
2. Decree limiting area in which defendant who sold his stock in corporation to plaintiff and covenanted not to engage in same business for period of 10 years to county in which corporation had its office from which it conducted business of surfacing buildings with simulated brick *held*, seemingly reasonable under record presented, notwithstanding covenant failed to specify any limitation as to area (CL 1948, § 445.766). *Id.*
3. An equity court has authority to limit the area of restriction under a covenant not to compete to make the area of restriction a reasonable one according to the facts. *Id.*
4. Trial court's decree, entered on the pleadings in suit to enforce covenant not to engage in competing business with that purchased by plaintiff by which area of noncompetition was restricted to county in which plaintiff's business was conducted without testimony having been taken, is affirmed subject to right to hearing on motion therefor with right to take testimony as to whether the territory should be enlarged or restricted and to modification of decree accordingly. *Id.* 301.

See CONSTITUTIONAL LAW (1).

MORTGAGES—See DIVORCE (2); FRAUDULENT CONVEYANCES.

MOTIONS AND ORDERS—See APPEAL AND ERROR (1).

MOTION TO DISMISS—See ACTION (2); APPEAL AND ERROR (2, 10, 15, 39); FRAUD (1).

MOTION TO STRIKE—See APPEAL AND ERROR (29).

MOTIVES—See LABOR (2–5).

MUNICIPAL CORPORATIONS.

1. Municipal pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby, ambiguous provisions being so construed, if reasonably permissible, to give vitality and efficiency in the accomplishment of the obvious purposes and objects sought to be attained. *O'Connell* v. *Dearborn Police and Fire Pension Board (Rabideau* v. *Same)*, 208.
2. A judicially administered pension fund may be a potent agency in securing and retaining the services of the most faithful and efficient class of persons connected with municipal services in which property owners and residents of a municipality are most vitally interested. *Id.*
3. The powers of a board, created by a city ordinance, to exercise discretion must be found in the ordinance itself and are subject to its limitations thereon. *Id.* 209.
4. City firemen who had each served more than 20 years were entitled to be placed on pension roll under charter provisions granting firemen the option to retire after such length of service and the police and fire pension board had no discretion to exercise, where no factual issues were presented, hence mandamus to place names of plaintiffs on the roll was properly granted (Dearborn Charter, §§ 21.16, 21.17, 21.28). *Id.*
5. A city is granted the power to purchase and use voting machines meeting statutory standards and requirements (CL 1948, §§ 191.2, 191.6). *Moran* v. *Detroit Board of Election Commissioners*, 234.
6. Statute requiring statement of propositions to be voted upon by municipal electors so that each proposition may be voted upon separately was not complied with, where proposition for approval of tax limitation upon real and personal property was coupled with an income tax proposition on ballot as a single proposition, hence, amendment of charter and implementing ordinances were not validly adopted (CL 1948, § 117.-21). *House* v. *City of Saginaw*, 241.
7. The purpose of the amendment to the home-rule act relative to the submission of charter amendments to the electorate was to eliminate their submission at primary and special elections and require submission at a regular city or State or county election (CL 1948, § 117.21). *Attorney General, ex rel. Reuter*, v. *City of Bay City*, 514.
8. Submission of proposed amendments to home-rule city charter relative to organization of city board of health at primary election was null and void, hence former provisions relating to the board remained in full force and effect (CL 1948, §§ 638.26–638.29). *Id.* 515.
9. The Supreme Court may determine the constitutionality of an amendment to a home-rule city charter but its propriety is a question for the voters of such city. *Attorney General* v. *Guy*, 694.
10. Charter amendment substituting office of associate municipal judge for that of a municipal judge theretofore appointed was designed to take immediate effect upon adoption, where

MUNICIPAL CORPORATIONS—Continued.

it provides that such associate municipal judge should hold office until the next municipal spring election rather than deferring its effective date until such election (Dearborn Charter, § 10.2, as amended in 1951). *Id.*

11. The office of municipal judge is not a constitutional one but is created by amendment of the home-rule city charter pursuant to legislative authority provided by statute, can be legally abolished in the same manner and need not be abolished by constitutional amendment. *Id.*

12. Voters on a lengthy charter amendment must be held to have been familiar with the terms thereof when they voted in strict accordance with the usual procedure for charter amendments of home-rule cities and abolished office of one municipal judge and substituted therefor an entirely different office pursuant to a different statute than that providing for other municipal judge whose office was continued without change except with some additional duties (CL 1948, §§ 117.28–117.33; § 730.101 *et seq.;* § 730.321 *et seq.;* Dearborn Charter, §§ 10.2, 10.10, 10.17, as amended in 1951). *Id.* 695.

13. Provision of home-rule city charter amendment, adopted pursuant to associate judges act, whereby the associate judge was to hold court "on direction of the municipal judge" was not contrary to the statute under which the amendment was adopted by permitting the full-time municipal judge to dictate to the part-time associate judge but merely a recognition of the administrative responsibility of the municipal judge in directing the details of the docket of the municipal court (CL 1948, § 730.321 *et seq.;* Dearborn Charter, § 10.10, as amended in 1951). *Id.*

14. Neither the municipal court act nor the associate judges act requires that there be more than 1 municipal judge functioning full time, nor prevents an increase or decrease in the number of municipal judges in a municipality (CL 1948, § 730.101 *et seq.;* § 730.321 *et seq.*). *Id.*

15. Changes in the structure of a municipal court for a home-rule city may be made by way of charter amendment, where the establishment of such a court is effected by way of charter amendment (CL 1948, § 730.101 *et seq.*). *Id.* 696.

16. The number of full-time municipal judges may be reduced by charter amendment concurrently with the establishment of the new office of associate judge (CL 1948, § 730.101 *et seq.;* § 730.321 *et seq.*). *Id.*

17. Voters themselves may constitute the legislative body for purposes of appointment of city officials. *Id.*

18. The sovereign power of the people in a home-rule city to alter the charter implies power to provide for the effective functioning of the new government under the proposed alteration, by providing who should hold an office in event the charter amendment creating it is adopted (Dearborn Charter, § 10.2, as amended in 1951). *Id.*

See APPEAL AND ERROR (43, 45); AUTOMOBILES (7); CONSTITUTIONAL LAW (7); COSTS (6, 14, 17); CRIMINAL LAW (11, 14,

MUNICIPAL CORPORATIONS—Continued.

15); DEDICATION (4, 8); DEEDS (9); EJECTMENT; EXECUTORS AND ADMINISTRATORS (3); MALICIOUS MISCHIEF; NEGLIGENCE; QUO WARRANTO (5–7).

MUNICIPAL COURTS—See JUDGMENT (2, 4, 8).

MURDER—See CRIMINAL LAW (7, 13–15); HOMICIDE.

NAMES—See JUDGES (1, 3, 4, 9).

NATIONAL BANKS—See ACTION (1); APPEAL AND ERROR (9); COSTS (3).

NECESSITY—See EMINENT DOMAIN (1–4).

NEGATIVE TESTIMONY—See RAILROADS (7, 8).

NEGLIGENCE.

Violation of a city traffic ordinance is not negligence *per se*, but is evidence of negligence presentable to the trier of the facts (Detroit Traffic Ordinance No 115–D, §§ 14[b], 16). *Hodgdon* v. *Barr*, 60.

See AUTOMOBILES (1, 2, 4, 6, 9, 10, 13, 14, 16); RAILROADS (4).

NEVADA—See APPEAL AND ERROR (21); HUSBAND AND WIFE (3).

NEWLY-DISCOVERED EVIDENCE—See NEW TRIAL.

NEW TRIAL.

1. Denial of new trial because of alleged newly-discovered evidence that there was no sound of train whistle before train reached crossing at which collision occurred was not an abuse of discretion, where there was no showing that plaintiff could not, with reasonable diligence, have discovered the evidence and produced it at the trial. *Buchthal* v. *New York Central Railroad Company*, 557.
2. It is not error to deny a motion for a new trial on the ground of newly-discovered evidence in the absence of a showing that such evidence could not have been discovered timely by exercise of reasonable diligence. *Id.*

See APPEAL AND ERROR (11, 20); AUTOMOBILES (7); HABEAS CORPUS (7).

NIGHTTIME—See CRIMINAL LAW (20); RAILROADS (2).

NOMINATING PETITIONS—See JUDGES (1, 2, 4–9); MANDAMUS (2).

NONFEASANCE—See OFFICERS (7).

NONJURY CASES—See APPEAL AND ERROR (7, 8, 31, 33); COURTS (9); CRIMINAL LAW (19, 20); TRIAL (9).

NONPROFIT CORPORATIONS—See CORPORATIONS (9); DEDICATION (4); EXECUTORS AND ADMINISTRATORS (3); SALES (1).

NONRESIDENT—See JUDGMENT (4, 8).

NONSUPPORT—See DIVORCE (20); HUSBAND AND WIFE (1).

NONUSE—See DEDICATION (3).

NOTICE—See APPEAL AND ERROR (5); DEPOSITIONS; EMINENT DOMAIN (4); EVIDENCE (3); EXECUTION (1); EXECUTORS AND ADMINISTRATORS (1); OFFICERS (5); SCHOOLS AND SCHOOL DISTRICTS (4).

OATS—See FRAUD (1, 2, 4).

OBJECTIONS—See APPEAL AND ERROR (28, 29); WITNESSES (3).

OBSERVATION—See AUTOMOBILES (17); RAILROADS (6).

OFFER AND ACCEPTANCE—See APPEAL AND ERROR (14); BROKERS (1, 3); CONTRACTS (7, 8); VENDOR AND PURCHASER (1).

OFFICERS.

1. Reversal or disturbance by the courts of an administrative board's decision is limited to want of jurisdiction, fraud, bad faith, abuse of discretion, or arbitrariness. *O'Connell* v. *Dearborn Police and Fire Pension Board (Rabideau* v. *Same)*, 208.
2. The judgment of municipal officers in the execution of powers conferred on them by law or charter for a public purpose is not subject to control and correction by the courts in the absence of fraud or a clear abuse of discretion. *Moran* v. *Detroit Board of Election Commissioners*, 235.
3. A petition for the recall of a public officer differs from a proceeding for removal and exacts neither the technical, detailed statement of charges nor proof or procedure of a petition for removal (CL 1948, § 201.101 *et seq.*). *Eaton* v. *Baker*, 521.
4. A petition for recall of a public officer must be such as will furnish information to the electors on which they may form a judgment when called upon to vote and reason or reasons assigned must be based on some act or failure to act which, in the absence of a sufficient justification, would warrant the recall (CL 1948, § 201.101 *et seq.*). *Id.*
5. A petition for recall of a public officer must contain such specific allegations of facts and charges of misconduct in office as to enable the officer to identify the incident and prepare his justification but is not insufficient because it does not allege the time, person and occasion involved as it must be presumed to refer to the current term of office (CL 1948, § 201.101 *et seq.*). *Id.*
6. A meticulous detailed statement of the charges of misconduct in office is not required in a petition for recall of a public officer (CL 1948, § 201.101 *et seq.*). *Id.* 522.
7. A petition for recall of a public officer which contains sufficient valid reasons, properly stated, that may be classified as charges of misfeasance, malfeasance or nonfeasance to warrant a recall entitling the electors to vote thereon would not be invalid because it also contained some reasons which were insufficient or unimportant (CL 1948, § 201.101 *et seq.*). *Id.* 522.

OFFICERS—Continued.

8. Public offices may be abolished and no office holder has a contractual right thereto. *Attorney General* v. *Guy*, 694.

9. It is unnecessary to use actual words of abolition or their equivalent to eliminate or abolish a public office, when the only proper reading of the legislation, a charter amendment, as a whole, shows such purpose. *Id.*

See APPEAL AND ERROR (5, 17, 45); CORPORATIONS (2–5, 8, 14, 16); COSTS (6); EXECUTION (1, 2); HABEAS CORPUS (8); MANDAMUS (1); MUNICIPAL CORPORATIONS (3, 4, 11, 17, 18); PARDON (5); QUO WARRANTO (5); STATES (7, 8); STATUTES (9, 11).

OIL AND GAS—See CONTRACTS (2); RECEIVERS (6).

OIL-WELL DRILLING AGREEMENT—See CONTRACTS (2); RECEIVERS (6).

OMISSIONS—See APPEAL AND ERROR (23).

OPEN COUNTRY—See RAILROADS (3, 4).

OPENING STATEMENT—See FRAUD (1); TRIAL (4).

OPINION EVIDENCE—See WORKMEN'S COMPENSATION (4).

OPTIONS—See LANDLORD AND TENANT (1–3); VENDOR AND PURCHASER (2).

OR—See DEEDS (3).

ORAL AGREEMENT—See APPEAL AND ERROR (27, 28); FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE (1, 2).

ORDINANCES—See MUNICIPAL CORPORATIONS (3); NEGLIGENCE; SALES (1).

ORPHANAGE—See WILLS (14, 16).

OSTEOGENIC SARCOMA—See WORKMEN'S COMPENSATION (4).

OUTER DOORS—See EXECUTION (2, 3).

OVERTAKING VEHICLES—See AUTOMOBILES (1).

PARACHUTE DIVISION—See CORPORATIONS (5).

PARAMOUR—See APPEAL AND ERROR (34); DIVORCE (23, 25, 28).

PARDON.

1. Release by parole of person who had been committed as a criminal sexual psychopathic person must have been upon conditions attached thereto, at least by implication, where there was no hearing in court to determine whether or not he had recovered from such psychopathy, since an unconditional parole would amount to a complete discharge and would be contrary to statute; the word "parole" itself implying a conditional release (CL 1948, § 780.501 *et seq.*). *In re Kader*, 339.

PARDON—Continued.

2. Conditions of the parole of one who has been committed as a criminal sexual psychopathic person should bear some relation to the main object of the statute under which he was committed, that is, to prevent sexual deviates from preying upon society (CL 1948, § 780.501 *et seq.*). *Id.*

3. A person who exhibits abnormal sexual behavior while on parole from commitment as a criminal sexual psychopathic person breaches an implied condition of his parole (CL 1948, § 780.501 *et seq.*). *Id.*

4. What constitutes abnormal sexual behavior of a parolee from commitment as a criminal sexual psychopathic person is primarily a matter for medical determination (CL 1948, § 780.501 *et seq.*). *Id.*

5. Determination of director of department of mental health that parolee had violated terms of his parole from commitment as a criminal sexual psychopathic person was not an abuse of his discretion, where there is evidence that parolee was convicted of simple larceny so committed as to disclose the characteristics of a planned sex crime rather than simple larceny (CL 1948, § 780.501 *et seq.*, as amended by PA 1950, No 25). *Id.*

6. Parolee from commitment as a criminal sexual psychopathic person, committed in the first instance until he should have fully and permanently recovered from his psychopathy, was properly ordered returned for further treatment, where there is evidence that he committed a crime having the characteristics of a planned sex crime (CL 1948, § 780.501 *et seq.*, as amended by PA 1950, No 25). *Id.* 340.

See CRIMINAL LAW (16).

PARENT AND CHILD—See DIVORCE (29).

PARKS—See APPEAL AND ERROR (43); DEDICATION (1, 4, 7–9); DEEDS (9–11); EJECTMENT; WORDS AND PHRASES.

PAROLE—See PARDON.

PAROL EVIDENCE—See APPEAL AND ERROR (28); EVIDENCE (14).

PARTIES—See APPEAL AND ERROR (13); COURTS (3); DEPOSITIONS (1); DIVORCE (14, 28); EJECTMENT; EQUITY (4); HABEAS CORPUS (3, 4); QUO WARRANTO (5, 6); REFORMATION OF INSTRUMENTS (3).

PARTNERSHIP.

1. Finding of trial court in suit for accounting between partners that 2 wrecking businesses and a contracting business were parts of lumber business for which partnership was formed *held,* proper. *Kelso v. Coburn,* 43.

2. Determination of trial court in suit for accounting that plaintiff surviving partner had no interest in a sales company, a partnership organized by deceased partner and 3 relatives, nor in other business transactions of the deceased partner *held,* fully justified by record. *Id.*

PARTNERSHIP—Continued.

3. Finding of court that vendee interest in land contract belonged to partnership rather than surviving partner alone *held*, supported by proofs, including testimony that such interest was carried as an asset of the partnership and the unpaid balance as a liability and that payments on the contract were made by the partnership. *Id.* 44.
4. Vendor interests in land contracts were properly found not to be assets of partnership in suit for accounting between partners, where it does not appear that partnership assets were used in acquiring such interests nor that the deceased partner and his wife executed the contracts for and on behalf of the partnership or in connection with its business. *Id.*
5. A partnership is a distinct legal entity separate from the individuals composing it and its essential elements are their contribution to it of whatsoever nature, whether capital, skill or labor. *Employment Security Commission* v. *Crane*, 411.

See ACCOUNTING (1); UNEMPLOYMENT COMPENSATION (2, 4–6, 9); WITNESSES.

PASSENGERS—See APPEAL AND ERROR (36).

PATERNITY—See DIVORCE (11); RECEIVERS (7, 8).

PAVEMENT—See AUTOMOBILES (1).

PAYMENT—See ACCOUNTING (2); CONTRACTS (5); CORPORATIONS (4, 10–12); DIVORCE (25); FRAUDS, STATUTE OF (2); FRAUDULENT CONVEYANCES; PARTNERSHIP (3); SPECIFIC PERFORMANCE (3); VENDOR AND PURCHASER (4, 5).

PEDESTRIANS—See AUTOMOBILES (3–5, 8–13).

PEMPHIGUS—See WILLS (5).

PENSIONS—See COSTS (6); MUNICIPAL CORPORATIONS (1, 2, 4).

PERFORMANCE—See FRAUDS, STATUTE OF (2); VENDOR AND PURCHASER (8).

PERJURY—See EVIDENCE (6).

PERPETUITIES—See TRUSTS (8–10).

PERSONAL SERVICE—See ATTACHMENT (2); JUDGMENT (4, 8).

PERSONALTY—See ESCAPE (2, 3); INDICTMENT AND INFORMATION (4); SPECIFIC PERFORMANCE (4, 5).

PETITIONS—See APPEAL AND ERROR (39); CERTIORARI; DIVORCE (31); HABEAS CORPUS (3, 5); JUDGES (1, 2, 4–9); MANDAMUS (2); OFFICERS (3–7); QUO WARRANTO (2, 4); SCHOOLS AND SCHOOL DISTRICTS (4).

PHOTOGRAPHS—See TORTS (1, 3–5).

PHYSICIANS AND SURGEONS—See APPEAL AND ERROR (37); INSANE PERSONS (1, 9); PARDON (4).

PICKETING—See INJUNCTION (3); LABOR (1–5).

PICNICS—See ADVERSE POSSESSION (2).

PIPES—See INSURANCE (1).

PLEADING.

Allegation of a conclusion in pleadings, without any facts being stated in its support, will be disregarded. *Hopkins* v. *Crantz*, 300.

See APPEAL AND ERROR (10, 13, 15, 28, 39); CORPORATIONS (2); DEEDS (10); FRAUD (1); FRAUDS, STATUTE OF (1); JUDGMENT (11–14).

PLEA OF GUILTY—See CRIMINAL LAW (19, 20); HABEAS CORPUS (6, 8).

PLEDGE—See CORPORATIONS (4).

POLICE AND FIRE PENSION BOARD—See MUNICIPAL CORPORATIONS (4).

POLITICAL PARTIES—See ELECTIONS (5).

POSSESSION—See DIVORCE (11); IMPROVEMENTS; LANDLORD AND TENANT (6); RECEIVERS (1, 2, 7); REFORMATION OF INSTRUMENTS (5); SPECIFIC PERFORMANCE (6).

POSTING OF NOTICE—See APPEAL AND ERROR (5).

PRECEDENT—See COURTS (4).

PREJUDICE—See APPEAL AND ERROR (5); CRIMINAL LAW (7); DIVORCE (30); JUDGMENT (15); RECEIVERS (8).

PRELIMINARY INVESTIGATION—See EVIDENCE (4).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (7, 8, 26, 27, 30).

PRESIDENT—See APPEAL AND ERROR (17); CORPORATIONS (5, 7, 10–12).

PRESUMPTIONS—See AUTOMOBILES (2); ELECTIONS (3); EVIDENCE (9–12); INSANE PERSONS (7, 8, 10); LANDLORD AND TENANT (5); OFFICERS (5); STATUTES (5); WILLS (10, 11, 13).

PRICE-FIXING—See CONSTITUTIONAL LAW (1); TRADE-MARKS AND TRADE NAMES (4–6).

PRIMARIES—See COSTS (9, 14); ELECTIONS (5); JUDGES (8); MUNICIPAL CORPORATIONS (7, 8).

PRIMARY DISTRICTS—See COSTS (5); SCHOOLS AND SCHOOL DISTRICTS (1–3).

PRINCIPAL AND AGENT—See CORPORATIONS (16); FRAUD (2); WITNESSES (2, 3).

PRIVACY—See TORTS.

PRIVILEGES—See EXECUTION (3).

PROBATE COURT—See COSTS (9, 13); COURTS (5, 8); DIVORCE (22); HABEAS CORPUS (5); INSANE PERSONS (3, 6, 9); JUDGES (1, 2, 6–9); MANDAMUS (2); TRUSTS (2–7, 9–11).

PROCESS—See CORPORATIONS (1).

PROFIT—See CORPORATIONS (5); EXECUTORS AND ADMINISTRATORS (2).

PROPERTY—See ATTACHMENT (2); DIVORCE (11, 15, 17); ESCAPE (2, 3); INDICTMENT AND INFORMATION (1, 4); INSANE PERSONS (5); MALICIOUS MISCHIEF; RECEIVERS (1, 7, 8).

PROPERTY SETTLEMENT—See CONSPIRACY (4); DIVORCE (22, 28).

PROPERTY TAX LIMITATION—See MUNICIPAL CORPORATIONS (6).

PROSECUTING ATTORNEY—See CRIMINAL LAW (7).

PROXIMATE CAUSE—See AUTOMOBILES (16); INSURANCE (1); WORKMEN'S COMPENSATION (4).

PUBLICATION—See TORTS (1, 3–5).

PUBLIC AUCTION—See DIVORCE (2).

PUBLIC HEALTH—See CONSTITUTIONAL LAW (1).

PUBLIC INTEREST—See TRADE-MARKS AND TRADE NAMES (4).

PUBLIC MORALS—See CONSTITUTIONAL LAW (1).

PUBLIC QUESTION—See COSTS (2, 3, 5–9, 12, 14–17).

PUBLIC WELFARE—See CONSTITUTIONAL LAW (1).

PUNISHMENT—See CRIMINAL LAW (8).

QUESTION FOR TRIER OF FACTS—See AUTOMOBILES (1, 3–6, 8, 13); EVIDENCE (12); FRAUD (5); LABOR (3); NEGLIGENCE; RAILROADS (8); WILLS (12, 13).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (2, 6, 9, 12, 14, 16–21, 28, 29, 34, 35, 37, 43–45); ATTACHMENT (4); CERTIORARI; HABEAS CORPUS (6, 7); JUDGMENT (7).

QUITCLAIM DEEDS—See CONSPIRACY (1); DEEDS (4); DIVORCE (23).

QUO WARRANTO.

1. A writ in the nature of quo warranto is the proper writ to test the validity of an election (CL 1948, §§ 638.26–638.29). *Attorney General, ex rel. Reuter,* v. *City of Bay City,* 514.
2. A petition for a writ in the nature of quo warranto to test the validity of an election must be filed within 30 days

QUO WARRANTO—Continued.

after the election when filed in the circuit court (CL 1948, § 638.29). *Id.*

3. The power to issue writs of quo warranto at any time, conferred upon the Supreme Court by the Constitution, cannot be limited by statute (Const 1908, art 7, § 4; CL 1948, § 638.29). *Id.*

4. Challenge to the validity of election did not come too late, where petition for writ in nature of quo warranto which might have been filed in the circuit court was filed in the Supreme Court after lapse of more than 30 days following the election (Const 1908, art 7, § 4; CL 1948, § 638.29). *Id.*

5. Fact that terms of office of members of home-rule city board of health had expired before the attorney general filed petition for writ in nature of quo warranto on their relation against city was immaterial, as statute authorized the attorney general to file an information in the nature of quo warranto either on the relation of a private party without leave or on his own relation, where it is alleged an office is being held illegally (CL 1948, § 638.1). *Id.* 515.

6. Information in nature of quo warranto to test validity of adoption of amendment to charter of home-rule city was filed by a proper party, where filed by the attorney general on the relation of private parties (CL 1948, § 638.1). *Id.*

7. Defendant in quo warranto proceedings, brought by the attorney general, who had been municipal judge in a home-rule city, occupying an office lawfully abolished by charter amendment, *held*, without right to office of municipal judge. *Attorney General* v. *Guy*, 696.

See COSTS (14, 17).

RAILROADS.

1. The presence of a railroad train on a crossing is notice and warning to those using the highway and railroads will only be chargeable with negligence if there are unusual conditions which require additional warnings. *Allen* v. *Grand Trunk Western Railroad Company*, 104.

2. Fact that night was dark, horizon black and railroad gondola car blocking highway crossing was also black was not such an unusual combination of circumstances as to require railroad to provide more than the customary railroad crossing sign. *Id.*

3. The speed of railroad trains is not limited while they are traveling through open country. *Buchthal* v. *New York Central Railroad Company*, 556.

4. Negligence of railroad company may not be inferred from mere fact that it permitted a speed of 80 miles per hour on passenger trains being operated in open country where the track is straight for several miles and that train involved in accident with plaintiff was operated at that speed. *Id.*

5. It is not incumbent upon operators of a railroad train to stop it or slow it down merely because automobiles are approaching a grade crossing unless danger is apparent. *Id.*

RAILROADS—Continued.

6. Omission of crew on northeastbound train, proceeding at 80 miles per hour, to make actual observation of country grade crossing where plaintiff, as a passenger, was in an eastbound automobile moving across double track at speed of 2 or 3 miles an hour did not constitute negligence, since realization by crew from an observation that the driver intended to continue would obviously be too late to prevent the accident. *Id.* 557.
7. Positive testimony of members of train crew that bell was ringing and train whistle was blown as required by statute will be accepted as determinative as to whether statute was being complied with, where plaintiff's negative testimony that the bell and whistle were not sounded related to time when train was so far from crossing that statute did not apply and when sounds were required to be made the windows in her car were closed and she was not in a position to hear the signals if given (CL 1948, § 466.13). *Id.*
8. Negative testimony that train bell was not rung and whistle not sounded will not present an issue of fact for consideration of jury unless person giving the negative testimony was in a position to hear the signals, if given, and was paying attention when the signals were claimed to have been given. *Id.*

See AUTOMOBILES (17); COMMERCE; EVIDENCE (13); NEW TRIAL (1).

RATIFICATION—See CORPORATIONS (11).

RAZING BROADCASTING TOWER—See WORKMEN'S COMPENSATION (9).

REAL TAXPAYER—See TAXATION (5).

REALTY—See APPEAL AND ERROR (5); COSTS (12); COURTS (4–7); ESCAPE (2); INDICTMENT AND INFORMATION (4); TAXATION (7, 9).

REASONS AND GROUNDS FOR APPEAL—See APPEAL AND ERROR (43).

REBUTTABLE PRESUMPTION—See EVIDENCE (9, 10).

REBUTTAL—See EVIDENCE (12).

RECALL—See CERTIORARI; COSTS (15); OFFICERS (3–7); SCHOOLS AND SCHOOL DISTRICTS (4).

RECEIVERS.

1. Ordinarily a receiver may not in a summary manner take property from the possession of strangers to the record who claim adverse right therein. *Singer* v. *Goff*, 163.
2. Receiver appointed by trial court had jurisdiction to take possession of property from party named as defendant in suit for accounting, the fact that such defendant came into possession of the personalty prior to the appointment of the receiver being immaterial. *Id.*
3. Equity courts have inherent power to appoint a receiver. *Id.* 164.

RECEIVERS—Continued.

4. It is a matter of discretion with the appointing court as to whether a receivership shall be continued or discontinued. *Id.*
5. Issuance of various orders to receiver after expiration of term for which receiver was originally appointed implied a continuance of the receivership. *Id.*
6. A receiver occupies the same position as the person named as trustee under agreement as to sharing cost of drilling oil well and distribution of proceeds from sale of oil, where receiver was appointed incident to suit for accounting against trustee as defendant, hence latter must account to the receiver as to undistributed moneys on hand. *Id.*
7. Plaintiff wife, suing for divorce, made no case for appointment of receiver under inherent power of chancery court to do so, where she showed husband had failed to make payments of $15 per week temporary alimony for support of child whose paternity he denied and it was shown she had possession of property of the husband affording her an income greatly in excess of temporary alimony awarded her. *Zielinski* v. *Zielinski*, 276.
8. Appointment of receiver of property of defendant husband in suit for divorce was an abuse of discretion, if made merely because trial court may have thought receiver could manage the property better than the husband or because husband appeared uncooperative about informing court as to the extent of his property or that purchasers entitled to a deed could not obtain it, in the absence of any showing defendant was likely to dissipate or dispose of his property in such a way as to prejudice rights of plaintiff or minor child whose paternity he denied or that the appointment was necessary to secure payment of the temporary alimony as ordered. *Id.* 277.

See APPEAL AND ERROR (5, 16); DIVORCE (11).

RECOMMENDATIONS OF JUDGES—See CONSTITUTIONAL LAW (7).

RECORD—See ACCOUNTING (2); APPEAL AND ERROR (22–25, 27, 31, 36, 38); CORPORATIONS (11); EXECUTION (5); HABEAS CORPUS (8); LABOR (4); PARTNERSHIP (2); RECEIVERS (1); UNEMPLOYMENT COMPENSATION (4).

RECORDER'S COURT—See CRIMINAL LAW (13, 15).

RECORDING—See ADVERSE POSSESSION (1).

REFORMATION OF INSTRUMENTS.

1. Finding of trial court that parties had intended to purchase tract as specified in reformed deed, *held*, supported by evidence. *Etherington* v. *Bailiff*, 543.
2. A conveyance of real estate may be reformed, where, through error, it fails to express the result of the meeting of the minds of the parties as to boundaries, particularly when it is clear that the description fails to embody the clear, undisputed visual standard of the parties. *Id.*

REFORMATION OF INSTRUMENTS—Continued.

3. Reformation of deeds as to parcels of land plaintiffs had sold to others than defendants and prior to the sale to defendants is not made even though descriptions in other deeds relate to same erroneously located corner, where such grantees are not parties to instant suit, although boundaries between plaintiffs "and defendants" property and such other properties are inevitably affected. *Id.* 544.
4. Defendants are required to stand loss due to excavation and cost of moving small buildings from area disputed in suit for reformation of deed and awarded to plaintiffs, where they had dug basements and moved such buildings onto the area without permission from plaintiffs and not in reliance upon any act, representation or admission of plaintiffs. *Id.*
5. Defendants in suit for reformation of deed who excavated a basement and moved small buildings onto disputed piece of land when they knew plaintiffs contested the title thereto were not entitled either to have an award for the value of the improvements as determined by the court or to have the value of the land determined and be permitted to pay plaintiffs such value and take possession. *Id.* 545.

See APPEAL AND ERROR (36); BOUNDARIES.

REFUSAL OF OWNER—See APPEAL AND ERROR (14); BROKERS (3).

REGISTERED LETTER—See VENDOR AND PURCHASER (2).

REGISTRATION—See SCHOOLS AND SCHOOL DISTRICTS (2).

REINSTATEMENT—See LANDLORD AND TENANT (7).

RELEASE—See PARDON (1).

REMAINDER—See DEEDS (1); ESTATES (2, 3); WILLS (2, 4).

REMARRIAGE—See DIVORCE (9, 29, 30); HUSBAND AND WIFE (3).

REMISSION BETWEEN ATTACKS OF DISEASE—See WILLS (5).

RENEGOTIATION—See CORPORATIONS (5).

RENEWAL—See APPEAL AND ERROR (12); LANDLORD AND TENANT (4, 5).

RENT—See LANDLORD AND TENANT (3, 5, 7).

REPAIRS—See DEDICATION (7); JUDGMENT (12); SPECIFIC PERFORMANCE (2, 3).

REPEATED TRAUMA—See WORKMEN'S COMPENSATION (4).

REPORT—See DIVORCE (22).

REPUBLICAN FORM OF GOVERNMENT—See CONSTITUTIONAL LAW (4).

REQUEST—See VENDOR AND PURCHASER (1).

REQUEST TO CHARGE—See APPEAL AND ERROR (11); TRIAL (5, 6).

RESCISSION—See CONTRACTS (4, 5).

RESERVATIONS—See DEEDS (9).

RESIDENCE—See APPEARANCE (1); CRIMINAL LAW (14); EXECUTION (6); FRAUD (1, 6, 7); JUDGMENT (2).

RES JUDICATA—See EMINENT DOMAIN (4); INJUNCTION (2); JUDGMENT (14, 15).

RESTRAINT OF TRADE—See CONSTITUTIONAL LAW (1).

RESUMPTION OF WORK—See WORKMEN'S COMPENSATION (7).

RETAILERS—See TAXATION (2–4, 6).

REVERTER—See DEDICATION (3, 7); DEEDS (5, 9).

REVOCATION—See WILLS (10, 12, 14, 16).

RIGHT-OF-WAY—See DEDICATION (9).

RIGHT TURN—See AUTOMOBILES (4).

ROTATION OF NAMES—See ELECTIONS (3).

RULE AGAINST PERPETUITIES—See TRUSTS (8–10).

SALARIES—See APPEAL AND ERROR (17); CORPORATIONS (5, 7).

SALES.

1. Auction sale of 4 taxicabs which had been owned by defendant's decedent, a member of a nonprofit corporation, was not held in 2 parts where purchaser paid a lump sum for the vehicle and its accessories and the right to operate it, a right for which personal representative had to apply to mayor for transfer of city license (Detroit Compiled Ordinances 1945, ch 103, § 4). *In re McKenna's Estate (McKenna* v. *McKenna)*, 368.
2. A divisible contract to sell is one in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation (CL 1948, § 440.76). *Blumrosen* v. *Silver Flame Industries, Inc. (Silver Flame Industries, Inc.,* v. *Blumrosen)*, 441.

See APPEAL AND ERROR (5); CORPORATIONS (3, 9); DIVORCE (2); EXECUTION (1, 6); EXECUTORS AND ADMINISTRATORS (3); SPECIFIC PERFORMANCE (4, 5).

SALES TAX—See ACTION (1); APPEAL AND ERROR (9); COSTS (3); TAXATION (1–4, 6).

SAND AND GRAVEL BUSINESS—See INJUNCTION (3).

SANITY PROCEEDINGS—See APPEAL AND ERROR (37); HABEAS CORPUS (5); INSANE PERSONS.

SARCOMA—See WORKMEN'S COMPENSATION (4).

SCHOOLCRAFT COUNTY—See CRIMINAL LAW (19).

SCHOOLS AND SCHOOL DISTRICTS.

1. The number of special elections for the purpose of annexing primary school districts to second or third class school districts and the time between such elections is not restricted by statute (CL 1948, §§ 352.3, 352.4 and § 353.23, as amended by PA 1951, No 174). *Chapel* v. *School District No. 8, Fractional, Parma Township, Jackson County,* 176.
2. A primary school district does not have a registration of school electors such as is provided for other school districts. (CL 1948, § 357A.1, as added by PA 1951, No 199). *Id.*
3. "Majority vote," as that term is used in statute pertaining to election for approval of annexation of a primary school district to an adjoining second or third class school district, is construed as requiring approval of electors voting on the proposition, not a majority of the qualified electors in the district, especially where there is no public record of those entitled to vote (CL 1948, § 353.23, as amended by PA 1951, No 174). *Id.*
4. A petition for the recall of a school district trustee which contained averments that he had received money in the form of wages from the school board and district in violation of law and that he has been using property of the district for his own use, pleasure and business, to the neglect of its proper use, particularly the station wagon, constituted a sufficiently specific averment of misfeasance or malfeasance in office, since it was such a misappropriation of assets as would warrant a recall and gave the officer involved sufficient notice so as to be able to prepare his justification of his conduct in office (CL 1948, § 201.103). *Eaton* v. *Baker,* 522.

See COSTS (5, 15); TRUSTS (11).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (1).

SECOND OFFENDER—See CRIMINAL LAW (20).

SECRETARY OF STATE—See JUDGES (1).

SELF-DEFENSE—See CRIMINAL LAW (7).

SENTENCE—See CRIMINAL LAW (3–5, 16–20); HABEAS CORPUS (7).

SEPARATE MAINTENANCE—See APPEAL AND ERROR (21); HUSBAND AND WIFE.

SEPARATE STATEMENT OF PROPOSITIONS—See COSTS (8); MUNICIPAL CORPORATIONS (6).

SEPARATION OF POWERS—See CONSTITUTIONAL LAW (4, 6); JUSTICES OF THE PEACE (3); STATUTES (11); TOWNSHIPS (7).

SERVICE OF PROCESS—See APPEARANCE (2); ATTACHMENT (2).

SET-OFF AND RECOUPMENT—See CORPORATIONS (11).

SHERIFFS AND CONSTABLES—See EXECUTION (5, 6).

SHOW GIRL—See TORTS (1, 3).

SIGNALS—See RAILROADS (7, 8).

SIGNATURES—See CERTIORARI.

SIGNS—See RAILROADS (2).

SIMULATED BRICK—See MONOPOLIES (2).

SIRENS—See AUTOMOBILES (15, 16).

SISTERS—See WILLS (4, 14).

SLIP JOINT—See INSURANCE.

SOLICITATION OF BUSINESS—See COMMERCE; CORPORATIONS (1).

SOVEREIGN IMMUNITY—See STATES (2).

SPECIAL ELECTIONS—See MUNICIPAL CORPORATIONS (7); SCHOOLS AND SCHOOL DISTRICTS (1).

SPECIAL QUESTIONS—See TRIAL (2, 3).

SPECIAL TERMS OF COURT—See COURTS (9); CRIMINAL LAW (19, 20).

SPECIFIC PERFORMANCE.

1. Equity courts have jurisdiction to decree the specific performance of verbal agreements to devise land, where the verbal agreement is satisfactorily established. *Kelley* v. *Dodge,* 499.
2. Evidence supported trial court's finding in suit for specific performance that deceased father and daughter had orally agreed with plaintiffs that if latter would make improvements and repairs upon dilapidated cottage and pay $150 per year for duration of lives of decedents that decedents would pay taxes and insurance and leave the property to plaintiffs, notwithstanding the daughter, as survivor of her father, had not devised the property to plaintiffs. *Id.*
3. Trial court's findings in suit for specific performance of an oral contract to convey land that plaintiff purchasers owed $335 in payments of so-called rent, $403.23 for repairs and improvements and $111.77 for interest and incidentals are not disturbed, being supported by evidence. *Id.*
4. Generally specific performance is not decreed of a contract relating to sale of personal property. *Jaup* v. *Olmstead,* 614.
5. Equity may take jurisdiction to compel specific performance of a contract to sell personal property, where the specific property is not obtainable on the market and damages will not provide adequate compensation. *Id.*
6. Bill by purchaser under contract for sale of stores, wherein it was agreed that gas heating units were to remain on the property, and to compel vendor who removed them to return them and to compel gas company to furnish heating service, stated a cause for equitable relief, where loss of such heating units resulted in loss of gas heating service because possession of such units was necessary to obtain such service and a court

SPECIFIC PERFORMANCE—Continued.

of law could not require the gas company to furnish the service. *Id.*

SPEED—See AUTOMOBILES (6, 8, 13, 15, 16); EVIDENCE (13); RAILROADS (3, 4, 6).

SPOUSES—See HABEAS CORPUS (4, 5).

STABBING—See CRIMINAL LAW (7); EVIDENCE (8).

STATEMENT OF QUESTIONS INVOLVED—See APPEAL AND ERROR (43).

STATEMENT OF REASONS AND GROUNDS FOR APPEAL—See APPEAL AND ERROR (6, 42).

STATES.

1. The question of intent of the court of claims act, whereby a means was afforded of presenting claims against the State, was not left to be determined by general rules of construction by reason of the specific statement that the act was not to be construed as enlarging the present liabilities of the State and any of its agencies which provision functioned as a guide for observance by the courts in the interpretation of such act (PA 1939, No 135, § 24). *Van Antwerp* v. *State*, 594.
2. The court of claims act did not waive or abrogate the right of the State to rely on its sovereign immunity (PA 1939, No 135). *Id.*
3. A State does nothing more than waive its immunity from action by consenting to be sued and does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist. *Id.*
4. Liability of the State for tort cannot be predicated upon the fact that the State has entered its general statutory consent to be sued and directing the manner in which suits may be brought by those having claims against the State (PA 1939, No 135). *Id.*
5. A special statute permitting suits against the State on particular claims does not concede the justice of such claims. *Id.*
6. Statutory consent to sue the State merely gives a remedy to enforce a liability and submits the State to the jurisdiction of the court, subject to its right to interpose any lawful defense. *Id.*
7. The State is liable for the torts of its officers, agents or servants only upon its clear and definite consent. *Id.* 595.
8. Plaintiff who failed to make it appear that any cause of action arose or became vested in his behalf for void commitments during period when court of claims act was amended so as to waive immunity from liability for the torts of its officers and employees with certain exceptions not here applicable, may not rely upon the statute as so amended, where it has since been repealed (PA 1939, No 135, § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87). *Id.*

STATES—Continued.

9. Fact that section of court of claims act declaring that it was not to be construed as enlarging present liabilities of the State or its agencies was repealed did not subject the act to an interpretation so as to include liability for void commitments in State institutions, where the repealing act itself set forth a specific class of torts upon which immunity from liability was waived and such class did not include liability for void commitments to State institutions (PA 1939, No 135, § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87). *Id.*

10. Liability on the part of the State in actions *ex delicto* may result only from affirmative legislation clearly manifesting such intent. *Id.*

11. Statute amending section of court of claims act relating to jurisdiction of the court to hear claims *ex contractu* and *ex delicto* against the State and another statute expressly waiving immunity from liability as to torts committed with State-owned motor vehicles and which latter statute expressly repealed a provision of the court of claims act relating to waiver of immunity from liability must be construed together, where they became effective simultaneously and relate to the same subject matter (PA 1939, No 135, § 8, as amended by PA 1941, No 137, and PA 1945, No 199, § 24, as amended by PA 1943, No 237, and repealed by PA 1945, No 87). *Id.*

12. Section of court of claims act vesting the court with jurisdiction to hear actions *ex contractu* and *ex delicto* against the State is not construed as waiving State's immunity from liability for tort of committing plaintiff to State institutions under void commitments (PA 1939, No 135, § 8, as amended by PA 1931, No 137, and PA 1945, No 199). *Id.* 596.

See APPEAL AND ERROR (39, 42); COSTS (12); COURTS (1, 2); CRIMINAL LAW (3, 5); DEDICATION (8); EJECTMENT; JUDGMENT (9); TAXATION (7, 9).

STATION WAGON—See SCHOOLS AND SCHOOL DISTRICTS (4).

STATUS—See WITNESSES (3).

STATUTES.

1. Statutes relating to the same subject, being *in pari materia*, should be construed together and effect given to all of of them. *In re Jones' Estate*, 393.

2. The primary purpose of rules governing the interpretation of statutes is to ascertain and give effect to the intention of the legislature. *Van Antwerp* v. *State*, 593.

3. A bare reading of a statute suffices and no interpretation is necessary, if the language employed therein is plain, certain and unambiguous. *Id.*

4. Effect must be given, if possible, to every word, sentence and section when construing a statute and 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

STATUTES—Continued.

of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole. *Id.* 594.

5. Amendments to statutes which include language previously used and which have been subjected to judicial construction are presumed to have been adopted in the light of the prior construction placed on such provision. *Id.* 595.

6. A statute must be construed with the deference due to a deliberate action of a co-ordinate branch of the State government and if it does not violate any of the provisions of the Constitution, the Supreme Court may not inquire into the wisdom of the legislation or substitute its judgment for that of the legislature. *Township of Dearborn* v. *Dearborn Township Clerk*, 673.

7. The conflict between a statute and a provision of the Constitution must be clear and inevitable before the statute may be declared unconstitutional. *Id.*

8. A statute which is repugnant to the Constitution would not remain in force merely because enacted prior to the adoption of a revised Constitution (Const 1850, sched § 1; Const 1908, sched § 1). *Id.*

9. Provision in schedule of Constitution continuing officers in their respective offices until superseded under laws in force at time of adoption of Constitution or under the Constitution is inapplicable so as to continue membership in township board as provided by statute enacted before Constitution was adopted (Const 1908, sched § 5). *Id.*

10. Long acquiescence in a certain interpretation may be binding in the case of a statute containing an ambiguity but cannot prevail over the plain language of the Constitution. *Id.* 674.

11. The doubt existing in an ambiguous statute creating duties for public officers is resolved in favor of the traditional separation of powers (Const 1908, art 4). *Id.* 675.

See ACTION; APPEAL AND ERROR (2, 5, 6, 9, 28, 37); APPEARANCE; ATTACHMENT (3, 4); AUTOMOBILES (2, 4, 10, 13–16); CERTIORARI; CONSTITUTIONAL LAW (1, 2); CORPORATIONS (2, 13); COSTS (2, 3, 5, 8, 12, 14, 16); CRIMINAL LAW (8, 9, 12–15, 19, 20); DEDICATION (6); DIVORCE (11, 20); ELECTIONS (1–3); EMINENT DOMAIN; ESCAPE; EXECUTION (1, 6); FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; GARNISHMENT (1, 2); HABEAS CORPUS (1–5); HOMICIDE; HUSBAND AND WIFE (2); INDICTMENT AND INFORMATION (1, 3, 4); INJUNCTION (1, 3); INSANE PERSONS; JUDGES (2–5, 8); JUDGMENT (1, 9); JUSTICES OF THE PEACE (2, 3); LABOR (1, 5, 6); MALICIOUS MISCHIEF; MONOPOLIES (1, 2); MUNICIPAL CORPORATIONS (5–8, 11–16); OFFICERS (3–7); PARDON; QUO WARRANTO (1–6); RAILROADS (7); SALES (2); SCHOOLS AND SCHOOL DISTRICTS; STATES (1, 2, 4–6, 8–12); TAXATION (1–4, 6–9); TOWNSHIPS (1, 6–8); TRADE-MARKS AND TRADE NAMES (1–3, 5, 6); TRIAL (2, 3, 5–7); TRUSTS (2–11); UNEMPLOYMENT COMPENSATION; WITNESSES; WORKMEN'S COMPENSATION.

STAY OF PROCEEDINGS. See GARNISHMENT (1).

STENOGRAPHER—See CRIMINAL LAW (7).

STOCK AND STOCKHOLDERS—See APPEAL AND ERROR (26); CORPORATIONS (3, 4, 6, 10); MONOPOLIES (2).

STOCK EXCHANGE—See CORPORATIONS (3).

STOPPING—See RAILROADS (5).

STORES—See SPECIFIC PERFORMANCE (6).

STREETCARS—See AUTOMOBILES (5, 6).

SUBCONTRACTOR—See WORKMEN'S COMPENSATION (8).

SUBJECT MATTER—See COURTS (3); JUDGMENT (3, 8).

SUBSEQUENT DEALINGS—See JOINT ADVENTURES.

SUCCESSOR EMPLOYER—See COSTS (2); UNEMPLOYMENT COMPENSATION (1–5, 7, 9).

SUICIDE—See INSANE PERSONS (8).

SUMMARY JUDGMENT—See EVIDENCE (14); JUDGMENT (1, 10–13).

SUMMONS—See ATTACHMENT (1, 3).

SUPERINTENDENT—See INSANE PERSONS (1, 3).

SUPERSEDEAS BOND—See GARNISHMENT (1).

SUPERVISORS—See TOWNSHIPS (8).

SUPPLEMENTAL RECORD—See APPEAL AND ERROR (22).

SUPPORT OF CHILDREN—See DIVORCE (11, 24, 26, 27).

SUPREME COURT—See ACCOUNTING (2); APPEAL AND ERROR (6, 7, 12, 16, 19, 20, 22–25, 31–33, 35, 40, 41, 43); CONSTITUTIONAL LAW (2); COSTS (10, 13); COURTS (1); DIVORCE (3, 7, 24, 28); EXECUTORS AND ADMINISTRATORS (1); GARNISHMENT (1, 2); HABEAS CORPUS (8); INSANE PERSONS (10); MUNICIPAL CORPORATIONS (9); QUO WARRANTO (3, 4); STATUTES (6); TOWNSHIPS (1); WILLS (15); WORKMEN'S COMPENSATION (3).

SURPLUSAGE—See OFFICERS (7).

SURVEYS—See BOUNDARIES.

SURVIVORSHIP—See DEEDS (1–4).

SUSPICIONS—See WILLS (7).

TAXATION.

1. It was the intent of the legislature that the economic burden of the State tax on retail sales of tangible personal property be passed on chiefly to the consumer (CL 1948, § 205.23). *National Bank of Detroit* v. *Department of Revenue*, 132.
2. Economically speaking, the State general sales tax is a tax on the privilege of doing a retail business in this State by virtue

TAXATION—Continued.

of the fact that the collection of such tax is in some degree an economic burden upon the retailer (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272). *Id.*

3. The State general sales tax is a privilege tax imposed upon the privilege of making retail sales, measured by the gross proceeds of such sales, less deductions allowed by statute and the use tax is imposed upon the privilege of using, storing and consuming tangible personal property brought from out of the State after it has come to rest, being intended to reach purchases not covered by the sales tax act (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 205.91 *et seq.*). *Id.*
4. The presence of the State use tax in the State tax system supports the proposition that retailers are used only as a conduit or means of collection from consumers of a sales tax, since the 2 acts imposing the 2 taxes intercorrelate and are complementary (CL 1948, § 205.51 *et seq.*, as amended by PA 1949, No 272; § 205.91 *et seq.*). *Id.* 133.
5. The person liable for a tax, primarily, cannot always be said to be the real taxpayer, since the real taxpayer is the one ultimately liable for the tax itself. *Id.*
6. Amounts paid for sales tax by a consumer to his vendor may be deducted under the internal revenue law the same as if the tax had been imposed upon and paid by the consumer (26 USCA, § 23[c] [3]). *Id.*
7. An interest in land situated beyond the borders of this State is not taxable for an inheritance tax in this State (CL 1948, § 205.201). *In re Stahl's Estate (Tucker* v. *Department of Revenue)*, 380.
8. The court before which a State tax is challenged must determine for itself the nature and incidence of the tax, where the validity of a State tax is challenged under the Federal Constitution. *Id.*
9. The interest of deceased in lands situated in Illinois held in trust by an Illinois trustee but subject to the directions of deceased who could direct a conveyance by the trustee and enjoyed all the qualities of ownership ordinarily enjoyed by an owner except the right to sign the ordinary instruments of conveyance possessed an interest in land that was not subject to the inheritance tax laws of this State (CL 1948, § 205.201). *Id.*

See ACTION (1); ADVERSE POSSESSION (2); APPEAL AND ERROR (9); COSTS (3, 8, 12); COURTS (1); MUNICIPAL CORPORATIONS (6); SPECIFIC PERFORMANCE (2); UNEMPLOYMENT COMPENSATION (6).

TAXICABS—See AUTOMOBILES (4, 15, 16); CORPORATIONS (9); EXECUTORS AND ADMINISTRATORS (3); SALES (1).

TAXPAYERS—See APPEAL AND ERROR (13).

TAX TITLE—See APPEAL AND ERROR (44).

TEMPORARY ALIMONY—See DIVORCE (11); RECEIVERS (7, 8).

TEMPORARY INJUNCTION—See INJUNCTION (2).

TENANCY IN COMMON—See DEEDS (1).

TENDER—See VENDOR AND PURCHASER (2, 5).

TERM OF OFFICE—See OFFICERS (5); QUO WARRANTO (5).

TERMS OF COURT—See COURTS (9); CRIMINAL LAW (19, 20).

TESTAMENTARY TRUSTS—See TRUSTS (1–7, 9–11).

THEORY OF CASE—See APPEAL AND ERROR (12).

TIMBER—See FRAUD (1, 2, 4, 6).

TIME—See APPEAL AND ERROR (16); CONTRACTS (3, 8); CRIMINAL LAW (4); ESTATES (3); EVIDENCE (3); FRAUDULENT CONVEYANCES; JUDGES (4–7, 9); LANDLORD AND TENANT (1); OFFICERS (5); QUO WARRANTO (2, 4); VENDOR AND PURCHASER (4, 8); WILLS (1).

TITLE—See ADVERSE POSSESSION; COURTS (5–7); DEDICATION (6); DEEDS (3); EJECTMENT; IMPROVEMENTS; REFORMATION OF INSTRUMENTS (5).

TORTS.

1. Instructions amounting to a directed verdict for plaintiff were properly denied in her action for damages for alleged unauthorized publication of her photograph, where a question of fact was presented as to whether there had been an unreasonable and serious interference with her right of privacy by testimony showing that picture in question was taken by a commercial photographer at the instance of her employer for publicity purposes in connection with her employment as a show girl and that it was available, with her consent, to the photographer, with whom she had registered as a photographic model, in an effort to get a start as a model. *Pallas* v. *Crowley-Milner & Company*, 282.
2. Whether or not an invasion of plaintiff's right of privacy was waived may depend on whether she had in any particular or degree abandoned her strictly private character and waived to any extent the right to absolute privacy when seeking damages solely for an invasion of her right of privacy. *Id.*
3. Fact that plaintiff was a professional show girl or model was evidence that she had abandoned her strictly private character and justified jury in finding that commercial use of her picture in connection with advertising cosmetics was not a serious or unreasonable invasion of her right of privacy. *Id.* 283.
4. Court's instruction to jury in action for invasion of plaintiff's right of privacy caused by unauthorized publication of her photograph *held*, free from prejudicial error in respect to damages, when taken as a whole, and not contradictory and ambiguous, as claimed. *Id.*
5. The unauthorized publication of plaintiff's likeness in connection with the sale of cosmetics, did not, under circum-

TORTS—Continued.

stances presented, constitute a serious or unreasonable invasion of her privacy as a matter of law. *Id.*

See STATES (4, 7–12).

TOWNSHIP BOARDS—See JUSTICES OF THE PEACE (2, 3); STATUTES (9); TOWNSHIPS (1–3, 6–8).

TOWNSHIP CLERK—See TOWNSHIPS (8).

TOWNSHIPS.

1. The existence of a township board implies it will be given powers by other statutes, hence, it is proper for Supreme Court to consider the constitutionality of statute establishing the board possessing certain powers of a township as authorized by the Constitution (Const 1908, art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9). *Township of Dearborn* v. *Dearborn Township Clerk*, 674.
2. A township board has special and limited jurisdiction as conferred by the legislature pursuant to permission contained in the Constitution and insofar as the legislature has conferred upon it legislative powers, it is a legislative body (Const 1908, art 8, § 17). *Id.* 675.
3. The township board possesses no judicial duties, all of its duties being legislative or administrative in character, duties which the justices of the peace, being judicial officers, may not exercise (Const 1908, art 7; art 8, § 17). *Id.*
4. The organization of the township and that of the office of justice of the peace are directly under the purview of the legislature and the Constitution of the State and are subject to the provisions of the latter. *Id.* 676.
5. Individual townships are given no power over the structure of their own government but may exercise only such legislative power as is delegated to them subject to the provisions of the State Constitution. *Id.*
6. There is no affirmative requirement of the Constitution that justices of the peace act on the township board, hence, since they are judicial officers they may not participate in the exercise of the legislative or administrative functions of that board (Const 1908, art 4; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9). *Id.*
7. Statute, insofar as it makes justices of the peace members of the township board, is unconstitutional, there being no basis for the application of the "modified" or "limited" doctrine of separation of powers so far as township government is concerned (Const 1908, art 4; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9). *Id.*
8. The only legal members of the township board are the supervisor, the township clerk and the township treasurer (Const 1908, art 4; art 7, § 1; art 8, § 17; CL 1948, § 41.70, as amended by PA 1949, No 9). *Id.*

TOWNSHIP TREASURER—See TOWNSHIPS (8).

TRACKS—See AUTOMOBILES (5, 6); RAILROADS (4, 6).

TRACTORS—See UNEMPLOYMENT COMPENSATION (9).

TRADE-MARKS AND TRADE NAMES.

1. State statute declaring that advertising, offering for sale or selling of a commodity which bears the trade-mark, brand, or name of the producer or owner and which is in fair and open competition with commodities of the same general class at a price that is less than that set by the producer or vendor is unfair competition and actionable at the suit of any person damaged thereby is unconstitutional as applied to persons who have not signed a so-called fair-trade agreement whereby they agree to abide by the producer's minimum prices on the products, since it constitutes a deprivation of property without due process of law (Const 1908, art 2, § 16; CL 1948, § 445.151 *et seq.*). *Shakespeare Company* v. *Lippman's Tool Shop Sporting Goods Company*, 109.
2. Trade-marks and brand names, together with the good will attendant thereon, are protected in certain respects by act of Congress, the function of a trade-mark being to designate the goods as the product of a particular manufacturer or trader and to protect his good will against the sale of another's product as his; to prevent confusion of the public regarding the origin of goods of competing vendors (15 USCA, § 1051 *et seq.*). *Id.*
3. Trade-mark rights of trade-mark owner are not breached by sale of commodity at less than price set by owner, where sold by party who had not signed so-called fair-trade agreement to sell at price set by manufacturer (CL 1948, § 445.151 *et seq.*). *Id.* 110.
4. The business of manufacturing and selling trade-marked fishing tackle is not affected with a public interest, hence the State legislature may not interfere with the right of a party to fix the price at which the owner of such property may sell it merely to protect the good will of the manufacturer. *Id.*
5. Price-fixing agreements involving or affecting interstate commerce applicable to signers thereof are legal, where permitted under local law (26 Stat 209; 50 Stat 693; CL 1948, § 445.151 *et seq.*). *Id.*
6. Price-fixing agreements involving or affecting interstate commerce do not restrain nonsigners from cut-rate sales even when such agreements are permitted by local law (26 Stat 209; 50 Stat 693; CL 1948, § 445.151 *et seq.*). *Id.*

TRAFFIC LIGHTS—See AUTOMOBILES (12, 15, 16).

TRAILERS—See CORPORATIONS (10).

TRAINS—See APPEAL AND ERROR (37); AUTOMOBILES (17); EVIDENCE (13); NEW TRIAL (1); RAILROADS (1, 3–8).

TREES—See ADVERSE POSSESSION (2).

TRESPASSER—See LANDLORD AND TENANT (6).

TRIAL.

1. A jury's verdict may not rest on sheer conjecture and guess.

TRIAL—Continued.

*Reynolds* v. *Great American Insurance Company of New York*, 1.

2. Instruction by court which is given in such a way as to indicate to the jury what answer shall be given to a special question if their general verdict is to be a certain way was error, since the purpose of special questions is to ascertain whether the jury has, in making up their general verdict, properly applied the law, as given by the court, to the facts in the case and the statute requires that the answers to the special questions shall control the general verdict (CL 1948, § 618.39). *Mitchell* v. *Perkins*, 192.

3. It was reversible error for the trial court to permit counsel for plaintiff to argue to the jury how to answer special questions as to plaintiff's contributory negligence if they returned a general verdict in favor of plaintiff and then follow such argument with an instruction whereby their general verdict would be permitted to control the answers to the special questions (CL 1948, § 618.39). *Id.* 193.

4. Trial court's restrictive ruling upon plaintiff's attorney in his opening statement wherein he attempted to tell jury what the court's instructions would be and what the law was did not result in error, where the attorney was permitted to state his claim of the law in the opening statement. *Pallas* v. *Crowley-Milner & Company*, 282.

5. A trial judge is entitled to a reasonable opportunity to examine requests to charge jury and to determine whether they are in proper form (CL 1948, § 691.432). *Corpron* v. *Skiprick*, 312.

6. A trial judge may comply with an oral request to charge if he thinks it proper to do so, but, if he declines, such refusal is not a proper basis for an assignment of error, since the statute relating to requests to charge provide for written requests but is silent as to any right to verbally ask for a specific instruction (CL 1948, § 691.432). *Id.*

7. Failure of plaintiffs to indicate in their motion for directed verdict that it was based on their sworn bill of particulars wherein they claimed damages in the sum of $10,000, or to bring the matter to the attention of the trial court prior to the determination of the case by the jury precludes use of such basis for decision in their favor on motion reserved under Empson act for judgment notwithstanding the verdict for $2,000 (CL 1948, § 691.691; Court Rule No 20, § 5 [1945]). *Watson* v. *Dax*, 321.

8. A party claiming to be entitled to judgment as a matter of law should, at the time of making such request, state the grounds upon which he relies, the decision of the trial court being limited to grounds fairly covered by such motion. *Associates Discount Corporation* v. *Gear*, 360.

9. A trial judge who tries an action at law without a jury is the trier of the facts and may give such weight to the testimony as it is entitled to have in his opinion. *Eggebeen* v. *Red Top Cab Company of Grand Rapids*, 490.

TRUCKS—See APPEAL AND ERROR (26); AUTOMOBILES (1, 4).; CORPORATIONS (10, 11, 15); FRAUD (7).

TRUSTEE—See COSTS (15); SCHOOLS AND SCHOOL DISTRICTS (4); TRUSTS (2–5, 10, 11).

TRUSTS.

1. Two trusts created by will for cemetery and educational purposes are construed as testamentary trusts for charitable purposes. *In re Jones' Estate,* 392.
2. The probate court has jurisdiction over testamentary trusts and must require bonds of all trustees before issuing letters of trusteeship and no exception as to trusts for charitable purposes is made by statute conferring jurisdiction (CL 1948, §§ 701.19, 704.1, 704.3). *Id.*
3. The probate court is not authorized to appoint any other person than one named in will setting up testamentary trust, except in case of failure to qualify or for other good cause shown (CL 1948, §§ 701.19, 704.1, 704.3). *Id.*
4. A testamentary trustee, appointed by the probate court, can accept the trust and perform the duties of trustee only after filing the required bond (CL 1948, §§ 701.19, 704.1, 704.-3). *Id.* 393.
5. An order of the probate court, granting letters of trusteeship to trustees named in a will, is necessarily a construction of the will and is not subject to collateral attack (CL 1948, §§ 701.19, 704.1, 704.3). *Id.*
6. Statute conferring jurisdiction upon circuit courts in chancery over charitable trusts and probate code conferring jurisdiction upon probate courts over testamentary trusts can both be given effect without necessary conflict (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3). *Id.*
7. Statute conferring jurisdiction upon circuit courts in chancery over charitable trusts does not give such court exclusive jurisdiction over a testamentary trust for a charitable purpose so as to nullify provisions of probate code conferring jurisdiction upon probate courts over testamentary trusts without exception (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3). *Id.*
8. The purpose of the act conferring jurisdiction upon circuit courts in chancery over charitable trusts is to prevent certain gifts, grants, bequests and devises, whether in trust or otherwise, to religious, educational, charitable or benevolent uses, or for the care of cemeteries, from being held invalid, by reason of indefiniteness or uncertainty of the object of the trust, of beneficiaries thereunder, or by reason of contravention of any statute or rule against perpetuities, or by reason of failure to name a trustee or provide for his successor (CL 1948, § 554.351 *et seq.*). *Id.*
9. Charitable trusts, created by testamentary devise or bequest are included under the jurisdiction granted by statute to the probate court the same as other testamentary trusts except as such trusts are saved from invalidation by statute,

TRUSTS—Continued

conferring jurisdiction upon circuit courts in chancery over charitable trusts, by reason of indefiniteness or uncertainty of object, contravention of statute or rule against perpetuities or failure to name trustee or provide for successor (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3). *Id.* 394.

10. The circuit court in chancery has jurisdiction to construe wills, incident to its general power over trusts, but such jurisdiction over testamentary charitable trusts is not exclusive nor does its existence deny jurisdiction of probate courts over such trusts, in the absence of any proceeding in chancery court whereby validity of the trust is challenged by reason of indefiniteness or uncertainty of object, contravention of statute or rule against perpetuities or failure to name trustee or provide for successor (CL 1948, § 554.351 *et seq.;* §§ 701.19, 704.1, 704.3). *Id.*

11. Probate court properly declined to authorize executor to turn over testamentary trust funds to appellants until they had qualified and obtained authority as trustees to receive and administer funds left in trust for cemetery and educational purposes, since it had authority to order the trustees to give bonds, qualify and receive letters of trusteeship before receiving funds devised (CL 1948, §§ 701.19, 704.1, 704.3). *Id.*

See CONSTITUTIONAL LAW (1); RECEIVERS (6); TAXATION (9).

TUMOR—See WORKMEN'S COMPENSATION (4).

ULTRA VIRES—See CORPORATIONS (2).

UNDERWRITERS—See CORPORATIONS (3, 4).

UNEMPLOYMENT COMPENSATION.

1. Compliance with the unemployment compensation act's provisions as to when a successor employer is entitled to the transfer of the experience records of its predecessor is necessary in order to obtain right to such experience records (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246). *Russ Dawson, Inc.,* v. *Unemployment Compensation Commission,* 82.

2. Successor employer, a corporation, which took over a business that had paid only 75% of the total wages paid by predecessor employer, a partnership, during the preceding year was not entitled to the transfer of the experience record of the partnership, where unemployment compensation act provided that the successor employer would not be so entitled unless it acquired operating establishment paying 95% or more of the aggregate wages payable during such preceding year (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246). *Id.*

3. A trial court in making a determination involving values of a business may not place a value upon an asset so as to enhance assets sufficiently to comply with provisions of employment compensation act relative to transfer of experience record of predecessor employer to successor employer, contrary to the stipulated facts as contained in the record (PA

UNEMPLOYMENT COMPENSATION—Continued.

1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246). *Id.*

4. Trial court's inclusion of value of automobile sales agency contract in determination as to whether corporation, as successor employer to partnership, was entitled to the transfer of the experience record of the predecessor, was error, where record is void as to the value of such contract and statutory standard for determining right to such experience record was not otherwise met (PA 1936 [Ex Sess], No 1, § 22, as amended by PA 1943, No 246). *Id.* 83.
5. The question of whether 2 partnerships owned by the same 2 individuals constituted but 1 employing unit is to be determined by the provisions of the employment security act in proceeding for determination of contribution rate of successor of one of the partnerships (CL 1948, § 421.1 *et seq.*). *Employment Security Commission* v. *Crane,* 411.
6. The employment security act does not require that 2 separate and distinct copartnerships must be construed as a single employing unit, where they conducted separate businesses in physically separated premises, for which separate and distinct books of account were kept for each, separate bank accounts maintained and operated under separate franchises from different manufacturers and distributors, separate personnel employed, separate letterheads and separate billings used and separate Federal income tax returns filed, since there is no unity of enterprise (CL 1948, §§ 421.40, 421.41). *Id.*
7. The experience records of 2 or more employers may be combined, where a change in the legal entity or form of an employer has been effected by a change of ownership or in the composition of a partnership (CL 1948, § 421.22). *Id.*
8. The employment security act recognizes that legal entities of employers are not to be disregarded unless it appears that there is no sound business reason for separation other than merely to avoid contributions under the act (CL 1948, § 421.41). *Id.* 412.
9. Partnership of 2 brothers conducting automobile sales agency under franchise from one manufacturer in physically separate premises with separate books of account and bank accounts from that of another partnership, conducted under another name, operating under franchise from another manufacturer for sale of tractors and implements and which prohibited its dealers from engaging in any other business constituted 2 separate and distinct employing units, hence, successor of automobile sales agency was entitled to more favorable contribution rate resulting from combined experience record with partnership succeeded (CL 1948, § 421.40). *Id.*

See COSTS (2).

UNIONS—See INJUNCTION (3); LABOR (5, 6).

UNITED STATES—See CORPORATIONS (3–5); COURTS (1); CRIMINAL LAW (1).

UNSKILLED LABOR—See WORKMEN'S COMPENSATION (7).

UNSWORN STATEMENT—See CRIMINAL LAW (1).

UPHOLSTERING BUSINESS—See CORPORATIONS (15).

USE TAX—See TAXATION (3, 4).

USURPATION OF POWER—See CONSTITUTIONAL LAW (3).

VACANT LOT—See DIVORCE (17).

VALUE—See DIVORCE (2); FRAUD (1, 3, 4); IMPROVEMENTS (1, 2); REFORMATION OF INSTRUMENTS (5); UNEMPLOYMENT COMPENSATION (3, 4).

VENDOR AND PURCHASER.

1. Acceptance of offer contained in option that was incorporated in lease, which was coupled with "request" for deed and abstract of title was not ineffectual because not accepted according to terms of offer, the "request" being construed as a mere request that the lessors might grant or refuse. *Holt* v. *Stofflet*, 272.
2. Right of lessees to take up option to purchase was not lost by them because of failure to make tender in a proper amount, where it appears lessors, by refusing to accept registered letter in which was stated the amount placed in escrow for payment of purchase price, were intent on refusing to acknowledge a tender even if it were in the proper amount. *Id.*
3. Equitable relief against forfeiture of land contract may be obtained by defendant in an action of ejectment by bill in chancery. *Bilandzija* v. *Shilts*, 421.
4. Holder of purchaser's interest under land contract, who first tried to locate vendor, then attempted to make annual payment at banks in town near which property was located and at office of vendor's attorney, made reasonable effort to comply with requirements for payment of such instalment where no place of payment was established nor exact date on which to make annual payment provided. *Id.*
5. Vendor's refusal to receive check of holder of purchaser's interest on sole ground it was too late obviated need for making a more formal and legal tender of cash. *Id.*
6. Forfeitures of land contracts are not favored in the law. *Id.*
7. Forfeiture of a land contract may be provided for but provisions relied upon for forfeiture must be clear and unequivocal. *Id.*
8. Equity will not enforce forfeiture of land contract, where purchasers have offered to perform within a reasonable time and were refused. *Id.*

See FRAUD (2–6); LANDLORD AND TENANT (3); PARTNERSHIP (3, 4); RECEIVERS (8).

VENUE—See CRIMINAL LAW (9–12, 14, 15); HOMICIDE (1); JUDGMENT (5).

VERDICTS AND FINDINGS—See APPEAL AND ERROR (7, 11, 26, 27, 30, 33, 36, 41); AUTOMOBILES (9, 16); BOUNDARIES; CONSPIRACY (4); CORPORATIONS (11); DIVORCE (5, 7, 14); FRAUD (2); INSANE

VERDICTS AND FINDINGS—Continued.

PERSONS (10); JUDGMENT (1); PARTNERSHIP (1–3); REFORMATION OF INSTRUMENTS (1); SPECIFIC PERFORMANCE (2, 3); TORTS (3); TRIAL (1–3); WILLS (15); WORKMEN'S COMPENSATION (3, 4).

VESTED RIGHTS—See STATES (8).

VESTING—See ESTATES (1, 3).

VICINAGE—See CRIMINAL LAW (10).

VIOLATION OF ORDINANCE—See NEGLIGENCE.

VIOLATION OF STATUTES—See SCHOOLS AND SCHOOL DISTRICTS (4).

VISUAL STANDARD—See BOUNDARIES; REFORMATION OF INSTRUMENTS (2).

VOTING MACHINES—See APPEAL AND ERROR (13); COSTS (7); ELECTIONS (1–4); INJUNCTION (1); MUNICIPAL CORPORATIONS (5).

WAGES—See LABOR (5); SCHOOLS AND SCHOOL DISTRICTS (4).

WAIVER—See APPEARANCE; EXECUTION (3); JUDGMENT (5); STATES (2, 3, 8, 11, 12); TORTS (2); WITNESSES (3).

WARNINGS—See AUTOMOBILES (15, 16); RAILROADS (1, 2, 7, 8).

WATER PIPE—See INSURANCE.

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (20); AUTOMOBILES (7, 9); EVIDENCE (10); TRIAL (9); WILLS (14, 15).

WHEAT—See FRAUD (1, 2, 4).

WHISTLES—See NEW TRIAL (1); RAILROADS (7).

WILLS.

1. A will speaks at and takes effect from the time of the testator's death. *Durgee* v. *Simons*, 4.
2. The fact that a will may operate so as to convey a life interest to the spouse of the deceased and a half interest in the remainder is not a repugnancy. *Id.*
3. The manifest intent of the testator should govern when construing a will. *Id.* 5.
4. Will whereby testatrix gave husband the life income from her estate and made several other small bequests but made no provision for remainder over nor disposition of the residue or remainder, operated to vest a half interest in the remainder in the husband at the death of the testatrix, where her only other heir was her half sister. *Id.*
5. No substantial evidence *held*, to have been adduced to rebut presumption that at the time of making the will testatrix was in full possession of her mental faculties, where it appears will was executed during period of remission between attacks of rare but fatal disease known as pemphigus. *In re Solomon's Estate (Solomon* v. *Badalamenti)*, 17.

WILLS—Continued.

6. An insane delusion invalidating a will exists when a person persistently believes supposed facts which have no real existence, and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed. *Id.*
7. Capricious and arbitrary dislikes, unjust suspicions against relatives or mistaken beliefs as to their feelings and designs towards a testator and his property, however visionary, or belief of acts or facts which have any evidential basis, do not constitute insane delusions. *Id.*
8. Testatrix who practically disinherited 2 of her 4 children, may not be said to have done so as the result of an insane delusion, where such action was based upon her belief that such children had stolen money from her, a belief which was substantiated by some facts supporting it, even though it may seem illogical and foundationless to the court, since a will should not be overturned merely because the testator has not reasoned correctly. *Id.*
9. Contestants who seek to defeat a will on ground of insane delusions of testatrix have burden of proving that she believed her statements, had no reasonable information or evidence supporting them and would not have disinherited them but for such belief. *Id.* 18.
10. A presumption arises that will was destroyed by the testator in his lifetime with the intention of revoking it, where a will which is known to have existed during the testator's lifetime, and in his custody, cannot be found at his death. *In re Kanera's Estate (Ten Cate* v. *Kanera),* 451.
11. Proponents of a will which is presumed to have been destroyed have the burden of producing evidence to overcome or rebut the presumption. *Id.*
12. Trial court was not in error in failing to direct a verdict for contestants on ground that deceased had destroyed his will with intention of revoking it, in view of conflicting evidence presented on such issue. *Id.*
13. Circuit court was not in error in instructing jury that it must not weigh presumption that will was destroyed, where there was testimony on the subject but that it must make its determination from the evidence introduced. *Id.* 462.
14. Verdict for proponents in will contest was not contrary to the great weight of the evidence in respect to issue as to whether childless deceased had destroyed his will during his lifetime, where proposed will left nothing to his brother and sisters, gave a life estate to his housekeeper and remainder to a home for veterans' widows and orphans and there was evidence testator did not want contestant relatives to share in his estate and that they had an opportunity to destroy the will. *Id.*
15. The Supreme Court will not invade the province of the jury by weighing evidence in will contest, where it cannot be said that jury's verdict upholding will was not based upon substantial evidence. *Id.*

WILLS—Continued.

16. Admission of testimony concerning testator's interest in home for veterans' widows and orphans was not prejudicial in will contest, where it showed testator's continued interest in such home and, in the absence of any testimony concerning the change in his attitude could properly be considered on issue of a likelihood of revocation of will providing substantially for such home. *Id.*

See CONTRACTS (6); TRUSTS (1).

WINDOWS—See RAILROADS (7).

WINTER—See AUTOMOBILES (15, 16).

WITNESSES.

1. The testimony of surviving partner as to matters equally within knowledge of deceased partner is barred in suit between them for an accounting (CL 1948, § 617.65). *Kelso* v. *Coburn*, 43.
2. Conclusion of court that one of the defendants in suit for an accounting had been an agent of plaintiff and that he was in fact an agent of plaintiff, thus not competent as a witness as to matters equally within knowledge of partner who died prior to trial, *held*, supported by the record (CL 1948, § 617.65). *Id.* 44.
3. Counsel for defendants in suit for accounting between partners did not waive the right to object to testimony of a witness as relating to matters equally within the knowledge of a deceased partner by the asking of questions to determine the status of such witness, also a defendant, in his dealings with the parties, and between them, where defendants claimed such witness was an agent of plaintiff and plaintiff that he supervised to some extent the accounts of the partnership (CL 1948, § 617.65). *Id.*

See APPEAL AND ERROR (6, 36, 38, 40); DEPOSITIONS; DIVORCE (3, 5, 7, 14).

WOODLAND—See DEDICATION (7, 8).

WORDS AND PHRASES.

A park is a pleasure ground for the recreation of the public to promote its health and enjoyment, a place open to everyone for purposes of pleasure, exercise, amusement or ornament or to which the public may resort for recreation, air and light. *Clark* v. *City of Grand Rapids*, 648.

See DEDICATION (5); DEEDS (3); HABEAS CORPUS (1); PARDON (1); PARTNERSHIP (5); STATUTES (4); TAXATION (5); WILLS (6).

WORKING CONDITIONS—See LABOR (5).

WORKMEN'S COMPENSATION.

1. The burden of proving a right to workmen's compensation is on the party asserting that right. *Nightlinger* v. *Giant Super Market, Inc.*, 90.

WORKMEN'S COMPENSATION—Continued.

2. The workmen's compensation commission may not indulge in the assumption of a mere possibility in the nature of a guess as to whether a plaintiff is entitled to compensation but it may draw reasonable inferences from established facts. *Id.*
3. Findings of fact and legitimate inferences drawn from established facts as found by the workmen's compensation commission are binding upon the Supreme Court (CL 1948, § 413.12). *Id.*
4. Record in proceeding to recover workmen's compensation which showed plaintiff's leg was amputated above the knee because of osteogenic sarcoma near the knee joint but failing to show such tumor was caused by repeated trauma while plaintiff was at work as a packer at checking counter in grocery did not support finding of fact as to proximate cause even with testimony showing that some pathologists were of the opinion such traumas might have something to do with that type of tumor. *Id.*
5. The test of an injured employee's right to compensation is his inability by reason of the accident to work and earn wages in the employment at which he was engaged when injured. *Wieland* v. *Dow Chemical Company*, 427.
6. An employee who accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency thereby establishes a present earning capacity equal to such wages, whatever may be his physical condition. *Id.*
7. Plaintiff, an unskilled lathe operator, whose left hand was injured and who received compensation for upwards of a month until he resumed employment, who thereafter continued to work at the same and heavier work at increased pay, established an earning capacity which was not shown to have diminished at the time of or during 7-month period of layoff for lack of work beginning nearly 9 months after resumption of work after injury, hence he was not entitled to workmen's compensation during such layoff. *Id.*
8. Workmen's compensation may not be recovered from a principal contractor by a subcontractor's injured employee or his dependents unless the subcontractor was not subject to the workmen's compensation act (CL 1948, § 411.10). *Roman* v. *Delta Broadcasting Company*, 669.
9. Defendant broadcasting company, not engaged in the business of razing radio towers, may not be subjected to payment of workmen's compensation for fatal injuries sustained by an employee of independent contractor engaged for job of razing such a tower for defendant, since it was not a part of the business of the defendant or work undertaken by it (CL 1948, § 411.10). *Id.*

WORKMEN'S COMPENSATION COMMISSION—See WORKMEN'S COMPENSATION (2, 3).

WRITS—See ATTACHMENT (1).